



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 50 OF 2009

MARY NJERI NDEGWA.....APPELLANT

VERSUS

GRACE WAMBUI NDEGWA.....RESPONDENT

JUDGMENT

This is an appeal against the decision of Hon. G.A. M’Masi, Senior Resident Magistrate. It was delivered on 19/2/2009 in Nyahururu PMCC 139/2001. Grace Wambui Ndegwa the plaintiff now the respondent sued her co-wife, Mary Njeri Ndegwa (appellant) seeking orders that:-

- 1. A declaration that the appellant held the parcel of land Nyandarua/Ol Kalou Salient/376 in trust for, her own behalf and that of the respondent in equal shares;**
- 2. An order that the suitland be distributed equally between the appellant and respondent and an order compelling the appellant to transfer the respondent’s ½ share from the said plot and in the alternative, the Executive Officer of the court do execute the same.**

In the plaint filed in the trial court by the respondent, it was stated that the two, respondent and appellant were wives of the late Ndegwa Kuria and the suit land was acquired through their joint efforts and was paid for by their late husband; that about 1971, the Salient Farm was dissolved, subdivided into small portions and the families resettled thereon; that each family was entitled to one vote and the land was registered in the name of the appellant being the first wife, because their husband had no Identity Card and worked with the Government; that before the loan was paid to the Settlement Fund Trustee so that the land could be transferred to Ndegwa, he passed away. The land Nyandarua Ol Kalou Salient/376 was registered in the name of the appellant but both the appellant and defendant occupied their respective portions in the said piece of land and each developed ½ share of the land. According to respondent, the appellant therefore held the suit land in trust for herself and the respondent.

The appellant filed a defence and counterclaim denying the respondent’s claim and averred that the respondent built a temporary structure on the suit land as a licence which was revoked in 1995; that the appellant is the absolute owner, being a first registration and therefore the claim is vexatious and bad in law. The appellant pleaded that the matter had been the issue in HCSUCC 99/99 and in which she counterclaimed that the respondent was a trespasser on the suit land, sought for an order of eviction of the respondent from the suit land. After a full trial the court found in favour of the respondent and declared that the appellant held the land in trust. Being aggrieved by the said decision the appellant preferred this appeal based on the following grounds:-

- 1. The trial court erred by holding that the appellant held the suit land in trust for both the appellant and respondent;**

2. **That the trial court erred in law and fact in declaring a trust in contravention of Section 6 of the Land Control Act Cap 302, Laws of Kenya;**
3. **That the court erred in ordering that the suit property be subdivided into two equal portions notwithstanding the powers of the Registered Land Control Act Cap 200, Laws of Kenya;**
4. **The court erred in failing to consider the appellant's counsel's submissions in her judgment which resulted in a miscarriage of justice;**
5. **That the court erred in law and fact in giving a judgment that was against the weight of the evidence.**

The appellant prays this appeal be allowed, respondent's claim be dismissed and appellant's counter claim be granted with costs. The appeal was opposed. Both counsel filed written submissions and highlighted them before this court.

Before I consider the submissions, I must revisit the case before the trial court. The respondent, Grace, testified as PW1 and called one other witness, David Andanyi. Grace recalled that she got married to Ndegwa Kuria as the second wife in 1961 while the appellant, Mary was the first wife. They lived on a white settlement farm in Ol Kalou from 1962 to 1966, while their husband worked as a civil servant. Salient Farm was shared out into smaller portions in 1965 and they moved there after their husband paid Kshs.500/- for a share. They built a house which the wives shared till 1973 when the Government took over the farm and handed over to the Settlement Fund Trustees. She said that Grace and Mary used to work in turns as one looked after children and the other went to work; that Mary was away in Nakuru with their husband when Grace balloted and they got Plot 376 (12.7 acres) (suit land) which was registered in the names of Mary Njeri, the appellant. They subdivided the land by digging trenches and each built on their own land. Ndegwa died in 1984 and after 10 years, Mary started claiming the shamba to belong to her alone and, filed a succession cause without Grace's knowledge but she was asked to call Grace and the land was shared between them equally. They had not paid the Settlement Fund Trustee loan and the chief directed each to pay Kshs.10,000/- which Grace did. Grace said that her two children died and were buried on the suit land and all others except two, live on the said land with their families. The matter was before elders who asked them to share the land equally but Mary refused and they went before the Land Tribunal in 1995 which again ordered that the land be shared equally.

PW2 testified that in 1965 he was working at Salient Farm as a foreman when Ndegwa introduced Mary and Grace as both his wives. PW2 used to live in the same village. The Salient Farm was subdivided and given to families and the land was recorded in the name of the person whose photograph was taken. He said that it is the Grace who balloted for the plot as Mary was absent and that Ndegwa paid Kshs.500/- for the plot. After the ballot, Grace, Mary and Ndegwa took possession of their plot. He said that each plot was 5 acres and so the respondent and appellant were entitled to 2½ acres each.

Mary testified as DW1. She admitted that Grace has been her co-wife since 1961 when her husband worked at Kiganjo as a tractor driver; that she was employed to work in the farm of John Botha (white settler) in 1962 where she harvested pyrethrum. She produced a copy of the employment card. She denied that Grace was ever employed in the said farm. In 1966, the employees were photographed and were informed that they would get land. Mary admitted staying with the Grace then but that Grace never worked. She was given 1½ acres and later the workers were given 12 acres. She worked for Ol Kalou Salient Board for 7 years and was given a letter on 11/10/74 (Ex.7) in the name of Matheya Ndegwa, which is also her name. She admitted that Grace balloted for her when she was away and got the plot number. Mary said that her husband was working with Nyandarua County Council as a driver and could not have been given a shamba. She produced the letter of offer, the charge, a consent changing her names from Matheya to Mary Njeri Ndegwa and statement of account issued by the Settlement Fund Trustee. She denied that Grace ever assisted in paying for the land and produced bundles of receipts and also payment for the title. She admitted that they live together in the said land since 1973 as the husband had asked her to stay with Grace. Mary denied that the land is family land or that she held it in trust. She also denied that their husband paid Kshs.500/- for the land. She has also been paying the rates to Ol Kalou

Town Council, and insists that the Grace should vacate her land.

DW2, Thomas Mureithi Kariuki told the court that he was employed by Ol Kalou Salient Board in 1966 as a clerk. He produced employment card. He was later trained as a farm manager in 1969. In 1972 he worked at Ol Kalou Salient Scheme units 335 and 336 as per employment letter DEx.11. He recalled that in 1966 a decision was taken to subdivide Salient farm and it was given to members who fell in 3 categories: former employees of white settlers, public dams through District Officers and Chiefs were to appoint people and skilled category who had to apply to be members of Salient, were photographed, issued with certificates and had to pay Kshs.500/-. DW2 fell under this last category. She knew Mary but denied knowing Grace or that she ever worked for Salient Farm during his tenure of 3 years nor did he know Ndegwa, the husband of Grace and Mary. He said that once one qualified, even if they came several from one family, they would be allocated with land. He denied knowing whether members of the same family could work in shifts. He was aware couples who had applied had got 2 pieces of land but was not aware of any polygamous family that got more than one parcel.

Having carefully considered all the pleadings and submissions by counsel, it is not in dispute that both Grace (PW1) and Mary (DW1) are widows of the late Ndegwa Kuria. Mary was the 1st wife while Grace was the 2nd wife. It is also not disputed that Mary is the registered proprietor of the suit land. It is clear from the evidence on record that Mary and Grace shared a house before they settled on the disputed land with their respective families. They moved into the land in 1973 and have lived therein without any problem till their husband passed away in 1984. Grace has buried 4 of her children on the suit land.

By her evidence and the documents produced before the trial court, Mary has ably demonstrated that she was employed by Salient Board and was allocated the said plot. No doubt that both PW2, Andanyi and DW2 worked with Salient Board and must have known the process of one acquiring land at Salient. Also not disputed is the fact that it is Grace who balloted for the said plot because Mary was absent when the exercise was ongoing. Although DW2 did not know Grace, it is apparent that Grace was well known at Salient Board to be allowed to ballot for her co-wife.

The first issue for determination is whether Mary held the disputed land in trust, for her benefit and that of the rest of the Ndegwa family. In the case of **Gichuki v Gichuki (1982)KLR 285**, the Court of Appeal held that:-

“The party relying on the existence of a trust must prove through evidence the existence and creation of a trust.”

Later in the case of **Mbothu and 8 Others v Waitimu & 11 Others (1986)KLR 171**, the Court of Appeal had this to say:-

“The courts will not imply a trust save in order to give effect to the intentions of the parties and such intention must clearly be determined beforehand.”

The onus was on Grace to prove on a balance of probability that Mary held the suit land in trust since it was never registered or written down in an agreement and why she believed that the land was held on trust for the Ndegwa family. In **Gathimba v Gathimba HCC 1647/1984**, J Khamoni adopted the decision of the Court of Appeal in **Limuli v Marko Sabayi (1979)KLR 51** where the court said:-

“It is now generally accepted by the counts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration and there is nothing to prevent the giving effect to such a trust by requiring the Registrar to do his duty by executing transfer documents.”

Grace said that it is their husband, Ndegwa, who gave out Kshs.500/- to pay for the deposit of the said land. Unfortunately, the receipt issued then was not availed by either party. Mary claims to have been the one who paid the said sums. However, her evidence is quite contradictory as to who gave the money. In cross examination by Grace’s counsel, she said:-

“At the tribunal I said my husband gave me the Kshs.500/- as I was enraged. At the Chief’s office I said my husband gave me Kshs.200/- as deposit for the shamba. By then I was annoyed. My husband used to give me money. He gave me Kshs.500/- but was not for paying deposit for the land.”

All the 4 witnesses who testified confirmed that to be allocated with land at Salient, one had first to pay Kshs.500/- DW2 specifically said **“the main issue was payment of Kshs.500/-, was a guarantee that you had accepted the offer.”** From the contradictory statements made by Mary, this court is persuaded to believe that the Kshs.500/- deposit for the land was paid by Ndegwa. All witnesses agreed that Ndegwa could not have been allocated the land because he was a Government employee.

Mary denied that Grace ever worked at Salient farm though Grace and PW2, who was a foreman at the said farm said Grace and Mary used to do so alternatively. DW2 could not confirm whether that was the arrangement or whether Grace ever worked for Salient Board. He said that a couple could apply for more than one plot if they qualified but he had not heard of any polygamous family getting more than one plot. Whereas DW2 was a Manager, PW2 was a foreman who kept records and was in charge of the village where Grace and Mary lived. He said they shared a house. He knew them in 1965 till he left the farm.

DW2 on the other hand worked at the Salient Board for only 3 years from 1972 when the process of subdivision and balloting had started way back in 1966. DW2 came to know Mary in 1976, when he was deployed to work at unit 335 of Salient Farm. In my view, PW2 knew and worked with Grace and Mary more than DW2 did and may have been more conversant with them and he must have known both Grace and Mary well. After the land was allocated to Mary, both Mary and Grace settled on it with each occupying ½ of the land. Grace was said to have buried 4 of her children on the land. From 1973 till 1984, Mary never complained that Grace was on the land unlawfully. Mary waited till about 10 years after the death of the husband that she sought to evict Grace from the land. Elders met and found in favour of Grace. Ndegwa having paid for the deposit for the land, the fact that both Grace and Mary worked for Salient Board at one time and even though the receipts to the Settlement Fund Trustee are in Mary’s names, by the conduct of the parties occupying the said land in equal portions for over 30 years without Mary claiming the land to be hers alone, I am satisfied that Grace has proved on a balance of probabilities that the said land belonged to the Ndegwa family and it was registered in Mary’s names to hold in trust for herself and the rest of the family. The other reason for registering the land in May’s name was that Ndegwa was a civil servant and could not be a beneficiary to the land.

Whether the court erred by declaring a trust contrary to Section 6 of the Land Control Act:-

Section 6(2) of the Land Control Act Cap 302, Laws of Kenya provides as follows:-

“For avoidance of doubt, it is declared that the declaration of a trust of agricultural land situated within a Land Control area, is a dealing in that land for the purposes of subsection (1).”

According to Mary, there can be no declaration of trust over agricultural land unless there is a Land Control Board Consent. Reliance was made on the decision of **Mucheru v Mucheru (2000)2 EA 455** where the Court of Appeal held that:-

“Declaration of a trust in agricultural land is a dealing in the land requiring Land Control Board Consent following Statute Law (Repeal and Miscellaneous Amendments) Act 1980. Hence any such trust declared without the relevant consent is void for all purposes.”

Whereas I do agree that the above decision is binding on this court, yet it is not practically possible to seek the consent of the Land Control Board for a trust that has not yet been determined. I think the proper way to go is as was done in the case **Mani Gichiru & Another v Gitau Mani**, HCC 340/1977, where J Muli, after declaring a trust ordered that the consent of the relevant Land Control Board to be granted. Consent of the Board can only be sought after declaration of a trust. Ground 2 must fail.

As regards ground 3, since the trial magistrate found in favour of Grace, the next step was to order for a subdivision of the plot into two equal portions.

Having read the trial court's judgment, I entirely agree with Mary's view that the magistrate did not consider the submissions of both counsel in detail. However, this being the first appellate court, I have evaluated and considered the evidence afresh and I have arrived at the same conclusion as did the trial court.

The trial court found that there was sufficient evidence to support the declaration of a trust. I have found above that the Land Control Board Consent could only be sought after the declaration of the trust and in the end I do uphold the findings of the trial court. I find no merit in the appeal and it is hereby dismissed. I add as the judge did in **Mani Gichiru & Another v Gitau Mani** (supra) that the Land Registrar is hereby ordered to effect the trial court's orders. In default of the appellant signing the relevant subdivision or transfer documents, the Deputy Registrar of this court do sign the documents and the relevant Land Control Board do accept the so signed documents as if they were executed by the appellant. The appeal is dismissed and each party will bear its own costs being a family matter. It is so ordered.

DATED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the appellant

Ms Mureithi holding brief for Mr. Ndegwa for the respondent

Kennedy – Court Assistant