



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 398 OF 2011**

**ELLEN WANGARI MBURU.....PLAINTIFF**

**VERSUS**

**PATRICK KINUTHIA KIIGA.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff is the administratrix of her late husband John Mburu Kiiga (Deceased) who was an elder brother to the Defendant. The Plaintiff was married to the deceased in 1963 and they settled on LR No. Ndarugu/Gakoe/344 (suit property). The deceased died in 1969 and left the Plaintiff on the suit property where she has settled to date.
2. The father to the deceased and the Defendant was called Kiiga Mutichui (Kiiga) who died in 1977 and was buried on the suit property as was his late wife. Before Kiiga died, he showed the Plaintiff her portion on the suit property and he too showed the Defendant his portion. The suit property is about eleven (11) acres.
3. There arose a dispute over the suit property between the Plaintiff and the Defendant. The Defendant claimed that he had purchased nine (9) acres from Maina Manyeki alias Kimani Muigai (Muigai) and that Muigai added him two (2) acres as an appreciation for Kiiga taking good care of the suit property.
4. The Plaintiff filed a dispute before the Gatundu North Land Disputes Tribunal Vide Case No 6 of 2004. The Tribunal ruled that the Defendant was to give 4 acres to the Plaintiff. The Defendant was aggrieved with the decision of the Tribunal. He appealed to the Provincial Land Disputes Appeal Tribunal which upheld the Tribunal decision. The Defendant appealed against the Provincial Appeals Tribunal to the High Court which overturned the Provincial Appeals Tribunal decision on grounds of lack of jurisdiction on the part of the Tribunal to entertain disputes touching land with a title.
5. In or around October 2011, the Plaintiff got wind that the Defendant had applied to the Kamwangi Land Control Board for the subdivision of the suit property into two portions. The Plaintiff had filed a suit against the Defendant on 8<sup>th</sup> August 2011, in which she sought a declaration that the Defendant held title to the suit property for himself and her in equal shares.
6. The Plaintiff moved back to Court on 1<sup>st</sup> December, 2011 and filed an application seeking an injunction to restrain the Defendant from interfering with the suit property. The Court in a ruling delivered on 22<sup>nd</sup> May, 2012 granted the injunction preserving the suit property until hearing and determination of the suit.

**Plaintiff's case**

7. The Plaintiff's case is that during the process of land demarcation in the late 50's no one individual was allowed to have two parcels of land registered in his name. Due to this, her father-in-law Kiiga reached an understanding with Muigai that Muigai was to be registered as owner of the suit property on condition that Kiiga was to occupy the land and Muigai was to be paid some money for transfer of the land back to Kiiga.
8. As per the understanding between Muigai and Kiiga, Muigai was registered as owner of the suit property but Kiiga is the one who settled on the suit property with his family. Kiiga then instructed the Defendant to sell the animals which were on the suit property including the wattle trees to pay Muigai for transfer of the suit property back to his family. Kiiga died in 1975 and was buried on the suit property.
9. Muigai processed title in his name on 6<sup>th</sup> June, 1980. He however died on 24<sup>th</sup> June, 1993 before he could transfer the land back to the

family of Kiiga. The Defendant together with the family of Muigai carried out succession in respect of his estate and had the suit property transferred to the name of the Defendant. It is the Plaintiff's contention that the Defendant should have registered the land in equal portions for her and the Defendant respectively.

10. The Plaintiff testified that when she was married by the deceased and settled on the suit property, the Defendant was still a school going young boy. The Plaintiff called PW2 Godfrey Mwangi Mwaura who was 84 years old as at the time he testified in 2017. He stated that he was an agemate of the deceased who married the Plaintiff in 1963. As the deceased predeceased his father Kiiga, Kiiga showed the Plaintiff the portion where she was to cultivate on the suit property. The Defendant was also shown his portion. The Plaintiff planted tea bushes, coffee and bananas and that her houses and those of his children are on the suit property. He denied the Defendant's claim that he is the one who purchased the suit property. He further stated that the Kiiga family moved from Gituamba to Gakoe where they settled during the process of land demarcation. He stated that he knew the Kiiga family well as his aunt is married in the Kiiga family.

#### **Defendant's case**

11. The Defendant's case is that the suit property belongs to him. He states that he began paying for the suit property in 1977 and it took him nine (9) years to complete paying for it. He stated that he paid a total of Kshs.45,000/= to Muigai. Muigai died before he could transfer the suit property to him. He stated that it is Muigai's son who transferred the suit property to him after the process of succession. He denied that he is holding the suit property in trust for the Plaintiff. He further stated that during the sale, one of Muigai's sons the late Peter Ndung'u Kimani was his witness.

12. The Defendant called DW2 Stephen Kariuki Kuria who testified that during the sale between the Defendant and Muigai, he is the one who used to carry money for the Defendant. He stated that during the first payment, he carried Kshs.10,000/= in cash on behalf of the Defendant. He denied that the suit property was an inheritance from the Defendant's father.

13. The Defendant also called his sister DW3 Elizabeth Muthoni who also stated that the Defendant bought the suit property and that the same was not an inheritance from their father.

#### **Analysis and issues for determination**

14. I have carefully considered the evidence adduced by the Plaintiff as well as the evidence of the Defendant. I have also considered the submissions by the parties which are mainly a recap of the evidence adduced. There are two issues which emerge for determination. The first issue is whether the Plaintiff purchased the suit property from Muigai. The second one is whether the Plaintiff has established that the Defendant holds the suit property in trust for himself and for Plaintiff in equal shares.

15. On the first issue, there is no credible evidence that the Defendant purchased the nine (9) acres he claims to have purchased. The Plaintiff had intended to rely on a sale agreement which was not in the language of the Court but during the hearing, he expressly stated that he was not producing it as an exhibit because it had not been translated into English. While being cross-examined by the Plaintiff's Advocate he again reiterated the reason why he did not produce it but said that he was not aware that translation of a document not in the language of the Court was a requirement of the law.

16. As far back as 22<sup>nd</sup> May 2012, the Court had pointed out that the agreement which the Defendant had annexed to his replying affidavit to the application for injunction by the Plaintiff was not in the language of the Court. The Defendant did not bother to make a translation and prepare a certificate as required by the law. The only evidence left is his word and those of his witnesses whose evidence regarding the alleged sale was severely dented during cross-examination.

17. Though the Defendant claimed that the suit property was transferred to him through the process of succession, the affidavits which he swore indicate that he was presented as one of the heirs of the estate of Muigai and there is nowhere it was mentioned that he was included as a purchaser. During cross-examination, he denounced all the affidavits which he swore including a letter from a chief who introduced him as one of the heirs to the estate of Muigai. This being the case, there is no evidence left upon which a finding can be made that he purchased the suit property. I therefore find that there was no purchase of the suit property by the Defendant from Muigai.

18. On the second issue, the law is clear that the issue of trust is a matter of evidence. The Plaintiff's evidence has been consistent as can be seen from the proceedings of the Land Disputes Tribunal where she gave the history of how the Kiiga family came to settle on the suit property. Evidence from PW2 is clear that the Kiiga family moved from Gituamba and settled at Gakoe. This evidence fits well in the evidence of the Plaintiff that Muigai had been asked to be registered as owner of the suit property so that Kiiga could beat the requirement that no one individual could have two parcels registered in his name. Demarcation in the area where the suit property is situated started in the 50's.

19. When the Plaintiff was married in 1963, she found the Kiiga family on the suit property. By then the Defendant was a school going boy. If the suit property was meant to be Muigai's there is no way he would have allowed Kiiga to remain on the same for decades before he could start selling it in 1977. The family of Muigai was aware about the arrangement between Muigai and Kiiga that is why the family transferred the land to the Defendant in fulfilment of the understanding.

20. During cross-examination, DW2 confirmed that Kiiga was buried on the suit property. Kiiga died in 1975. If the land was not his, I do not think that Muigai would have allowed him to be buried there. DW2 also confirmed that Kiiga who was his father as well as her mother were buried on the suit property. Kiiga died in 1975 and his wife died in 2000.

21. The Defendant and her sister wanted the Court to believe that Kiiga's portion was only two acres. These are the acres which the Defendant claimed were given as a token to the Kiiga family for taking good care of the suit property. The question one would ask is why did the Defendant have to include this in the nine acres which he claims he purchased?

22. When the Plaintiff filed this suit against the Defendant, the Defendant moved to have the suit property subdivided into two unequal portions. This was however stopped by the Court granting a conservatory injunction. The Plaintiff has been cultivating on the suit property for now over five decades. It is beyond comprehension why one would want to evict her now. There are only two sons of Kiiga. One and perhaps the only sister came to Court and expressly stated that she has no interest in the suit property.

23. Kiiga had two sons, that is the deceased and the Defendant. The deceased left behind the widow who is the Plaintiff. The Plaintiff has known no other home other than the suit property. Even if the title to the suit property is in the name of the Defendant that does not entitle him to decide on what portion to give the Plaintiff. The Defendant' is on record as having said that he had intended to give the Plaintiff two acres but that since she has sued him he is contemplating giving her one acre or nothing.

24. In the case of **Mbui Vs Mbui [2005]IEA** the Court of Appeal had this to say on overriding interest as regards occupation and cultivation

***“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.***

***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.”***

### **Conclusion**

25. Following the decision in the Mbui case (supra) and taking into account that the Plaintiff has been cultivating the suit property for 56 years now, I find that the Plaintiff's evidence has established a strong case for declaration of trust. I find that the Plaintiff has proved her case on balance of probabilities. I therefore grant prayers 1, 2, 3, 4, and 5 of the plaint filed in Court on 8<sup>th</sup> August, 2011.

Dated, Signed and delivered at **Nairobi** on this 27<sup>th</sup> day of **August, 2019**.

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Mogi Koyi for Plaintiff and Mr Ng'ang'a for Mr Kariuki for defendant

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**