



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 38 OF 2014

(An appeal from the Judgment of the Ag. Senior Resident Magistrate, Runyenjes in Succession Cause No. 37 of 2011 dated 27/10/2014)

JACOB NYAGA NJERU.....1ST APPELLANT

DANIEL NJUE.....2ND APPELLANT

JACKSON NTHIGA NJERU.....3RD APPELLANT

JONATHAN IRERI CORNELIUS.....4TH APPELLANT

AYUB NYAGA NJERU.....5TH APPELLANT

VERSUS

DANIEL NJIRU E. NYAGA..... 1ST RESPONDENT

EPHANTUS NYAGA NJAGI.....2ND RESPONDENT

J U D G M E N T

1. The appellants have appealed against the judgment of Runyenjes Ag. Senior Resident Magistrate in Succession cause No. 37 of 2011 in which the trial magistrate distributed the estate of their deceased father. The heirs of the estate were given their shares and in addition the respondents who had made separate claims were given their portions of land which they had been occupying.
2. The 4th appellant was the petitioner in the succession cause and was dissatisfied with the judgment and lodged this appeal. His four brothers joined him in this appeal as the 1st, 2nd, 3rd and 5th appellants.
3. The grounds of appeal are that the magistrate erred in finding that the 1st respondent and his family should get 0.5 acre out of Kagaari/Kanja/2119 and that the 2nd respondent was entitled to 1 acre out of parcel number Kagaari/Kanja/1896 when the consent produced by the 2nd respondent was for Kagaari/Kigaa/896 and not Kagaari/ Kigaa/1896.
4. The other grounds of appeal are that the magistrate misdirected himself in finding that the 2nd respondent had bought an acre out of Kagaari/Kigaa/1896 and not Kagaari/ Kigaa/896 and that there was a typographical error in indicating the land reference number as Kagaari/Kigaa/ 896 instead of Kagaari/Kigaa/1896.
5. The appellants submitted that the evidence was clear that the deceased was given by the clan Kangaari/Kanja/2119 solely and not to hold a share in trust for the 1st respondent's father. It is alleged that it was not clear from the 1st respondent's evidence what proportion of the land was to

- be given to the 1st respondent's family. Neither did the 1st respondent explain why he never made a claim of a portion of the land Kagaari/Kanja/2119 during the lifetime of the deceased.
6. The 2nd respondent did not demonstrate that there was a Land Board consent for parcel No. Kagaari/Kigaa/1896. The appellant cited the case of **DANSON MUNIO NJERU VS WILLIAM KIPATARBEI KORIR & 6 OTHERS [2014] eKLR** where the court held that it was mandatory to obtain a Land Board consent for transfer of an agricultural parcel of land.
 7. The 2nd respondent submitted that he is entitled to 1 acre of land out of Kangaari/Kigaa/1896 and has been in occupation of it without interference since 1979 having bought it and acquired consent from the Land Control Board. He even buried one of his sons on the parcel of land without any objection from the appellants. He said he has never occupied parcel number 896. He testified that he bought parcel 1896 and not parcel 896.
 8. The duty of the 1st appellate court was explained in the case of **JABANE VS OLENJA [1986] KLR 661**

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi - vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”

9. PW1 testified that the deceased was his uncle and that he had two wives and ten children. He owned two parcels of land LR. Kagaari/Kanja/2119 and Kagaari/Kigaa/1896. He further said that his father and the deceased were given kagaari/Kanja/2119 by the clan in 1961. The deceased was to give PW1's father a portion out of this land. PW1 has been utilizing this land since 1961 together with the children of the deceased. His father and the deceased were also utilizing the same parcel until 1990 when PW1's father passed away.
10. PW1 said that the children of the deceased offered him ¼ of an acre out of the same parcel but he rejected the offer. He further stated that the children of the deceased also sold ¼ acre out of Kagaari/Kanja/2119. According to him, the land should be divided into two equal parts. He says that he has stayed on the said parcel of land for over 50 years.
11. PW2 was called as a witness by the 1st respondent. He testified that he was born in 1924 and knew the deceased who was from his clan. He said that he witnessed the clan giving the deceased LR. No. Kagaari/Kanja/2119 to share with his brother Cornelius Njeru, the father of the 1st respondent. He said that the land should be distributed equally between the houses of both brothers.
12. The 2nd respondent PW3 testified that he bought one acre of land from the deceased in 1979 for Kshs.9,500/=. The Land Board authorized the transaction and issued him with a consent which he produced in evidence. The deceased later refused to sign the transfer and filed a suit in Runyenjes Court but the case was decided in his favour. He started using the said land in 1979 and is still on the land. He is claiming the one acre he bought from the deceased's estate.
13. The 4th appellant DW1 testified that the deceased was his father and that he had two wives. He had two parcels of land LR. Kagaari/Kanja/2119 and Kagaari/Kigaa/1896. The deceased and the 2nd respondent's father were each given land separately by the clan and that Parcel number 2119 was registered in the deceased's name. He denied that the deceased held the land in question in trust for the respondent's father.
14. The proposal to divide the land into two portions was opposed. According to him the deceased did not sell any land to the 2nd respondent. He even sued him seeking eviction orders in Runyenjes Civil Case 1991.
15. It is important to note that the green card for parcel No. Kagaari/Kanja/2119 shows that it measures 1.572 ha. The magistrate distributed one acre to the 2nd respondent's family one acre jointly.
16. It was the evidence of the 1st respondent that he has utilized a portion of the land since 1961 which co-owned by the his father and the deceased father. His witness, a member of the deceased

- clan supported the case of the 1st respondent. The deceased was registered proprietor to hold the land in trust for himself and his brother Cornelius Njeru. The 4th appellant alleged that the 1st respondent's father was given his own land which was sold but he did not produce any documentary evidence or call any witness to rebut that of the 1st respondent.
17. The record of appeal contains an admission by the 4th appellant that his deceased father gave the 1st respondent a portion of land to put up his house. The 4th appellant admits that in his proposed mode of distribution that he gave the respondent and his mother a portion almost equal to what each of the beneficiaries of his deceased father got.
 18. The 4th appellant did not explain the reason for that kind of generosity given that he said that the land belonged to the deceased alone. He also included the 1st respondent in the list of beneficiaries in the summons for confirmation of grant. The inclusion and the admission in his testimony shows that the 1st respondent had an entitlement in the estate of the deceased following his own father's share.
 19. The 1st respondent testified that his family has occupied and utilized the land for over five decades with the consent of the deceased. The 1st respondent has established that the deceased was registered as proprietor of LR. Kagaari/Kanja/2119 to hold in trust for himself and for his brother.
 20. The magistrate gave the 1st respondent only 0.5 acre out of the land which measures 1.57 ha, equivalent to 3.87 acres against his claim of half the portion. In his submissions the respondent insists that he should get half of the whole portion. Unfortunately, he did not lodge a cross-appeal.
 21. It is alleged that the 1st respondent was treated as a beneficiary of the estate. The 4th appellant had himself included the 1st respondent in his list of beneficiaries. However, the 1st respondent did not get the portion of land in his capacity as a beneficiary but he stepped into the shoes of his late father to claim interest of a co-owner by virtue of the trust.
 22. The land was registered under the Registered Land Act Cap 300 (now repealed) which sanctioned the concept of trust under Sections 28 and 126(1) of the Act. It follows that where trust has been established in absolute ownership conferred by first registration, the proprietary rights will be subject to the trust. The land in question was registered in the name of the deceased in 1961 which was the first registration and therefore the doctrine of trust may be rightly invoked. The copy of the register shows that the deceased obtained registration later and was issued with an identity card No. 35131990/66 which was reflected in the register.
 23. The court observed in the case of **SAMSON M'ITWAMWARI MUMIRA VS JACKSON KIBETERU & ANOTHER [2007] eKLR** that:-

It was held:-

As the learned trial magistrate correctly held, a trust can be declared on land even where the title relates to first registration under the Registered Land Act as was held in LIMULI VS MARKO SIBAYI [1979] KLR 251. Similarly it is not a mandatory requirement under the provisions of Section 126(1) of the Registered Land Act that the fact of the existence of a trust be endorsed on the instrument of acquisition. See GATIMU KINGURU VS MUYA KATHANGI [1976] KLR 253.

24. The 2nd respondent's case was that he bought one acre out of Kagaari/Kigaa/2119 from the deceased in 1979. He produced a copy of the sale agreement which the petitioner did not challenge. The 2nd respondent also produced an application for consent dated 18/7/1979 signed by the parties and a letter of Land Board consent dated 19/7/1979. The petitioner stated that the application for consent was for parcel No. Kagaari/ Kigaa/ 896.
25. It is not in dispute that the 2nd respondent has been utilizing the said parcel of land since he bought it from the deceased. The 4th appellant admitted this fact in his testimony.
26. He further admitted that the 2nd respondent was still utilizing the land and was never evicted during the lifetime of the deceased. A perusal of the interpreted sale agreement dated 26/4/1979 between the deceased and the 2nd respondent does not indicate the parcel number out of which the appellant bought one acre.

27. The application for consent of the land board and the letter of consent indicates that the application was for parcel number Kangaari/Kigaa/896. It however indicates that the seller was the deceased Neru Mwanjagwa and the buyer was the 2nd respondent. The 4th appellant in his testimony testified that his deceased father had sued the 2nd respondent seeking eviction in Runyenjes SRM Civil Case No. 6 of 1991.
28. The court record indicates that the 4th appellant produced a plaint for the said case. The magistrate in her judgment however indicates that she perused the file for Runyenjes Civil case 6 of 1991 and noted that the matter was dismissed for want of prosecution.
29. Even though the sale agreement, the application for Land Board consent and the letter of consent do not refer to parcel number Kangaari/Kigaa/896, it is noted that the 4th appellant admitted that the 2nd respondent had been utilizing the land and was never evicted even during the lifetime of the deceased.
30. The copy of plaint for Runyenjes SRM Civil Case No. 6 of 1991 where the 1st respondent had been sued by the deceased seeking eviction orders is in the court record. He said the case ended in his favour but did not produce the ruling or judgment. He said that the court papers got burnt in his house. This plaint which was not disputed states:-

The defendant lives in the plaintiff's land LR. Kagaari/Kigaa/1896 and has refused to vacate.....

31. The respondent produced a land sale agreement, an application and letter of consent for transfer of one acre out of LR. Kagaari/Weru/896. He said there was a topographical error in the documents indicating the parcel number as 896 instead of 1896. The plaint which was drawn by the deceased confirms that the 2nd respondent was living on his land LR. Kagaari/Kigaa/1896. There is no evidence that the deceased owned any other land by the number LR. Kagaari/Kigaa/896. This leads to the conclusion that the number on the Land Board consent documents was an error as the magistrate correctly put it.
32. There was evidence that the 2nd respondent took possession of the portion he bought immediately afterwards and has lived there and developed the land which was admitted by the appellant. He said he has planted macadamia nuts, tea, coffee and bananas. The trial magistrate found that the 2nd respondent had proved that he was entitled to the portion he had bought. This portion had to be transmitted to the 2nd respondent in the succession proceedings where the claim was lodged.
33. It is my considered opinion that the respondents proved their respective claims to the standards required before the trial magistrate. The findings of the learned magistrate were therefore supported by cogent evidence and I find no reason to disturb the said findings. The judgment is hereby upheld.
34. I find no merit in this appeal and it is hereby dismissed.
35. Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

1st, 2nd, 3rd, & 5th Appellants

1st Respondent