



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2940 of 1992**

**GITAU KARONG'A ..... PLAINTIFF**

**VERSUS**

**MUEYA KARONG'A ..... DEFENDANT**

**JUDGMENT**

**1: PROCEDURE AND BACKGROUND OF CASE**

1. It is imperative to outline the procedure this suit has taken. It will therefore mean giving a brief background of the said matter.
2. Gitau Karanja, the plaintiff to the main suit as a brother to Mueya Karonga the defendant herein. They had another brother called Kabi Karonga who passed away in 1951. He was survived by a widow and a son called Ndichu. Their father had three wives. The litigants in this suit come from the house of the second wife. There is no dispute in the first wife's house and the 3<sup>rd</sup> wife's house.
3. The father to the litigants divided the original land – being the disputed land of LR Dagoretti/Kangemi/7 consisting of 7.8 acres to his family consisting of the 2<sup>nd</sup> wife's house. The land was originally registered in the name of Mueya Karonga on 4 January 58 the defendant herein as the eldest son of that home. The plaintiff alleged that this was so registered in trust of all the sons of the home. Their brother Kabui had died and the plaintiff being not available during the time (which fact the plaintiff denies) He is alleged to have been in detention.
4. Whilst their father was still alive the defendant was informed that he did hold the land in trust of the said brothers. To this end the family held an agreement that the plaintiff and family of deceased brother Kamau pay compensation to the defendant on grounds that he held the suit land for them as a trustee/administrator without selling the same. This consisted of beer, goat and honey. The items computed into money amounted to Ksh.700/-. The same was paid to the defendant. This was sometime in 1980.
5. The land was then divided and plans forwarded to the relevant authorities in Nairobi as this area was now within the municipality. Some how the defendant went and substituted these plans to include a third party one Michael Kamau sub diving to him one acre. The plaintiff protested. The dispute went before elders tribunal which held that Michael Kamau was infact never a claimant to the land. He was the son of their only sister who returned home after leaving her husband, gave birth to Michael then passed away in the 1950's. The parties father had set aside land for the children of the single or unmarried daughter. Someone may have fraudulently sold the land and as such the elders ruled that Michael Kimani – who

had made no claim to the suit land together with other grand children ought to pursue the person who sold their portion of land specifically ear marked for them. Alternately that those concerned ought to give up their portion of shares equivalent to the grand children's share.

6. After the hearing of the elder's case it was held that the suit premises be sub-divided and transferred to the plaintiff Ndichu (Richu) to represent Kabuis house (now deceased) according to the sub-division plan approved by the director of City Planning on 14 May 82. The said plans should not contain any alteration as was made by the defendant in 9 June 1984. That Michael Kamau was not part of this agreement.

7. The defendant not being satisfied with this ruling and that of Mrs. W.M. James, the then Resident Magistrate on 31 July 1985 who confirmed the elder's arbitration award to be divided into three equal shares between the three brothers. It seems that the matters had gone twice to arbitration. Mrs. James held that the "elders were called upon to ascertain the beneficial ownership of land" RMCC20/82.

8. On appeal to the High Court being appeal 361/85 whereby Aluoch J ruled that the said elders had no right to decide on issue of land ownership. This meant that the interpretation by the Hon. Magistrate was incorrect stating that it only concerned beneficial ownership of land and not the land ownership. Alouch J set aside the orders of James R.M. and in effect set aside the orders of the said tribunal on grounds that the tribunal had no jurisdiction to determine the matters in question.

9. The plaintiff appealed. He was out of time. He came before Kwach J in the court of appeal who ruled that the plaintiff lied on giving the reasons why he did not appeal on time. The application was dismissed

15 May 90. The plaintiff called for a three bench judge to decide this. The reference was nonetheless withdrawn on 21 May 92 before Gachui, Cokar and Muli JJA.

10. The plaintiff then filed this present suit Hccc2940/92 whereby he claimed beneficiary interest by way of a trust this was all on the grounds of the defendant holding the land in trust for him. He prayed that he be given such declaration, that the suit land be sub-divided to him.

11. The defendant filed a defence and counter – claim. In the said counter claim he alleged that whilst the suit was still subsisting the plaintiff had actually effected the sub-division. This was some time in 1994- whilst the suit was filed in 1992. His advocate was able to rely on the case law of Redall v Mact land (1881) 17 CLD 174 whereby he argued that suit be struck out due to his position namely, the transfer of the suit land pending the subsistence of a suit.

12. The Hon. Mr. Justice Githinji was then the presiding judge. In his ruling in 2000 he stated that the main suit on trust be stayed. That the defendant now proceeds with his counter-claim. If the defendant is able to prove that the transfer was fraudulently one then the main suit collapses and is dismissed. If the plaintiff referred the suit without fraud then the main suit becomes alive.

13. It was with this in mind that the parties preceeded for trail between this year 2000 and 2 December 2003. Githinji J was elevated to be a Court of Appeal judge. The law requires that he completes his part hears in the High court, regardless. The Hon. Judge I believe was willing and ready to do so. After four years and due to unforeseen circumstances the case was never heard further. In the meantime the plaintiff passed away.

14. When the matter was before Githinji J, the defendants began their case and actually gave evidence along the issues in question to be determined by the court. The plaintiffs witness together with the plaintiffs gave evidence on the same line. Parties infact never readdressed to the court the issue of fraud and or transfer or after the suit property duly sub divided.

15. When the plaintiff passed away, he was never cross examined by the defendant. The parties came before me for directions.

16. The Land and Environmental Law Division having been established the file was placed before me for direction which I accordingly gave Orders under Order 17 r 10 Civil Procedure Rules. That the suit proceeding from where it was left off.

17. The parties by admission did not question the locus. The substituted administrator to the plaintiff estate as the legal representative to the plaintiff. He too gave evidence in line that the other witnesses took as per the agreed issued before the court.

## II AGREED ISSUES

16. The agreed issues before the court dated 27 May 1997 and duly amended to take into account the legal representative (27 March 07) can be answered as follows.

17. The deceased Gitau Karonga (original plaintiff) was detained by the colonial government. He nonetheless according to the evidence before court and the pleading had come out in time for the allocation land. That the Land reference Dagoretti/Kangemi/7 was registered in the defendants name Mueya Karonga. That at the time he was registered the defendants alleged that the plaintiff was in detention and thus not present. The plaintiff states that he was. The fact remains that as the eldest son to the suit premises – the land was registered in the name of the defendant.

18. It has also been established from the evidence and pleading that the said Land reference Dagoretti/Kangemi/7 was so registered in the name of the defendant upon trust for and on behalf of Gitau Karonga (deceased) and his late brother. Whilst the father of the parties were alive, Gitau Karonga was shown his portion of the same land and occupied it and subsequently continues to occupy it to date.

19. The parties held a family meeting that culminated to the agreement of 30 November 80 whereby the whole land was divided equally amongst the three brothers as agreed upon as per a map. A sub-division was then undertaken (when the defendant was paid the usual traditional compensation as stated earlier.) This sub-division was duly approved and came be known as Dagoretti/Kangemi/754 and 757. The same had been done in 1982.

I believe up to this point of the trial the facts are not disputed. What is disputed is whether such action by the plaintiff was lawful or not namely, Issue No.7 was the subdivision of the suit property and subsequent registration into the deceased Gitau Karongo's name LR NO. Dagoetti/Kangemi/754 and 757 legal and lawful as alleged in the defence and counter claim? Issue No.8. Is the Estate of the deceased Gitau Karonga entitled to apart of Dagoretti/Kangemi/7 on account of this? Issue No.9. Is the defendant entitled to an order of the cancellation of the sub-division of LR Dagoretti/Kangemi/7? Issue No.10. Who pays the costs?

21. According to the Indian Transfer Property Act of 1882 Section 52, where a suit is pending before in court, no party is permitted to transfer the same in his name or to another third party.

22. The argument as seen in the counter-claim is that the plaintiff knowingly and unlawfully had the land transferred using the court order given by James R.M in RMCC20/82 where the magistrate confirmed the orders of the elders in an arbitration that the permitted such sub-division. This case infact had been dealt with and completed by Aluoch J who set aside those said orders according to the defendant, this was fraud and such the title for sub-division be cancelled and revert back to him.

23. The cause of this action arose as outlined in Aganyanya J's ruling of 23 February 94, whereby the plaintiff on filing this suit was granted an injunction that the defendant be restrained form disposing of the said land pending the finalization of the suit. The defendant discharged the orders moved onto the plaintiff's portion of land. This was recorded by Pall J on 17 November 93 by consent of the parties that the defendant was restrained from alienating or disposing of land parcel marked 754 and 757 as per the sketch plan . . . . That the plaintiff occupies land parcel number 754.

24. Whether defendant moved onto the plaintiffs portion contrary to the orders of an injunction, there

were contempt proceeding brought in which Aganyanya J sort to query how the suit was in fact subdivided in the first place? It was on these facts that the defendants, I presume, based his counter claim.

25. The issue of how the property was registered is in question herein. The green card entry of proprietorship section reflects that on 3 June 92 the court had restrained the defendants from disposing of the suit land. The prior to this, both Michael Kamau claiming an interest as licensee and Gitau Karonga claiming a beneficiary interest in 1982 lodged a caution. There was one John Maina Mukuni who claimed purchaser's interests on part of the land in 1987. It was therefore clear that despite the court cases proceeding the defendant was dealing in the suit premises and attempted by implication to sell the same. The trees were cut and an attempt to construct was made.

26. The green card proprietorship section shows that on 24 January 94 the court orders used No.20/82 actually gave the plaintiff a title deed issued on the same day a caution was lodged by the defendant but this was duly removed under section 133 of the Registered Lands Act Cap.300.

27. The sub divisions is in the new parcel of land Dagoretti/Kangemi.755

Dagoretti/Kangemi/756

Dagoretti/Kangemi/757

Reflecting that these parcels were registered in the name of Mula Karonga the defendant herein?

28. The Land parcel Dagoretti/Kangemi/757 further transferred to Gitau Karonga and title issued on the same day as stated above. There was a caution placed and thereafter by an order of the High Court on 5 November 97 the HCCC2940/92 the caution was subsequently removed. On perusal of the court file of 5 November 97 Kuloba J there was indeed no orders of the court made.

This indeed in itself was irregular.

## FINDING

29. The parties are brothers. They have lived on the same premises for over 40 years. The law on the other hand states in the case of :-

Mawji v USIU and Another (1976) KLR 185.

Madan, J.

30. Where a contract of sale has been entered into then the suit land is not to be transferred pending the suit before court section 52 of the Transfer and Property Act applies – except with the authority of the court.

31. Whoever thereafter purchases the property does so at their peril.

32. In this case the issue of a contract does not arise. What was being disputed was the beneficial ownership. That although it is true the plaintiff did transfer the property whilst this suit is pending due to the frustration given to him by the defendant who attempted to sell the suit land whilst the suit was still pending, I would find and hold that the action of the plaintiff (deceased) would serve no useful purpose.

33. In the case law of:- Njuguna v Njau (1981) KLR 225 where a party was time barred in filing the execution proceeding within 12 years – the execution proceeding would mean that the execution would lapse. The court of appeal held though the applicant was entitled to execute and that the high court had granted the prayers of the dismissal of such execution due to the limitation of action.

34. The suit was originally one of specific performance. It would have been of no use to dismiss the

issue of execution due to limitation of time when the party had been on the land for 12 years and would nonetheless claim under Adverse Possession.

35. The parties in this case had lived on the suit premises for over 40 years. It would service no useful purpose as to strike out the plaint for allegations of fraud in that the plaintiff may claim under Adverse Possession. This was a claim for beneficial interest. The defendant himself did not come to court with clean hands.

36. I would accordingly dismiss the counter claim and enter judgment for the plaintiff as per plaint. I do not award costs but order that each party bears their own costs.

Dated this 24<sup>th</sup> day of May 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

M. Gitau for Muthoga Gaturu & Co. Advocates for the plaintiff

P.R. Amuga for Amuga & Co. Advocates for the defendant