



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 657 OF 2008

AMOS KAMAU WANGUNYU.....APPELLANT

VERSUS

GEOFFREY THINGO WANGUNYU.....RESPONDENT

***(An appeal from the judgement and decree of the honourable Mr. Kiarie W. Kiarie In Kiambu SPMCC
no. 256 of 2002 delivered by the Honourable M. S. Mutoka on 4th November 2008)***

JUDGEMENT

1. Amos Kamau Wangunyu, the Appellant herein, sued his brother,

Geoffrey T. Wangunyu, the Respondent herein, vide the plaint dated 30th October 2002, filed before the Chief Magistrate's court, Kiambu. In the aforesaid plaint, the Appellant sought for judgment in the following terms:

- a. ***An order that the defendant do transfer his ½ share out of plot no. Sigona/382 to the plaintiff herein.***
- b. ***Costs of this suit.***
- c. ***Any further or other relief that this court may deem just and fair.***

2. The Respondent filed a defence to deny the Appellant's claim.

The suit was heard and eventually dismissed on 4.1.2008 by as he then was Hon. K. W. Kiarie, the learned Senior Principal Magistrate.

3. The Appellant was dissatisfied hence this appeal.

On appeal, the Appellant put forward the following grounds.

1. ***THAT the learned trial magistrate erred in law and in fact in failing to appreciate the plaintiff's claim and thus proceeding to grant reliefs that had not been sought.***
2. ***THAT the learned trial magistrate erred in law and in fact in failing to take into account the admissions made by the respondent during the trial which should have guided the court in reaching a just conclusion.***
3. ***That the learned trial magistrate erred in law and in fact in making an order that was incapable of being executd and which could not afford a relief to teh appellant.***
4. ***THAT the learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case despite the weight of evidence before him.***

5. ***THAT the learned trial magistrate erred in fact and in law in failing to appreciate the nature of the plaintiff's case and in failing to make an order that would have compensated the appellant vis a vis the prayers in his claim.***

4. When the appeal came up for hearing, learned counsels

appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I

have also considered the rival submissions filed before this court. It is the Appellant's submission that the learned Senior Principal Magistrate failed to frame up the issues for determination. It is also argued that he also failed to appreciate the nature of the relationship between the parties. The Appellant also argued that the learned Principal Magistrate when dismissing the appeal, failed to appreciate that the Appellant would be left with no remedy despite the admissions made by the Respondent acknowledging receiving the full amount of the purchase price for his share as well as the fact that the Respondent has failed to disclose the second plot he purchased to the Appellant so that it was difficult for the Appellant to assert his rights over an unknown parcel of land.

6. On his part, the Respondent beseeched this court to dismiss the

appeal because the Appellant had failed to prove his case to the required standards on a balance of probabilities. The Respondent argued that the learned trial magistrate correctly applied the law by ordering the warring parties to have the disputed plot to be subdivided equally between the two parties. The Respondent further argued that the Appellant had failed to establish that plot no. Sigona/382 was purchased specifically for his own used and benefit to the exclusion of the Respondent. The Respondent also argued that the Appellant had failed to establish any fraud or illegality on the Respondent's part. The Respondent denied the Appellant's assertion that he was evicted.

7. According to the Respondent, the Appellant vacated the suit

premises at his own volition.

8. Having carefully considered the submissions, and having re-

evaluated the case that was before the trial court, it is important to examine how the trial court dealt with the dispute. The record shows that the Appellant testified and summoned a total of three witnesses to support his case. The (Appellant's) plaintiff's case is that both the Appellant and the Respondent contributed money to purchase the plot no. Sigona /382 to be jointly owned in equal share. The Appellant also averred that they bought another plot in a similar manner therefore it would suffice if the Appellant is solely given plot no. Sigona/382 and the Respondent took the other undisclosed plot. The Respondent denied the Appellant's assertion that two plots were bought. He also denied the assertion that the two plots would be divided equally. The Respondent proposed that they share in equal measure plot no. Sigona/382. The learned Senior principal Magistrate considered the evidence tendered by both sides and came to the conclusion that the Appellant had failed to establish his case. He consequently proceeded to dismiss it with costs. He also stated that the disputed plot ought to be divided equally between the two brothers. I have critically examined the evidence tendered by the Appellant. The Appellant stated in cross-examination that they had not agreed with the Respondent that he would take half of plot no. Sigona/382 and half of the plot which he claimed he was shown by the Respondent. He also stated that they are both registered joint proprietors of plot no. Sigona/382 in 1990. He further claimed that he had gone to occupy the aforesaid plot but was evicted by the Respondent in 2003. The evidence of Samuel Thuo Wangunyu (P.W.3) was to the effect that the two brothers would have each a plot from the two plots to be

bought.

9. According to the Respondent, they were to buy two plots. One

plot measures $\frac{1}{4}$ an acre while the other measured $\frac{1}{8}$ of an acre. The Respondent stated that some differences arose between them, but they eventually agreed to have plot no. Sigona/382 subdivided into two equal shares. He produced the letters of consent to buttress his evidence. He denied evicting the Appellant. The Respondent also confirmed that two plots were actually purchased but the other one has no registration number.

10. After a careful analysis of the evidence, I am satisfied that the

Appellant had actually failed to prove that they had agreed whether verbally or in writing that they would each have a separate plot purchased. What has emerged is that plot no. Sigona/382 was jointly purchased hence the only logical decision to make is to actualise what has taken place, that is to have the two share the plot in equal measure. The learned Senior Principal Magistrate cannot therefore be faulted.

11. I find no merit in the Appellant's appeal. The same is

dismissed. Since the dispute involves siblings, I order that each

meets his own costs of the appeal.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent