

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 568 of 1976

KABURA WAWERU.....PLAINTIFF

VERSUS

DAVID GIKERE.....1ST DEFENDANT

KIMANI KAHORA.....2ND DEFENDANT

NYAMBURA KIMANI.....3RD DEFENDANT

JUDGMENT

The plaintiff filed this suit against the 3 defendants seeking orders that:-

(a) The defendants be evicted from the suit premises namely *LR NO. KIAMBAA/MUCHATHA/T.75* and *LR NO. KIAMBAA/THIMBIGUA/1304*.

The 1st defendant is a brother in law to the plaintiff. The 2nd defendant is the father in law of the plaintiff while the 3rd defendant is the sister in law of the plaintiff and the plaintiff is the widow of Waweru Kimani now deceased who was the eldest son of the 2nd defendant.

It is the plaintiff's case that the two parcels of land were purchased in 1958 by her late husband Waweru Kimani who got registered as the proprietor of the same. When he died in 1972 she petitioned the court through a succession cause and she got registered as the sole proprietor and she filed this case seeking orders to have the defendants evicted from the suit premises. On cross examination she admitted that when the said plots were purchased by her late husband she had not been married to him. She also conceded that both her late husband and the defendants settled on the suit lands soon after they were purchased in 1958 and they have been living there since then. She also admitted that she has been cultivating 1 acre of LR NO. KIAMBAA/THIMBIGUA/1304 while the rest of the family cultivated ½ acre and they shared LR NO. KIAMBAA/MUCHATHA/T.25 equally. While the defence case is that the two suit lands were purchased by their father as family lands but there registered in the name of the plaintiff's husband because he was the eldest son of the family. This was in 1958 and they all settled on the suit land and have lived there since then.

The plaintiff's husband the late Waweru Kimani was given a bigger portion because he was the eldest son of the family. They lived there peacefully from 1958 until 1974 when their eldest brother died and this is when trouble started. Waweru Kimani was registered as a trustee for the other members of the family and at that time the plaintiff had not even been married. David Gikanga who is the young brother of Waweru Kimani the deceased husband of the plaintiff told the court that he is now 70 years old and has lived on the suit lands which he now shares with the plaintiff for the last 47 years. Each has his distinct portion with demarcated boundaries though the same have not been surveyed.

Customary trusts was considered in the case of *Mwangi and Another Vs. Mwangi 1986 KLR 328 at page 332 where the court said:-*

Kikuyu Customary Law recognizes the law of trusts and so does Registered Land Act under which this suit falls.

The suit lands were purchased and registered in the name of the plaintiff's husband as the eldest son of the family who was not even married. The family comprising of the plaintiff's husband, the defendant, their parents and sisters moved in and took possession and have lived there for over 47 years although some of the family members have since passed away. As by now it is only the plaintiff and the defendant who are settled on the suit land and each occupies specific portions with demarcated boundaries though no survey beacons have been fixed.

I have given consideration to all the issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intention of the parties that there would be such a trust which under Kikuyu Customary Law is common.

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

I am satisfied that the registration of the plaintiff's deceased husband as the proprietor of the two parcels of lands as the eldest son of the family even before he got married envisaged a customary law trust and he was so registered as a trustee for the rest of the members of the family.

For the above reasons the plaintiff's suit is not tenable and the same is dismissed since the parties are members of the same family who have since lived on the suit land for over 47 years and this suit having been in court for about 30 years, I order that each party bears his own costs.

Delivered and dated at Nairobi this 22nd day of September 2005.

J.L.A. OSIEMO

JUDGE