



REPUBLIC OF KENYA

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

Civil Case 3087 of 1985

1. PETER NDUNGU THIONGO
2. PETER MUCHUGA GITAU PLAINTIFFS
- VERSUS
1. JUVENALIS GITAU MUCHUGA
2. HANNAH WAMBUI GITAU
3. FRANCIS MUNIRA GITAU
4. JAMES CHARU GITAU
5. JOHN MUTHAMA GITAU
6. JOSEPH THIONGO GITAU
7. ANDREW KURIA KINYANJUI DEFENDANTS

J U D G M E N T

This is a dispute about the ownership of land parcel No. Lari/Kirenga/20 measuring approximately 37.6 Hectares. The first defendant Juvenalis Gitau Muchuga was registered as the proprietor of the land on 29th December, 1958. In 1985 he transferred the land to Francis Munira Gitau (3rd defendant) James Charu Gitau (4th defendant); Hanna Wambui Gitau (2nd defendant) in trust for John Muthama (John Mutham Gitau – 5th defendant), Joseph Thiongo Gitau (6th defendant) and Juvenalis Gitau Nganga (not a party) by way of gift.

The new proprietors were registered on 16th April, 1985. Thereafter the land was partitioned into several portions – Lari/Kirenga/ 1112, 1113, 1242, 1243, 1245, 1240, 1247, 1257 and 1258.

Thus, by 30th September, 1985 when this suit was filed, the suit land had already been subdivided and sub-divisions transferred to other people some of whom are not parties to this suit.

1. PLEADINGS:

The plaint describes the first plaintiff as nephew of the first defendant and the second plaintiff as

son of the first defendant by a second marriage. The second defendant is described as the wife of the first defendant and the mother of 3rd – 6th defendants. It is necessary to set out in full paragraphs 4, 5, 6, 7, 8, 9, 10 of the plaint for better appreciation of the nature of the plaintiffs' claim.

4. The Plaintiffs grandfather, and the father of the 1st Defendant was Muchuga Thiongo and as a head of the family was the owner of customary land parcel which upon demarcation was known as LARI/KIRENGA/20 which land was registered in the name of the 1st Defendant as a trustee for the 5 other sons of the then late Muchuga Thiongo aforesaid.

5. The 1st Defendant is the only surviving son o the late Muchuga Thiongo but his other 5 brothers (deceased) had wives and children one of whom is the First Plaintiff.

6. The said original land parcel LARI/KIRENGA/20 was subsequently subdivided into several parcels of land known as LARI/KIRENGA/ 1242, 1243, 1245, 1246, 1247, 1257, 1258, 1259, 1112 and 1113.

7. The said subdivisions referred to in the preceding paragraph were allotted by the First Defendant to the 2nd Defendant (his 3rd wife) and their selected sons (Defendants number 3 to 6) thereby leaving out the sons from his other wives (first, second and fourth) and the sons of his 5 deceased brothers for whom the First Defendant was a trustee.

8. The said subdivisions allotment and registration of the parcels named hereinabove were done by the 1st Defendant unlawfully and in breach of trust.

9. As a result of the matters complained of the plaintiffs have been denied their rightful share of the family land aforesaid to which they are entitled through their fathers. Consequently the Defendants number 2 to 6 cannot keep their allotment the same having been made unfairly and in breach of trust. And the Plaintiff have suffered loss and damage.

10. The cause of action arose in Kiambu District within the jurisdiction of this Honourable Court.

The 1st – 7th defendants filed one joint defence.

First defendant denied that the first plaintiff was entitled to any claim to the land. However, the 1st defendant admits in the Defence that the 2nd plaintiff is his son by his 2nd wife Wairimu who left with the children except 2nd plaintiff in 1964 and that the 2nd plaintiff after completing his education in 1968 left to join his mother in Rift Valley.

The first plaintiff pleads that he has always been willing to give his son a share of the land on condition that 2nd plaintiff returned with his mother but second plaintiff refused to go back.

An *interlocutory* injunction was issued in this suit on the application of the two plaintiffs. On 8th June, 1992 the second plaintiff filed an application for discharge of the injunction saying in paragraph 3, 4, 5, 6 of the supporting affidavit:

“3. THAT I have reconsidered, thought and rethought this particular suit and I have come to the conclusion that I was ill advised as to my rights in respect of all the pleadings contained in my plaint as well as the prayers thereto.

4. THAT the history of the suit premises is aptly reflected by the affidavit sworn by my brother Francis Munira Gitau on the 6th day of September, 1989.

5. THAT consequently I do not wish to pray for any of the orders as contained in my plaint and would wish the injunction issued in this matter be discharged and the caution registered against all the land parcels hereof to wit LARI/KIRENGA/1242 1245 1246 1247 1257 1258 1259 1112 and 1113 be removed forthwith.

6. THAT I further wish to retract and withdraw all allegations contained in my affidavits heretofore sworn in this matter.

However, the 2nd plaintiff's suit was not formally withdrawn and at the hearing of the suit he elected to continue with the suit and gave evidence as PW6. He testified, among other things, that he sued his father because he did not give him a share of the land when he was distributing the land to his sons. It transpired, however, that during the pendency of the suit the first defendant gave 10 acres out of parcel No. Lari/Kirenga/ 1242 comprising of 15 acres which he had retained to the 2nd plaintiff which the 2nd plaintiff sold to various persons.

The first defendant sold the remaining 5 acres. He has also donated land on which Juvenalis Gitau – Primary School is built.

The first plaintiff is the son of Njeri who was a daughter of Thiongo Muchuga by the 3rd wife, Wangari Thiongo. Thiongo Muchuga had five wives. First wife had 4 sons, all deceased. The 2nd wife – Wakage had one son – Muturi Thiongo. The third wife Wangari had one son. The 4th wife – Woki had no son. The 5th wife Mukatu Thiongo had one son. The first plaintiff was born in 1938. His mother Njeri who was not married died three months after first plaintiff was born. Plaintiff lived with Thiongo Muchuga until 1949 when, he, Thiongo Muchuga died.

Plaintiff asserts that under Kikuyu customary law he is the son of Thiongo Muchuga and entitled to inherit his property. He admits that the suit is brought by two people and that it is not brought on behalf of anybody else. Thiongo Muchuga had very many sons. By the time the suit was filed, Njoro Thiongo, Mungai Kariuki, Kigotho Kariuki, Gachunga Thiongo and Wakuru Thiongo all sons of Thiongo Muchuga were alive. Jane Wangonde w/o Karanja – a daughter of Thiongo Muchuga gave evidence as PW2 while Joseph Gachunga, also a son of Thiongo Muchuga, gave evidence as PW3. He is the only surviving son of Thiongo Muchuga.

Juvenalis Gitau Muchuga – first defendant was a step brother to Thiongo Muchuga both sons of Muchuga. Thiongo Muchuga was older than Juvenalis Gitau. Thiongo Muchuga had other brothers including Kariuki Muchuga who begot Mbagu Kariuki.

The second plaintiff is a businessman in Molo. He has other brothers – Thomas Mburu, Francis Thiongo, Patrick Njoroge who are all alive and Charles Muiru who is deceased.

It is apparent from the plaint that the plaintiffs claim is that the suit land is family land originating from first defendant's father – Muchuga Thiongo and that the first defendant holds the land as trustee for himself and his other brothers and their wives and children. The main relief sought is a declaration that the first defendant was a trustee of the plaintiff and all the grand children of the late Muchuga Thiongo.

The plaintiffs evidence show that by the suit, the plaintiffs want the land restored to “*MBARI YA MUCHUGA*” for re-distribution to all those entitled. They however admit that “*Mbari ya Muchuga*” not only includes Thiongo Muchuga, his five wives and children but also Thiongo Muchuga's brothers, step brothers and sisters and their children.

2. HISTORY OF THE SUIT LAND:

The history of the land dispute as extracted from the oral evidence and documents retrieved from Kenya National Archives and produced as exhibits can be briefly stated.

In early 1930s the Colonial Government through Land Commission decided to acquire land in Tigoni for establishment of Tigoni Township. The land earmarked at Tigoni was occupied by about ten clans ("MBARI" in Kikuyu language). The ten clans whose land was to be compulsorily acquired in Tigoni were to be compensated with land in Nyamweru – carved from the forest reserve. It seems from the letter dated 22nd February, 1950 from the District Commissioner, Kiambu to one John Mbugua, Document No. 11 of Plaintiff's exhibits) that the total acreage of land occupied by Kikuyus and Ndorobo in Tigoni was 945 acres; that the compensation was on the basis of 1½ acres for 1 acre and that 1471 acres were earmarked at Nyamweru for compensation. The letter dated 6th July, 1945 from the District Commissioner, Kiambu to Provincial Commissioner, Central Province (Defendants' exhibit 3) states that the land which was ultimately occupied by residents of Tigoni measured 1,500 acres. The residents of Tigoni were also to be compensated for developments on the land occupied by each and were also to be provided with a lorry to transport their belongings to Nyamweru. A committee comprising of Senior Chief Waruhiu, Ex-Senior Chief Koinange and Divisional Chief Josiah was appointed to demarcate land at Nyamweru and resettle the residents of Tigoni. The residents of Tigoni were given upto the end of March, 1937 to move from Tigoni (see letter dated 21st November, 1936 (Defendants' Exhibit 8). Most of the residents of Tigoni accepted the compensation and agreed to move to Nyamweru. Juvenalis Gitau (1st defendant) moved to Nyamweru in about January, 1937. However, some residents of Tigoni refused to be settled in Nyamweru. They wanted to be settled in another area. Others refused to be moved from Tigoni on principle (see documents dated 28th August, 1950 and 16th November, 1950 of the District Commissioner, Kiambu, (Defendants' exhibits No. 12 and 13).

The family of Thiongo Muchuga and Kariuki Muchuga (brothers of Thiongo Muchuga) were paid compensation (letter dated 19th April, 1940, 3rd defendants exhibit 2) but refused to move from Tigoni. On 26th June, 1939, the Governor issue a removal order under Section 49 of the Native Trust Ordinance, 1938, for removal of Thiongo Muchuga and his sons, Njoro Thiongo; Muturi Thiongo and Kamau Thiongo and his brother Kariuki Thiongo amongst other families.

They were removed from their land in Tigoni on 13th April, 1940 (3rd defendant's exhibit 2 dated 19th April, 1940). After removal Thiongo Muchuga moved to Ndeiya where he died in 1949. Njoro Thiongo and Kariuki Muchuga moved to what was then "Chief Njiri's location", (now Muranga). Although Thiongo Muchuga had very many sons, it is only Muturi Thiongo who moved to Nyamweru. Even after the eviction of people from Tigoni, the government still reserved the land at Nyamweru for the evicted persons for about 10 years (see letter dated 24th November, 1950 from the Provincial Commissioner to Chief Secretary, document No. 14). By that letter, the Provincial Commissioner recommended that the offer should remain open until 30th June, 1951 and if the land is not taken by then, the land should be allocated to other persons *"not necessarily of those clans, whom it was considered had good claims for compensation in land and whose claims had not been met"*.

The land allocated to Juvenalis Gitau in Nyamweru was demarcated sometime in 1941 (see letter of Juvenalis Gitau dated 11th October, 1941 thanking the District Commissioner for the exercise – Exhibit 5) and registered as Lari/Kirenga/20 after land adjudication.

3. (i) THE MERITS OF THE SUIT:

The mains issue is whether the land allocated to Juvenalis Gitau at Nyamweru was compensation for his own land or as compensation for the land of mbari ya Muchuga:

Mr. Andere for the first plaintiff conceded that direct evidence was scanty but submitted that

archival evidence was plenty. He referred to several documentary exhibits produced by the plaintiff and the defendants which, according to him, show that Juvenalis Gitau took up land at Nyamweru as a “*Muramati*” (trustee) of “*Mbari ya Muchuga*”.

According to the second plaintiff’s counsel, the several exhibits tendered in court support the fact that Tigoni people were relocated in Nyamweru as “*mbaris*” (that is clans) and not as individuals although compensation for improvement, one one’s “*Githaka*” (land) was being paid to an individual. He contended that first defendant who belongs to *Mbari ya Muchuga* was allocated land at Nyamweru and the land recorded as having been allocated to Juvenalis Gitau, *mbari ya Muchuga*.

On the other hand, Mr. P. M. Kimani, learned counsel for the 4th, 5th and 6th defendants examined the oral and documentary evidence and submitted that:

(i) the land allocated to the first defendant was not communal land but compensation for his individual land.

(ii) It was possible for some members of a particular clan to accept and take up land at Nyamweru on their own behalf even if other members of the clan did not do so.

(iii) Among those who had rejected the Nyamweru land were members of the mbari ya Muchuga.

(iv) Going by the fact that the step-brothers of Juvenalis Muchuga and their immediate families did not settle in Nyamweru during their life time, they must have been among those who rejected the Nyamweru land.

(v) That the land in Nyamweru rejected by people evicted from Tigoni was allocated to about 200 people and is today called “Kwa Aregi” (Area which was rejected by owners).

Mr. George Kimani, learned counsel for the 3rd defendant, on his part submitted that the evidence show that first defendant moved to Nyamweru as an individual and not on behalf of *Mbari*, whereas the other members of *mbari ya Muchuga* defied the government order and consequently forfeited their shares of the land.

The defendants’ case regarding the history of the land in dispute and its acquisition is pleaded in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the amended Defence. They aver, among other things, that 1st defendant’s late father, Thiongo Muchuga, had 4 wives; that in accordance with Kikuyu customary law, Muchuga Thiongo divided the land and gave each wife a separate piece of land to cultivate and which the son of each respective wife would inherit; that when Muchuga Thiongo died in 1916, the children of each of the 4 wives, was living in and using the land given to their respective mothers and this continued upto 1935; that 1st defendant was the only son of the third wife and youngest of all the sons of Muchaga Thiongo by the four wives; that as the youngest son, he could not be a “*Muramati*”; that the 1st defendant surrendered his portion of land which he took from his mother in Tigoni to colonial government which portion was measured; that he was compensated with another land at Nyamweru on which he settled in 1936; that all half brothers of 1st defendant including Thiongo Muchuga refused to comply with the government order as a result of which they were ejected from Tigoni without compensation with another land and land set aside for them given to other people; that 1st defendant has lived in the land in Nyamweru for over 50 years since 1936 without any claim from any of his half brothers and that when demarcation took place between 1956 – 1957 none of his half brothers raised any claim to the land.

The averments of the 1st defendant were not contradicted particularly by the evidence of Jane Wangondu w/o to Karanja, PW2; the daughter of Thiongo Muchuga and by Joseph Gachunga

(PW3), the son of Thiongo Muchuga. As conceded by the 1st plaintiff's counsel, there is paucity of oral evidence to show that the 1st defendant was allocated the land in Nyamweru as a trustee for the members of the *mbari ya Muchuga*.

The plaintiffs mainly rely on the contents of several documents retrieved from the archives relating to the relocation of people from Tigoni to Nyamweru. The documents produced by the plaintiffs do not wholly support the plaintiff's case. For example, in the letter dated 29th June, 1936 (Ex.1) the representatives of the "*mbaris*" denied that they had agreed to exchange Tigoni land with Nyamweru land and disowned those who may have conveyed the agreement to the government saying in part:

"Moreover, the compensation of the land was refused by every Tigoni inhabitants (land holders).

In addition to this everybody that inhabits the land of Tigoni stands for his own "Githaka" and not for another man's Githaka".

That letter indicates that although the whole land in Tigoni was owned by ten *mbaris*, each inhabitant had rights to his specific piece of land. This supports the averment of defendants in the Amended Defence. In addition the counsel for the 2nd plaintiff submitted that it is not disputed that each family in the clan had its Githaka or that 1st defendant lived in the Githaka that he had inherited from his mother in Tigoni.

Some of the documents indeed show that the 1st defendant was in fact fighting for adequate compensation for his individual piece of land as shown by plaintiffs exhibit 2 – letter dated 19th December, 1936; 1st defendants' letter dated 12th April, 1935 – document No. 9 and the letter dated 21st June, 1935 from District Commissioner to Provincial Commissioner confirming that 1st defendant who was a teacher at that time had "*invested considerable money in improving his property at Tigoni*". When the 1st defendant wrote the letter dated 1st March, 1940 to his step brother, Kariuki Muchuga, (Exhibit 4), the 1st defendant had already settled in Nyamweru for 3 years. He was trying to convince his elder brother and the representative of the *mbari* to agree to move from Tigoni and accept alternative good land anywhere within Kikuyu land. The 1st defendant did not tell him that the land already allocated to him in Nyamweru belonged to *mbari ya Muchuga* or ask him move to that land.

Indeed the Notices from the District Commissioner dated 8th May, 1931 to Thiongo Muchuga and to each of his sons Njoro Thiongo, Muturi Thiongo, Kamau Thiongo and his brother Kariuki Muchuga informed each of them that "*The area which is likely to be offered to you is in the area of the NYAMWERU*".

That notice was issued to individual members of the family and offered each a piece of land at Nyamweru. The notices did not say that the land belonging to "*mbari ya Muchuga*" had already been allocated to the 1st defendant. Considering that the 1st defendant had moved to Nyamweru three years previously and that there was still land reserved for people in Nyamweru until about 1950 when it was allocated to other people (kwa Aregi), the land mentioned in those notices could not have been the land already allocated to the 1st defendant.

Although the rough sketch map of the portion allocated to the 1st defendant in Nyamweru (Ex. 11) has the inscription "*land allotted to Mwa. Juvenale Gitau, Mbari ya Muchuga at Nyamweru*" that does not necessarily mean that the land was allocated to the clan – "*mbari ya Muchuga*". Those words could mean, as submitted by P. M. Kimani that land was allocated to him individually as a member of *mbari ya Muchuga*.

The directive from the District Commission to the Headman Luka Wanganga of Tigoni dated 21st August, 1936 (Defendant's Document No. 7) puts the matter to rest. By the directive the District Commissioner instructed the Head man thus:

“Will you please tell the Tigoni people that Government has agreed to give each owner of a Githaka a letter saying that the land given to him at Nyamweru belongs absolutely to him and his descendants and that no one may bring any claim against the people of Tigoni for the land given to them at Nyamweru”.

There is evidence from the 2nd defendant that she got married in the land in dispute in 1942 and that since then no member of the clan of *mbari ya Muchuga* has ever claimed any interest in the land.

There is irrefutable evidence that Thiongo Muchuga, his brothers, sisters and children did not accept land in Nyamweru and went to settle elsewhere. The correspondence show that those who refused to be settled in Nyamweru forfeited their share of land in Nyamweru. They did not claim any interest in the land allocated to the 1st defendant at Nyamweru.

From the evidence, I conclude that the plaintiffs have not proved on balance of probabilities that the land at Nyamweru was allocated to the 1st defendant as clan land to be held by him in trust for members of “*mbari ya Muchuga*”. On the contrary, I find that the land was allocated to the 1st defendant absolutely as compensation for his individual land surrendered to the government in Tigoni.

3. (ii)

The first defendant is a nephew of Thiongo Muchuga. His mother Njeri Thiongo never made any claim to Nyamweru land in her life time. He has not made a case that 1st defendant was holding Nyamweru land in trust for him either as in his own right as an individual or as a member of the clan.

The defendant cannot be a trustee for his own son – 2nd plaintiff. In any case, the 2nd plaintiff was given his own share of the suit land which he sold. His claim was thus compromised.

Those findings conclusively determines the suit on the merits. However, several issues of law have been raised which go to the competence of the suit. It is necessary that I should deal with two of the legal issues raised.

4. WHETHER COURT HAS JURISDICTION TO DECLARE A REGISTERED PROPRIETOR OF LAND UNDER THE REGISTERED LAND ACT (CAP 300) AS A TRUSTEES FOR A CLAN OR INDETERMINATE GROUP:

The main prayer in the suit is a declaration that the 1st defendant was a trustee of the plaintiffs and all other grand-children of the late Muchuga Thiongo in respect of land originally known as Lari/Kirenga/20. The 1st plaintiffs counsel framed the main issue in the suit in his submission thus:

“whether Juvenalis Gitau was a trustee of mbari ya Muchuga”.

He submitted that plaintiffs had adduced sufficient evidence to establish a customary law trust and in dealing with the issue of the abatement of the suit, he submitted thus:

“Mbari ya Muchuga will be the one to divide the shamba equitably according to custom once the court has declared that the 1st defendant was a trustee and nullifies the

subdivisions and allotments. The order goes back to when the land was first adjudicated, consolidated and registered in the 1st defendant's name. The presence of the 1st defendant will therefore not be required here to carry out any court order or to effect its judgment".

The second plaintiff's advocates, submitted on the same issue thus:

"The land consolidation schemes was a Government exercise and somebody had to be registered as the owner of the land since ... the Muchuga land had not yet been divided to the clan members, the 1st defendant was registered in the fiduciary capacity because as it can be gathered from the evidence most of his relatives were dead yet the land had been allocated to the mbari ya Muchuga. The fiduciary position made the 1st defendant a trustee vide section 26 (1) of Cap 300".

Mr. P. M. Kimani, the defendant's counsel, on the other hand, contended that any customary law right (which is not admitted) that the first plaintiff may have had on the land was extinguished when the suit land was registered in the name of the deceased 1st defendant as a first registration and after the process of demarcation and land consolidation.

It is clear from the evidence of the first plaintiff that the intention of the plaintiffs is to have the suit land restored to the "mbari ya Muchuga" so that it can be re-distributed to the members of the clan.

We have it from the evidence of the first plaintiff that Thiongo Muchuga had five wives and very many sons and that "mbari ya Muchuga" does not just include Thiongo Muchuga, his five wives and children but also includes Thiongo Muchuga's brothers, step brothers and sisters and their children. Thus, the clan has indeterminate members.

Before the 1st defendant was registered as the proprietor of the land, under the Registered Land Act on 29th December, 1958, the land was subjected to the elaborate adjudication process stipulated in **Part II** of the *Land Consolidation Act* (Cap 283). As **section 11** of that Act provides, the land adjudication committee is required to:

"to adjudicate upon and determine in accordance with African customary law title claim of any individual person to any right or interest in any land within the adjudication section".

After the completion of the adjudication process which preceded the registration of the land under Registered Land Act (RLA) the adjudication register became final (**Section 27** of the *Land Consolidation Act*). By this suit, the plaintiffs are asking the court to rewind the clock back to the pre-land adjudication period (1956 – 1957) and restore the land to the clan for a fresh adjudication of the rights of each member of the clan.

In ***Mbui Makangu v Gerald Mutwiri Mbui***, Civil appeal No. 281 of 2000 (unreported) the Court of Appeal said in part:

"The very purpose of subjecting land, hitherto to be held under customary tenure to process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is ipso facto to change the land tenure system. The assumption is that all rights and interest of persons in the land subjected to such new system would have been ascertained and recorded before registration".

Indeed, the purpose of the land adjudication process and subsequent registration of land is to convert communal land tenure system into individual absolute ownership with a sanctity of title.

In this case, upon the completion of the adjudication process of the land allocated, whether allocated to the 1st respondent or the “*mbari ya muchuga*”; the preparation of the Adjudication Register and the subsequent registration of the land as Lari/Kirenga/20 in the name of the 1st respondent, the clan rights of “*mbari ya muchuga*”, assuming that they ever existed, were absolutely extinguished.

It follows that the first defendant upon registration as proprietor of the suit land could not in law hold the land as trustee for the clan. That is not to say that a proprietor of land registered under the RLA cannot hold registered land in trust for one or more specific persons. On the contrary, as proviso to section 28 of the RLA and the many decision of the superior courts in this country show (some of which are cited by respective counsel), the registration of a person as a proprietor of land under RLA does not relieve him from any duty and obligation to which he is subject to as a trustee. That is however, not the issue raised in this dispute.

It is clear from the foregoing, that this court has no jurisdiction to give a declaratory judgment of trust in favour of the clan. In my view, the adjudication process can be repeated only through the intervention of the legislature.

5. ABATEMENT OF THE SUIT:

The principal party in the suit is the first defendant.

The plaintiffs’ cause of action as pleaded gravitates around him. The plaintiffs aver in the plaint that Lari/Kirenga/20 was registered in the 1st defendant’s name as a trustee. The plaintiffs also aver that it is the 1st respondent who sub-divided the land into several portions and transferred them to the 2nd, 3rd, 4th 5th and 6th defendants. The plaintiffs further aver in the plaint that the 1st defendant sub-divided the land and transferred the sub-divisions unlawfully and in breach of trust. There is no cause of action pleaded against the 2nd, 3rd, 4th and 5th defendants except an averment that they cannot keep their allotment, the same having been made unfairly and in breach of trust. The first and the main prayer in the plaint is a declaration that the 1st defendant was a trustee of the plaintiffs and others. It is a declaration sought against the first defendant.

The first plaintiff’s counsel submitted that the suit has not abated inspite of the death of the 1st defendant and stated in part:

“This is a declaratory suit which also seeks a nullification order. It is not a suit in which the court will order defendants to carry out any order to be issued by court in respect of the suit and in the case the plaintiffs succeed”

The first defendant died on 20th August, 1995 and an application to appoint the 2nd, 3rd, 4th 5th and 6th defendants as his legal representatives in the suit was dismissed by Kuloba, J. on 29th November, 1996.

I am not persuaded that this is merely a declaratory suit which survives the death of the 1st defendant. As I have endeavoured to show above, the cause of action is entirely structured on the actions of the 1st defendant and the main remedy sought in against him. The 2nd to 7th defendants are subsidiary parties. In my view, with the death of the first defendant and there being no legal representatives of the 1st defendant, the whole substratum of the suit is gone and in effect, the whole suit has abated under **Order XXIII Rule 4 (3)** of the *Civil Procedure Rules*. The suit against the 7th defendant has also abated.

For the foregoing reasons, I dismiss the suit with costs to 2nd, 3rd, 4th, 5th and 6th defendants.

Dated and Delivered at Nairobi this 23rd day of March, 2006.

E.M. GITHINJI

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JUDGE OF APPEAL