



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**E.L.C CASE NO. 620 OF 2013**

**ELIJAH NJERU MUGO ..... 1<sup>ST</sup> PLAINTIFF**

**PATRICK KINYUA SAMUEL .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NJIRU SAMWEL M'RWINGO .....DEFENDANT**

**JUDGMENT**

By their plaint filed herein on 27<sup>th</sup> June 2013, the plaintiffs sought the following remedies against the defendant:-

- a. *A declaration that the defendant holds two-thirds (2/3) equivalent to four (4) acres of land parcel No. KAGAARI/KANJA/1011 in trust for the plaintiffs and that each of the plaintiffs is entitled to a share of two acres to be excised therefrom*
- b. *An order that the defendant do transfer two (2) acres to each plaintiff to be excised from land parcel No. KAGAARI/KANJA/1011*
- c. *An order that the defendant do execute all requisite and necessary instruments to excise and transfer two (2) acres to each of the plaintiffs and in default this Honourable Court do empower its Deputy Registrar/Executive officer to execute such necessary instruments to effect the excision and transfer of two (2) acres to each of the plaintiffs*
- d. *An order that the defendant do produce the original title deed to facilitate the excision and transfer of two (2) acres to each of the plaintiffs and in default, this Honourable Court do dispense with the production of the original title deed to land parcel No. KAGAARI/KANJA/1011*
- e. *Any further or better order as this Honourable Court might deem necessary and appropriate*
- f. *Costs of the suit and interest thereon*

According to the pleadings, both the plaintiffs and defendant are children of the late SAMUEL IBRAHIM who owned the ancestral land KAGAARI/KANJA/1011 (hereinafter referred to as the suit land) measuring 6.25 acres and which he had wanted sub-divided equally amongst the parties herein. However, following his death, the defendant fraudulently filed a succession cause at Runyenjes Court and had the entire suit land transferred to him. The particulars of fraud are pleaded. It is the plaintiff's case that this was in breach of trust hence this suit.

Though served, the defendant only entered appearance but filed no defence and on 16<sup>th</sup> August 2013, interlocutory judgment was entered against him and on 29<sup>th</sup> October 2013, the matter was listed before me for formal proof.

The 1<sup>st</sup> plaintiff gave evidence which was supported by the 2<sup>nd</sup> plaintiff (his brother). That evidence was that the defendant is their step brother and prior to their father's death in 1963 he was the registered owner of the suit land and they produced a copy of the register (Exhibit 1). When the plaintiffs started asking the defendant for their share of the land, he only allowed 1<sup>st</sup> plaintiff to plant tea bushes on ½ acre but refused to have the land sub-divided even after the plaintiffs approached an elder NJAGI NJANJA (PW2) to intervene and when plaintiffs conducted a search at the Lands office, they found that defendant had in fact transferred the land into his names in 1977 having done succession without involving them at Runyenjes Court (Exhibit 2). The plaintiffs continued approaching the defendant to give them their share and proceedings were conducted before the Chief (Exhibit 3) and even though the elders directed the defendant to share the land equally with them, the defendant would not budge. The plaintiffs then moved to the Embu District Land Tribunal and filed Case No. 22 of 2011 but before it could make its decision, the Tribunal was dissolved. It is the plaintiffs' case that defendant holds the suit land in trust for all of them hence this suit.

NJAGI NJANJA (PW2) said he knew the parties late father had expressed a wish that his three sons should equally share the suit land but the defendant has refused to do so even after he and the area Chief tried to intercede. He added that he was also a witness in the Tribunal Case.

Similar evidence was given by RAHAB RWAMBA GEOFFREY (PW3) who is a brother to the late SAMUEL IBRAHIM and therefore an aunt to the parties. She too said it was the wish of her late brother that the suit land be shared among the parties herein with each getting two (2) acres. She too also added that she was a witness in the proceedings before the elders and the Tribunal.

Mr. Arithi for the plaintiffs made oral submissions in which he urged me to find that the plaintiffs' claim under customary trust had been established.

I have considered the plaintiff's evidence, un-rebutted as it is as the defendant did not file any defence nor attend trial though served. It is not in doubt that the plaintiffs and the defendant are sons of the late SAMUEL IBRAHIM who was the registered owner of the suit land. There is also un-controverted evidence that during his life time, the late SAMUEL IBRAHIM had expressed a wish that the suit land be shared equally among the parties herein. It has also been established by evidence that following his death, the defendant had the same registered in his names after succession proceedings in which he did not involve his brothers who are the plaintiffs herein. That is prima facie evidence of fraud which is pleaded in the plaint. As children of the late SAMUEL IBRAHIM, the plaintiffs were his heirs and were entitled to a share in the suit land. Trust is a question of fact to be proved by evidence and there is un-controverted evidence from PW2 and PW3 that the late SAMUEL IBRAHIM had expressed a wish that the suit land be shared among his three sons and in trying to deny the plaintiffs their share, the defendant is acting fraudulently.

The suit land is now registered in the names of the defendant and the title is under the now repealed **Registered Land Act**. However, that registration does not relieve the defendant of any obligation to which he is subject as a trustee – see **MUKANGU VS MBUI K.L.R (E & L) 1 at Page 622. Section 28 of the Registered Land Act** under which the suit land was registered also provides that registration of one as proprietor of land does not

***“ ---- relieve a proprietor from any duty or obligation to which he is subject as a trustee”.***

And **Section 25 of the new Land Registration Act of 2012** has a similar provision.

From the evidence before me, un-rebutted as it is, I find that the plaintiffs have proved their case as required in law and I hereby enter judgment for them as prayed in their plaint save that each party will meet their own costs this being a family dispute.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> FEBRUARY, 2014**

12/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

MS Kainga for Arithi for Plaintiffs present

Defendant absent

COURT: Judgment delivered this 12<sup>th</sup> day of February 2014 in open Court.

MS Kainga for Arithi for Plaintiffs present

Defendant absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**12<sup>TH</sup> FEBRUARY, 2014**