



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(WARSAME, G.B.M. KARIUKI & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO 228 OF 2006**

**BETWEEN**

**WAITHIRA GITAU (as administrator of the estate of Gitau Ichagai (deceased) ...APPELLANT**

**AND**

**NJERI KURU.....1<sup>ST</sup>  
RESPONDENT**

**BEATRICE WAITHIRA KURU.....2<sup>ND</sup>  
RESPONDENT**

**WANJIRU KURU.....3<sup>RD</sup>  
RESPONDENT**

*(an appeal from the judgment of the High Court of Kenya at Nairobi (Visram, J.) dated 22<sup>nd</sup> October 2004*

*in*

*High Court Civil Case No 1293 of 1985)*

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**JUDGMENT OF THE COURT**

This is a fairly old matter that has spent thirty years in court. Suit in the High Court was filed in the year 1985. However due to various reasons, the matter was not heard until the year 2002 by Mbitio J., who unfortunately resigned his station as judge before he had written the judgment. At the direction of the Hon. Chief Justice at the time, the file was allocated to Visram J. (as he then was) to write the judgment based on the typed proceedings that had been recorded by Mbitio J. That judgment was delivered on October 2004.

This appeal relates to land that was originally known as Komothai/Gathugu/966 (hereinafter referred to as the suit property) which was registered in the name of Gitau Ichagai (hereinafter referred to as the deceased). He and the respondents were the children of one Kuru Ichangai (hereinafter referred to as the deceased patriarch). During the course of the trial before the High Court, the deceased passed away and was replaced in the suit by his administrator, Waithira Gitau, who is the appellant in this appeal.

By way of an amended plaint dated 15<sup>th</sup> August 1986, the deceased's sisters sued him claiming that the deceased patriarch had given to them a parcel of land measuring eleven acres in the parcel known as Komothai/Gathugu/966, and that the deceased was directed to hold the said parcel of eleven acres in trust for the respondents. As a result, the eleven acres of land were joined together with the deceased inheritance and registered in his name in the parcel known as Komothai/Gathugu/966. The respondents claimed that their share was given to the deceased to hold in trust for them, and that despite the property being registered in the deceased's name, they had continuously developed the property without interruption until March 1985 when the deceased ejected them from the property.

The respondents therefore prayed for a declaration that the deceased held a part of the suit property measuring 11 acres in trust for the respondents; and an order directing the deceased to transfer to the respondents the said property and costs of the suit. They also prayed, in the alternative, for a declaration that they were entitled to 11 acres in the suit property by way of prescription or adverse possession.

The deceased denied the claim, and in particular denied that his father had ever given the respondents a portion of the land as claimed. He claimed that he was the first registered owner of the suit property, and that his title to the said property is indefeasible and could therefore not be altered or rectified.

Our role in a first appeal, such as this one is to reconsider the evidence, evaluate it and draw our own conclusions bearing in mind that we have neither seen nor heard the witnesses and make due allowance in that respect. See ***Kenya Ports Authority versus Kuston (Kenya) Limited [2009] 2 EA 212***. In a bid to perform our role, we shall reprise the evidence that was tendered before the High Court.

The respondent's case was advanced by four witnesses. Their testimony was to the effect that the deceased patriarch had two wives: Wachuka Kuru and Wambui Kuru. Wachuka gave birth to seven girls (three of whom are the respondents), while Wambui had two boys, that is the deceased and Njoroge Kuru. Before his death in 1958, the deceased patriarch called his family for a meeting during which he distributed his property. He gave Njoroge Kuru, the eldest of his children, 27 acres while the deceased was given 25 acres. Wachuka's house was given 11 acres which was to be distributed amongst the respondents, who at the time were not married. They were to get this property even if they subsequently got married. Consequently, Wachuka's children stayed on the 11 acres. They used the land and cultivated coffee, maize and beans March 1985 when they were kicked out of the property by the deceased.

The deceased's case was that at no time did the deceased patriarch leave any of his property to his daughters. The deceased and his brother were left a total portion of eleven acres each, and a further eleven acres was apportioned with the deceased taking up 6 acres whereas his brother inherited five acres. So that Gitau inherited 17 acres while Njoroge inherited 16 acres. The deceased and his family, as well as the respondents lived on that land until the 2<sup>nd</sup> and 3<sup>rd</sup> respondent got married. The 1<sup>st</sup> respondent, who died in 1985 was buried on a section of that property. Later on the deceased bought land using his own resources and registered the he registered the entire piece in his name.

The parties filed agreed issues on 7<sup>th</sup> March 1987. The main issues that came up for determination were whether or not the patriarch gave to the respondents a portion of the suit property; whether the deceased was directed to hold the said portion of land in trust for the respondent whether they were married or not; if the deceased joined that parcel of land with his and had it all registered in his name; and if the deceased's title, as the first registered owner of the property, was indefeasible. The court was also asked to consider if the respondents had been in continuous possession of the property that they claimed from 1958 until March 1985.

The High Court found that the respondents had proved their case on a balance of probabilities and entered judgment in their favor. The appellant is aggrieved with that finding which has prompted this appeal.

The first issue that we must first determine is whether or not the deceased, as the first registered owner of the property, held indefeasible title to the suit property. The property in question was registered under the repealed Registered Land Act which provided at section 28 that:

**“28. 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, but subject –**

- a. **to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- b. **unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

***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.”***

As was correctly noted by the trial judge, nothing in the section above, or in the entire Act precluded the inference of a trust, even if that trust has not been entered into the register. This position was affirmed by this Court in *Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR (Civil Appeal No. 281 of 2000)*:

***“We think it cannot be argued too strongly that the proper view of the qualification or proviso to section 28 is that trusts arising from Customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act.”***

In that appeal, the Court approved the statements of the High Court in *Gathiba v Gathiba [2001] 2 EA 342 368* wherein it is stated that:

***“Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.***

Were the respondents in actual possession of the property since 1958? All the respondents’ witnesses testified that the respondents had been in possession of the property for an uninterrupted continuous period until 1985. The testimony on behalf of the deceased was that the respondents and their sisters lived with the deceased and his family, and that they cultivated the land together with the family. The deceased’s witnesses were not clear as to how much acreage the respondents would cultivate, but Leah Waithira, the deceased’s wife, conceded that the respondents and their sisters were on the property, cultivating food crops and on a bigger portion of land because they were many. It therefore appears to us that the respondents must have been in possession of the property for the period that they claimed that they were. Possession and occupation of land can amount to an overriding interest that need not be noted on the register, as was stated in *Obiero v Opiyo [1972] EA 227* that:

***“The Respondent had rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be***

***noted on the register and the appellants' proprietorship was subject to it, section 30(g)."***

It is clear that a portion of the suit property was family land that was initially owned by the deceased patriarch. Our evaluation of the evidence tendered by the parties leads us to the conclusion that the respondents in use and occupation of a portion of the suit property from the time that the deceased patriarch died until sometime in 1985. This evidence leads us to believe the respondents' version that the deceased was holding a portion of the suit property in trust for them. This position is reinforced by the evidence of Njoroge Kuru, the brother to the deceased and who was present when the deceased patriarch distributed the land, which eleven acres of his property was to go to Wacuka's house.

We have not had the benefit of hearing or seeing the witnesses testify, and we must make allowances for that. The trial judge in his judgment noted that the evidence offered by the defence to controvert the respondents' testimony was unclear. The deceased first testified that he was given 6 acres and that he had bought 10 acres. On cross examination, he stated that he had actually bought 30 acres, and not 10 as he had stated before. Another witness, Kamau Kinguuri, who testified as PW4, stated that he had no knowledge of the distribution of the property because he would not have been called to a meeting for that purpose as it would have been a family affair. Wairi Kiama, who testified as DW2 conceded that the deceased had inherited land from his father so that the family could share it out.

Having perused the record of appeal, we find that the evidence tendered by the witnesses for the deceased was contradictory and did not controvert the respondents' case. In light of the evidence, we find that the deceased was holding a portion of the suit property in trust for the respondents, which was evinced by the fact that they continued to cultivate the land, and were allowed to keep the proceeds of the farming that they undertook there.

The appellant took fault with the finding of the learned judge that the respondents were entitled to a portion of the land despite their marital statuses. The events that gave rise to this appeal took place as far back as 1958. This was before the enactment of the Law of Succession Act in 1981 which removed the distinction between married and unmarried daughters. At this time, the law was as was stated in *Wambugi v Kimani* [1992] 2 KAR 292 where Kwach JA quoted Eugene

Cotran's his *Restatement of African Law Vol.2*

***"Inheritance under Kikuyu law is patrilineal. The pattern of inheritance is based on the equal distribution of man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried."***

This leads us to the question of whether or not the respondents were married or unmarried. The 1<sup>st</sup> respondent was not married; 1<sup>st</sup> respondent maintained that she had been married, but she had subsequently divorced, while the 3<sup>rd</sup> respondent is married. To our minds, it would not matter that the respondents were married or unmarried. As we have stated, it appears that the deceased patriarch intended to leave some property to his daughters, and that these daughters, at the time of his death, had been unmarried. It therefore seems to us that the fact of being married would not militate against the respondents. There is overwhelming evidence of the deceased holding a portion of 11 acres in trust for the respondents; we find and hold that the learned trial judge was correct in reaching this finding.

The end result is that this appeal fails in its entirety. We hereby order it dismissed, with costs to the respondents.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of March, 2016**

**M. WARSAME**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**