REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 39 of 2008

JOSEPH CHEGE …… APPELLLANT

Versus

GIKURI HEHO ……..…….. RESPONDENT

JUDGMENT

The respondent GIKURI HEHO was the plaintiff in Civil Case No. 53 of 1981 Muranga Principal Magistrate's court. He sued JOSEPH CHEGE the appellant herein. His claim as seen in the plaint is as follows:-

"***During the land demarcation, the defendant who is my step brother got the whole land parcel ref. No.Loc.8/Kionjoine/23 registered in his name while I was away from home. I am now claiming half share i.e. 3 acres from the defendant."***

The respondent drew that plaint in person. The appellant in his defence denied the respondents claim. In his defence he stated that he is the sole registered owner of the suit property and denied that the respondent was entitled to three acres. He further pleaded in that defence that his title was a first registration which could not be impeached. The learned magistrate in his considered judgment gave judgment for the respondent as prayed in the plaint. In so finding the learned magistrate found as a fact that the suit property belong to the plaintiff (respondent) grandfather Waweru. Waweru it was found divided his property equally between his two wives both called Wambui. That whilst the respondent was away from the family land, the appellant consolidated the two portions of their two grand mothers together and had the same registered in his sole name which is the suit property. The court found that the appellant came from the line of one of the wives of Waweru whilst the respondent came from the line of the other wife of Waweru. The learned magistrate also found that although the respondent in his plaint had not used the word "trust" his claim was however based on trust. The finding of the lower court aggrieved the appellant who filed the present appeal. In that regard he presented before court the following grounds:-

1. That the learned Principal Magistrate erred in law in ignoring the glaring and fatal irregularity in the plaint which did not plead any particulars of trust and no effort was made to amend it.

2. The learned Principal Magistrate erred in law in not considering the evidence adduced by the respondent especially in cross-examination where the respondent stated that he knew that the appellant had cheated or defrauded him out of his land. Had the learned magistrate considered the said evidence, he would have found that the claim by the respondent was not one of trust but fraud and could thus not be sustained against a first registration and secondly that since fraud was a tort, the action had to be brought within 3 years of its discovery in order to comply with the Law of Limitation of Actions Act.

3. The Learned Principal Magistrate erred in law in failing to consider the law on capacity to sue in that despite the respondent admitting that he was claiming what his father would have been entitled to, the court failed to make the correct finding that the respondent required letters of administration to the estate of his father Heho in order to ventilate the claim which lay only in favour of Heho's estate

4. The Learned Principal Magistrate erred in fact and in law in his finding that the respondent's father Heho died along time ago before demarcation and consolidation of the sit land No. Loc. 8/Kiojoine/23 despite the respondent's own admission that his deceased father was present during consolidation and which fact was also admitted by PW 3 in the case. Had the Learned magistrate made the correct finding of fact that the respondent's father was not only present during the said consolidation but infact consolidated an 8 acre portion of land in the respondent's name, the court would have then made the conclusion that the appellant could not have been registered as a trustee for the respondent while the said Heho was present to direct consolidation of his own share of land and that of the respondent.

5. The learned Principal Magistrate misdirected himself on the evidence when he disregarded the testimony of DW 2 who was the only surviving eye witness who witnessed and participated in the consolidations of the suit land and who stated that even though Heho was there he did not raise any complaint and that all queries were being forwarded to the registration office but that there were none in respect of the suit land. This failure by the court occasioned the appellant injustice.

6. The Learned Principal Magistrate's judgment was made contrary to the weight of the evidence, pleadings and parties submissions on both law and facts.

This court being the first appellant court is guided by the principles of the case of RUHEMBA V SKANKA JENSEN (U) LTD (2002) 1 EA where it was held:-

"***A first appellate court had a duty to reappraise the entire evidence on record and to make its own finding of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court decision could be supported."***

To that end the court will consider the evidence adduced before the lower court. The respondent in evidence stated that his father was called Heho. The father of his father was called Waweru. That grandfather had two wives both known as Wambui. Both those wives had children. His grandfather shared his land between the two wives equally. The sons of those wives inherited that land. His father Heho son of Waweru had four sons but all were deceased except him. The brother of his father was called Kiumba. He got 3 children namely Chege the appellant herein, Kamau and Waweru. In 1959 the respondent said that he left Muranga for the Rift Valley. In his absence the land was consolidated. Consolidation was carried out in the presence of the appellant. When the appellant consolidated the suit land which was six acres he failed to give him his entitlement of 3 acres. The respondent said that there was a time prior to 1959 when he made use of the suit property. He said that he was brought up there on that land and also cultivated it. On being cross examined he said that he was older than the appellant. He left Muranga in 1959 for the Rift Valley. His father Heho was alive during the land consolidation and registration but died in 1965. In 1964 he returned to Muranga to get his parents. By then consolidation was over. He made inquiry on how the distribution of the land had been and realized that the appellant had the land registered in his name. He stated; '***I knew I had been cheated'.*** He however proceeded to the Rift Valley with his parents and came back to Muranga in May 1990. He accepted that from the date he discovered that the land had been registered in the appellant's name he had not taken any action for a period of 16 years. He denied that his father Heho had allowed the appellant to register the property in his own name. He also denied that the appellant had bought the suit property. PW 2 Kamau Kiumba was a brother of the appellant. He described the respondent as his uncle. The suit property he said was approximately 6 acres and that it was registered in the name of Joseph Chege the appellant. He got registered during the period of land consolidation. At that time he said the family members were in Western Kenya. He said that the land was family land from their grand father. Even after it was registered in the appellant's name he and his brother continued to use it. He confirmed that the respondent returned to Muranga and demanded for his share in the suit property. The appellant refused to

give him any share and chased him away. In this witness view the respondent deserved to be given 3 acres. In cross examination he stated that the respondent was demanding from the suit property his father's share. He said that the respondent was present when the first land consolidation took place but was in Rift Valley when the second consolidation took place. This witness confirmed that he occupies the suit property. PW 3 stated that the respondent was a brother to his father. He said that the land belonged equally to the appellant and the respondent. That their father were joint owners of that land. His evidence was however discredited by his admission that he gave that evidence from the fact he obtained when he attended elder's meeting. The appellant in his defence stated that the respondent was his step brother. He later stated they were cousins. The suit property was registered in his name in 1963 during land registration. He denied that the respondent was entitled to 3 acres. That during the land consolidation and registration the respondent's father was alive. That Heho the respondent's father did consolidate some other land for himself and the respondent while the respondent was in Rift Valley. After the suit property was registered in the appellant's name, Heho the respondent's father did not complain. In cross examination he stated that Heho assisted him to have the suit property consolidated. He further stated in cross examination that he intended to call a witness who took the land measurements at consolidation and who would confirm that he had redeemed that land at the price of kshs. 140. He however was unable to tell the court the exact area of land that he had redeemed. DW 2 stated that in 1963 he was the land adjudication clerk in Murarandia location. He stated that he collected the land portion for the appellant and he did this in the presence of 3 elders from his home. He was however unable to give their names. He took measurements on the ground and took those measurements to the lands office. If there had been a dispute the same would have been heard. In respect of the appellant's land there was no dispute. He however stated that he was not aware of the origin of the appellant's land. At cross examination he said that he had no documents to support his contention that he was carrying out those duties. He began doing that work in 1954 and retired in 1963 when the exercise of land consolidation ended.

The appellant's ground No. 1 and 2 in the Memorandum of Appeal can be considered together. Those two grounds raised two issues. The first is that the lower court erred in finding that the respondent claim was based on trust since the plaint did not specifically plead trust. It will be recalled that I quoted the respondent's claim earlier in this judgment. It is indeed correct to state that the plaint did not in specific words state that the appellant held the suit land in trust for the respondent. The respondent as stated in evidence drew the plaint without the assistance of counsel. The learned magistrate had this to say about the respondent's claim:-

"***From my reading of this, I gather that the plaintiff (respondent) is saying the land in issue belong to the two of them jointly. The defendant (appellant) however got himself registered alone as proprietor for the entire parcel. ……. The plaintiff does not use the word "trust". It is clear to me that the claim is based on breach of trust. I must however state that the plaint as drawn may appear to come out clearly. It is upon the court to proceed with the matter and pronounce substantial justice in the case."***

In the case of MUMO V MAKAU (2002) 1 EA the court of appeal considered a similar situation. In that case the pleading before the High Court related to parcel no. MACHAKOS/KIANDANI/3013. In evidence it became clear that the defendant occupied parcel No. 3012 which was registered in the name of the plaintiff's mother. The high court in respect of that had this to say:-

"***Although it may not have been a subject of this suit, this court is inclined to observe that while plot 3013 should go to the defendant (and his mother) it is similarly proper and fair that they also get plot 3012 on which they live and which is in the name of the plaintiff's mother. The plaintiff's mother sold three portions of original plot 403. It is fair that the other house enjoys the two portions comprising plots 3013 and 3012."***

The Court of Appeal in considering the appeal preferred by the plaintiff and in particular considering the ground of appeal which stated that the High Court erred in holding as is quoted herein above had this to say:-

"***The course of action adopted by the learned judge was not only equitable but also did bring about an expeditious disposal of the long simmering dispute. He was not oblivious of the fact that the part to the dispute are very close members of the same family. To waste money on prolonged litigation would benefit nobody and can only damage family unity which both parties to this litigation wish to promote. It is true as Mrs Nzei submitted that parcel 3012 was not the subject matter of the dispute between the parties. But from the course the parties adopted at the hearing of their suit, the parcel of land was also considered and evidence was given on it. The learned judge in these circumstances should not be vilified."***

In this case the evidence clearly pointed to the fact that the respondent's claim was based on trust. That is the respondent was claiming that the appellant held three acres in trust for him since those three acres belonged to his family. In view of that evidence I find that I cannot fault the learned magistrate's finding as quoted herein before. The use of the words by the respondent,

"*I knew I had been cheated"* do not retract the court's finding that the evidence pointed to a claim of trust. Having made that finding the appellant's contention therefore that the respondent claim was one in fraud and was therefore caught by statute of limitation is rejected. The appellant in ground 1 and 2 also argued that his title was first registration and that the lower court erred in finding that the respondent was entitled to 3 acres of that land. That argument was also raised in the case of MUMO V MAKAU (supra) before the Court of Appeal. The Court of Appeal responded to that argument as follows:-

"***Mrs Nzei further submitted that the appellant as the registered proprietor of the suit land had a good and indefeasible title which could not be challenged in this court. This argument, we think is fallacious for two reasons. Firstly, there is nothing in the Registered Land Act (Chapter 300) Laws of Kenya, (the Act) which precludes the declaration of a trust in respect of registered land, even if it is a first registration. Secondly, section 28 of the Act, which reads as follows:-***

28. Rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration of an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject;

(a) to the leases, charges and other encumbrances and to the conditions and restriction, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require nothing on the register;

provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation which he is subject as trust".

The fact that the appellant's title was first registration did not defeat the respondent's claim in trust. Ground 3 and 4 shall also be considered together. The grounds bring out two issues. Firstly, that the respondent's claim should not have succeeded without the respondent first obtaining letters of administration of his father's estate. To recap on the evidence adduced by the respondent, he stated that his grandfather Waweru divided his land equally between his two wives both called Wambui. The respondent was from the line of one wife while the appellant was from the line of the other wife. The respondent's case was that he was entitled to three acres of the suit property by virtue of that relationship. In 1964 when he went to Muranga he found the appellant had registered himself as a sole proprietor of that land. The respondent's evidence before the lower court does support the plaint as drawn. His claim was for three acres by virtue of being the son of Heho who was a son of his grandfather Waweru. That being so it was not necessary to apply for letters of administration of his father estate. He was claiming the three acres in his own right by virtue of that relationship. The appellant argument therefore in that regard is rejected. The respondent had capacity to bring the action in his own name. The second issue raised in those grounds is that the learned magistrate erred in his finding that the respondent's father was dead during land consolidation. The respondent in his evidence stated that his father died in 1965. It is

clear therefore as can be seen in the green card of the suit property that the land consolidation was carried out during the lifetime of his father. I do therefore accept the argument that the learned magistrate erred in find that the respondent father died before land consolidation. The learned magistrate in making that finding seemed to prefer the evidence of PW 2. In my view that error has no bearing on the final finding of the court. The respondent on re-examination stated:

"***In 1959 when I left home my father was very old.***"

If that was so it may well explain why Heho was not involved in the land consolidation of the suit property. It may perhaps also be that the appellant took advantage of Heho's advanced age. The appellant by ground No. 5 argued that the lower court disregarded the evidence of DW 2. That argument is not correct for indeed the lower court did consider that evidence. The lower court had this to say in respect of that witness evidence:-

"***For the defence Mr. Mumbura Karani was called as a defence witness. He was involved in the registration of defendant's lands. …… whose testimony is merely that he took measurements of the parcels that were consolidated. He does not know the origin of the parcels and therefore does not support the defendant.***"

The lower court did therefore consider that evidence and this court is in agreement with its finding in respect of that testimony. The evidence of DW 2 in my view did not advance the appellant's case. The appellant in evidence stated that he redeemed the suit property which had been sold off. He said that he had witness who would confirm this. However to the contrary DW 2 did not confirm that. That ground is therefore rejected. The appellant in ground 2 stated that the lower court's judgment was contrary to the weight of the evidence. I have reconsidered that evidence and I find that the finding of the lower court cannot be faulted. The judgment of the lower court is well supported by the evidence tendered before it. That ground is rejected. In the end the appeal is hereby dismissed with costs being awarded to the respondent. The order of stay of execution granted by this court on 15th October 2008 is hereby vacated.

Dated and delivered this 27th day of January 2009

MARY KASANGO

JUDGE