



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 232 OF 2017**

**FESTUS KIRAI MUGAA.....1<sup>ST</sup> PLAINTIFF**  
**SAMSON KAGIRI.....2<sup>ND</sup> PLAINTIFF**  
**GEOFFREY KABURU.....3<sup>RD</sup> PLAINTIFF**  
**DAVID KAARIA.....4<sup>TH</sup> PLAINTIFF**  
**NAZARINA NKIROTE.....5<sup>TH</sup> PLAINTIFF**  
**MARTHA KATHANGA MUGAA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JOSEPH KIMATHI ISAAC.....DEFENDANT**

**JUDGMENT**

1. In their plaint dated 5<sup>th</sup> August, 2005 and filed in court on 17<sup>th</sup> August, 2005, the plaintiffs jointly and severally pray for judgment against the defendant for:

- a) Declaration that the Defendant holds land parcel No. NTIMA/IGOKI/3712 and 3713 on his own behalf and in trust for the plaintiffs in equal shares.
- b) An order directing the Defendant to share L.R. NO.NTIMA/IGOKI/3712 and 3713 with the plaintiffs equally and in default the Deputy Registrar be empowered to sign all the relevant documents to facilitate equal distribution of the two parcels of land amongst all the parties herein.
- c) Costs and interest.

2. PW1 Festus Kirai Mugaa, the 1<sup>st</sup> plaintiff, told the court that the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs were the children of the 6<sup>th</sup> plaintiff, Martha Kathanga Mugaa. He says that the defendant is their half brother, born by his father's 1<sup>st</sup> wife together with Margaret Kambura who is now deceased. He testified that his mother had five children, namely;

- a) Festus Kirai Mugaa (himself) – born in 1948
- b) Nazarina Nkirote (only sister) – born in 1948

- c) Samson Kagiri – born in 1951
- d) Geoffrey Kaburu – born in 1953
- e) David Kaaria – born in 1960

3. PW1 said that David Kaaria was not his father's son as he was born in 1960 when his father was not alive. He told the court that his father was detained during the state of emergency in 1954 and presumably died in detention as he never returned home even after the state of emergency ended.

4. He testified that his brothers and sister together with the defendant and his deceased sister Margaret Kambura were raised by his mother as one family. He claimed that the defendant's biological mother died when he was about 3 months old. Of course, he could not be sure of that age as he himself was not born.

5. He testified that the defendant was registered as proprietor of their family land L.R. NTIMA/IGOKI/81 to hold as trustee on his own behalf and on behalf of all other family members. He said that in breach of that trust the defendant without their knowledge and consent subdivided the land into two portions, to wit, parcel Nos. NTIMA/IGOKI/3712 and 3713. He said that parcel No. 3712 was 2 acres in size and parcel No. 3713 was supposed to be 4 acres in size. Later on, a surveyor informed the plaintiffs that parcel No. 3713 was 3.3 acres in size.

6. PW1 testified that the defendant had wanted to transfer parcel No. 3713 to the plaintiffs but they had reservations as they wanted their ancestral land shared equally among the plaintiffs and the defendant.

7. From the copies of green cards for both parcels of land parcel No. 3712 is 0.81 Hectares (approximately 2 acres) in size and parcel No. 3713 is 1.50 Hectares (approximately 3.7 acres in size). PW1 told the court that the plaintiffs had exclusive use of their portions on parcel 3713.

8. PW1 told the court that his mother had bought 5 acres from the Settlement Fund Trustees. He was categorical that this was not ancestral land. He told the court that his mother later on sold the land to meet her financial needs and he was categorical that she did not share any of the proceeds of the apposite sale with any of her children. PW1 denied that the defendant had single handedly funded all cases apposite to the suit land.

9. PW1 prayed that their prayers in the plaint be allowed and the 2 parcels of land which are the subject of this suit be shared equally between the plaintiffs and the defendant.

10. At the close of PW1's evidence in chief, the plaintiff's advocate, Mr. Manasses Kariuki, intimated to the court, that all other witnesses, to wit PW2, PW3, PW4 and PW5 would just "concur" with PW1's evidence.

11. PW2, PW3, PW4 and PW5, by and large, gave evidence which was in congruence with PW1's evidence. They expressed their wish to have the suit lands shared equally by the plaintiffs and the defendant.

12. DW1 told the court that he gathered the original land during demarcation and it was registered in his name because his father had died. He told the court that his father had 2 wives, Grace Mukemeru, the first wife, and the plaintiffs' mother Martha Kathanga, who was the 2<sup>nd</sup> wife. He told the court that when his father was detained in 1954, the 2<sup>nd</sup> wife, the plaintiffs' mother had 3 children:

- a) Justus Kirai – 1<sup>st</sup> plaintiff
- b) Nzarinia Nkirote – 5<sup>th</sup> plaintiff
- c) Samson Kagiri – 2<sup>nd</sup> plaintiff

13. DW1 claimed that the 3<sup>rd</sup> plaintiff, Geoffrey Kaburu and the 4<sup>th</sup> plaintiff, David Kaaria, were born after his father had gone to detention. He, however, did not dispute that all of them had been brought up, as one family, by the plaintiffs' mother.

14. DW1, told the court that, he and his stepmother, the plaintiffs' biological mother agreed that the suit land be subdivided into 2 portions of 2 and 4 acres each. They agreed that he would take 2 acres and the plaintiffs would take 4 acres. He opined that out of the 6 acres, he should have taken 3 acres but of his own volition, he agreed to give the plaintiffs 4 acres as their house had more children than his. He averred that it is the 1<sup>st</sup> plaintiff who facilitated the subdivision. The plaintiffs were to share parcel No. 3713 and he and his biological sister, Margaret Kambura, if she demanded would equally share parcel No. 3712. He told the court that even though the house he had constructed for his step-mother, the 6<sup>th</sup> plaintiff, was on parcel No. 3712, she was not cultivating any portion of it. He further said that Nazarina Nkirote, the 5<sup>th</sup> plaintiff, although she lived on the house DW1 had constructed for her mother, she cultivated her own parcel of land on parcel No. 3713.

15. DW1 was categorical that it was greed that had prompted the plaintiffs to file this suit saying that he had subdivided the land in 1986 and had even attempted to have parcel No. 3713 sub divided further so that the plaintiffs would be registered as proprietors of the portions they exclusively occupied. He attributed their decision to file this suit to the escalation of the value of land in the area where the suit lands were situated.

16. DW1 opined that had it not been for his efforts, the plaintiffs would not be having any land to lay a claim on. He said that he gathered the land during adjudication and fought against all adverse claims including suit No. Meru CMCC 448 of 1988 filed by one M'Mwithimbu M'Mugongo.

17. DW2, Obadia M'Mbwiria, avers that he is a brother of the father of some of the plaintiffs. In his evidence and in his witness statement he avers that the father of the defendant was called Isaac M'Mugaa and that he died and was buried in detention. He avers that he had 2 children, Margaret Kambura and Joseph Kimathi with his first wife, the defendant's mother, who died before he was taken to detention. He also avers that the 2<sup>nd</sup> wife Martha Kathanga had 3 children before he was detained. He named them as Festus Kirai – 1<sup>st</sup> plaintiff, Nazarina Nkirote – 5<sup>th</sup> plaintiff and Samson Kagiri – 2<sup>nd</sup> plaintiff. He avers that Geoffrey Kaburu – 3<sup>rd</sup> plaintiff and David Kaaria – 4<sup>th</sup> plaintiff were born after the defendant's father had been detained.

18. DW2 avers that there were several adjudication cases in which the defendant defended the family and he personally, as a close family member, assisted the defendant in fighting off those cases. He also avers that the defendant employed his resources, to fight those cases, including Meru CMCC 488 of 1988.

19. DW2, avers that the 1<sup>st</sup> plaintiff spearheaded the subdivision of the original land and claims that the family had agreed to give the defendant 2 acres because he was the eldest son and had used his resources to protect the original family land. He also claimed that the plaintiffs' biological mother had been given 5 acres being family land originating from the late Isaac M'Mugaa, her husband and that she had given this land only to her biological children leaving out the defendant and his sister Margaret Kambura. He supported the defendant's claim to 2 acres on parcel 3712. He was also categorical that in Meru custom, land is shared equally between or among existing houses, with each wife constituting a house.

20. By and large, the evidence proffered by the plaintiffs and by the defendant and his one witness, was not materially shaken during cross-examination by the parties' respective advocates. The parties stuck to their assertions.

21. I have considered the evidence proffered by the parties in support of their assertions. I consider the issue to be determined as being: if the suit lands should be shared equally between the plaintiffs and the defendant or should they be shared equally between the houses of their mothers.

22. All parties are in agreement that the original suit land, parcel No. NTIMA/IGOKI/81 was family land.

The defendant avers that he single handedly gathered the land and personally met expenses attendant to cases at the adjudication level and in Meru CMCC No. 448 of 1988. The defendant does not dispute that he was registered proprietor of the suit land in trust for the family. He however feels that he should be compensated for his efforts and for the financial cost he underwent in protecting the family land. Although some of the plaintiffs claim that they assisted him with financial assistance, it is pellucid that whether or not they assisted him, he played the greatest part in securing the subject land.

23. The defendant raises issue with sale of land at Timau, which the plaintiffs' mother was allocated through the Settlement Fund Trustees. The defendant asserts that the land had been allocated to the plaintiffs' mother through his deceased father, who died in detention. This assertion was supported by DW2 who claims to be the brother of the father of the defendant and of some of the plaintiffs. DW2 was unequivocal in asserting that the land was allocated to the sixth defendant, the mother of the 1<sup>st</sup> to 5<sup>th</sup> plaintiffs, because her husband was detained and died in detention. I take cognizance that this was common after independence and that where possible Mau Mau detainees and /or their dependants were given priority when it came to allocation of available land. If this was the case, then the apposite land would attain a veneer of family land.

24. During all land allocations, the allottees were required to pay for the attendant transaction costs and for developments existing in the land they were allocated. This explains the loan granted to the plaintiff's mother by the Settlement Fund Trustees. This was common to all allottees. The differentials in the loan amounts offered were dependent on the size of the land allocated and the extent of the developments therein.

25. The defendant says that the 6<sup>th</sup> defendant did not consult him or share the proceeds of the sale of this land with him. The plaintiffs' claim that their mother sold the land because it was her land which she bought through a loan. The evidence proffered by the defendant and his deceased father's brother, to me is more persuasive. This land should have been considered as family land. It is pellucid to me that the defendant and his deceased sister, Martha Kambura were excluded from this scheme of things by the plaintiffs and their mother.

26. The plaintiff further argues that even if the land was to be shared equally by the children of his father, he asserts that the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were not his father's children. He says that they were born when his father was in detention. All parties agree that the 4<sup>th</sup> plaintiff was not sired by the defendant's father. The plaintiffs say that the 3<sup>rd</sup> plaintiff was born in 1953 whereas the defendant says that he was born in 1957. If he was born in 1953, then he was the son of the defendant's father. If he was born in 1957, only his mother, the 6<sup>th</sup> defendant, could tell who his father was. The plaintiffs have produced an identification card indicating that the 3<sup>rd</sup> defendant was born in 1953. Of course, an identity card is not a birth certificate. Many of them contain dates self-declared by identity card holders. The defendants' assertion is supported by DW2, his uncle.

27. The defendant further states that Meru Customary Law requires that land be shared equally among houses. This assertion was supported by DW2 who claimed to be the brother of the father of the defendant and some of the plaintiffs. Where a man is married to more than one wife, a house is constituted by a wife and her biological children. The defendant asserts that the plaintiffs belong to the house of their mother, Martha Kathanga Mugaa. He says that he and his deceased sister, Margaret Kambura, belong to the house of his mother, Grace Mukemeru.

28. This assertion by the defendant that in Meru Customary Law land is shared among houses, and which assertion was supported by DW2, was not controverted by the plaintiffs.

29. I agree that had it not been for the defendant who gathered the suit land and defended cases threatening to deny the family of its land including Meru CMCC 448 of 1988 in which he was the defendant, there would be no family land to talk about. I also agree with him that he has been generous to the plaintiffs by offering them the bigger portion of the subdivided original land No.NTIMA/IGOKI/81 instead of insisting that the land be shared equally by his father's two houses.

30. On a balance of probabilities, I find that the plaintiffs have not proved their case. This case merits dismissal. I do note that the defendant has no counterclaim.

31. Ideally, costs follow the event. Should I move in this direction, I opine that the defendant deserves to be awarded costs. However, the parties will continue living on subdivisions of the original suit land and they are close relatives. To promote harmonious co-existence of the family members, I will exercise my discretion and refuse to award costs to the defendant.

32. Judgment is entered for the defendant against the plaintiffs in the following terms:

a) This suit is dismissed

b) Parties to bear own costs

Delivered in open court at Chuka this **21<sup>st</sup> day of November, 2017** in the presence of:

CA: Ndegwa

Carlpeters Mbaabu h/b M.Kariuki for Plaintiff

Joseph Kimathi Isaac - Defendant

**P.M. NJOROGÉ**

**JUDGE**