



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

**AT NAIROBI**

**Mbuthia v Kamuri**

**Hancox J**

**Civil Case No 1279 of 1981**

The plaintiff and the defendant are father and son and the former claims that he was at all material times the owner of the suit land at Njuku/Kamubata/26 which had been given to him by the family for all his three sons to benefit. The defendant denies the plaintiff's claim and maintains that his father has his own land elsewhere.

The case originally proceeded ex parte, but the defendant subsequently appeared at the hearing and was able to cross-examine the plaintiff, and his two other witnesses, and called evidence. Mr Lathigi filed a notice of appointment at a late stage in the case and subsequently represented him. The certificate of official search (Ex 1) produced by the plaintiff and dated October 2 this year shows that what I am satisfied is the suit land comprises 2.31 hectares, which multiplies by 2.47 gives 5.7 acres, not 6 acres as the plaintiff claims, is registered in the name of the defendant. There is a caution in favour of Benson Njoka Kamuri who claims the beneficial interest.

The case for the plaintiff supported by both his witnesses, was that at the time of land consolidation in about 1958, the plaintiff, who had another wife, bought another piece of land at Gachegi and was living there then. The defendant was given this land to occupy it and use it in trust for himself and the other brothers and was registered as proprietor. This was because he was the eldest son. It was elucidated in cross-examination that the defendant was not the first person who cultivated the land, but when he did so he planted maize.

Both the plaintiff and his second witness, Muturi, were members of the six-man sub-division committee who demarcated the land during consolidation. Muturi confirmed that the plaintiff was the real owner of the land and that the defendant was only registered in the defendant's name in trust for himself and his brothers.

The defendant and his two witnesses gave evidence to the effect that the land was registered in his name absolutely and not in trust and that the land which the plaintiff had at Gachegi (said to be 6, 7 acres or 8 acres) was not purchased by him, but given to him by the Agachiku Clan (as was the suit land to the defendant), with the result that both of them had roughly the same amount of land. The defendant has planted coffee and tea on the land. One of the sub-division committee members Mr Kamau Gachara said that they were at the time of land consolidation, giving land to elder sons. It seems that the defendant, being born in 1936, was an adult, though unmarried at that time.

The defendant's neighbour, Gacharui Njue, confirmed this. He is of similar age to defendant. No documentary evidence relating to the Gachege land was produced.

Mr Muturi admitted that despite a notice for objectors being published, no one did so in this case. Although the defendant said his brothers had not claimed the land, this is refuted by the caution entered by Benson Njoka.

Having assessed the relative credibility of the witnesses, I have no hesitation in accepting the evidence of the plaintiff and his two witnesses and in rejecting that of the defendant's witnesses where it differs therefrom. I am satisfied that even though the suit land was registered in the defendant's name, the plaintiff was none the less the owner of it, but that in the words of Njiru Mututa:

“The plain I tiff said he would hand over his six acres of land to the defendant to hold in trust for himself and his two brothers.”

I am satisfied that the reason the defendant was registered as owner was because, as elder brother, after his father, he was most suitable person to hold the land and that he did so in trust for himself and the two other sons. Accordingly, in accordance with the provisions of Sections 26 to 28 of the Registered Land Act Cap 300, I grant a declaration in terms of Prayer (a) of the plaint, not that the defendant holds 4 acres in trust for the plaintiff and his other two sons, but that he holds one-third of the 5.7 acres, namely 1.9 acres each in trust for the two other sons of the plaintiff, namely, Mwai Kamuri and Ben Kamuri – the latter being the person in whose favour the caution is entered on Exhibit 1. I make no order in terms of paragraph (b) or (c) of the prayer, but the plaintiff will get the costs of this case.

May 9, 2000, **Aganyanya J** delivered the following Ruling. The case subject to this application commenced in this court in 1981. I cannot tell what has happened to the file but there is no plaint or defence thereon.

But the plaintiff-applicant herein is father to the first defendant/respondent herein. He must have filed a suit against the said first respondent to claim from the latter a portion of the land known as Kabare/Njiku/26 saying that during land consolidation in the area in 1958 this land had been given to him by the family for his three sons including the first respondent, but that the same was registered in the first respondent's name as the eldest son of the applicant to occupy and use it in trust for himself and his other brothers.

That at the time, the applicant, who had another wife, had bought another piece of land at Gachege where he lived.

The respondent denied this and said that this land was registered in his name as its absolute proprietor and that the applicant had his own land elsewhere.

Parties and their witnesses appeared before Hon Justice Hancox, as he then was, who heard and recorded their evidence. The said Judge then delivered his judgment on October 19, 1982, wherein he ordered that the respondent held the suit land in trust for himself and his two brothers, Mwai Kamuri and Ben Kamuri, who were entitled to 1.9 acres of the suit land each.

An appeal against this decision filed in the Court of Appeal was dismissed on November 8, 1989 for failure by the first respondent and/or counsel to prosecute it.

Then after about ten years, there is this application in this court for review of Justice Hancox's order dated October 19, 1982, and for an order for the addition of one Njiru Kabui to these proceedings.

That the review required is for correcting of the applicant's name from Kimuri Mbutia to Kimuri Mubuta and for cancelling of the name of the second respondent from the land register over LR Number Kabare/Njiku/26. The grounds annexed to this application are that the applicant has not been able to execute the decree, that this inability was occasioned by the respondent and that the said first respondent

had appealed against the decision of this court which appeal was dismissed.

There is also a supporting affidavit to this application which gives the reason why the decree had not been executed and/or how the first respondent clandestinely transferred the suit land to the second respondent to defeat the court order made on October 19, 1982.

The intended second respondent filed grounds of opposition to state that the applicant's application was misconceived, that the intended second respondent cannot be joined to the suit which is concluded; that the application is an abuse of the court process and so forth. The intended second respondent filed a replying affidavit too in which he deponed that on November 7, 1991, he bought the suit parcel of land by public auction in some case in which Kabore Njogu was the plaintiff and Simon Muchira Kamuri was the defendant. He gave the case number as Kerugoya Senior Resident Magistrate's Court Case Number 9 of 1991. That he was issued with a title to the land on July 7, 1992; that an appeal against the decision of the Senior Resident Magistrate in the Kerugoya case to the High Court at Nyeri by the sons of the first respondent (No 60 of 1995) was dismissed; that the suit subject to this application is concluded and there is no provision for joining a third party; that the orders in the case do not affect him; that nothing is pending in respect to the outcome of the suit and that there is no procedure for rectifying of the register under the Registered Land Act and so on.

The first respondent did not file any pleadings in respect to this application, may be because he thinks the application does not affect him.

Counsel for the applicant and second respondent appeared before the court on April 5, 2000, and either supported or opposed the application. This is a rather tricky case and it is unfortunate counsel for the applicant did not do a thorough research to ascertain what sort of pleadings to present to this court in respect to this dispute.

I am not sure the applicant perused the Kerugoya Senior Resident Magistrate's Civil Case Number 9 of 1991 to know exactly what transpired therein.

The dispute between the applicant and the first respondent ended with the dismissal of the appeal filed by the first respondent by the Court of Appeal on November 8, 1989, and what remained then was for the applicant to execute the decree drawn out of Honourable Justice Hancox's judgment.

But there are indications that before the execution of the decree by the applicant, the first respondent got entangled in a civil case at Kerugoya with one F Kabere Njogu, which culminated in the sale of the suit land by public auction to the second respondent herein.

Facts of this case are not disclosed or known but the applicant alleges this was a clandestine arrangement with the first respondent. It may or not have been a clandestine arrangement, but whatever the case might have been in the present application, is this the proper forum for the court to untie the complicated knots created by these happenings? In my view, no. Of course by the first respondent not replying to this application, one could be tempted to think that he knows what he has done, that he has nothing for which he can be sued. But the facts disclosed in this application are such that a different forum is required in which all those named should have an opportunity to disclose all they know in the matter, not through this application, by chamber summons.

No doubt the applicant has been put to unnecessary burden by what has happened so far but there can be no shortcut.

With lots of sympathy for the applicant, I dismiss this application but with an order that each party do bear his/their own costs of the same.

Dated 9th day of May of 2009

Hancox J