



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO.91 OF 2010**

JOSEPH NGATIA MACHARIA.....PLAINTIFF

**VERSUS**

JAMES GITHAIGA KARANI.....DEFENDANT

**J U D G M E N T**

The plaintiff is the Nephew of the defendant, the latter who is the registered owner of land parcel **No.RUGURU/KIAMARIGA/708**. The plaintiff claims that the defendant holds 2 acres out of parcel No.Ruguru/Kiamariga/708 in trust for him and that the two acres are clearly marked on the ground where he has planted coffee trees on his portion and states that the defendant has not outrightly refused to excise the two acres from the land to him but has been dragging his feet as a result of which the plaintiff has lodged a caution on the suit parcel of land to protect his interest. He prays for a declaration that the defendant holds two acres out of parcel of land RUGURU/KIAMARIGA/708 in trust for the plaintiff and the said trust be terminated by the defendant transferring the two acres to him and prays for the costs of the suit.

The defendant on the hand denies holding 2 acres in the land parcel aforesaid in trust for the plaintiff and puts the plaintiff to strict proof thereof claims that the land is registered in his name and that the beneficiaries are Ngina Mwai, Nyaguthi Mwai, Gathii Mwai, and himself. On the 23/1/2008 the defendant obtained the necessary consent of the land control board with the intention to subdivide the land and give the beneficiaries their title deeds but the process was frustrated by the plaintiff who cautioned the land without any lawful justification. He claims that the beneficiaries of the suit land are already utilizing their portions by themselves or through their families.

The defendant averred that he is ready to subdivide the land and give the respective beneficiaries their shares therein and the plaintiff being a son of Nyaguthii Mwai can then take the share of his mother.

The plaintiff states in his written statement that His grandfather Wamwai and Githaiga's father Karani and Kiongi were brothers. His grandfather sired his mother: Nyaguthii, and Aunties: Ngima, Gathii and Njanja. Karani sired Githaiga, Wangu, Gathii, Njaria, Kahoi and Ngui. The three brothers thus Karani, Wamwai and Kongi had acquired land in kahiga area of Ruguru. During the land consolidation the land of Wamwai was demarcated at kahiga. By this time, Wamai was dead, having died during the state of emergency. Karani and Kiongi were alive hence Karani was responsible for consolidating his land and that of Wamwai. He demarcated the land of Wamwai in this area but he could not fit there and was demarcated at a place called Kianjau measuring 3 acres. His grandfather's land measured 4.9 acres and was registered in the name of Karani. After land consolidation Karani died but he left a word that the land of Wamwai should remain with his wife and nobody should take it away from her.

The land of Wamwai was cultivated by his wife and he was assisting her. Before Wamai died he told his grandmother that his land would go to him because he was assisting them with food etc.

He got married in early sixtieth. He continued living in the village but he would go to cultivate the land with his wife. Before Karani's death he had informally sub-divided that land into two. He occupied one portion and his grandmother the other. That is the land he was cultivating.

After Karani's death, his son Githaiga continued to respect the arrangement. He continued to occupy the part of Karani and he continued to occupy his grandmothers part. After his grandmother died he buried her in that part of the land. Nobody has ever occupied or cultivated that part of the land without his permission. Sometimes he allowed a son of Ngima called Wamwai to cultivate a portion of that land on condition he did not claim any part of the land. He also allowed one Kinyua a son of Gathii to cultivate a portion. He allowed them purely on the basis that they would not claim the land. Wamwai used to say that they could not claim the land because they had their own land. Githaiga has no mandate to give that land to anybody because it is not his and this is not the intention of his grandparents.

In his written statement and in his testimony on oath he stated that his mother was the daughter of Wamwai who had other daughters. The daughters of Wamwai were not given the land by their father because they were married. The plaintiffs father did not have any land and that is why the whole of his grandfather's land was given to him. He has built on the land and planted trees and coffee and that the other daughters of Wamwai have never lived on the land. On cross-examination by Lucy Mwai advocate for the defendant, he admitted that Wamwai had 4 daughters namely Nyaguthi, Ngina, Gathe, Njanja. Njanja was married but did not have children and died before Wamwai. When Wamwai died he had only three living daughters who were given portions of land to cultivate maize and beans but upon their death, their heirs continued cultivating the land but stopped in 1955 when he was given the land by his grandmother known as Wamaitha. He states on cross-examination that he knows the persons who are cultivating the land.

The plaintiff called Mr. Wilson Kahoi who states that his mother and his father are cousins. He know James Githaiga Karani. He is his uncle. Wamwai, Kiongi and Karani are the children of Mureithi. Wamwai gave birth to Nyaguthi, Ngima and Gathii. Kiongi had Waruguru, Margaret Nyakinyua, him and Gacheru. Karani had Githaiga the defendant, Wangui, Njaria, Kahoi, and had his own land. Wamwai also had his own land. During land consolidation Wamwai's land was consolidated with Karani's land. During land consolidation he was not around. When he came back he found Githaiga's land being cultivated on one side by Ngatia and the other by Githaiga. with a boundary between them and there were Mikungugu boundary features that are still existing to date. On Ngatia's side there are coffee trees, blue gum trees mikima, bananas and nappier grass.

He knows that Ngatia had built a house on the land but he later moved to Kieni however his first wife was buried on this land. They have been referring the land as Ngatia's and Infact half of the land is exclusively occupied by Ngatia.

On cross examination he states that he does not know the acreage of the Wamwai's land but at one time they went to put a boundary between Wamwai's land and Githaiga's land. They determined that the land belonged to Ngatia but the heirs of Ngina and Gathe were cultivating the same. He admitted that the heirs of the two are still cultivating the land to date and states that there are three portions of land clearly marked on the ground being cultivated by the descendants of the three daughters of Wamwai however he has not seen the boundaries and maps proposed by James Githaiga Karani. He stated that the land belongs to Ngatia because he was living on the same with his grandmother. He confesses that he does not know how the land was given to Mr. Githaiga Karani because at that time he was in Hola.

The defendant filed a statement whose import was that he is the registered owner of land parcel Ruguru/Kiamariga/708 and the land parcel comprises of 1.272 hectares belonging to him and 0.711 hectares belonging to his uncle who was the plaintiff's grandfather called Wamwai. His uncle had 3 daughters only, namely Nyaguthii, Ngima and Gathii. Wamwai directed the defendant to give his 0.711 hectares to Wamwai's daughters in equal shares.

In the year 2008, the defendant applied for consent to partition land parcel Ruguru/Kiamariga/708 into 4 portions, one for himself and 3 for the daughters of Wamwai.

The defendant stated that he intends to give the portions of land due to Nyaguthii and Gathii to their children. Ngatia is a son of Nyaguthii and is entitled to the portion of land due to Nyaguthii his mother. However, the conduct of Ngatia of cautioning the suit land made it impossible for the defendant to complete the process of partitioning the land and giving Ngatia and other beneficiaries their portions of land. He stated that he does not have 2 acres belonging to Ngatia as his only entitlement is 1/3 of the land due to his grandfather, one Wamwai.

In his testimony, he states that the land in dispute belonged to his uncle but was registered in his name to hold the same in trust for the three daughters of Wamwai. The three descendants of Wamwai's daughter are utilising the land. He claims that every one of Wamwai's daughter descendants are utilizing the land and have their own portions of the said land. According to the defendant, the land does not belong to Ngatia but to the daughter of Mr. Wamwai. He believes that Mr. Ngatia should claim his mother's share which he cultivates and states that Mr. Wamwai told him to share the land to the three daughters hence he has subdivided the land to the three descendants of Mr. Wamwai however, Mr. Ngatia is opposed to sharing the land and wants the whole of it.

On cross-examination by Mr. Wachira he states that Mr. Wamwai told him that the land was to be shared amongst his three daughters who were married.

The *gravamen* of the submission by Mr. Kebuka Wachira is that the issue herein is who is supposed to get Mr. Wamwai's land and concludes that it is clear that the plaintiff is the one in possession of Wamwai's share of the land and that the other children of his aunties do not seem to have permanent use of the land and seem to be utilizing the small portions on temporary basis. Moreover none came to give evidence that they are entitled to the land. The defendant has not adduced evidence of his alleged meeting with his uncle who died before land consolidated where he was directed to share the land amongst his daughters.

According to *Lucy Mwai*, the defendant has not disputed the fact that he is holding the land in trust for the Wamwai's descendants but it is his case that he is holding the land in trust for descendants of the three daughters of Wamwai.

This court has considered the evidence on record and the rival submissions and ascertains that there are two issues for determination in this matter, *firstly* whether the land was registered in the name of the defendant to hold the same in trust for the descendants of Mr. Wamwai or solely for the plaintiff. *Secondly*, whether the plaintiff's grandmother had the power to give the land to the plaintiff and disinherit the other descendants.

On the first issue this court finds that there is no dispute that the defendant held the land in dispute under Kikuyu Customary Law in trust for the descendants of Mr Wamwai and a fact that he has not denied.

On the second issue the court finds that there is no evidence that the plaintiffs grandmother bequeathed him the land. Even if she did so, the same was a nullity as the land was being held by the defendant as trustee and he alone could determine the trust. The fact that the land was registered in the defendant's name is evidence that there must have been an agreement that the defendant be registered as trustee for the descendants of Mr. Wamwai.

Moreover, it is inconceivable that Mr. Wamwai and his wife intended to disinherit some of their descendants and heirs and therefore I agree with the submissions of Lucy Mwai and do find that the suit property be apportioned between the descendants of the three daughters of Wamwai.

Accordingly, the suit is dismissed with no orders as to costs as this is a family dispute.

*Dated, signed and delivered on 14th day of March 2014.*

**A. OMBWAYO**

**JUDGE**