REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 01 OF 2019

NDIWA CHESEBE ……...……. APPELLANT

VERSUS

JOHN CHESEBE SIKUKU ……..…….……. RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment of HON G. R. SAGERO delivered on 5th May 2015 in KIMILILI SRM COURT CIVIL CASE No 2 of 2011)

1. NDIWA CHESEBE (the Applicant) and **JOHN CHESEBE** (the Respondent) are step – brothers being among the ten (10) sons of the late **CHESEBE MEINI** (the deceased) who prior to his death, was the owner of the land parcel **NO ELGON/KAPTAMA/459** (the suit land) which, as per the Certificate of Search produced during the trial, measured 26 Hectares i.e. 64.2 acres (not 66 acres as was captured in the testimony of the parties and also the Judgment subject of this appeal).

2. By a plaint filed in **KIMILILI SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No 2 of 2011**, the Respondent sought an order to compel the Appellant to sub – divide the suit land and transfer to him ten (10) acres being his rightful share. It was the Respondent's case that the Appellant held the suit land in trust for him and their other siblings but had refused to give them their shares as directed by their late father.

3. The Appellant filed a defence in which he denied holding the suit land in trust and putting the Respondent to strict proof thereof.

4. The dispute was heard by **HON G R SAGERO – SENIOR RESIDENT MAGISTRATE** and in a Judgment delivered on 5th May 2015, he found in favour of the Respondent. A Decree issued directing the Appellant to sub – divide the suit land and transfer ten (10) acres to the Respondent.

5. Aggrieved by that Judgment, the Appellant moved to this Court and filed this appeal seeking to quash the same.

6. The following five (5) grounds of appeal have been proffered: -

1. **That the learned trial Magistrate erred in law in not holding that the Respondent's claim was statutorily barred pursuant to Section 7 of the Limitation of Actions Act.**

2. **The learned trial Magistrate erred in law and in fact in failing to hold that he had no jurisdiction to arbitrate on the issue of trust.**

3. **That the Judgment was against the weight of the Respondent's case as the Respondent had not produced any documents nor proved his case on the balance of probabilities.**

4. **That the learned trial Magistrate erred in law and in fact when he failed to hold that the Respondent's claim based on his father's land could not stand without Letters of Administration.**

5. **That the learned trial Magistrate erred in law and in fact in failing to recognize the indefeasibility of the Appellant's title.**

The Appellant therefore sought the following orders: -

(a) The Judgment of the lower Court be quashed.

(b) Costs of the appeal.

7. The Appeal having been admitted on 22nd February 2021, it was listed before me for directions on 2nd December 2021 but there was no appearance by Counsel for the Appellant or his client. I fixed another date for mention on 15th December 2021 and directed that both the Appellant and his Counsel **MR WAFULA** be served. However, there was still no appearance on that day.

8. I directed that the Appellant and his Counsel be both served with Respondent's submissions. He would then have 14 days to respond. By 26th January 2022, only the Respondent had filed and served his submissions. I have therefore not had the advantage of the Appellant's submissions and it would appear that he abandoned this appeal. Nonetheless, since there is a Record of Appeal, I must determine it on the basis of that record and the submissions by **MR WAMALWA** Counsel for the Respondent.

9. I shall consider grounds 1 and 2 of the Memorandum of Appeal together. It is the Appellant's case that the trial Magistrate erred both in law and fact in not holding that he had no jurisdiction in the matter which was infact statute barred.

10. It is clear from the plaint filed in the Subordinate Court that the Respondent's claim to ten (10) acres out of the suit land was based on trust. As I have already stated earlier, the parties are siblings and in paragraph three (3) of his plaint, the Respondent framed his claim as follows: -

> ***3: "That the defendant having been fully given mandate by his father as trust (sic) of the land parcel NO ELGON/KAPTAMA/459, the defendant have (sic) ignored or refused to sub – divide the said land parcel to the plaintiff despite the fact that I was lawfully given mandate by the plaintiff father to sub – divide and give it to his brothers."***

The Respondent's case in the trial Court was that the suit land originally belonged to their late father but the Appellant had registered in his names and failed to give him his share of ten (10) acres as directed by their late father. The Respondent's case was therefore based on a customary trust and it was not barred by the provisions of the **Limitation of Actions Act**. In the case of **MACHARIA KIHARI .V. NGIGI KIHARI C.A CIVIL APPEAL No 170 of 1993**, the Court held thus:-

> ***"We are unable to accept MR THIONGO's contention that the suit was time barred. Limitation prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law."***

See also the case of **STEPHENS & 6 OTHERS .V. STEPHENS & ANOTHER CIVIL APPEAL No 18 of 1987**.

11. Section 20(1) of the **Limitation of Actions Act** provides that: -

> ***20(1) "None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –***
>
> ***(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or***
>
> ***(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."***

The Respondent did not plead fraud but it is clear from his plaint that the Appellant was essentially a trustee holding the suit land which belonged to their late father in trust for both of them but which the Appellant had converted to his own use as provided in **Section 20(1) (b)** of the **Limitation of Actions Act**.

12. Therefore, the Respondent's claim was not statute barred.

13. On the issue of jurisdiction, the suit in the Subordinate Court was filed in 2011. That was long before the enactment of the **Magistrate's Court Act 2015** and which came into commencement on 2nd January 2016 and empowers Magistrates to hear cases of land held under customary trust. However, even before the enactment of that Act, the Court of Appeal had held as far back as 1982 in **MUTHUITA .V. WANOE 1982 KLR 166** that a Magistrate's Court had the jurisdiction to declare a customary trust so long as the value of the subject matter did not exceed the Court's pecuniary jurisdiction and so long as the dispute did not involve the **Trust of Land Act (Cap 290)**. There is no evidence to suggest that the value of suit land exceeded the pecuniary jurisdiction of the **PRINCIPAL MAGISTRATE** who delivered the impugned Judgment.

14. Furthermore, **Section 2** of the repealed **Magistrate's Court Act (Cap 10)** which was the applicable law in 2011 as read together with **Section 3(2)** of the **Judicature Act** vested jurisdiction in the Magistrate's Court to determine claims under customary law. **Section 2** of the repealed law provided thus: -

> ***"In this Act, unless the context otherwise requires, claim under customary law means a claim concerning any of the following matters under African Customary Law –***

(a) land held under customary tenure."

The suit land was of course registered in the Appellant's names but as is clear under **Section 28** of the repealed **Registered Land Act** under which it was registered, such registration did not relieve the Appellant of his obligation as a trustee. A similar provision obtains under Section 25(2) of the new **Land Registration Act**. In **KANYI .V. MUTHIORA 1984 KLR 712**, it was held that the registration of land does not defeat a claim to land based on customary law.

15. The Magistrate's Court was therefore vested with the requisite jurisdiction to determine the dispute before it.

16. In grounds 3 and 4 of the Memorandum of Appeal, the trial Magistrate is assailed for not finding that the Respondent had not produced any document to prove his case and for failing to find that the Respondent could not claim his father's land without a Grant of Letters of Administration. Nothing turns on those grounds. As the Respondent was claiming a portion of what he was entitled to as part of what belonged to his father, part of what he needed to prove was that the suit land was family land and that he belonged to the family of the late **CHESEBE MEINI**. In the impugned Judgment, the trial Magistrate made the following four (4) findings of fact, at page 31 of the typed proceedings and Judgment: -

1. ***"The defendant is a step – brother to the plaintiff being children of the same father one MR CHESEBE MEIN their father."***

2. ***"That the land in question was the property or used to be occupied by CHESEBE MEIN their father."***

3. ***"That in 1945, the family moved from CHEPTAIS to KAPSOKWONY only for the defendant to reclaim the land later. It was the defendant's words in re – examination 'the land is mine the Chief gave me the land which was my father's property."***

4. ***"That other than land No 456 (sic) there is no other known land belonging to CHESEBE MEIN."***

The reference to land **No 456** in paragraph 4 above can only be a typographical error and it must have referred to the suit land **No 459**.

17. The Respondent did not have to produce any document such as Letters of Administration in support of his case. He was not claiming the ten (10) acres out of the suit land for the benefit of his late father's Estate. He was claiming it as his own entitlement and therefore he did not need to produce any Grant of Letters of Administration in respect of his late father's Estate.

18. There is no merit in grounds 3 and 4.

19. Finally, in ground No 5, it is the Appellant's case that the trial Magistrate erred in law and in fact in failing to recognize the indefeasibility of his title.

20. The answer to the above is found in **Section 28** of the repealed **Registered Land Act** under which the suit land was registered and which I have already referred to above. That provision recognizes the rights of a registered proprietor of land but has the following provision: -

"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."

It is now well settled that the registration of land in the name of a proprietor does not defeat claims of others based on a customary trust – **MUKANGU .V. MBUI KLR (E & L) 622, KANYI .V. MUTHIORA** (supra) among other cases. The Appellant was clearly a trustee of family land holding it in trust for the family of **CHESEBE MEINI** who of course include the Respondent. The trial Magistrate made the same finding when in the last paragraph of his Judgment he said: -

"The evidence on record also reveal that the defendant was the eldest son and that he may have used his position to secure the land and the title. Based on the above, I find that the plaintiff has proved his case on a balance of probability and proceed to award the order sought in prayer (1) and (2) of the plaint."

That is a correct finding.

The Appellant's title to the suit land was not ***"indefeasible"*** in the circumstances. In any event, as is clear from **Section 26(1)** of the **Land Registration Act** that title is only ***"prima facie evidence"*** that he is ***"the absolute and indefeasible owner"*** of the suit land. It must now be clear to him both from the impugned and this Judgment that he is only a trustee.

21. That ground similarly fails.

22. Finally, on the issue of costs, the trial Magistrate awarded the Appellant costs of the suit. Costs are of course the discretion of the Court and ***"follow the event unless the Court or Judge shall for good reason otherwise order"*** – **Section 27** of the **Civil Procedure Act**. In the circumstances of this case, the parties are siblings and the order that commends itself to make is that each shall bear their own costs both in this Court and in the Court below. To that extent, this Court must interfere with the order as to costs so as not to further set them up against each other and strain their relationship.

23. Ultimately therefore and having considered the Record of Appeal, this Court makes the following disposal orders: -

1. **The appeal is dismissed.**

2. **Each party to meet their own costs both in this Court and in the Court below.**

Boaz N. Olao.

J U D G E

23rd March 2022.

Judgment dated, signed and delivered on this 23rd day of March 2022 at **BUNGOMA** by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

23rd March 2022.