



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 268 OF 1997

GEOFFREY MBUGUA DEDAN..... 1ST PLAINTIFF

HANNAH NJOKI GATHUKU & JOSEPH MBURU GATHUKU(suing as the legal representative of the Estate of GATHUKU GICHUGU (DECEASED)).....2ND PLAINTIFF

VERSUS

JOSEPH MBUGUA DEDAN GACHUMI1ST DEFENDANT

JAMES GUCHUGU GACHUMI 2ND DEFENDANT

JUDGEMENT

This suit concerns a family land dispute over Land Parcel Number **Limuru/Ngecha/68** which is the ancestral land belonging to the late **Dedan Gachumi** who was the father of the 1st plaintiff and the defendants herein and a brother to the 2nd Plaintiff's husband. **Limuru/Ngecha/68** was subdivided into three portions **Limuru /Ngecha/1239, 1240 and 1241** in or about 1988. In the amended plaint filed in court on 17th December 2008 the plaintiffs contend that the Defendants are registered as joint owners of the parcels **LIMURU/NGECHA/1239, 1240 and 1241**. The 1st plaintiff's averment is that the late **Dedan Gachumi** was registered and held the parcel in trust for himself and other members of the family including the plaintiffs and the Defendants. That in breach of the said trust the defendants colluded with the late **Dedan Gachumi** to transfer to them by way of a gift, the said parcel which was subsequently sub-divided into three portions and is now the subject matter of this suit. The Plaintiff further avers that prior to the said transfer to the defendants by way of gift the late **Dedan Gachumi** had signed a mutation form so as to give to his brother, the 2nd plaintiff the 1 ½ acres portion being his share from the said ancestral land.

The plaintiff further state in the amended plaint that in **R.M.C.C No 162 of 1989**, Kiambu, where the Defendants were the plaintiffs and the 1st plaintiff was the defendant, it was found as a fact that the 1st plaintiff was entitled to the portion of the suit land but despite such determination by the court as to the 1st plaintiff's entitlement, the Defendants have refused and or neglected to transfer to him his portion of two acres which the late **Dedan Gachumi** his father had given to him as the eldest son. That the 2nd plaintiff having been entitled to a share of the ancestral land also claim the 1.5 acres the late **Dedan Gachumi** was to give to him and which the 2nd plaintiff had extensively developed and still occupies as the beneficial owner. The plaintiffs therefore pray that this court makes a declaration that the defendants hold in trust the 2 acres for the 1st plaintiff and 1.5 acres for the benefit of the 2nd plaintiff and for the

defendants to transfer to the plaintiffs their respective portions of land and in default or refusal to transfer, the Deputy Registrar be authorised to sign on behalf of the defendants all the necessary papers to effect such transfer.

The defendants filed a further amended defence in court on 24th November 2008 denying the plaintiffs claim and in reply state that their father the late **Dedan Gachumi** was the registered proprietor of Land Parcels Numbers **Limuru/ Ngecha/ 68** and **Limuru/Ngecha 649** and that Parcel number **Limuru/Ngecha 649** was also ancestral land belonging and owned by the defendants deceased grandfather who bequeathed it to their deceased father. It is their averment that on or about the year 1988, the defendants' deceased father bequeathed the said two parcels of land as follows;

- (a) Parcel numbers **Limuru/Ngecha/68** in equal shares to the defendants.
- (b) Parcel numbers **Limuru/Ngecha/649** to the 1st plaintiff all parcels being approximately of equal shares.

The defendants aver that while the parcel **Limuru/Ngecha/68** was bequeathed to them by their deceased father in 1988, parcel number **Limuru/Ngecha/649** was bequeathed to the 1st plaintiff before 1988 and the 1st plaintiff thereafter sold his parcel of land to a third party. The Defendants deny that the 1st plaintiff is entitled to a share out of **Limuru/Ngecha/68**. The defendants further aver that all the issues pertaining to ownership and or entitlement to any portion of the above parcels were matters that were already in issue in Kiambu **RMCC NO 162** of **1989** and could not be raised in subsequent proceedings hence this suit is res judicata and this suit therefore is not sustainable in law.

The Defendants further contend that the 2nd plaintiff lacks any basis to bring a claim on the suit land since it is the 2nd plaintiff who declined to take up the portion of 1 ½ acres which the Defendants have always been ready and willing to transfer to the 2nd plaintiff. The Defendant further averred that the 1st plaintiff in 1996 conceded that he had no right to the suit land and sought to be allowed time to vacate and is therefore estopped in law from laying claim to the suit land.

The two plaintiffs testified in support of their claim while the 1st Defendant and one defence witness testified in support of the defence. The 1st plaintiff testified he purchased land parcel **Limuru/Ngecha/649** in 1969 from **Harrison Gichugu Gachumi** and that the land was not bequeathed to him by his father who only owned **Limuru/Ngecha/68**. The witness testified that the title **Limuru/Ngecha/68** no longer existed as it was closed upon subdivision in 1989 when land parcel Numbers **Limuru/Ngecha/1239, 1240** and **1241** were created. Land Parcel **Limuru/Ngecha/1239** though registered in the defendants joint names is occupied by the 2nd plaintiff and measures 1 ½ acres and was given to the 2nd plaintiff by his brother **Dedan Gichumi** as his inheritance and/or entitlement out of land parcel **Limuru/Ngecha/68**. The 1st plaintiff stated in his evidence that he had no problems with the 2nd plaintiff getting his portion but wants to get his portion of 2 acres out of land parcels **1240** and **1241** where he resides. Title **Limuru/Ngecha 1240** is registered in the name of the 2nd defendant while **Limuru/Ngecha/1241** registered in the name of the 1st defendant which registrations were done during the lifetime of their father. The witness pointed out that this was not the 1st time the matter is subject of court proceedings as there was a case in Kiambu Court **RMCC NO. 162 OF 1989** in which his father was a witness and testified that he did not give him a portion of land parcel **Limuru/Ngecha/68**. The 1st plaintiff's testimony was that his father gave him 2 acres of the ancestral land when he got married in 1963 and that this was to be hived off from the suit land. The witness questioned the validity of two affidavits one dated 26th August 1988 and the other dated 5th August 1991 where the deceased father is said to have deponed that he had given the plaintiff land parcel NO. **Limuru/Ngecha/649** and the Defendants land parcel NO. **Limuru/Ngecha/68** respectively.

Pw1 testified that he purchased land parcel **Limuru/Ngecha/649** using his own means and that the same was not given to him by his deceased father as alleged. The witness insisted that he was entitled to a portion of his father's land parcel **Limuru/Ngecha/68** as his inheritance and that the defendants were thus

registered and holding the land in trust for themselves and for the 1st Plaintiff. Pw1 asserted that both the Kiambu court in **SRMCC NO. 162 of 1989** and the High court in the resultant appeal in Nairobi **HC Civil Appeal NO. 187 OF 1991** had found that the 1st plaintiff was entitled to a portion of **Limuru/Ngecha/68** pursuant to Kikuyu customary law as relates to inheritance. Pw1 contended that his father did not own Land Parcel **Limuru/Ngecha/649** so that he could bequeath the same to him and that the Defendants had connived and colluded with their deceased father to transfer the ancestral land to them to deny the 1st plaintiff his right of inheritance.

Pw1 dismissed the purported agreement of 2nd July 1967 showing **Dedan Gachumi** as the buyer of land parcel **Limuru/Ngecha/649** from **Gichinju Gachumi** as fake as his father never at anytime claimed ownership of **Limuru/Ngecha/649** which land had been transferred to the 1st plaintiff after it was hived off by the seller from Land parcel **Limuru/Ngecha/90**.

Pw2 **Hannah Njoki Gathuku** the widow and personal legal representative of **Gathuku Gichugu** (deceased) 2nd plaintiff testified that her deceased husband was the brother of the 1st plaintiff's and the defendants father one **Dedan Gachumi** (deceased). She testified that the late **Dedan Gachumi** (deceased) had been registered as owner of **Limuru/Ngecha/68** and was holding a portion of 1.5 acres comprised in the said title in trust for her deceased husband. She testified that the 1st plaintiff and the Defendants were brothers and that she like the 1st plaintiff and his Defendant brothers all resided in the parcel of land **Limuru/Ngecha/68** where they have all built their homes. The witness testified that out of **Limuru/Ngecha/68** her husband was entitled to a portion of 1.5 acres which his late brother had acknowledged but though the portion was parceled/subdivided out the title the portion had not been given to her. The 2nd plaintiff asserted that all the children of **Dedan Gachumi** were entitled to share land parcel **Limuru/Ngecha/68** as it was family land.

Dw1 **Joseph Mbugua Gachumi** gave evidence that he and the 2nd Defendant and the 1st plaintiff were brothers. The witness testified that land parcel **Limuru/Ngecha/68** which was owned by their father was subdivided into 3 portions as follows:-

- i. **L.R. Limuru/Ngecha/1239 registered jointly in the 1st and 2nd Defendants name and measures 1.5 acres.**
- ii. **L.R. Limuru/Ngecha/1240 registered in 2nd Defendants name and measures 2.5 acres.**
- iii. **L.R. Limuru/Ngecha/1241 registered in 1st Defendants name and measures 2.5 acres.**

The witness testified that the 1st plaintiff was not given any share of L.R. NO. **Limuru/Ngecha/68** since he had already been given another parcel of land **Limuru/Ngecha/649** by their father which measured about 2 acres. The witness admitted that before the sub-division of **Limuru/Ngecha/68** in 1988 all the parties to the suit were residing on the property but states that sometime in 1988/89 the 1st plaintiff was requested to move out of the land to the parcel of land he had been given by their father but the 1st plaintiff never moved.

Apparently soon thereafter the Defendants in the present suit filed the suit in the Kiambu Magistrates court (**Kiambu SRMCC NO. 162 OF 1989**) interlia seeking the eviction of the 1st plaintiff at which their father who was still alive testified. The suit at Kiambu was dismissed and a subsequent appeal to the High Court was also dismissed. The magistrate in the case before him held that land parcel **Limuru/Ngecha/68** was ancestral land and further held that there was no evidence to contradict the Defendant (**1st plaintiff herein**) assertion that he bought land parcel number **Limuru/Ngecha/649**. The magistrate in particular made the following holding and finding:-

“on the evidence before the court, I have found that the plaintiff parcels of land arise out of land parcel NO. LIMURU/NGECHA/68 which is ancestral land and according to Kikuyu customary law as stated by Mr. Contran in his book the “Restatement of African Law” a father cannot disinherit a son during his lifetime. Defendant is in danger of being disinherited”.

The appellate court upheld the decision of the Trial Magistrate both on the findings of fact and law after the evaluation and assessment of the evidence. **Hon Justice Sheikh Amin**, as he then was, observed while delivering judgment in the appeal thus:-

“Here we have three brothers who are the litigants. The land in dispute is ancestral land Limuru/Ngecha/68. All these brothers reside on this land since birth and have constructed their dwellings. Subsequently the land was subdivided into two portions i.e Limuru/Ngecha/1241 and Limuru/Ngecha/1240 in the names of the first and second Appellants (original plaintiffs) respectively. These two plaintiffs instituted action against the Respondent (defendant) for ejectment from the original ancestral land Limuru/Ngecha/68. In support of their claim it was contended that the Respondent (defendant) had been allocated another piece of land Limuru/Ngecha/649 by his father. This contention of the appellant/Plaintiff was contested vigorously. For the appellant/plaintiff the witnesses testified one was Pw1 the father and the second was Pw2 Mbugua Gichugu. This evidence related to the distribution of the land by the father. The learned magistrate found this evidence defiant. He did not accept it”.

The Judge held that in the circumstances peculiar to the appeal before him customary law would apply in the distribution of the ancestral land.

The Defendants in the present suit called **DW2 Rev. Stephen Njoroge Chege** who testified that he knew the parties to the suit well and that he was a friend to the family of **Dedan Gachimu**, the deceased, and that sometime in 1968 he was requested by the deceased to accompany him to the home of one **Harrison Gichunju** to witness a transaction of land purchase. The witness stated that they went to **Gichunju’s** home and that the 1st plaintiff wrote a record of the proceedings in a small notebook which was produced as **DEX4**. The witness identified the notebook and acknowledged it has writings relating to several days and not only 15/4/1968 when he was present. The witness acknowledged the notes were not counter signed by anybody and further conceded that the notebook may have been written on several occasions. The notebook did not have any reference of the land that was the subject of the purchase or sale.

The Defendants have acknowledged the entitlement of the 2nd plaintiff to a portion of 1.5 acres and indeed DW1 testified that they hold title to land reference **Limuru/Ngecha/1239** in trust for the 2nd plaintiff and it is only that the 2nd plaintiff has failed to pay a sum of Kshs.10,000/- on account of subdivision costs to retrieve the title. Thus the claim by the 2nd plaintiff is acknowledged and admitted by the Defendants.

Having reviewed the evidence by the parties the court frames the issues for determination as follows:-

- a. **Whether land parcel Limuru/Ngecha/68 was ancestral land.**
- b. **Whether the 1st plaintiff was entitled to a share of land parcel Limuru/Ngecha/68 or whether he had been given a separate parcel of land being Limuru/Ngecha/649 by his deceased father as alleged.**
- c. **Whether the Defendants hold land title Limuru/Ngecha/1240 and Limuru/Ngecha/1241 being resultant subdivisions of Limuru/Ngecha/68 in trust for themselves and the 1st plaintiff.**
- d. **Whether the present suit is res judicata by reason of the decision in Kiambu SRMCC NO. 162 OF 1989.**

The parties filed written submissions in which they canvassed their issues and articulated their respective positions as relates to the suit. I have reviewed the evidence and the submissions filed on behalf of the parties and now proceed to make my determinations on the issues:

Issue.

- a. **Whether land title Limuru/Ngecha/68 was ancestral of land.**

There is no dispute that **Dedan Gachimu** (deceased) the father of the 1st plaintiff and the 1st and 2nd Defendants was the registered owner of the land parcel **Limuru/Ngecha/68** as from 29/3/1957 as per the abstract of title tendered in evidence. It is admitted that the said **Dedan Gachimu** inherited this land from his father and that he was so registered as a trustee to hold a portion of 1.5 acres in favour of his brother the deceased 2nd plaintiff. Both the Kiambu Senior Magistrates court (**SRMCC**) **NO 162 of 1989**) and the High court in Civil appeal NO. 187 of 1991 held and found that the land was ancestral land such that it's distribution was subject to the Kikuyu customary law. Thus on this issue I find and hold that the land parcel **Limuru/Ngecha/168** was ancestral land. The evidence that the deceased Dedan Gachimu inherited this land from his father is not contraverted.

Issue

b. Whether 1st plaintiff was entitled to a share of land parcel Limuru/Ngecha/68 or he had been given land parcel Limuru/Ngecha/649 by his father in lieu thereof.

It is not disputed that the 1st plaintiff was a son of **Dedan Gachumi** and a brother to the 1st and 2nd Defendants. That being the position the 1st plaintiff was under the Kikuyu customary law entitled to inheritance from his father. The issue that fell to be determined in the Kiambu Magistrates court was whether the 1st plaintiff in this suit who was the defendant in the Kiambu Magistrate's court and who the Defendants in this suit and who were the plaintiffs in the Kiambu Magistrate's court ought to have been evicted from land parcel **Limuru/Ngecha/68** on the basis that the 1st plaintiff herein had been given another parcel of land namely **Limuru/Ngecha/649** by their father. The court in Kiambu emphatically held that land parcel **Limuru/Ngecha/68** which had then been subdivided to create title numbers **Limuru/Ngecha/1240** and **1241** which were registered in the Defendants names was ancestral land and the 1st plaintiff was entitled to a share of it. The court did not find any evidence that land title **Limuru/Ngecha/649** was owned by the 1st plaintiff's father so that he could have bequeathed the same to the 1st plaintiff. The court found and held that the 1st plaintiff had purchased parcel **Limuru/Ngecha/649** from his own means. The High court sitting as an appellate court on the decision of the Magistrate's court upheld the findings of the trial Magistrate.

Before this court I dare say the parties attempted to relitigate the matter and particularly as regards whether or not land parcel **Limuru/Ngecha/649** was given to the 1st plaintiff by the father. With respect even though that issue ought not to have been re opened I am still of the view that the evidence fell short of establishing that the 1st plaintiff was given parcel **Limuru/Ngecha/649** by the father. There was simply no evidence that the 1st plaintiff's late father owned this land so that he could bequeath the same to the 1st Plaintiff.

The evidence adduced shows that the property was transferred to the 1st plaintiff by **Harrison Gichinju Gachumi** for valuable consideration in 1969 after the consent of the Land Control Board was given and a title deed was issued to the 1st plaintiff on 13th March 1979. There is no time when this land was registered in the 1st plaintiff's father's name. The 1st plaintiff testified he purchased the land using his own sources and that the same was not purchased by his father as alleged. The evidence given by Dw2 respecting the alleged sale transaction on 15th April 1968 cannot be relied upon as it is evident the document he was referring to **DEX4** was made out on several occasions and the same did not have any reference to any specific land and neither was it signed by anybody. The authenticity of **DEX4** is also doubtful considering the Defendants and their own father testified in the Kiambu Magistrates Court and this exhibit even though shown to have been made much earlier was not tendered in evidence. Indeed also an affidavit stated to have been made by the Defendants and the 1st plaintiff's father on 25/8/1988 before the Kiambu Court was filed was also not tendered in evidence at the Kiambu Court casting doubts as to whether the same was a genuine document. If it was available why was it not availed in evidence?/reject the evidence by DW2 as to the existence of a sale agreement in regard to land parcel **Limuru/Ngecha/649**.

In the premises and upon my evaluation of the evidence I find that there is no proof that the 1st plaintiff's father owned land parcel **Limuru/Ngecha/649** and/or that he gave the same to the 1st plaintiff's as claimed. I have considered the totality of the evidence adduced in regard to this aspect of the matter and I accept the 1st plaintiff's evidence that he purchased the parcel of land from his own sources.

Issue

c. **Whether the Defendants hold land title Limuru/Ngecha/1240 and Limuru/Ngecha/1241 in trust for themselves and the 1st plaintiff.**

The 1st plaintiff and the Defendants have since their birth resided on their father's plot **Limuru/Ngecha/68** and each of them have settled and built the residential homes on this land. I have made a finding that this land **Limuru/Ngecha/68** was ancestral Land. There is evidence through PW1 that his deceased father had agreed to give him 2 acres and indeed their father while testifying in the Kiambu Magistrate's court stated that he had given the 1st plaintiff 2 acres when he got married. The 1st plaintiff married in 1963/1964 and was shown where to construct his home in **Limuru/Ngecha/68** and cultivate. The grant of 2 acres could only have been from this land since the 1st plaintiff's father did not own any other land since even the other land **Limuru/Ngecha/649** did not come into being until 1968/69.

The deceased father of the 1st plaintiff and the Defendants was the registered owner of title **Limuru/Ngecha/68** before the same was subdivided to create Title NOS. **Limuru/Ngecha/239, 1240 and 1241**. The Defendants admit the deceased was holding the land in trust for his family and the 2nd plaintiff's family and they are agreed that land parcel **Limuru/Ngecha/1239** ought to be transferred to the 2nd plaintiff in discharge of that trust. The deceased plaintiff's father could not lawfully under the Kikuyu customary law distribute his property and exclude the 1st plaintiff as that would constitute the 1st plaintiff being disinherited.

The transfer of parcels **Limuru/Ngecha/1240 and 1241** being the remnant of **Limuru/Ngecha/68** following the subdivision to the exclusion of the 1st plaintiff could only be subject to the 1st plaintiff's overriding interest of a trust under the Kikuyu customary Law. The 1st plaintiff's deceased father under the Kikuyu customary law could not distribute what has been found and held to be ancestral land leaving out any of his sons who were entitled to have inheritance from him. It is not entirely clear how the deceased determined to do the subdivision at the time he did and considering the manner under which the subdivision and the transfer to the defendants was done and closely followed with the institution of the suit at the Kiambu Law Courts by the defendants against the 1st plaintiff the claim by the 1st plaintiff of collusion between the defendants and his deceased father may have some merit.

The repealed Registered Land Act (Cap 300 Laws of Kenya) under the proviso to section 28 clearly acknowledged that a registered proprietor would not be relieved of any duty or obligation he would be subject to as a trustee. The proviso to section 28 RLA provide thus:-

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

In the case of a voluntary transfer as in the present case where the Defendants were transferred the parcels of land **Limuru/Ngecha/1240 and 1241** as gifts by their father, Section 29 of the repealed Registered Land Act provided such transferor would be subject to any unregistered rights or interest that the transferor held the property. Section 29 RLA provided thus:-

29. Every proprietor who has acquired land, lease or charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the Bankruptcy Act and to the winding up provisions of the Companies Act, but save aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.

The effect of the foregoing provision is that if as in the instant case the deceased father of the 1st plaintiff was obligated under the Kikuyu customary law not to disinherit the 1st plaintiff, he did make any transfer as he did to the 1st and 2nd Defendants such transfer would be subject to such obligations as he may have had as the transferor as at the time he made the transfer. It is my holding that as at the time he effected the said transfers he was under an obligation to provide for the 1st plaintiff as concerns his inheritance under the Kikuyu customary Law.

While under the land Registration Act NO. 3 of 2012 section 25 replaced the previous section 28 of the Registered Land Act Cap 300 Laws of Kenya the new Act under section 28 expressly recognized customary trusts as an overriding interest that does not require to be noted in the proprietorship register. Section 28 (b) of the land Registration Act NO.3 of 2012 provides thus:-

28. 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 being noted on the register:-

(a) spousal rights over matrimonial property,

(b) trusts including customary trusts,

(c)

(d)

(e)

On the basis of the evidence tendered by the parties in this case there is no proof that the deceased 1st plaintiff's father gave the 1st plaintiff land parcel **Limuru/Ngecha/649** and it is the finding of this court as was the finding by the Kiambu Magistrate's court and the High Court sitting as an appellate court that the 1st plaintiff purchased this parcel using his own resources.

From the evidence tendered in this matter it is apparent the 1st plaintiff was not involved and neither was he made a party to the subdivision and distribution of parcel **Limuru/Ngecha/68** owned and registered in his father's name. It looks like the defendants brought the fact of the subdivision of the land parcel to the 1st plaintiff after the process and transfer of the subdivisions was completed when they wanted to have him evicted through the proceedings before the Kiambu Magistrate's court. The subdivision and transfer of the subdivisions was thus not consensual and it is therefore not surprising that the parties have been wrangling for now over 20 years. The fact remains that the 1st plaintiff just like the Defendants was entitled to receive his inheritance from his deceased father out of the parcel of land **Limuru/Ngecha/68**. Since the parcel was subdivided and transferred to the Defendants. It is my finding and holding that the Defendants were transferred the respective parcels of land subject to the 1st plaintiffs overriding interest over the land as a beneficiary entitled to inherit a portion of the land. I thus make the finding that the Defendants are holding the parcels of land registered in their names in trust for themselves and the 1st Defendant.

Issue

d. Whether the present suit is resjudicata by reason of the decision in Kiambu SRMCC NO. 162 of 1989.

Before I conclude this judgment there is a matter both counsel for the parties addressed in their submissions respecting whether or not this suit was resjudicata by reason of the suit and decision in the Kiambu Magistrates court and additionally **Mr. Mbigi Njuguna advocate** for the defendants raised the issue of jurisdiction of the Kiambu Magistrate's court.

On the issue of res judicata it is my view that the magistrate's court did not and could not make any decision and/or finding as to whether there was a trust arising in favour of the 1st plaintiff. It is only the High court that has jurisdiction to make a declaration of trust as sought by the plaintiffs. The issue that fell to be determined by the magistrate's court was whether the 1st plaintiff should be evicted and the magistrate in the circumstances found and held that the 1st plaintiff was in possession and occupation of the suit land as a beneficiary entitled to inherit a portion of the suit property. The plaintiffs were right to come to the High Court to seek declaration of trust and the decision and proceedings in the magistrates court could be properly relied on in evidence.

The submission that the Kiambu magistrate's court had no jurisdiction to handle the matter that was before the court is untenable. As observed earlier the defendants went before the Kiambu magistrate's court seeking the eviction of the 1st plaintiff and in those proceedings the issue of title to the suit premises was not in issue and as stated elsewhere the magistrate's court could not determine issues of trust. The right forum for the plaintiffs in this suit to litigate was before the High Court.

Decision

The Defendant in his submissions has referred the court to the decisions in the cases of **OBIERO –VS- OPIYO & OTHERS (1972) EA 227 and ESIROYO – VS- ESIROYO (1973) EA 338 and BELINDA MURAI & OTHERS –VS- AMOS WAINAINA (1982) ER 51** where the courts held that rights under customary Law are not overriding interests as regards registered land under the Registered Land Act. These decisions are no longer good law and have been departed from. Madan, J in the case of **GATIMU KINGURU –VS- MUYA GATHANGI (1976) KLR 253** held that the provisions of the Registered Land Act did not exclude the application and/or recognition of customary trust provided it can be established. In the case of **KANYI – VS- MUTHIORA (1984) KLR 712** the court expressly held that the registration of land in the name of one party under the Registered Land Act does not extinguish the right of other parties who may be entitled to it under Kikuyu Customary Law.

Indeed now the Land Registration Act 2012 under section 28 (b) has clarified what was previously left to conjecture and arguments that clearly trusts including customary trusts are overriding interests that do not require to be noted on the register. Hence the submission by the Defendant that customary trust has no application in regard to registered land is unsustainable.

After reviewing and evaluating the evidence and the submissions made on behalf of the parties in this matter I am satisfied that the plaintiffs have proved their case on a balance of probabilities. I note that the 1st plaintiff seeks a declaration that he is entitled to a portion of 2 acres from the land held by the Defendants. The 1st and the 2nd Defendant each hold portions of 2.5 acres each while they hold land parcel **Limuru/Ngecha/1239** which is said to be about 1.5 acres in their joint names to the benefit of the 2nd plaintiff.

While the 1st plaintiff may have been entitled to a larger portion as the first born son of the deceased in keeping with the Kikuyu custom I see no reason why that should continue to be the case. The current practice is for all siblings who are entitled to inheritance from their parents to share what is available equally to the extent that it is possible to achieve that. The evidence that has been adduced is to the effect that the 1st plaintiff has built his home straddling the two plots of his brothers such that he is positioned in the middle. This would therefore require getting an equal portion from each of the Defendants along the common border where the 1st plaintiff has built.

In the premises I enter judgment in favour of the plaintiffs as against the Defendants in the following terms:-

- a. **That the Defendants do effect the transfer of Title NO. LIMURU/NGECHA/1239 to HANNAH NJOKI GATHUKU & JOSEPH MBURU GATHUKU unconditionally,**
- b. **That Joseph Mbugua Dedan Gachumi do excise and transfer a portion of 0.85 of an acre out of title Limuru/Ngecha/1241 to Geoffrey Mbugua Dedan,**

- c. **That James Mbugua Dedan Gachumi do excise and transfer a portion of 0.85 of an acre out of title Limuru/Ngecha/1240 to Geoffrey Mbugua Dedan.**
- d. **That the excisions under (b) and (c) above to be adjacent and alongside where the said Geoffrey Mbugua Dedan has built his residence on the common boundary of plot NOS. Limuru/Ngecha/1240 and 1241.**
- e. **In case of default on the part of the Defendants to execute any necessary documents to effectuate the subdivisions and transfers the Deputy Registrar of the court to sign all the necessary documents on behalf of the Defendants to give effect to these orders of the court.**

I have considered the issue of costs and I note that this has been a long drawn family dispute and I do not think that any party should be burdened with the costs and I have accordingly decided each party will meet their own costs of the suit.

It is so ordered.

Judgment dated signed and delivered this 14th day of February 2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the plaintiff

.....for the Defendants