



**REPUBLIC OF KENYA**

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

**ELC CIVIL APPEAL NO. 190 OF 2010**

HARUN NJENGA MUNGAI

KINYANJUI MUNGAI .....APPELLANTS

RACHEAL MUGURE

**VERSUS**

DANIEL NGURIMU MUNGAI.....RESPONDENT

**JUDGEMENT**

1. Being dissatisfied and aggrieved by the judgement of Mrs L. Gicheha, Principal Magistrate delivered on 4/5/2010 in **Thika CMCC No. 1739 of 2005**, the Appellants filed this appeal. The main grounds of appeal can be summed up as follows:-

- a. The Learned Magistrate erred by not finding that the Respondent holds the parcels of land known as Kiganjo/Kimwangi 854 and 855 in trust for the Appellants;
- b. The Learned Magistrate erred by not finding that the Appellants together with their mother contributed towards the purchase of the suit land;
- c. The Learned Magistrate erred in finding that Respondent was the absolute owner of the suit land and had sold a portion to his elder brother;
- d. The Learned Magistrate erred in failing to consider that the Appellants had lived on the suit land from the time it was purchased until they were chased away by the Respondent;
- e. The Learned Magistrate disregarded the evidence that the suit land had been subdivided and each of the Appellants was occupying their portion.

2. The Appellants seek to have the judgement of the Learned Magistrate set aside. They also seek the costs of the appeal. This appeal is concerned with whether the Respondent held Kiganjo/Kimwangi 854 and 855 in trust for the Appellants.

3. After hearing the matter, the Honourable Magistrate found the evidence of the Respondent more believable. She found that the Respondent purchased the suit land through his mother and brother and that he allowed his mother and brothers to use the land. The court also found that he later sold a share to his brother Isaac and Harun's daughter. The court found that the Appellants had failed to prove on a balance of probability that their mother contributed towards the purchase of the suit land or that they made any contributions themselves. The court saw no basis for making a finding that the Respondent was holding

the suit land in trust for the Plaintiffs.

4. The court framed two issues for determination which were whether there was any customary trust in Kiganjo/Kiamwangi/854 and whether the trust could be terminated by the court.

5. On the issue of the agreement for sale between their brother Isaac Kamau and the seller Edward Mwangi, the court observed that it was unfortunate that Isaac was not called as a witness and his wife who testified was unable to shed much light on the transaction.

6. The court relied on the proceedings in Case No. 20 of 1990 in which Isaac Mungai had sued the Defendant seeking to have Kiganjo/Kiamwangi/351 transferred to his name. In the matter, the seller stated in evidence that the Respondent was purchasing the land through Isaac Kamau Mungai. The court took note of the fact that the parents of the Appellants and Respondent were not buried in the suit land.

7. The court has analysed the evidence tendered before the magistrate court. This being an appeal, this court did not have the advantage of hearing the witnesses first hand as the Learned Magistrate did.

8. The Appellants testified that the suit land was bought in 1963 and 1964 as family land. It was their mother who identified the land and entered into an agreement with Edward Mwangi. The land measured approximately 7 and 1/2 acres and was being sold at Kshs. 800 per acre. The Plaintiffs testified that the Defendant's name was written because the seller was buying land in Nakuru where the Defendant was working. The 1<sup>st</sup> Plaintiffs testified that he was unable to go to the Kiambu Land's Office on 20/10/1995 when the seller came to Nairobi to transfer the land. He therefore, asked his brothers to go to Kiambu and gave them Kshs. 200/= as transfer fees.

9. It was also his evidence that after his mother paid the first instalment for the land in 1963; they entered upon the land and started cultivating it. He stated that the land was subdivided into 5 portions for each of the children. They planted coffee and stayed on the land for 32 years without any problems until their mother died. That is when the Defendant began insisting that the land was his and evicted the other siblings. They testified that the Defendant gave his brother Isaac his own portion but did not give the other siblings.

10. On cross examination, he stated that his mother paid Kshs. 4,200/= as a deposit and all of them contributed in raising the balance of the purchase price. He could not remember what contribution each of them made. He stated that his brother Isaac Kamau participated in the negotiations but denied that his brother Isaac bought parcel number 856 from the Defendant; which was transferred to him by Defendant in 1978. He stated that each person's contribution was given to Isaac for onward transmission to the seller called Edward.

11. The 2<sup>nd</sup> Plaintiffs' witness testified that their mother raised the deposit of Kshs. 4200/= by selling porridge, potatoes and doing some other businesses. She stated that she wrote the agreement but this fact was challenged on the basis that by then she was 13 years old and could not have written the agreement. After paying the deposit her mother requested to be allowed to use the land as she made arrangements to pay the balance.

12. It was her evidence that their mother asked each one of them to contribute towards the purchase of the land. She produced a booklet showing how the money was raised. Their mother attempted to call the children to discuss the issue of the land but an agreement could not be reached. It was her evidence that their mother subdivided the suit land among her children before her death.

13. The 3<sup>rd</sup> Plaintiffs' witness also testified that it was their mother who bought the land and that they contributed to the purchase of the land. He stated that he contributed about Kshs. 1000/= and that the Defendant too contributed towards the purchase price for the suit land. It was his evidence that his brother Isaac used to collect the money for onward transmission to the seller.

14. The 4<sup>th</sup> Plaintiffs' witness stated that their mother bought the suit land and subdivided it among her children. He stated that by the time the Defendant went to Japan in 1964 the land was subdivided and each son was cultivating 4 acres.

15. One of the neighbours also gave evidence confirming that he used to see Isaac Kamau cultivating the land with their mother; they planted coffee on the land. He confirmed that there was a case between Isaac Kamau and the Defendant in which Kamau claimed he had contributed money for the purchase of 4 acres and that the Defendant gave Kamau an additional 1 acre so that he got 5 acres. This witness was unable to explain why the Defendant was giving Isaac Kamau an additional acre.

16. The Defendant gave evidence stating that he bought the land through his brother Isaac Kamau. He stated that his brother Isaac negotiated on his behalf and entered into an agreement with the seller. He then would send money through his brother Kamau to be given to the seller. He finished paying for the land in 1965.

17. He denied ever seeing the book in which the Plaintiffs testified to be where the records for the payments were entered. He relied on a booklet which he had produced in Case No. 20 of 1999. He stated that during the purchase of the land there were elders and that the agreement was written by Mr. Gicharu.

18. He testified that his brother Isaac Kamau signed the agreement and that the same Isaac made payments on his behalf until 5/4/1964 when he started paying directly. He stated that his parents were living in his other plot T.196 on which he also allowed his brother Harun to construct on that land. He stated that he later sold this land to Harun's wife.

19. On the issue of the case at Gatundu, he claimed that his brother Isaac laid claim to all the. He claims that to have sold 4 acres to his brother Isaac Kamau and to have added him an acre out of the respect between the two of them. He only produced a copy of a green card showing the value of 12,600/= but never produced any sale agreement to prove that he sold this land to his brother Isaac.

20. He referred to the Gatundu case in which he claimed that Isaac's wife testified. He contended that his sister Rachael had never asked for land and does not qualify for the land having been married and divorced. He stated that his other brothers had never asked for land. He denied that he bought the land with his mother maintaining that he had given her money to buy the land in the company of Isaac and the elders. He claimed he gave his mother Kshs. 4,200/= for the initial payment for the land. He confirmed that he travelled to Japan for 7 months from April, 1964 and came back in September.

21. His explanation for not signing the agreement was that he was out of the country and tasked his brother to do this. He was adamant that he never gave his brother who has sued him a share in the land but that the brother bought the land from him. He conceded that the booklet which he produced in evidence did not show when he sold the land to his brother. He confirmed he never entered into a sale agreement with his brother Isaac.

22. He stated that he chased away his brother Henry Njenga while leaving the brother called Isaac behind since he trusted Isaac. He stated that he buried both his mother and father at Langata when they died claiming that it was their choice to be buried there. He claimed his father attended court in Gatundu when the other matter was heard and that he knew the land belonged to him. He also stated that his brothers did not attend their mother's funeral and only one sister attended.

23. The 2<sup>nd</sup> defence witness stated that he wrote the agreement in 1962 upon Isaac Kamau's request when the land was being purchased. He stated that the Defendant's mother gave the initial payment of 4,000/= which she stated had been given to her by the Defendant. He confirmed that the agreement did not state that the land was being purchased by the Defendant and does not state that the money was paid by the Defendant. Isaac is stated to be the purchaser. The witness confirmed that their mother used to cultivate the land and only stopped when she grew old.

24. The 3<sup>rd</sup> defence witness testified that the land was not being bought by the Plaintiffs' mother but was

bought by the Defendant. However, he could not confirm that the Defendant had sent his mother money to buy the land. The witnesses maintained that the Defendant's mother told them that she had been sent by the Defendant to buy the land.

25. Isaac Kamau's wife also testified. She informed the court that when she got married in 1965 she found the siblings on the same land. She sued her husband and the court gave her a quarter an acre (1/4).

26. In **Mbothu & 8 Others v Waitimu & 11 Others** the court held that the court will not imply a trust save in order to give effect to the intentions of the parties and such intention must clearly be determined beforehand.

27. From the evidence which this court has reviewed and considered, the parties intended to create a trust. The court believes the Plaintiffs' evidence that their mother contributed the initial deposit of Kshs. 4200 towards the purchase of the land in 1964. The court is inclined to believe that all the parties contributed towards paying the balance of the purchase price in 1964. That is why each brother and their mother was able to farm on a portion of the land for over 32 years until they were forcefully evicted by the Defendant. The Defendant could have taken possession of all the land if indeed he had purchased it all by himself without his mother and siblings. If he had solely bought it he would not have allowed the Plaintiffs and their mother to farm coffee and reside on the land for more than 30 years without asking them to move out.

28. It was the testimony of the Plaintiffs that the land was previously subdivided into five portions for each of the children. The Defendant would not have allowed that subdivision and occupation of the land by his siblings if the land belonged to him exclusively.

29. No evidence was tendered to show that the Defendant sold land to his brother Isaac Kamau after he sued the Defendant claiming the land. The court is persuaded that the land was jointly owned by the parties to this suit their mother having purchased it by paying the initial deposit to the seller before the seller allowed them to occupy the land in 1963.

30. The appeal is allowed. The judgement of the subordinate court is set aside. The court notes that the Appellants in their Memorandum of Appeal only prayed to have the appeal allowed and the judgement set aside. It would not serve the interest of justice to order a new trial in light of the length of time it has taken for the dispute to be resolved and the fact that witnesses have died.

31. The court finds that the Respondent held the land known as Kiganjo/Kiamwangi/854 and Kiganjo/Kiamwangi/855 in trust for the Appellants. The Respondent is hereby directed to subdivide the land and transfer 4 acres each to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and 1.5 acres to the 3<sup>rd</sup> Appellant. Each party will bear its own costs of the appeal.

Dated and delivered in Nairobi on the 25<sup>th</sup> day of January 2018.

**K. BOR**

**JUDGE**

In the presence of:

Ms. Wairimu for the Appellants

No appearance for the Respondent

Mr. J. Okumu- Court Assistant