REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Case 127 of 1997

ISAYA THEURI M'LINTARI ……. 1ST PLAINTIFF

ISACK NTONGAI M'LINTARI ……. 2ND PLAINTIFF

VERSUS

GEORGE MBITI KIEBIA ……..1ST DEFENDANT

ISACK M'INABGA KIEBIA ……. 2ND DEFENDANT

JUDGMENT

The two plaintiffs who are brothers filed this case against the two defendants who are their uncles. Their deceased father Musa M'Lintari was a brother to both the defendants. And they were of Athimba clan. During the period of gathering consolidation and demarcation of land, the first defendant was registered as the owner of parcel No. Njia/Kiegoi Scheme/86. The 2nd defendant was registered as the owner of parcel No. Njia/Kigeoi scheme/70. The plaintiffs alleged in their claim that both the defendants were holding in trust for them 3 acres from each of those parcels of land. They therefore prayed for a declaration to that effect and an order for transfer of those 3 acres from each of those parcels of land. This case proceeded for hearing and the first plaintiff in evidence stated that he resides at parcel No. 86 with the first defendant. He had been on the said land since his childhood, that indeed he was born there. His father also resided on the same land. The two parcels of land were registered in the defendant's name because they were clan land. The land was being shared by the clan according to families. The defendants who are their uncles were given the family land. Parcel No. 86 was 10.15 acres and parcel No. 70 was 10.70 acres. Their late father was supposed to get 3 acres from the first defendant's parcel of land leaving the first defendant with 7.15 acres. Similarly, their late father was to get 3 acres from the 2nd defendant's parcel of land. Both defendants however failed to surrender those acres. The 1st plaintiff said that he occupies and cultivates 3 acres of parcel No. 86. The 2nd plaintiff also had occupied parcel No. 86 but a year before he tendered his evidence, had vacated. That he had moved to another parcel of land which he had purchased. In respect of parcel No. 70 he said that it is only occupied by the 2nd defendant. He himself had never lived or cultivated on that land. He had asked the defendants to transfer the 3 acres from those parcels of land and although at first they had agreed to do so, they later changed their mind. They had a case before the elders in 1993 and 1994. After discussing the matter before the elders, a decision was made that they were to get 3 acres. The first defendant was present at the meetings. At that meeting, the first defendant had agreed to give him 2 acres. Todate he had not given

him the land. He produced the minutes as exhibit in this case. He stated that the defendants got their land in 1962. At that time, he was a child. They were given that land on behalf of the family. They did not buy it. The process at that time was that land was given to one person of the family whilst the rest of the family continued to occupy the land. The first plaintiff said that both his parents had been buried on parcel No. 86. On being cross examined he stated that their deceased father died in 1990. Their father was older than the two defendants. That he is presently 62 years old. At the time when the land was given to the defendants he was at school in Std 5. He responded to a question by saying that the land he was seeking the court to transfer was the land which his father was entitled to. In that regard, he said that he had not obtained letters of administration. The 2nd plaintiff essentially reiterated the evidence of the 1st plaintiff and stated that he is presently residing on his own land that he had purchased. Before occupying that land, he was residing on parcel No. 86. He vacated from parcel No. 86 two years ago. He too had been born on parcel No. 86. Similarly, his father resided on that land. He reiterated the 1st plaintiff's evidence by saying that the defendants were registered as owners of their respective parcels of land by the clan on the basis that they were getting the land on behalf of their family. He too stated that their deceased father was to get land from the defendants. On cross examination he said that he is 49 years old. He further stated that their deceased father did not get his share whilst he was alive because he was sure that they would get the share from the defendants. PWIII stated that he was from the same clan as the parties in this case, that is, Athimba clan. That in 1963/4 the shambas that previously were owned by the clan were given to houses with each house getting 10 acres, whereby one person would represent the family. Even though one person was the registered owner, the family members had the right to stay on the land. That the 1st and 2nd defendants were registered as owners of the respective parcels of land on behalf of the family. Even after that registration, the other family members continued to occupy the same parcels of land. That the father of both defendants and the plaintiff's deceased father also resided on that land and on their death were buried on parcel No. 86. This witness said that from his birth he had seen the plaintiffs living on that land. He confirmed that the defendants had failed to give the plaintiffs their portion of land. The plaintiffs after the death of their father because the defendants were attempting to evict them raised a complaint that they had not been given their land. They were cultivating on parcel No. 70 but had been stopped by the 2nd defendant. The matter was discussed by the elders and the elders decided that each defendant was to surrender 3 acres of their land to the plaintiffs. This witness said that he was the chairman of the clan meeting. He pointed out that he had signed those minutes as the chair. Because the defendants failed to abide by the finding of the clan another meeting was convened on 30th April 1995. The purpose of that meeting was to confirm whether their decision had been complied with. When the elders found that the defendants had failed to comply, they suggested to the plaintiff that the matter be filed in court. The witness was emphatic that the parcels of land registered in the defendants names were not purchased by the defendants. He was cross examined and stated that the defendants failed to attend the 2nd clan meeting. He also responded to cross examination by saying that that land could be held in trust for the family by either the younger or the older member of the family. He was asked in respect of parcel No. Kiegoi/117 and in his response he said that he was not aware that it was owned by Stephen Ngiri. He however said that the same did not belong to the plaintiffs' deceased father. This witness said he was 70 years old. PWIV stated that he had known the parties in this case since his birth. They come from the same clan. That land belonging to the clan was given to the defendants to hold for other members of the family. He too confirmed that the plaintiffs and their grandfather lived on the suit land. He confirmed that even today the plaintiffs resides over that land. He had attended the clan meeting where it was decided that the defendants would each give to the plaintiffs 3 acres. The defendants in support of their defence gave evidence whereby the first defendant stated that the plaintiffs were children of his elder brother. Their father had died in 1990. There after he stated:-

*"**Parcel No. 86 is mine. No. 86 it was used by our great grandfathers. They were using it to feed their animals."***

A time came, he said, when the demarcation officers were set up into committees to divide the shambas. One of their chairman was the 2nd defendant. When he carried out the measurements, both he and the 2nd defendant were given land but the government gave a period of 90 days in which if there was dispute the same was to be raised. Since no dispute was raised after 90 days, they were registered as owners of those lands and they were allowed to use the land whereby they planted tea bushes. During this time, they were

in the company of the plaintiff's deceased father. He did not get land on the upper side. There was however another land on the lower side where their father used to plant bananas. That was Kiegoi/Kinyaga/117. They allowed the plaintiffs deceased father to use that land where he cultivated and resided. That property, he said, was registered in the name of Stephen Ngiri. Stephen Ngiri, according to him, was the brother of both plaintiffs. That Stephen Ngiri presently, resides on that parcel of land. He produced a copy of official search over that property which I must state does not assist this court at all. This is because it bears various cancellations where the title number appears. It is not clear whether the cancellations were done before or after the Land Registrar signed the official search. He certainly did not counter sign the cancellations. The 1st defendant denied knowledge of clan meetings, he denied attending the same. He denied that he holds his parcel of land in trust for the plaintiffs. On being cross examined, he stated that the land where his title is was the land of Athimba clan. The clan of Athimba was rearing animals on that land. At the time of consolidation and demarcation, the clan divided that land by giving him 10 acres. He however confirmed that both of the plaintiffs, their deceased father and grandfather resided on parcel No. 86. He himself had been born on parcel No. 86. He then stated:-

"1st and 2nd defendant got land but M'Rintari (Plaintiffs' father) did not get land."

The 2nd defendant in evidence stated that parcel No. 70 belonged to him and was given to him by the committee which was sub dividing the land. That he got the said land just like anyone else did. He however confirmed that he was the chairman of the committee overseeing the said subdivision. Contrary to what the 1st defendant said in respect of the plaintiff's deceased father, he said:-

"He (plaintiffs' father) was given land but he refused to take it. ……. He refused to take the land of the scheme so that he was given Kinyaga property. He did not like the land given to him at the scheme. He was cultivating at Kinyaga and he resided at Kinyaga and even died there."

It will be recalled that the plaintiff's case and it was also accepted by the first defendant was that M'Lintari resided and died and was buried at parcel No. 86. The 2nd defendant continued by saying that he was not holding parcel No. 70 in trust for anyone. He said presently he resides there alone. On being cross examined, he said that his land was not Athimba clan land. That Athimba clan was not the only clan cultivating it. That contradicted the evidence of the 1st defendant. Further this witness stated that the land which had been given to M'Lintari when he got his portion was taken away by a person called Mbabu. He was not clear on that issue in respect of exactly which land M'Lintari had been given and the significance of it being taken by Mbabu. When he was asked whether he had himself registered his name under parcel No. 70 he denied and became defensive and rude to the plaintiff's counsel. He however did accept that M'Lintari was buried on parcel No. 86. He also did accept that ordinarily a person is buried on their own land. On being re- examined by his own counsel, he stated:-

"When I got my land, I got it because my father used to cultivate it."

From the evidence above it is clear that the defendants got registered as proprietors of the suit properties whilst the plaintiffs and other members of the family were in occupation of both parcels of land. It was accepted that the father of both defendants who was the grandfather of the plaintiffs was then alive when they got the said registration. The defendants accepted that parcel No. 86 was being used by their forefathers to feed their animals. The defendants' defence to the plaintiffs' case is that M'Lintari got parcel No. 117 during the time of demarcation. They said that that property is presently registered in the name of Stephen Ngiri. It did not escape my notice that when the plaintiffs were being cross examined by the defence counsel, they were not questioned on whether firstly they were the brothers of Stephen Ngiri and secondly whether the said Stephen Ngiri was the registered owner of parcel No. 117. The defence counsel instead of putting those questions to the plaintiffs waited until when he was cross examining PWIII to question him on the same. The said witness responded by saying that Stephen Ngiri was a brother of the defendants. PWIII was unaware of the existence of parcel No. 117 but he was emphatic that it did not belong to M'Lintari. The issue of that parcel No. 117 in my view was an afterthought of the defendant. If not they would have raised the same when cross examining the plaintiffs. I have already stated my misgivings in relation to the defence exhibit No. 1,that is the official search of that parcel of

land. The 2nd defendant was one of the committee members involved in demarcation of parcels of land. In my view, the part he played would well explain how both he and the 1st defendant got registered as owners of those parcels of land and they got the registration whilst the family members were occupying the land. They did not tell the court whether they disclosed to those family members that they had obtained registration. Plaintiff's exhibit number 1, the minutes of 16th October 1994, show that both the first and second defendants were in attendance of the clan meeting. They are number 1 and 8 of the list of members present in that meeting. Those minutes, in my view, are worth reproducing in this judgment.

"***After a lengthy discussion, Mr. Isaac M'Ananga (the 2nd defendant) said that he kept his promise of surrendering 3 acres to this family (Mr. M'Lintari's family) according to the sub clan's agreement. Mr. George Mbiti (1st defendant) told the clan that he had changed his mind of giving 3 acres but he was to surrender only one acre to them. After a terrible debate between the clan members, George was warned by the clan. He was advised to call his family aside and reconsider his remarks. The clan refused the acre totally. After a private talk between George's family members, they came with a solution that he agreed to add to another acre to make them two. Mr. Gideon Mugwika became the mediator."***

As it can be seen from the above quotation, the defendants did not object to transferring some of their land to the plaintiffs, the dispute rather was on the acreage that was to be transferred. I had the opportunity to observe the witnesses in this case and I form the opinion that the plaintiffs and their witnesses were credible and honest witnesses. To the contrary, I found the defendants were not credible and contradicted not just themselves but also each other. Before ending my analysis of this evidence, I wish to state that as I understand the plaintiff's claim is that the defendants hold the suit properties in trust for them as family members. It is not necessarily their claim that what they seek from court is the interest of their deceased father. Their claim as I understand it is by virtue of being members of the family who originally owned the suit properties. That being so, their claim does not fail for lack of grant of letters of administration of their father's estate. The plaintiffs claim arises from customary law. The defendants' registration over the suit properties is undoubtedly protected under section 27 of the Registered Land Act Cap 300. That section provides that registration of a person as the proprietor of land vest in that person the absolute ownership together with all the rights and privileges belonging or appurtenant thereof. It has previously been decided by the courts that, that right in that section is subject to the rights recognized under section 28 and Section 30(g) of Cap 300. Section 28 has a proviso whereby the rights of a proprietor are stated not to relieve a proprietor from any duty or obligation to which he is subject as a trustee. Section 30(g) recognizes that registered land is subject to overriding interests and in sub paragraph (g) the Act recognizes the rights of persons in possession as representing such an overriding right. It is worth in my view to quote that section in particular the sub section which is relevant to our case.

"***30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-***

(a) …….

(b) …….

(c) …….

(d) …….

(e) ……..

(f) ……..

(g) The rights of a person in possession or actual occupation of land to which he is entitled in right

only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."

The provisions of Section 28 and Section 30 have been the subject of various decisions before the courts. The Court of Appeal in the case of **Alan Kiama Vs. Ndia Mathunya & Others** Civil Appeal No. 42 of 1978 Madan J.A. had this to say in respect of Section 30(g):-

"What meaning is to be given to section 30(g)? the rights under customary law may be argued to be extinguished by section 28 – Kneller, J. in Esiroyo Vs. Esiroyo [1973[E.A. 388, at p. 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Over-riding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case, the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.

Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour or the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for."

In the case of **Kanyi Vs. Muthiora** [1984] KLR 712 the court stated as follows:-

"The respondent had rights against the appellant stemming from possession and occupation of part of the land, which amounted to over-riding interest not required to be noted on the register and the appellants proprietorship was subject to it, section 30(g)."…… The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondent's rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee…….. The Trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary Law, if the Act had intended to exclude Customary Law rights it would have been clearly so stated."

The Court of Appeal also in the case of **Mbui Mukangu Vs. Gerald Mutwiri Mbui** HCCCA No. 281 of 2000 had to consider the same facts as I am considering in this judgment and I can do no better than to extensively quote from its finding in this case.

"We think it cannot be argued too strongly that the proper view of the qualification of proviso to section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act. After passionately and extensively analyzing the concept of Customary law trusts, Khamoni J. in Gathiba V. Gathiba, Nairobi HCCC No. 1647 of 1984 (decided in January 2001 and reported in [2001] 2 EA 342] at page 368 stated:-

The position as I see it is therefore as follows:- Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since

African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee.

……. It is significant, we think, that unlike the Muriuki Marigi case (supra) where the father had his own land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations."

The trust which the plaintiffs have sought to enforce by this action arose not only from their possession and occupation of the suit properties but rather from the fact that this was ancestral land which was passed on from generation to generation. This is what the Court of Appeal as quoted above termed intergenerational equity. The defendants have not denied that the plaintiffs are members of their family. Further it is not denied the plaintiff have been in possession and had utilized the land, all with knowledge of the defendants. That being so the plaintiffs have on a balance of probability proved their claim that the defendants hold the land in trust for them. They are therefore entitled to a share of that land. The plaintiff's father was a brother to both defendants . By virtue of that relationship, the plaintiffs are entitled to the share that their father would have obtained. The defendants did not dispute the plaintiffs evidence in respect of the acreage of the suit properties. The plaintiffs claim for 3 acres from both parcels of land would ensure that the defendants and the plaintiffs deceased father would get more or less equal share of the land. The plaintiff's evidence was that they had occupied parcel No. 86 from their birth and were cultivating parcel No. 70 until after the death of their father when the 2nd defendant denied them access. They are therefore entitled to 3 acres of land from both portions. The judgment of this court is as follows:-

1. I hereby declare that the first defendant holds 3 acres of land parcel No. Njia/Kiegoi Scheme/86 in trust of the plaintiffs and that the 2nd defendant also holds 3 acres of the land parcel No. Njia/Kiegoi Scheme/70 in trust for the plaintiffs.

2. I order that the said trust be terminated and to that end I order that 3 acres be excised from parcel No. Njia/Kiego Scheme/86 and the same be registered in the name of Isaya Theuri M'Lintari in this regard I hereby grant leave to the land registrar to dispense with the necessity of the production of the original title documents for the purpose of carrying out the same registration.

3. I also order that the trust declared in paragraph 1 herein above be terminated in respect of 2nd defendant's land and to that end I order that 3 acres be excised from parcel No. Njia/Kiegoi Scheme/70 and the same be registered in the name of Henry Ntongai M'Lintari, in this regard I hereby grant leave to the land registrar to dispense with the necessity of the production of the original title documents for the purpose of carrying out the same registration.

4. The plaintiffs are awarded costs of this suit as against the defendants.

Dated and delivered at Meru this 5th November 2009.

MARY KASANGO

JUDGE