



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, and Nyarangi, J.J.A. and Gachuhi, Ag. J.A.)

CIVIL APPEAL NUMBER 22 OF 1984

BETWEEN

- 1. MWANGI MBO THU**
- 2. MBUGUA MUGO**
- 3. JOHN NJOROG E**
- 4. GITHIGA NEW FARMERS LIMITED**
- 5. GITAU MBIRI**
- 6. SIMON NGUGI NGANGA**
- 7. KAGWE MUGO**
- 8. BEDAN KUNGU**
- 9. SOFIA WANJIKU.....APPELANTS**

AND

- 1. GACHIRA WAITIMU**
- 2. BAIYA WAITHIRU**
- 3. MURIITHI KAROMO**
- 4. MUIRU MUCHOMBA**
- 5. MUKORA WOROGE**
- 6. KIHIIKA KIMANI**
- 7. MUIRU MUCHOMBA as the administrator ad litem and legal representative of Kuria Karago, deceased.**
- 8. MWANGI GACHIRA alias MAINA GACHIRA**

9. FRANCIS MBURU GACHIRA

10. MIGWI GACHIRA

11. NATHANIEL MWICHIGI BAIYA

12. DAVID KIBUI MUIRU.....RESPONDENTS

JUDGMENT OF THE COURT

It is as well to begin right at the beginning in this matter because a sudden plunge into it at the appeal stage will make it very difficult to reach the end of it without floundering on the way.

The appeal is concerned with who now owns the lease of a 442 acre farm LR 62178 in Rongai in the Molo Division of the Nakuru District. It is 3 kilometres to the West of Nakuru town on the Nakuru Eldama Ravine Road but nearer Molo. It was sold by a European settler called Graham on June 2, 1965 for Kshs 11,250 to ten Wakikuyu farmers and businessmen called Mwangi Mbothu, Muiru Muchomba, Kihika Kimani, Mukora Njoroge, Gachira Waitimu, Mureithi Karomo, Mbugua Mugo, Karia Karogo, John Njoroge and Baiya Waithiru as tenants-in-common in equal shares. They charged it on October 10, 1965 to the AFC for a Kshs 50,000 loan

Mwangi Mbothu, Mbugua Mugo, John Njoroge, Gitau Mbiri, Simon Ngugi Ng'ang'a, Kagwe Mugo, Bedan Kungu and Sofia Wanjiku (the plaintiffs) farmers and business people in the Kiambu area filed a plaint in Nairobi High Court on January 8, 1981. This was the beginning of Nairobi High Court Civil Suit 60 of 1981.

They prayed for judgment against Gachira Waitimu, Mwangi Gachira (he is sometimes called Maina Gachira) Francis Mburu Gachira, Migwi Gachira, Baiya Waithuri, Nathaniel Mwichigi Baiya, Mureithi Karomo, Muiru Muchomba, David Kibui Muiru, Mukora Njoroge and Kihika Kimani (the defendants) for –

- (1) eviction from this parcel of land;
- (2) a permanent injunction restraining them from entering upon it and from committing acts of waste or destruction upon them;
- (3) a declaration that only the plaintiff's and Gachira Waitimu (the first defendant) have the sole right title and interest in and to that property;
- (4) general damages;
- (5) an order that the defendants pay for making good the destruction they caused on the property;
- (6) costs; and
- (7) interest on the damages and costs

According to the plaintiff the first defendant was a Githunguri businessman and the next three were his sons. The fifth was another Githunguri businessman and the sixth was his son. The seventh, eighth and tenth were farmers in that area and the ninth was the son of the eighth. The eleventh was a Nakuru businessman.

The first three plaintiffs and the first, fifth, seventh, eighth, tenth and eleventh defendants and someone called Kuria Karogo purchased this property in common in equal shares and they intended to run that

farm as a partnership business to be called the Kiambu New Farm but it was never registered in that name.

Between June, 1965 and December, 1969 Muiru Muchomba, Kihika Kimani, Mukora Njoroge, Muriithi Karomo and Baiya Waithiru (they are the eighth, eleventh, tenth, seventh and fifth defendants) and Kuria Karogo sold or gave up their interest in the farm to some of the plaintiffs and to someone called James Kirugi.

James Kirugi and Sofia Wanjiku, his widow, the eighth plaintiff inherited his share. Kuria Karogo died in 1974 and by January 8, 1981 no-one had applied for probate or letters of administration to his estate.

The business partnership, according to the plaint, was converted into a limited liability company sometime in January 1968 known as Githiga New Farmers Limited (the company) and from that time it managed the farm. That word managed is in this pleading, and it is significant. The company chairman was the first plaintiff and the management committee was composed of the first, second and fourth plaintiffs. And since then only the lawful owners of the land had been receiving dividends from the company and they were the first, second, third, fourth, seventh, eighth plaintiffs and the first defendant. The other defendants had no interest in the land or the company.

But in March 1980 Baiya Waithiru, Mureithi Karomo, Muiru Muchomba, Mukora Njoroge and Kihika Kimani with the assistance of Gachira Waitimu had began to assert that they still had an interest in the farm land and from October 1980 they had entered upon it and were still there. All the defendants (save for Kihika Kimani) had taken over some of the farm buildings, ploughed some of the land with tractors and sold off some of the farm livestock without the authority, knowledge and consent of the plaintiffs. They had refused to depart or desist when asked to do so.

The plaintiffs also filed an *ex-parte* chamber summons on January 8, 1981 under order 39 rules 1,2 and 3 of the Civil Procedure Rules asking for eviction orders against the defendants (in this first suit) interlocutory injunctions to restrain them from entering on the land, destroying anything on it or disposing off any property on it. The supporting affidavit was sworn by Isaac Ndungu Githu, a clerk from 1965-1975 and then manager of the company. He alleged that in October, 1980 Gachira Waitimu appeared on this farm and stated he wanted to build on it which he did although this manager said he could not do so. He and two other men broke into two of the farm houses. He tried to sell some of the company's cattle in December 1980. On Christmas Eve that year he came to the farm with his sons and relatives and substituted a sign with Kiambu farm on it for the one bearing the name of Githiga New Farm. Back they came a week or so later with three tractors with which they ploughed the farm. A transporter, Peter Ndungu Ngae, who was allowed to live on the farm, also put in an affidavit alleging Francis Mburu Gachira a son of Gachira Waitimu, assaulted him on the farm and that he was convicted and fined Kshs 100 for doing so. The other defendants either lived on the farm without the company's permission or were related to Gachira Waitimu. Mbugua Mugo added his affidavit in support. He alleged he was one of the original purchasers of the farm. Those who sold their interest in it from March 1980 tried to recover it through their advocates, and later the District Officer, Molo, who had no jurisdiction over disputes of land in the Nakuru District, and then by force. He added that Gachira Waitimu and Baiya Waithiru had tried to sell of their one-tenth portions since they had returned to the farm.

This *ex-parte* application was heard and granted on January 9, 1981 in Nakuru by Mr Justice Masime.

Gachira Waitimu briefed Mr Muhia and in his written statement of defence of January 21, 1981 denied everything set out in the plaint (including the allegation that he was a Githunguri man because he claimed he lived in Nairobi) but he admitted he was one of the original purchasers of the parcel.

He also pleaded that

(a) Githiga New Farmers Ltd did not at any time acquire the ownership of Kiambu New Farm which was LR Number 2617/8; and

b) Githiga New Farmers Ltd was only the management company of that parcel and not its owner.

Consequently his prayers were for the dismissal of the suit against him and for partition of the farm into ten equal shares between Mwangi Mbothu, Baiya Waithiru, Muriithi Karomo, Muiru Muchomba, Mukora Njoroge, Kihika Kimani and the personal representative of Kuira Karogo because there was conflict in the partnership.

On January 28, Mr Muhia on behalf of the eight plaintiffs in Nairobi Civil Suit 60 of 1981 moved to have the *ex-parte* orders set aside. Gachira Waitimu and Muiru Muchomba set out the reasons for this in their affidavits. Gachiga New Farmers Limited was formed to manage the farm and to repay that loan of Kshs 50,000 to the Agricultural Finance Corporation which had a charge on the land, and when that was accomplished the land was to be subdivided among its partners. The company mismanaged the farm. No meetings were held, no balance sheets prepared, no dividends were paid after January 5, 1977 and the livestock was dwindling through improper sales or death due to neglect. Mwangi Mbothu had allowed a nephew, Peter Ndungu Ngae, to occupy part of the farm and conduct several of his own businesses from it. But the time came when the AFC loan had been repaid so Gachira Waitimu and six other co-owners asked Mwangi Mbothu and Mbugua Mugo the other two co-owners to agree to subdivide the farm but they refused to do so. The seven who wanted to subdivide thought this must be due to the fact that the two who did not were the 'leaders' of the company that mismanaged the farm to their own profit and to the loss of the others. The farm was in the Molo division of the Nakuru District so the Molo District Officer was entitled to try and settle this dispute but he failed because 'the company's owners' did not turn up for the meetings he called.

The seven defendants co-owners then formed a company called the Kiambu New Farm on September 15, 1979 and elected as chairman, Gachira Waitimu, secretary, Baiya Waithiru, and treasurer, Muriithi Karomo. They paid Kshs 1,200 for an outstanding water supply bill. They repaid an AFC loan of Kshs 12,396.60 so they could harvest the maize (which was rotting) and sell off some cattle to pay for a water pump for the farm borehole.

Gachira Waitimu built a Kshs 40,000 house on the farm and lived in it from October 1980 without hindrance. He and his co-defendants asked the local Land Control Board for consent to sub-divide and that was given on November 26, 1980. They all denied using force or violence and they all denied destroying anything on the farm. Mburu Muchomba's affidavit brought out this crucial allegation. None of them had sold his interest in the land. They had, however, sold their shares in the management company Githiga New Farmers Limited.

Peter Ndungu Ngae and Mbugua Mugo in their affidavits opposing the raising of the injunction explained the loss of the cattle was due to drought and denied mismanagement of the farm or company. Mbugua Mugo underlined the fact that from 1965 until 1980 none of the defendants made any claim to the land.

Mr Mitra filed an amended notice of motion in the same suit (Nairobi HCCS 60 of 1981) on May 25, 1981 supported by affidavits from Gachira Waitimu.

Different reasons for raising the interlocutory injunction were put forward. Withiga New Farm Limited had ceased to have the consent or permission of six of the co-owners to manage or occupy the farm because it did it so badly. These six had sold their shares in it but no more to the first three. It had no interest in the farm. It was a trespasser as to seventh tenths of the farm but not to three tenths of it.

So there were two groups at loggerheads over this farm. The majority and the minority, with the latter trying to usurp (or retain) total possession and control of it. The time had come to subdivide it into 42.5 acres (16.9 hectares) plots and let each litigant have his own parcel which would be worth about Kshs 500,000 in May 1981. This had been recommended by the Molo District Officer and Provincial Commissioner of the Rift Valley and the Land Control Board had given its consent. The majority then took up occupation from the end of November 1980 and began building, cultivating and ploughing on it only to be dispossessed on January 29, 1981 by the *ex parte* injunction. None of them had sold his interest in the land. This was why the minority could not produce any document to support their allegations that

they had. The registration of the majority's ownership had never been altered, so, by section 23 of the Registration of Titles Act (cap 281), the minority could not claim they were anything but tenants-in-common in equal shares of it.

Mr Justice Simpson heard this (second) motion to raise the interlocutory injunction on June 26, 1981 in Nakuru and rejected it on July 6, 1981 and so it remained in force. The learned judge found it surprising that the majority had not made any complaint between 1969 and 1980 about the management of the farm if they had retained any interest in it. They were evicted from land which they had not occupied for long. There had been no regular sub-division. The Registrar of Lands had not yet approved of the survey plans to sub-divide it.

Mr Mitra came on the record, however, as the advocate for all the defendants and pursuant to directions obtained in early October 1981 he filed their amended defence in mid-November that year in the first action, Nairobi High Court Civil Suit 60 of 1981.

Then their defence was that ten people were registered owners of that farm and they were Mwangi Mbothu, Mbugua Mugo, John Njoroge, Gachira Waitimu, Baiya Waithera, Muriithi Karomo, Muiru Muchomba, Mukora Njoroge, Kihika Kimani and Kuria Karogo (deceased). Their title were absolute and indefeasible under the Registration of Titles Act (cap 281). Each was entitled to occupy one tenth of the farm. Without the representative of the last named registered owner, however, the suit was incompetent for he was a necessary and proper party. None of these registered owners sold their interest in the parcel. None of the plaintiffs could claim by purchase or otherwise any right title or interest in the property registered in the names of the defendants. Githiga New Farmers Company Limited and Gitau Mbiri, Simon Ngugi Ng'ang'a, Kagwe Mugo and Bedan Kungu had no legal interest registered or unregistered, in this parcel either as owner or lessee.

But, the defendants went on in their pleadings, if Baiya Waithiru Muriithi Karomo, Muiru Muchomba, Mukora Njoroge and Kihika Kimani sold their shares in Githiga New Farmers Company Limited to some of the plaintiffs, this transfer of these shares did not qualify those plaintiffs to claim any interest in 6217/8 Nakuru. A sale of shares in a limited liability company is not a sale of any interest in the land. The defendants on all that, asked the High Court in Nairobi to dismiss the plaintiff's claims with costs.

Then on December 30, still in 1981, the same six defendants having joined Muiru Muchomba as the administrator *ad litem* and legal representative of Kuria Karogo (deceased), filed their plaint in the same registry asking for judgment against Mwangi Mbothu, Mbugua Mugo, John Njoroge and the Githiga New Farmers Limited for:-

- (i) partition of that farm (excluding the portions set aside, for a school, church and cattle dip) into ten equal sub-divisions;
- (ii) allocation of each sub-division to the registered owners;
- (iii) eviction of Mwangi Mbothu, Mbugua Mugo, John Njoroge and the Gathigia New Farmers Limited;
- (iv) damages from January 7, 1981 until vacant possession was given; and
- (v) costs.

This plaint led to the registration of Nairobi High Court Civil Suit 3778 of 1981. The defence in it was filed on March 9, 1982 and, in effect pleaded what was in the plaint in the earlier action. It also added pleas of adverse possession, estoppel and limitation. These two actions were consolidated and heard in Nairobi by Mr Justice Aganyanya between September 21 and December 8, 1983.

During the trial the District Officer Molo who had tried to resolve the dispute between the parties explained that in 1965 or so land in that area was often purchased from settlers by groups of people who then formed themselves into co-operatives or partnerships or limited liability companies. The last would

issue shares which represented the land they had purchased. He had been told that Githiga New Farmers Limited had been formed to manage the farm but not to acquire it.

Gachira Waitimu said the sale price for these 442 acres in June 1965 was Kshs 112,500 so each of the ten registered owners contributed Kshs 13,000. Kshs 17,500 of the total Kshs 130,000 went to pay for legal and other expenses. It was mortgaged by the vendor before this sale so he transferred the loan and mortgage to the purchasers. This loan was repaid by 1975 and the discharge issued in 1976 but this discharge was not registered.

Soon after this purchase was completed the new owners resolved to form a partnership called the New Kiambu Farmers and register it which Mwangi Mbothu its chairman said he had done but in fact never did. Instead he asked the advocates Malik & Company to form a different company, Githiga New Farmers Limited which it did and this was registered on January 16, 1968. Mwangi Mbothu and Mbugua Mugo were appointed 'directors' with the first to be in charge of the farm and to see to it that the Kshs 50,000 loan was repaid and the shareholders received dividends. Each was issued with a share certificate but paid no extra money for this.

Kihika Kimani did not put any money into the purchase of the farm but became a registered proprietor. He was not issued with any shares in the company because they went instead to Ngugi Ng'ang'a to whom he had 'sold his name'.

Mwangi Mbothu, Mbugua Mugo and John Njoroge put up Kshs 13,000 for the purchase of the farm, became registered proprietors, were allotted 500 shares in Githiga New Farmers Limited and never sold them.

Baiya Waithiru, Muriithi Karomo, Muiru Muchomba, Mukora Njoroge and Kuria Karogo put in their Kshs 13,000 for the purchase of the farm, became registered proprietors of it and shareholders in the company receiving 250 and 500 shares in it which they sold between 1969 and 1974 for sums ranging from Kshs 20 to Kshs 50 a share.

Gitau Kahura, Kihara Muthura, John Karoba Iroba and Ruth Mwicigi paid Kshs 5,000 each for 250 shares each in 1968 and sold them off between 1969 to 1972 at Kshs 7,000 to Kshs 13,500 for 250 shares.

All these sales brought in Gitau Mbiru, Simon Ngugi Ng'ang'a and Mwangi Mbothu as shareholders of the company but not as registered proprietors of the land.

Kagwe Mugo, Ngugi Ng'ang'a, Bedan Kungu paid Kshs 5,000 or Kshs 10,000 for 250 shares in the company in 1968, did not sell them but were never registered as proprietors.

James Kirugi died so his shares were inherited by his wife, Sofia Wanjiku. Kuria Karogo died in 1974 or 1975 and Muiru Muchomba became his administrator *ad litem*.

Those who sold their shares did so because they needed the cash. They had asked the company for loans but had been refused. And because from 1965 to 1968 they had received no dividends. Those who did not sell received dividends in 1968, 1972, 1973, 1974, 1975 and 1977 of sums ranging from Kshs 1,000 to Kshs 35,000 a year. In some years they were also given farm animals.

The two directors did not live on the farm but employed a manager Isaac Ndungu, to manage it. He cultivated maize and wheat on it and reared 150-200 cattle on it.

The land was not transferred to the company. Such a transfer was signed by some of the registered owners but not the others who claimed to have discovered that it was intended to cover up fraud and cheating. The transfer was not registered.

At first the acknowledged leader was Mwangi Mbothu but with the failure of the company to manage the farm profitably, Gachira Waitimu led a breakaway (majority) group which demanded sub-division. He

has three sons, Francis Mburu, Maina and Migwi and they entered the farm in 1980 with him and so became parties in this appeal. They entered the land then because Mr Kanyi, the District Officer, at Molo, told them to set up a company and then take over the farm. Mr Kanyi had not been told of any sale of any shares in the company by the majority.

At the time of the trial the farm was worth Kshs 6,600,000 and should have been making a profit of Kshs 24,000,000 a year which would have meant Kshs 2,400,000 for each of the ten registered proprietors or his widow or representatives or even Kshs 1,142,857 for each of the twentyone litigants. Some did not sell all their shares for the company e.g Baiya Waithiru who sold 250 of his 500. Those who sold thought they were selling their share in the dividends from the company but not their ownership in the farm or their share of the farm land. They knew the difference between the company, the partnership and the land.

Between 1965 and 1980 the registered owners did not enter upon or cultivate the farm as individuals. They had a management company and the company employed a manager.

This was the evidence at the trial of the majority group as it can now be called in this judgment. There was, of course, a different account in the testimony of the minority, and to that we now turn and try to summarise it.

Much was the same, or nearly the same as the majority had claimed so far as the early history of this venture was concerned. It is different, however, when the partnership is to be turned into a limited liability company, and the majority put those differences in this way.

The cash for the purchase of the farm was provided by more than ten people but only these ten were registered because Kihika Kimani had handed the names of those ten to a Nakuru advocate called Da Gama Roso to register. The seven other purchasers were told their names would be added later.

Now, according to the minority, all who pooled their contributions to buy this farm, including the registered owners, entered upon the farm as soon as the settler left it. Next they hired a manager, Isaac Ndungu, and appointed one of their own, Baiya Waithiru, to direct him, which he failed to do so they dismissed him. He was replaced by Mukora Njoroge who was, in turn, dismissed, after one year, when it was discovered he had been using a partnership vehicle for his own profit. Thus, Isaac Ndungu was left to manage it alone.

New Githiga Farmers Limited was incorporated on January 16, 1968. Why? Mwangi Mbothu said it was to halt the partnership's drift into a profitless venture and the new company would invite outsiders to buy its shares and with their cash buy more farm land and so the company's dividends would swell. But, his son Mbugua Mugo explained it was so that those who had contributed to the purchase of the farm but not been registered as one of its owners should be recognised as an owner and become one by being issued with shares equal in value to his or her contribution.

Both claimed the only asset this company had was this land which was transferred to it by resolution of the partners (or most of them) and later the transfer was signed by nearly all the registered owners but because it was incomplete it was never registered.

Mwangi Mbothu became its managing director and his two sons, Mbugua Mugo and John Njoroge, its secretary and treasurer. Shares were issued to the registered and non-registered owners according to their contribution and those shares 'represented' their ownership of this land.

Some shareholders sold their shares (and therefore their interest in the farm) and they rose up and went elsewhere. And those who bought them entered upon it.

Retracing our steps in this part of the minority's story a little, we must just analyse who did not sign the transfer and why. They were the registered owners, Kihika Kimani, Muriithi Karomo and Kuria Karogo. They did not do so because Kihika Kimani had 'sold his name' to Ngugi Ng'ang'a who also never signed it, Muriithi Karomo for reasons that were never made clear and Kuria Karogo because he was abroad but

sent his brother to do so who did not have or did not produce any power of attorney for this.

The company's auditor, Jivandra, of G M Kariuki and Partners, Nakuru, produced its annual returns from 1969 to 1981. There was a loss for every year save the period 1976 to 1980. Until 1981 there were only two shareholders listed for the company, Mwangi Mbothu and his son Mbugua Mugo, because those were the only two names Jivandra was given but then in 1981 his own researches, and not the return of the majority group to the land, led him to list seven more making a total of nine. All along, without checking the appropriate land titles register, he has, on the instructions of those shareholder directors of the company, set out as one of the company's assets LR 62178 – this 442 acre farm.

At the close of all the evidence the sole issue (as it is in this appeal) was who were the legal owners of the farm?

Mr Mitra submitted it was the majority group. Their ownership was based on sections 23, 32, and 34 of the Registration of Titles Act. The title was conclusive evidence that only the ten who were registered were owners. There had been no fraud or mistake or misrepresentation pleaded or proved. The purported documents of transfer of shares were not instruments of transfer, were not registered and did not transfer an interest in land: sections 32 and 34 (*ibid*). The company had never been registered as owner or lessee of the land.

This being so, he added, the majority should also be allowed to re-occupy the farm and be paid compensation for being hustled off it. Mr Chakava, of Malik and Company, for the minority, stressed the importance of the evidence and invited the learned judge to hold that the company owned the farm and only its shareholders had any interest in it. This was a matter of equity because they each held under a resulting trust whether they were registered or not registered as owners. This equitable interest was not defeated by the provisions of the Registration of Titles Act.

Mr Mitra, in reply, pointed out the question of any party holding under a trust was not pleaded and was not thrown up by the evidence and anyway such an interest would have to be registered.

Mr Justice Aganyanya delivered judgment on December 8, 1983 and he dismissed the action of the minority in the first suit with costs and entered judgment for the majority in the second one with costs on the higher scale. He ordered partition of the farm into ten plots, one for each registered owner, with portions to be reserved for public utilities and recreation.

The judge having set out in condensed form the background to these matters made these findings. Githiga New Farmers Limited never owned the land because the resolution that it should do so was not a unanimous one, and the transfer of it was not signed by all its registered owners, or registered. The agreements to sell shares did not mention the transfer of an interest in the land. There were parties and interests on both sides of the notion that these shares represented a ' slice' of the land. Much depended on whether he was a vendor or a purchaser of the shares. He refused to award the majority any damages because he found each had received his dividends from Githiga New Farmers Limited.

The minority was disappointed by this result, of course, and Malik and Company were instructed to appeal from it. The majority were not completely happy with it either so Mitra & Company filed a notice of cross-appeal.

The minority (the appellants) complained that Mr Justice Aganyanya erred in failing to-

- (i) set out the real issue and so did not resolve it;
- (ii) in declaring the issue was whether Githiga New Farmers Limited Had anything to do with the farm;
- (iii) in entering judgement as prayed;
- (iv) ordering the registered owners to hold a meeting within three months to decide on sub-division of the

farm;

- (v) not finding that equitable interests are not defeated by the Registration of Titles Act;
- (vi) failing to find Githiga New Farmers Limited owned the farm; and
- (vii) finding the resolution to form a company to acquire the farm was not unanimous.

They asked this court to allow the appeal with costs, set aside the decree of the High Court and to enter judgment for them (or transfer the suits to another judge to retry).

The successful majority (the respondents) in its cross-appeal complained that the learned judge should have-

- (a) in any event assessed the damages due to its members; and
- (b) awarded them such damages because none of them, save Gachira Waitimu, had received any dividends from the company having sold their shares before January 9, 1981 which was when they are evicted from the farm.

Their prayers were for the dismissal of their claim for damages or compensation be set aside and that they should be assessed by this court or sent back to the High Court to assess and to award to them with costs. They also prayed for the costs of this cross-appeal.

Mr Nowrojee represented the appellants and Mr Mitra the respondents before this court. Briefly, their submissions were as follows. Mr Nowrojee maintained that the company was formed to own the land and to this end it was put into possession of it. It issued shares to the ten registered owners and to an extra five who had contributed to the purchase of the land who had not been registered as its owners. They then elected the directors and office bearers of the company. None of the registered owners sold their shares in the company and left the land because they sold their interest in the land when they sold their shares in the company. Then those who purchased those shares or shares issued by the company had an equitable interest in the land which was permitted under sections 80,81, and 82 of the Registration of Titles Act. Those were the worthies who paid off the AFC loan, made it possible for dividends to be paid out and kept the land in good fettle by their labour including the application of fertilizers. All this should lead to a change in title, and those on the register be found to hold in trust for those who did not sell their shares and those who purchased shares in the company at any stage. It was pleaded. This was put forward not on the basis of only documents but on all documents and the conduct of the parties in the history of this land after its sale by Graham to the Africans when Kihika Kimani organised to purchase it. It was wrong to treat the company as a management one. It never charged the owners fees or commission. There was no management contract or other documents outlining its duties or the terms of its employment.

Mr Mitra's main argument was that the company was formed to manage the land. It was something it was allowed to do by its memorandum of association. It never owned this land because the registered owners never executed the transfer of it. Kihika Kimani did not sign the transfer and Kuria Karogo's brother signed it for him but without a power of attorney which he could not do for a registered owner.

Those who were issued with shares in the company sold them because they received no dividends. The company had no assets so anyone who sold its shares sold worthless shares and not part of the land or any interest in it. The register which was based on the torrens system was conclusive. It was impossible to find any evidence of a trust of any sort from a sale of an undivided share or an interest in the land, contribution to its purchase, residence on it from 1965 to 1983, purchase of shares in the company, payments towards the rates or income tax or its upkeep. The trial judge did not err in refusing to award mesne profits because the respondents were not entitled to them. They, were, however, entitled to compensation for the period between their eviction (as a consequence of the mandatory injunction sent forth by Mr Justice Masime and not raised by Mr Justice Simpson) until the Molo District Officer told them to return to the farm as a result of the orders of Mr Justice Aganyanya at the end of the trial of the

two actions.

This is a first appeal so this court can rehearse the evidence (as we have) and draw its own conclusions. The facts, according to all the evidence, are that this farm was registered in mid-June 1965 in the names of ten men as tenants in common in equal shares under the Registration of Title Act. They intended to form a partnership to run this farm. It would have livestock and maize on it and be called the Kiambu New Farm. They did not register the partnership.

On January 16, 1968 Githiga New Farmers Limited was incorporated to manage the farm. Only two of those ten were registered as shareholders (though the advocates for the ten registered owners acted for the two share-holders who were two of those ten registered shareholders). Others were told they were shareholders and were handed documents purporting to be shares.

A transfer of the farm from the ten registered owners to the company was drawn but it was not signed by them all and so never executed or registered.

Today the farm is registered in the names of the original ten.

But from 1965 (when the ten were registered as its owners) others with the consent of the ten entered upon the farm and between 1965 and 1981 some of the ten (not the two shareholders) sold their shares to others who then became shareholders.

Lawful or adverse possession, estoppel, limitation were abandoned while laches and wrongful joinder of the two suits were never raised and, in our view, cannot be considered at this stage.

The order of Mr Justice Simpson in the application to raise the *ex parte* Interim injunction of Mr Justice Masime does not, with respect, effect the judgment of Mr Justice Aganyanya in the trial of all the issues that were pleaded.

It is correct to adumbrate that the respondents were not in possession (or receiving any dividends) from 1965 to 1981 and there was no sub-division of the farm (and in 1986 this still has not taken place) but there are still ten men registered as its owners as tenants-in-common in equal shares.

We agree that Mr Justice Aganyanya erred in law when he refused to find for the respondents in damages because they all enjoyed dividends declared by the company under the erroneous assumption that it owned the land. There was insufficient evidence to support the assumption of the receipt of such dividends.

The company was authorised by its Memorandum of Association to manage the farm.

We would not accept that on the evidence, especially the documents, most of these parties believed that when they sold or purchased the shares in the company an interest in the farm passed.

The relevant law cited to this court was as follows. A certificate of title issued by a purchaser of land upon a transfer on transmission by the proprietor of it shall be taken by all courts as conclusive evidence that the person named in it as proprietor of the land is the absolute and indefeasible owner of it, subject to the encumbrances, easements, restrictions and conditions contained in it or endorsed on it and the title of the proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. Section 23(1) Registration of Titles Act.

Where there has been fraud or error anyone who has been deprived of land by either may bring or prosecute at law an action at law for the recovery of damages. Section 24(*ibid*).

Every grant is deemed to be a registered one when it has been marked by the registrar with folio and volume. Section 27(*ibid*).

No instrument passes any land or interest in it unless it has been registered. Section 32 (*ibid*).

Leases and charges may be transferred by a transfer executed in duplicate in form G in the First Schedule. Section 37(1). It has to be signed by the transferer and transferee.

A registrar or person dealing with land subject to the Act is effected by notice of a trust, express, implied or constructive, and the registrar shall not enter its particulars or instrument with its details. Section 80 (*ibid*).

The Registration of Titles Act is based upon the Torrens system of registration and its prime principle is the sanctity of the registrar. *Popatal v. Visandjee* [1960] EA 361, 365 I (A-K): also *sub nom*; [1962] EA 372, 376 (PC).

Co-shares of lands settled and held in common may cultivate any part of it not being cultivated by another co-sharer provided he pays compensation to the other co-shares if called upon to do so. The others are not ousted by this cultivation and so they cannot claim mesne profits. If they object, their remedy is to ask for partition, with compensation, limited to user during the six years before suit. *Midnapur Zamindary Company Limited v Naresh Naran Roy and Others* [1924], 51 IAR 293 (PC).

The English Partition Acts, 1868 and 1876, are applicable to claims for partition in Kenya. Section 3(1) (c) Judicature Act (cap 8); Article 4(2) Kenya Order-in-Council 1921; *Thakar Singh v Kesar Kaur* [1936-7], 17 KLR Pt 1 Page 1; *Patel v Patel* (1939), 6 EACA 48 (CA-K).

A partition suit may be commenced without all interested persons being made parties but at the earliest stage it should be ascertained with precision who are interested in the property, and in what proportions, and on all matters into which inquiry must be made, all co-owners are entitled to be heard. *Ali bin Khamis v Salim bin Khamis and Others* (1956), 23 EACA 195 (CA-K).

The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. *Cook v Fountain* (1676), 36 ER 984, 987, *Marie Ayoub, & Others v Standard Bank of South Africa Ltd and Another* [1963] EA 619, 622 (PC-K); *Joseph Kamau Kamere v Ndungu Kiiru* C A E A Civil Appeal 43 of 1976, Wambuzi P, Law VP and Musoke J A August 26, 1977. Now all that, in our view, is enough for this appeal to answer the issues in the appeal and the crossappeal. Apply that law to the facts that have been found. And our conclusions are these.

Mwangi Mbothu, Muiro Muchomba, Kihika Kimani, Mukora Njoroge, Gachira Waitimu, Muriithi (or Mureithi) Karomo, Mbugua Mugo, Kuria Karago, John Njoroge and Baiya Waithiru are (still) the tenants-in-common in equal shares of LR 62178 as lessees for the residue of the unexpired term of 999 years beginning on July 1, 1919. Those are the names on the registrar and the folio and volume are there, too. They, or by now, their legal representative are the co-owners today.

Fraud or misrepresentation were not pleaded and not proved. Trust was not pleaded and on the evidence it was never intended by the parties. It was not expressed and it cannot be implied. A resulting trust cannot be implied. Consequently, we dismiss the appeal with costs. We allow the cross-appeal with costs and make the orders sought in it. The names of those who contributed to the original purchase of this lease should be agreed and those people or their legal representatives invited to take part in the sub-division. It is not too late to do this. Damages for the eviction of the respondents from the farm from January 9, 1981 until the date of their re-entry should be remitted to the High Court in Nairobi for assessment if not agreed and for this purpose the parties should be at liberty to call further evidence if necessary. Finally, the parties should have liberty to correct the spelling of the names of the parties if need be.

We are only too aware that such spelling differs from document to document and court records and may cause difficulty with further proceedings in various registries. Orders accordingly.

Dated and delivered at Nairobi this 14th day of July, 1986.

A.A.KNELLER

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR