



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 19 OF 2014
(Coram: F. Gikonyo J)

**Appeal arising from the judgment of Hon. D.O. Onyango, SRM, rendered
in RUNYENJE'S SRM SUCC CAUSE NO 63 OF 2003 on 19.11.2009**

GENESION MURITHI (Representative of the estate of

M'BOORE MURUNGA Deceased).....1st APPELLANT

FESTUS MWALIMU.....2nd APPELLANT

MBAKA MURANGA.....3Rd APPELLANT

Versus

GENESIA CIARWIGI MUCHIRI.....RESPONDENT

JUDGMENT

Appeal

[1] This appeal arises from the judgment of the learned Senior Resident Magistrate D.O. Onyango, rendered in RUNYENJE'SSRMSUCC CAUSE NO 63 OF 2003 on 19.11.2009. The following five grounds were preferred in the Memorandum of Appeal:-

1). Copy memo of appeal...

Submissions by the Appellant

[2] The Appellants abandoned grounds 1 and 2 and argued only grounds 4, 3 and 5 in that order. They submitted that the evidence tendered and recorded by the trial magistrate does not support the judgment by the trail magistrate. According to them, the evidence by PW1 was clear that the deceased was registered as trustee of L.R NO KARINGANI/236 for the family of the late M'MurangaNjagi, their grandfather. Under section 28 of the RLA- now repealed- the trustee is not relived of his duties as a trustee and trust need not be indicated in the register. In addition, the Appellants have lived all their lives in the said land during and after the death of the deceased. They have developed the said land and have planted permanent crops like coffee therein. They did these developments during the lifetime of the

deceased who did not stop them because he knew the land was family land. They relied heavily on the fact that the Respondent admitted that this is the land the family of the deceased- his parents and brothers- came from when they went to the concentration camp at Ndagani at the time of emergency. The deceased did not, therefore, buy the said and as has been alleged by the Respondent. Therefore, all the brothers of the deceased had equal share with the deceased to the said land. They contended that this evidence was corroborated by other witnesses and was not shaken at all.

[4] More was submitted; that the Respondent admitted that their parents lived in the said land and their mother was buried in that land. Accordingly, the testimony by the Respondent that she had agreed in her testimony to give the Appellants 0.50 acres for they had already built on the land is confirmation that they were on the land all their lives. Again, they urged that the record of the adjudication showed that they enjoyed right of occupation. To them, these rights cannot be defeated by the death of the deceased and are protected under section 30 of RLA- now repealed- as overriding interest. Even Land Registration Act in section 28(b) recognizes overriding interest which need not be noted in the register. The customary trust herein is protected in law and they cited judicial decisions on the point. The trial magistrate erred in not holding that a trust existed for the Appellants.

[5] On the basis of the above, the Appellants submitted that the deceased was their brother and was entitled to equal share with the others in the family land. But despite this equality, they gave him 1.5 acres in the estate of their father which was a little more because he was the elder brother. Therefore, their proposals were the most apt. But, treating them as mere dependants of the deceased was a great error and a violation of their equal rights over the estate property with the deceased. The finding was discriminatory for preferring the Respondent and her children over them. It also denied them equal access to land. by the trial magistrate for they had rights but that record was dismissed by the trial magistrate. For those reasons, the Appellants prayed for this appeal to be allowed.

Submissions by the Respondent

[6] The Respondent's arguments rotated on one axis; that the court held that there was no trust in favour of the Appellants, thus, it was right for the court to have treated them as dependants of the deceased and made reasonable provision for them under section 26 of the Law of Succession Act. In making the provision, the trial court considered the needs of both parties. Therefore, the trial court exercised its discretion properly and should not be interfered with. Moreover, the trial magistrate did not have jurisdiction to determine issues of trust and so it took the right path. In summing up, the Respondent argued that the Appellants did not plead any violation of right and only introduced constitutional issues through their submissions. Those submissions have no basis. Accordingly, the Respondent beseeched the court to dismiss the appeal.

Duty of court

[7] This being a first appeal; this court has the responsibility of analyzing and re-assessing the evidence on record and reaching at own conclusions, except, bearing in mind that it neither saw nor heard the witnesses who testified. On this see *Selle v Associated Motor Boat Co.*[1968] EA 123 and *Kiruga v Kiruga & Another*[1988] KLR 348). I will perform that duty without rehashing the evidence already recorded.

Allegation of trust

[8] This appeal will turn on whether or not there existed a trust in favour of the Appellants in respect of LR. NO KARINGANI/NDAGANI/236 (hereafter the suit land). The Respondent stated that the deceased was registered as the absolute proprietor of the suit land. I have seen the Land Certificate issued to him on 26th day of July 1976 under the Registered Land Act, Cap 300 Laws of Kenya (hereafter RLA)- now repealed. Except, however, the proprietorship is subject to inter alia to such overriding interests set out in section 30 of the RLA and trusts. First, the Appellants were recorded in the Adjudication Record to have rights of occupation. These were existing rights and are recognized in law especially under section 30 of the RLA- now repealed as overriding interest. Therefore, the registration of the deceased as absolute

proprietor was first and foremost subject to occupation rights of the Appellants. The trial magistrate treated that interest as that of a dependant and shared the estate on that basis. I will not close on that point before I determine the main point of the appeal i.e. allegation of trust. I will, therefore, revisit the former issue later.

[8] On the alleged trust, the following evidence was tendered. PW1 testified that the suit land was ancestral land and that they have all lived on it together with their children all their lives. The land belonged to their father, one M'.MurangaNjagi who died in 1953 in a concentration camp at Ndaganiduring the emergency period.He said that they have also developed the land; they have built their residential homes, planted coffee and other trees thereon. The land should therefore be inherited by the children of M'MurangaNjagi who had seven siblings except, the rightful beneficiaries of the suit land should be:

- (i) M'BooreM;Muranga
- (ii) Festus Mwarimu
- (iii) MbakaMuranga
- (iv) RainiMuranga alias Mutegi; and
- (v) GenesiaCiarwigiMuchiri (petitioner) and her children

PW1 stated that after the death of his father, he, together with the deceased, Festus and Mbaka facilitated the adjudication of the suit land. But, the suit land was registered in the name of the deceased because he was their elder brother. He produced the Adjudication Record dated 18.6.70 to show that they were already in occupation of the suit land and those rights were recognized. He further testified that the deceased did not object to them living and also planting of permanent crops like coffee on the land. Again, he stated that they had registered a caution on the land during the lifetime of the deceased so that to prevent him from taking a loan on the land. He said that the deceased did not object to the registration of the caution because he knew the land was family land.

[9] PW1 gave more evidence in support of the alleged trust; that this is the land they lived before the emergency was declared in Kenya in 1952. But, they were removed therefrom to the concentration camp at Ndagani where their father died in 1953. According to him, the Petitioner was married to the deceased while at the concentration camp. But later went back to settle on the suit land with her husband. All the other siblings of the deceased also went back to live on the suit land. Their mother was even buried on this land. PW2 and PW4 supported the evidence by PW1.

[10] The Respondent on the other hand testified that the deceased was the sole owner of the suit property having bought it from one MiritiwaKimanthi in 1961. She stated that she participated in the fixing of the boundaries of the suit land. She was also present during the negotiations for the purchase of the suit land. The negotiations were done under a tree and were witnessed by 3 elders including Miriti, Karetu and Mathai. Miriti's son one NgatariKimanthi was also present in the negotiations. DW2 testified in support of the Respondents claim and stated that he was present when the deceased bought the suit land and also when it was transferred to the deceased on 22nd April 1961. The consideration given was a he goat and honey. And that after the acquisition of the suit land the deceased invited his brothers to live with him on the land.

[9] What picture does the evidence paint?The Respondent admitted that the Appellants came from the suit land previously known as Ndagani when they were taken to the concentration camp during the time of emergency in Kenya. The state of emergency was declared by the governor of Kenya Sir Evelyn Barring in 1952 and ended in 1959. During that period, many natives were removed from their lands and taken into concentration camps for purposes of detention and ease of administration by the colonial government. The evidence in this case shows that the entire family of the late M'MurangaNjagi left their land and was taken into the concentration camp at Ndagani in 1953. The Respondent was married by the

deceased in the concentration camp. At the end of the state of emergency, the deceased, his wife (Respondent) and all of the siblings of the deceased went back to the suit land and settled there. Their father was not lucky though for he died in the concentration camp and was buried at Chogoria in accordance with the colonial rule at the time. Accordingly, the evidence shows that the family of the late M'MurangaNjagi lived on the suit land even before the emergency was declared. Therefore, the land was available to the family of the late M'MurangaNjagi before 1952. On that basis, there evidence by the Respondent that the land was bought in 1961 by his late husband is not consistent with the evidence on record. In any case, there is no cogent evidence that the deceased bought the land in 1961. The testimony by the Respondent and DW2 on the alleged purchase is not tight and none of the witnesses in the alleged sale negotiations was called to give evidence. From the evidence adduced, the deceased and all his other siblings lived on the suit land. The deceased did not stop them from constructing their homes on and reaping from crops such as coffee planted on the suit land. At one time, a caution on the title was registered by the brothers of the deceased and he did not object to it. The evidence by the Respondent that the deceased had told his brothers to buy their own land so that they can vacate his land is not supported by evidence of concrete actions taken by the deceased to remove his brothers from his land. In fact, during the lifetime of the deceased, his brothers as well as he purchased their own lands but they continued to live on the suit property. There is absolutely nothing to support the evidence by the Respondent that the deceased wanted his brothers to move out of the suit land. Their rights were also captured in the Adjudication record as existing rights. But, what do all these facts portend?

[10] According to section 2 of the Trustee Act:

“trust” does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and “trustee” where the context admits, includes a personal representative, and “new trustee” includes an additional trustee;

[11] Is this a case of constructive or implied trust? By dint of the reception clause and the Judicature Act, common law of England as modified by equity applies in Kenya. Equitable doctrines of implied constructive and resulting trusts are creatures of Equity and so they apply in Kenya. Accordingly, as was held in the case of Kanyi vs. Muthiora [1984] KLR 712:

“Registered land as per section 163 of the Act is subject to the common law of England as modified by equity which brings in the equitable doctrines of implied constructive and resulting trusts”.

Applying this test, the evidence herein shows that the entire family of the late M'MurangaNjagilived on this land even before the emergency period. In all possibilities, it was ancestral land. No one claimed that the said the late M'MurangaNjagibought the suit land; that was not necessary either as families settled on particular lands for ages and those lands constituted ancestral lands. The evidence by PW1, PW2 and PW4 clearly showed they, together with the deceased facilitated the adjudication and registration of the suit land, except, it was registered in the name of the deceased because he was the eldest son and their father was already dead. Such mutual trust amongst members of the same family is not uncommon. Accordingly, in this case a constructive trust arose in favour of the Appellantswhen the suit land was registered in the name of the deceased. As such, a proprietor by first registration or any other subsequent registration is not absolute owner of a trust land but a trustee. Similarly, the personal representative of the deceased registered proprietor is a trustee of the trust land. In any event, and I have found this already, the rights of the Appellants are overriding rights to which the title herein is held. Their rights are not extinguished at all by dint of first registration of the deceased as absolute proprietor of the suit land. Thus, obligations of a trustee are carried over by and should be discharged by the personal representative of the deceased herein- the Respondent. See section 28 of the RLA- now repealed. Before I close, I must state that our land law has grown and provides for trusts including customary trust as overriding interest which need not be noted in the registered. This removed much judicial debate that existed as to whether or not section 30 of the RLA- now repealed- excluded customary law rights.

The upshot on my final analysis...

[14] The upshot of my analysis above is that a constructive trust arose in favour of the Respondents and the other children of the late M’MurangaNjagi living on L.R NO KARINGANI / NDAGANI / 236. Accordingly, they were entitled to share the suit land equally. However, the Appellants have expressed desire to give the deceased 1.15 acres. Therefore, I order that L.R NO KARINGANI / NDAGANI / 236 shall be shared as follows:-

- (1) 1.15 acres shall go to the family of the deceased to be held by the Respondent under the principle of representation.
- (2) Each of the Appellants shall get 1 acre.

[15] Distribution of the other parcel of land, namely, L.R NO KARINGANI / MUIRU / I543 is not in dispute and shall be as was ordered by the trial court. The grant herein is confirmed in accordance with the foregoing terms. This being a succession cause involving close family members, I order each party to bear own costs. It is so ordered.

Dated, signed and delivered in open court on 30th day of May 2017

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F. GIKONYO

JUDGE

In the presence of:

Mr. Gitonga advocate for Mr. Nyamu Nyaga advocate for appellants

Mr. Macharia advocate for Respondent – absent

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F. GIKONYO

JUDGE