



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO 14 OF 2017**

**(FORMERLY NAKURU ELC 102 OF 2012)**

**ELIJAH KOGI GICHAGA.....1<sup>st</sup> PLAINTIFF**

**LABAN MWANGI GICHAGA.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**SAMUEL MUNYUA GICHAGA.....DEFENDANT**

**JUDGEMENT**

1. The Defendant in this case was the Plaintiff in the in Nakuru High Court Civil suit No. 87 of 2009 who had filed suit against the Plaintiffs who were the Defendants then and who had filed their counter claim to the suit.
2. In yet another matter filed at the Nakuru HCCC No. 75 of 2009, one Martha Achieng Odhiambo and Luke Komondi Oreti had filed suit against Elijah Kogi Gichana and Laban Mwangi Gichaga. The two files were consolidated on the 23<sup>rd</sup> January 2012 wherein Nakuru HCCC No 87 of 2009 became the lead file. The matter was then certified ready for hearing on the 8<sup>th</sup> July 2015.
3. Subsequently, it was transferred to this court upon it establishment wherein it was registered with the present number.
4. The Plaintiffs' case was adduced by the 2<sup>nd</sup> Plaintiff herein who testified that all the parties herein were brothers. That their late father had bought land No. 60 Ngorika in 1964 wherein he had settled thereon in the year 1965 with his family, who included his two wives and their children.
5. That later his step mother, who was the elder wife, and her children had moved to Kinangop on a land that was registered in the name of his step brother Meshack Watira Gichaga who was to hold the farm in trust for the other siblings.
6. That the land in Ngorika being plot No. 60 on the other hand was registered in the Defendant's name to hold it in trust for the family.
7. The Plaintiff testified that the suit land had been bought partly with cash and partly on loan wherein they had been given one grade cow. That he did not go to school because he used to help on the farm by taking pyrethrum to the factory so as to offset the loan with the proceeds from the pyrethrum.
8. That their father had died in the year 1972 and was buried in Kinangop. Their mother had also died in 1997 and had been buried in Kinangop too.
9. That following the death of their father, they had initially lived in harmony on the suit land together with Samuel Elijah, Laban and their families as well as Hannah
10. That in the year 1985, they had temporary subdivided the land amongst themselves and had put a fence around it. However, sometime in the year 1986, they had been informed by a Good Samaritan that the Defendant had sold the 1<sup>st</sup> Plaintiff's portion of land measuring 8 acres. They had however come to learn about the transaction in the year 1988 after being summoned by the Chief at Ngorika who informed him, that Defendant had sold 8 acres of their land to one David Maina Gathoga. At the time, he was in the company of his mother and the 1<sup>st</sup> Plaintiff. The Chief had then advised them to report the matter to the District officer because at the time, they were still servicing the loan on Plot No. 60 and they stood to lose it to the Government through repossession if they stopped servicing the loan.
11. That he and the 1<sup>st</sup> Plaintiff had gone to the District Officer's office at Olkalou wherein an officer Known as Wangenya had confirmed to them that indeed the land had been sold. They proceeded to report to the District Commissioner who sent them to the Land Registrar.

12. That later, he had been issued with a Notice dated the 15<sup>th</sup> April 1991 to vacate the land, wherein he had refused to acknowledge it. He was arrested and taken to the District Officer who had informed him that he was on somebody's land. That he had then been escorted back to his house where he watched as the same was demolished and his farm implements and house goods destroyed.
13. That he had then gone to report the matter to the Provincial Commissioner at Nyeri who had written a letter dated the 15<sup>th</sup> April 1991, which letter he produced as Pf exh 1.
14. The 2<sup>nd</sup> Plaintiff testified that the Defendant had sold the land to David Maina Gathoga, who in turn sold part of it to John Adhiambo Akuru for Ksh 36,000/= vide an agreement dated the 14<sup>th</sup> December 1988 herein produced as Pf exh 2.
15. It was his evidence that when he had gone to conduct a search at the Land's registry, he had discovered that plot No. 60 Ngorika had been sub divided into parcels No. 346 and 347 which parcels of land had been registered in the Defendants name. That he had subsequently placed a caution on the land. He produced the green card for plot No. 346 and 347 which were opened on the 21<sup>st</sup> November 1988 as Pf exh No. 3(a) and (b) respectively.
16. That they had gone before a tribunal wherein the elders vide their verdict had advised that since they had another piece of land in Naivasha, that they should move there.
17. That upon the conclusion of the tribunal hearing in 1989, the Plaintiffs being dissatisfied with the elders award, appealed against the said award at the Nakuru High Court, vide Civil Suit No. 883 of 1990 dated the 30<sup>th</sup> January 1990, herein produced as Pf exh 4, where an injunction had been issued against the Defendant vide an order dated the 13<sup>th</sup> May 2008, herein produced as Pf exh 5.
18. That pursuant to the issuance of the order, he had moved back on the suit land and rebuilt his house but they did not live in peace because they had been arrested on several occasions at the instigation of John Adhiambo Akuru who wanted them out of the land so that he could sell it to one Patrick Mbugua. That thereafter, many false charges had been leveled against them both (Plaintiffs) which charges had been dismissed by the court upon finding that they were trumped up charges.
19. He produced the mutation form which had been signed by a Mr. Munyao and dated the 15<sup>th</sup> November 1988, as Pf exh 6. He also produced the judgment in Nakuru Cr case No. 15 of 2010 as Pf exh 7.
20. That the appeal they had lodged was heard in Civil Appeal No 78 of 1990 wherein the court's judgment, herein produced as Pf exh 8, was to the effect that the award by the elders be set aside.
21. He also produced the cautions that they had placed on the suit land No. 346 and 346 as Pf exh 9 (a) and (b) and a bundle of cash bail receipts as Pf exh 10.
22. His further evidence was that John Adhiambo Akuru finally sold the land to Patrick Mbugua Njuguna who embarked on farming thereon and that at the time he was testifying, nobody was living there.
23. He testified that although Elijah and Samuel lived on their own pieces of land, he had tried many times to settle the matter with the Defendant to no avail. That further, the last search he had conducted on the suit lands was on the 23<sup>rd</sup> February 2017, as evidenced in Pf exh 11, wherein he had been confirmed that the cautions were still in place and the land was still registered in the name of the Defendant.
24. On cross examination, he confirmed that he did not have any written document to show the land was held in trust, but that they had been informed by their mother of the same. That the decision to register the Defendant in the year 1964 on the suit land was in accordance to the Kikuyu elders' advice. Because at the time, parcels of land were registered in the elders son's name.
25. He also confirmed that they used to take the milk and pyrethrum to the points as a family, whereby the produce would be sold and the money used to offset the loan for the suit land. That further there was no land in Naivasha as was alluded to by the elders during the dispute before the tribunal. That at the moment, he was living on a 50 X100 piece of land in pipeline which the church had bought for him.
26. He also confirmed that the suit land was balloted for by Meshack their brother at the behest of their father.
27. The 1<sup>st</sup> Plaintiff testified as PW2 confirming the testimony of the PW1 wherein he added that upon his father taking possession of the suit land, which he had bought partly with the proceeds of the sale of a parcel of land in Muranga being No. location 9/Kanyenyaini/1020, to Mr. Burugu Nduati, he had built houses for his two wives and a house for Defendant as well as the Plaintiffs. That their elder step brother Meshack was given land in Gaita and later their step mother and father had moved to Gaita whereas his mother and her children had remained in Ngorika.
28. He confirmed that they had offset the loan through the proceeds of the farm produce like milk, pyrethrum and maize. That it had been Meshack his step brother who had been sent to go and conduct the transaction to sell the land in Muranga.
29. He also testified that the land in Ngorika was 23 acres and that in 1986, when the Respondent started disturbing the family for reasons that he wanted sell the land, they had subdivided it into 3 portions amongst themselves where everyone got 8 acres. That was when the Defendant sold the 2<sup>nd</sup> Plaintiff's piece of land. He also confirmed that they came to know about the sale agreement in 1986 when they were summoned by the chief on 7<sup>th</sup> March 1988 vide a letter herein produced as Pf exh 12 where they were asked to vacate the land because the Defendant had already sold 5 acres vide a sale agreement Pf exh 13. He also produced the letter addressed to the Deputy Registrar dated 27<sup>th</sup>

August 2003 as PF Exhibit 14 and confirmed that the suit filed in Nakuru HCCC No. 883 of 1989 had not been concluded to date.

30. He further testified that the Defendant had also threatened to evict him from his part of the suit land but at the moment, he still lived on his 8 acres of land wherein the Defendant occupied his side of the land but the 2<sup>nd</sup> Plaintiff had been evicted from his share of land vide an order from the court. John Adhiambo also lived on another side of the land.

31. He produced the certificate of outright purchase registered to the Defendant's name as well as the offer and acceptance letter as PF exh 15(a) and (b). He also produced an application of consent from the land control board and a Letter of consent dated 18<sup>th</sup> March 1986 as PF exh 16 (a – c) all these documents were in the Defendant's name.

32. He also confirmed that they had used the produce from the farm repay the loan of the suit land wherein the last payment was Ksh 15,700/= as per the statement of 1985 herein produced as Pf exhibit 17. He was firm that he had lived on the land for 54 years, land which belonged to their father and which land the Defendant had held it in trust for the family.

33. PW3, PW4 PW5 also confirmed that the suit land had belonged to the parties' father but the same had been registered to the Defendant because he was the eldest son, to hold in trust for the others. They also confirmed that trouble started when the Defendant sold the 2<sup>nd</sup> Plaintiff's share.

34. PW 6 the Land Registrar, Nyandarua and Samburu counties testified confirming that the green cards for parcel No. 346 and No. 347 were indeed subdivisions of parcel No. 60 which was first registered to the Settlement Fund Trustee on the 7<sup>th</sup> June 1988 wherein on 8<sup>th</sup> November 1988 the parcel of land was discharged and transferred to Munyua Gichaga of identity card No. 8286062/70. That the consideration of discharge was ksh 5,300/= paid to Settlement Fund Trustee.

35. That on the 21<sup>st</sup> November 1988, the parcel of land was subdivided into No. 346 and 347 after which No. 346 was opened on the 21<sup>st</sup> November 1988 in the name of Munyua Gichaga and title deed issued on 18<sup>th</sup> January 1989. The said parcel of land was then placed under caution on 25<sup>th</sup> June 1990 by Laban Mwangi Gichaga claiming beneficiary interest.

36. That on the 15<sup>th</sup> May 2008, a prohibitory order in suit No. 883 of 1989 in CM's Court Nyahururu was registered. On the 22<sup>nd</sup> December 2016, another caution on the same parcel of land was registered by one Laban Mwangi Gichaga of Id No 1106355 claiming beneficiary interest, which prohibition was still in place.

37. That in regard to parcel No. 347 which was also a sub division of No. 60. The same measured approximately 5 acres and was registered on 21<sup>st</sup> November 1998 in the name of Munyua Gichaga wherein on the 25<sup>th</sup> June 1990, a caution by Laban Mwangi Gichaga was placed/registered claiming beneficiary interest. On 13<sup>th</sup> February 1990, the said caution was withdrawn under Section 133 (l) of the Registered Land Act. On the 13<sup>th</sup> February 1991, the parcel of land was transferred to one James Odhiambo Akuku of identity card no 4439755/67 for consideration of ksh 96,000/= wherein a title deed was issued to John Odhiambo Akuku on the same date. That on 15<sup>th</sup> May 2008, a prohibitory order in relation to suit No. 883/1989 in the CM's court Nakuru was registered. On the 3<sup>rd</sup> April 2012, this prohibitory order was removed vide succession cause No. 1056 of 1997. On the 5<sup>th</sup> April 2012, the parcel of land was transmitted to Martha Achieng Odhiambo and Patrick Mbugua Njuguna and the title was issued to the two on the same day. On the 22<sup>nd</sup> December 2016 a caution by Laban Mwangi Gichaga claiming beneficiary interest was registered.

i. The land Registrar produced the copies of the green cards to parcel No. 60 as Pf exh 18.

ii. Green Card for No. 346 as Pf exh 19

iii. Green card for No. 347 as Pf exh 20

38. When he was referred to Pf exh 20 on entry No 2, he could not confirm how the caution by Laban Gichaga claiming beneficiary interest, was removed. On entry No. 6, he confirmed that the same was removed via a succession cause although he did not find the copies of the said orders. That the conclusion of case No 883 of 1989 was not registered as the results were probably not forwarded to the Registrar. He further testified that if entry No. 2 was not properly removed from the land registrar's end, then he sought for the copy of the order of succession cause No. 1056 of 1997 which informed the removal of the caution, but as it stood, if Laban was not a party to the succession Cause, the rest of the entry would be illegal in the circumstances.

39. He confirmed in cross examination that other than Munyao Gichaga (the Defendant) who was the initial owner, there was no other person registered until the others came in. That further if the property had been held in trust, the entry would have indicated the same as it ought to have been express. There was no such entry. That in regard to parcel No.346, the same was still intact.

40. In re-examination, he testified that not all trusts were necessarily registerable. That once in a while the court order would state that the property was held in trust for other family members.

41. Upon the closure of the Plaintiff's case, Counsel submitted that he wished to amend their counter claim to seek a declaration that the Plaintiff/Defendant held title No Ngorika 60 in trust for himself and Defendants/now Plaintiffs. There being no objection the amendment was adopted as sought.

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

42. The Defendant's case while relying on his filed statement, was that he used to work for a white man from the year 1958 to 1965. That in 1965, it had been decided that anybody who had an identity card was to be allotted the white settler's land within Ngorika through the ballot system and since he had an identity card, he was given the suit land, 1 cow and a calf by the District officer called Muchiri. Later they had been registered and shown their respective parcels of land which was about 23 acres, where he had started planting/ploughing on the land from 1966 together with his parents, at that time, his brothers the Plaintiffs herein were about 5 years old.

43. He confirmed having sold the land so that he could repay the loan after which he had been given the title which he gave to the person he had sold the land to. (The Court notes that the witness stammered and had difficulty in talking as he testified) He produced the Original Title to parcel No.346 wherein after the court having compared it to its copy, returned the original to the witness for safe keeping and marked the copy of title to No. 346 as Df exhibit 1.

44. He proceeded to testify that he had repaid the loan with a lot of difficulties and produced receipts to show the payments of the loan and rates for the council, as follows:

- i. Receipts dated 24<sup>th</sup> July 1986 for ksh 15,700 DF exhibit 2(a)
- ii. Receipt dated 18<sup>th</sup> January 2005 for ksh 40/- DF exhibit 2(b)
- iii. Receipt date 24<sup>th</sup> July 1986 for ksh 1,190.40/= DF Exhibit 2(c)
- iv. Receipt dated 12<sup>th</sup> April 1994 for kshs 300/= DF Exhibit 2(d)
- v. Receipt dated 23<sup>rd</sup> July 1966 for ksh 629/= Df exhibit 2 (e)

45. He conceded to having sold the 5 acres of land so that he could pay the loan which he had completed at that time. He confirmed that his elder brother Meshack was also allotted land in Olkalou at Bushi Geita, land where his father was buried.

46. He also confirmed that indeed his father had land in Muranga measuring about  $\frac{3}{4}$  acres, but by the time he got the suit land, the land in Muranga had been disposed and he did not know anything else about it.

47. He further testified that by the time his brothers were born, he was already working for the white man and that it was not true that he had held the land in trust for his family. That it was unfortunate that all the witnesses he would have called to testify with whom he worked with for the white man were all dead.

48. That after their parents died, his bothers had started causing the problems for him where at one time, the 2<sup>nd</sup> Plaintiff burnt his house, while the 1<sup>st</sup> Plaintiff hit him with a panga.

49. That the search certificate dated the 25<sup>th</sup> January 2013, herein produced as Df exh 4 was proof enough that the land was his. He sought for eviction orders against the Plaintiffs whom he said he had allowed to live on his land but who had turned hostile towards him.

50. He testified that after he had sold the 5 acres of land, he had bought for the 1<sup>st</sup> Plaintiff another land in Naivasha which he had showed him but which the 1<sup>st</sup> Plaintiff had sold after the post-election violence. He testified that he had bought the land in Naivasha so that the Plaintiffs could leave his land.

51. On cross examination he clarified that he was born in 1942 in Muranga. That his mother was married as a second wife when she already had him. That he had come to Nyandarua-Ngorika in 1952 with two other boys wherein he was employed for a white settler. That his step brother Meshack was older than him. At the time his father used to take care of animals while he lived with and worked for the white man called Gateru. That the parcels of land were given only to people who used to work for the white man.

52. That when they were given land, they used to pay Ksh 60/- .At the time he used to earn a salary of Ksh 30/= per month which money they utilized at home because all his family members depended on it.

53. That when they were given the land, the surveyor had employed him and others to carry logs for marking the boundaries wherein he was paid Ksh 60/= as a casual laborer. At that time the white man had already left in the year 1965. The subdivision was done in 1964 and the land was issued in 1965 at a consideration of Ksh 70,000/= that the allotment of the land also included a cow and the fencing wire.

54. That his mother and his 1<sup>st</sup> wife had built in the middle of the land where he had shown his father and his wives where to build. That he had also built his house.

55. He further conformed that he had been the one who had educated the Plaintiffs herein who studied up to class 4 and 1 respectively. That as they grew into adults, he had built his house towards the middle of the land, the 1<sup>st</sup> Plaintiff had remained where their mother's house was and ploughs 7 acres by force. That before the 2<sup>nd</sup> Plaintiff left the land, he used to utilize 1 acre

56. He confirmed that at first he had sold land to Maina Gathoga and later to Okuku to offset a loan of Ksh 70,000/=. That initially they had repaid the loan using proceeds from milk and pyrethrum which could barely repay the loan which was the reason why he had decided to sell part of the land to repay the loan Ksh. 70,000/= to Settlement Fund Trustee.

57. When referred to Pf exh 2, the sale agreement between David and the witness, the witness testified that he sold the land for Ksh. 90,000/= to Gathoga who then sold it to Okuku.
58. That he had signed the mutation form/plan of 21<sup>st</sup> November 1988 wherein after, an agricultural officer had conducted the subdivision of the 5 acres of the land and the title to his parcel of land No. 346 was issued on 21<sup>st</sup> November 1988. He refuted the fact that both the Plaintiffs had 8 acres of land each and inquired as to whom had subdivided his land into 3 equal acres.
59. He also denied the fact that in the year 1990, he had a case with his mother. He also stated that Pf exhibit 8 was false and that it was not true that his mother's house had been demolished. He confirmed that he only had one case with the Plaintiffs who had placed a caution on his land to harass him because he was weak.
60. He also confirmed that there was a time when the 1<sup>st</sup> Plaintiff had cut him on his fore head following which he had been sentenced to 3 years imprisonment.
61. He testified that before his father died, he had summoned all of them wherein he had told the Plaintiffs to move to Naivasha to the land he had showed them. That the suit land had been bought as a result of his 10 year sweat working for the white man without his brother's help.
62. DW2 the Defendant's elder brother confirmed that the suit land had been issued to the Defendant by the Government in 1965 after he had balloted for it. That at the time their father was alive and also lived on the land which land had been given to the landless people who worked for the white settlers.
63. That after he had balloted for his own land, he had moved there where his father had joined him and was even buried there. He denied having balloted for the suit land herein and confirmed that although the Plaintiffs were living on the same it was actually the Defendants land.
64. In cross examination and when he had been referred to Pf exh 16(a), he testified that he had been a witness to the transfer. He also testified that although their father took the money in 1965, it was not used to buy the suit land and neither did he use it to buy his land which had been issued freely as he had only paid Ksh 5/= only.
65. He denied any knowledge of Pf exh 16(b) and stated that there was no time they had gone to rectify his father's name in 1996. He confirmed that the land in Muranga was sold for Ksh. 1,850/=. That the Defendant had asked their father for Ksh 160/= for the ballot and that although their father also worked for the white man, he wasn't given land because he had another land.
66. That the Plaintiffs had dropped out of School on their own volition and were working on their mother's land where they used to plant maize, that in fact everybody used to sell their own maize while Pyrethrum used to be sold to the society.
67. Dw 3, a neighbor to the Defendant and a secretary to Ngorika co-operative society from 1966 – 1976 also confirmed that the Defendant got the suit land through balloting. That Farmers used take milk and pyrethrum to the society which used to pay them. That they used to transfer money's from the produce to the Settlement Fund Trustee and the Defendant was one of the farmers who had a loan with Settlement Fund Trustee. That he used to supply milk where they would subtract his money to pay the settlement fund trustee. He also confirmed that the 1<sup>st</sup> Plaintiff and another, now deceased, were aged between 12 – 13 years old and they used to help their brother the Defendant to deposit the produce to the society.
68. On cross examination, he testified that apart for the fact that he was a neighbor to the Defendant, the 2<sup>nd</sup> Plaintiff was his brother in law, having married his sister. He denied ever being a witness to the Plaintiffs in another land matter and stated that they had cordial relationship with the Plaintiffs. He denied having a case involving property of their deceased father with his sister or her children and set the record straight that the case in Nyeri involved his brother and not him. He also denied having refused to be a witness to the Plaintiffs because of the case in Nyeri. He confirmed that the Defendant and the 1<sup>st</sup> Plaintiff live in the same land and that the Plaintiffs had their own piece of land where they were ploughing although he had heard that the 2<sup>nd</sup> Plaintiff had been chased away from where he was once living. He also confirmed that he had not heard that the parties' mother's house had been demolished and further that he not seen any problems between them.
69. DW 4, the chairman of Ngorika Farmer's Society also confirmed the Defendants testimony that indeed the land had been given to the Defendant in the year 1965 by a white man called Gateru, where the Defendant had serviced its loan through the society and the money was forwarded to the Settlement Fund Trustee. Thereafter, the Defendant had sold a portion of the land to service his loan. He also confirmed that the Defendant's father could not have been given land because the Defendant was the person who worked for the white man.
70. On cross examination, he stated that he had lived in Ngorika since 1965 when he came to the land as a freedom fighter. That they had found when the squatters including the Defendant, had already been given land and the white man had already left. He confirmed that at the time, the Defendant used to live on the land with his parents and siblings.
71. He also testified that being the Defendant's neighbor that the 1<sup>st</sup> Plaintiff herein used to cut up the Defendant's cattle and also assault the Defendant. That he was not a witness to the sale transaction between the Defendant and Akuku. He also could not tell if the Defendant's siblings used to bring the produce but that the receipts would bear the name owner of the land not the people who brought the produce. He also confirmed that the Plaintiffs did not go to school properly. And those days such children worked in the fields. At the close of the Defence case, parties filed their submissions.

**Plaintiffs' submission.**

72. The Plaintiffs submission was that the land in question was originally known as No 60 Ngorika and was allotted by the Settlement Fund Trustee to the Defendant in 1965 in place of his father for reason that those who had land elsewhere were not eligible for settlement land.

73. That later, when DW2 had been allotted land, the Plaintiff's father had moved to live with him after selling his land in Muranga. After some time the Plaintiffs got married and the Defendant moved from their mother's house and together they shared the suit land in portions of 8 acres each. That according to Kikuyu customs the 1<sup>st</sup> Plaintiff was given land in the middle while the Defendant built on the extreme end, a position that obtains to date.

74. Counsel's submission further was that their evidence was supported by the evidence of DW3 that they all worked on the suit land and never went to school, so as to pay the Settlement Fund Trustee loan.

75. That upon the Defendant obtaining title to the suit land, he had sold five acres of the portion occupied by PW1 and conspired with the purchaser one Martha Achieng Odhiambo to evict the second Plaintiff from the remaining three acres of land on the disguise of tribal clashes.

76. That from the evidence adduced, it was clear that the suit land had been owned by their father and the Defendant was a trustee for the Plaintiffs and himself. That had the Plaintiffs been of age in 1965, they too would have been allotted land just like the Defendant.

77. That through the evidence of the Land Registrar and the productions of the green card to the suit land, it clearly came out that it could not be explained on how the caution placed by the Plaintiff on the said land had been removed to pave way for subdivision and transfer thereafter. The Plaintiffs' evidence was that they had never been summoned by the Land Registrar to remove the caution and the said removal was therefore unprocedural and tainted with the intention of evicting the Plaintiffs from the suit land.

78. That the Defendant did not explain the circumstances under which he stayed on the suit land with his mother and brothers for all those years from 1965 to date. He also did not explain how they had agreed to share the land in three equal parts as well as their positioning on the said land.

79. Indeed the evidence of both the Plaintiffs and the Defendant was that their father's land in Muranga had been sold by their step brother who had used the proceeds to pay for both the Defendant's and his own land to which was a clear indication that their step brother and father intended to hold the land in trust for both families.

80. From the record herein produced, there was no evidence that the said land was sold to Martha Achieng Odhiambo above board. There was no sale agreement available and neither was there a consent from the Land Control Board or transfer documents for the parcel of land. PW1 was forcefully removed from the suit land and therefore his claim for (8) eight acres is still valid.

81. Martha Achieng Odhiambo to whom the land was sold to did not prosecute her case and therefore her case should fail.

82. The Plaintiffs framed their matters for determination as follows;

i. Has the Plaintiffs statements proved that the land held by the Defendant is so held in trust for them and the Defendant?

ii. Is the court satisfied that such a declaration is enforceable?

83. The Plaintiffs submitted that from the evidence on record and their statements, they had on a balance of probability proved that the land was acquired for them, their mother and their brothers and to confirm this the brothers shared the land equally amongst themselves where each one developed his piece of land until the Defendant, out of greed sold five acres from the piece of land given to his youngest brother.

84. The Plaintiffs relied on the decided case in the Supreme Court in **Petition No.10 of 2015 Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari and Isack Nyongai M'Lintari** where the court held:

*That the categories of a customary trust are therefore not closed. It is for the court to make a determination on the basis of the evidence as to which category of such a trust subsists as to bind the registered proprietor.*

85. That considering the Plaintiffs were in occupation of the suit land, they were therefore protected by the provisions of section 30 (g) of the Registered Land Act and the claim on trust for PW1 who was forcefully evicted by the proceedings in these consolidated files was fortified by this decision.

86. That the Supreme Court had made a finding that customary trust as well as other trusts were overriding interests which were not required to be noted in the register. That the Plaintiffs had proved the existence of a trust which need not be noted in the register.

87. That the purchaser, Martha Achieng Odhiambo in HCCC No. 75 of 2009 cannot therefore claim that she was an innocent purchaser for value as they had found the Plaintiffs in possession wherein they had gone to court to have them evicted. The order of removal of PW 1 was an interlocutory order in a suit that had a counterclaim of trust.

88. That since her claim failed when she failed to prosecute her case and the claimants manage to prove their case on trust on a balance of probability the court had no other option than to declare the existence of such trust and to cancel all subsequent titles from the subdivision of plot No. 60 and to direct that the said land be shared equally among the three brothers.

89. The Plaintiff submitted that the evidence adduced in court and applicable law was amplified by the holding of the Supreme Court wherein the Plaintiffs had managed to prove their case on the existence of trust that the land was registered in the name of their brother, the Defendant herein, in place of their father and therefore the court is compelled by the facts and the law to declare that that was constructive trust and to cancel of the subdivisions and resultant titles and order that the parties share the suit land equally amongst themselves as the case had been proved to the required standard.

#### **Defendant's submission**

90. The Defendant submitted that what came out from the Plaintiffs evidence was that the suit parcel of land Previously Ngorika Plot No. 60 belonged to their father Ayub Gichana and was allotted to the Defendant to hold it in trust for himself and the Plaintiffs. There was however contradiction on who had balloted for the land and who was the registered owner. The Plaintiffs case was also based on the fact that the Defendant was registered as owner of the suit land it because he was the eldest son of their father.

91. The Defendant's case on the other hand was hinged on the fact that by virtue of him having been employed by the white settler in 1905, he had been allocated the land after balloting for the same. That subsequently he had been a registered and shown his respective parcel of land where demarcation was done by the surveyor after which he had moved onto the land with his mother and father and had started clearing the same for farming. That he had continued paying for the loan with a lot of difficulties until he eventually decided to sell 5 acres from the said suit land so as to settle the outstanding loan.

92. The Defendant's matters for determination was therefore whether he held the suit parcel of land in trust for himself and for the Plaintiffs.

93. The Defendant submitted that the suit parcel of land was registered in his names and therefore the burden of proof was upon the Plaintiffs to prove that the suit land was held by him in trust for them. That based on the material placed before court, there was no evidence to conclude that a trust existed. That despite the whole family moving on the suit land upon its acquisition, the affected parties' father had moved out of the suit land with his 1<sup>st</sup> wife to settle on his eldest son's land in Geita in Kinangop, where he and his wife were later buried.

94. The Defendant sought to know why the parties' father left the suit and further why the land was not given to their mother who was still alive to hold it in trust for the family but was given to the Defendant who was not a legitimate son to their father (sic). That the Plaintiffs had also adduced evidence that their father had sold his land in Murang'a before moving to Ngorika to work for the white settler, it is therefore not clear why he did not register himself given that he was the alleged owner of the land and had no other land.

95. The Defendants submitted further that there was no evidence proving that the Plaintiffs ever contributed to the purchase price of the parcel of land, secondly there was no evidence that the Plaintiffs settled on the suit land without objection from the Defendant. If anything the parties herein have been in constant disagreement over the ownership of the suit land which has led to the filing of several cases in court. There was therefore no peaceful occupation by the Plaintiffs.

96. The Defendant relied on the provisions of Sections 27, 28 and 30 of the Registered Land Act to submit that there was no transfer and/or evidence of such transfer of the suit property from their father to the Defendant so as to prove ownership.

97. There was also reliance on the decided case of **Mathew Sichangi Wafula & 3 Others vs Simon Wafula Wesusa [2019] eKLR** where upon the Defendant submitted that the Plaintiffs had not established that any trust existed and therefore the Defendant could not be held as holding the land in trust on their behalf.

98. The Defendant further submitted that in case **No 113 of 2016 Prisca Jesondin Cumo vs Nally Jobor**, the court held that even though the law was clear on overriding interests which need not be noted in the register, yet the same must be proved. That apart from there having been no evidence adduced of the existence of a constructive trust by the Plaintiffs, there was also no evidence adduced to the effect that the suit land had been registered fraudulently or with misrepresentation from the Defendant.

99. That the Defendant had proved that he was rightfully registered after the allotment and payment of the loan, and other than the production of the title deed, he had also produced, the letters of allotment dated the 28<sup>th</sup> April 1965.

100. That he had justified the selling of the 5 acres of the suit land which was to enable him clear the loan otherwise the whole parcel of land would have been sold to recover the loan and the Plaintiffs would have had nothing to claim.

101. That since the Plaintiffs had failed to prove that there existed any constructive trust over the suit parcel of land, the Defendant sought that the court dismisses the Plaintiff's suit with costs to the Defendant and thereafter issue eviction orders as against the 1<sup>st</sup> Plaintiff.

#### **Analyses and determination.**

102. I have considered the evidence adduced in court as well as the submissions thereafter by both parties. I have also considered the authorities herein annexed. Indeed the matter before me is one pitting siblings against each other.

103. Suffice to state that the present matter is a consolidation of two suits being Nakuru HCCC No. 87 of 2009 where the parties were Samuel Munya Gichiga vs Elijah Kogi Gichana and Laban Mwangi Gichana. The Plaintiff in his amended Plaint amended on the 2<sup>nd</sup> June 2009 sought for orders that an order of mandatory and permanent injunction do issue against the Defendants and secondly a declaration that the Defendants whether by themselves their servants and or agents or otherwise whomsoever are not entitled to remain on that portion of land in No. Nyandarua/Ngorika 346.

104. The Defendants filed their defence and counter claim seeking a declaration that the Plaintiff now Defendant holds the title Nyandarua/Ngorika /346 in trust for himself and the Defendants now Plaintiffs. The particulars of the parcel of land were amended to read Nyandarua/Ngorika/60.

105. They also sought for an order for the distribution and transfer of the trust property to each beneficiary according to their share and further the cancellation of any subsequent title before distribution of the Trust Property.

106. The second suit was Nakuru HCCC No.75 of 2009 wherein the parties were Martha Achien Odhiambo & Luke Komondo Oreti (the legal representative of the late John Odhiambo Akuku vs Elijah Kogi Gichana and Laban Mwangi Gichana where the Plaintiffs in this case sought for orders of a mandatory injunction to issue and a declaration that the Defendants whether by themselves their servants and or agents and otherwise whomsoever and not entitled to remain on their portion of land No. Nyandarua /Ngorika /347.

107. The Plaintiffs also sought for permanent injunction to issue against the Defendants by themselves their servants and or agents or whomsoever restraining them from remaining on the said portion of land for any purpose whatsoever.

108. By an order of the court of the 23<sup>rd</sup> January 2012, these two matters were consolidated with Nakuru HCCC No.87 of 2009 being the lead file. That upon the establishment of this court, of the matter herein where it was registered with its present number. It is also worth noting that to the Plaintiff in Nakuru HCCC No. 75 of 2009 did not prosecute her case and therefore the same turns on nothing.

109. I must point out that from the 8<sup>th</sup> August 2015 the record shows that parties elected to prosecute the defence and counter claim first followed by the Plaintiff which order of proceedings run throughout the record to the final stage of determination. The parties herein are referred to as pleaded in the counterclaim. No prejudice was caused on either parties.

110. The Plaintiffs case in the defence and counter claim was hinged on the fact the suit parcel of land, previously known as Ngorika Plot No. 60 belonged to their father Ayub Gichana and was allotted to the Defendant to hold it in trust for himself and the Plaintiffs.

111. The Defendant's case on the other hand was hinged on the fact that by virtue of him having been employed by the white settlers in 1905, it had been decided that since the settlers were leaving that land was to be allotted to persons who had worked for them and who had an identity card. That he had fallen into the category of these persons wherein he had balloted for the suit land and had been allotted the same before subsequently being registered as the owner.

112. Arising from the pleadings and submissions made, the court finds various issues arising for determination as follows:

- i. What is the applicable law with respect to the Plaintiffs' claims in the counter claim?
- ii. Whether the Defendant (in the counter claim) holds the property known previously as Ngorika Plot No. 60 in trust for himself and the Plaintiffs (in the counter claim).
- iii. Whether the Plaintiffs (in the counter claim) had made a contribution to the acquisition Ngorika Plot No. 60, and if so what is the share of the said property?

113. In **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR**, the court of Appeal examined and stated the law on constructive trusts as follows: -

***A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...***

*From the foregoing we need to establish*

- i. Whether there was a constructive trust established*
- ii. Whether the trustee took advantage of their position for his/her own benefit.*

114. From the above, holding, a constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired.

115. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by doing so, he was acquiring a beneficial interest.

116. From the evidence adduced in court, it was not disputed that the Defendant's mother was married when she already had him. That he had come to Nyandarua-Ngorika in 1952 with two other boys wherein he was employed for a white settler called Gateru from the year 1958 to 1965.

117. That in 1965, it had been decided that anybody who had an identity card was to be allotted the white settler's land within Ngorika through the ballot system. That since he had one, he balloted and was allotted parcel No 60 by the Settlement Fund Trustees (SFT) which also gave him one cow and a calf to help in the repayment of the loan. That he had invited his parents to join him on the suit land where they had all started planting/ploughing in the year 1966. The proceeds from the farm were used to repay the loan at the rate of Ksh.60/= every month. At the time, his step brothers, the Plaintiffs herein were only about 5 years old. Later the land, which measured about 23 acres had been registered in his name.

118. There was also no dispute that the Plaintiff's father had a parcel of land in Muranga which he had sold and moved to Ngorika. Although the Plaintiffs testified that the proceeds from the sale of the Muranga land had been used to purchase the suit land yet they laid no evidence in court to conform the said allegations. Secondly their explanation that their father had asked the Defendant to be registered in his place for reasons that land could not be allotted to persons who had another land or that because the Defendant was his eldest son, could not hold water for reasons that at the time the balloting was taking place, the land in Muranga had already been disposed of allegedly 'to purchase the suit land', therefore their father had no land at the time, and if he did, this evidence was not brought forward, secondly it could not be true that the Defendant was asked to be registered in place of his father as his father's eldest son because there was Meshack, who testified as DW2 and who was their father's eldest and biological son and who ought to have been the proper person to be registered on the suit land following this line of argument.

119. The evidence further revealed that once Meshack was allotted his own parcel of land, their father had moved thereon together with his wife, the Defendant's mother where they had lived until their demise. They had been buried on Meshack's land.

120. From the above narrative it is clear that at the time the Defendant balloted for the suit land, he was in gainful employment and therefore was able to ballot and service the loan and that was why he had been allotted the land. Which narrative was supported by the evidence of Meshack who testified as DW2.

121. Trust was a question of fact and has to be proved by way of evidence; the burden of proof lay on the Plaintiffs to produce credible evidence to prove that their father bought the land comprising of 23 acres. *They did not produce any proof that their late father paid any money at all towards the Settlement Fund Trustee (SFT) loan for the suit land and neither did they produce any evidence that they themselves paid any money towards the SFT loan. The only evidence they adduced in court was that they had helped to take farm produce to the society, which was the norm in those years as testified by DW 4, of children who were not in school. I therefore find that there was no direct contribution by the Plaintiffs or their father towards offsetting of the Settlement Fund Trustee loan for the suit land.*

122. In the case of **Gichuki vs Gichuki (1982) KLR 285 and Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171**, the court held that;

*The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."*

123. In the case of **Odinga Makaka & 2 others v Lucie Nambo Pamba (suing as the administrator of the Estate of Hannington Ouma Pamba (Deceased) & 8 others [2017] eKLR**, the court held that;

*To prove a constructive trust, the Plaintiffs were duty-bound to show that there was some bargain, undertaking, understanding or promise between themselves and the Defendants which the Court should construe as giving rise to constructive trust. And this is so because the Court would have to look at such bargain, undertaking, understating or promise and establish whether it would be unconscionable for the Defendants as owners to assert their beneficial interest and deny the beneficial interests of Defendants. Even if therefore it is accepted that there is a constructive trust between the parties separate from their deceased parents, the Plaintiffs would still be found to have failed to show the necessary bargain, undertaking, promise or understanding. Such trust would therefore fail.*

124. I find that no evidence to show that the deceased Plaintiff's father, by agreement, arrangement or understanding agreed with the Defendant that the property is to be shared equally or otherwise between his children.

125. I also have not seen any evidence show that there was any common intention between the Plaintiffs and the Defendant that they should share the suit land neither have I seen any evidence of the direct contribution by the Plaintiff towards the development of the suit land.

126. A constructive trust is a doctrine of equity imposed by courts to benefit a person who has been wrongfully deprived and ask a person who would be unjustly enriched to transfer the property to the intended party (*See Simon Gardner, 'An introduction to the Law of Trusts; Gbolahan Elias, 'Explaining Constructive Trusts).*

127. Having found as above, I herein find that the Plaintiff/Defendants in their counter claim and defence respectively have not proved their case on a balance of probabilities and proceed to dismiss it with cost.

128. On the other hand, I find in favour of the Plaintiff in the amended plaint of the 2<sup>nd</sup> June 2009 and allow as prayed. To the effect:

(i) An order of mandatory and permanent injunction is hereby issue against the Defendants. A declaration be and is hereby issued that the Defendants whether by themselves their servants and or agents or otherwise whomsoever are not entitled to remain on that portion of land No. Nyandarua/Ngorika 346.

(ii) The Defendants shall vacate the parcel of land within 90 Days of the delivery of this Judgment. Failure to do so, the Plaintiff is authorized to use the police assistance herein to as to maintain law and order and enable the Plaintiff and his authorized agent to

*evict* the Defendant herein.

**Dated and delivered at Nyahururu this 29<sup>th</sup> day of October 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**