REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 199 OF 2013

NANCY WANJIKU KABUI ……APPELLANT

VERSUS

JOHN KABUI MIRIO ……..……. RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 23RD MAY, 2008 BY HON. P.T. NDITIKA – S.R.M. AT KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 273 OF 2006)

JUDGMENT

This is an appeal against the judgment of Hon. P.T. NDITIKA Senior Resident Magistrate in Kerugoya SRMCC No. 273 of 2006 delivered on 23rd May 2008.

What gave rise to this appeal was the plaint filed by the Respondent (as plaintiff) in Kerugoya Senior Resident Magistrate Court Civil Case No. 273 of 2006 against the Appellant (as defendant) seeking the removal of a caution and/or restrictions lodged on land parcel No. INOI/KERUGOYA/20 and a permanent injunction against the Appellant from entering into the said parcel of land. The Respondent's case was based on the pleading that the parcel of land in dispute was his property registered in his names. However, in an amended defence and counter-claim, the Appellant (who is the wife of the Respondent) pleaded that the land was ancestral/family land registered in the Respondent's names to hold in trust for the entire family and the same had been jointly developed by the joint efforts of the family members yet the Respondent had threatened to dispose off the land hence necessitating the lodging of the caution. The Appellant therefore counter-claimed for an order of permanent injunction restraining the Respondent from selling, transferring or charging the land subject of the suit.

The suit was heard by P.T. Nditika Senior Resident Magistrate on 1st April 2008 where only the parties testified and called no other witnesses and in a judgment delivered on 23rd May 2008 and which is the subject of this appeal, the magistrate ordered the removal of the caution and dismissed the counter claim with costs to the Respondent.

On behalf of the Appellant Mr. Kagio filed a memorandum of appeal raising the following four grounds of appeal:-

1. ***The learned trial magistrate erred in law and in fact in failing to address the issue of customary trust and the Respondent was given L.R No. INOI/KERUGOYA/20 being an ancestral land to benefit one generation after the other.***
2. ***The learned trial magistrate erred in law and fact in failing to consider the evidence of the appellant, her submissions and the principles applicable as set out in the Nyeri Court of***

Appeal Case No. 281 of 2000 MBUI MUKANGU VS GERALD MUTWIRI MBUI.

3. ***The learned trial magistrate erred in law and fact in making a finding that the disputed land could have been registered in the names of the plaintiff (Respondent) in trust, then proceeded to hold that the Court's hands are tied due to the provisions of CAP 300 Laws of Kenya***
4. ***The learned trial magistrate erred in law and fact in failing to analyze the evidence adduced by both parties critically hence giving a judgment which was against the weight of the evidence adduced and the applicable law.***

The appellant therefore prays that the appeal be allowed, the orders of the trial magistrate be set aside and be substituted with an order dismissing the Respondent's case and allowing the Appellant's counter claim with costs.

This being a first appeal, it is in the nature of a re-hearing and it is my duty to re-evaluate the evidence, analyze it and come to my own conclusions but in so doing, I must give allowance to the fact that I neither saw nor heard the witnesses – see ***PETERS VS SUNDAY POST LTD 1958 E.A 424, SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & OTHERS 1968 E.A 123*** and also ***KOGO VS NYAMOGO 2004 1 K.L.R 367*** among other cases. This appeal was canvassed by way of written submissions which were filed both by Mr. Kagio for the Appellant and Mr. Njeru for the Respondent.

I have considered this appeal guided by the principles set out above and the respective submissions by counsels.

The first ground is that the trial magistrate erred in law and in fact by failing to address the issue of customary trust that the Respondent was given the land in dispute being ancestral land for the benefit of one generation after the other. This ground can be determined together with the third ground wherein it is stated that the trial magistrate having found that the disputed land could have been registered in the Respondent's names in trust proceeded to hold that his hands were tied due to the provisions of ***CAP 300 Laws of Kenya***. In his judgment subject of this appeal, the trial magistrate did make a finding that the land could have been registered in the Respondent's names in trust but nonetheless proceeded to hold that since the land was registered in the Respondent's names, he had absolute right to the same and could do whatever he wished with it. The Court addressed that issue as follows:-

> "***It will be noted that the shamba in question is registered in the name of the plaintiff and it is under Cap 300. Under Cap 300, it matters not how land was obtained. The person who is registered has absolute right to the land and can do whatever he wishes to do with the land. Whereas I do agree that the land could have been registered in the name of the plaintiff in trust, the Court's hands are tied"***

The land in dispute is registered under the now repealed ***Registered Land Act*** and while the trial magistrate recognized the interests conferred upon a registered proprietor under ***Section 27 and 28 of the said Registered Land Act***, he did not consider that ***Section 28*** of the said ***Registered Land Act*** has the following provisal:

> ***"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"***

The trial magistrate having found, and correctly in my view, that the Respondent was registered as the owner of the land in trust, he erred by failing to up-hold the Appellant's counter-claim seeking to injunct the Respondent from transferring the suit land without consulting the family. Mr. Njeru in his submissions stated that the claim of trust could not succeed as the magistrate's Court has no jurisdiction to entertain a claim based on trust. It is clear from the evidence before the subordinate Court that the land subject of this suit had been given to the Respondent by the clan. A case of customary trust had been made out by the Appellant. The Court of Appeal in the case of ***MUTHUITA VS WANOE 1982 K.L.R 166*** held that a magistrate's Court has jurisdiction to declare the existence of a trust where the subject dispute falls within its pecuniary jurisdiction. It has not been suggested that the value of the land subject of this suit was beyond the pecuniary jurisdiction of the trial magistrate. This Court can only conclude

therefore that before embarking on the trial, the magistrate was satisfied that the subject dispute was within his pecuniary jurisdiction. It is clear therefore that having found that the Respondent was registered as the owner of the suit land to hold in trust for the family, the trial magistrate erred by proceeding to rule that the Respondent "***has absolute right to the land and can do whatever he wishes to do with the land***". ***Section 28*** of the repealed ***Registered Land Act*** and also ***Section 25 (2) of the new Land Registration Act*** does not grant the Respondent such rights. This appeal must therefore succeed on grounds 1 and 3.

Ground 2 and 4 will be considered together. It is submitted by the Appellant that the trial magistrate erred both in law and in fact by failing to consider the principles set out by the Court of Appeal in the case of ***MBUI MUKANGU VS GERALD MUTWIRI MBUI CIVIL APPEAL NO. 281 of 2000*** and also to consider and analyze the evidence by both sides thus rendering a judgment that was against the weight of the evidence. It is clear from the record herein that at the end of the trial in the subordinate Court, Mr. Kagio filed written submissions in which he urged the trial magistrate to be guided by the case of ***MBUI MUKANGU*** (supra) which had distinguished the case of ***MARIGI VS MURIUKI & TWO OTHERS 2008 1 K.L.R (G & E) 1073*** which Mr. Njeru has relied on in his submissions. In his judgment, the trial magistrate makes no mention of those two cases which both counsels have also referred to in their submissions before me. If the trial magistrate had considered the eighteen (18) page judgment of the Court of Appeal in the ***MBUI MUKANGU*** case (supra), which was binding both on him and on this Court, he would have come to the inevitable conclusion that the mere fact that the land in dispute was registered in the names of the Respondent did not render his hands ***"tied"*** as he stated in his judgment. It is true that the pleadings in the trial Court were not founded on trust. However, as stated above, having found that there was evidence upon which a trust could be said to exist, the trial magistrate would have seen from the ***MBUI MUKANGU*** case (supra) that ancestral land, as is the case in this dispute, is held by one generation for the benefit of succeeding generations through the concept of intergenerational equity. This is also among the guiding principles that this Court is mandated to observe under ***Section 18 of the Environment and Land Court Act***. Mr. Njeru has relied on the case of ***MARIGI*** (supra) to the effect that once a person is registered as proprietor of land, he cannot be directed on how to distribute it during his life time. That judgment was delivered in 1997 but it was distinguished in the ***MBUI MUKANGU*** judgment delivered in 2004 on the basis that where land is ancestral land, it is held for the benefit of subsequent generations. In distinguishing the ***MARIGI*** case, the Court in the ***MUKANGU*** case held as follows:-

> ***"It is significant, we think, that unlike the MURIUKI MARIGI case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of MBUI was ancestral land that devolved to him on the death of his father. It was un-registered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations".***

The situation is almost similar to this case. The Appellant in her evidence in chief told the trial Court that the Respondent had been given the land by the clan in 1958 since he was the eldest son and they had ten children who all live on the land. The Respondent admitted in cross-examination that indeed he was given the land in 1958. He said:-

> ***"According to the search certificate, I was given the land in 1958. I am from Unjiru Clan family of Mumbi"***

It should therefore have been clear to the trial magistrate from that evidence, that the Respondent herein was given the land by the clan and all the family reside on it and in the circumstances, like in the ***MBUI*** case (supra) and un-like in the ***MARIGI*** case (supra), the land was not his to deal with it as he wished. Rather, the respondent held it in trust for his family and subsequent generations. The trial magistrate therefore erred both in law and in fact in arriving at the decision that he did and he ought to have made a finding that Appellant was entitled to orders restraining the Respondent from selling, transferring or charging the land in dispute since it is land held in trust for the benefit of the family. On that evidence,

the trial magistrate ought to have made an order in favour of the Appellant and entered judgment in her favour as per her counter-claim and dismissed the Respondent's case.

Ultimately therefore, this appeal is allowed and the orders of the trial magistrate dated 23rd May 2008 are set aside and substituted with an order dismissing the Respondent's case and allowing the Appellant's counter claim. The parties being man and wife, I order that each meet their own costs both here and in the Court below.

Having said so, and even as the parties exercise their right of appeal, I think this is a matter that can still be settled amicably as it involves family members. Indeed, I notice from the record that on 5th December 2006, Mr. Kagio addressed a letter to Mr. Kahiga then acting for the Respondent suggesting a proposal for amicable settlement. I could not trace Mr. Kahiga's response to that proposal. Perhaps that may be worth considering again.

B.N.OLAO

JUDGE

18TH SEPTEMBER, 2015

COURT: Explanatory note on delay of the judgment:-

This judgment was due on 8th May 2015. However, I proceeded on urgent leave to attend to my sick mother who subsequently passed on and I was out of the country until 7th July 2015 when I resumed duties and thereafter the Court proceeded on vacation.

The delay is however regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Kagio for Appellant – absent

Respondent – present in person

COURT: Judgment delivered this 18th day of September 2015 in open Court.

Mr. Kagio for Appellant – absent

Mr. Njeru for Respondent absent but Respondent present in person.

Right of appeal explained.

B.N. OLAO

JUDGE

8TH SEPTEMBER, 2015