



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 3 OF 2019

RAEL KAROKI KIRINYA.....1ST APPELLANT

VERONICA NGUGI KIRIINYA.....2ND APPELLANT

VERSUS

GRACE GAPUNGE.....1ST RESPONDENT

IRENE NTUI KITHINJI.....2ND RESPONDENT

CHARITY GACHERI IKUNYUA.....3RD RESPONDENT

JOHNSON OGINGA OJWANG.....4TH RESPONDENT

JUDGMENT

1. The 2nd Appellant and 1st Respondent are sisters born of the 1st Appellant and one M'Kirinya M'Mworia (Deceased). At the heart of the dispute is a parcel of land originally known as no. **ABOTHUGUCHI/KARIENE/1651** measuring about **3 acres**, which was initially owned by M'Kirinya M'Mworia but was transferred to the 2nd appellant on **14.6.1999** during the lifetime of M'Kirinya who apparently passed on in **August 2004**. For ease of reference, I will abandon the title part **ABOTHUGUCHI/KARIENE** for all the parcels of land which I will identify by their numerical term. The original land parcel is no longer there as it was subdivided. The initial subdivision occurred on **25.9.2002** resulting in two parcels, namely **2909 measuring 0.20 ha.** and **2910 measuring 1 ha . Parcel no. 2909** was transferred to one Paul Kinoti on **18.10.2002**, while the other **parcel no. 2910** remained in the name of 2nd appellant. In the year 2009, the **parcel no. 2910** was surveyed and subdivided into 4 resultant parcels which gave rise to **parcel nos.3689 measuring 0.38 ha., 3690 measuring 0.12 ha., 3691 measuring 0.20 ha., and 3692 measuring 0.2 ha.** Thereafter, titles were issued all in the name of 2nd appellant in respect of the 4 resultant parcels. The 2nd appellant transferred **parcel no. 3691**(half of an acre) to one **Japhet Kimathi on 21.9.2012**. The **parcel no. 3692** (half an acre) was transferred to 1st respondent on **24.7.2013**. The 2nd Appellant retained **parcel no 3689** as well as **parcel no 3690** where she was registered as the owner of the two parcels on **20.9.2012**.

2. The 1st respondent proceeded to subdivide the parcel no. 3692 into 2 parcels namely **4411 (a quarter acre)** which she sold to 2nd respondent and parcel number **4412 (a quarter acre)** which she sold to 3rd and 4th respondents.

3. There are accusations and counter accusations between the two sisters (2nd Appellant and 1st Respondent) on how the suit land which had initially belonged to their father ought to have been dealt with. The first salvo was thrown in the litigation arena by the 1st respondent who filed a case **Meru ELC NO. 119 OF 2013** on **13.5.2013** claiming the following;

(a) **“A declaration that the plaintiff is entitled to one and half (1 ½) acres of what was land parcel no. Abothuguchi/Kariene/1651.**

(b) **An order that the defendant do excise and transfer to the plaintiff one (1) acre to be excised from land parcel No. Abothuguchi/Kariene/3689 and 3690 and in default this honourable court do empower its executive officer to execute all the necessary documents/instruments to effect the excision and transfer of the same and the production of the title deed be dispensed with.**

(c) **Any further or better relief.**

(d) **Costs of the suit and interest**

(e) Interest on (c) above”.

4. The appellants then filed a case at Nkubu court no **PMCC 92 OF 2013** vide a plaint dated 14/11/2013. The same was amended on 4/12/2015 where the appellants sought the following Orders;

(a) “ declaration that L.r. Abothuguchi/Kariene/2910 and the resultant sub-division number 3692 and further subdivision 4411 and 4412 by the 1st Defendant are family land and the same should be re-transferred to the Second Plaintiff to hold the same in trust for herself and other family members.

(b) An order that the 1st Defendant’s dealing with the suit land was in breach of trust and fraudulent and the title deed therefore for L.r Abothuguchi/Kariene/4411 and 4412 which have been issued to the 2nd, 3rd , 4th Defendants should be canceled and the land to revert to the names of the 2nd Plaintiff.

(c) General damages for trespass to land and fraud.

(d) Costs and interests at court’s rates”.

5. The suit before Meru ELC Court was transferred to Nkubu Court where it was consolidated with the Nkubu matter.

6. In the case before the Magistrate’s Court, the appellants were contending that **M’Kirinya M’ Mworira** was the registered owner of **L.r. Abothuguchi/ Kariene/1651**, which was family trust land. That before his death he called elders and transferred the land to the 2nd Appellant and directed her to hold the same as a trustee for herself and other family members. That the deceased instructed the 2nd Appellant to subdivide **L.r. Abothuguchi/Kariene/1651** and grant 1 acre to the 1st Respondent and hold the balance in trust for the family members. That the 2nd Appellant indeed did the same and granted the 1st Respondent 1 acre. That the 1st Respondent sold ½ an acre to Japheth Kimathi and remained with 1/2 an acre.

7. Further, in their pleadings, the appellants had stated that during the months of July to August 2013, the 1st Respondent secretly dealt with **L.r. No. 2910** and the resultant subdivision in **No. 3692** altering the subdivision and the mutation forms and the sketch resulting to subdivision of the same into **Parcels No,s 4411 & 4412** and subsequently transferring Parcel No. 4411 to the 2nd Respondent, while during the pendency of this suit she also transferred parcel No. 4412 to the 3rd and 4th Respondents.

8. The 1st Respondent filed her statement of Defence on 4th June 2014 denying the particulars of the Appellants claim. She averred that the deceased directed that **Abothuguchi/Kariene/1651** be shared equally between the two sisters where each one was to get 1 ½ acres out of **parcel no. 1651** , while their niece, one Mary Mukami was to get the land parcel in Nanyuki which is ½ an acre . However, the 2nd Appellant without notice caused **Parcel No. 1651** to be subdivided into **Parcel Nos. 2909 (0.20 ha.) & Parcel No. 2910 (1.00 ha)**. That the 2nd Appellant later sold Parcel No. 2909 to Paul Kinoti and retained Parcel No. 2910.

9. The 1st respondent further pleaded that the 2nd Appellant had gone ahead to subdivide **Parcel No. 2910** into Parcels **3689,3690,3691 & 3692** and transferred **Parcel No. 3691 (1/2 an acre) to Japheth Kimathi**. The 2nd appellant had then reluctantly transferred **Parcel No. 3692 (½ an acre)** to the 1st Respondent. That the 2nd Appellants reluctance to transfer 1 acre is what prompted her (1st respondent) to file **Elc case No. 119 of 2013** seeking an order for the transfer of 1 acre. The Meru ELC Case No. 119/13 was transferred to Nkubu court where it was consolidated with Nkubu PMCC 92/13.

10. The 2nd 3rd and 4th Respondents also denied the appellants’ claim in toto, averring that they bought the land from the 1st Respondent after conducting due diligence and being satisfied that the land was registered in the name of the 1st Respondent. The 3rd and 4th respondents filed a counterclaim against the appellants seeking an order of their eviction from the suit premises.

11. The trial court at Nkubu in its **Judgment of 13.12.2018** stated as follows;

(i) “The suit by the plaintiffs is dismissed in its entirety.

(ii) The suit by the 1st defendant against the plaintiffs succeeds to the extent that she is entitled to the one acre of land out of her father’s estate but the same is to take consideration of the portion taken up by the access road and the 2nd plaintiff is to transfer the said portion to her forthwith failure to which the executive officer of this court to sign the transfer thereof in favour of the 1st defendant.

(iii) Upon excising the said portion in favour of the 1st defendant, the 1st plaintiff will have a life interest in respect of the remaining portion left to the 2nd plaintiff after which it shall devolve to the 2nd plaintiff absolutely.

(iv) A declaration is hereby made that the title held by the 2nd, 3rd and 4th defendant’s titles are good in law for all purposes free from any fraud.

(v) The 1st and 2nd plaintiffs in the counter claim (3rd and 4th defendants in the main suit at Nkubu Court) succeeds and an order of eviction is hereby issued evicting the 1st and 2nd defendants in the counter claim (1st and 2nd plaintiff in the main suit) their agents, servants or employees and any other person acting at their behest from all that parcel of land known as

Abothuguchi/Kariene/4412 but the same shall only be effected after 60 days from the date of this judgment taking into account any economic activities within that area.

(vi) The OCS Kariene Police Station shall enforce the order of this court upon lapse of the 60 days from the date of this judgment.

(vii) Each party to bear their own costs”.

12. Aggrieved by the decision of the trial court, the appellants filed this appeal raising fifteen grounds of appeal which ostensibly challenged the trial court's decision in failing to find that the land parcel no. **Abothuguchi/ Kariene/1651** was held in trust for herself (2nd appellant), and family members including the 1st Respondent. That the trial Magistrate failed to find that the doctrine of lis-pendes was applicable in this case hence no property could be sold or transferred during the pendency of the proceedings. That the trial Magistrate erred in failing to find that the element of fraud had been proved and the Respondents' counterclaim had not been proved to the required standard.

13. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See the celebrated case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**. I will therefore first endeavour to summarise the evidence as tendered before the trial court.

14. **Pw1 Rael Karoki Kirinya (1st appellant)** testified that she is a wife to **M'Kiirinya M'Mworia** (the deceased herein) and before her husband died he had transferred the land **parcel no.1651** to their daughter, 2nd Appellant and gave clear instructions on how the land was to be subdivided. That the land was to be shared between the 2nd Appellant and the 1st Respondent each getting one acre and the balance was to be left for her. The 1st appellant had further stated that the 2nd Appellant gave out 1 acre to the 1st Respondent, who then sold part of her share to one Kimathi. That it is not the 2nd Appellant but the deceased who sold the land to Paul Kinoti and that she did not give any consent and/or authority to the 1st Respondent to sell ¼ an acre to the 2nd Respondent.

15. **Pw2 Veronica Ngugi Kiriinya (2nd appellant)** testified that the parcels of land in question were sold at different times and that her mother, (PW1) cultivates in one of them. Just like PW1, PW2 stated that it was her father, the deceased, who sold a part of the suit land to Paul Kinoti. She denied selling the land to Japheth Kimathi averring that it was the 1st respondent who sold the same. PW2 desired that the titles numbers **4411 and 4412** be cancelled to revert back to parcels number **3692** and to be registered in her name.

16. **Pw3 Joel Murithi Ngora** is a cousin of the two sisters. Though he adopted his witness statement as his evidence, I did not see the same in the Record of Appeal. He testified that he was present at the meeting held on **6/3/2002** where the deceased gave instructions on how his land was to be shared. The same was to be shared equally, where one portion was to go to **Grace Gapunge** and the other to **Veronica Ngugi**. Veronica was to take care of their mother as she was the one nearby. There was no surveyor on the land to show each person their respective parcels of land and the deceased never indicated the respective part of each person. He only said that the land should be subdivided. Pw3 further testified that Veronica Ngugi transferred a parcel to Grace Gapunge who in turn sold her share to Japheth Kimathi.

17. **Pw4 Gerevasio Kabii Mugambi**, a surveyor stated that acting on instructions given by the 2nd appellant, he surveyed the suit land parcel no. **2910** on **23.12. 2009**. He then subdivided the said land into four portions. i.e. **Parcel No. 3689 measuring 0.38ha, 3690 measuring 0.12 ha, 3691 measuring 0.20 ha and 3692 measuring 0.20 ha**. He further stated that he was only invited to survey **parcel no. 2910** and he is therefore not familiar with any other parcel of land. He affirmed that the information in the mutation form is what was entered in the land register and Veronica is the one who signed all the relevant documents and she also availed the consent for the aforementioned subdivisions.

18. **Dw1 Grace Gapunge** stated that her father gave the land in Kariene to her and her sister, where each was to get 1 ½ acres of the suit premises. She claims that she never got her rightful share of 1 ½ acres out of the suit land. She averred that she was not aware when her sister subdivided the original **parcel 1651** into **2909 and 2910**, and she was also not aware when **parcel no 2909** was sold to **Paul Kinoti**.

19. Further, DW1 was not told as to why parcel **no.2910** was subdivided into 4 parcels. She claims that parcel no **3691** was to be transferred to her, but on 20.9.2012, it was transferred to Veronica (2nd appellant) and on the following day of 21.9.2012, this parcel was transferred to Japheth Kimathi. DW1 was not given her share, so she persisted in her claim, prompting her to file the case **Meru ELC No. 119 of 2013**. That is when Veronica agreed to transfer to her parcel no **3692** on **18.4.2013** which was half an acre. DW1 then subdivided this parcel into two portions which are nos. **4411 and 4412** of which she sold the former to 2nd respondent herein while the latter, she sold to the 3rd and 4th respondents herein. She therefore wants her full bequest out of the original parcel.

20. **Dw2 Irene Ntui Kithinji** stated that when she visited land **Parcel 4411**, subdivision was already done. That she found Grace Gapunge's mother occupying **parcel No. 4412**. That she conducted a search on the title in Parcel No. 3692 and she found that it had no encumbrances at the time and that's why she agreed to buy the land. After buying the land parcel no 4411, the 2nd Respondent embarked on the process of fencing and cultivating the same. It was only later that Veronica armed with pangas told her that she was on their land. She reported the matter at Kariene Police station.

21. **Dw3 Johnson Oginga Ojwang** stated that he conducted a search before he purchased **Parcel No. 4412**. That at the time, he found Grace Gapunge's mother on the land. There were temporary structures and bananas on the land. That he however bought the land since he was satisfied from the search records that the land belonged to Grace Gapunge. That the plaintiff's came to the parcel of land after realizing he had bought the same.

DETERMINATION

22. I have considered the evidence on record and the submissions of the parties. It is not in dispute that the deceased, (M'Kirinya, husband

of 1st appellant and father of 2nd appellant and 1st respondent) was the original owner of **parcel no. Abothuguchi/Kariene/1651 measuring 3 acres (1.23 ha.)**, having been so registered on **13.8.1973** (as per the green card). It is also not disputed that the entire suit land **NO 1651** was transferred to 2nd appellant during the lifetime of M’Kirinya. The main warring parties (1st appellant and her daughters) also agree that 2nd appellant was holding the land in trust for the family members. The point of departure in the appellants’ and 1st respondent’s arguments touches on how the suit land was to be alienated.

Ground 1, 2: Trust

23. The law never implies, the Court never presumes a trust but in a case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied - *See Mbothu & Others vs Waitimu & Others 1986 K.L.R 171, Solomon Amian v. Salome Mutenyo Otunga (2016) eKLR*. The appellants contend that the suit **parcel no. 1651** is ancestral land and was therefore subject to Trust. The appellants and the 1st respondent agree that M’Kirinya had called for a meeting and expressed his desire on how the land was to be shared.

24. According to 1st appellant, the **parcel no. 1651** was to be shared by Veronica and Grace, where each was to get one acre and the balance of the land was to go to her. 1st appellant had no problem if the 1st respondent sold her own share of the land. However, she contended that what 1st respondent sold was the portion of the land which belonged to 1st appellant. For 2nd appellant, she contended that her father’s directions in the meeting was that she was to transfer one acre to 1st respondent (Grace) while the balance was for herself and other family members. During cross examination before the trial court, she stated that **“Our father gave me the land and asked me to subdivide and give a share to my sister.....”**. As for Joel a cousin of the two sisters and who testified on behalf of the appellants, he averred that M’Kirinya’s instructions in the meeting were that the land was to be shared equally between Veronica and Grace, and Veronica was to take care of their mother. The 1st respondent on the other hand contended that the land was to be shared equally between herself and Veronica, each getting 1 ½ acres as the land was 3 acres.

25. What emerges from the evidence of these family members is that the land **no. 1651** was to be shared. There is no consensus on how the sharing was to be done such that there is a dispute on the actual acreage due to each family member. Further, the designations of the portions due to each party were not mentioned in the meeting. However, all those who were present in the meeting agree on one point, that 2nd Appellant was to give her sister at least 1 acre out of the suit land **no. 1651**.

26. In light of the foregoing, the logical conclusion to make is as follows; Firstly, I find that indeed the land **parcel no. 1651** was to be held by 2nd appellant in trust for the family and such family members are the two appellants and the 1st respondent. Secondly, there is no evidence to indicate that after the land was shared, the beneficiaries were to continue holding the same in trust for family members. Thus the contention by the appellants that 1st respondent was to hold her share of the suit land in trust for family members is unfounded. Indeed 1st respondent’s mother (1st appellant) had no problem if 1st respondent sold her specific share of the land.

27. At this juncture, I find it necessary to determine the question as to whether the 2nd appellant breached the trust bestowed upon her in respect of the **parcel no. 1651**. It has emerged that the suit land **no. 1651** was transferred to Veronica on **14.6.1999** (see green cards) and has since been subdivided into several parcels at different times. There are tell tale signs which indicate that the alienation of the original suit land no. 1651 was not in tandem with the concept of trust

28. The alienation of the suit land to Paul Kinoti (Parcel 2909)

The **suit land no 1651** was first subdivided on **25.9.2002** into two parcels **no. 2909 and 2910** both in the name of the 2nd Appellant. Before the lapse of a month on **18.10.2002**, the **parcel no 2909** was transferred to **Paul Kinoti**. The 2nd appellant retained **parcel 2910**. Both appellants contend that it is deceased who sold the **parcel 2909** to **Paul Kinoti**. However, the records (green card) show that the transfer was effected by Veronica as she was the registered owner of the land by then. The alleged family meeting occurred on 6.3.2002. Since the suit land 1651 was held in trust going by the deliberations in the family meeting, then it was not enough for the appellants to say that M’Kirinya is the one who sold the land to Paul Kinoti. The fact is that the alienation of the suit land by the 2nd appellant to Paul Kinoti seven months after the family meeting is not in tandem with the principle of trust which had been bestowed upon the 2nd appellant by her father.

29. The subdivision of parcel no 2910

The subdivision of the parcel 2910 is another telltale sign that 2nd appellant was breaching the trust. The year 2009 is when the 2nd appellant embarked on the process of subdividing the remaining land **parcel no 2910** into 4 portions. The 2nd appellant has not given any plausible reasons as to why this land was to be divided into 4 portions. After all, the appellants have claimed that the other family member is one Mary Mukami, a grand child of 1st appellant who was to get the land at Nanyuki and not **parcel 1651**. The subdivision itself was rather odd; For **parcel no 3689**, it is **0.38 ha**, **parcel 3690** is **0.12 ha**, **parcel 3691** is **0.2 ha**, while **parcel 3692** is another **0.2 ha**. How the 2nd appellant came up with this idea of 4 parcels with unequal measurements, only herself and perhaps her mother know.

30. The alienation of land to one Japhet Kimathi (parcel 3691)

The 2nd appellant went ahead and transferred one of the resultant parcels out of **2910**, the same being **parcel no. 3691 (1/2 an acre)** to Japhet Kimathi. The circumstances surrounding this transfer reek of hypocrisy on the part of 2nd appellant. The 2nd appellant has stated that she had transferred the parcel no **3691 measuring 1/2 an acre** to her sister Grace only for the later to sell this land to Japhet Kimathi. However, the green card of **parcel 3691** shows that this parcel was registered in the name of 2nd appellant on **20.9.2012**. The following day on **21.9.2012**, 2nd appellant transferred the land to Japhet Kimathi. Why this speed if indeed there was some kind of arrangement that 1st respondent was to sell her share of the land to Kimathi? The logical conclusion to make is that 2nd appellant was unilaterally alienating the suit land contrary to

the trust.

31. *Alienation of parcel 3692 to 1st respondent.*

It was not until **24.7.2013** that the **parcel no 3692**, was transferred to 1st respondent, 11 or so years from the year of the family meeting in 2002. It is crystal clear that this transfer was triggered by the filing of the suit **Meru ELC NO 119 OF 2013 on 15.5.2013** where the 1st respondent was demanding from her sister, her rightful share of the suit land. And now 2nd appellant wants this parcel to revert back to her on the basis of trust!

32. My conclusion is that the 2nd appellant has failed miserably to uphold this trust. I therefore find that the trial magistrate did not error in finding that 2nd appellant was the one in breach of such trust.

Ground 3, 4, 5 and 9: Fraud

33. In the case of **Denis Noel Mukhula Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR**, the court quoted the case of **R.G Patel vs Lalji Makanji** as follows:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

34. In paragraph 10 of the amended plaint of the appellants, it is pleaded as follows:

“In breach of the trust, the first defendant secretly and without the knowledge of the plaintiffs on or about the months of July and August, 2013 dealt with land L.R No. Abothuguchi/Kariene/2910 and the resultant sub division no. 3692, altered the mutation forms and the sketch and dealt with L.R. NO Abothuguchi/Kariene/3692 belonging to the 2nd plaintiff and she subdivided the same into new numbers Abothuguchi/Kariene/4411 and 4412 and further transferred parcel number Abothuguchi/Kariene/4411 to the second defendant and she remained with parcel number Abothuguchi/Kariene/4412 in breach of the trust”.

35. The surveyor who testified as **PW4** before the trial court clearly stated that he is the one who surveyed and subdivided the **parcel no. 2910** on instructions given by Veronica. He also added that the mutation forms were signed by Veronica who availed the consent for subdivision. The mutations data was then entered in the land register. From the foregoing, it is apparent that the 2nd appellant's claim that her sister Grace fraudulently interfered with the mutation forms and survey documents at lands office and managed to transfer parcel 3692 to herself is hollow. On this point, I am astounded by the submissions of the appellants where they aver that **“ the 1st respondent in blatant breach of a court order of 15.8.2013 transferred and issued a title deed for Lr. No Abothuguchi/Kariene/3692”**. The appellants have submitted that this was un-procedural and fraudulent. In the first place the orders of **15.8.2013** had been sought by the current 1st respondent in the case **Meru ELC NO. 119 Of 2013** for the inhibition in respect of **parcels no. 3689 and 3690** and the orders were issued as against the 2nd appellant. Secondly, those orders of 15.8.2013 had nothing to do with **parcel no 3692!**

36. He who alleges must prove and in this case the appellants failed to demonstrate any fraud on the part of 1st respondent.

Ground 6, 7, 8: *Whether 1st respondent's actions of selling parcel no's 4411 and 4412 when the suit was pending was illegal.*

37. The records indicate that when 1st respondent filed suit **Meru ELC 119 of 2013** against 2nd appellant on 13.5.2013, an order was thereafter issued on 15.8.2013 inhibiting alienation of land parcel no. 3689 and 3690. The suit parcels which 1st respondent dealt with were in respect of parcel 3692.

38. As regards the matter at Nkubu court **Pmcc no. 92 of 2013**, the advocates for the parties did agree to maintenance of the status quo on **16.4.2014**. However, it appears that the 1st respondent had already embarked on the process of selling her land. The appellants herein filed the suit at Nkubu against 1st respondent on **21.11.2013**. A green card availed by the appellants indicate that the parcel **no. 3692** had been subdivided as at 24.7.2013 as this is when parcels 4411 and 4412 came to be. The 2nd respondent herein (Irene) was issued with a title on 29.8.2013. It was therefore incumbent upon the counsels representing the parties to clarify the extent of the status quo which they were agreeing upon. I find no basis to fault 1st respondent in the manner in which she dealt with her land parcel 3692.

Ground 10, 15: *Whether the trial magistrate erred in ordering 2nd appellant to transfer 1 acre of land to 1st respondent.*

39. The 1st respondent in her submissions has captured some content in the trial magistrate's decision as follows:

*“Indeed the trial court keenly noted at page 15 of the judgment delivered on 13.12.2018 thus; **I have analyzed the evidence as presented by the plaintiffs and clearly there was nothing tangible left by their deceased father on how division was to be made. This being a court of equity, presumption devoid of anything left behind by their father leads to half-half division. Yes, the plaintiffs have referred to some minutes allegedly left behind by the deceased but clearly the same was never tendered before this court. We cannot assume that the contents were true since the same was never presented as exhibit and its authenticity to be tested**”.*

40. The trial magistrate had made a finding that 1st respondent was entitled to 1.5 acres, and that 2nd appellant was also entitled to an equal share. And since the 1st respondent had already been given parcel 3692, the trial court ordered the 2nd appellant to transfer another one acre to 1st respondent. The 1st appellant was then to have a life interest in the remaining portion after which such balance was to devolve to 2nd appellant absolutely. The trial Magistrate arrived at this conclusion, after invoking the equity principle, that the two sisters were to share the suit land no. 1651 equally. This is my point of departure with the trial court. I am not in agreement with the half to half sharing of the suit land 1651 as between the two sisters. I have come to this conclusion despite the fact that no survey was carried out when M'Kirinya called the meeting to state how the suit land was to be shared. And equally no specific portion was pointed out to any of the parties as being their designated share. The reasons for this departure are explained in the subsequent points.

41. The first point to consider touches on the calculation of the acreage available. A court must take into account that once land is subdivided, the cumulative acreage is lost through such factors like access roads. It is therefore important to grasp how the suit land has been alienated over the years. Going back in time, the original parcel **1651** was **3 acres**. The parcel transferred to Paul Kinoti, **no. 2909** was **½ an acre (0.2 ha)**. The remaining parcel **2910** was divided into four parcels **3689 (0.38 ha- almost an acre), 3690 (0.12 ha- just slightly more than a quarter acre), and 3691 and 3692** which are a half acre each (**0,2 ha**). The parcel no 3691 was transferred to Japheth Kimathi in year 2012, while 1st respondent took up **parcel 3692**, subdivided it and sold to the other respondents. The remaining parcels are therefore **no. 3689** and **parcel 3690** all in name of the 2nd appellant a conclusion rightly arrived at by the trial court despite some minor conflicting analysis like the statement that the share sold to Japheth Kimathi was parcel 3691 measuring 0.12 ha (it was 0.20 ha).

42. It is therefore apparent that the original 3 acres of parcel 1651 have been affected by the various subdivisions. That is why the total acreage of the 4 resultant parcels of 2010, give rise to about 2.3 acres and not 2 ½ acres. If 1st respondent was to get an acre from the remaining land which is parcel **3689 (about one acre)** and 3690 (slightly more than a **quarter acre**), it would mean that the remainder of the land will be about a quarter acre. The question is, is this an equal and proportionate entitlement for the appellants?. I will determine this answer in my next point.

43. The second point to consider is that 1st respondent's entitlement to the suit land is not anchored on the property of her father's estate contrary to what the trial magistrate has stated in point (b) in the final orders of the Judgment. The property in question **1651** ceased to belong to M'Kirinya in 1999 when he transferred the same to 2nd appellant. The claim of the 1st respondent must therefore be founded on the concept of trust and not anything akin to an inheritance.

44. I therefore have to determine whether 1st respondent was entitled to one acre as alleged by both appellants or whether the land **parcel 1651** was meant to be shared equally between the two sisters as alleged by the 1st respondent. In order to determine this issue, I have keenly considered the circumstances appertaining to the proprietorship of the suit land. M'Kirinya was registered as the original owner of **parcel no. 1651** way back in **1973**. However, in 1999, he transferred this land to his daughter, the 2nd appellant. He passed on in year 2004. There is no evidence to show that M'Kirinya made efforts to ensure that the 2nd appellant gave 1st respondent a share of this land to the tune of one and 1/2 acres during his lifetime. Like wise, the 1st respondent never attempted to get this 1 1/2 acre share of the suit land when her father was alive despite the fact that the family meeting where she was given the land occurred 2 years before the death of her father.

45. What I have found rather astounding is that the two sisters don't seem to factor in their mother in all this mathematical scuffle for a piece of the precious commodity. I am of the view that the 1st appellant would not be adequately catered for if 1st respondent was to get another acre out of the remaining parcels of land as directed by the trial magistrate?. Certainly, this is not what M'Kirinya could have envisaged, that his wife would be rendered destitute through the insatiable greed and machinations of his own daughters. I am inclined to find that 1st respondent is entitled to one acre of land not from the remaining parcels but from what was the original **parcel 1651**. Since 1st respondent has already gotten 1/2 an acre, the same being **parcel 3692**, then she is entitled to another 1/2 acre from the remaining parcels. On this point, I will vary the directions given by the magistrate in point (b) of the Judgment in the following terms:

“The 1st respondent is entitled to 1/2 an acre out of land parcel no. 3689 measuring 0.38 ha. The 2nd appellant is to transfer the said 1/2 acre out of parcel no 3689 forthwith to the 1st respondent failure to which, the Deputy Registrar of the court is hereby authorized to sign all requisite documents to give effect to the aforementioned transfer. The remainder of the land is to be held in terms directed by the trial magistrate”.

Ground 11, 12, 13, 14: *Whether the 2nd – 4th respondents have a good title.*

46. The 2nd respondent owns a parcel no. 4411 while 3rd and 4th respondents own parcels 4412 which they bought from 1st respondent. The two parcels emanate from parcel **3692** which was the only ½ acre that 1st respondent obtained after being taken round and round by her sister for years. As earlier noted, no evidence was adduced to indicate that 1st respondent obtained title to parcel 3692 fraudulently. If anything, I have already established and so did the trial magistrate, that 1st respondent was entitled to more than ½ an acre out of the original suit land. I find no basis to interfere with the trial magistrate's findings in so far as the alienation of parcel no. 3692 by the 1st respondent is concerned. In the circumstances I find that the 2nd – 4th respondents hold good titles.

Conclusion

47. I am in agreement with the trial magistrate's finding in so far as this dispute is concerned that the confusion was created by 2nd appellant. Had the 2nd appellant been a worthy trustee in her fiduciary relationship, this kind of litigation would not have thrived. She should not be allowed to get away with it. I will therefore condemn her to pay some costs.

48. In the final analysis, this appeal is hereby dismissed and the decision of the trial court is upheld with the following variation;

1) The decision of the trial magistrate as captured in point (b) of the judgment's final orders is hereby set aside and substituted with an order that the 1st respondent is entitled to 1/2 an acre out of land parcel no. 3689 measuring 0.38 ha and the 2nd appellant is hereby directed to transfer the said 1/2 acre out of parcel no 3689 forthwith to the 1st respondent failure to which, the Deputy Registrar of the court is hereby authorized to sign all requisite documents to give effect to the aforementioned transfer. The remainder of the land is to be held in terms directed by the trial magistrate".

2. The 2nd appellant is condemned to pay half costs of this appeal, and half costs in the lower court to the respondents.

3. Any orders of injunction or inhibition as well as orders of stay of execution in respect of the suit parcels are hereby discharged, but I proceed to grant a stay of this judgment for a period of 60 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. L. MBUGUA

ELC JUDGE