REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Civil Appeal 72 of 2009

PHINIAS ILATSIA KEYA ..... APPELLANT

V E R S U S

JOHN KEYA KUKUYU ..... 1ST RESPONDENT

SAMUEL JAMHURI KEYA ..... 2ND RESPONDENT

J U D G M E N T

The appellant filed his plaint on 7th August 2006 before the Vihiga Senior Resident Magistrate's Court seeking a permanent injunction against the defendant from interfering with the plaintiff's portion of land comprised in plot number **KAKAMEGA/MUDETE/559**. The appellant contended that the 1st defendant, John Keya Kikuyu was registered as a co-proprietor of the land as a trustee of the plaintiff since it was family land.

The trial court dismissed the plaintiff's suit with no orders as to costs. The plaintiff filed this appeal. The main grounds of appeal are:-

- **That the trial court based its decision on the provisions of the Trustee Act (Cap.167) yet the matter before the court was not the subject of that Act.**
- **That the matter before the court was for an equitable remedy of injunction and not for division and/or inheritance of the suit land.**
- **That the appellant's clam was based on customary right under the provisions of Section 3(2) of the Judicature Act (Cap8).**
- **That the trial court erred in law and fact by holding that the 1st respondent was the owner of the suit land whereas the 1st defendant was merely an administrator of the estate of the late Cheywe Kikuyu.**
- **That the trial court applied the wrong precedent and the court's decision was based on the wrong principles of law.**

Parties agreed to determine the appeal by way of filing written submissions. The appellant in his written

submissions elaborates the grounds enumerated in his Memorandum of Appeal. The appellant contends that the respondents intended to sub-divide the suit land and in the process pull down the appellant's house thereby rendering him and his family homeless. Further, it is submitted that the trial court acknowledge the appellant's proprietary rights having occupied the suit land for long. The 1st respondent gave the appellant a portion of the land to build his home and could not disposes of him under Maragoli customary law. It is further reiterated by the appellant that under customary law a father who has settled a son on an ancestral land is barred from shifting from his decision and that custom is not inconsistent with the Judicature Act.

On their part the respondents maintain that the appellant cannot dictate to his father, the 1st respondent, where to settle him. The appellant was allocated his share of the family land but has refused to move to his portion and that the suit is only a matter of rivalry amongst siblings.

The plaintiff's testimony before the trial court is that his father, the 1st defendant showed him a portion of land out of plot **KAKAMEGA/MUDETE/559** where he was to construct his home. The 1st defendant planted a stick on the land called "*KIKANGU*" under the maragoli custom and even prayed for him. Three elders were present during the ceremony and some euphobia plants were planted to demarcate the boundary of the plot. However, on 9th June, 2007 the 1st defendant removed the euphobia plants and when the plaintiff enquired the 1st defendant told him it was his land and he would do whatever he wanted. The appellant's position is that according to the Maragoli customs a father cannot reverse a decision to allocate a son a portion of land on the family land.

PW2, Jotham Mbandi Onyango's evidence is that under Maragoli customs once a boy reaches marital age he is shown where to build by his father. **PW3,Tito Barati Keya's** evidence is that the appellant built a semi permanent house on the plot shown to him by his father, the 1st defendant in 1998. **PW4, Herman Mulinya Asava**, a 78 year old man testified that he was a herbalist and has written books in Maragoli Culture. His evidence is that once a father has shown his son where to build, the procedure is done once and for all and cannot be repeated. He explained the process involving a father showing his son where to build his own house.

PW5, Tulufena Mumboga Mage is the eldest daughter of the 1st respondent, she testified that there was a ceremony whereby the appellant was shown where to build his house.

The 1st defendant's testimony was that the land in dispute was not ancestral land. He bought it in 1948 with his late brother Cheywe Kikuyu from two vendors namely Ilahinya Mahoro and Ngalawa Ilahinya. He produced a sale agreement dated 5/3/1948 and stated that there was a court case involving the land, this being Kakamega HCCC 313 of 1987. According to the 1st respondent, he has 10 sons from his two wives and he has settled each of his sons after demarcating the land which is 1.0 Hectares. The 2nd respondent is his last born son and would like him to take the portion where his homestead is. The appellant has not constructed any house on the alleged plot and denied that he had intended to move the appellant from the portion he occupies as that is where he would like to settle his last born son.

DW2, the 2nd respondent reiterated his father's evidence. His further evidence is that where his father wants to settle him is where their parent's home is. **DW3, Samuel Onzenze Kuwoy** testified that he was a mason and is the one who built thehouses on the 1st respondent's home. The houses were built by the 1st respondent. He built more than 10 houses on the plot and the 1st respondent told him that they were for his children.

The main issues for determination are whether the suit land is ancestral land, whether the trial court arrived at the correct decision, whether the 1st respondent was holding the land in trust for the appellant and whether the Maragoli customs stops the 1st respondent from moving the appellant to another portion of the land.

It is the appellant's contention that the 1st respondent and his late brother were joint owners of the suit land. The 1st respondent conducted a succession cause on the portion of his late brother and became the registered owner. His late uncle – 1st respondent's brother had one son, Aguvash Cheywe. Further, the appellant maintains that the land belonged to his grandfather. In paragraph 11 of the plaint the plaintiff states as follows:-

"That even though the 1st respondent is registered as co-proprietor of land parcel KAKAMEGA/MUDETE/559 valued at about KShs.500,000/= he is but a trustee of the plaintiff the said land being family owned."

The 1st defendant produced a sale agreement dated 5/03/1948. The translated agreement reads in part:-

"I ELAHUYA s/o MAHOLO and GALAVA s/o ELAHUYA:

We are selling to KEYA s/o KIKUYU land. This land is in Dula. We both have agreed on the price of two Bulls and KShs.40/= (Kenya Shillings forty only).

Today at the home of Galava at Givudieyi we have received the two bulls and KShs.40/= (Kenya Shillings forty only) from KEYA and there is no balance left and today we have given KEYA the land completely.

WITNESS
1. **MATANYA s/o KEDULA**
2. **ENUKA AYIEGO s/o KIMAGWA**
3. **BERU s/o KIKUYU**
4. **TOMASI ONYANGO KAVTA**
5. **PAULO KAGUTA s/o MWENGU MUKALAMI**

The 1st respondent also produced proceedings for Kakamega High Court Civil Case number 313 of 1987. The title for that suit gives the parties as follows:-

JOHN KEYA KIKUYU - PLAINTIFF

VS

1. **JONA NYABERA**
2. **ELAM DIVISI KIKUYU**
3. **LABANI IMBUKU KIKUYU**
4. **MARIKO MASINZA KIKUYU**
5. **DISHONI GALANI KIKUYU**
6. **ASSISTANT CHIEF J.K. ONYANGO**

I have read the proceedings in that suit and it involved a prayer for injunction by the 1st respondent against the defendants in that suit who were his step brothers. The defendants wanted to bury their brother on the current suit land and it was the 1st respondent's position that the land was jointly owned by him and his late brother.

Given the background of the land, I do hold that the suit land was bought by the 1st respondent. It is not ancestral land. Having inherited the other portion owned by his later brother, the suit property now belongs to the 1st respondent absolutely. I do further hold that having bought the land for two bulls and forty Kenya Shillings, the 1st respondent has not been holding the land in trust for anyone. The appellant is not the son of Cheywe Kikuyu. I do find that there is no trust involving the suit property.

Section 3(2) of the Judicature Act (Cap 8 Laws of Kenya) provide as follows:-

3. (2) ***"The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with the written law, and shall decide all such cases according to substantial justice without undue regard to technicalities or procedures and without undue delay."***

It is the appellant's contention that he was shown where to build his homestead by the 1st respondent and that under Maragoli customs such decisions cannot be rescinded. PW4, Herman Mulinya Asava was the witness who testified on the Maragoli custom. Although the witness claimed to have written several books on Maragoli culture, not a single book was produced. It is the respondent's position that the last born is the one to stay where his father's homestead is.

From the pleadings and the evidence on record, it is not established that indeed the 1st respondent showed the appellant a place to build his house. The respondent brought a witness who built all the houses in that homestead. He testified that it was the 1st respondent who built the houses for his sons. It is the respondent's position that the appellant has not built a house on the plot and the house he is using is the old house built by his parents. Assuming that the appellant is the one who built the semi permanent house on the portion his father would like to allocate to the 2nd respondent, would it have made the situation irreversible. I do not find so. The 1st respondent is the absolute proprietor of the suit land. He has 10 sons and would like to give his estate to his children. The plot measures 1.0 Hectares. The maragoli custom cannot replace the 1st respondent's right of absolute possession. The 1st respondent is free to move his children where he wants. He can even sell his plot as he wishes. The appellant should be contended with what his father is giving him and cannot hide behind the Maragoli custom to defeat his father's right of absolute proprietorship. Indeed the sale agreement of 1948 indicates the 1st respondent's name as the purchaser although he admits that his late brother assisted him. I do hold that the trial court reached the correct decision.

In the end, I do hold that the appeal has no merit and the same is dismissed with costs to the respondent. I do note that there has been several road blocks placed on the 1st respondent in his attempt to distribute his property to his children during his lifetime. I will make the following orders:-

(i) Any orders restraining the 1st respondent from utilizing plot number KAKAMEGA/MUDETE/559 either issued by this court or by the trial court are hereby vacated.

(ii) All the titles that were created out of plot number KAKAMEGA/MUDETE/559 to be handed over to the 1st respondent and the 1st respondent is at liberty to transfer any portion of his land in any manner he deems fit.

(iii) Any caveat, caution or inhibition registered against plot number KAKAMEGA/MUDETE/559 or any of the subsequent sub-divisions by the appellant, if any, shall be removed.

Delivered, dated and signed at Kakamega this 27th day of March 2012

SAID J. CHITEMBWE
J U D G E