



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**MERU ELC CASE NO 234 OF 2013**

DAVID KINYUA.....PLAINTIFF

VERSUS

ZIPPORAH KAMWITU M'MUKINDIA.....1<sup>ST</sup> DEFENDANT

MOSES MUTHURI MUKINDIA.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. In his plaint dated **18<sup>th</sup> July, 2013**, the plaintiff prays for Judgment against the defendants jointly and severally for:

- a) A declaration that the 1<sup>st</sup> defendant held L.R. No. **Abothuguchi/Katheri/4046** in trust for the plaintiff and transfer the same to the 2<sup>nd</sup> defendant was in breach of the said trust.
- b) An order for cancelation of the name of the 2<sup>nd</sup> defendant from the register in respect of **L.R. No. Abothuguchi/Katheri/4046** and replacement thereof with the name of the plaintiff who is the rightful owner thereof.
- c) Costs of the suit.

2. PW1, the plaintiff told the court that he was claiming his share of ancestral land from his grandmother who had wrongly transferred it to his uncle, the 2<sup>nd</sup> defendant. He says that the original land had been subdivided by his father's stepbrother who had gathered it. After subdivision, Reuben Meme, his father's step brother shared it out to his brothers, including the plaintiff.

3. PW1 told the court that he was **claiming parcel No.4046**, a resultant of the original **parcel No.2593**, which he said was his father's portion.

4. When cross-examined by **Mrs Ntarangwi**, the defendants' advocate, PW1 admitted that he was taken to his grandmother's place when he was very young and that his grandmother showed him his mother, whom he did not know only in 1974. He insisted that he was the son of Zachary Karuntimi, his grandmother's son. He gave conflicting evidence in cross-examination first saying that he did not know if he was the child of Zachary Karuntimi. He was, however, categorical that Zachary Karuntimi had not disowned him. He also told the court that his grandmother, the 1<sup>st</sup> defendant never educated him although he owned up that she had brought him up.

5. The plaintiff could not explain why his step uncle gave the land which spawned this dispute to his

grandmother instead of to Zachary Karuntimi, even though his father was alive. He told the court that he had not asked how that was the case.

6. In cross-examination, the plaintiff did not controvert the suggestion that his father had been given ancestral land elsewhere. He could also not explain why the land given to his grandmother was not given to Zachary Karuntimi and why if there was any basis for doing so, his father never complained. He denied knowledge of a suit involving his father and one Karuti concerning the ancestral land his father was meant to inherit.

7. Also in cross-examination, the plaintiff denied that he had appeared before the relevant Land Control Board where he refused the gift his grandmother was offering, being  $\frac{1}{4}$  of the land but instead claimed the whole portion. He denied that he had demolished his house, sold cows and fencing wire and moved out. He also denied that his wife had committed suicide after she heard him insulting his grandmother. He, however, admitted that his wife had committed suicide by drinking poison. He told the court that he had buried his father and his wife on the parcel of land he was claiming.

8. Also in cross-examination, the plaintiff admitted that the trees he claimed to have planted were not on the disputed land but on a road reserve. The plaintiff denied that he had brought his mother to the disputed land to support his claim that the land should be given to him. He told the court that he had brought her to look after his children, the youngest of which was in standard four.

9. The plaintiff laconically denied that he had other land elsewhere.

10. PW2 gave evidence that the plaintiff was his step brother Zakayo's son. He also said that the 2<sup>nd</sup> defendant was his step brother.

11. PW2 asked the court to adopt his witness statement dated **18<sup>th</sup> July, 2013** as his evidence in this suit. In his statement he states that his father was called Jacob M'Mukindia and that he had 2 wives and five sons. He says that his mother who was the elder wife had 3 sons whereas the younger wife, the 1<sup>st</sup> defendant, had 2 sons. He avers that his mother was not alive.

12. PW2 avers that he gathered his father's land and registered it as L.R. No. **Abothuguchi/Katheri/758** which he held in trust for himself and his 4 brothers.

13. PW2 asserts that in 1993 he subdivided L.R. No. **Abothuguchi/Katheri/758** into five portions (**parcel Nos. 2593 to 2597**). He avers that parcel No.2593 was intended to be transferred to **Zakayo Karuntimi**, the son of the 1<sup>st</sup> defendant, now deceased. He says that as he was living in Nairobi he could not attend the apposite Land Control Board and for that reason he could not transfer the land to him. He avers that in 1996, he transferred **parcel No. 2593** to the 1<sup>st</sup> defendant to hold it in trust for his son (**Zakayo Karuntimi**) and for her grandchildren, among the plaintiff.

14. PW2 avers that the land has since been sub divided to create **Nos.4045, 4046 and 4047**.

15. PW2 avers that since his step brother Zakayo Karuntimi, had 3 sons, he had directed that **parcel no.2593** be shared out among them following the death of his father. He laconically avers that his step brother **Moses Muthuri** should not have been given any of the resultant parcels of land as he had already given him land. He says that **parcel No.4046** should have been given to the plaintiff.

16. During cross examination, PW2 said that he had gathered the suit land in the **1960s**. He also said that he could not remember how much money he had paid for the apposite title to be issued. He categorically stated that the original suit land **Parcel No.758** was not gathered by his father **M'Mukindia Butunga** (It is noted that in the plaint he is called **Jacob M'Mukindia**). He also denied that he had fraudulently had the land registered in his name when he was given **Kshs.45** by his father to go to the land office and have the apposite land registered in his father's name.

17. PW2 admitted that when he claims to have gathered the original suit land, his father was alive but did not want the land as being a former **Mau Mau fighter**, he expected to be allocated other land.
18. Despite the plaintiff, during cross examination, admitting that his father never lived with his mother, PW2, told the court that **Zakayo Karuntimi**, had lived with her. At the outset, I am inclined to believe the evidence of the plaintiff when I juxtapose it with that one of PW2 in this respect.
19. PW2 had difficulty in explaining why at one time his name is **Reuben Meme M'M'Mukindia** and at another time he was called **Kirera M'Mukindia**. He told the court that when he was born, he was named after his mother's side of his family but when he became of age, he adopted his father's name. He categorically testified that the 2 names belonged to him with Meme being a childhood name and **M'Kirera M'Mukindia** becoming his name after he was circumcised. The court noted that he was being evasive.
20. PW2 denied knowledge of **Meru Chief Magistrate's Civil Case No.522** of 1987 even though it was demonstrated that he had filed an affidavit in the said suit. This trait brings into question the integrity of the evidence he proffered in this suit.
21. DW1, a very old lady who could not move, was carried to court and gave evidence while seated.
22. DW1 asked the court to adopt her witness statement as her evidence.
23. In her statement, DW1 testified that she is the widow of the **late Jacob M'Mukindia** who gathered family land and sent his son **Kirera M'Mukindia**, PW2, to pay for its registration but contrary to her husband's instructions the said **M'Kirera M'Mukindia** registered the family land in his name.
24. DW1 also avers that her son **Zacky Karuntimi Mbatinga** (deceased) also known as **Zakayo Karuntimi** was not entitled to the family land at Abothuguchi because he was entitled to a parcel of family land at Mpuri where he had lived and which land was held by one Marete Ituma. She avers that her son had lived on this land for over 40 years and that he had carried out extensive developments. She also says that his son Karuntimi had lodged a claim for 6 acres against Marete Ituma.
25. PW2 also says that the land at Katheri was subdivided and that the persons entitled to the land was herself and her other sons except Karuntimi (the person the plaintiff claims to be his father) who had a share of the family land at Mpuri.
26. DW1 states that upon the birth of the plaintiff, the plaintiff's paternal grandfather dumped him at her home as his daughter claimed that he had been sired by his son Karuntimi. She states that her son Karuntimi never in his lifetime acknowledged the paternity of the plaintiff and never assumed any responsibility towards the plaintiff's welfare.
27. DW1 states that she had brought up the plaintiff as a child who had been abandoned and she took care of her as one of her own. She however laments that despite having his own assets, which he would not have acquired had she not brought him up, and despite all the good things she had done to him, the plaintiff on several occasions threatened her and made her to suffer.
28. DW1 avers that since she had become old, she had decided to gift her land to her grandchildren and also give a portion to David Kinyua, the plaintiff whom she had gratuitously brought up. She says that the plaintiff refused to cooperate at the land control board and told the board that he was not interested in the land he was being offered. He thereafter said that he was not a member of the family and moved out of the suit land.
29. DW1 never visited the land again until when before he instituted this suit he brought his mother to the suit land after she was chased away from where she was living.
30. DW1 states that after the plaintiff refused to accept the portion of land she had offered and after he

refused to attend the Land Control Board for consent to have the land transferred to him, she gifted the land to her son Moses Mukindia.

31. In her statement DW1 is categorical that the plaintiff cannot claim her land by alleging that he was a son of her son Karuntimi. She asserts that he was not Karuntimi's son. She also asserts that Karuntimi, her son, was also not entitled to the land. She categorically debunks the claim by the plaintiff that she held the land in trust for him.

32. I do note that in her oral evidence, the plaintiff more or less asserted what she had stated in her witness statement.

33. Further evidence was to be taken on **2<sup>nd</sup> March, 2016**. The plaintiff's advocate would cross-examine DW1 and the defence evidence would be orally taken.

34. On **2.3.2016**, in the morning, advocate D.J. Mbaya, holding brief for Mr Mwenda Mwarania, the plaintiff's advocate told the court that Mr. Mwarania was ready to proceed with the hearing and asked the court to have the hearing of the matter allocated time.

35. Mrs Ntarangwi, the Defendant's advocate also indicated that she was ready to proceed.

36. The court fixed the hearing to proceed from 11.15 am.

37. Inexplicably Mr. Mwarania, the plaintiff's advocate and the plaintiff were not in court. Nevertheless, the hearing continued. As the plaintiff and his advocate were not in court, DW1 was not cross-examined. The veracity of her evidence was not tested by the defence side.

38. DW2, Erick Mwenda Mbatinga, asked the court to adopt his witness statement dated 18<sup>th</sup> day of October, 2013 as his evidence in this suit.

39. DW2 states that he was about 16 years old when his father died and that in his lifetime he had never introduced him to a brother called David Kinyua, the plaintiff. He also states that he never grew up with the plaintiff.

40. DW2 also states that on 15<sup>th</sup> October, 2009, his grandmother, the 1<sup>st</sup> defendant asked him, his mother and family members to attend a Land Control Board meeting as she wanted to subdivide her land and give it out. DW2 states that David Kinyua, the Plaintiff, who had been brought up by his grandmother, the 1<sup>st</sup> defendant was in attendance. He avers that the plaintiff informed the members of the Land Control Board that he was against his grandmother's decision to subdivide her land as he wanted to be given the whole land. He refused to accept the portion that was being given to him and said that it was too small.

41. DW2 stated that his grandmother transferred Land Parcel Numbers Abothuguchi/Katheri/4045 and 4047 to him and to his brother. He states that he got to know from his grandmother that David Kinyua had refused to take the portion gifted to him and had refused to attend the Land Control Board for the transfer to him to be consented to.

42. DW2 laconically states that his grandmother gave him and his brother Land Parcel Nos. Abothuguchi/Katheri/4045 and 4047 out of her own will and not because the land belonged to their father Karunturi.

43. DW2 was not cross-examined as the plaintiff's advocate had absented himself from court.

44. DW3 asked the court to adopt her witness statement signed on 18<sup>th</sup> October, 2013 as her evidence in this suit. In her statement she says that she is the wife of Zacky Karuntimi, the deceased son of the 1<sup>st</sup> defendant. She says that she was married to him under Meru Customary Law in 1982 and that the marriage was solemnized in 1994. She avers that during the period she was married to Karuntimi, he never

informed her that he had a son called David Kinyua, the plaintiff, and he never took any responsibility over him. She also, states that she only saw the plaintiff living with her mother in law, the 1<sup>st</sup> defendant.

45. DW3 avers in her statement that her husband's land was at Mpuri and was Abothuguchi/Katheri/81 which one Marete Ituma held in trust for him. She avers that he lived in that land for many years although he also lived in Nairobi. She avers that during his lifetime, her husband had filed a claim over the said land but the apposite suit had not been concluded by the time he died.

46. DW3 states that the 1<sup>st</sup> defendant brought up the plaintiff gratuitously but not as a son of Karuntimi, her husband.

47. DW3 states that on **15<sup>th</sup> October, 2009** or thereabout, she attended a Land Control Board where the 1<sup>st</sup> defendant had called them after she had expressed her intention of gifting portions of her land to her children. She says that the plaintiff was also in attendance and he informed the members of the Board that he was against the intended subdivisions of the 1<sup>st</sup> defendant's land as he did not want her son to be given any land. She states that he also said that if the land was subdivided, he was not interested in it.

48. DW3 avers that her sons were gifted land parcel NOS. ABOTHUGUCHI/KATHERI/4045 and 4047 not because the land belonged to their father Karuntimi, but because the 1<sup>st</sup> defendant wanted to give the same to them.

49. DW3 was not cross-examined because the plaintiff's advocate and the plaintiff had absented themselves from court.

50. I have considered the pleadings, the oral evidence and the submissions filed by the parties in support of their propositions. I do opine that written submissions cannot replace the evidence proffered by the parties.

51. I do find that PW1's evidence does not controvert DW1's evidence although it was given earlier. There is no doubt that PW1 was brought up by DW1. DW1 has testified that PW1 was dumped at her home by his paternal grandfather. PW1 owned up that he only came to know his mother after he had been brought up by his grandmother.

52. From his grandmother's evidence, PW1 was not acknowledged by her son Karuntimi during his lifetime. She also testified that when she sought to subdivide the suit land, which was one acre in size, the plaintiff told the Board that he was not interested in getting  $\frac{1}{4}$  of the land, if at all it was to be subdivided. DW1 testified that the plaintiff, who had other land elsewhere moved out of the suit land and sold the property he had on the land.

53. DW1 testified that on many occasions PW1 had threatened her and had subjected her to suffering. She testified that PW1's wife committed suicide after she had been rendered distraught after witnessing PW1 insulting DW1.

54. DW1 testified that after PW1 declined the  $\frac{1}{4}$  acre of land she had gifted him, she waited for 3 years and because she was growing old and wanted to deal with her land before she died she decided to gift the land to the 2<sup>nd</sup> defendant, her son, who continues to look after her.

55. She was categorical that PW1 was not his son, Karuntimi's son and that she only raised him up gratuitously and the land she had offered him was only being given to him as a gift. Indeed DW1 testified that PW1 had told her that he did not share her bloodline.

56. The veracity of DW1's evidence was not tested through cross-examination. Only PW1 and his advocate know why they grew cold feet on the day they were scheduled to cross-examine DW1. For that reason, her evidence remains uncontroverted. Vis-à-vis the testimony of PW1, I am inclined to find that DW1 was a truthful witness.

57. DW2 testified that he was present when PW1 declined the ¼ acre of land he was being offered by DW1. This was at the Land Control Board on 15<sup>th</sup> October, 2009 or thereabout. DW2 was also categorical that the land gifted to him belonged to the 1<sup>st</sup> defendant and was therefore, not given to him because he was his father's son. DW1 testified that by the time his father Karuntimi died, he was 16 years old and his father had never introduced him to a brother called David Kinyua, the plaintiff.

58. DW3, testified that she never during her marriage to Karuntimi, the 1<sup>st</sup> defendant's son, been introduced to the plaintiff as her husband's son. She testified that her husband had land at Mpuri and was not entitled to the suit land. She also averred that she was present at the Land Control Board when the plaintiff said that he was not interested in the ¼ of an acre he was being offered by the 1<sup>st</sup> defendant. She was also categorical that Land Parcel NOS.ABOTHUGUCHI/KATHERI/4045 and 4047 were gifted to her sons out of the 1<sup>st</sup> defendants own will and not because the said land belonged to Karuntimi, her husband.

59. As already stated, DW3's evidence was not subjected to cross-examination and was, therefore, not controverted.

60. It is clear that the evidence of the 1<sup>st</sup> defendant and that of her witnesses is not controverted. The evidence of PW2 was shaky in many instances especially regarding how the original parcel of land No.758 came to be registered in his name. He was also not forthright with his answer regarding how he came to own 2 names. He also could not explain why he did not transfer the suit land to Karuntimi, his step brother whom the plaintiff claims to be his father, but instead transferred it to the 1<sup>st</sup> defendant, even though Karuntimi was alive.

61. I found PW2 uneconomical with the truth when he feigned ignorance of Meru CM's Case Number 522 of 1987, before it was demonstrated that he had sworn an affidavit in that suit.

62. The plaintiff based his claim by way of trust by saying that he was the son of Karuntimi, the son of the 1<sup>st</sup> defendant. The plaintiff does not explain why Karuntimi was not given a share of the original parcel No.758. I accept the defence witnesses evidence that Karuntimi did not claim any portion of the original parcel of land because he was living on another parcel of land at Mpuri. This explains why his mother was given 1 acre out of the 5 portions, for her to use as her own as is customary. I find that Karuntimi, was not entitled to any portion of land out of parcel No.2593. Through his claimed father, Karuntimi, the plaintiff cannot lay any claim against parcel No.4046, which is a resultant subdivision of the defendant's land parcel No.2593.

63. I do not find it necessary to make any finding regarding who sired the plaintiff. However he and his advocate refused to cross-examine the 1<sup>st</sup> defendant and her witnesses. Their evidence remains uncontroverted.

64. Without any other choice, I find that the 1<sup>st</sup> defendant had gratuitously offered to gift the 1<sup>st</sup> defendant ¼ acre of land which he declined to accept. A gratuitous giver can withhold a gift at will before it changes hands.

65. In the circumstances, I order as follows:

1. It is declared that the 1<sup>st</sup> defendant **DID NOT** hold L.R. NO. ABOTHUGUCHI/KAITHERI/4046 in trust for the plaintiff.
2. It is declared that the transfer of L.R. NO. ABOTHUGUCHI/KAITHERI/4046 to the 2<sup>nd</sup> Defendant **WAS NOT** in breach of any trust.
3. Land Parcel No. ABOTHUGUCHI/KAITHERI/4046 is rightly registered in the name of the 2<sup>nd</sup> defendant and should so remain.

4. It is so ordered.

Delivered in open court at Chuka this **26<sup>th</sup> day of July, 2017** in the presence of:

CA: Ndegwa

I.C. Mugo h/b Mwenda Mwarania for the plaintiff

Mark Muriithi h/b Mrs Ntarangwi for the defendants

**P.M. NJORGE**

**JUDGE**