



Case Number:	Civil Case 176 of 1973
Date Delivered:	05 Nov 1976
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Chunilal Bhagwandas Madan
Citation:	Gatimu Kinguru v Muya Gathangi [1976] eKLR
Advocates:	P Gichukie and PM Gatheru (instructed by Njuki & Gichukie) for the Plaintiff, PM Wamae (instructed by Munoru & Co) for the Defendant
Case Summary:	<p style="text-align: center;"><b>Gatimu Kinguru v Muya Gathangi</b></p> <p style="text-align: center;">High Court, Nairobi 14th, 15th February, 10th, 11th July 1974;</p> <p style="text-align: center;">Madan J 10th, 14th, 18th, 30th June, 12th July;</p> <p style="text-align: center;">4th October, 5th November 1976</p> <p><b>Limitation of actions</b> - action to recover land – action barred after twelve years – title to land extinguished – agricultural land in land control area - failure to obtain consent to transaction – whether failure to obtain consent vitiates title acquired by adverse possession - whether title requires register to be rectified - Land Control Act (cap 302), section 6(1)(a) – Limitation of Actions Act (cap 22), section 7</p> <p><b>Trust</b> - Trust property – land – acquisition of agricultural land in land control area – land impressed with trust - no consent to trust by land control board -meaning of “other disposal of or dealing” - no reference to trust in instrument of acquisition – whether trust enforceable – Land Control Act (cap 302), section 6(1)(a) – Registered</p>

*Land Act (cap 300), section 126(1)*

Section 6(1) of the Land Control Act provides: "Each of the following transactions, that is to say: (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area . . . is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of the transaction in accordance with this Act.

Section 126(1) of the Registered Land Act provides: "A person acquiring land, a lease or charge in fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the word trustee', but the Registrar shall not enter particulars of any trust in the register".

The consent of the local land control board is not required under section 6(1)(a) of the Land Control Act to a change in the ownership of agricultural land situated within a land control area which occurs by adverse possession in accordance with section 7 of the Limitation of Actions Act. Further, a title acquired by adverse possession creates a change in ownership of the title which does not require reallocation of the register.

The creation of a trust over agricultural land in a land control area does not constitute an "other disposal of or dealing" for the purposes of section 6(1)(a) of the Land Control Act and, therefore, does not require the consent of the local land control board; and the absence of any reference to the trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive.

*Mwangi Muguthu v Maina Muguthu* (unreported) followed

*Githuchi Farmers Ltd v Gichamba* [1973] EA 8 not followed

	<p><b>Cases referred to in judgment:</b></p> <p><i>Guthuchi Farmers Co Ltd v Gichamba</i> [1973] EA 8.</p> <p><i>Hosea v Njiru</i> [1974] EA 526.</p> <p><i>Mbugua Karanja v Kamara Muhia</i> (unreported) Civil Case No 409 of 1975, HC.</p> <p><i>Mwangi Muguthu v Maina Muguthu</i> (unreported) Civil Case No 377 of 1968, HC.</p> <p><b>Action</b></p> <p>Gatimu Kinguru, the registered proprietor of a parcel of land known as Githunguri/Ikinu 58, instituted proceedings in the High Court (Civil Case No 176 of 1973) against Muya Gathangi alleging trespass by Muya Gathangi and claiming an order for possession of the land, a perpetual injunction restraining further trespass, damages and costs. In a counterclaim, the defendant sought, <i>inter alia</i>, a declaration that, he was the owner of half the parcel of land and an order for rectification of the register to include his name as owner of half of the parcel of land. The facts are set out in the judgment.</p> <p><i>P Gichukie and PM Gatheru</i> (instructed by Njuki &amp; Gichukie) for the Plaintiff.</p> <p><i>PM Wamae</i> (instructed by Munoru &amp; Co) for the Defendant.</p> <p><i>Cur adv vult</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 176 OF 1973**

**GATIMU KINGURU ..... PLAINTIFF**

**VERSUS**

**MUYA GATHANGI..... DEFENDANT**

**JUDGMENT**

The dispute between the parties in this case concerns land situated in Kikuyu Country. The Court has been ably assisted by Mr Gatheru, counsel for the plaintiff, and by Mr Wamae, counsel for the defendant. The scheme of this judgment is:

Introduction

A narrative of evidence adduced in Court (not reproduced)

Findings of fact made by the Court

Law (adverse possession)

Law (trust)

Summary

Introduction

The plaintiff is the registered proprietor under a first registration of a parcel of land known as Githunguri/Ikinu/58 (hereafter referred to as parcel Ikinu/58). He is claiming that the defendant has without his consent since 1965 persistently trespassed on his land, erected a temporary dwellinghouse thereon, and also cultivated a portion of it. The plaintiff wants the Court to order the defendant to move out from the plaintiff's land, together with an order for a perpetual injunction restraining the defendant from trespassing, damages and costs.

The defendant admits that the plaintiff is the registered owner of parcel Ikinu/58. The defendant's case is that parcel Ikinu/58 was inherited by him and the plaintiff, who is his real brother, from their father Kinguru Kibuu, to be held by them as tenants in common in equal shares; that the plaintiff became the registered owner of the land half in trust for the defendant whilst the defendant was away in detention during the emergency. Trespass is denied by the defendant, who claims that he has been in lawful possession of a half portion of the land since 1959 which is marked by a boundary separating it from the plaintiff's portion and on which he has built his home, developed a coffee plantation and effected other development.

Paragraph 5 of the defence contains the averment that in 1960 Githua Munene, the sub-chief of the area, with the consent of the parties subdivided this land into two equal parts: one part to be occupied by

the plaintiff and defendant each; and that the defendant is still in possession of the portion which was allocated to him.

Section 7 of the Limitation of Actions Act is also pleaded. It is averred that the plaintiff's suit is barred as twelve years have elapsed since the defendant took possession of the parcel of land, no doubt meaning the portion in the defendant's possession.

A counterclaim follows the two main prayers of which are: (a) a declaration that the (defendant) is the owner of half of the subject-matter, that is, the parcel Ikinu/58; and (b) an order for rectification of the register to include the defendant's name as owner of half of the parcel of land.

#### Findings of fact

On this evidence I make the following findings of fact;

1. Kibui was originally married to Kinguru Kibuu; when he died she married his brother Kamara Kibuu or, Kamara Kibuu married her, according to custom.
2. There is no evidence to satisfy the Court that Kinguru was married to a woman called Wairimu or to any woman, other than Kibui, or that he had any children by any woman other than Kibui or that the plaintiff's mother was Wairimu or any woman other than Kibui. Githuka Munene's evidence suggests that Kinguru had a daughter Wairimu by Kibui.
3. The plaintiff, Munene Kara and the defendant are all three sons of Kamara by Kibui who is the mother of them all and the three of them are real brothers.
4. Neither the plaintiff nor Munene Kamara nor the defendant is a real son of Kinguru.
5. The plaintiff is know as Kinguru's son under custom.
6. The plaintiff, Munene Kamara and the defendant became and they are sons of Kinguru only by custom through their common mother, Kibui, because she was Kinguru's widow. In this respect, they all three enjoy exactly the same status and same rights of inheritance to Kinguru's property through their common mother, Kibui. The three brothers and Kibui lived together on the disputed land for a time. When the defendant and the witness Njonji Gathangi say that the plaintiff, Munene Kamara and the defendant are sons of Kinguru, they are referring to a customary relationship and not as Kinguru's real progeny.
7. Apart from a customary connection, the plaintiff, Munene Kamara and the defendant have no direct blood relationship with Kinguru.
8. Gathangi was not the defendant's real father and the defendant is not his son, except by custom only. The defendant took Gathangi's name as his father because he went to live on Gathangi's land after his father Kamara died. The defendant did not inherit any land from Gathangi which he would have done if he was a real son of Gathangi.
9. The plaintiff's denial of Kibui's claim that she gave birth to him, and her and Gituka Munene's claim that he is a son of Kamara, is specious as is his further denial that Kamara gave him away to Ngaichu. The plaintiff could not possibly know – he was only three years old then except from hearsay and unacceptable evidence from Githongo who is not a witness in these proceedings.

Otherwise this case is one big huge conspiracy to perpetrate a heinous fraud upon the Court in which Munene Kamara, the defendant, Kibui, Githuka Munene, the plaintiff's half-brother, Njonji Gathangi, are actively involved as perjurers.

This is a land case. The people living around and near the parties and the disputed land must have become aware of these proceedings between the plaintiff and defendant which have been going on since 26th January 1973 when this suit was first filed in this Court, and in particular since the date of the Court's visit to the disputed land when everyone in the countryside seemed to be present. No one, except the plaintiff himself, has come forward to make the contrary claim that the plaintiff is known as a son of Kinguru and not as a son of Kamara. The parties are members of a society in which ancestral memories are long and dealings in land remembered without writing from generation to generation. It is remarkable, really remarkable, that not a single person has been found to connect the plaintiff with Kinguru.

It is also remarkable, again really remarkable, that there is not a single person to be found to connect the plaintiff with Wairimu who he says he was told is, or was, his mother. Which Wairimu" Whose daughter" Why should (in particular) witnesses like Githuka Munene and Njonji Gathangi, who have no personal interest in this dispute, tell lies in Court as the plaintiff says they have done"

10. Kinguru died intestate.

11. Kibui inherited twelve acres of land as Kinguru's widow.

12. The plaintiff did not inherit any land from Kinguru direct; he did not get possession of the land in dispute after a legal fight with Gathangi. No one else has come forward to give the knowledge about such a dispute which ought to be like a prairie fire in the plaintiff's society. In my opinion, the fact of the matter is that, on his own evidence, the plaintiff knew nothing about being owner of this land while he was in Masailand.

13. The plaintiff married after his return from Masailand. His mother Kibui paid the dowry for his wife.

14. Four out of twelve acres were given to Munene Kamara as a separate piece. The remaining eight acres are the land in dispute.

15. The remaining eight acres would have been registered in Kibui's name so that she could give the land to her two sons, the plaintiff and the defendant. It was, however, registered in the plaintiff name as Kibui was getting old and was unable to leave her house and the defendant was in detention.

16. The defendant was not given a piece of land separately, like his elder brother Munene Kamara, because he was in detention. The elders decided to give the whole of the disputed land to the plaintiff from whom the defendant was to get his share; in the mean time, the plaintiff holding it in trust for the defendant.

17 The plaintiff holds half the land in trust for the defendant.

18. When the defendant came out of detention, sometime in 1958 or 1959, the land was divided into two portions (mistakenly said by Munene Kamara to have been done in 1962), one portion for the plaintiff and one for the defendant, by the elders under the chairmanship of subchief Githuka Munene who also marked a boundary between the two portions. Both the plaintiff and defendant were present when this subdivision was carried out and the boundary marked. The plaintiff did not object to the land being

subdivided between him and the defendant or to the boundary being marked; the evidence proves that he actually consented.

19. In my opinion, the plaintiff was not being truthful when he said that the portion upon which the defendant has built is not demarcated. On its visit to the land the Court saw for itself the boundary dividing the land into two clear separated and distinct portions. The plaintiff's counsel agreed that there is a napier grass boundary.

20. The defendant is not in possession of his portion as a result of permission given to him by the plaintiff to build a house on the land in 1960 because the defendant was refused a place by his father for the want of a he-goat to be given to the father. The defendant is in possession in his own right.

There is no explanation at all why the plaintiff should have given the defendant, according to the plaintiff a complete stranger and in no way related to him (the plaintiff), and whom he first came to know when the defendant asked him for a place to build on his land or why the defendant should have approached the plaintiff, a complete stranger, for such permission. I do not believe they fought together during the Emergency as the plaintiff says. To me, it is unbelievable that a father would turn away from his home a son who had just been freed, possibly after spending many years in detention; the father would know that the defendant was most unlikely to have a he-goat. It is also most unlikely that the plaintiff would have agreed to let the defendant build on his land knowing, as he himself says, that the defendant had his own parcel (number 65). A certified copy of the title of this parcel shows that the defendant has never owned it, and he does not own it.

21. The defendant has been in continuous and uninterrupted possession of the land and living on the portion which he calls his own within the knowledge and awareness of the plaintiff since 1959, and certainly from 1960 onwards. The plaintiff himself accepts that the defendant started to build straightaway on his land after he gave him permission to do so in 1960.

22. The defendant did not enter upon the land or build thereupon for a short period under a licence from the plaintiff.

23. The defendant did not take possession of the portion occupied and cultivated by him and he is not in possession of it as a licensee from the plaintiff. The defendant took possession of it and continued to occupy it as his portion of land inherited from his customary father, Kinguru.

24. The defendant has been cultivating his portion of the land since 1959 and certainly since 1960 after it was subdivided and given to him by the family and the elders with the plaintiff's consent; the defendant planted coffee and made other developments on the land to the knowledge and awareness of the plaintiff. The plaintiff was not being truthful when he said that he has never allowed and the defendant has never cultivated in and he has no coffee trees. The evidence is overwhelmingly in favour of the defendant's cultivating the land. The defendant has produced an official receipt dated 15th October 1963 showing his membership of Kiambu Coffee Growers Co-operative Union Ltd, which is issued in relation to the land in dispute. The defendant must have been growing coffee for some years before 1963 to make this membership meaningful. It was a poor performance by the plaintiff to say that the receipt is a false document. The plaintiff also forgot that it is averred in his plaint that the defendant had cultivated a portion of the land; secondly, when the plaintiff gave evidence, he told the Court that the defendant cultivated the land. During its visit to the land the Court saw for itself that the defendant's portion is cultivated and that is not done by the plaintiff; nor does the plaintiff make any such claim.

25. The proceedings by way of suit 176 of 1971, filed by the defendant against the plaintiff on 22nd



October 1971, filed by the defendant against the plaintiff on 22nd October 1971, which was withdrawn by consent of the parties for want of jurisdiction by the Resident Magistrate were a complete nullity.

26. The plaintiff admits that he first asked the defendant to vacate the portion occupied by him in 1961 though he may have, as he says, taken up the matter more seriously in 1965.

In my opinion, the evidence for the defendant is more creditworthy than the evidence given by the plaintiff who, on at least two occasions, was demonstrably untruthful: that is, first when he said that the defendant had never cultivated the land, and secondly that the defendant had no coffee trees. In my opinion, the plaintiff was also untruthful when he said that he came to know Munene Kamara for the first time in Court. Munene Kamara lives and farms across the road opposite the plaintiff, as the Court saw for itself. Further, the plaintiff was untruthful when he said that he did not know that the defendant was a son of Kibui and that the defendant's mother was not living on the land when it was shown to him. I now come to consider the law to be applied.

#### Law (adverse possession)

As mentioned at the beginning, one defence to the plaintiff's claim is that the defendant has been in lawful possession of a half portion of the land since 1959 on which he has built his home, developed a coffee plantation and effected other improvements, and that the defendant is still in occupation of one equal portion which was allocated to him in 1960 after sub-chief Githuka Munene subdivided parcel Ikinu/58 with the consent of the parties. Therefore, the defendant has pleaded, the plaintiff's suit is barred by virtue of the provisions of section 7 of the Limitation of Actions Act as twelve years have passed since the defendant took possession of his portion of the land; in other words, adverse possession is pleaded. Section 7 enacts:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In this connection the following provisions of section 13 of this Act have to be taken into account, ie:

(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and ...

The evidence clearly establishes that the defendant has been in continuous and uninterrupted possession of the land since 1960; ie for more than twelve years when the plaintiff filed this suit against the defendant on 26<sup>th</sup> January 1973. I think Mr Wamae was mistaken when he suggested the period should be calculated from some date in the year 1961. I think he confused it with both the plaintiff's defendant's reference to the year 1961 when the plaintiff is said to have asked the defendant to vacate the land. The defendant's portion has never ceased to be in adverse possession to the plaintiff by the defendant at least since 1960 and probably since 1959.

In calculating this period of twelve years the year 1960 has been left out completely. There is no evidence on what date exactly the defendant took adverse possession, built thereon, cultivated it and began to live on it in 1960. Therefore the benefit of the whole year 1960 must go to the plaintiff.

The defendant's possession was open and notorious. Upon partition or subdivision of the land the plaintiff ceased to be in possession of the well defined portion taken over and occupied by the defendant in whose favour the period of limitation could run. There has been no discontinuance of possession by

the defendant since 1959. There is also no evidence of entry by the plaintiff upon the portion occupied by the defendant during all this period. There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant. The defendant claimed ownership of a portion of the land which was given to him by the family and clan elders as his land by an open assertion of a hostile title to the plaintiff which necessarily meant a denial of the plaintiff's title to the portion taken over by the defendant.

The defendant did acts which were inconsistent with the enjoyment of the soil by the person entitled, i.e. the plaintiff, for the purposes for which he had a right to use it. Planting a boundary of tufts of napier grass is the best evidence of adverse possession like fencing off, and cultivation of land even without fencing off has been held sufficient to prove adverse possession (see 24 *Halsbury's Laws of England* (3rd Edn) page 252). The plaintiff had notice of all these matters. At least two such assertions of a hostile title are admitted by the plaintiff when he said that he asked the defendant to leave the land in 1961 and pursued the matter again more seriously in 1965. On both these occasions the defendant refused to vacate and move out. Again, there was an assertion of a hostile title to the plaintiff which necessarily meant a denial of the plaintiff's title when the defendant instituted suit 176 of 1971 in the court of the Resident Magistrate, Kiambu, notwithstanding that those proceedings were a nullity. The defendant's continuous occupation of the land adversely to the plaintiff for over twelve years was not interrupted as suggested as a result of his filing of those proceedings, for the defendant was seeking confirmation of a right of ownership in a Court of law that he was openly and consistently claiming and practicing to the exclusion of the plaintiff from the portion of the land in dispute. The filing of the Kiambu suit was not an acknowledgement of the plaintiff's right to ownership of the land; it was a further but formal assertion of a continuing adverse possession against the plaintiff. The onus is upon the plaintiff to show that he made entry on the land amounting to a resumption of possession by him. The plaintiff has not done so; he has not discharged this onus. The plaintiff himself has stated that land is still in possession of the defendant who is a trespasser. Whatever the nature of the defendant's possession originally, his right by adverse possession began to accrue to him during 1959 and certainly in 1960. At whatever date adverse possession by the defendant began during the year 1960 the full circle of twelve years adverse possession had been completed when this suit was instituted on 26th January 1973.

The portion occupied by the defendant is not a separately surveyed piece of land with a plot number and title number to it. There is no deed plan in respect of it, at least none has been produced to the Court. It is, however, a definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain; that which is definitive is positive. It is so plotted that if not certain it can be made certain. I think the absence of a plot and title number should present no difficulty or be a bar to the defendant in establishing his claim on the ground of adverse possession. The defendant has established a title to his portion by adverse possession.

It has been argued that the land in dispute being admittedly agricultural land situated within a land control area the defendant is in any event not entitled to succeed on his plea of adverse possession or trust or to succeed in obtaining a rectification of the register because of the provisions of section 6(1) of Land Control Act, which provides:

(1) Each of the following transaction that is to say:

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;... is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of the transaction in accordance with this Act.

Does a successful claim under the doctrine of adverse possession as in this case amount to a disposal or dealing with agricultural land" Do the expressions "transfer" or "dealing" include acquisition of the title by adverse possession (taking into account the definition of "dealing" in the Registered Land Act which states that "dealing" includes disposition and transmission, and also in the Registration of Titles Act, which states "dealing" means any transaction, of whatever nature, by which land is affected)" I think that even though the land affected is agricultural land and there is a change of ownership without the consent of land board the acquisition of title by adverse possession is neither a disposal of nor a dealing in land. The process takes place by operation of law and not by a voluntary act or by agreement between parties or by a dealing in land by parties which in my opinion is the notion inherent in and is a pre-requisite for section 6(1) and is the type of dealing covered by it. The consent of the land board is not required to a change in ownership occurring by adverse possession. To fall within section 6(1) a dealing in land requires a free and voluntary act of parties involving disposition of land.

When there is a successful claim by adverse possession there is a total ouster of the owner from the title, there is no room for a tenancy in common or a joint tenancy. It is all or nothing, there are no partial measures unless the interest of only one out of several joint owners or tenants in common is affected, which is not the case here. To make an order that the defendant's name be included in the register of the title of the land as a tenant in common with the plaintiff who is the sole registered owner of the land would be a negation of the right to acquire absolute title to land under the doctrine of adverse possession because each tenant in common is the owner of the whole land but limited to the extent of his share therein because it is not subdivided, in conjunction with his co-tenant in common or joint tenant who also is similarly owner of the un-subdivided land to the extent of his share therein.

It has been contended that another difficulty that seems to exist against the defendant acquiring title by adverse possession is to be found in the provisions of section 143(1) of the Registered Land Act which reads:

Subject to sub-section (2) of this section, the Court may order the rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

In this case the plaintiff is indisputably the registered owner of the land under a first registration. It was not obtained, made or omitted by fraud or mistake. Even if it was so obtained, made or omitted I am of the opinion the Court may not make an order for rectification of the register if it is a first registration. However, also in my opinion, section 143(1) does not erect a statutory barrier which wipes out the benefit of a title acquired by adverse possession even in the case of a first registration. A title acquired by adverse possession creates a change in ownership of the title, not requiring rectification of the register. There is no mistake or error which is rectified, corrected or set right or to be rectified, corrected or set right. It is transmission of title by operation of law and what happens is that a new owner supplants the existing or old owner.

I am reinforced in my opinion by the following provisions of section 38 of the Limitations of Actions Act which, as Mr Wamae has pointed out, is a later Act, ie:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act (Government Lands

Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act), or a land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the

land...

In my opinion the defendant has established his claim by adverse possession. The plaintiff is not entitled either to possession of or to oust the defendant from the portion occupied by the defendant. The defendant has acquired a transmissible interest in the portion occupied by him against all the world including the plaintiff; whether his interest can be made the subject of an assignment or transfer is a matter of conveyancing. However, the declaration which the Court will make is that the defendant is owner of the well and clearly demarcated portion which is in his possession and occupied by him but, for the reasons which I have stated, the Court will not give the defendant a further declaration that the parcel of land (Ikinu/ 58) belongs to him and the plaintiff as tenants in common in equal shares as pleaded in paragraph 8 of the counterclaim, though it is not made, inadvertently I think, a part of the defendant's prayers to the Court. In order to make the court's decision fully meaningful the Court will assume that the defendant's counterclaim also contains an averment together with an appropriate prayer that upon the portion in possession of the defendant having been surveyed the plaintiff should execute an assignment thereof in favour of the defendant at the latter's expense. If an application to this effect had been made whenever to amend the pleading I would have granted the same with the object of doing real justice between the parties in particular in view of the provisions of section 17 of the Limitation of Actions Act as follows:

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption), the title of that person to the land is extinguished. Section 18 is not relevant, and the title of the plaintiff to the portion in possession of the defendant has been extinguished. Law (trust)

It seems to me that the defendant is also entitled to succeed on his claim under the heading of trust and his prayer for rectification of the register to include his name as half-owner of the land simply has to be granted. The court's holding is that the plaintiff is a trustee for the defendant for half the land. Section 6(1) raises its hydra-head again. Does the creation of a trust amount to "other disposal of or dealing" within the ambit of section 6(1) (a)" It was so held by Harris J in *Githuchi Farmers Co Ltd v Gichamba* [1973] EA 8.

In this connection, in addition to the wording of section 6(1), one should also carefully bear in mind the provisions of sections 28 and 126 of the Registered Land Act, which reads as follows:

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 be rights not 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 interests and claims whatsoever, but subject... 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.

126(1) A person acquiring land, a lease or a charge in fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the word 'trustee' but the Registrar shall not enter particulars of any trust in the register...

(3)Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust.

It will be noted that both the foregoing sections contemplate the holding of land in trust. Mr Gatheru has

submitted that the word “may” in section 126(1) is mandatory, that it means and should be read as “shall”. I understand his argument to mean that unless a registered owner is described as trustee in the instrument of acquisition of land, there can be no trust and the land cannot be said to be held in trust and, as the plaintiff is not described as trustee in the instrument of title in this case, he cannot be said to hold half the land in trust for the defendant. I am not in agreement with this argument. As far back as *Mwangi Muguthu v Maina Muguthu* (unreported) I said:

As regards section 126, there was no need to register the defendant ‘as trustee’. He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half share in ‘*marango*’ [land] to the plaintiff. In any event this section does not make registration ‘as trustee’ obligatory. It states a person may be described by that capacity.

Under section 143(1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya.

It would require express legislation to enable the Court to so hold. Kneller J followed *Mwangi Muguthu (supra)* in *Mbugua Karanja v Kamara Muhia* (unreported). If what I said in *Mwangi Muguthu (supra)* is not correct, what it amounts to is that in order to hold that the creation of a trust is rendered void if done without the consent of the land” should be read *ejusdem generis* with the words “sale, transfer, lease, mortgage, exchange, partition” in section 6(1) (a). There is no warrant for such an interpretation of these words. Harris J in *Githuchi Farmers Co Ltd v Gichamba* [1973] EA 8, 10, 11, said:

... would not the creation of trusts provide so effective a means of circumventing the widely drawn prohibition regarding sales, transfers, leases, exchanges and partitions as to defeat almost completely the purpose of the Act" Again, what construction other than the literal is to be given to the expression in section 6(1) (a) ‘or other disposal of or dealing with any agricultural land’ if it is not to be so construed as to evade the very object of the legislation" If a mortgage or charge is within the act why not also an express trust"

It will be noted that Harris J is impliedly admitting that an express trust is not included within the words of section 6(1) (a).

A mortgage or charge is within the Act because it is expressly so stated in section 6(1), charge being included, as Harris J pointed out, by the definition of “mortgage” in section 2. An express trust is not so included in section 6(1). It is the contrary proposition that appeals to me: that is, the prohibitions are so widely drawn that care must be taken not to include or read in to the section that which is not expressly enacted. What reason is there to think that apart from, with respect, expanded thinking on the part of Harris J, the creation of trusts would defeat almost completely the purpose of the Act" Are we to embrace an expansive interpretation of the language used in section 6(1) (a) because of fear that it might provide means of circumventing the prohibitions expressly set out" Surely not; the people cannot be deprived of an ancient and well-grooved-in mode of dealing with land by creating a trust without the express sanction of Parliament. If Parliament intended to include trusts among the prohibitions in section 6(1) (a) it would have said so expressly instead of leaving so important an aspect which is of frequent occurrence in Kikuyuland to interpretation by the Courts, knowing well that a trust can be and mostly is created orally and without a written instrument; more so, when it is clear that the subject of trust could not be an accidental omission from the Act as Parliament was alive to this subject when framing sections 28 and

126(1) of the Registered Land Act. If a trust or an express trust is to be within the ambit of section 6(1), let Parliament say so.

In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the Court to whittle down the rights and privileges of the subject. The Court's task is to protect the rights and privileges of the people, not to clip and shear them. I must therefore respectfully disagree with Harris J. I feel the interpretation which I advocated in *Mwangi Muguthu* (unreported) is the correct one. And did not Simpson J recognise the existence of a trust in *Hosae v Njiru* [1974] EA 526"

In my opinion, the defendant is entitled to succeed in any event because section 6(3) provides a complete answer to the plaintiff's objection that a trust transaction is void for all purposes unless the land control board concerned has given its consent in respect of it. Section 6(3) enacts:

This section does not apply to (a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transaction would result in the division of the land into two or more parcels to be held under separate titles; or ... Shorn of diversionary irrelevancies, Kinguru Kibuu was the original owner of the land in dispute. The court's holding is that he died intestate. The transmission of land through his widow, Kibui, is by virtue of the intestacy of a deceased person. It is not going to result in the division of the land into two or more parcels to be held under separate titles as the defendant is not asking for the land to be subdivided between him and the plaintiff; all that he is asking for is a declaration that he is the owner of half of the land, and for an order for rectification of the register accordingly. Under this head even though there is no prayer for an order that the defendant be registered as a tenant in common in equal share with the plaintiff in spite of it being pleaded in paragraph 8 of the defence, this omission can only be due to inadvertence, and it must be imported into any order handed by the court to make it sensible. The Court under this head grants the defendant a declaration accordingly: that is, the defendant is entitled to an equal half undivided share and interest in parcel Githunguri/Ikinu 58 which is to be held by the plaintiff and the defendant as tenants in common in equal shares. The defendant's name should be entered in the register accordingly.

In the case of a transmission of land by virtue of the will or intestacy of a deceased person, in my opinion the provisions of section 6(3) override to the extent stated the provisions of section 143 of the Registered Land Act; and also the consent of the land board is not required. And, thinking aloud, would it not be both wrong and unjust to refuse to grant relief which would enable the plaintiff undeservedly and indefensibly to hold on to that which he is justly not entitled to"

Lest it be so considered I would point out that there is no inconsistency because the Court refused to grant the defendant a similar declaration on the ground of his having acquired a title by adverse possession. These two issues have to be treated independently. I declined to make a declaration then because of the ingredients as stated of a title acquired by adverse possession.

There exists here luckily a boundary between the portions occupied by the plaintiff and defendant though the land has not been surveyed and subdivided. The parties should be able to live on the land peacefully each on his portion allotted to him by the family and elders more than 16 years ago, cultivating and developing it. As the years roll by, when the parties have mellowed and the personal bitterness generated by this dispute has evaporated through the passage of time, they may decide to seek the consent of the land control board for the issue of separate titles to their respective portions which should be done to avoid future litigation over this piece of land in particular among their heirs.

Under this head the appropriate registrar is ordered to make an entry in the register so that the title of parcel Githunguri/Ikinu/58 will show both the plaintiff and defendant as owners of this piece of land as

tenants in common in equal shares.

### Summary

There will be judgment for the defendant against the plaintiff as follows.

(1) A declaration that the defendant has acquired by adverse possession an absolute title to the portion of parcel Ikinu/58 which is in his possession and occupied by him. (2) A declaration that the defendant is entitled to an order under section 38 to be registered as proprietor of that portion in place of the plaintiff who shall execute a valid transfer or assignment in favour of the defendant free from encumbrances.

(3) A declaration that the plaintiff holds the parcel Ikinu/58 in trust for himself and the defendant as tenants in common in equal shares and the defendant's name shall be entered in the register accordingly, and

(4) the plaintiff's suit is dismissed with costs and the defendant's counterclaim is allowed with costs.

*Order accordingly.*

Dated at Nairobi this 5th day of November 1976

**C.B. MADAN**

.....

**JUDGE**



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