



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 340 OF 2003**

**SAMUEL THACI WANGI.....PLAINTIFF**

**VERSUS**

**ALEX KAMAU RIGAGA.....1<sup>ST</sup> DEFENDANT**

**LOISE WANJIRU THAMA.....2<sup>ND</sup> DEFENDANT**

**RACHAEL WARUGURU GICHERU.....3<sup>RD</sup> DEFENDANT**

**AGNES WAIRIMU MUNENE.....4<sup>TH</sup> DEFENDANT**

**PENINA WANJIKU MUCHIRI.....5<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KIAMBU.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant's husband were sons of Rigaga Gatharigi who died a long time ago. The late Rigaga Gatharigi married two wives called Ruguru and Njoki. Ruguru had three daughters and one son called Wangi Kamau while Njoki had three sons called Thama Kamau, Thaci Wangi and Alex Kamau. Wangi Kamau married Esther Wanjiru and they were blessed with one daughter, Rachael Waruguru.

2. The Plaintiff claimed that when he was 8 years old, Wangi and his wife Esther adopted him with the consent of his mother Njoki and that he went to live with them. The Plaintiff averred that the land known as Kiambaa/Kihara/427 ("the Suit Property") was given to him in place of Wangi and Esther Wanjiru, as the share that they were entitled to on behalf of Ruguru, as the first house of Rigaga Gatharigi. Rigaga Gatharigi owned two parcels of land, the Suit Property and Kiambaa/Kihara/405. Kiambaa/Kihara/405 was registered in the name of Njoki's eldest son Thama Kamau. The Plaintiff contended that Kiambaa/Kihara/405 is what the second house of Njoki was entitled to.

3. The Plaintiff's claim was that he was entitled to the Suit Property and that the Defendants who were illegal trespassers on the land had refused to move out of the land despite demands to do so. In the undated amended plaint the Plaintiff sought judgement in terms of an order that the Defendants were illegal trespassers on the subdivided parcels of the land and they were required to hand over and surrender vacant possession with immediate effect. He also sought costs, interest on costs and any other orders that the court may deem

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Further Re-amended Defence and Counterclaim on 11/3/2010 seeking a declaration that the transfer of Kiambaa/Kihara/3101 by the Plaintiff to the 4<sup>th</sup> Defendant and that of Kiambaa/Kihara/4588 to the 5<sup>th</sup> Defendant was fraudulent. They sought a declaration that the Plaintiff held Kiambaa/Kihara/427 which was subdivided into Kiambaa/Kihara/3101 to 3110, 4588 and 4589 in trust for the family of the late Kamau alias Rigaga. They further sought an order for revocation and cancellation of the title documents in respect of Kiambaa/Kihara/3101 to 3110, and 4588 and 4589 and an order directing the Land Registrar to subdivide that land into three equal parts to be registered in the names of the Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant.

5. The hearing of this suit commenced on 2/3/2016 before Gitumbi J. when the Plaintiff testified. He confirmed that the 1<sup>st</sup> Defendant was his brother and had since died. The 2<sup>nd</sup> Defendant was the wife of his late elder brother. The 3<sup>rd</sup> Defendant was his brother's daughter who he claimed gave him the Suit Property. He confirmed that he sold plots to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. He also confirmed that they all lived on parcel number 427. He claimed that the Suit Property was given to him by Esther Wanjiru Wangi and that their father died before the process of demarcation of land started. His father had two wives and the children they got were all dead except for him. He claimed that his

father had divided his two parcels of land among his wives. That Njoki was given parcel number 405 and Ruguru was given parcel number 427. Ruguru had one son who got a daughter called Rachael Ruguru who was married. He claimed that his step brother Mungai Wangi did not have a wife and lived with his mother and that his mother got married elsewhere. He claimed that when Ruguru died she left parcel number 427 to her son Wangi Mungai who in turn left it to Esther Wanjiru Wangi when he died.

6. He testified that he was given to Ruguru's house when he was 8 years old and stayed with Esther Wanjiru Wangi, the wife of Wangi. His brothers Alex and Thama were living on parcel number 405. After demarcation the parcel called Kanugu was given number 427. He claimed that his brother could not build on parcel number 405 because it was a forest and he therefore came and asked them for a place to build a house when Esther was still alive. He maintained that it was Esther who left parcel number 427 to him because her daughter Rachael Ruguru was already married. Parcel number 427 measured 3 acres out of which he had sold one and half acres to the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

7. He claimed that he had subdivided parcel number 427 for his family members and that there was no opposition when he sold the two plots to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. He denied giving the 1<sup>st</sup> and 2<sup>nd</sup> Defendants title to the suit land and maintained that he only allowed them to farm and that when he asked them to return to their own land they refused. He asked the Chief to remove them from the Suit Property but the Chief was not able to do so. He maintained that his brothers had their own land being parcel number 405. He stated that the 1<sup>st</sup> Defendant died and neither had a wife nor children. His second brother had also died. He sought the court's help in evicting his family so that they could go to their land which according to him was parcel number 405.

8. On cross examination, he stated that he was 75 years and that the Suit Property belonged to him from 1968. He claimed that the Suit Property was given to him by Esther Wanjiru who raised him. That he went with Esther Wanjiru to the lands office where the registration was done. He also maintained that his father had shared his farm between his two wives. He added that when a man marries even 20 wives his land should be divided among that number of wives. He clarified that during demarcation women were not registered as owners of the land which is how he came to be registered on behalf of Ruguru's family while Thama represented Njoki's family. He denied that he was registered as a trustee of the Suit Property.

9. He confirmed on cross examination that there was no ceremony for his adoption and that Esther gave him the land of her own free will and that Rachael Ruguru was not interested in the land. He could not remember when he subdivided the Suit Property. He confirmed that the subdivision was only on paper but not the ground. He did not want his brother Stephen Thama Kamau to be buried on parcel number 427 because he had given him a portion of that land to live on temporarily. He did not know how long his brother stayed on his land. No one lived on parcel number 405. The 1<sup>st</sup> Defendant who had been nicknamed Wajohnny refused to move out of parcel number 427 and was buried on that land with the Plaintiff's permission because he did not have a farm.

10. He confirmed that the 2<sup>nd</sup> Defendant lived on the Suit Property and that she had built houses for commercial use on the other side of the road. That whenever the thought crossed her mind, she would just build on the Suit Property and if he tried to stop her she would take him to the police. He claimed that she made him get jailed for one month. He maintained that Stephen Thama was buried on his land by force and that there was a bit of corruption in getting him buried there. He stated that he placed a caution on parcel number 405 because his brother put a caution against his land. He could not remember when he sold portions of the Suit Property to Agnes Wairimu and Peninah Wanjiku Muchiri but was emphatic that it must have been before this case was filed. He claimed that he was 18 years old in 1958 when he was registered as the owner of the Suit Property by Esther Wanjiru Wangu. He emphasised that he was not registered as a trustee of parcel number 427 but as the owner.

11. He stated that there was a time when his brother Stephen Thama Kamau took him to court and the case was referred to a tribunal which subdivided the land into three portions. He was not satisfied with that decision and came to the High Court. He filed a suit in the Kiambu Magistrate's Court seeking to stop the burial of his brother on the Suit Property.

12. Geoffrey Ngere Mungai gave evidence. He stated that he was a distant relative of the Plaintiff. He claimed that Ruguru had no children and that she went to Njoki and asked to be given the Plaintiff who was then 8 years old. He claimed that Ruguru went with the Plaintiff from Kanungu to Gachie. That Ruguru's son died and she decided to ask for the Plaintiff to go live with her as her son up to maturity. When Ruguru died she left the Suit Property with the wife of her late son, Esther Wanjiru. That the Plaintiff was left to Esther Wanjiru. He stated that the Suit Property was left to the Plaintiff by Esther Wangi who approached the Chief and elders in a committee. That Esther Wanjiru was asked to take the Plaintiff to Kiambu who by then was 18 years old so that they could decide whom the Suit Property would be left to.

13. Mr. Mungai claimed that Esther told them that she wanted to get married in a place with a big farm and it was written that when the title came out it would be issued in the Plaintiff's name. He confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lived on the Plaintiff's land which is the Suit Property. He claimed that a Mzee called Karuri gave the 1<sup>st</sup> and 2<sup>nd</sup> Defendants permission to live on the Suit Property temporarily. That they were given time to move to parcel number 405 but they refused. The Assistant Chief also asked them to go and build on parcel number 405 but when their things were removed they had nowhere to go and requested the Plaintiff who is their brother to allow them to live in a vacant house. That after a while he told his brothers to move out of parcel number 427 to go and build in parcel number 405 but they did not want to move out. That is when the case started and they went to the tribunal. He maintained that when the matter went to the tribunal the Defendants were told to move out of parcel number 427 and go to parcel number 405. He stated that all these information was given to him but he was not present.

14. He denied that the Plaintiff's father gave him the Suit Property but that it was Ruguru who took the Plaintiff and it was she who had the land. He later changed his evidence to state that the Plaintiff was given the land by Esther Wanjiru, the wife of Wangi. He stated that the Suit Property had been subdivided by a surveyor and beacons were placed on the land. He maintained that 2<sup>nd</sup> Defendant had used force in constructing on the Suit Property. He stated that the 1<sup>st</sup> Defendant died and did not leave any family. He believed that no one had constructed on parcel number 405 because it was a bit far away compared to the Suit Property which was near Gachie town.

15. Rachael Ruguru, the 3<sup>rd</sup> Defendant gave evidence. She stated that she was the daughter of Wangi Mungai. Her father was the son of Rigaga Kamau who had two wives. Her mother was called Esther Wanjiru. Her grandfather gave her father some land whose number she did

not know. She claimed that she was brought up with the Plaintiff. That Njoki, her grandmother who was her grandfather's second wife had her own land which was not the one in Gachie. She was older than the Plaintiff who went to live with them in Gachie before the land was demarcated. She was married and stayed in Kahuru. At that time Njoki was living in the village. She emphasised that she did not want any part of the Plaintiff's land. She testified that her grandmother died before her mother got married and that she found her grandmother alive.

16. She testified that her father died in 1953 and her mother was given the land which her father would have been given. She claimed that the land was registered in her mother's name although she did not see the papers. Her uncle, Stephen Thama Kamau, was buried on the Suit Property by 11.00 a.m. There was a time when she wanted part of the Suit Property but later abandoned the matter because the land was given to the Plaintiff by her mother with a lot of love. She could not recall the testimony she gave the court in the Kiambu case. She later on clarified that Njoki was living in Gachie when she left to get married. She testified in the Kiambu case but had lost interest in the Suit Property.

17. The 2<sup>nd</sup> Defendant, Loise Wanjiru Thama, gave evidence. She stated that she lived on the Suit Property. She could not recall signing the witness statement and when it was read to her she could not tell whether the contents were what she had said. She got married to Stephen Thama when she was 20 years old. They lived in Gachie before demarcation. Her father-in-law had two wives called Ruguru and Damaris Njoki. When she got married Ruguru was dead but she found Njoki. Ruguru was survived by James Mungai Wangi who had a wife called Esther Wanjiru. They lived in the same locality. Esther lived in Kitusuru where she worked for a white man. Her daughter was left with Njoki. She stated that the Plaintiff lived with Njoki as her son.

18. She confirmed that parcel 405 was registered in the name of Stephen Wangi as a trustee while the Suit Property was registered in the Plaintiff's name to hold in trust. She explained that previously the two parcels of land were in the name of her late father-in-law and that Ruguru died a long time ago leaving Njoki in charge. By the time demarcation was done, Ruguru's daughter was already married. She stated that they moved into the Suit Property after demarcation in 1958. She claimed that there was fresh allocation because there was no one on the land and that the men who were doing the demarcation are the ones who showed people their parcels. That she moved onto the Suit Property with her mother-in-law Njoki, her husband Stephen Thama and Rachael Ruguru. The beacons were placed on the land. She did not know Karuri. They stayed in the natives' camp before moving to the Suit Property. The Suit Property was registered in the Plaintiff's name as trustee the same way parcel 405 was registered in her late husband's name as trustee. She explained that at that time a woman or a deceased father was not registered as a land owner which is why the parcels were registered as such. Being the eldest sons, the two parcels of land were registered in their names as trustees. She explained that when she got married the Plaintiff was known as Samuel Thaci Kamau or Rigaga but he adopted the name Wangi when he needed to align his name with the name registered on the Suit Property.

19. Mrs. Loise Thama stated that since there were two parcels of land, each parcel was divided into two portions in accordance with the Kikuyu culture. She stated that Ruguru died living Njoki and that Njoki brought up Ruguru's daughters and gave them away in marriage. She explained that Rigaga married Njoki before Ruguru died and left young children. She confirmed that they had a case in Kiambu with the Plaintiff and her brother-in-law after her husband died. They tried to stop her from burying her husband on the Suit property.

20. She stated that Njoki divided parcel number 427 into three portions in the presence of the Plaintiff. She stated that Njoki called a gentleman called Kamau Kariri to help partition the Suit Property to ensure the portions were equal. Njoki prevented her husband and the Plaintiff from getting involved in that partitioning and only allowed the 1<sup>st</sup> Defendant to be involved. She maintained that when Njoki was alive there were no disputes at all. When Njoki died, issues of subdivision of the land came up. She maintained that the 1<sup>st</sup> Defendant had a family and that his wife was called Mwiaki and that they had two children but had matrimonial disputes. She could not move to parcel number 405 which was divided into three portions for the three sons. She claimed that she lived on her portion, farmed on it and had built there. She filed a succession cause for her late husband. No succession cause had been filed in respect of her late father-in-law's estate.

21. On cross examination, she stated that Njoki was given parcel number 405 and Ruguru got 427. That that was Njoki's decision because her father-in-law died earlier. She got married in 1955. She stated that it was Njoki's decision to have two separate portions during demarcation because had they been given one parcel it would fall on a stormy place. She stated that it was Njoki and Esther Wanjiru who decided that her husband would be registered as the owner of parcel number 405 since their husbands had died and women could not be registered as owners. They took her husband and the Plaintiff and had them registered as proprietors of the two parcels. Both parcels of land were not registered in the name of one son in a bid to increase the chances of a land falling on a good place.

22. When the 2<sup>nd</sup> Defendant got married, the Plaintiff was living in his mother's house with his siblings. They did not have the title for parcel number 405 which she stated was last with Esther Wangi and got burnt. When she filed succession proceedings she listed Stephen Thama's property to devolve to her including parcel number 405 which is in her late husband's name. She stated that the Plaintiff was allocated parcel number 405 by Njoki his mother and that he farmed there. Njoki's family that is her family and that of the Plaintiff lived on the Suit Property since the 1<sup>st</sup> Defendant's family had moved away. The Plaintiff sold his land to the 4<sup>th</sup> Defendant and part of her own portion to the 5<sup>th</sup> Defendant. Her issue was that the Plaintiff had sold a portion of her land. She stated that the Plaintiff subdivided the Suit property into ten plots but as far as she was concerned the land was divided into three portions according to how they farmed it and the boundaries.

23. She stated that the Plaintiff got a title deed while a caution was registered against the suit land. He subdivided the land during the pendency of the case. Her husband placed a caution on the Suit Property as she also did. She maintained that the subdivision of parcel number 427 and its closure was done unprocedurally because there was prohibition by the court. The 4<sup>th</sup> Defendant took three lorries of stones to the suit land but she removed them and took them to the road. The Plaintiff showed the 4<sup>th</sup> Defendant another place where she could build. She sued the 4<sup>th</sup> and 5<sup>th</sup> Defendants because the Plaintiff sold to them a portion of the land where she farmed. She maintained that the Plaintiff had a share in parcel number 405 and that Njoki subdivided the land.

24. She wanted to bury her husband on the Suit Property because she was entitled to a portion of the land. The case she filed in Kiambu was a burial dispute. The court went to the Suit Property and allowed her to bury her husband on the land. She maintained that each person cultivated parcel number 405. She had never seen a surveyor on the Suit Property since Njoki died and according to her, it remained the way it was partitioned initially. She added that the 1<sup>st</sup> Defendant's family had a right to a portion of the Suit Property and also in parcel number 405.

25. Mary Muthoni Kiarie gave evidence. She was a sister of Thama. She had three brothers who were the Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant's husband. She knew about the Suit Property because that is where she grew up. Before land consolidation was done, they lived in colonial villages. The Plaintiff lived with them in the colonial village and they all moved to Gachie land as a family. She confirmed that she testified before the elders in Karuri when the case was previously handled by the elders. The elders directed that the Gachie land was to be shared equally among her three brothers and the Plaintiff and the 2<sup>nd</sup> Defendant's eldest son were to be given a plot each. She stated that during her mother's lifetime there were no disputes regarding the Suit Property. She subdivided the land among her three sons before she died. That she ordered the subdivision of both the Gachie land which is the Suit Property and the Kagongo land being parcel number 405 among her three sons. She stated that there was a v shaped portion on the Gachie land which her mother had directed was to be shared equally between Kamau Thaci and Kamau Thama because they were named after her late husband.

26. In Ms. Kiarie's view, the plaintiff did not have the authority to sell the Suit Property and should have waited for the land to be subdivided among the brothers. She believed that the land was registered in the Plaintiff's name because their mother could not be registered as an owner of land back then. The v-shaped portion was occupied by Kamau Thama and Kamau Thaci, with each of them having built on his portion. She stated that three plots had been hived off the Suit property one of which was occupied by Wajohnny. The second portion was occupied by Thaci while Thama Thaci occupied the third one. The western part of the land was cultivated by Thama's widow, the center one by the 1<sup>st</sup> Defendant and the last one by the Plaintiff. This arrangement had subsisted since they were young adults except that previously their mother used to cultivate the portion that belonged to Wajohnny and the v- shaped portion. She knew that there were fixed boundaries demarcating each portion which were the traditional shrubs used to demarcate land.

27. She knew the Plaintiff filed **Kiambu SPMCC No. 170 of 2000** when he wanted to stop the burial of their elder brother Thama on the land. The court visited the Suit Property and directed that Thama would be buried there. Her mother was buried by the portion that was cultivated by the Wajohnny. Thama was buried on the portion where he used to cultivate. She stated that Njoki, her sister's daughter and Wajohnny's wife were buried on the 1<sup>st</sup> Defendant's portion. She added that the Plaintiff's mother in-law was buried on the portion which the Plaintiff cultivates. She stated that there was no case challenging any of these burials except that of Thama which demonstrated that the Suit Property belonged to the family and the Plaintiff hold the land in trust for the family. She proposed that the Suit Property should be shared out as her late mother directed. She added that they had treated Thama as their father because he raised them all together with their mother and that it was the 2<sup>nd</sup> Defendant who found a wife for the Plaintiff.

28. She stated on cross examination that before she got married in 1965, she stayed on the farms and not in the colonial villages. That by the time her mother got married, their father had had a previous wife called Ruguru who had died. She stated that Ruguru's children used to live with her mother but they later moved out and got married. Her father married her mother after Ruguru had died. Ruguru had a son called Mungai who had been nicknamed Wangi. When she was born she found Mungai staying at their home. By the time demarcation was being done Mungai had died and all the daughters were married. Her mother was in charge of the demarcation. Men were the ones being registered as the owners of the parcels of land. The eldest son was the one to be registered. Thama was the eldest son in their family. After the demarcation the land came out in two parcels. Her mother asked her neighbour called Kamau Karori to assist her demarcate the land. Women could subdivide land with ordinary boundaries since there were no surveyors in those days and there were no succession proceedings. She maintained that her father died a long time ago before demarcation was done could not have therefore given any land to anyone.

29. She stated that her mother caused one parcel to be registered in Thama's name and the second one in Thaci's name as trustees for the family. Their step brother, Mungai commonly referred as Wangi had one daughter and died before the demarcation of the land was done. She stated that nobody had ever lived on parcel number 405 which was rocky and sloppy. Her mother built on the Suit Property. She stated that the Plaintiff was entitled to one of the pieces of the Suit Property. She was aware that the Plaintiff's portion was sold and she had seen the houses built on it. She maintained that the Suit Property was divided into three. She stated that Wajohnny had a wife and two children and that his portion of the land should go to them. She maintained that the Plaintiff could sell his portion to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. She was emphatic that the two parcels of land had been split into three portions.

30. Kamau Karari gave evidence. He stated that he was born in 1940 in Gachie. When he was born Rigaga Kamau was alive with his two wives Ruguru and Njoki. Rigaga died when he was still young. By the time the land consolidation and demarcation was done, Rigaga, his first wife Ruguru and her son Wangi had died. Widows and daughters could not be registered as land owners during land demarcation. Njoki was involved in the registration of the land belonging to the Rigaga family. He stated that Njoki authorised the registration of parcel number 405 and the Suit Property in the names of Thama and Thaci. That it was Njoki the young widow of Rigaga who went to the Suit Property to cultivate it. She went with her family including the Plaintiff. Mr. Karari stated that their own land was next to the Suit Property and that they occupied the land since 1959.

31. Mr. Karari stated that in the mid-1980s Njoki called him to her home and requested him to subdivide the land into three portions. He did the measurements and put beacons by planting *mikungugu* or shrubs to mark the boundaries which he stated exist up to date. After measuring the areas that were under cultivation, Njoki instructed him to measure three equal plots where her sons had constructed their houses. Njoki directed that the small portion remaining would be shared equally between Kamau Thama and Kamau Thaci upon her demise. He confirmed that the two had constructed on that portion. He also went to the Kagongo land which is parcel number 405 and was instructed to subdivide it into three portions of land. He stated that Njoki called everybody including her three sons and their children and asked whether anybody had a question regarding the exercise she had undertaken and none of them had a question.

32. That Njoki informed her children that she had another parcel of land in Mai Mahiu which was to be shared by the three of them with the 1<sup>st</sup> Defendant and the Plaintiff being directed to pay Thama the money used to acquire that land. That she bequeathed her shop in Gachie to Thama. After she had done that she uprooted grass at the place where she was sitting and she stated that there should never be a dispute regarding any of her property or her homestead. She died a year later and was buried on the Suit Property on the portion allocated to the 1<sup>st</sup> Defendant. He denied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were occupying the land as trespassers. He stressed the point that it was not true that the Plaintiff gave the 1<sup>st</sup> and 2<sup>nd</sup> Defendants some place to settle on in 1989. He had never seen a surveyor come to the suit land.

33. Peninah Wanjiku Muchiri gave evidence. She bought a plot measuring 0.1 hectares from the Plaintiff, Thaci Wangi, who was the registered owner of Kiambaa/Kihara/3102, on 13/11/2009 for Kshs. 2,000,000/= and paid the entire purchase price. They applied for Land

Control Board consent and she was duly issued a title over the portion of the Suit Property which she purchased. She did not know that the Suit Property had a dispute. She maintained that the land had been subdivided and had beacons. She later clarified that they did not go to the land board but went to the lawyer's office with the Plaintiff and his wife. She was not the one who paid the deposit of Kshs. 500,000/=, someone who was abroad made the payment. They paid the money in the advocates' office about seven years ago. She stated that Agnes Wairimu was her immediate neighbour. Their land was far from Thaci and the 2<sup>nd</sup> Defendant. She did not do anything on the land. When she went to the land it was chaotic and people came out with *pangas* and asked her to move away.

34. Agnes Wairimu Munene gave evidence. She paid Kshs. 307,000/= to the Plaintiff for the purchase of Kiambaa/Kihara/3101 and was issued a title on 24/5/2001. The land she bought measures 0.05 hectares. The 2<sup>nd</sup> Defendant placed a caution against her land on 28/6/2002. Whenever she tried to develop the land, the 2<sup>nd</sup> Defendant resisted and brought thugs to intimidate and harass her. She agreed with the Plaintiff not to develop the land until the dispute was resolved. She built her house next to the disputed plot as she awaited the court's determination of the land dispute.

35. She knew the Plaintiff because her sister was married to the Plaintiff's son. She got the title for the land before making full payment because she was a family member. They did not go to the Land Control Board. There was no dispute over the land according to her and she learned of it when the 2<sup>nd</sup> Defendant added her to this suit. The Plaintiff's children and her sister witnessed the sale agreement. They did not attend Thama's burial because when Thama died the Plaintiff's family refused to have him buried on the Suit Property. The sale agreement she relied on referred to Kihara/Kiambaa/311 yet her title deed reads Kiambaa/Kihara/3101. She could not explain why the numbers were different. She did not know how come the land reference was given in the agreement dated January and yet the mutation forms were drawn in August. She later clarified that her title was issued on 24/5/2001 and the mutation forms were prepared on 5/4/2001.

36. The court directed parties to file submissions. However, the court referred the matter for mediation on 8/5/2019 owing to the fact that the land dispute is between members of one family. Parties did not reach a settlement agreement and the file was brought back for this court to determine the dispute.

37. The Plaintiff in its submissions disputed the assertion that he held the Suit Property in trust for his two siblings. He argued that the Suit Property could have been registered in Wangi's name had he been alive during the time when consolidation and demarcation of the land was done. Further, that the first wife Ruguru or her daughter Rachael Waruguru would have been within their rights to claim ownership of the suit land had the ownership of land not been restricted to men. He relied on the evidence which Rachael gave in court. He maintained that the Defendants' alleged interest in the Suit Property was neither registered in the lands register nor was it an overriding interest contemplated by Section 30 of the repealed Registered Land Act. He relied on Section 27 of the Land Registration Act while urging that a trust cannot be invoked without it being noted on the register.

38. The Plaintiff relied on the decision in **Nyeri High Court Civil Appeal Number 90 of 2002** where the court stated that a trust was not an overriding interest under the Registered Land Act (RLA). He submitted that the Defendants had failed to establish an implied, constructive, resulting or customary trust. He argued that the Defendants had not established the existence of a trust on which they could hinge their claim. Further, that apart from stating that they had resided on the Suit Property for a long time, the Defendants did not adduce evidence on the history of the land and the relevant customary law on which the trust was founded. He claimed that the Defendants were licensees on the Suit Property having been given temporary accommodation by Ruguru to enable them build on parcel number 405. To quote his submissions, he urged as follows: "*talk of asante ya Bunda ni mateke*".

39. The Plaintiff submitted that the house of Njoki was adequately provided for during Rigaga's lifetime when she was given parcel number 405 which she caused to be registered in the name of her eldest son Thama Kamau. That her co-wife was given the Suit Property and her daughter in law caused it to be registered in the Plaintiff's name because they had taken the Plaintiff as their own son and wanted him to inherit their share since their only daughter was married. He maintained that Njoki had no right to dictate how her co-wife Ruguru was to utilise or dispose of the portion of land which was given to her by their husband Rigaga.

40. He submitted that under Kikuyu customs, a relative could adopt another relative once the parent of a minor consented to giving their infant child to any qualified person for adoption. The Plaintiff relied on Section 4 of the repealed Adoption Act and Section 158 of the Children's Act.

41. On the Defendant's counterclaim, the Plaintiff contended that if the Suit Property formed part of the late Rigaga's estate then the Defendants did not have capacity to deal with the beneficial interest of a dead person's estate without first obtaining letters of administration. Further, that Njoki's action of subdividing the Suit Property and dishing it to her two sons without legal capacity could not stand. The Plaintiff urged the court to dismiss the counterclaim and instead give the Defendants time to vacate the Suit Property failing which an eviction order should issue.

42. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants maintained in their submissions that the registration of the Plaintiff as the proprietor of the Suit Property was done so that he could hold the land in trust for his siblings. The Defendants submitted that there were steps to be undertaken under Kikuyu customary law when there was an adoption and that the Plaintiff had not tendered any evidence of such an adoption taking place. They argued that logically speaking, the 3<sup>rd</sup> Defendant who is the daughter of Wangi could not have sued the Plaintiff claiming a share of the land if indeed the Plaintiff represented the 3<sup>rd</sup> Defendant. The Defendants contended that the Plaintiff was registered as trustee for his brothers under Kikuyu customary law of trust.

43. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on the decision made by the Learned Magistrate in the suit which the Plaintiff filed before the Kiambu Resident Magistrate's Court seeking to stop the burial of Thama on the Suit Property. The court observed after a site visit that the front portion facing the road was used by Thama and Thaci in equal portions and that both Thama and Thaci had built rental houses on the land. The land behind the portions used by Thama and Thaci was being used by Alex Kamau, who had a residential house on the land. Behind Alex's house, there was Thaci and Thama had constructed his residential houses including those of his children behind Thaci. The portion of land behind Thama's residential houses was divided into three equal portions between Thaci, Alex and Thama. Thama was using the lower

portion, Alex the middle one while Thaci was using the upper portion. The portion which Thaci was using was separated by a straight trench which acted as a boundary. Another boundary separated the portion used by Alex from that of Thama. The Learned Magistrate found that there was a clear and definite usage of the Suit Property. He observed that parcel number 405 was likewise divided into three equal portions for Alex, Thama and Thaci.

44. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pointed out that all their family members who had died were buried on the Suit Property and there was no dispute except in the case of Stephen Thama Kamau. They relied on the 2<sup>nd</sup> Defendant's evidence who testified that by the time she got married, Kamau Rigaga, Ruguru and Wangi were all dead and the Plaintiff cannot therefore allege that he was registered as the owner of the Suit Property on behalf of Ruguru's house. They pointed out that during the lifetime of Njoki who was the Plaintiff's mother there was no dispute because the Suit Property had been demarcated for each of her three sons and their families.

45. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on Section 28 of the Land Registration Act which stipulates that registration of one as a proprietor of land will not be taken to relieve him of any duty or obligation which he is subject to as a trustee. They pointed out that registered land was subject to various overriding interests without their being noted on the register with customary trust being one such interest. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that in order to prove the existence of a trust one had to prove that the suit land was ancestral clan land which during adjudication and consolidation was registered in the name of one member of the family to hold on behalf of the family. They relied on **Gatimu Kinguru v Muya Gathangi [1976] KLR 253** in which Madan J held that the absence of any reference to a trust in the instrument of acquisition of the land did not affect the enforceability of the trust because the reference to the capacity as trustee in the instrument of acquisition in Section 126 (1) of the Registered Land Act was merely permissive and not mandatory.

46. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on the decision of Khamoni J. but unfortunately did not annex a copy of that decision. They submitted that the court has held that possession and occupation were key elements in determining the existence of customary trust. Further, that a customary trust existed even if it was not registered or noted on the register.

47. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were not innocent purchasers for value without notice because the sale was carried out when there was an existing caution against the Suit Property. They pointed out that there was a relationship between the Plaintiff and the 4<sup>th</sup> Defendant who purchased a portion of the Suit Property and that she was aware of the dispute since she confirmed that she did not attend the funeral of Thama Kamau.

48. They claimed that the 5<sup>th</sup> Defendant acquired title over Kiimbaa/Kihara/4588 at the time when there were court orders stopping dealings with the Suit Property. They argued that no valid transfers were effected by the Plaintiff to the 4<sup>th</sup> and 5<sup>th</sup> Defendants while pointing out that failure to obtain Land Control Board consent rendered the sale transaction void.

49. The 4<sup>th</sup> and 5<sup>th</sup> Defendants agreed with the Plaintiff that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were trespassers. They relied on Section 26 of the Land Registration Act in urging that the certificates of title they held were *prima facie* evidence of their ownership and added that no evidence had been tendered to show that the Plaintiff acquired the Suit Property through fraud, illegally, unprocedurally or through a corrupt scheme. They added that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not presented any evidence to show that the 4<sup>th</sup> and 5<sup>th</sup> Defendants interfered with the land records or that they altered the documents submitted to the Lands Registry in a way that would distort the material facts. Further, that they had failed to show that the transfers to the 4<sup>th</sup> and 5<sup>th</sup> Defendants were made through fraud or mistake. They pointed out that the 4<sup>th</sup> Defendants title was issued on 24/5/2001 before this suit was instituted.

50. The 5<sup>th</sup> Defendant argued that she came on record on 31/5/2003 and that she became aware of the court order long after the title had been issued on 10/12/2009. They contended that there was no evidence to show that as proprietors in possession who acquired the land for valuable consideration, they had knowledge of any trust, omission, fraud or mistake which is to be rectified. They sought the protection of the court as innocent purchasers for value without notice. They concluded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had not placed enough material before the court for it to invoke its inherent powers granted by Section 80 of the Land Registration Act to order rectification of the register and cancellation of the titles for parcel numbers 3101 and 4588 belonging to the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively.

51. The issue for determination is whether the Plaintiff holds the Suit Property in trust for his brothers or whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are trespassers on the Suit Property. The Plaintiff, the 1<sup>st</sup> Defendant and the husband of the 2<sup>nd</sup> Defendant were brothers and the sons of Njoki. The Plaintiff's claim to the Suit Property is premised on the assertion that the suit land was intended for the house of Ruguru, his step mother and by extension her son who died leaving behind the 3<sup>rd</sup> Defendant. The evidence of the Plaintiff was contradictory on when he claimed to have been adopted and by whom.

52. The Plaintiff did not lead any evidence on the process under Kikuyu customary rites that had to be followed when a relative adopted a child who was related to them. The Plaintiff's sister, Mary Muthoni Kiarie stated in her evidence that she grew up on the Suit Property and that they lived in colonial villages before land consolidation was done. She confirmed that the Plaintiff lived with them in the colonial village and that they all moved to the Gachie land as a family. That would be the Suit Property. The court is inclined to believe the evidence of Mary Muthoni Kiarie. Were it true that the Plaintiff was adopted by Ruguru or her daughter in law as he claimed, his own sister would have confirmed that adoption and would not have stated that they lived together as a family in the colonial village and later in Gachie. The 2<sup>nd</sup> Defendant stated that when she got married in 1955 the Plaintiff was living with his siblings, which makes it doubtful that the Plaintiff was adopted as part of Ruguru's house. The court is inclined to find that the Plaintiff was not adopted by Ruguru or her son or daughter in law as he claimed.

53. What emerges from the evidence of the witnesses who testified is that the two parcels of land were allocated to the family during the lifetime of Njoki who as a widow could not be registered as the owner of land. In order to increase their chances of getting arable land, she had two of her sons registered as the owners of the two parcels of land. It is also apparent from the evidence adduced that none of the parties ever lived on parcel number 405. Njoki lived on the Suit Property. The 3<sup>rd</sup> Defendant confirmed that Njoki was living in Gachie when she

left to get married. The 2<sup>nd</sup> Defendant stated in her evidence that they moved into the Suit Property after demarcation in 1958. She also stated that the Plaintiff was farming on his portion of parcel number 405 which Njoki allocated him. That evidence was not controverted.

54. The court prefers the evidence of Kamau Karari to that of the Plaintiff regarding the role which Njoki played during the registration of the Suit Property. Mr. Karari testified that during her lifetime, Njoki divided the two parcels of land for her three sons. He stated that in the mid-1980s Njoki called him to her home and requested him to subdivide the Suit property into three portions. He stated that he took the measurements and put beacons by planting *mikungugu* or shrubs to mark the boundaries which still existed on the Suit Property up to date. The Learned Magistrate prepared a report on the site visit to the Suit Property which gave an overview of where the family members had settled on the land and developed their houses. The report lends credence to the evidence of Mary Muthoni Kiarie and Kamau Karari that Njoki subdivided the two parcels of land between her three sons during her lifetime and that she even showed Kamau Thaci and Kamau Thama where they were to build on the v-shaped portion because they were named after her late husband.

55. The 2<sup>nd</sup> Defendant testified that she had lived on the Suit Property for many years. The Plaintiff confirmed that she had developed part of the Suit Property and put up commercial buildings. In the court's view, had the Plaintiff wished to claim the whole of the Suit Property he should have done so during Njoki's lifetime. The witnesses stated that all their dead family members were buried on the Suit Property without any mishap save for the 2<sup>nd</sup> Defendant's husband. If indeed Njoki was only entitled to parcel number 405 then she should have been buried on that land and not on the Suit Property.

56. The Supreme Court of Kenya addressed the issue of customary trust in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another [2018] eKLR**. The court gave some of the elements that would qualify a claimant as a trustee. This is where the land in question was family or clan land before registration and the claimant belonged to such a clan or family and he would have been entitled to be registered as an owner of the land were it not for some intervening circumstances. The claim has to be directed against the registered proprietor who is a member of the family.

57. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's claim is directed against the Plaintiff who was registered as the proprietor of the Suit Property. The Plaintiff and his two brothers belong to the same family. His two brothers could have been entitled to be registered as proprietors of the Suit Property which was family land, were it not for their mother's desire to increase their chances of getting arable land which prompted her to get her two sons registered as proprietors of parcel number 405 and the Suit Property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not trespassers on the Suit Property.

58. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's possession and occupation of the Suit Property for over fifty years gives rise to a trust. The circumstances of this case demand that equity treats the Plaintiff as a trustee. A customary trust is presumed to be created in favour of the other family members. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants had rights over the Suit Property by virtue of their actual possession of the land which was an overriding interest under Section 30 of the repealed Registration of Land Act. A customary trust existed and the registration of the Plaintiff as proprietor of the Suit Property was subject to the customary trust. The Plaintiff therefore held the land in trust for the benefit of his brothers and their families.

59. The Plaintiff could not purport to subdivide the Suit Property and dispose of portions of it to the 4<sup>th</sup> and 5<sup>th</sup> Defendants as he purported to do because he held the land in trust for the other members of his family. The court is not persuaded that the 4<sup>th</sup> and 5<sup>th</sup> Defendants are innocent purchasers for value without notice. Had they carried out due diligence before attempting to purchase from the Plaintiff plots that were to be excised from the Suit Property, they would have learned of the family dispute over the land. The tension and acrimony surrounding the burial of the 2<sup>nd</sup> Defendant's husband on the Suit Property would have scared away any prudent purchaser. Mrs. Loise Wanjiru Thama stated in her testimony that she had to obtain a court order to bury her husband on the Suit Property. The 5<sup>th</sup> Defendant confirmed that when she went to the land after purchasing it from the Plaintiff the scene was chaotic and people came out with *pangas* and asked her to move away. Being a relation of the Plaintiff's, she would have known about the family dispute over the Suit Property.

60. The court declines to grant the orders sought in the Amended Plaintiff. The Plaintiff held parcel number Kiambaa/Kihara/427, which was subdivided into Kiambaa/Kihara/3101 to 3110 and 4588 and 4589 in trust for himself and his deceased brothers Alex Kamau Rigaga and the 2<sup>nd</sup> Defendant's husband. The transfer of Kiambaa/Kihara/3101 by the Plaintiff to the 4<sup>th</sup> Defendant and the transfer of Kiambaa/Kihara/4588 to the 5<sup>th</sup> Defendant was irregular because the Plaintiff held Kiambaa/Kihara/427 in trust for the family of the late Kamau alias Rigaga.

61. The District Land Registrar, Kiambu, alongside the District Surveyor is directed to cancel and revoke the title documents in respect of Kiambaa/Kihara/3101 to 3110 and 4588 and 4589 and to cause these parcels to be resurveyed and amalgamated into one parcel of land which will be subdivided into three equal portions to be registered in the names of the Plaintiff, the legal representative of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant respectively. The subdivision will take into account where each of the brothers or their family lives or has developed.

62. This being a family dispute which spanned several decades, each party will bear its own costs.

Delivered virtually at Nairobi this 9<sup>th</sup> day of August 2021.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. K. Kirimi holding brief for Mr. G. Gakaria for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. V. Owuor- Court Assistant

No appearance for the other parties