

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL CASE 74 OF 1997

MICHAEL NJOGU NYAGA PLAINTIFF

VERSUS

GEOFFREY KIBOI NYAGA DEFENDANT

J U D G M E N T

This suit was brought by Michael Njogu Nyaga (hereinafter referred to as the Plaintiff) who has sued his brother Geoffrey Kiboi Nyaga (hereinafter referred to as the Defendant) seeking an order that the Defendant do transfer to him half acre out of Iriaini/Gatundu/833 or in the alternative the Defendant be ordered to refund to the Plaintiff a sum of Kshs.2,000/=

The Plaintiff's suit is based on an agreement allegedly entered into between the Plaintiff, the Defendant and their father Nyaga Gathara whereby the Plaintiff and the Defendant jointly acquired 1 acre out of LR Iriaini/Gatundu/300 being their father's interest in the said land at a consideration of Kshs.4000/= which was to be paid equally by the plaintiff and the defendant, and that in breach of that agreement the Defendant failed to pay his share of Kshs.2000 which amount was paid by the Plaintiff. The Plaintiff contend that Iriaini/Gatundu/300 was subsequently equally sub-divided between the Plaintiff and the Defendant, the Plaintiff getting Iriaini/Gatundu/832 and the Defendant getting Iriaini/Gatundu/833, the Defendant therefore got the benefit of ½ an acre acquired from their father without paying the agreed consideration. The Plaintiff maintains that since he is the one who paid the full consideration for the 1 acre acquired from their father he is entitled to the one acre and the Defendant therefore holds the half acre in Iriaini/Gatundu/833 in trust for the Plaintiff.

Apart from the Plaintiff, his two brothers Wanjohi Nyaga Gathara (P.W.2) and Joseph Ngure Nyaga (P.W.4), his cousin Isaiya Kungu Gakuya (P.W.5) and Joseph Njoroge the Land Registrar Nyeri District all testified in support of the Plaintiff's case.

In his defence the Defendant denied that there was any agreement between him and the Plaintiff involving the sale of Iriaini/Gatundu/300 for Kshs.4000/= from their father. He maintained that Iriaini/Gatundu/300 was his property registered in his name and that he voluntarily excised and transferred 2.5 acres from that land, to the Plaintiff and registered the transferred land as Iriaini/Gatundu/832 and therefore the Plaintiff had no claim in the 2.5 acres which the Defendant retained and registered as Iriaini/ Gatundu/833. The Defendant's brother Caesar Gatimu Nyaga (D.W.3) and his cousin Muriuki Macharia (D.W.2) both testified in support of the defence maintaining that the defendant had voluntarily sub-divided Iriaini/Gatundu/300 equally and transferred half of the land to the Plaintiff, and that there was no agreement for the sale of part of the land.

From the evidence that was adduced by the parties it was common ground that the land known as Iriaini/Gatundu/300 was originally owned by Nyaga Gathara but that he had it registered in the name of the Defendant in 1958. The Defendant was one of Nyaga Gathara's 6 sons. Nyagah Gathara also owned another parcel of land Iriaini/Gatundu/295 which he subdivided and distributed before his death to 4 of his sons and a grandson. Neither the Defendant nor the Plaintiff got any share in Iriaini/Gatundu/295. It is also not disputed that Iriaini/Gatundu/300 was 5 acres and that the Defendant sub-divided the land into two equal portions of 2½ acres and transferred one portion which was Iriaini/Gatundu/832 to the Plaintiff and retained Iriaini/Gatundu/833.

The issues that arise include whether the Defendant was holding Iriaini/Gatundu/300 or any part of that

land in trust for Nyaga Gathara, and whether Nyaga Gathara had distributed this property *inter vivos*, whether Defendant is holding Iriaini/Gatundu/833 in trust for the Plaintiff, and whether Plaintiff is entitled to ½ acre out of Iriaini/Gatundu/833 and who should pay the costs of this suit.

Contrary to the submission of the Plaintiff's advocate, the Plaintiff did concede that the Defendant was not the oldest son. In fact P.W.2 testified that he i.e. P.W.2 was the oldest son of Nyaga Gathara. The Defendant's father however chose to have Iriaini/Gatundu/300 registered in the name of the Defendant way back in 1958. The registration was a first registration. It was conceded that Iriaini/Gatundu/300 was not clan land but had been bought by the Defendant's father and registered in the Defendant's name.

It is evident that Nyagah Gathara did not include the Plaintiff or the defendant when he distribute his land Iriaini/Gatundu/295 to his sons. There appears to have been an understanding that the Defendant would share his land i.e. Iriaini/Gatundu/300 with the Plaintiff. Indeed the Defendant appears to have honoured this understanding. This was however only out of respect for his father and did not in any way interfere with the indefeasible nature of the defendant's title to that land. The land was neither clan land nor was the defendant the eldest in the family and therefore no customary trust or implied trust could arise. Although the land originally belonged to Nyaga Gathara he disposed it off by having it vested on the Defendant when the Defendant was a minor. It was in actual fact a gift *inter vivos* to the Defendant completed by the registration of the Defendant as the sole proprietor and could not therefore be revoked. By 1993 Nyaga Gathara no longer had any interest in the said land which he could dispose off to the Plaintiff or the Defendant either as an outright sale or as a gift *inter vivos*, nor could the defendant pay any consideration for what was already his. Any agreement entered into by Nyagah Gathara in 1993 for disposal of that land was therefore null and void.

I find that the issue of a land Control Board consent to the transaction did not arise as Nyaga Gathara had no interest to dispose off.

Although there were questionable dealings concerning the registration of the subsequent subdivisions of Iriaini/Gathara/833 that did not however alter the fact that Nyaga Gathara had no interest in that land. I find that the Defendant was not holding this land in trust either for Nyaga Gathara or for the Plaintiff. I find that the Plaintiff has failed to prove his case and I therefore dismiss his suit. Given the circumstances of the case, I do not find it appropriate to make any orders as to costs.

Dated signed and delivered this 6th day of October 2005.

H. M. OKWENGU

JUDGE