



**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE NO. 60 OF 1984**

1. DAVID KINUU M'MUGAMBI.....)
2. JOSEPH MEEME MUGAMBI.....)
3. JULIUS KIMAITA.....) PLAINTIFFS
4. MUTHURI M'MUGAMBI.....)

**VERSUS**

1. M'MUGAMBI M'IMANYARA.....)
2. GEOFFREY MUGAMBI.....) DEFENDANTS
3. PATRICK K. MWORIA.....)

3/8/1989

CORAM: S.O Oguk- Ag. Judge

Mr. Rimita for the Plaintiffs

Mr. A. Mbaya for the Defendants.

Court Interpreter – Mwirigi.

**JUDGEMENT**

The 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA, now deceased, is the father of both the Plaintiffs in this case and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. He was sued by the Plaintiffs in this case who claim that he has disentitled them of any share of the family land parcel Number ABOTHUGUCHI/KITHIRUNE/97 measuring 24 acres which he was holding as their father in trust for himself and each of his children.

The 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA, who died sometimes in October, 1985 after this suit had been filed against him, was a polygamist. He was married to 5 wives and was blessed with a total of 11 sons. His 1<sup>st</sup> wife, SARA w/o M'MUGAMBI, had 2 sons, namely, M'MBOGORI MUGAMBI and MUTHURI MUGAMBI (4<sup>th</sup> Plaintiff). His 2<sup>nd</sup> wife, RUTH w/o M'MUGAMBI, had 3 sons, namely, SAMUEL KIARA MUGAMBI, FREDRICK KIBITI MUGAMBI (3<sup>RD</sup> Defendant) and GEOFFREY MUGAMBI (2<sup>nd</sup> Defendant). The 3<sup>rd</sup> wife, CIOKIGUNDU w/o M'MUGAMBI had 3 sons, namely, JUSTUS MBAYA MUGAMBI, JOSEPH MEEME MUGAMBI (2<sup>nd</sup> Plaintiff) and DAVID KINUU M'MUGAMBI (1<sup>st</sup> Plaintiff). The 4<sup>th</sup> wife, REBECCA w/o M'MUGAMBI had 2 sons, namely, STANLEY NTIRITU and JULIUS KIMAITA (3<sup>rd</sup> Plaintiff). The 5<sup>th</sup> wife, MUTHONI w/o M'MUGAMBI who later separated from him left him with one son, RICHARD M'MUGAMBI.

The evidence adduced in this case shows that before the 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA was registered as the proprietor of the land parcel No. ABOTHUGUCHI/ KITHIRUNE/97 measuring 24 acres, this land belonged to their clan. It was during the time of land adjudication and registration in the year 1957 that the clan started to allocate land, which had before then, been cultivated by its members anyhowly to individual members. Those members of the clan who had responsible sons were allowed to give names of their children whom they would like the clan to give land directly. The 1<sup>st</sup> Defendant then gave out the names of his three (3) sons to be given land by the clan. The clan then gave his son, JUSTUS MBAYA MUGAMBI (P.W.1) land parcel ABOTHUGUCHI/ KITHIRUNE/123 measuring 11 acres.

They further gave the other son, M'MBOGORI MUGAMBI land parcel Number ABOTHUGUCHI/ KITHIRUNE/352 measuring 7 acres. The clan further gave the other son, STANLEY NITIRITU land parcel Number ABOTHUGUCHI/ KITHIRUNE/125 measuring 9 acres. All these three sons of the 1<sup>st</sup> Defendant were given these parcels of land by the clan at the same time that he was also given 24 acres of land by the clan which was registered in his name as ABOTHUGUCHI/ KITHIRUNE/97.

After the 1<sup>st</sup> Defendant had been given the said parcel of land, he sold some 6 acres of it to some of his three sons who each got 2 acres. The said land parcel No. 97 was then subdivided into 4 portions, namely parcel No. ABOTHUGUCHI/ KITHIRUNE/1360, 1361 and 1362 each 2 acres and 1363 measuring 18 acres. The two acre portions of land he transferred to each of his sons, SAMUEL M'IKIARA M'MUGAMBI (1360); GEOFFREY KAMUNDE MUGAMBI (2<sup>nd</sup> Defendant) (1361); and FREDRICK K. MWORIA M'MUGAMBI (3<sup>rd</sup> Defendant) (1362). They are all the sons of his 2<sup>nd</sup> wife, RUTH w/o M'MUGAMBI. The 1<sup>st</sup> Defendant retained for himself land parcel Number ABOTHUGUCHI/ KITHIRUNE/1363 measuring 18 acres after the said sub-division of his original land parcel No. 97.

A controversy later erupted within the home of the 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA regarding how he was to sub-divide amongst his children land parcel No. ABOTHUGUCHI/ KITHIRUNE/1363 measuring 18 acres he had retained. A meeting was held under the area chief, Asst. Chief, clan elders and all the sons of the 1<sup>st</sup> Defendant together with the 1<sup>st</sup> Defendant on how to resolve the matter. The 1<sup>st</sup> Defendant then stated that he had 8 sons to whom his land should be sub-divided. It was agreed that his three sons who had already been given land by the clan, namely, JUSTUS MBAYA M'MUGAMBI, M'MBOGORI M'MUGAMBI and STANLEY NITIRITU should not claim any share on the family land under the name of the deceased. However, MUTHURI M'MUGAMBI (4<sup>th</sup> Plaintiff) who had by then got some 5 acres of land in a settlement scheme was still to get a portion of the family land. The agreement then reached was that the family land measuring 18 acres remaining under the name of the 1<sup>st</sup> Defendant, was to be sub-divided as follow:-

1. FREDRICK K. MWORIA (3<sup>rd</sup> Defendant) - 2 acres
2. GEOFFREY MUGAMBI ( 2<sup>nd</sup> Defendant) - 2 acres
3. RICHARD MUTHEE - 4 acres
4. SAMUEL M'IKIARA MUGAMBI - 2 acres
5. MUTHURI MUGAMBI (4<sup>th</sup> Plaintiff) - 2 acres
6. JULIUS KIMAITA ( 3<sup>rd</sup> Plaintiff) - 2 acres
7. JOSEPH MEENE MUGAMBI (2<sup>nd</sup> Plaintiff) - 1 ½ acres
8. DAVID KINUU M'MUGAMBI (1<sup>st</sup> Plaintiff) - 1 ½ acres
9. M'MUGAMBI M'IMANYARA (1<sup>st</sup> Defendant's father) - 1 ½ acres

It later transpired that the 1<sup>st</sup> Defendant had sub-divided the family land, parcel Number, ABOTHUGUCHI/ KITHIRUNE/1624, 1625 and 1626 each of 5 acres and parcel No. 1627 measuring 3 acres. He transferred each of the 5 acres portions to FREDRICK K. MWORIA (3<sup>RD</sup> Defendant) - parcel No. 1624, GEOFFREY MUGAMBI (2<sup>nd</sup> Defendant) - parcel No. 1625, and RICHARD MUGAMBI - Parcel No. 1626. He retained for himself the remainder of the said parcel of land measuring approximately 3 acres as parcel No. 1627. During the hearing, it was stated by the Defendants that this parcel No. 1627 may not really be there as it will cater for the provisions of roads during the sub-division process.

The Plaintiffs having learned that the 1<sup>st</sup> Defendant (their father), has already given out and sub-divided the remaining land to only 3 sons, filed the present suit against him and two of the said sons GEOFFREY MUGAMBI and FREDRICK K. MWORIA claiming that the sub-division of the family land, Parcel No. ABOTHUGUCHI/ KITHIRUNE/1363 into the various parcels of land had been done secretly with the sole aim of denying them any share of the family land which the 1<sup>st</sup> Defendant held in trust for them. Despite intervention by the Provincial Administration to solve the dispute between the 1<sup>st</sup> Defendant and his sons, the 1<sup>st</sup> Defendant would not give in.

It is the contention of the 1<sup>st</sup> Defendant and his two sons (2<sup>nd</sup> & 3<sup>rd</sup> Defendants), that the Plaintiffs are not entitled to any portion of land parcel No. ABOTHUGUCHI/ KITHIRUNE/1363 or to any of the portions to which the land was subdivided. It is their contention that the Plaintiffs should look upon their elder brothers to whom the clan had given some land during adjudication process to claim a share. It is the 1<sup>st</sup> Defendant's contention that he had distributed all his pieces of land according to the houses of each of his 5 wives and he has no more land to give to the plaintiffs.

It is the defence case that the share of the children of the 3<sup>rd</sup> wife of the 1<sup>st</sup> Defendant, CIOKIGUNDU w/o M'MUGAMBI was given to their eldest son, JUSTUS MBAYA M'MUGAMBI and so his brothers, 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff should claim land from him; that the share of land of the house of the 1<sup>st</sup> wife, SARA w/o MUGAMBI was given to her son M'MBOGORI MUGAMBI and so the 4<sup>th</sup> Plaintiff should claim land from him; that the share of land of the house of 4<sup>th</sup> wife REBECCA w/o M'MUGAMBI had been given to his son, STANLEY NTIRITU and so his brother the 3<sup>rd</sup> Plaintiff should claim land from him.

During the hearing of the suit, M'KIARA KAGWABI who was appointed as a legal representative of the 1<sup>st</sup> Defendant, who died after the

suit had been filed but before it was heard, produced a written WILL of the deceased (Exhibit 1) dated 20<sup>th</sup> of January, 1983. Another Defence witness, STANLEY M'MUGAMBI (u.w.2) also produced a copy of the said WILL which both of them had signed as witnesses. The substance of this WILL was that the deceased had appointed, M'IKARA KAGWABI as the executor of the WILL and that he had divided 5 acres of land comprised in land Title Number to ABOTHUGUCHI/ KITHIRUNE/1363 to his son FREDRICK MWORIA MUGAMBI (2<sup>nd</sup> Defendant), about 5 acres of land from the said parcel of land to GEOFFREY MUGAMBI (2<sup>nd</sup> Defendant) and another 5 acres of land to his son RICHARD MUTHEE MUGAMBI. He declared that the remainder of his land (which in this case is approximately 3 acres) and his personal properties, to be shared amongst his children in accordance with Meru customary law. The existence of this WILL was kept a secret till the legal representative of the 1<sup>st</sup> Defendant (now deceased) stood before the Court to testify.

The WILL (Exhibit 1), does not introduce anything new to this case. The 5 acres piece of land that the deceased stated therein to have given his sons the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants together with RICHARD MUTHEE MUGAMBI are the portion of land he had sub-divided from family land, parcel No. 1363 and numbered 1624,1625,1626 and 1627. According to his WILL therefore, only the portion numbered 1627 which presently remained in his name is the one to be shared to the rest of his children according to his Meru customs. The sons to whom he had not given any land are the four plaintiffs in this case and one SAMUEL M'KIARA MUGAMBI who had bought some two acres from him registered as ABOTHUGUCHI/ KITHIRUNE/1360. As matters stand now, the Plaintiffs have not got any single bit of the family land.

The case has given me maximum difficulty.

Although it is the defense contention that the Plaintiffs should look upon their elder brothers for some land and not upon their father (1<sup>st</sup> Defendant), it will be noted that the land held by the said brothers i.e. JUSTUS MBAYA M'MUGAMBI parcel Number, ABOTHUGUCHI/ KITHIRUNE/123, M'MBOGORI M'MUGAMBI parcel Number, ABOTHUGUCHI/ KITHIRUNE/352, and STANLEY NITIRITU parcel Number, ABOTHUGUCHI/ KITHIRUNE/125, was never given to any of them by their father (1<sup>st</sup> Defendant). It was given to them by the clan. These parcels of land had never at any time belonged to the 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA. It is therefore difficult to understand how he claims to have allocated such parcels of land to the house of his 1<sup>st</sup> wife, 3<sup>rd</sup> wife and 4<sup>th</sup> wife if he had never possessed such lands in his life time. These lands were given to these registered proprietors as any other member of the clan had given to case way the 1<sup>st</sup> Defendant was also given land ABOTHUGUCHI/ KITHIRUNE/97 measuring 24 acres. I find it difficult to bring in these three pieces of land that the clan had given to JUSTUS MBAYA M'MUGAMBI, M'MBOGORI M'MUGAMBI AND STANLEY NITIRITU together with the parcels of land that the clan had given their father as parcel of his properties to be shared amongst his children. The same way, I find it difficult to include the portions of land, parcels Numbers 1360, 1361 and 1362 which the 1<sup>st</sup> Defendant had sold to his sons as part of his properties to be distributed.

Generally in a polygamous family amongst the Meru tribesmen, land is distributed according to the house of each wife. In the instant case, if the land of the 1<sup>st</sup> Defendant were to be distributed amongst the house of his wives, then it is only land parcels No. ABOTHUGUCHI/ KITHIRUNE/1363 measuring 18 acres which he was holding in his own name. It is also an accepted principle of Meru customary law that a man distributes his properties equally between his sons. It was held by C.H.E. Miller, J. (as then was) in the case of MARIA WAMBUI & 4 OTHERS -v- KURIA NDIBI (Nairobi Civil App. No. 97 of 1977 – unreported) that: -

“It is a principle of Kikuyu customary law that a man distributes his property equally between his sons” and I believe that a similar principle exists amongst the Merus.

When it comes to inheritance or distribution of ancestral or clan lands, the legislative has made it clear in sec. 3(2) of the Judicature Act that cases of that nature should be dealt with in accordance with a combination of the relevant customary law, Sec 3(2) of the Judicature Act provides as follows: -

“The High Court and all subordinate Courts shall be guided by African Customary law in Civil cases in which one or more of the parties is subject to it, or affected by it, so far as it is applicable and is not repugnant to Justice and morality or inconsistent with any written law and shall decide all such cases according to substantial Justice without undue regard to technicalities of procedure and without undue delay.”

I think that it is clear that the legislative did not pronounce customarily law to be useless. Under Sec. 3(2) of the Judicature Act, where the application of the customarily law principles in a particular case takes the court to a point where strict adherence to customarily law principle would result in injustice in the wide field of justice and morality, the courts are empowered to resort to the concept of substantial justice qua justice.

I do not think that under Meru Customs, a man is entitled to render some of his children landless by giving the whole of his land or a large chunk of it to his few selected children and leaving out the rest landless. In the instant case, the 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA had faced practical difficulties as to how he could sub-divide his land amongst his 8 children.

He called the assistance of his clan elders who with the chief and Asst. Chief, made provision for each and every child. The dispute within the family was then so grave that even the District Officer I as a representative of the District Commissioner had to move in to help resolve the problem.

However, M'MUGAMBI M'IMANYARA through his right to dispose of his properties by WILL decided to give his chosen sons 5 acres each and leave 5 other sons with only 3 acres to share amongst them. In this way, he gave the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants together with RICHARD MUTHEE MUGAMBI 5 acres of land each which he proceeded to sub-divide secretly for them from the family land, parcel Number ABOTHUGUCHI/KITHIRUNE/1363 as parcel Numbers 1624, 1625 and 1626 leaving only 3 acres of the 18 acres family land to be shared according to Meru customs amongst his 5 remaining children. Even these three (3) acres is said by the Defendants to have been conserved to provisions for roads of access to their respective parcels.

That the 1<sup>st</sup> Defendant was openly biased in the manner in which he distributed the family land amongst his children, in which he distributed the family land amongst his children, by not only leaving out the Plaintiffs without any land, but also by completely ignoring the eldest son of his 2<sup>nd</sup> wife RUTH, SAMUEL M'KIARA MUGAMBI whom he also left without any land and yet the younger brothers of SAMUEL, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he gave 5 acres each. Is this really just? This is where equity comes in. This is provided for under Sec. 163 of the Registered Land Act (Cap 300), which makes provision for the application of the English Common Law as modified by the doctrine of equity. I think that equity and the principles of Meru customary law demands that this court should throw away the WILL dated 20<sup>th</sup> January, 1983 (Exhibit 1) purposely made by the 1<sup>st</sup> Defendant with the sole aim of perpetuating unfair distribution of the family land amongst his children so as to favour only a few chosen ones and render the other sons remaining – the majority landless.

For reason given, I disregard the WILL of the deceased dated 20<sup>th</sup> January, 1983 (Exhibit 1) and hold that as far as possible, the family land registered in his name as land parcel number ABOTHUGUCHI/KITHIRUNE/1363 should be distributed equally among all his sons. He was holding this land in trust for himself and the rest of the family. Although he has now sub-divided the said land secretly and transferred or was in the process of transferring portions thereof to some of his chosen sons, equity will still follow them and hold that they are holding these portions of land as trustees for the other brothers who were not provided for by their father (the 1<sup>st</sup> Defendant)

Doing the best I can in the circumstances of this case, I hold that the 3<sup>rd</sup> Defendant, FREDRICK K. MWORIA who is holding or was given a portion of family land parcel Number ABOTHUGUCHI/KITHIRUNE/1624 measuring 5 acres by the 1<sup>st</sup> Defendant, is holding this land to the extent of 2 acres as a trustee for the 1<sup>st</sup> Plaintiff, DAVID KINUU M'MUGAMBI. The interest of the said FREDRICK K. MWORIA on this land in my Judgement is only limited to 3 acres and he should transfer the 2 acres thereof to DAVID KINUU M'MUGAMBI.

Similarly, I hold that GEOFFREY MUGAMBI who is holding or was given a portion of the family land, parcel Number ABOTHUGUCHI/KITHIRUNE/625 measuring 5 acres holds this land to the extent of 2 acres as a trustee of 2<sup>nd</sup> Plaintiff, JOSEPH MEEME MUGAMBI. His interest in this land in my Judgement is limited to only 3 acres and he should transfer 2 acres thereof to JOSEPH MEEME MUGAMBI.

I further hold and declare that the 1<sup>st</sup> Defendant, M'MUGAMBI M'IMANYARA (now deceased), who held the portion of the family land, parcel Number ABOTHUGUCHI/ KITHIRUNE/1627, measuring approximately 3 acres in his name, holds the said parcel of land as a trustee for each of his sons, JULIUS KIMAITA and NUTHURI MUGAMBI (3<sup>rd</sup> & 4<sup>th</sup> Plaintiffs) to the extent of 1½ acres for each of them. This parcel of land shall be sub-divided into two portions of 1½ each and transferred to each of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.

Each of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are ordered to sign all necessary documents of transfer to confer title to the 2 acres of land awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in respect of the portions of the land they are holding. Should they or any of them refuse to do so, which I do not think is likely to happen, then I empower and authorize the Executive Officer of this Court to sign all such documents on their behalf and also on behalf of the 1<sup>st</sup> Defendant (now deceased).

For the avoidance of doubt, I state that land parcel Number ABOTHUGUCHI /KITHIRUNE/1626 measuring 5 acres which was given to RICHARD M'MUGAMBI, is not affected by this Judgement as he was never a part to this suit and the said portion of land was not one of the parcels of land upon which the plaintiffs' prayer was based.

The Plaintiffs will have their costs of this suit against the Defendants.

Order accordingly.

**DATED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF AUGUST, 1989.**

**S.O.OGUK**

**A.G JUDGE**