



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ELC SUIT. NO 35 OF 2002**  
**JAMES M'NGARUTHI M' RINTARI.....1<sup>ST</sup> PLAINTIFF**  
**SILAS KIRIGIA M'RINTARI.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**MUGUNA M'RINTARI.....DEFENDANT**

**J U D G M E N T**

**BACKGROUND.**

1. The Plaintiffs and Defendant are brothers. Defendant is the registered proprietor of the Suitland No. Kibirichia/ 501, which is 20.8 Acres. The Plaintiffs filed the suit way back on 18.3.2002 claiming a share of the Suitland on the basis of Customary Trust.
2. The Second Plaintiff has since died. On 16.03.09 the Court gave orders declaring that the suit for 2<sup>nd</sup> Plaintiff had abated and defendant herein was granted half costs of the suit to be payable by the legal Representative of the deceased's estate.

**THE RECORD.**

3. The case has experienced much turbulence in the legal arena. The record is in shambles but fortunately, the proceedings have been typed.
4. The matter stalled ostensibly because it had been dismissed at some point. The case was heard by Judge Emukule and Judge Kasango as from 14.7.09, and by 20.1.11 defence case was closed. Matter was then due for Judgment on 12.5.2011. On 18.5.2011, a ruling was delivered to the effect that the suit stood as dismissed pursuant to previous orders given on 26.5.2008. The proceedings of 14.7.2009, 19.10.2010, 19.1.2011 and 20.1.2011 whereby the witnesses had testified were also set aside.
5. Soon thereafter, an application was filed on 31.5.11 to have the orders of 18.5.11 reviewed on the basis that the suit had never been dismissed. A ruling was delivered on 19.12.11 whereby the court ordered as follows;

**“The order of 18.5.2011 is reviewed and set aside. The courts proceedings of 14.7.2009, 19.10.2010, 19.1.2011 and 20.1.2011 are reinstated back on record. The injunction issued in favour of the plaintiff is also reinstated”.**

6. For one reason or another, the Judgment has remained pending for all these years. It is against this

background that I have embarked on the task of writing and delivering a judgment.

### **1<sup>ST</sup> PLAINTIFF'S CASE**

7. 1<sup>st</sup> Plaintiff (hereinafter referred to as the plaintiff) states that he was born in 1935 or there about, whereas defendant who is his younger brother was born in 1938.

8. PW2 is one Stanley M'mugumbi who testified that he is from Kitare- Mbura clan which was residing at Kithirune. He lived in Kithirune, Katheri and he eventually settled in Kibirichia. PW3 is one Japhet M'Ikundu also from Kithirune but from Gakiu clan of which the parties here in belong. Both PW2 and PW3 testified as to how people relocated from Kithirune to Kibirichia in early 1960s.

9. The Gakiu Clan was originally from Kithirune. PW 2 and 3 stated that they were in a Committee which was identifying families, who did not get land at Kithirune. Rintari's family was one of them (amongst many other families) who were to be settled at Kibirichia. Rintari happens to be the father of the two litigants but was already dead. The mother of the two litigants could not be registered as owner of the land as the policy then was against such registration. Plaintiff and his other brother were not around. It is against this back ground that the clan recommended for defendant to be registered in respect of the Suitland but on behalf of his brothers.

10. Plaintiff testified that he had gone to work at a place called Thuura in 1956 and left the work place in 1974. He states that it is the clan which sent them to have land at Kibirichia and that is how their land came to be registered in the name of defendant as their father was dead.

11. Plaintiff produced a Green Card showing that the land was registered in defendant's name on 15.06.1964. He wants the land to be subdivided so that he can get 7 acres of the land, from the 20.8 acres.

### **DEFENDANT'S CASE**

12. Defendant avers that he is the sole registered owner of the Suitland. He avers that he was born at Kithirune but he went to stay and work for one Paul Kigunda when he (Defendant) was undergoing initiation. He learnt that there was land for the landless at Kibirichia. Paul Kigunda then took him to 3 people namely Samson Murathania, Charles M'Kirera and Muruithu, and he was assisted to get land No. 501. He further stated that he has never seen his father who died in 1940s.

13. DW 2 one Charles Kirera who had also relocated to Kibirichia states that defendant was brought to him by Paul Kigunda with a request for Charles to take him (Defendant) as a son. DW2 had obliged. Both DW 1 & 2 state that defendant got the land at Kibirichia from the Mbura Clan. As for DW 3, he states that it is his own father who took him to Kibirichia to get land. So he got his own land and not one to share with others.

### **DETERMINATION**

14. Undisputed facts:

- That Defendant is the one registered as proprietor of the Suitland, which is 20.8 acres.
- That Plaintiff and Defendant are brothers, children of one Rintari who died a long time ago.
- Existence of H.C.C. No. 25 of 1990.

15. **ISSUES FOR DETERMINATION**

**1) What is the impact of H.C.C.C. No. 25 of 1990 in this suit?**

**2) Limitation of Action.**

**3) Whether the suit land is ancestral land.**

## 16. What is the impact of H.C.C.C. No. 25 of 1990 in this suit?

In paragraph 3 of the plaint, it is stated that the suit was struck out on technicalities, while in paragraph 8 of the defence, it is pleaded that this suit was dismissed for want of prosecution. None of the parties have availed the proceedings and or the order which ended the aforementioned case. None of the parties mentioned this case during the trial. I do not even know in which high court the matter was filed. Consequently, this Court would not be in a position to determine the circumstances under which the suit was terminated. I will therefore proceed to determine the present case as if it is a fresh matter.

## 17. Limitation of Action

It has been pleaded by defendant that the suit is stale and time barred by statute of limitation. There is a Court order of 05.03.02 allowing Plaintiff (then applicant) to file the suit within 14 days. The suit was filed on 18.03.02 within the time lines of the court order.

18. Plaintiff's claim is based on trust. He (plaintiff) avers that defendant holds the title to a portion of the land in trust for him. It follows that the trusteeship exists by virtue of the existence of the title, as long as the claim itself is proved.

19. In the case of *MACHARIA KIHARI VS NGIGI KIHARI CIVIL APPEAL NO. 170 OF 1993*, it was held that:-

**“we are unable to accept Mr. Thiongo's contention that the suit was time-barred. Limitation prescribed in Section 20 (2) of the Limitations of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal.”**

20. And in the case of *STEPHENS & 6 OTHERS VS STEPHENS & ANOTHER CIVIL APPEAL NO. 18 OF 1987*, it was held that:-

**“the period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use”.**

## Whether the Suit land is ancestral land?

21. It has been submitted (for Plaintiff) that Plaintiff has established the existence of a trust. It is averred that under S. 28 of Cap 300(the Registered Lands Act now repealed) Plaintiff's interests are protected. To this end, Plaintiff has cited the following authorities; *Civil Appeal No. 65 of 02 Samuel Gichina Muiruri Vs. Evanson Kimemia* and the case of *Peter Gitonga V. Francis Maingi M' Kiara H.C.C. No. 146 of 2000*.

22. On the other hand defence submits that Kibirichia land cannot be ancestral land as it is a settlement Scheme.

23. As rightly submitted by defence, the question of how a trust is created is a question of fact to be proved by evidence -*Mumo vs. Makau (2002) IEA 170 Court of Appeal* (Case cited by defence).

24. The evidence given by both sides confirm that the two litigants originally hailed from Kithirune. That is where, Rintari, the father of the litigants hailed from. The two sides also agree that landless people were being given land at Kibirichia.

25. The evidence of DW1 and DW2 is not consistent on whether the family of the litigants had land at Kithirune or not. DW2, Charles Kirera who had apparently taken in defendant has his own son has

claimed that Rintari had land at Kithirune where he lived since time immemorial. This is contrary to what defendant has stated. Defendant had told the court that his father was one of the landless people. The father had died in 1940's and so defendant had taken in his mother.

26. Defendant also stated that **“all I know I have never seen land belonging to my father at Kithirune. I took my mother to Kibirichia because the Kithirune land had been taken away. At that time my two brothers were living far away one was in European farm, but the eldest I cannot tell where he was”**.

27. It has also emerged that the mother of the litigants also relocated from Kithirune and at some point she was staying with defendant. All this evidence confirms that the family of the litigants somehow lost their place of abode at Kithirune.

28. **The Clan factor**; According to Plaintiff's side, the clan would identify the people who were landless and they would be allocated Land elsewhere. Rintari the father of the litigants was no more and his wife could not be registered as owner of land as women were not being registered. That is how Defendant came to be the registered owner of the Suitland on behalf of his siblings (brothers).

29. Defence to some extent has recognized the clan factor in land allocation. Defendant admitted that there was a clan committee which was the one vetting persons who would get land. He got the land through the Mburu sub clan. Defendants witness No. 2 clarified that Mburu clan and Gakiu clan were the same. DW2 also confirmed that the clan committee was only giving land at Kibirichia. He further stated that it was the clan which was making recommendation of who would get land and that the clan would send their recommendation to the committee at Kibirichia.

30. In the light of the fore going, I am inclined to find that the allocation of land was not an individual affair. It was clan based whereby the clan was ensuring that families were not left without land. The present case is one where the father of the litigants was already dead, defendant's brothers were far away, and women were not getting land. The plausible conclusion to make is that defendant got the land on behalf of the family.

31. To this end, I find that the case cited by the plaintiff, is relevant. In **MERU HC.CC NO. 146 OF 2000- PETER GITONGA VERSUS FRANCIS MAINGI M'IKIARA**, it was stated that :-

**A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.**

32. I have noted that DW3's evidence is not really helpful as he knows not about Rintari's family. He had told the court that; **“I did not know if the family of M'Rintari had land at Kithirune. ....In short, I do not know about the family of M'Rintari except Muguna's issues....”**

33. It follows then that the two witnesses for defendant have nothing to say about defendant's father yet they claim to be clan members.

## **CONCLUSION**

34. My conclusion on issue of ancestral land is that the family of the litigants retained no ancestral land at Kithirune and that gives credence to Plaintiff's averment that defendant acquired the land at Kibirichia in trust for his brothers.

35. Pursuant to provisions of **section 28 of the Land Registration Act**

**“Unless the contrary is expressed in the register, all registered land shall be subject to the**

**following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (b) trusts including customary trusts”.**

36. I find that Plaintiff is entitled to the portion of land he is claiming. The land is 20.8 acres. Plaintiff is claiming 7 acres. I allow the claim.

37. While making this conclusion, I have taken into account that plaintiff is only claiming 7 acres yet the land is 20.8 acres and there doesn't seem to be other claimants so far.

38. The final orders are as follows;

**1. It is hereby declared that plaintiff is entitled to 7 acres of land from parcel No. KIBIRICHIA /KIBIRICHIA/501.**

**2. An order is hereby issued for the transfer of 7 acres of land to the plaintiff from parcel no. KIBIRICHIA /KIBIRICHIA/501.**

**3. As to costs, I have taken into account that the litigants are close family members, as such I direct that each party bears their own costs of the suit, though defendant is still entitled to half costs as earlier ordered against the legal representatives of the plaintiff who died.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22<sup>ND</sup> NOVEMBER, 2017 IN THE PRESENCE OF:-**

Court Clerk: Janet

**HON. L. N. MBUGUA**

**ELC JUDGE**