REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 182 OF 1991

NGANGA GICHURI .....1ST PLAINTIFF

DAVID KIHANYA NGANGA .....2ND PLAINTIFF

VERSUS

NDUNGU NGANGA.....DEFENDANT

JUDGMENT

The plaintiffs who are a father and son filed a plaint here in January, 1991 against the defendant who is son of the 1st plaintiff and step brother to the 2nd plaintiff. The plaintiff averred that during land demarcation, consolidation and registration in 1958 the 1st plaintiff had two pieces of land, one measuring 8 acres. At the time there, it was the policy of the Kenya Government that no one person would be registered as proprietor of more than one piece of land in the same area. It was on this basis that the 1st plaintiff registered one piece of land, Gatamaiyu/Nyanduma/243. The 1st defendant was to hold 51/2 acres for himself and 4 acres on behalf of the 1st plaintiff and the other son who is the 2nd plaintiff and 0.5 acres in trust for the defendant's unmarried sister Phyllis and 1.475 acres in trust for the 1st plaintiff.

That the defendant accepted that he was registered as owner of the land subject to the mentioned trusts and agreed to transfer the shares of the land to the beneficiaries as and when requested by the plaintiff and the beneficiaries to do so. In 1974 the defendant sold 21/2 acres from this land leaving a balance of 8.975 acres in LR Gatamaiyu/Nyanduma/1022 which was a subdivision of the original number Gatamaiyu/Nyanduma/243. In breach of the trust aforementioned, the defendant refused to transfer the aforementioned shares to the beneficiaries and this left no alternative to the plaintiffs but to bring this action.

The plaintiffs seek a declaration that the defendant holds 1.475 acres in trust for the 1st plaintiff and 4.0 acres in trust for the 2nd plaintiff respectively, an order that the defendant do transfer to the 1st and 2nd plaintiff their respective shares of the said suit land and costs of this suit. The defendant filed a defence on 10th June, 1991 in which he averred that he is the son of Fracia Njeri ,1st wife of the 1st plaintiff. That the 1st plaintiff had two portions of land one Gatamaiyu/Nyanduma/243 and Gatamaiyu/Nyanduma/446 which he shared between his two households in accordance with Kikuyu customary law. No Gatamaiyu/Nyanduma/ 243 was given to the house of Fracia Njeri whose only son is the defendant. The other plot Gatamaiyu/Nyanduma/446 was given to Wanjiru Nganga the 2nd wife of the 1st plaintiff who is mother to the 2nd plaintiff and two other sons.

That the 1st plaintiff attempted to create an imaginary trust over the suit land as a false way of depriving the defendant of his land properly given to him as share to the 1st household by the 1st plaintiff in his lifetime in settlement of a normal legal and customary share of property settlement in the family.

That the distribution was in accordance with Kikuyu customary law and the 2nd wife and her son should not confuse the issues. That the defendant sub divided the land and sold a portion of it and gave the 1st plaintiff Kshs 5,250/- part of the purchase price and the remaining portion No 1022 is the sole property of the defendant and there is no trust or beneficial interest in the suit property and it is an attempt to disinherit the defendant of his rightful share under customary law and prayed for dismissal of the suit.

The plaintiffs put in a reply to the defence and the 1st defendant denied ever distributing his family land during his lifetime and denied ever having distributed the suit land to the defendant's house and other land to the 2nd house.

That the 1st plaintiff tried to distribute his land in the manner described in the plaint to ensure equality among his sons. He further denied receiving 5,250 as part of the sale price of part of the suit land and denied that the suit land is the sole property of the defendant.

The evidence in brief is as follows:-

PW1 the 1st plaintiff, PW5 a nephew of the 1st plaintiff and uncle to 2nd plaintiff and PW6 brother to 1st plaintiff and uncle to the 2nd plaintiff were firm both in their examination-in-chief and cross-examination that the father of the 1st plaintiff shared land amongst his sons. That the 1st plaintiff had a second piece of land and as per regulation at the time the 1st plaintiff had not been registered as proprietor for both pieces of land and he decided that the land he had inherited from his father should be registered in the name of his 1st born son of the first wife as trustee for himself and the 1st plaintiff. They were firm that a father is free to distribute his property in any manner he wishes.

The first plaintiff conceded that he had two wives. That the 1st wife had only one son who is the defendant herein. That the 2nd wife has three sons and they reside on the land registered in his name. He denied the suggestion that he had shared his two pieces of land according to his wives.

It is also apparent that the 1st wife who is mother of the defendant was settled on to this land where she used to cultivate and was buried on to this land when she died in 1986.

That in 1987 is when the 1st plaintiff called family elders and stated that he wanted the land held by the defendant back so that he can distribute it amongst his four sons equally. PW6 was chairman of this committee which the 1st plaintiff had called to distribute his land. The committee ruled that the land where the defendant resides should belong to the first house and that the 2nd house should share the second land where the 1st plaintiff resides with the other sons.

That the 1st plaintiff disagreed with this and that is why he came to Court. PW2 the 2nd plaintiff confirmed what his father said that he is to get 4 acres from the 1st defendant as the 1st defendant was registered as a trustee for himself and for the rest of the family.

He stated that at one time after they had been to the Chief and DO in respect of the suit land the defendant agreed to sign the transfer forms to transfer 4 acres to him but he later changed his mind. This was confirmed by PW3 his brother that the defendant agreed and that is why they filled the transfer forms exhibit 4. The proceedings before the Chief are produced as exhibit 3 and the Chief ruled that the defendant was registered as a trustee and that the land should be shared by other children. The proceedings before the DO were produced as exhibit 5 and in it the elders ruled that the land was held on trust by the son and that it should be shared out by the father as he so wishes.

PW4 confirmed the evidence of PW1, 2, 3 that the defendant sent him to his father the 1st plaintiff with a message that he had agreed to share out the land according to his father's wishes in accordance with the ruling of the elders. The evidence of the defendant on the other hand is that he is the son of the 1st plaintiff and step-brother to the 2nd plaintiff. That he belongs to the 1st house. That his father had two portions of land one he settled the first house on and the second one he settled the second house. In 1972 he sold 2 acres of this land with the knowledge of his father the 1st plaintiff as per exhibit D6. He used part of this money with the other portion he gave to his father as per exhibit D3. This was in 1972. His

father did not raise any objections to the sale. Thereafter the father did not lay any claim on the land. The defendant continued cultivating the land along with his mother until 1986 when his mother passed away and she was buried on this land. In 1987 is when the father started claiming this land as his own and wishing to distribute it to the sons of the other house.

The defendant conceded that he resides with his unmarried sister whom he can give a portion to use. He was firm the suit land was set-aside for him in the 1950s when he was working in Nandi evidenced by exhibits he produced exhibit D 4, 5.

When cross-examined the defendant was firm that exhibits D4 and D5 confirm that the father set aside this land as the share for his mother's house and he paid the fees for the assigned number Gatamaiyu/Nyanduma/243. He was firm the elders heard the case and gave him the land but his father did not accept the verdict. He denied the suggestion that he agreed to share all the land at any one time and that the transfer forms were filled by the 2nd plaintiff and his brother on their own.

He conceded he was registered as trustee for his mother's house only and not for the second house. He added that his father the 1st plaintiff used to cut trees from this land which he finished by 1964 and since then neither him nor his sons have ever used that land. He was firm his father took part of the money for the proceeds of sale for the two acres he sold. The plaintiffs' counsel put in written submission to the effect that the 1st plaintiff had two pieces of land in that area and as per the regulations prevailing at the time he could not be registered as proprietor for both of them and that is why he registered in the name of his eldest son in accordance with Kikuyu customary law. The eldest son has to hold as trustee for the benefit of the other children in the family.

Secondly that the defendant was unable to show that the 1st plaintiff gave him land. That the letters produced in Court do not show that the defendant was given any land as there is no indication of the number or acreage of any land. The defendant's counsel on the other hand put in written submission to the effect that the defendant is the registered owner of the suit land as a first registration and even if the plaintiff proved his case, the case bars him from claiming the land under s 143 of cap 300 Laws of Kenya.

Secondly that rectification of a register is not possible as this was a first registration. Thirdly that the defendant has enjoyed occupation of the suit land since 1958 which is a period of over 12 years and as such he is entitled to the suit land by way of prescriptive title.

Having assessed all the evidence on the record it is clear that there is no dispute that the 1st plaintiff is father to the 2nd plaintiff and the defendant. Also it is not in dispute that the suit land originally belonged to the father of the 1st plaintiff who is the grandfather to the 2nd plaintiff and the defendant. It is not in dispute that the suit land is a subject of a first registration.

The purpose of registering the defendant as proprietor is what is in dispute. The contention of the plaintiff is that he was registered as trustee for the 1st plaintiff and he, 1st plaintiff, now claims this land from him so that he can distribute it to his other children as he wishes. The connection of the defence is that his father had two wives and two pieces of land. The 1st piece he registered it in the name of the 1st born son of the first house who was to hold it in trust for his mother's house.

He is the only son and as such is entitled to the whole land. He added that he has one sister who is unmarried and who has never had children who could be given a small portion to use. He was firm this was the share for his mother's house and the 1st plaintiff changed his mind after the death of his mother at the instigation of the 2nd wife and her sons. Issues were framed herein but were not agreed as the counsel for the defendant did not endorse them. He was however duly served but filed no objection and therefore they are deemed to be the issues in this case.

The 1st issue deals with question as to whether the 1st plaintiff owned two pieces of land Gatamaiyu/Nyanduma/243 comprising 11.5 acres and Gatamaiyu/Nyanduma/446 in the same locality. Both the plaintiffs' evidence and the defence confirm that this was the position.

The 2nd issue deals with the question as to whether the defendant was the 1st son of the 1st plaintiff. Again the evidence on record both from the defence and the plaintiff confirm that this was the position.

The third issue deals with the question as to whether it was government policy at the time not to register any one person with more than one parcel of land as proprietor. The witnesses have said so but no document of policy was produced to this effect. However it came out from the evidence that this was an accepted practice.

The rest of the issues No 4-7 deal with trust. No 4 deals with the question as to whether the defendant was registered as owner of Gatamaiyu/Nyanduma/243 in trust for himself for 51/2 acres, 2nd plaintiff 4 acres, 0.5 acres for his sister Phyllis Nyambura and 1.475 acres for the 1st plaintiff and whether the defendant accepted the trust as particularized above. Issue No 5 deals with the question as to whether by selling 21/2 to Gichini Mwangi the defendant reduced his share from 51/2 acres to 3 acres.

Issue No 6 deals with the question as to whether the defendant committed a breach of trust by failing to transfer the land aforesaid in 1987 and lastly whether the defendant should transfer 4 acres to the 2nd plaintiff and 1.475 acres to the 1st plaintiff.

Section 143 of the Registered Land Act cap 300 Laws of Kenya states clearly that the Registrar has power to order rectification of a register other than a first registration. The defence relies on this section. A copy of the certificate of registration produced as Exh No 1 indicates that the nature of title is absolute. There is no indication of a trust nor a notification of any other interest of any other nature. As such there is no indication that the defendant accepted registration of the suit land as a proprietor subject to trust as set out in the plaint.

S 28 of the Registered Land Act states *inter alia* that the rights of the proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the Court shall not be liable to be defeated except as provided for under this Act. The proviso to the same section states:

> " provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trust."

S 126 of the same Act stipulates that where a person holds or acquires land in a fiduciary capacity he will be indicated as trustee but the particulars of the trust will not be entered in the title. The instrument creating the trust will be deposited with the Registrar and the trustee thereof shall hold the land subject to any unregistered interest.

In this case whether a trust was indicated in the title or not does not prevent the existence of such a trust. This was the position in the case of *Limuli v Marko Sabayi* [1979] KLR 251, in which it was held that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute the transfer documents.

As to whether a trust can be declared against the suit land or not will have to be determined from the conduct of the parties. Since 1958 or so the defendant has occupied this land. He cultivated it with his mother uninterrupted. In 1972 he took a loan against the title. There was no objection from the plaintiffs. There is a letter Exh 6 purportedly written to the Agricultural Officer trying to stop the defendant being issued with a loan against the title. After this no action was taken.

In the year 1974 as per Exh D3 the defendant sold 2 acres from the said land. When examined on the issue the 1st plaintiff stated:

> " I never knew when he was selling. I came to know of it when surveyors came to subdivide the land."

When cross-examined he states:

> "I learned about the sale to Gichini during subdivision it was being sold in relation to a loan."

He added that he objected to the sale as per Exh 6.

The two actions of obtaining a loan against the title and selling of a portion of the suit land were acts of breach of trust if there was one. The person who would have been aggrieved is the 1st plaintiff but he took no concrete steps. From 1974 the parties continued staying and cultivating their respective parcels until 1986 when the mother of the defendant passed away. All along from 1972 to 1974 when the land was mortgaged and a portion of it sold the 1st plaintiff did not call any elders' meeting to complain against this action, neither did he file a case either with the local administration accusing the defendant of acting prejudicially in respect of the rights of the other sons in respect to the suit land.

In 1987 is when he complained after the death of his first wife. The elders he called to this meeting including PW6 who is the 1st plaintiff's brother to that meeting resolved that the parcels should be shared equally between the two wives in accordance with Kikuyu customary law.

PW6 conceded that was the position under Kikuyu customary law but added that these days a person is free to distribute his property in any manner he wishes and that these days people are more inclined to distribute their properties to their sons than wives to ensure equality more so when families are monogamous. The 1st plaintiff refused to accept that he had distributed the land in accordance with customary law and he was firm he wished to distribute it according to sons to ensure equality.

The 2nd plaintiff in whose favour the land is being claimed was born in 1957 as per the photocopy of birth certificate produced Exh 8. As at the time of registration he was indeed an infant and he couldn't be registered as proprietor. He became of age by 1975. He states that he learned up to standard seven. The year when he left school was not shown.

In cross-examination he stated:-

> "I have not cultivated plot No 243 or 1022 as I was not married, I was married in 1980. I have not cultivated it because the defendant refused."

From 1980 up to 1986 when the 1st wife died there is no mention that the 2nd plaintiff attempted to set up a home on to the suit land during that period and he was stopped or prevented. In fact the 2nd plaintiff specifies clearly that in 1987 is when they went to the Chief claiming his share of land from the suit land. There is no explanation as to why this claim was not lodged earlier on.

The onus of proof as stipulated in section 107,108 of the Evidence Act cap 80 Laws of Kenya and as set out in the case of *Ernest Kinyanjui Kimani v Muiru Gikanga and another* [1965] EA 735 is on the plaintiffs to prove their case on a balance of probability.

Before I proceed further on the issue of trust I would like to dispose of a point raised by the defence counsel in his submission namely that the defendant is entitled to the suit land by virtue of adverse possession if the plaintiffs are held to have had some tangible interests in the suit property. The law on adverse possession is well settled. It is that the claimant must have been in excessive uninterrupted possession for a period of twelve years. *Salim v Boyd* [1977] EA 550. Secondly the claimant must not have been under any disability affecting the prescriptive period. *Hosea -v- Njiru and Others* [1974] EA 526. In this case the period would have run from the time of registration in 1957 and as at time of first dispute in 1987 a period of 28 years had elapsed. This period was interrupted by the registration of mortgage in 1972 which by 1987 a period of 15 years had elapsed. There is a third event which is the sale of a portion of it in 1974 and as at 1987 a period of 13 years had elapsed.

From the above it is clear that the defendant could also succeed under prescription although there is no limitation as at what stage of time a trust can be declared. However this Court cannot entertain the question of adverse possession as it was not counter claimed by the defendant. The general principle is that a party is bound by his pleadings. As such this Court will have to confine itself to the issue of the

trust.

Coming back on to the issue of trust the evidence on the record shows that the defendant has been in exclusive occupation, use and cultivation of the suit land without any objection from the time of registration till 1986 when his mother died. Acts of exclusive use are the mortgaging of the suit land in 1972 for a loan. Exh 6 does not amount to an objection. The 2nd act is the sale of a portion of it in 1974 and there is no objection or attempt to stop or block the said sale. The other factor is that in 1980 when the 2nd plaintiff got married he never made any attempt to set up a home on to this suit land nor his elder brother. It is also clear that active opposition or claim started in 1987 after the death of the defendant's mother.

The inference that can be drawn from the surrounding circumstances is that the 1st plaintiff had indeed settled his family on his two pieces of land according to his wives but later changed his mind either on his own or at the instigation of the family of the 2nd house.

The question then now is whether the 1st plaintiff can retract his gift from the defendant and then distribute it to other sons namely the 2nd plaintiff. The 1st plaintiff is firm he is entitled to do so as he has not renounced his claim over the suit land. I did not manage to get any authority on the subject except a case falling under Muslim customary law and I have no doubt that principle can be applied to a similar situation here *Haidar bin Mohamed Eimandry and 5 others v Khadija Binti Ali Bin Salem* (1956) 23 EALR 313.

In this case the deceased gave by way of gift land and a house to her niece the respondent. After transfer and registration the house and land were leased to the respondent for 20 years at a nominal rent of 30/- annually. Upon her death the appellants sued for a declaration that in the circumstances the gift was invalid under Muslim law and for rectification of register. It was held *inter alia* that the reservation in form of any interest similar to a life interest or the reservation of any effective control over the *corpus* of the gift will invalidate the gift.

(2) The reservation of the annual fruits of the property without control of the corpus is permissible.

(3) The deceased did not retain a part of what she purported to give but gave the whole of her original interest and received back something essentially different.

From the evidence on the record there is nothing to show that the 1st plaintiff reserved any interest in the suit land either for himself or the children of the 2nd house evidenced by his conduct namely failure to claim title to the suit land when the defendant took a loan against its title and when he sold a portion of it. If the 1st plaintiff had indeed reserved any interests in the suit land after the sale is when he would have claimed the land to be re-transferred back to him for re-distribution to the other sons of the family. His failure to do so confirms the inference that he had given that land to the house of his 1st wife as an absolute gift and anybody who claims this land from the 1st wife's house is rightly entitled to it.

However as a father the 1st plaintiff can make use of the said land without claiming title to it to the detriment of the defendant. However as conceded by the defendant he is trustee for his mother's house and as such he will set aside one acre for the use of his unmarried sister Phyllis Nyambura over which she shall have a life interest.

For the reasons given above the plaintiffs' suit is dismissed with costs to the defendant.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of October 1992.

R.N NAMBUYE

JUDGE