Case Number:	Civil Case 146 of 2000
Date Delivered:	23 Oct 2007
Case Class:	Civil
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Isaac Lenaola
Citation:	PETER GITONGA v FRANCIS MAINGI M'IKIARA [2007] eKLR
Advocates:	-
Case Summary:	**LAND LAW-...**
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 146 of 2000

PETER GITONGA……..……...PLAINTIFF

V E R S U S

FRANCIS MAINGI M'IKIARA……..……DEFENDANT

JUDGEMENT

1. In the Plaint filed on 20.11.2000, the Plaintiff, Peter Gitonga, averred that the Defendant who is his brother was holding title number Abogeta/Upper- Chure/100 in trust and that the Plaintiff is now entitled to his share of that land, being 9.80 acres. The particulars of trust are said as paragraph 5 of the Plaint to be:

"a . Being registered over the said lan**d being the eldest son.** *(sic)*

b. Being registered over the said land to enable the father to get another parcel of land(*sic)*

c Being registered over the same when he was a very young boy. *(sic)"*

2. The only order save that of costs is that the 9.80 acres claimed should be transferred to the Plaintiff.

3. In his Statement of Defence filed on 1.12.2000, the Defendant denied the existence of any trust as alleged and averred that he was the absolute registered proprietor of the suit land and that the suit was wholly incompetent and should be dismissed.

4. The suit was partly heard by Tuiyot J. who took the Plaintiff's evidence and that of his witnesses while I took the Defendant's evidence and that of his witnesses and concluded the trial after submissions, hence this Judgment.

5. From my reading of the record and the pleadings, the only issue to determine is whether the Defendant holds 9.80 acres comprised in title No. Abogeta/Upper-Chure/100 in trust for the Plaintiff or not.

6. The Plaintiff's evidence in a bid to prove the trust is that at the time of demarcation of land in Abogeta Area, it was the rule that one person would not get two pieces of land and therefore the father of the two disputants decided to register the suit land in the name of his eldest son, the Defendant. He then moved his family to Kiirua Location where he obtained another parcel of land measuring 8 acres. It was the Plaintiff's evidence that the said parcel of land has since been sub-divided and the Defendant has 3 acres of it, the Plaintiff has 3 acres of it, acres and their nephew, Henry Gikunda has 1 acre.

7. As regards, the suit land, the Plaintiff said that since it was family land, their father created

boundaries for his two sons and the Plaintiff occupies 9.8 acres while the Defendant occupies 10 acres where each has made developments including planting tea. That when the Plaintiff asked the Defendant to formalize the arrangement by transferring the 9.8 acres to him, the latter refused and the matter taken for arbitration by elders. The elders who heard the dispute were Stephano Rukaria, Wilson Mbui, Kirimi, Nkanata and others and since they all knew the history of the acquisition of the land, they ordered the Defendant to effect the transfer but he refused and this suit was then filed.

8. P.W.2, Sarah Karambu, the mother of the Defendant and Plaintiff confirmed the evidence by the Plaintiff that her husband gathered the suit land, registered it in the name of the Defendant who was then a minor (about 10 years old, she said) and that the land should be shared as proposed by the Plaintiff because each of them occupies a separate portion of it just like the land in Kiirua.

9. P.W.3, M'Rukaria M'Bariu an uncle of the parties was present in 1960 when the father of the parties decided to register his minor son, the Defendant as proprietor of the suit land and the reason was that a directive had been issued that one person could not be registered over two portions of land. P.W.3 confirmed that the father of the parties had determined that the plaintiff should have 9 acres while the Defendant should have 10 acres of the suit land. Just as the arrangement of user now is, P.W.3 denied that the land was given to the Defendant by his grandfather because the grandfather had died long before the Defendant was born.

10. The Defendant testified on his own behalf and called no witness. His evidence was that the suit land was given to him by his grandfather, M'Bagiine and that he held no trust over it. That his father had other parcels of land which he shared with the Plaintiff i.e. **KIIRUA/NAARI MAAITEI/215** and **NTIMA/NTAKIRA/296** and as regards the suit land, the Plaintiff's claim is baseless. He admitted however that he was a minor at the time of demarcation and did not know how he came to be registered over the suit land.

11. From the above evidence certain facts cannot be challenged i firstly that at the time of registration of the suit land, the Defendant was a minor and did not know who or why he was so registered.

12. Secondly, the evidence of P.W.2 and P.W.3 (the mother and uncle of the parties) has not been challenged at all and the truth emerging is that the father of the parties registered the Defendant as proprietor of the suit land so that the family would get the opportunity to have another parcel of land. Had the rules therefore permitted he would have had all parcels of land registered in his name but that was not possible. What he did was neither peculiar nor unusual because it is a matter of common knowledge in the greater Meru area that this practise, whatever its legality was rampant. In any event in this instance the practice is glaringly obvious.

13. Thirdly, the parties have shared the other two parcels of land equally and the question then is, should the suit land be shared as proposed because of the alleged trust or not"

14. A **"trust**" can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this;

"**Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged**." See **HCCC 1400 of 1973** as quoted in **Mwangi vs Mwangi [1986] KL R 328 at 332, by Shah J.A.**

15. In Mwangi (supra), the situation was similar to the one obtaining here because the Defendant

was eight (8) years old when his father registered the land in his name and it was held that there was a trust intended and he held the trust for his brother in equal shares. It was held as specifically as follows:-

"1. **In accordance with the provisions of the Registered Land Act sections 28 and 30, the defendants registered interest in the suit land was subject to the overriding interests of the Plaintiffs as persons in possession and occupation of the land without legal title. The plaintiff's equitable rights were binding on the land and the land was subject to those rights when it was registered in the defendant's name."**

16. The holding in the Mwangi case holds true in this case and there was no need for the words **"trustee**" to have been inscribed on the Defendant's title for the trust to be recognizable. - See **Gatimu Kinguru vs Muiya Gathangi (976) KLR 253**. The evidence clearly shows it, the same has not been strongly denied in the Statement of Defence and in evidence and I hold the strong view that the trust has been proved on a balance of probabilities.

17. In the end the Plaintiff is entitled to 9.8 acres of the suit land and I shall allow prayer (a) of the Plaint, which includes costs for this suit.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In the presence of

Ms. Mwangi Advocate for the Plaintiff

N/A Advocate for the Defendant

Defendant presentd

ISAAC LENAOLA

JUDGE