

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 3 of 2003

ALICE WAIRIMU MUGO

BILHA WANCHEKE MUGO PLAINTIFF

VERSUS

WILSON MUTUMBO DEFENDANT

J U D G M E N T

Alice Wairimu Mugo and Bilha Wacheke Mugo (hereinafter referred to as 1st and 2nd Plaintiffs) are sisters. They have brought this suit jointly against their brother Wilson Mutumbo (hereinafter referred to as the Defendant) seeking a declaration that the Defendant holds 2 acres out of land parcel Aguthi/Gaki/1084 (hereinafter referred to as the suit land) in trust for them. They further seek orders for determination of the trust and transfer of 2 acres out of the suit land from the Defendant to them.

The Plaintiffs' evidence was that their late father Mugo Marugu owned 4 acres of land which was consolidated with another 4 acre piece of land belonging to their uncle Gachengo s/o Marugu. The 8 acres of land was registered in the name of Gachengo s/o Marugu during the land consolidation as Aguthi/Gaki/6. Gachengo s/o Marugu later sold his 4 acres of land to the Plaintiffs brother Johnson Wachira Mugo. Gachengo s/o Marugu transferred the whole parcel Aguthi/Gaki/6 which was 8 acres to Johnson Wachira Mugo. It is the plaintiffs contention that only 4 out of that land parcel acres was transferred to Johnson Wachira Mugo absolutely but the other 4 acres which originally belonged to their father was to be held by Johnson Wachira Mugo in trust for himself and the rest of his siblings who included the two Plaintiff's and the defendant. Johnson Wachira Mugo subsequently had Aguthi/Gaki/6 subdivided into two portions: Aguthi/Gaki/1084 comprising 3 acres which he transferred to the Defendant and Aguthi/Gaki/1085 comprising 5 acres he retained in his name.

The Plaintiffs maintained that their father's land of 4 acres should have been shared out amongst his 2 sons and 2 daughters each getting 1 acre. They therefore urged the court to find that the 3 acres transferred to the Defendant was his father's land which he was holding in trust for himself and his two sisters and that Defendant be ordered to transfer 2 acres out of that land to the Plaintiff. The Plaintiffs maintained that they were both not married and were therefore entitled to their father's land.

In his defence the Defendant admitted that his late father was entitled to ½ share of land parcel No. Aguthi/Gaki/6, and maintained that he acquired Aguthi/Gaki/1084 from Johnson Wachira Mugo absolutely and that there was no trust created in favour of the plaintiff, who were happily married.

In his evidence before the court, the Defendant explained that his father's land was 4.4 acres and that on their mother's instructions, the plaintiff and his brother were each to get 2.2 acres, but that his brother magnanimously added him 1.2 acres and therefore transferred 3.4 acres to him. He testified that the 1st Plaintiff was married to one Julius Wachira Murori. Later 1st Plaintiff disagreed with he husband and came back to leave at her parents home and that was when she started agitating for land. Defendant and his brother later contributed and bought 1 acre of land for the Plaintiff in Nanyuki. As for the 2nd Plaintiff Defendant maintained that she was still married and had not gone back to her parents.

Both advocates for the Plaintiffs and the Defendant filed written submissions each urging the court to find in favour of his client.

From the pleadings and the evidence adduced, it is not disputed that the late Mugo Marugu owned land which was being held in trust for him by his brother Gachengo s/o Murugu. It is also not disputed that Gachengo s/o of Murugu transferred Aguthi/Gaki/6 which included the land owned by Mugo Marugu to Johnson Wachira Mugo who was to hold his father's 4 acres of land in trust for himself and his other siblings.

Again it is clear that Johnson Wachira Mugo transferred 3.4 acres of the land to the Defendant and remained with about 5 acres of the land. So the question that now arises is whether the Plaintiffs who are the deceased's daughters are entitled to any share of their father's land, and whether the Defendant holds the land transferred to absolutely or in trust for himself and his sisters. It is the Defendant's contention that the land was to be shared between him and his brother because the Plaintiffs were married. However no evidence has been adduced before this court to show when the marriages took place what formalities were performed and who took part. I find that the Defendant has failed to establish that any of the Plaintiff is married. I find that the Plaintiffs being unmarried daughters were indeed entitled to their share of their father's land. The Defendant attempted to show that they had bought alternative land for the plaintiff, but again there was no substantive evidence to support this allegation.

In his submissions counsel for the Defendant tried to rely on the Award issued by the Land Dispute Tribunal contending that the decree in Award No. 102 of 2000 had not been set aside. First the Defendant was not a party in the dispute before the tribunal. His attempts to appeal against the tribunal award was rejected by the High Court on that ground. Secondly the High Court in Civil Appeal No. 81 of 2001 (Nyeri) set aside the tribunal award and the same is no longer in existence and cannot be relied upon.

I am satisfied on the evidence adduced before me that the Defendant is holding 3.4 acres of his father's land in trust for himself and the Plaintiffs. This land ought to be shared out equally between the Defendant and his two sisters, However the Plaintiffs have prayed for 2 acres only. I therefore order that the Defendant do transfer one acre of the suit land to each of the Plaintiffs and remains with 1.4 acres. I make no orders as to costs. Those shall be the orders of this court.

Dated signed and delivered this 30th day of October 2006.

H. M. OKWENGU

JUDGE