REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU Civil Appeal 62 of 1998

GERALD MWITHIA ……...……APPELLANT

VERSUS

STANELY GITONGA …… RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. Chief Magistrate Mr. S.A. Wamwayi dated and delivered on 15th day of July 1998)

JUDGMENT

In the lower court, the appellant herein filed a claim against the respondent who is his brother seeking an order of declaration that he is the sole owner of plot No. 498 Kianjai Adjudication Section. Further, he sought an order for the respondent to vacate from the portion of land he was occupying on that plot and for damages for trespass. The respondent in his defence denied the appellant's claim. The case proceeded for hearing. The appellant stated that in 1958 prior to the period of demarcation of land he had been allocated that plot. He had been employed by the County Council to care for animals. He wrote to the Ministry of Agriculture requesting that he be allocated that plot which had been used by the County Council as a demonstration plot. He received a reply which he exhibited in court. In that reply, the Ministry of Agriculture Animal Husbandry and Water and Resources wrote a letter dated 30th October 1957 to the appellant. They stated as follows:-

"In reference to your letter of 3rd of October 1957 I have to inform you that the land in question was returned to the Mwiriga elders in June of this year.

Since the land had originally been given to this department by the elders, it had to be returned to them.

I regret that I cannot now interfere with the present arrangements and you should contact the Mwiriga elders yourself in this connection."

Following the receipt of that letter, the appellant contacted the chairman of the allocation committee who then brought together the clan elders. That chairman was the 2nd witness of the appellant in the lower court case. That committee gave the appellant a boundary certificate for the suit property. That certificate was exhibited in this court. The appellant said that he took possession in 1957 of the said property. He has been in occupation since that date. He said he took possession of 20 acres but when consolidation and demarcation was carried out, he remained with 19 acres. The property was then given plot number 498 Kianjai Adjudication. On 1991 September the respondent entered the said land forcibly. He apportioned himself 7 acres. The appellant requested him to vacate but he refused. He stated that he had obtained the consent of the District Adjudication Officer dated January 1993 prior to filing the case in the lower court. That consent was exhibited in court. The appellant proceeded to state

that his family had various portions of land and he named about 5 of them which were small portions which he stated were given to the respondent. He stated:-

"I allowed the defendant (respondent) to take entire family land as I am the oldest son."

He said that he had two brothers, one being the respondent and the other being Charles Muchene. Charles was living on a 15 acre property which the appellant gave him in 1958. He then referred to a report of investigation into land demarcation Kianjai Adjudication Section Meru District carried out by the Ministry of Lands dated 21st October 1988. He stated that that report recommended the 19.93 acres be returned to him. The respondent, he said, had not built on his land but that he uses it for cultivation. In further evidence he stated, that their father passed away in 1940s. After his death, he was left as the head of the household. PWII was the mother of both the appellant and the respondent. She confirmed that both were her sons and that her husband had died when the respondent was very young. Her late husband was buried at Nkirithia which is where the respondent resides. She stated that that was family land. She also spoke about other family land which is occupied by the respondent. Muchene, she said, occupies his own property Karithiria. She stated that the suit property was given to the appellant by the Agriculture Department and she denied that the land belong to her late husband. Indeed, she stated that the appellant had not benefited from the deceased land. She ended by saying:-

"Gitonga (the respondent) has no business claiming the land from Gerald (appellant)Gitonga has taken all my shambas. Gitonga is the last born child."

The 3rd witness for the plaintiff was John M'Itaire. He said that he knew the parties in this action. They were the sons of M'Itimitu. This witness was at one time the chief of Kianjai location, that is, from 1953 to 1965. During that time, he said, he was the chairman of the land consolidation committee. The appellant at that time went to him requesting that he would give him a piece of land which had previously belonged to the agricultural department. He confirmed that the appellant made an application to the agriculture officer when they were vacating from that land. He was requested to call the elders and on calling them, they agreed to give the land to the appellant. This witness referred to the boundary certificate dated 5th June 1959 which he stated had been signed by him as the chairman. The land was 20 acres. He said that this process took place in 1959 and at that time the respondent was not on the land. He too confirmed that the respondent occupies his deceased father's parcels of land. The respondent in his defence confirmed that the suit property had been used for demonstration by the Ministry of Agriculture. He however stated:-

"The land originally belonged to our uncle namely, Rukunga. The total acreage of the parcel of land was 16 acres. We are 3 brothers. After the land was taken by the Ministry of Agriculture, it was returned to its owners. It was entrusted to our elder brother the plaintiff (appellant)."

He then stated that the appellant had refused to give him a portion on that land and he had sued him before the Land Committee in 1969 which committee gave him 7 acres. He however did not produce evidence of those proceedings. After the decision of that committee, he said, he was allocated land which was hilly. He complained and after he was resettled to the original shamba 7 acres. He confirmed that he got land which belonged to their late father but stated that the appellant too had obtained land of their father's. In respect of the suit property, he stated that he took possession in 1969. That he lived on that land but vacated in 1984 when he had problems with the appellant. In further evidence, he stated that the original parcel No. 498 had been sub divided when he obtained the 7 acres and he had been allocated number 447. He called as a witness the other brother Charles Muchene. This brother reiterated what the respondent had said that the land had been used by the Agricultural Department and when it was returned it was registered in the name of the appellant on behalf of the 3 of them. This witness said that the respondent was entitled to a portion of that land. In contradiction to what the respondent had said, he stated:-

"My grandfather called Muchene gave the family land to the Agricultural Department.…… The land originally belonged to my maternal grandfather. Muchene gave the land to us. ……Muchene took us to the land which he gave to Agricultural Department. That was in 1940s."

The court in its considered judgment found that the appellant's suit was premature because it had been filed without fully exhausting the provisions of the Land Adjudication Act. The learned magistrate proceeded to dismiss the appellant suit. That dismissal provoked the present appeal. The appellant has brought the following grounds for the consideration by this court.

1. The learned trial magistrate erred in law in relying on the matters not pleaded to dismiss the appellant's case.

2. The learned trial magistrate erred in law and fact in holding that the appellant had not exhausted the machinery laid down by the Land Adjudication Act Cap 284 yet the land in dispute at the material time was grounded by the Land Consolidation Act Cap 283 Laws of Kenya where a decision of the committee and/or Board is final.

3. The learned trial magistrate erred in law and fact in failing to find for the plaintiff even on the face of overwhelming evidence and even on the admission by the respondent that his parcel No. 2557 was not excised from the appellant's land parcel No. 198.

4. The learned trial magistrate's judgment offends the mandatory provisions of O. XX R. 4 of the Civil Procedure Rules.

5. The learned trial magistrate's judgment is against the weight of evidence.

I will consider all the grounds together. I begin by analyzing the evidence adduced before the lower court. I noted that the appellant gave evidence of how he acquired the suit property and his evidence was supported by documentary evidence exhibited in the case. Much more than that, PWIII gave evidence of having signed a boundary certificate for the appellant when the land was allocated to them. The appellant's evidence was further collaborated by the mother of both he and the respondent who supported his claim that the land was allocated to them. She stated that the respondent had been given the family land which he occupied. It is conceded by all that the respondent does not reside on the suit property. He however cultivates 7 acres of the suit property. The evidence of the appellant in my view was consistent and credible. On the other hand, the respondent's evidence was not consistent. The respondent gave evidence saying that the suit property belonged to their maternal uncle. His witness on the other hand said that the land belonged to their grandfather who had given it to them. It is clear that unlike the appellant, the respondent was unable to give clear evidence of the genesis of the suit property. If indeed the evidence of the respondent was to be believed, DWII stated that they were from Amatu Clan. The plaintiff exhibit 1, the letter of the Agricultural Department which referred to the land being given to Mwiriga elders. The respondent failed to show the nexus between the Mwiriga elders and Amatu Clan. It should also be noted that the respondent did not cross examine the appellant and his witnesses in that regard to show that they were part and parcel of the Mwiriga clan which gave the appellant the land. The evidence of PWII was clear that she as the mother of the two parties could confirm that the suit property had been allocated to the respondent. On the evidence, I find that the appellant proved that the land was his and the respondent failed to prove that he was entitled to 7 acres of that land. I cannot ignore the fact that the respondent stated that since the 7 acres was excised from the suit property he had been allocated plot number 447. Therefore as I reach the conclusion of this judgment, in my view, the interest of justice would require that the land be restored back to its original number and into the appellant's name. Section 30(1) of Cap 284 is clear in my view, that a party can file court action once consent is obtained from the Land Adjudication Officer. In this regard, I am well persuaded by the decision of the Hon. Mr. Justice Lenaola in the case M'Itimitu M'Arange Vrs. Daniel Kinyua and Others Civil Appeal No. 94 of 2002. When faced with a similar appeal like I have before me, faulted the lower court for having found that a court action cannot be sustained even where consent has been obtained as provided by Section 30(1). That section is in the following terms:-

"30. (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act."

I too, do fault the learned magistrate for having not taken into consideration the consent given by the District Land Adjudication Officer prior to the filing of the court action in the lower court. Once that consent has been given, the court was mandated to proceed with the suit. Having found that the appellant had a right to file the suit, and having found as I have stated before that the appellant proved his case on a balance of probability, the following is the judgment of this court:-

1. The learned trial magistrate judgment delivered on 15th July 1998 in PMCC Meru 120 of 1993 is hereby set aside.

2. *This court does hereby declare the appellant as the lawful owner of plot number 498 Kianjai Adjudication Section and in that regard, this court issues an order of cancellation of plot number 447 Kianjai Adjudication Section and on that cancellation being undertaken, the land represented by that number 447 should be returned to plot number 498.*

3. *The court orders the respondent to hereby vacate the appellant's parcel Number 498 Adjudication Section forthwith and in default an eviction order is hereby issued against him.*

4. *The appellant is awarded the costs of the lower court suit and of this appeal.*

Dated and delivered at Meru this 6th day of November 2009.

MARY KASANGO

JUDGE