



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

**Civil Case 648 of 2004**

**JOYCE WANJIKU KAGUARA.....PLAINTIFF**

**VERSUS**

**GEORGE MBURU & ANOTHER..... RESPONDENT**

**J U D G M E N T**

On 2/8/04, the Plaintiff obtained an interlocutory judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The final judgment and the award of costs was to await formal proof, which took place on 5/5/04.

**FACTS:**

The brief facts on which this suit is based as follows:

The Plaintiff and both Defendants are blood sister and brothers, being children of the late Mzee Kaguara Uiru who died in 1970, intestate.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, being the only ones listed on the Certificate of Transmission upon Notification of Death, pursuant to Section 120 of the Registered Land Act, Cap. 300, Laws of Kenya, were registered as absolute proprietors to all that pie e of land – Title No. Kiambaa/Ruaraka/121, in Ruaraka Sub-Location, Kiambu District, to the exclusion of the Plaintiff who was otherwise entitled to a share of the said Land as a beneficiary (being an unmarried daughter of deceased father – under the Kikuyu Customary Law). The Defendants therefore held the land in trust for themselves and the Plaintiff.

The Plaintiff complained to the brothers (Defendants) and filed a case with the Karuri Land Disputes Tribunal over has exclusion to inherit a share of her late father’s land. On 30/11/2000, the Karuri Land Disputes Tribunal, having considered the case on its metis ruled that the Plaintiff be awarded 2 acres to be carved from land parcel No. Kiambaa/Ruaraka/121 measuring 9 acres and the Defendants be awarded 3.5acres each.

Being dissatisfied with the Tribunals decision, the Defendants moved the Central Province Lands

Disputes committee, sitting in Karuri to appeal against the Tribunal ruling. The appeals committee dismissed the appeal by the Defendants and confirmed that it was right for the Tribunal to award the Plaintiff/claimant the 2 acres of land.

On 7/6/01 the Kiambu Principal Magistrate Court endorsed the Karuri Land Disputes Tribunal award of 2 acres to the Plaintiff herein, but despite demand notices, the Defendants have refused and/or ignored to execute and Register a transfer of the 2 acres of land in favour of the Plaintiff, leading to this suit, seeking the following orders:

- (a) A declaration that the Defendants hold in trust 2 acres of the land Kiambaa/Ruaraka/121 on behalf and for the benefit of the Plaintiff.
- (b) An order that the Defendant's execute a transfer of the 2 acres in favour of the Plaintiff and in default the transfer be executed by the Deputy Registrar of this court.
- (c) An order that the Defendants deliver vacant possession of the said 2 acres of land to the Plaintiff.
- (d) Costs of this suit.

FORMAL PROOF – 5/5/05

P.W. 1 – JOYCE WANJIRU KAGUARA - an adult female, who said she understood Swahili. She took the Christina Oath and testified as follows:

The 2 Defendants are my brothers. Our late father was called Kagwara Uhiru, and our mother was called Jane Wambui. We are all from the same father and the same mother; with Samuel Uiru (the 2<sup>nd</sup> Defendant) being the oldest, followed by George Mburu (the 1<sup>st</sup> Defendant )being the 2<sup>nd</sup> oldest, then I, the Plaintiff follow as the last born.

During the life of our parents, we all lived in Kiambaa/Ruaraka/121, in Kiambu. The land belonged to our late father, and I have evidence to show that the land belonged to him. [Then Plaintiff produced and put in Exhibit No. 1 – a certified copy of GREEN CARD]; which shows that the land was registered – 1<sup>st</sup> entry on 28/11/1956 in the name of Kagwara Uiru, then the 2<sup>nd</sup> entry, 29/9/1970 in the joint names of Samuel Uiru and George Mburu, proprietors in Common Succession. The 3<sup>rd</sup> entry, 21/5/1980, is Land Certificate issued, Gazette No. 2656 of 5/9/1979]

The witness told the court that there was peace until 1991 when their mother died, then George Mburu – the 1<sup>st</sup> Defendant – began beating her and her children, telling her that the land was his, and she had no land there. Before the death of their mother, the Plaintiff had her portion of the land in the middle of her brothers – the two defendants – where she farmed, and had her house. But the house was demolished by the 1<sup>st</sup> Defendant. She told the court that her portion was 2 acres.

The witness further told the court that the 1<sup>st</sup> Defendant told her and her children to move away because the land was left to the two defendants by their late father. It is when the 1<sup>st</sup> Defendant began evicting her that she went and filed a complaint at the Karuri Lands Dispute Tribunal seeking to be given her 2 acres, added the witness.

At that stage, the Plaintiff produced and put in as Exhibit 2 the proceedings at the Karuri Lands Tribunal. She added that the Tribunal decided that she be given the 2 acres as she claimed. At the Tribunal, the witness added, there were elders from the village.

The witness added that although she is not married, she has 5 sons and 3 daughters.

Not being satisfied with the Karuri Lands Tribunal, the 1<sup>st</sup> Defendant had appealed to the Provincial Land Disputes Appeals Committee, Nyeri, but the appeal was dismissed and the Karuri decision that she gets the 2 acres upheld. The witness then produced as Exhibit 3, the Proceedings of the Provincial Tribunal, at Nyeri.

The witness added that despite the decision of the Tribunal, the Defendants had not allocated her the 2 acres. That is why she came to this court praying that the court helps her to get her 2 acres as decided by the Land Tribunals.

Asked by the court why she would not get a share equal to those of the 2 Defendants, the witness said she wanted to avoid wrangles, and that she would be contented with the 2 acres.

That was the close of the P.W. 1's evidence, and the end of the formal proof, there being no other witnesses.

At the close of the evidence, learned counsel for the Plaintiff Mr. Wandago – made a short submission, basically summarising the evidence on record and highlighting the basis of the Plaintiff's proprietary claim over the 2 acres; as a Kikuyu woman, under the Kikuyu Customary law of inheritance of land; and under the Registered Lands Act, Cap. 300, Laws of Kenya.

Upon review of the evidence adduced by the Plaintiff in this case, the gist of the matter is the Plaintiff's claim over 2 acres of land, part and parcel of Land Title No. Kiambaa/Ruaraka/121 in Kiambu District, of Central Province.

The Plaintiff, a blood sister to the two defendants herein, told this court how the land in dispute belonged to her late father, Kagwara Uiru, and in whose name the land was registered, the 1<sup>st</sup> entry on 28/11/56 under the Registered Lands Act, Cap.300, Laws of Kenya. Upon his death, the land was registered, 2<sup>nd</sup> entry, in the names of George Mburu and Samuel Uiru, the two defendants herein, as proprietors in common succession on 29/1/1970. As stated earlier on, the two defendants are blood brothers – same mother and same father – to the Plaintiff in this case.

During the life of their father and until 1991 when the mother of both the Plaintiff and the two Defendants died, the Plaintiff occupied the 2 acres of land between the Defendants, and they lived in peace. In 1991, the 1<sup>st</sup> Defendant, George Mburu, decided to evict the Plaintiff on the basis that the land she occupied belonged to him, then the dispute which ultimately found its way to this court, through the current suit, started.

The sole issue for determination is whether the Plaintiff is entitled to the parcel of land she has been occupying, as an unmarried woman within the Kikuyu tribe, through her late father; through whom she claims her proprietary right over the land.

The evidence adduced by the Plaintiff, both oral and documentary including the decisions by the Karuri Land disputes Tribunal, and the Provincial Land Disputes Appeals Committee, Nyeri, both found in favour of the Plaintiff, and ordered that the Plaintiff was entitled to the 2 acres which she has been occupying as an unmarked Kikuyu woman, under Kikuyu Customary Law, even during the life of her father, while the two Defendants, blood brothers of the Plaintiff, were entitled to 3.5 acres each. The two Tribunals further ordered that the Defendants execute a transfer of the 2 acres in favour of the Plaintiff.

This case is not an appeal from the Provincial Land Disputes Appeals Committee decision. It is an enforcement of the Tribunals decision which, according to the evidence before me, the Defendants have failed or refused to comply with. It is not clear why the Defendant's especially the 1<sup>st</sup> Defendant – George Mburu – decided to challenge only the portion claimed by the Plaintiff, and not any of the portions given to either of the two defendants. Yet it is manifestly clear that each of the defendants got a proportionately bigger piece than that given to, and occupied by the Plaintiff.

The only rational basis seems to be the law under which the Plaintiff's claim is founded. If that be the case, the Defendants are gravely mistaken and ill-advised.

The Kikuyu Customary Law on this aspect of inheritance of land by unmarried women from their deceased father's is firmly established. In his **RESTATEMENT OF AFRICAN LAW**, Vol. 2, at Page 8, E. Cotran states:

**“Inheritance under Kikuyu Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons the heirs are the nearest patrilineal relatives of the deceased, namely father, full brother, half-brothers and paternal Uncles.”**

The above position has been cited with approval by Kenya's Court of Appeal, the highest court in the land, in the case of **WAMBUGI VS. KIMANI (1992) 2 KAR 292**, at Page 301.

In the case before me, there is no evidence to controvert the Plaintiff's statement that she is, and has always been, even during the life of her late father, unmarried. I believe that these factual matters were canvassed at, and determined by, both the District Lands Disputes Tribunal and the Provincial Lands Disputes Tribunal, both of which have Kikuyu Elders Conversant with the inheritance law within the community, before arriving at their decisions, which allocated the Plaintiff the 2 acres, the subject matter of this suit.

There is another source of law in support of the Plaintiff's claim and entitlement to the suit land in this case. That is Section 30(9) of the Registered Land Act, Cap. 300, Laws of Kenya which provides as under:

**“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register – ‘the rights of a person in possession or actual occupation of land to which he is entitled in right only, of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.’”**

The evidence adduced by P.W. 1 – the Plaintiff herself – clearly shows at she has been occupation of the 2 acres which were given to her by the Lands Tribunals, even during the life of her late father, Kaguara Uiru. No contrary evidence or averment challenged that factual position, and I have no doubt that inquiries would have been carried out to that effect at the Land Tribunals level.

Having held as I have above, it is important to mention that despite the entry of the names of the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants herein, in the Register on 29/9/1970, and the Land Certificate Gazetted in No. 2656 of 5/9/1979, those entries are subject to the entitlement of the Plaintiff herein in terms of the provisions of Section 30(g) of Cap. 300, Laws of Kenya.

All in all therefore, and for the above reasons, I hold that the Plaintiff has proved her case and claim to the land herein on the balance of probabilities and as required by law. Accordingly I enter Judgment in favour of the Plaintiff and against the Defendants and grant the following orders:

- a) A Declaration that the Defendants hold in trust 2 acres of the land known as Kiambaa/Ruaraka/121 on behalf and for the benefit of the Plaintiff herein.**
- b) Order that the Defendants execute a transfer of the 2 acres in favour of the Plaintiff and in default, the transfer to be executed by the Deputy Registrar of this Honourable Court.**
- c) Order that the Defendants deliver vacant possession of the said 2 acres of land to the Plaintiff.**
- d) Order that the Defendants do pay costs of this suit.**

DATED and delivered in Nairobi, this 22<sup>nd</sup> day of June, 2005.

**O.K. MUTUNGI**

**JUDGE**