REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2306 OF 1980

SAMUEL KARIUKI MWANGI & ANOTHER.....PLAINTIFF

VERSUS

NJURU MWANGI.....DEFENDANT

JUDGMENT

The two plaintiffs and the defendant (I will call them Samuel, Kariuki and Njuru respectively) are half brothers. All have a common father, Mwangi s/o Irungu. All have different mothers, in that the mother of each of them is/was one of the three wives of Mwangi s/o Irungu.

Mwangi s/o Irungu had two separate plots of Land at Karuri Sub-location in Ngenda location of Kiambu district before the 1957 demarcation of plots. These are referred to as parcel numbers 350 and 671. Exhibit 4 shows parcel 671. Parcel 671 is the parcel which the parties have been litigating about since 1980.

At the time of Land Adjudication (demarcation) in 1957 Mwangi Irungu kept parcel number 350 in his own name. He appeared before the land adjudication committee and asked the committee to register parcel number 671 in the name of the defendant Njuru who was then probably about 8 years of age.

Exhibit 1 was produced before me by consent of all parties. So was Exhibit 2. Exhibit 1 (which quite clearly appears to me to be a well won and well thumbed document shows that parcel No 671 was to have Njuru's name as "private rightholder". There are remarks on Exhibit one which tend to show that "it (parcel 671) belongs to Njuru Mwangi, Kariuki Mwangi (A) and Kariuki Mwangi 'B' that is Njuru, Samuel and Kariuki, on the three parties to this suit. Samuel has testified before me. He said that parcel No 671 was given to all three parties to this suit, but registered in the name of Njuru. This was so, he said, as his father Mwangi did not want his other older sons to grab the land from Njuru who was then very young boy. Njuru was not present of course (being only 8 years then) before the land adjudication committee PW 3, Wallace Waweru Thuku, who was the chairman of the said committee substantially confirms what Samuel said.

I see no reason to believe that Wallace Waweru Thuku has anything to gain or lose by testifying in support of Samuel. I believe his evidence to be true and creditworthy. His demeanour impressed me.

Mr Gachomba for Njuru has suggested the parcel could or should have been registered in the names of all or the eldest sons in each household; this, he says, being a normal Kikuyu way. It may be so but I have no reason whatsoever to doubt what PW 3 and PW 1 said. I believe both of them. Exhibit one reinforces this version. It is signed by two of the parties to this suit, the chairman of the committee (PW 3), the demarcation officer and the interpreter (PW 4) Benson Kamau Munyambo. A suggestion was made that Exhibit one was a forgery of some sort. I cannot so find, to the contrary, I am satisfied that it is a genuine

document. In any event there is no evidence to prove any alleged forgery.

On the other hand Njuru says that his father told him in 1960 that the suit land was Njuru's only to pay for the dowry that Njuru would have to pay for his wife to be. He married in 1966. From 1960 to 1980 (that is for over 20 years) all three parties to this suit were in possession of the suit land and were cultivating the suit land, each in his own part, each for himself. This fact is not in dispute. To say the least, since Njuru became an adult all parties to this suit cultivated their own portions of the suit land peacefully for at least 14 years when Njuru in 1980 asked Samuel and Kariuki to quit.

Exhibit 2 shows that parcel No 676 belongs wholly to Njuru. This exhibit is incomplete. There is however no dispute that parcel No 676 is the same as parcel No 671 (original). Exhibit 3 also shows that Njuru is the registered proprietor of this parcel. It is acknowledged by Njuru that 1000 coffee trees planted by him before eviction of the plaintiffs from the suit land were planted on his real mother's side of the suit land. He planted more coffee trees, it appears, after 1980 when he obtained possession of the whole of the suit land.

I am not prepared to accept that Njuru's father would have told Njuru that the whole suit land was Njuru's to cover the payment of dowry. I see no reason why a father would discuss dowry issue with a 15 year old son. The father did not or could not have expected to die in 1963 although it so happened. I find this is too far fetched and is invented by Njuru to justify his claim to the whole of suit land. I have kept in mind the fact that Njuru is entitled to inherit his deceased father's other piece of land although he is now disclaiming this right.

In the result I am satisfied that the original intention of Mwangi s/o Irungu was that all three sons of his (from different wives) were to hold the land in equal shares. There never was a change in this intention. It must have been so.

Mr Gachomba has conceded that Kikuyu customary law recognises the law of trusts and so does Registered Land Act, under which the suit land falls. Mr Gachomba quoted an unreported judgment of Muli J (HCCC No 1400 of 1973) in support of his concession. Muli J said at page 59 of the judgment in that suit:

> "I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intention of the parties that there would be such a trust which under Kikuyu customary law is common. Registrations of titles are creation of the law and one must look into the considerations surrounding the registration of the titles to determine as to whether a trust was envisaged."

With respect I agree entirely with what Muli J said and in this suit I have come to the conclusion that the suit land was meant to be owned by the three sons (parties to this suit) of Mwangi s/o Irungu in equal shares.

Section 28 of the Registered Land Act (The Act) provides that the rights of a proprietor, whether acquired first on registration or whether acquired subsequently for valuable consideration, shall be rights not liable to be defeated <u>except as provided in the Act,</u> (underlining mine) and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject, unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are deceased by section 30 of the Act not to require noting in the register. Section 30(g) of the Act reads:

> "30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following avoiding interests as may for the time being subject and affect the same, without their being noted on the register.
>
> (g) The rights of a person in the possession on actual occupation of land to which he is entitled in right only of such possession or occupation save where enquiry is made and the

rights are not disclosed."

The said land was therefore subject to the avoiding intention of the plaintiff as person in possession and occupation (both) what I have said is from the decision of our Court of Appeal in CA No 42 of 1978, a unanimous judgment of Madan, Law and Potter JJA.

In my judgment therefore the avoiding interests of the plaintiff arising from actual occupation without legal title are equitable rights which are binding on the land and therefore on Njuru the defendant. I therefore find that when the suit land was registered in Njuru's name it was subject to the plaintiffs, existing rights as already found by me.

In *Jandu v Kirpal* [1975] EA page 226 it was held by late Chanan Singh J that registration shall be set aside on a knowledge of the existence of an unregistered interest and a defeat of that interest by registration – see fourth holding at page 226. I have already found here that at least since the defendant became of age he was aware of the fact that (at least) the plaintiffs were cultivating (in occupation) their own portions of suit land until 1980.

The creation of a trust over agricultural land in a land control area (which the suit land is) does not constitute an "other disposal on dealing" for the purposes of section 6(1)(a) of the Land Control Act (cap 302) and therefore does not require the consent of the local land board; and in the absence of any reference to the trust in the instruments of acquisition of land does not affect the enforceability of the trust as the provisions of section 126 (1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. This was held in *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 by Madan J (as he then was). I agree with that.

I turn now to the issue of adverse possession. It is true that if the plaintiffs were in possession with the consent of the defendant there is no adverse possession. In this case the defendant says that he knew in 1960 that the land was "entirely his". That is what, he says, his father told him. If such is the case, his having not denounced in the occupation (possession) of the suit land by the plaintiffs, puts the plaintiffs in adverse possession – adverse to the alleged right of the defendant. The defendant says that he evicted the plaintiffs from the suit land as the land was entirely his. So the defendant was aware at least from 1966 (if not from 1960) that the plaintiffs were in possession adverse to the defendant's rights.

I therefore find that the plaintiffs were in adverse possession of the suit land for a period exceeding 12 years when they were evicted.

I must mention here that I do not believe the defendant when he says that the magistrate in an alleged malicious damage suit ordered the plaintiffs to vacate the suit land. The magistrate could not have so ordered as that matter was not or could not be in issue. Even if the magistrate so ordered that order cannot be based on any facts which have been put before me.

I must also mention that I do not believe that the defendant was in occupation of a bigger part of suit land than that of the plaintiffs. I believe the plaintiffs when they say that all brothers were in occupation of equal portions of suit land. I think the sketch drawn by the defendant (Ex 1) in court was made up to suit the defendant.

Reverting the issue of adverse possession I refer once again to the case of *Gatimu Kinguru vs Muya Gathangi* [1976] KLR p 253 consent of the land control board is not necessary for rights acquired under section 7 of Limitations of Actions Act.

I am not overlooking the fact that the suit land was to really belong to all six sons of Mwangi s/o Irungu. I will revert to this in the cause of the actual orders that I will make.

I have felt considerable anxiety over the progress of this suit. It was filed on August 19, 1980. It was referred to the arbitration of the elders. The award was set aside by Mbaluto J on April 28, 1986. For nearly six years the parties were not sure of their position. It is an unfortunate state of affairs. I heard this

case pursuant to provision in order XLV rule 15(2) of Civil Procedure Rules. Cases of this nature, I believe, must be heard as quickly as possible by any forum, as provided by law, or as agreed by parties. I would venture to suggest that land cases must get a better priority than even accident injury cases. Land is an extremely important aspect of the lives of the ordinary people. They must be heard as soon as possible.

I make the following orders:

a)A declaration that the defendant holds land reference number Ngenda/Karuri 676 in trust for the following persons in equal shares:

1a Samuel Kariuki Mwangi

1b Simon Ndungu s/o Mwangi

2a Kariuki Mwangi (A) – the second plaintiff

2b Benard Kiburu Mwangi – the second plaintiff's full brother

3a Francis Njuru Mwangi (the defendant)

3b John Kariuki Mwangi

b) A declaration that the defendant holds Land Reference number Ngenda/Karuri 676 in trust for himself and all five other persons named in orde(a) above as tenants in common in equal shares and that the names of the said five persons shall be entered in the register accordingly.

c)A declaration that the five persons named in order (a) above have acquired by adverse possession an absolute title to the portion of Land Reference number Ngenda/ Karuri 676 in equal shares with the defendant

d)A declaration that all five persons named in order (a) above are entitled to be registered as proprietors of their respective portions of suit land in place of the defendant who shall exercise a valid transfer or assignment in their favour free from encumbrances.

e)Liberty to apply to any party at any time to give effect to the above orders.

f)If any of the persons named in order (a) above wish to relinquish their rights, they may apply for recording such orders.

g)The defendant to pay the plaintiffs costs of the suit.

I have, in making the above orders, borne in mind what the parties said about their real brothers' rights in respect of the suit land and I have also borne in mind the fact that it is my duty to bring any further litigation on suit land by sons of Mwangi Irungu who are not parties to the suit but whose interests are admittedly conceded by the parties to this suit.

I am obliged to both counsel for their cooperation and courtesy to court.

Dated and Delivered in Nairobi this 18th day of December 1986

A.B.SHAH

JUDGE