



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 104 OF 1989**

FRANCIS MUHINDA AYUB THINWA .....PLAINTIFF

VERSUS

ANTONY GATHARA AYUB .....DEFENDANT

**JUDGMENT**

Ayub Thinwa's father died in August 1950 leaving behind 4 wives Wairimu Wacheke, Wandia and Gathoni. He had 2 pieces of land one at Gaikuyu and the other at Gathehu. It was the Plaintiff's case that the clan elders met and decided on how the Deceased's land was to be distributed. The Deceased's land had been registered in the name of his eldest son William Githaiga. The Plaintiff and the Defendant were the only sons of Wacheke the second wife. In 1962 the clan elders met and decided that in accordance with the Deceased's wishes his land would be divided into five (5) equal portions. The fifth portion was to be given to William Githaiga in his own right despite the fact that his mother's house was also getting the share.

The land at Gaikuyu was measuring 30.6 acres while the one at Gathehu was measuring 10.2 acres. Each portion was to be 8 acres and it was decided that the house of Wairimu, Wandia and Gathoni together with Githaiga would get the land at Gaikuyu. Since the land was not sufficient, the one who got less i.e. Githaiga would get a portion of the Gathehu land which was given to the house of Wacheke.

It was the Plaintiff's case that the Defendant Antony Gathara Ayub wanted to grow tea and he could not sell tea unless he was a registered owner of the property. Githaiga who was then the registered owner of the land at Gathehu transferred the land at Gathehu to the Defendant to enable him grow and sell tea. It was the Plaintiff's case that 8 acres of land at Gathehu was for the house of Wacheke and he is entitled to 4 acres as his rightful share and he claims the same from the Defendant. The Plaintiff called one Geoffrey Kaigi who was one of those men in the list of the elders who confirmed that the clan decided that the land be divided into five equal portions of 8 acres each. It was his evidence that the portion for the Plaintiff and Defendant who were claiming under their mother Wacheke was at Gathehu.

In his defence the Defendant stated that he bought the land at Gathehu from his elder brother William Githaiga.

If the Plaintiff wanted a share of his mother's entitlement he should ask William Githaiga. He went further to produce copies of the Green Card to show that William Githaiga was registered as proprietor of more pieces of land than were disclosed and that he even sold very many pieces of land to other people.

I have evaluated the evidence adduced before me and I am satisfied that the clan elders knew the land that belonged to the Deceased. The Deceased had two portions of land; one was Plot No. **MAGUTU/GAIKUYU/367** measuring 30.6 acres and **MAGUTU/GATHEHU/17** measuring 10.2 acres. If the Deceased had more land the clan elders were in a better position to know than either of the parties herein who were children at the time. It is also not disputed that the Deceased's said pieces of land were registered in the name of his eldest son William Githaiga Ayub who was from the house of Wairimu. If one were to divide the land at Gaikuyu into four portions of 8 acres each one of the four persons would get 2 acres less than the others. I am therefore satisfied that William Githaiga was to get 2.2 acres from the land at Gathehu. The Defendant has raised various issues and produced various green cards to show that William Githaiga had more land. This may indeed be true but what concerns me is the Deceased's land and not what Githaiga owns in his own personal capacity.

William Githaiga could not attend court as he is currently sick. He was however, keeping the

minute book which recorded the meeting of the clan elders. Counsel for the Defendant objected to the production of the said book. The same was however, admitted in evidence for whatever it is worth. The book was written in Kikuyu language and there was no English translation attached. What is however, most important is the fact that one Geoffrey Kaigi PW2, was one of those who attended the meeting and his name appears in the book and testified as to what took place during the said meeting.

The Defendant claimed that he bought the suit land from William Githaiga though the record shows that it was given to him as a gift for the purpose of avoiding stamp duty. The issue for determination is whether the Defendant acquired the suit land by virtue of having bought it from William Githaiga or whether it was given to him by William Githaiga in trust for himself and the Plaintiff as the two sons of wacheke. By perusing the Green Cards produced by the Defendant himself it is quite clear that Githaiga was registered as the proprietor of the land at Gathehu and Gaikuyu in 1959. The subdivisions of the land at Gaikuyu and the transfer to the other beneficiaries were carried out in December, 1966 and the transfer to the Defendant was carried out shortly thereafter in February, 1967. All the transfers were shown as gifts. The Defendant was unable to show any sale agreement or document in form of receipt to prove that he bought this land from Githaiga. It is not disputed that the Defendant is in possession of the suit land and has developed the same. The fact remains that the Plaintiff has not received his share of 4 acres from his mother's house. Whereas the Defendant is registered as the proprietor of the suit land which measures 10.2 acres, the house of Wacheke was only entitled to 8 acres and it follows that the Plaintiff being the son of Wacheke is entitled to 4 acres out of the said piece of land. I am satisfied that the Plaintiff has proved his case against the Defendant on the required standard and I give judgment on the plaintiff against the Defendant as follows:-

1. I declare that the Defendant holds land parcel No. MAGUTU/GATHEHU/17 in trust for himself and the Plaintiff.
2. I order that the land parcel No. MAGUTU/GATHEHU/17 be subdivided into two (2) portions with the Plaintiff getting 4 acres.
3. I order that the defendant do transfer free from any Encumbrances the portion measuring 4 acres to the Plaintiff.
4. That the Defendant do pay the costs of this suit and interest.

**Dated this 14th day of May 2002.**

**J.V.O. JUMA**

**JUDGE**