



**REPUBLIC OF KENYA**

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

**Civil Appeal 86 of 2001**

**KIMANGU GATHENDU .....APPELLANT**

**VERSUS**

**MWANGI GATHENDU & ANOTHER.....RESPONDENT**

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

One Gathendu Kimangu died in 1941 leaving behind two (2) widows, namely Lisphah Wambui Gathendu and Wanjiku Gathendu; first and 2<sup>nd</sup> wives respectively. Both have also died. The first wife in 1996 and the second in 1971. All the deceased were buried on land later registered as LOC.19/RWATHIA/338.

The deceased Wambui Gathendu left behind two sons, namely Kimangu Gathendu the appellant herein and Samwel Miro Gathendu; while Wanjiku Gathendu also left behind two sons, namely, Mwangi Gathendu and Duncan Murai Gathendu – both respondents herein.

When land demarcation and registration commenced in the area in 1963, the appellant was registered as proprietor of Land Parcel Numbers LOC 19/RWATHIA/338 and LOC 19/KIAWAMBOGO/26 while land parcel number LOC 19/RWATHIA/1182 was registered in the name of the first appellant.

During September, 2000 the respondents instituted proceedings at Mathioya Land Disputes Tribunal claiming portions of Plot Numbers LOC 19/RWATHIA/338 and LOC 19/KIAWAMBOGO/26 under the guise that these parcels belonged to their father Gathendu Kimangu and that the appellant had his name registered thereon as trustee for himself and for other members of the Kimangu family, he being the eldest son.

The divisional tribunal heard witnesses on both sides. The record does not show when the hearing took place.

The respondents however, claimed that the two parcels of land registered in the name of the appellant were family lands and that the said appellant should sub-divide and give them their shares.

However, the appellant said he had subdivided the 6 acre plot belonging to the late Gathendu Kimangu and shared it out between himself and the respondents. That, otherwise the rest of the lands, including LOC 19/RWATHIA/338 and LOC 19/KIAWAMBOGO/26 was his personal parcels which he bought.

The view of the tribunal was that all the parcels, LOC 19/RWATHIA/338 and 1182 and LOC 19/KIAWAMBOGO/26 were acquired by virtue of inheritance and that the appellant and his brother Samuel Miro and the respondents were entitled thereto equally.

That there were no fragments of land purchased as the appellant alleged. The tribunal members said there was no evidence to show that the suit parcels were ever purchased.

The tribunal then set about to combine all the 3 parcels of land and to share them out as follows:-

Wambui's house

Loc 19/kiawambogo/26 measuring 4.4 acres,

A portion of Loc 19/Rwathia/338 3.1 acres

Kiamangu Gathendu to get 4.4 acres

Samuel Miro Gathendu to get 3.1 acres

TOTAL 7.5 acres

Wanjiku's house

Loc 19/Rwathia/1182 measuring ..... 3.0 acres

a portion of Loc 19/Rwathia/338 ..... 3.0 acres

Mwangi Gathendu to get 3.0 acres

Duncan Mwai Gathendu to get 3.0 acres

TOTAL 6.0 ACRES

The panel made this distribution saying the appellant was entitled to a bigger share by virtue of him being the eldest son of the deceased Gathendu Kimangu and that that position did not entitle him to swindle his other brothers (step brothers) of their shares.

This decision was made on 7<sup>th</sup> September, 2000.

This decision did not please the appellant who lodged an appeal to the Provincial Land Disputes Appeals Committee Central Province.

The appeals committee upheld the decision of the Divisional Land Disputes Tribunal and this is what prompted the present appeal being filed in this court on 15<sup>th</sup> March, 2001. The memorandum had 11 grounds of appeal which attacked the Provincial Land Disputes Appeals' Committee for failing to correctly consider the appellants' grounds of appeal; for basing its decision on incorrect and distorted proceedings which decision was illegal for lack of jurisdiction.

The grounds further faulted the appeals' committee for failing to recognize that parcels of land numbers LOC 19/RWATHIA/338 and LOC 19/KIAWAMBOGO/26 were first registrations and that these titles are indefeasible, that it failed to recognize that once the parcels of land were registered, customary law rights were extinguished and that the proceedings before the provincial committee were barred by operation of law.

The appeal was called out for hearing on 30<sup>th</sup> September, 2002 when counsel for the parties appeared

before this court to either urge or oppose the appeal.

According to counsel for the appellant, land once registered it ceases to be subject to customary law because during land adjudication and registration all customary claims are considered and completed.

That in the case subject to this appeal, all the parties to the suit were grown up during the time of land registration and the question of the disputed lands having been registered in the name of the appellant in trust for himself and other members of Gathendu family could not arise.

Counsel submitted that proceedings before Mathioya and Nyeri Tribunals were a nullity as those tribunals had no jurisdiction to adjudicate over this dispute.

That there was no evidence to establish a trust and that since the 1<sup>st</sup> respondent was registered as proprietor of LOC 19/RWATHIA/1182, no complaint had been raised since 1963 to 2000.

And that even during the lifetime of the mothers of the parties to this litigation, no question of trust had been raised. Counsel prayed that this appeal be allowed with costs.

Counsel for the respondent opposed the appeal and said a first registration cannot be challenged – but the respondent had a right to claim as beneficiaries from the trust.

That they had a right to institute proceedings in the Land Dispute Tribunal for the division of the land so that they could occupy their portions of the suit parcels of land.

He prayed for the suit to be dismissed.

These are submissions advanced by counsel for both parties which I have heard and recorded.

It is true to speculate that since the deceased Gathendu Kimangu and his wives were buried on the suit land LOC 19/RWATHIA/338, on their demise, if the said deceased had lived up to 1963 when land registration took place this particular land could most probably have been registered in his name in which case it is true to speculate further that this particular parcel was family land.

Unfortunately, Gathengu Kimangu died in 1941 and that when Land Adjudication was carried out in the area in 1962 – 1963, land LOC 19/RWATHIA/338 was registered in the name of the appellant as a first registered owner thereof.

Section 27 of the Registered Land Act Chapter 300 provides as follows:-

(27) Subject to this Act:

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Then Section 28 of the same Act provides that

S.28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject to

(a) ..... And

(b) .....

Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to

which he is subject as trustee. (See also Section 143 of the same Act).

On the issue of trust section 126(1) of the Registered Land Act provides as follows;

S.126(1) “.....A person acquiring land ..... in a fiduciary

capacity may be described by that capacity in the instrument of acquisition, and, if so described, shall be registered with the addition of the word “as trustee” but the Registrar shall not enter particulars of any trust in the Register.

However, in the case of Gatimu Kinguru v Muya Gathangi [1976] KLR 253 the late Madan, J (as he was then) held that absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of S.126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive.

Nevertheless, and though an inference of trust might have been made in respect of the registration of the appellant’s name on LOC19/RWATHIA/338, Section 3 of the Land Disputes Tribunal Act (No.18 of 1990) which confers jurisdiction to Tribunals to handle certain land disputes makes no provision for claims under trust, be they customary or otherwise.

Apart from this, there was no evidence offered by the respondents to show that the appellant held land parcel No. LOC.19/KIAWAMBOGO/26 in trust for himself and/or the respondents, and by virtue of him being a first registered proprietor thereof there was no evidence to challenge his assertion that he bought this particular parcel of land.

I am not also sure the Divisional or appeals Tribunals had jurisdiction to entertain land registered under chapter 300 in view of Section 4 thereof which provides that:-

Section 4 : Except as otherwise provided in this Act No other written law and no practice or procedure relating to land registered under this Act shall apply to land registered under this Act so far as it is inconsistent with this Act”.

Emphasis mine. It is not remote to say that Act No. 18 of 1990 is inconsistent with Chapter 300 of the Laws of Kenya.

Then there is Section 159 of the Act which states that

Civil suits and proceedings relating to title to or the possession of land ..... Shall be tried by the High Court and, where the value of the subject matter does not exceed twenty five thousand pounds, by the Resident Magistrate’s court.

These are clear provisions of existing law on titled land and they oust the jurisdiction of land tribunals in dealing with dispute over land registered under chapter 300 Laws of Kenya save as restricted under Section 3 of Act No.18 of 1990.

Tribunals were actually set up with sole purpose of adjudicating over claims and reaching decisions in accordance with recognized customary laws.

But there one legal provisions which suggest that prior to the registration of lands under the Registered Land Act the same were subject to the Land Adjudication process where every land holders interest was identified and registered in the Adjudication Register which later formed the Land Register

under Section 11(2A) of the Registered Land Act.

If that be so, and in view of the case of Obiero v Opiyo & Others [1972] E.A. 227, registered Land cannot be subject to customary law rights as these are extinguished on registration and that if the legislature intended that rights of a registered proprietor were to be subject to rights of any other person under customary law, it could have said so.

See also Esiroyo v Esiroyo [1973] E.A. 338 at P.390.

The respondents in the case subject to this appeal were raising a claim to title to portions of the suit plots, namely LOC.19/RWATHIA/338 and LOC 19/KIAMAMBOGO/26 but this type of claim is not covered by Section 3 of the Land Disputes Tribunal Act – No. 18 of 1990.

The claim was neither for trespass non a boundary dispute.

Looked at the other way, this is a dispute over which the limitation period would easily have applied.

The appellant was registered as proprietor of the suit parcels of land in 1963 and the claim subject to this appeal filed in the court of the Divisional Land Tribunal in Mathioya during the year 2000 – a period of about 37 years.

Section 7 of the Limitation of Actions Act bars a claim over title to land, after a period of 12 years and this provision has been re-inforced by Section 13(3) of the Land Disputes Tribunal Act No. 18 of 1990.

Perhaps by way of advice, members appointed to adjudicate tribunal land disputes should have had grip of the Land Disputes Tribunal Act and generally conversant with Land Law in this country otherwise land disputes in courts will continue piling up due to lack of such basic knowledge by such members.

Otherwise, for reasons given herein above, I allow this appeal and set aside the Provincial Land Disputes Appeals Committee decision delivered on 8<sup>th</sup> day of February, 2001 with costs to the appellant.

Delivered this 11<sup>th</sup> day of October, 2002.

**D.K.S AGANYANYA**

**JUDGE**