



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

CIVIL CASE NO. 9 OF 2001

ALEXANDER MBUBA M'RINDIA.....PLAINTIFF

VERSUS

NJOKA M'RINDIADEFENDANT

JUDGMENT

1. The Plaintiff is the elder brother of the Defendant herein. He filed this suit on

1.2.2001 seeking orders as follows:-

a) a declaration that the Defendant hold L.R.Karingani/Mugirirwa/467 in trust for himself and the Plaintiff herein and an order that the Defendant do transfer 2.50 acres from that parcel of land and in default the Executive Officer of this court to execute all the necessary documents to effect the transfer of the same.

b) Costs of the suit

c) Interest

2. The Plaintiff in his Plaint and in evidence contends that the suit land is 5.40 acres and that when demarcation of land was being done in the area, the Defendant who was a minor was registered as Proprietor of the land. The reason for this, he stated, was that there were rumours that the Independence Government of the Republic of Kenya would settle some people in what was then and probably forest land. It was therefore agreed that the Defendant being a minor should be registered and to bother who was on the list of those supposed to get forest land. It turned out that the rumour was just a rumour and no land in the forest was given out. In the meantime, the Plaintiff continued to live on the suit land as if it was his own, built a house and cultivated his portion extensively. Particulars of the trust are listed at paragraph 5 (i) –(v) of the Plaint and these include the contention that the suit land was originally vested in M'Rindia Magiri, father of Plaintiff and the Defendant. Further that the said father of the parties intended that the land be shared out equally between all his sons and that is why he allowed the Plaintiff to live on the suit land throughout his life.

3. The Plaintiff's further evidence is that the Defendant in an attempt to evict him from the suit land filed **CMCC No.682 of 1994 (Meru)** which suit was dismissed. The Plaintiff's counterclaim that the suit land be sub-divided was similarly dismissed. He then filed this suit to enforce his claim

4. Under cross-examination by the Defendant, the Plaintiff rejected an offer of 0.25acres insisting that his claim is to 2.5 acres-no more, no less!

5. The Plaintiff's witness, Kanga Rwaria was categorical that the Defendant was registered as proprietor of the land to enable the Plaintiff and his father to pose as landless people and thereby benefit from the land allocation at the forest. He also testified that the father of the parties gave their brother Mutegi, Ksh.400/= to go and buy land elsewhere and that explains why he does not even now live on the suit land.

6. The Defendant's case on the other hand is as follows:- that the Plaintiff's claim is totally misguided because the suit land was given to the Defendant by his father, and that the Plaintiff and their brother Mutegi given Ksh.500/= each to go and buy their own parcels of land. Whereas Mutegi bought his own parcel, the Plaintiff refused to do so and continued living on the land. Their father died in 1972 with the Plaintiff still living there. In cross-examination, the Defendant said that he only attempted to evict the Plaintiff when he filed the suit in Meru.

7. The Defendant's witness is his brother, Ephraim Mutegi who confirmed the Defendant's version of events that they were all given money to go and buy land away from the suit land. He stated something different though that he bought 6 acres and the Plaintiff also bought 6 acres as asked by their father. In cross-examination he stated however that his brother, the Plaintiff bought his 6 acres in 1984. This coincidentally was the same year that the witness also moved away from the suit land, at least as per his testimony. He caused the Defendant to be registered as the proprietor of the suit land.

8. The guide as to whether there was a trust in this matter is to be found in the statement of Muli, J. in an unreported judgment in **HCCC No.1400 of 1973** where he said in part;

“Registration of titles are a creation of the land and one must look into the considerations surrounding the registration of the titles to determine as to whether a trust was envisaged”

(Quoted with approval by Shah, C.A. in *Mwangi vs Mwangi* [1986] KLR 328).

9. In the instant case, I have come to the conclusion that the only reason why the suit land was registered in the names of the Defendant who all parties agree was the youngest son in the family was in the hope that other lands would be obtained in the forest by his father and elder brother (the Plaintiff). I believe the evidence of PW2 who did a similar thing by registering his land in the names of his son, John and when no land was obtained in the forest, had the land transferred back to himself. It is also generally agreed by all witnesses on both sides that the land was actually given to the parties' father by the clan. Since on other land was given to him it can only be right to conclude that he registered the land in the Defendant's name in trust for himself, and his two brothers also obtained in **Mwangi vs Mwangi** (Supra) whose facts are uncannily similar to those in this case. 10. Taking careful consideration of all the evidence before me I am happy to hold that it was the intention of the parties' father to create a trust over the suit land.

11. A trust is recognized both by customary law and by the Registered Land Act and as was said in *Kanyi vs Muthiora* [1984] KLR 712,

“Registered land as per section 163 of the Act is subject to the law of England as modified by equity which brings in the doctrines of implied constructive and resulting trusts.” Further, that “a proprietor by first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as a trustee”.

12. On this basis, I am satisfied that the Defendant holds title No. Karingari/Mugirirwa/467 in trust for himself and his brothers. This is not a far-fetched conclusion as as in a case decided on 14.5.2004, the Court of Appeal sitting in Nyeri said,

“In fact, we find the case to be only too familiar in which a Kikuyu elder dies leaving his ancestral land to be registered in the name of one of his sons. The son so registered does not become the sole

proprietor but a trustee for other customary lawsee Restatement of African Law 2 The Law of Succession by E.Cotran, Gatimu Kinguru vs Muya Gathangi [1976] KLR 253 and Muthuita vs Wanoie [1982] KLR 166.

13. This being my finding, what is the portion of the suit land being held in trust for the Plaintiff? The Defendant for all his denials of a trust and protestations about the Plaintiff's actions is willing to cede 1 acre out of the suit land to be shared between the Plaintiff, their other brother Mutegi (DW2) and a niece as well as the mother of the parties. The Plaintiff claims 2.5 acres. I have seen and heard nothing to justify the Plaintiff's claim. Not in evidence, or in pleadings nor in Submissions was that acreage justified. The land from the evidence is 2.2.ha (D.Exh 3) which is equivalent to 5.034 acres. Following my holding that the Defendant holds the land in trust for himself and his two brothers and taking into account the fact that their mother also lives on the land, I should in all fairness grant the Plaintiff $\frac{1}{4}$ of that land which would be about 1.258 acres. It cannot have been the end of the trust that the Plaintiff alone would have $\frac{1}{2}$ of the land as he is claiming.

14 . I shall therefore in summary grant the declaration that the Defendant holds title No. Karingani/Mugirirwa/467 for himself, his mother and brothers. (the niece by his evidence can inherit from the Plaintiff). The Plaintiff shall however be entitled to only $\frac{1}{4}$ of that land. The Defendant ought to transfer that portion to the Plaintiff failure to which the Plaintiff may take necessary legal action to do so.

15. The nature of this case, the relationship of the parties and their acrimonious history necessitates that each party should bear his costs.

Orders accordingly.

Dated and delivered in open court on this 17th day of January 2005.

I.LENAOLA

JUDGE

Presence of;

I.C Mugo for Plaintiff

Defendant present in person

I.LENAOLA

JUDGE