



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**HIGH COURT CIVIL APPEAL NUMBER 49 OF 2010**  
**(SUCCESSION CAUSE 540 OF 2006 THIKA SPM COURT)**

**IN THE MATTER OF THE ESTATE OF NJUGIA GIKERI (DECEASED)**

**RACHEL WAIRIMU NJUGIA.....APPELLANT/APPLICANT**

***VERSUS***

**REUBEN NJUGIA WAINAINA.....RESPONDENT**

**JUDGMENT**

By notice of motion filed by the Appellant on 13<sup>th</sup> April 2012 brought under **order 42 rule 6 (1) & 51 CPR 2010** the Applicant sought orders of stay of execution of the judgment and decree of the Trial Court delivered on 1<sup>st</sup> September 2010 at Thika Law Courts on the following grounds;

- a. The Applicant has been in possession of the land and built on it permanent structures and execution of the Court orders would prejudice the Appellant.
- b. The Respondent filed an application in the Trial Court that the Executive Officer should sign the documents for subdivision and transfer of the land.

The parties through learned Counsel agreed to dispose of the appeal through written submissions. The Respondent filed submissions on 28<sup>th</sup> August 2015 and the Appellant filed submissions on 1<sup>st</sup> September 2015.

The appellant has raised several issues;

- a. That the Trial Court lacked jurisdiction over the deceased's estate as it exceeded Ksh 100,000/- as provided by **Section 48 of the Law of Succession Act**
- b. The Appellant claimed that the Trial Court lacks jurisdiction to construe a trust.
- c. With regard to the evidence on record, the alleged fact that the deceased held the suit properties in trust for his other siblings was not proved by direct evidence.
- d. The Appellant did not know of the protestor at all before he claimed the land as being from his grandfather.

e. The deceased died in 2006, the protestor did not know him, had never seen him and did not know of the properties until he was shown the same by land brokers as testified by DW2.

f. If there was a trust over the suit properties; the other siblings and or their children would have laid claim on the suit properties

g. The appellant could not have agreed to any division of the property as per the agreement shown that she accepted the Protestor's claim at the meeting held at the Chief's office. She is advanced in age and is illiterate.

The Respondent raised the following issues;

a. The suit properties did not belong to the deceased but to his great grandfather NJUGIA GIKERI and therefore was ancestral land. The deceased's grandfather had 2 wives, Njeri and Wanja. Njeri had 3 sons amongst them the deceased who was the 1<sup>st</sup> born called NJUGIA GIKERI like his grandfather. He was registered as owner of the 2 parcels namely; LOC 16/KIARUTARA/T.20 & LOC16/KIARUTARA/167 but in trust for the other siblings and families.

b. The 2<sup>nd</sup> house was of Wanja who had 1 son called Wanaina Njugia who is father to the Respondent Objector Reuben Njugia Wainaina.

c. The 2<sup>nd</sup> house is entitled to ½ its share of the suit properties.

d. The Appellant during trial admitted that the 2 parcels did not belong to her husband Njugia Gakeri but was ancestral land belonging to their great grandfather also known as Njugia Gakeri.

This Court has perused the proceedings before the Trial Court and the Judgment of the Court and observed as follows;

1. The Trial Court that determined the matter did not hear the testimony of the Protestor to evaluate it and arrive at a proper finding. At the instance of Counsel, The Trial Court proceeded with the hearing from where it stopped. With respect, this testimony was crucial to the determination of the case; this is a prime and key witness and not a formal witness.

2. The Protestor contested the death certificate of the deceased. He claimed it belonged to his great grandfather and not the deceased as they had similar names.

3. The Protestor stated that the deceased is grandson to Njeri 1<sup>st</sup> wife to his grandfather. He learnt of this fact in 2007 after the deceased's death. He approached the Appellant and demanded his share of the suit properties as the deceased held the land for children of both wives of his great grandfather in trust. They went to the Chief and with elders it was agreed the 2 parcels shall be divided into 2 parts.

4. The Protestor did not know his grandfather or great grandfather, his grandmothers Wanja and Njeri and his father Wanaina died in 1960. He was born in 1944. They lived in Kinangop and then later he moved to Kisumu.

5. The Protestor who did not know all these people he claims owned the ancestral land so as to stake his claim. He did not meet or talk with them. He did not live on the land at any one time. How did he know that these parcels were held in trust and the land is ancestral land? What is the source of this information? Where is the proof of registration of these parcels as trust for the rest of the family? Why was this claim made several years later and not when the deceased was alive and other siblings also laying claim?

6. The evidence of PW2 John Mwangi Muthunga is crucial as one who is conversant with the

lineage of the deceased's family. He knew NJUGIA GIKERI SENIOR who died about 30 years ago. He had 2 wives Njeri and Wambui (Protestor said Wanja). The deceased was his grandson and had the same name Njugia Gikeri. He inherited the suit properties from the grandfather. Did the deceased inherit the suit properties from his father Gikeri wa Njugia or from his grandfather Njugia Gikeri ? He did not mention any trust in his testimony. If there was a trust was it from the deceased's father or grand father? He stated the events of the meeting at the Chief's office.

7. The proceedings at the Chief's office were not documented. The Chief did not testify on who said what and how they arrived at the conclusion. What is attached is an agreement of the House of Wanja and Njeri and the beneficiaries and division of the suit properties as follows; KIARUTARA 167 DIVIDED IN HALF and KIARUTARA 20 DIVIDED IN 3 PARTS. The Agreement is written in Kikuyu and translated into English. There is no signature or thumbprint of the Appellant. She is right in asserting that she was coerced; the meeting was held in the presence of all men except her as evidenced by the names in the Agreement. There is no record of the deliberations and no signature or thumbprint to confirm she agreed to the decision of the meeting.

8. If the land was held in trust as claimed, the division of properties would not be in half to each house according to Kikuyu customary law. The deceased died in 2006 and therefore the Law of Succession Act is operational in this case. **Section 40 of the Law of Succession Act** outlines the mode of distribution in a polygamous home. It is by units representing each of the widows and children. The mode of distribution was not proper under the law.

9. The evidence of PW2 John Mwangi Muthunga & PW3 Daniel Mwangi who claim that they know and agree from the family lineage the Protestor is entitled to ½ share of the suit properties held by the deceased as he held the same in trust for the family is controverted by the evidence of DW2 Kenneth Kahora who stated;

***“It is not true that Reuben is entitled to a share in the descendant's estate. Reuben did not even know where the property in question was, He was shown the same by a land broker known to me.”***

This may explain the source of the Protestor's information and why it took so long to pursue the matter. The Appellant DW3 is Rachel Wairimu Njugia. She said her late husband, the deceased was Njugia Gikeri. His Grandfather was Njugia wa Gikeri and his father was Gikeri Njugia. The deceased died in 2006. His grandfather died before she was married before emergency in 1952 and found her father-in-law deceased. She has been on the said land since marriage and has raised 6 children. She did not know the Protestor.

## **FINAL ORDERS**

**1. From these observations, this Court finds that under the rule of evidence in civil matters he who alleges must prove as prescribed by sections 106, 107 & 108 of the Evidence Act.**

**2. The Protestor was not heard by the Trial Court; he did not prove registration of the suit properties or offer direct oral evidence of the said trust over the land; he did not prove whether the trust was from the grandfather and then to the deceased or from the grandfather to his father to the deceased. All these questions cast doubt on the Protestor's claim. It is not quit clear why the matter took so long and he did not approach the deceased during his lifetime.**

**3. The Meeting at The Chief's office is not conclusive evidence that the matter was heard and determined or negotiations resulted in amicable settlement. There is no record of proceedings and resolution and no signatures or thumbprints to signify acceptance. The agreement is not sufficient evidence.**

**4. There is not sufficient evidence on record to confirm the suit properties are trust lands.**

5. There is no evidence that either at the time which is not known, there was a formal land registration system or later if there was registration of the suit lands as trust land or that anyone witnessed an oral agreement that the deceased held the suit lands in trust for the rest of the families.
6. In the absence of cogent evidence that the suit properties were ancestral land, this Court cannot uphold the judgment of the Trial Court.
7. The Appeal is allowed and the orders of the Trial Court vacated.
8. The Appellant shall have possessory and proprietary rights over the suit properties.
9. Although he may be from the Njugia wa Gakeri family, the Protestor's claim that the suit properties were handed over to the deceased in trust for children of both houses of Wanja and Njeri is not proved on a balance of probabilities.

Saying so cannot make it so, there must be some proof.

The appeal is allowed.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 8<sup>TH</sup> FEBRUARY 2016

M.W.MUIGAI

JUDGE

*In the presence of;*

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