



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

**CIVIL APPEAL NO 17 OF 1999**

MUNIU KAMAU ..... APPELLANT

VERSUS

ERNEST MWAURA KAMAU

alias MWAURA KAMAU ..... RESPONDENT

**JUDGMENT**

The Appellant and the Respondent are brothers.

Briefly the facts of the case according to the Appellant are that Land parcel Loc 5/Kagira/445 measuring 4.6 acres belonged to their father, while Loc 3/Gachangini/110 was bought by their mother; that these two parcels of land were registered in the Respondent's name during demarcation; and that he is entitled to one-half share of the same.

According to the Respondent, approximately 3.1 acres of land parcel 5/Kagwa/445 belonged to their father. However, he purchased 1.5 acres which he claims belongs to him absolutely. He is willing to share the 3.1 acre with the Appellant. The other parcel land Loc 3/Gachangini/110 belongs to him alone as he bought the same without the appellant's support. In 1995 the matter was heard and determined by elders who made an award to the effect that Land parcel 5/Kagira/445 be divided into two equal portions for both parties and regarding Land parcel Loc 3/Gachangini/110 both parties should keep their developed portions as then occupied.

However, that award was objected to and set aside by the Court. The matter was then heard and determined by the lower court in Thika. Judgment was delivered on the 10th December, 1998 by the Resident Magistrate Mrs G G Ngari as follows:

“That the defendant do transfer 1.5 acres from Loc 5/Kagira/445 after he removes his 1.5 acres.”

The Appellant was aggrieved by this decision thus this appeal based on the following grounds:

***1. That the learned trial Resident Magistrate erred in law and fact finding that the Appellant had not proved his case on the balance of probabilities when in fact there was ample evidence that the two suits land had been shared between the Appellant and the Respondent since the time in suit was registered in the name of the Respondent in or about 1962 during the land consolidation and since then the Appellant and the Respondent have enjoyed the use of the two suit lands, each party having exclusively possession of his portion.***

**2. The learned trial Resident Magistrate erred in law and fact in finding that the Respondent redeemed part of land Reference number Loc 5/Kagira/445 while there was no or no satisfactory evidence to support the allegation.**

**3. The learned trial Resident Magistrate erred in law in relying on a Book allegedly containing Sale agreement which was not formally produced in court and/or marked as an exhibit in the proceedings and which was not capable of being produced for non-compliance with the Stamp Duty Act as same was not produced.**

The Respondent told the lower court that he had redeemed some pieces of land from people who had bought it from their paternal grandfather, one Nduati, totaling approximately 1.5 acres. These pieces of land were consolidated with another owned by their grandfather and became land parcel Loc 5/Kagira/445. It is from this parcel of land that he was willing to share 1.5 acres with the Appellant.

The evidence of the Respondent was corroborated by PW 2 (Kimani).

The Appellant told the court that the whole of land parcel 5/Kagira/445 was inherited from their grandfather and should, therefore, be shared equally by both of them. His evidence was corroborated by PW 2 and PW 3.

Regarding Land parcel 3/Gichaigini/110, the Respondent testified that he purchased the same through his own resources, and produced as exhibit an old exercise book containing the sale agreement. The book was written in vernacular but translated in English and showed that the Respondent bought pieces of land from Tharanu Gachau, Gichuhi Njoroge and Kihara Ghachau in the presence of DW 2 who told the court that he was present during the sale transactions. Although his name did not appear in the sale agreement as a witness he explained that they did not deem that to be necessary at that time.

Having heard and evaluated the evidence before her the learned trial magistrate believed the evidence of the Respondent which was clear and not contradictory. This is how she delivered herself:

“He (the defendant) clearly narrated the transactions citing dates and told court all the listed witnesses are deceased except himself. I have no reason to doubt him unlike PW 2 and 3 who are not sure of their testimony. I am persuaded by defendant’s case and find that he has proved his case on a balance of probabilities.”

The learned Magistrate had the benefit of observing the demeanour of all the witnesses, evaluated the evidence properly before the Court, and in my view correctly found in favour of the defendant on a balance of probability. I have no reason to interfere with that decision, and I accordingly dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 26th day of October, 2004.

**ALNASHIR VISRAM**

**JUDGE**