



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 149 OF 2017

FORMERLY MERU ELC CASE NO. 137 OF 2012

BORANA MBWIRIA.....PLAINTIFF

VERSUS

BASILIO NJAGI.....DEFENDANT

JUDGMENT

1. This is a suit involving a father as the plaintiff and the son as the defendant. The father in his plaint says that he bought the land from one Nyaga Mutua Boro in the year 1952 for a consideration of two goats, a piece of cloth and he paid Kshs.48 to the government as tax payable by Nyaga Mutua Boro.

2. The plaintiff says that he had the land registered in the name of the defendant during the land adjudication and demarcation process, because he expected to get land from Mount Kenya Forest where people from Karingani Adjudication Section who were landless had been promised land. He says that he had the land informally subdivided and he had shown the defendants and his siblings the portions they should occupy. However, he says, the defendant had trashed that arrangement and had sold 0.25 acres to one Kangai Njeru Kaguri in breach of the trust he had to hold the suit land on behalf of his family.

3. In his plaint the plaintiff itemizes the following particulars of trust:

PARTICULARS OF TRUST

- i) That the plaintiff purchased the suit land from Nyaga Mutuoboro and the suit land was never ancestral land.
- ii) The defendant did not pay consideration whatsoever to be registered with the suit land.
- iii) The plaintiff walked the boundaries of the suit land during land adjudication and demarcation.
- iv) That the defendant came to know that he is the registered proprietor at around June, 2011 and the defendant had always believed and behaved as though the land belonged to the plaintiff.
- v) That the defendant was too young during land adjudication and demarcation to have acquired the suit land.
- vi) That the defendant did not control the use and management of the suit land and such use and management remained in the hands of the plaintiff.
- vii) That the defendant has never objected the family and in particular the plaintiff using the suit land.
- viii) The plaintiff and his children have been and are still in occupation of the suit land from the time the plaintiff purchased the same and the defendant has never evicted them.

4. The plaintiff seeks judgment against the defendant for ;

a) A declaration that the defendant holds the suit land in trust for the plaintiff, the defendant and the defendant's siblings and that the suit land should be shared equally between the plaintiff, the defendant and the siblings pleaded in paragraph 3 herein above.

b) Costs of the suit.

5. The siblings pleaded in paragraph 3 of the plaint are:

- i) Stanley Mugendi
- ii) Edward Gitonga
- iii) Peter Njue
- iv) Mutegi Borana
- v) Karitu Borana
- vi) Ciamwari Borana
- vii) Jane Borana
- viii) Lucy Borana
- ix) Karegi Borana
- x) Alibina Borana
- xi) Muthoni Gitari

6. PW1 asked the court to adopt his witness statement dated 17th October, 2012 as his evidence in this suit. The statement is reproduced herebelow exactly in the way it has been filed without any alteration whatsoever. The statement reads as follows:

WITNESS STATEMENT UNDER ORDER 3 RULE 2 OF CIVIL PROCEDURE RULES 2010

My (sic) names Borana Mbwiria alias Ignasio Njeru. I come from Kiereni village, Mugirirwa sub location, Mugwe location Meru South District, Tharaka Nithi County. I am a peasant farmer and my postal address is P. O. BOX 49 CHUKA.

I am the plaintiff in this case. The defendant is my eldest son. My other children include;

- i) Ciamwari Borana
- ii) Lucy Borana
- iii) Karegi Borana
- iv) Jane Borana
- v) Alibira Borana
- vi) Muthoni Gitari
- vii) Stanely Borana
- viii) Edward Borana
- ix) Karitu Borana
- x) Peter Borana
- xi) Mutegi Borana

I know the history of the suit land LR; Karingani/Mugirirwa/29. I bought the suit land from one Nyaga Mutuoboro far before land adjudication and demarcation came to our area. The land cost me 2 goats, a piece of clothing used for wearing that time and Kshs.48 tax for Nyaga Mutuoboro. I immediately took possession and started using the land after I paid for it.

By the time I bought the land from Nyaga Mutuoboro the defendant was not born and in fact I had not married the defendant's mother. Land adjudication and demarcation started in Karingani location around 1964. I walked the boundaries of what came to be registered as the suit land. I then caused the suit land to be registered in the name of the defendant when he was around 7 years. I caused him to be registered with the suit land for there were rumours circulating that there would be available land in Mt Kenya Forest which would be distributed to landless people. It was for this reason I caused the defendant to be registered with the suit land so that I could look landless and therefore legible to be

given land from Mt Kenya Forest. This was never to come. I then got married, sired my children aforesaid and continued to use the suit land as mine although I knew it was registered with the defendant.

On or around the year 2000, I formally sub-divided the land into six portions. I gave myself a portion, another to Gitari Borana, another to Karitu Borana, another to Edward Borana, another to Peter Borana and the other to Peter Borana and the other to Mutegi Borana. As for the defendant I gave him a portion measuring 0.19 Acres out of my father's land LR: Karingani/Mugirirwa/25. The defendant has constructed his house on land parcel LR: Karingani/Mugirirwa/25.

Around June, 2012 somehow, somewhat the defendant discovered that land parcel LR; Karingani/Mugirirwa/29 is registered in his name. He first acquired the title deed. He then entered the suit land and disrupted all the arrangements I had made by defacing and or removing the beacons I had fixed. He also constructed a house he also uprooted my napier grass, sugarcanes and banana plants. I then complained to the chief Mugwe location. The chief visited the suit land. The chief ordered the defendant to pay Kshs.1,000 as fine for disrespecting his father (myself). To date he has not paid the fine. The District Agriculture Offices (sic). The District Agriculture Officer came to the land in company of the assistant chief. The agricultural officer compiled a report where it was found out that the plaintiff had suffered Kshs.47,000 in damage crops at the hand of the defendant.

I was besieged (sic) by my brother Gabriel Njiru not to pursue the criminal matter against the defendant. The defendant was persuaded by my brother Gabriel Njiru to pay me Kshs.1,000 and say sorry to me and I withdrew the complaint. Later he then started constructing a house on the suit land and also started farming on the portions he had uprooted napier grass, sugarcanes and banana plants. He also cut out a portion and sold it to one Kangai Njeru Kagori (0.25 Acres). I then cautioned the land to stop the transactions (sic).

The defendant has sub divided the land thus, Kangai Njeru Kagori 0.25 Acres, the plaintiff 0.17 acres, Edward Borana 0.16 Acres, Mutegi Borana 0.16 Acres and the defendant 0.18 acres. Before the defendant sub divided the land as stated above, I sued him at the Land Dispute Tribunal Case No..... The award of the tribunal was to the effect that the land belonged to the plaintiff and I should sub divide the land amongst my children. The defendant was opposed to the idea thus this case.

DATED AT CHUKA THIS 17TH DAY OF OCTOBER, 2012

SIGNED BY:

BORANA MBWIRIA alias IGNASIO NJERU

7. PW1's oral evidence was more or less in congruence with his witness statement.

8. PW1 told the court that the defendant was his son who did not respect him. He sarcastically proffered that the plaintiff had another father. He told the court that other people suggested that that father was Albert Njagi. It transpired that Albert Njagi was PW1's real brother. He complained that Albert Njagi, who is DW2, always supported the defendant in all cases he had with him.

9. PW1 produced a copy of the green card and a copy of the official search for Land Parcel No. Karingani/Mugirirwa/29 as his exhibits. He denied his presence when the defendant informally subdivided the suit land to his siblings and to himself.

10. PW2, Sebastian Kireu Mung'atia asked the court to adopt his witness statement dated 17th October, 2012 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT UNDER ORDER 3 RULE 2 OF CIVIL PROCEDURE RULES 2010

My names (sic) Sebastian Kireu Mung'atia. I come from Kiereni village, Mugirirwa sub location, Mugwe location, Meru South District, Tharaka Nithi County. I am a peasant farmer and my postal address is P. O. Box 49 Chuka.

I know the plaintiff he is my neighbour. I also know the defendant. I know the defendant as the 1st born of the plaintiff.

I know land parcel LR; Karingani/Mugirirwa/29. This land neighbours my own land LR;Karingani/Mugirirwa/747. Am aware that the plaintiff purchased the suit land from one Nyaga Mutuoboro. This land was purchased by the plaintiff from Nyaga Mutuoboro before land adjudication and demarcation had come at Karingani location. I witnessed the plaintiff give Nyaga Mutuoboro 2 goats. I am also aware that the plaintiff was supposed to pay Kshs.48 as a tax for Nyaga Mutuoboro and also buy a blanket. I was not present when the tax money and "shuka" were paid but the plaintiff informed me he had paid them.

I am equally aware that it was the plaintiff who walked the boundaries of the suit land during adjudication and demarcation of the suit land. After the adjudication. Am aware that the plaintiff caused the defendant to be registered with the suit land granted that there were rumours circulating that those who were landless would be given land in the Mt Kenya Forest Region. This was never to be. The plaintiff indeed caused the defendant to be registered with the suit land to hold in trust for himself and the entire family.

The defendant has not been living in the suit land. Right from the start the defendant was not aware that the suit land was registered in his name. He came to know that the suit land is registered in his name around June, 2012. On realizing the position on the ground the defendant entered into the land, started constructing a house which is never complete as of now. The plaintiff had earlier taken the defendant to the Assistant Chief.

I am aware that the plaintiff took this matter to the land dispute tribunal. The tribunal advised that the land belonged to the plaintiff and they

should go home and discuss how the plaintiff would sub-divide his and amongst his children.

DATED AT CHUKA THIS 17TH DAY OF OCTOBER, 2012

SIGNED BY: SEBASTIAN KIRU MUNG'ATIA

11. PW2 testified that he was a neighbour to the litigants in this case. He was categorical that the land belonged to the plaintiff who had it registered in the name of his son, the defendant, when he was a toddler. He told the court that the defendant was in the habit of trying to evict the plaintiff, his father.

12. PW2, during cross-examination admitted that he did not belong to the litigant's family. He also admitted that he was not there when the plaintiff allegedly bought the suit land in 1952. He was, however, categorical that the land was registered in the defendant's name so that the plaintiff could appear landless, and, therefore, qualify to be given land meant to be allocated to landless people on parts of Mount Kenya. PW2 also admitted that he was not privy to what deliberations took place during meetings of the plaintiff's and defendant's family.

13. DW1, Basilio Njagi, the defendant asked the court to adopt his witness statement dated 24th November, 2017 as his evidence in this suit. The statement reads as follows:

DEFENDANT'S WITNESS STATEMENT

My name is Basilio Njagi Njeru and I reside at Chuka. I am a peasant farmer.

I know the plaintiff, he is my biological father. I do not know any other father. I am the registered owner of the land parcel No. 29, my father has his own land registered in his name. My grandmother gave me the land when I was a child of about fifteen years. When my grandmother was alive my father did not complain about me being awarded the parcel of land.

However after my grandmother died my father started causing conflict demanding that I give to him the parcel of land awarded to me. My uncles on noticing the problems that my father was creating decided to subdivide the land they inherited from my grandmother amongst the four of them. They subdivided the main land amongst themselves and my father got his portion. My father however was not satisfied as he had two wives and he had already abandoned my mother who was the 1st wife for the second wife and did not regard us as his family.

My uncles in an attempt to end the conflict, they combined the portion my grandmother had left me together with that which my father had inherited from my grandmother and subdivided the whole land amongst the children of both wives. The whole land including that which was left to me by my grandmother was subdivided equally among the children of both wives. The titles to the land however are two; I have the title for the land left to me by my grandmother while my father has title to the land he inherited known as land parcel No. 25. There are several families of my siblings living on the land registered in my name.

The land was subdivided amongst the children of the plaintiff about 15 years ago. I have not stopped anyone from getting a title for the piece of land they were given. My siblings are free to get a title for their portions as and when they deem it fit without any interference from me.

Previous attempts by my siblings to get a title for their portions of land have however been stopped by my father who put a caution on the land claiming that the land belonged to him.

The only reason my father wants the title transferred to his name is because he wants to sell the parcel of land. He already has a buyer at hand who is well known to me but he cannot complete the sale as the land is not registered in his name. If my father sells the piece of land and that his children own we will be left destitute with no source of income or anywhere to live. He wants to punish the children of the 2nd wife the same way he used to punish our mother who died this year 2017.

That is all.

DATED AT MERU THIS 24TH DAY OF NOVEMBER, 2017

14. DW1, told the court that the plaintiff was his father and that he was born in 1956. He told the court that the suit land was given to him by Njagi, his grandfather through his grandmother after the death of his grandfather. He said that the land was registered in his name in 1969. He denied that he only became aware of the registration of the land in his name in 2011. He denied his father's claim that he had bought the land from one Mutuaboro. He told the court that from his mother's household, they were five brothers and a sister. He testified that he held the suit land for them and for himself. He also told the court that his father's second wife, his stepmother, had 4 children. He was not pressed to specify their gender. He also told the court that he was aware that the adjudication process was taking place but stated that he was very young then.

15. DW2, Albert Njagi Francis, asked the court to adopt his witness statement dated 24th November, 2017 as his evidence in this case. His witness statement reads as follows:

WITNESS STATEMENT OF ALBERT NJAGI FRANCIS

My name is Albert Njagi Francis and I reside at Chuka within Tharaka Nithi County. I am a peasant farmer.

The plaintiff is familiar to me as he is my brother and the defendant herein is his son who is my nephew. The plaintiff married a second wife and was mistreating the 1st wife and his children. Due to the frequent attacks visited by the plaintiff upon his wife and children, my mother who is the defendant's grandmother gave to the defendant a portion of land to live on with his family which was far away from the plaintiff so as to ensure their security and well being.

When my mother died we inherited land from her as my father had passed on earlier leaving the land to her. We sub divided the portion of the land left to us by our mother amongst the four sons. The plaintiff and I were among those sons and we each got 56 points after sub division. We did not sub divide or interfere in any way with the land left to the defendant by our mother as my mother had specifically left the land to the defendant. We each applied for registration and got titles for our portions of land the plaintiff included as well. The defendant also got a title for his portion of land. The plaintiff did not object at any stage to the defendant getting a title.

The plaintiff however later on started causing problems to the family of his 1st wife where he wanted to evict and chase away the defendant, his siblings and his mother from the portion of land left to them by our mother. He claimed that the defendant's mother was no longer his wife and so her children were no longer his children and therefore they did not deserve to live on the land left to them by the plaintiff's mother.

On noticing the problems the plaintiff was causing his first wife and children we came together as a family and decided that we should subdivide the land among the children of both wives so as to end the conflicts caused by the plaintiff. We asked the children to get a title for the portion of land assigned to them on subdivision.

If the plaintiff's intention is to subdivide the land amongst his children, then he should not have stopped them from getting titles for the portions of the land that they already occupy. The plaintiff intends to sell the portion of land but the title is not in his name and therefore he wants the title transferred to his name to enable him complete his transactions of sale. The defendant has not stopped his siblings from getting their portions of land registered in their names or interfered in any way with their occupation of the said portions. The plaintiff cannot be trusted with the best interest of the defendant and his siblings as he disowned them a long time ago when he deserted and abandoned their mother who was his 1st wife for a second wife.

DATED AT MERU THIS 24TH DAY OF NOVEMBER, 2017

.....

SIGNED BY: ALBERT NJAGI FRANCIS

16. DW2 during cross-examination testified that the plaintiff was his brother. He told the court that all along his relationship with his brother has not been good because of his mistreatment of his wife and his children. He told the court that the plaintiff had never agreed with his mother and father (the defendant's grandparents). DW2 went on to tell the court that the plaintiff lived on parcel No. Karingani/Mugirirwa/25 with his second wife and their children. He told the court that the plaintiff had kicked out the defendant's mother and siblings out of this parcel of land. It was his evidence that the plaintiff cannot be trusted with the best interests of the defendant and his siblings as he disowned them a long time ago and that is why the family had resolved to register the suit land in the name of the defendant in trust for himself and for his siblings. DW2 was unequivocal that all along, the plaintiff was an irresponsible person.

17. DW3, Daniel Mutegi, asked the court to adopt his witness statement dated 24th November, 2017 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT OF MUTEGI DANIEL BORANA

My name is Daniel Mutegi Borana and I reside at Chuka within Tharaka Nithi County. I am a peasant farmer.

The plaintiff is my father and the defendant is my elder brother. We are both children of the 1st wife. The suit land was subdivided about 15 years ago in the presence and consent of the plaintiff, the defendant, my uncles and the children of the plaintiff.

I as a child of the plaintiff got a portion. All the children of the plaintiff got an equal portion whether from the 1st or the 2nd wife. I have been living in my portion since the land was subdivided.

My father who is the plaintiff herein put a caution on the land and therefore I am unable to get a title for my own portion of land. My brother has never stopped me from applying for registration of my portion of land. He has also never interfered with my occupation of the portion of land given to me after subdivision.

If the title is transferred to the plaintiff's name who is my father he is going to kick us out of our portions of land and sell them. My father who is the plaintiff herein already has a buyer at hand who is well known to me. The court is free to send someone to the land and verify that I already have a portion and that the land has already been sub divided among the plaintiff's children. The children of the first wife all live in the land registered in the defendant's name while those of the second wife live in the land registered in the plaintiff's name. The plaintiff deserted the first wife a long time ago and did not regard us as his family. He put my mother who was the 1st wife through untold suffering that's why my grandmother gifted the suit land to my brother so that the family of the 1st wife could have somewhere to live in peace far away from my father's everyday fights.

That is all.

DATED AT MERU THI 24TH DAY OF NOVEMBER, 2017

.....

SIGNED BY: DANIEL MUTEGI BORANA

18. I opine that DW3's oral evidence did not in any material manner depart from what he had averred in his witness statement. He was unequivocal that the plaintiff had deserted his mother who was his 1st wife and had put her and her children through untold suffering and said that that was why his grandmother gifted the defendant, his brother, land so that the family of the first wife could have somewhere to live in peace away from his father's daily fights. I find that whether the suit land was given to the defendant by his grandmother or by his grandfather does not in any probative manner affect the veracity and integrity of PW3's evidence.

19. The parties filed written submissions.

20. The plaintiff's written submissions which are pasted herebelow in exactly the same form in which they were filed without any alteration whatsoever read as follows:

PLAINTIFF'S FINAL SUBMISSIONS

(A) PLEADINGS

1. Your lordship by a plaint dated 17th October 2012 the plaintiff set forth the following prayers for consideration by the court

(a) A declaration that the defendant holds the suit land in trust for the plaintiff, the defendant and the defendant's siblings and the suit land should be equally shared between the plaintiff, the defendant and the siblings pleaded in paragraph 3 herein above.

(b) Cost of the suit.

(B) THE PLAINTIFF'S CASE

2.

(i) The plaintiff's case was as follows. That the defendant is the registered proprietor of LR; KARINGANI/MUGIRIRWA/29. The plaintiff purchased the said land from one NYAGA MUTUOBORO for a consideration of two goats, piece of cloth and Ksh 48. Ksh 48 which by then was a lot of money was in payment for NYAGA MUTUOBORO's tax.

(ii) That the plaintiff caused the suit land to be registered with the defendant for there were rumors circulating that landless people would be given land in Mt Kenya Forest. The plaintiff therefore caused the defendant to be registered with the suit land when the defendant was a toddler about three years of age so that the plaintiff could pause as landless and therefore benefit from the lands that were to be allocated from Mt Kenya Forest. Later the rumors turned to be untrue.

(iii) The plaintiff caused the defendant to be registered with the land during adjudication. The land therefore came out with the name of the defendant as the first registered proprietor. The plaintiff was clear in his mind that the defendant was to hold the land in trust for the plaintiff, the defendant and other siblings. The defendant came to know that he was the registered proprietor with the suit land in June 2011. The adjudication process took place in 1960's. This is clear that he was not aware that he had been registered with the land up to 2011.

The plaintiff, the defendant and other siblings were using the land in believe that the land belonged to the plaintiff their father. When the defendant realized that he was the registered proprietor he turned tables against the plaintiff his own father. He took charge and shared the land against the manner in which the plaintiff had shared it earlier. The defendant wanted to sell a portion measuring 0.25 acres to one KANGAI NJERU KAGORI. On realizing the intention of the defendant the plaintiff cautioned the land. He believed that the defendant was only a trustee.

(iv) The plaintiff's case comprise of the plaint, compliance documents, his evidence in court and that of his witness PW2 SEBASTIAN KIREU MUNGATIA. PW2 was clear that he witnessed the plaintiff pay to NYAGA MUTUOBORO two goats and clothing for the purchase of land. This was far before adjudication took place in Karingani Adjudication section. He confirmed that during adjudication which came many years after the plaintiff had purchased the land he caused the land to be registered with the defendant due to the circulating rumors that landless people around Mt Kenya would be given land in the forest.

(C) DEFENDANT'S CASE

3.

(i) The defendant's case was that he was given the land by his grandfather. He did not mention the name of the grandfather. His two witnesses came up with the same story. DW2 in his evidence mentioned NYAGA MUTUOBORO. He said that it was his father who had bought this land. When and for how much he could not tell. They insisted that it was the defendant's grandfather who gave them the land. The defendant, DW2 and DW3 on cross examination looked stupefied by the pleadings of the defendant that he was given the land by the plaintiff his own father as a **gift**. This pleading which the defendant cannot deny is contained in paragraph 6 of his statement of defence

where he is admitting the plaintiff's pleadings of paragraph 6 of the plaint which is as follows; "that during land adjudication in Karingani Adjudication Section the plaintiff walked the boundaries of the suit land and caused the suit land to be registered in the name and style of the current proprietor i.e the defendant". It means therefore the defendant cannot deny that it is the plaintiff who caused land parcel LR; KARINGANI/MUGIRIRWA/29 to be registered in the defendant's name.

When the matter came up for hearing the defendant paraded two witnesses DW2 and DW3. The much one can say about these witnesses is that they contradicted the defendant's oral evidence in court and the defendant's pleadings. The defendant's oral evidence was not at per with his statement. The same case applied to the oral evidence of DW2 and Dw3. Their testimony did not match with their written and filed statements. In court they deviated from their written statements. This can be explained by the fact that the statements were written and filed after the plaintiff and his witness had testified.

(D) ISSUES FOR DETERMINATION

4. In our humble view your lordship the issues for determination in this case include but are not limited to the following:

(i) What are the origins of land parcel LR; KARINGANI/MUGIRIRWA/29?

(ii) Whether it is the plaintiff or the defendant's grandfather who caused the defendant to be registered with land parcel LR; KARINGANI/MUGIRIRWA/29?

(iii) Whether the defendant hold LR; KARINGANI/MUGIRIRWA/29 in trust for his benefit, that of the plaintiff and the defendant's siblings?

(iv) Who should pay the cost of this suit?

(E) ANALYSIS

5.

(i) Your lordship one may pause and ask oneself what were the origins of land parcel LR; KARINGANI/MUGIRIRWA/29? It is the plaintiff's contention that he purchased this land from one NYAGA MUTUOBORO for a consideration of two goats, a piece of cloth and Ksh 48. This purchase was made far many years before the adjudication in Karingani Adjudication section. PW2 corroborated this assertion by the plaintiff. PW2 in particular witnessed the plaintiff pay to NYAGA MUTUOBORO two goats and clothing. When the land was bought by the plaintiff the defendant was not born. The defendant came into the picture during adjudication in the late 1960's. The plaintiff by the late 1960's had already bought the land and started making use of it.

On the other hand the defendant avers that he was given the land by his father. He has no story to tell about the origins of the land. DW2 who is the brother to the plaintiff told the court that it was the defendant's grandfather who gave the defendant the land. On cross examination he told the court that he is aware that the grandfather to the defendant purchased the land from one NYAGA MUTUOBORO. He could not however tell when and for how much the land was bought. This assertion was an afterthought one may say granted that in his statement he does not mention the land having been purchased by his father from one NYAGA MUTUOBORO. In his statement he only contends that the defendant was given the land by his grandfather.

Who between the two sides of divide on a balance of probability could be telling the truth? We submit that the plaintiff has a better case than the defendant regarding the origin of the suit land. The plaintiff in his evidence in chief and pleadings remained categorical that he purchased the land from NYAGA MUTUOBORO. He is specific that he paid a consideration of two goats, a cloth and Ksh 48. The plaintiff's witness could not be moved even on cross examination that he had witnessed the plaintiff pay NYAGA MUTUOBORO two goats and clothing. The plaintiff and his witness mentioned these transactions in their statements. On the other hand the defendant doesn't mention NYAGA MUTUOBORO both in his evidence in chief and in cross examination and in his defence and statement. Simply he is not aware of the origin of the land. So is DW3. He has never heard from anybody concerning NYAGA MUTUOBORO. In his evidence in chief and in his statement he does not mention the land having been purchased from NYAGA MUTUOBORO. Dw2 mentions NYAGA MUTUOBORO in cross examination. In his evidence in chief and statement he does not mention NYAGA MUTUOBORO. The defence has concentrated on how the grandfather of the defendant gave the defendant LR; KARINGANI/MUUGIRIRWA/29. We submit that on the balance of probability the plaintiff's is far believable than the defendant's story. It is for this reason we submit that it is the plaintiff who purchased the land in issue from one NYAGA MUTUOBORO many years before adjudication and many years before the defendant was born.

(ii) The next question posed by these proceedings is whether it is the plaintiff or the defendant's grandfather who caused the defendant to be registered with land parcel LR; KARINGANI/MUGIRIRWA/29? We submit that from the evidence on record and pleadings it is clear that the plaintiff caused the suit land to be registered with the defendant. Without repeating ourselves very much we will refer the court to the defendant's pleadings at paragraph 6 of the defence where the defendant says, "paragraph 6 of the plaint is admitted by the plaintiff (sic)". The defendant was responding to paragraph 6 of the plaint which was to the effect that the plaintiff had walked the boundaries of LR; KARINGANI/MUUGIRIRWA/29 during adjudication in Karingani adjudication section and caused the same to be registered with the defendant.

(iii) The defendant at paragraph 7 of the defence in response to the plaintiff's pleadings at paragraph 7 of the plaint which was to the effect that the defendant was holding the land in trust, the defendant at paragraph 7 of the defence avers that; "the defendant vehemently denies the contents of paragraph 7 of the plaint including the particulars of creating of trust tabulated there under and avers that the suit land was bequeathed by the plaintiff to the defendant as a **gift** from his father". From the foregoing it is clear that the defendant admits that he was given the land by his father and not from his grandfather. The defendant, DW2 and DW3 insisted that the land was given to the defendant by the grandfather. In law a litigant cannot part from his pleadings. The defendant is therefore bound by his pleadings that he got LR;

KARINGANI/MUUGIRIRWA/29 from the plaintiff his father and not from his grandfather. The stories traded by the defence as a whole regarding the grandfather in respect of the suit land is nothing but an afterthought which the court should not believe.

(iv) Does the defendant hold LR; KARINGANI/MUGIRIRWA/29 in trust for his benefit, that of the plaintiff and the defendant's siblings? The answer to this question is in the affirmative. As pointed out supra when the land was purchased by the plaintiff the defendant was not born. When it came to adjudication in Karingani Adjudication section it was the plaintiff who walked the boundaries of LR; KARINGANI/MUGIRIRWA/29. The defendant was not on the scene during adjudication for he was only a toddler. How he was registered with the land and by who he cannot tell. This is the reason that it was not until 2011 that the defendant realized that he was the registered proprietor of the suit land. By this time he was a mature person and one can conclude that for all this while he believed the land belonged to his father the plaintiff. On discovering this he took advantage of the registration and wanted to use the land as though it was exclusively his. The land was subject to a trust and this is why the plaintiff cautioned the land.

It is worth noting that the plaintiff has no land of his. He and the defendant has settled on LR; KARINGANI/MUGIRIRWA/25 which is registered with AMBWIRIA AMUKIRI. AMBWIRIA AMUKIRI is the grandfather of the defendant and the father of the plaintiff. The fact that the defendant was living with his father on his grandfather's land LR; KARINGANI/MUGIRIRWA/25 is a clear demonstration that the defendant was not aware that during adjudication of Karingani Adjudication section the plaintiff caused him to be registered with LR; KARINGANI/MUGIRIRWA/29. As we talk his house and the family are housed and settled on LR; KARINGANI/MUGIRIRWA/25.

It is worth pointing out that the defendant and his siblings and so is the plaintiff cultivate and have been cultivating LR; KARINGANI/MUGIRIRWA/29. The children of the plaintiff including the defendant occupied portions of the suit land as they were shown by the plaintiff their father. Up to 2011 it was the plaintiff who was guiding on how and by who the suit land was to be occupied and made use of. The plaintiff himself had his portion where he grew subsistence crops and nappier grass. The defendant had his own portion and so were his siblings. After June 2011 upon the defendant discovering that he was the registered proprietor he disrupted the manner in which the land was occupied and divided it in a manner that the plaintiff was injected out of the land and the defendant set aside 0.25 acres which he sold to KANGAI NJERU KAGORI. It is for this reason that the plaintiff cautioned the land. To date the defendant has not discharged his duty as a trustee.

Why should the plaintiff cause his own purchased land registered with the defendant during Karingani Adjudication section. There are many cases of this nature within what was then Karingani Adjudication section and other adjudication sections that bordered Mt Kenya forest. Rumors were ripe that landless people would be given land from Mt Kenya forest. It was for this reason that many persons caused their land to be registered with their first born sons so that they could pause as landless and therefore benefit from the alleged arrangements. The rumors turned to be false and the result was that many persons remained landless after they had caused their lands to be registered with their first born sons. Definitely such persons were not giving their interest in their lands to their first born sons. The sons thereof were only holding their lands in trust and the whole arrangement was the father to pause as landless so that he could get more land for the family. The son who was registered as such could not claim the land to be his absolutely. He held such land in trust for himself, the father and the siblings. In the present case the plaintiff's intentions were similar. He wanted to pause as landless to get more land from Mt Kenya forest and thereby increase the land base for his family. A persuasive authority was that of JUSTICE ISAAC LENAOLA IN EMBU HIGH COURT CIVIL CASE NO 9 OF 2001. This case had similar facts to the instant one whereby the youngest son was registered with the family and/or ancestral land so that the father could pause as landless and benefit from the alleged arrangement that landless people would be given land at Mt Kenya forest. The son who was registered with the land turned against one of his brothers and wanted to evict him from the land although he had lived there from time immemorial. JUSTICE LENAOLA declared that the registered proprietor thereof was holding the land in trust for his benefit, that of his mother and other siblings. JUSTICE LENAOLA ordered that the land be shared equally between the registered proprietor and two other sons. One of the other sons was the plaintiff. We attach herewith a copy of the **JUDGMENT OF JUSTICE ISAAC LENAOLA IN EMBU HIGH COURT CIVIL CASE NO 9 OF 2001 ALEXANDAR MBUBA RINDIA VERUS NJOKA M'RINDIA**. To compound the plaintiff's argument that the defendant held the land in trust he has correctly pleaded that first that the plaintiff purchased the land from NYAGA MUTUOBORO and it was not ancestral. Secondly the defendant did not pay any consideration to be registered with the suit land. That plaintiff walked the boundaries of the suit land during demarcation and adjudication and caused the suit land to be registered with the defendant. That the defendant came to now that he is the registered proprietor of the suit land on or around June 2011 and the defendant believed and behaved as though the land belonged to the plaintiff. The defendant was too young during land adjudication and demarcation to have acquired the suit land. The defendant did not control the use and management of the suit land and such use and management remained under the hands of the plaintiff. That the defendant has never objected the family and in particular the plaintiff using the suit land. The plaintiff and his children have been and are still on the suit land from the time the plaintiff purchased the suit land and the defendant has never evicted them. From the foregoing the court should make a finding and hold that indeed the defendant holds the suit land in trust for his benefit, that of the plaintiff and the defendant's siblings.

6. We will be praying for cost for costs follow the events.

(F) CONCLUSION

7. Your lordship in conclusion we urge the court to make a finding that the plaintiff has made his case on a balance of probability. He has demonstrated to the court that the defendant did not even know when he was registered with the land. The defendant did not know the origins of the land and he paid no consideration whatsoever. Having admitted in his pleadings that he got the land from the plaintiff it will only be fair that the court orders that he holds the said land in trust for his benefit, that of the plaintiff and the defendant's siblings. the court should order the land to be registered with the plaintiff or in the alternative the land be subdivided and shared amongst the plaintiff, the defendant and his siblings equally and the defendant be ordered to execute all the necessary documents to effect the subdivision and transfer of the resultant parcels and in default the deputy registrar be authorized to sign such documents necessary to make such subdivisions and transfer.

8. We rest our submissions and pray.

DATED AT CHUKA THIS.....4THDAY OF.....JUNE,.....2018

DRAWN AND FILED BY

.....

I.C MUGO & CO ADVOCATES FOR THE PLAINTIFF

21. The defendant's written submissions which are pasted herebelow in exactly the same form in which they were filed without any alteration whatsoever read as follows:

DEFENDANT'S WRITTEN SUBMISSIONS

May it please you my Lord, these are the Defendant's brief and humble submissions;

DEFENDANT'S CASE

Your Honour the Defendant is the registered owner of all that parcel of land known as LR; KARINGANI/MUGIRIRWA/29. The land was obtained from his grandmother who had obtained it from his grandfather both of whom are deceased. The land was registered in the Defendant's names when he was fifteen (15) years old. The defendant was to hold the land in trust for his mother who was the Plaintiff's first wife and his siblings.

Your Honour the Plaintiff had kicked out the Defendant's mother from his parcel of land known as LR; KARINGANI/MUGIRIRWA/25 and married a second wife leaving the Defendant, his siblings and his mother destitute and with no home or a place to live. The Defendant's grandmother who is the Plaintiff's mother tried to assist them by apportioning them the suitland and registering it in the Defendant's names during adjudication. He apportioned the Defendant the suitland to hold in trust as she was apprehensive the Defendant's mother might leave and get remarried hence abandoning her children with no one to bring them up.

The Defendant submits that the suitland was never at any time vested in the Plaintiff or registered in the names of the Plaintiff who is his father. Your Honour the claim that the Plaintiff was able to cause the suitland to be registered in the Defendant's names when he was a toddler are not only misleading but ridiculous and in bad taste. At the time your Honour registration in land was done by committees and the party claiming a particular piece of land had to appear in person before the committee. It would have been impossible for the committee not to note that they were registering a toddler as a proprietor of land and the Plaintiff imputing such conduct on the committee is malicious and in bad faith. Furthermore every document that the Plaintiff would have used would have been a forgery and the Plaintiff has not produced any such forgeries before this court. Your Honour in the alternative and without prejudice to the foregoing the Plaintiff had more than fifty (50) years to undo and/or reverse such registration once he verified that rumours of landless people being given land at M.t Kenya were false but he never did so.

Your Honour the Defendant submits that the allegation by the Plaintiff that he did not know that he was registered as the proprietor of the suitland are false and ridiculous as there is no way the Defendant can hold a Title Deed to the suitland registered in his names and issued to him by the Department of Lands and not know that he was the proprietor to such land.

Your Honour the Defendant only lived with the Plaintiff on land parcel LR; KARINGANI/MUGIRIRWA/25 for only a brief period until he was 11 years old. Afterwards his father The Plaintiff kicked him and his mother out of the land and he has since then lived on land parcel LR; KARINGANI/MUGIRIRWA/29. The plaintiff inherited LR; KARINGANI/MUGIRIRWA/25 from his father **AMBWIRIA AMUKIRI** who died long time ago when the Defendant was still a child and the Plaintiff has owned the land since then.

Your Honour the allegation that the Defendant set aside 0.25 Acres of land and sold them to KANGAI NJERU KAGORI are false and are mere rumours perpetuated by the Plaintiff in an attempt to advance his cause. KANGAI NJERU KAGORI is unknown to the Defendant and is merely an excuse conjured by the imagination of the Plaintiff to create an excuse to support his false allegations. Your Honour there has been no evidence produced to support such a claim during the hearing of this suit and there is no such sale that has been registered with the department of Lands.

Your Honour according to the evidence adduced in court by the Defendant he is not aware of the means by which his grandparents acquired the suitland. However your Honour going by the evidence adduced by the Plaintiff he bought the land from MUTUOBORO NYAGA long before adjudication which means he bought the land during the colonial period using two goats and clothing. His one witness claims to remember that transaction vividly! No explanation was given as to why the clan was not involved in the said sale given that during such period consent of the clan was required to sell land.

PLAINTIFF'S CASE

The plaintiff is requesting the court to cancel the Defendant's title and vest the suit land solely in him

ANALYSIS

Your Honour it is not in dispute that the Defendant holds the suit land in trust for his benefit and that of his siblings. The Defendant did not however get the suit land from the Plaintiff and neither does he hold it in trust for the benefit of the Plaintiff but that of his siblings and himself. Infact during the hearing of the suit, the Defendant adduced evidence that his siblings and him have subdivided the suit land equally and each of his siblings is free to take out a title on their own portion of land and the Defendant is ready to have his title to the suit land extinguished. This position was confirmed by his brother MUTEKI DANIEL BORANA who testified that he is living in his own portion and would have in fact already taken out his title were it not for the caution launched by his father the Plaintiff herein over the SUITLAND.

Your Honour it is also not in dispute that the Plaintiff has two wives and the suit land is occupied by the children of the Plaintiff's first wife and the Plaintiff himself is in possession of a portion of the suit land which was occupied by his first wife who has since passed on. Your Honour it is also not in dispute that the Plaintiff owns another parcel of land known as LR; KARINGANI/MUGIRIRWA/25 which he inherited from his father **AMBWIRIA AMUKIRI** where he lives with his second wife and their two children who are adults. Therefore your Honour, the Plaintiff does not live on the suit land but all the children of his first wife live therein. Your Honour the intention of the Plaintiff is therefore to take away the little piece of land the Defendant and his siblings own and to sell it as he has another land with his second family.

Your Honour it is also not in dispute that the Plaintiff is the only one aggrieved by the subdivision of the suit land amongst the Defendant and his siblings. The Plaintiff never produced any of the Defendant's siblings in court to testify that the suit land had been irregularly subdivided or to raise any issues of concern on the part of the Defendant. This your Honour only points to the existence of bad blood between the Plaintiff and his children from his first marriage. He can therefore not be trusted to have their best interest in this matter. As a matter of fact your Honour this being a family matter the Plaintiff ought to have produced the affected family members who are his children to testify but he did not. The Defendant on his part had his brother testify on his behalf which is the only evidence that sheds light on the position of other family members in this matter.

THE LAW

Your Honour **Registered Land Act, Cap 300, Laws of Kenya section 28** provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. Therefore the Plaintiff has not created an overriding interest in his favour to enable him request the court to cancel the Defendant's title and register the suit land in his names.

Your Honour This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; **no man shall benefit from his own wrongdoing; and equity detests unjust enrichment.** Your Honour the Plaintiff should not benefit from his own wrong doing of registering a toddler as a proprietor of land.

Your Honour the question of trust is a matter of evidence. The Plaintiff must be in possession and/or occupation of the suit land for him to create a trust. In this matter we are guided by the case of **Peter Karanja Kamani vs Isaac Mwangi Kimani ELC 69 of 2016** where the court held **"Trust must be proved by credible evidence adduced by the person claiming that a trust exists."** The evidence adduced in this case falls far short of that required to prove that the defendant holds the suit property in trust for the plaintiff. The mere fact that the Plaintiff is the Defendant's father cannot reasonably be said to be proof of the alleged trust against the defendant.

CONCLUSION

In conclusion your honour, the defendant has already subdivided the suit land equally amongst his siblings and was ready to have his title cancelled and individual titles issued in the names of his siblings in equal shares. The plaintiff was present during the subdivision of the suit land and was allocated the portion that would have been occupied by his deceased first wife who is the mother of the defendant.

Your honour, with these brief and humble submissions we pray that the Plaintiff's suit be dismissed with costs to the defendant.

DATED AT MERU THIS..... DAY OF2018

.....
FOR: DAVID JOHN MBAYA & CO.

ADVOCATES FOR THE PLAINTIFF

22. The plaintiff proffered the case of Alexander Mbuba M'Rindia (op.cit) which is a good authority that trust is recognized by customary and by statutory law. It quoted the case of Kanyi versus Muthiora [1984] KLR 712 which stated as follows:

"Registered land as per section 163 of the Act is subject to the law of England as modified in equity which brings in the doctrines of implied constructive and resulting trusts... a proprietor by first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as a trustee".

23. The defendant proffered the case of Peter Karanja Kamani versus Isaac Mwangi Kimani – Nyeri ELC No. 69 of 2016 (OS) [2018] eKLR. This case is a good authority that trust must be proved by credible evidence adduced by the person claiming that a trust exists. It quotes the Court of Appeal in the case of Salesio M'Itonga versus M'Ithara & 3 Others [2015] eKLR as having stated:

"It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki versus Gichuki, Civil Appeal No. 21 of 1981, this court held that a party relying on the existence of a trust must prove through evidence the existence of a trust. We concur with the following findings by the High Court:-

"Trust must be proved by credible evidence adduced by the person claiming that a trust exists".

24. I have considered the oral evidence, the pleadings and the submissions proffered by the parties to buttress their veritably incongruent

assertions. I have also considered the authorities they have proffered.

25. I have no hesitation in finding that the evidence adduced by the plaintiff has not proved any of the particulars of trust itemized in his plaint. The age of the defendant when he was registered as owner of the suit land, though a minor then, is explained by his evidence and that of his witnesses DW2 and DW3, that the family decided to have the defendant registered as owner of the suit land, to give his mother, himself and siblings a place to stay peacefully after the plaintiff had disowned them and handled them cruelly. This evidence has not been controverted by the plaintiff in any way.

26. PW2, the plaintiff's witness admitted that he was not there when the plaintiff allegedly bought the suit land and even when the suit land was registered in the name of the defendant. In my opinion the probative value of his evidence is next to zilch.

27. The plaintiff did not controvert the evidence proffered by the defendant that he stayed with his second wife and their children on parcel No. Karingani/Mugirirwa/25. He also did not controvert the defendant's evidence that he held the suit land on his behalf and on behalf of his siblings. He did not controvert the assertion that the defendant had given out the suit land equally to his siblings and that he, the plaintiff, had cautioned or inhibited the land to deny issuance of titles to them.

28. I agree with the evidence of DW1, DW2 and DW3 that the plaintiff cannot be trusted to take care of the welfare of the defendant and his siblings as he had all along disowned them and been cruel to them as the evidence they have given to this end has not been controverted by even an iota of evidence.

29. He who alleges must prove. In accordance with section 107 of the Evidence Act, the facts concerning the allegation of the existence of trust must be proved by the plaintiff. I find that he has failed to do so.

30. In the circumstances, this suit is dismissed.

31. The circumstances of this case which involves a father and a son persuade me to exercise my judicial discretion not to grant costs to any of the parties. They will bear their own costs. Hopefully this will promote harmony in the family.

32. Orders accordingly.

Delivered in open Court at Chuka this 18th day of December, 2018 in the presence of:

CA: Ndegwa

Miss Hayata present for defendant

Siagi h/b I.C. Mugo for the plaintiff

P.M. NJOROGI

JUDGE