REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 115 of 1999

WACHEKE GACHUHI…..……..APPELLANT

VERSUS

MARY WANDIA GACHUHI…….…..…RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate's Court at Murang'a

(A.M. MACHARIA – R.M) in R.M.CC. NO.470 of 1994 dated 19th February, 1998.)

J U D G M E N T

The appellant, Wacheke Gachuhi, is the unsuccessful defendant in Civil Suit number 470 of 1994 instituted against her by Mary Wandia Gachuhi, the respondent herein and the plaintiff in the suit. The appellant is a step mother to the respondent. By her plaint dated 20th December, 1994 and filed in the Senior Resident Magistrate's Court Murang'a, the respondent averred that on or about 1971 the appellant was registered as a proprietor of land parcel Loc.20/Gikindu/Mirira/464 measuring 1.5 hectares or thereabouts. That the appellant was so registered in trust to share the suit land with the respondent's mother now deceased. Accordingly the plaintiff's claim was for her late mother's share of the suit land.

The appellant in response filed written statement of defence through Messrs J.N. Mbuthia & Co. Advocates. In the defence she pleaded that she was never registered in trust in respect of the suit land, that the respondent had no locus standi to sue her, that the respondent's mother's share was in existence and that is where she resides and finally the appellant contended that the plaint as drawn failed to disclose a proper cause of action and ought to be struck out with costs.

During the trial, the following facts clearly manifested themselves. That the appellant and respondent were related. The appellant was a co-wife to the respondent's mother and therefore a step mother to the respondent. That the respondent was not married and had a sister. The respondent's mother had died in 1983. That there were two parcels of land involved, one measuring 1.5 acres which we shall hereinafter refer to as "*Kambirwa land"* and Loc.20/Gikindu/Mirira/464 which we shall hereinafter refer to as "*Mirira land"*. Out of her own violation and free will the respondent's late mother had given a son of the appellant 2.2 acres out of the Kambirwa land that measured 3.7 acres. The appellant also had 3.7 acres of Mirira land. The respondent's mother's piece of land was consolidated and registered first. Later the appellant's land was also consolidated and registered. The respondent's mother and the appellant agreed that the appellant would curve out 1.5 acres out of Mirira land and give it to the respondent. The appellant later on changed her mind. The matter was then discussed before the clan and the appellant agreed to surrender a portion of the land to the respondent. This again was not done. In 1994 the issue

was reported to the Chief of the area who also directed that the respondent be given a portion of Mirira land. The Kambirwa land is subdivided into two portions and that is where the respondent's mother and appellant resided. That is where the appellant and respondent still reside. Each one of the two had use of her own portion of Kambirwa land. When the respondent's mother passed on and who in any event was the elder wife, the respondent took over her portion in Mirira land. The Mirira land though registered in the appellant's name, at the time of the respondent mother's death they were cultivating it equally. The respondents contention is therefore that Mirira land should be equally divided into 2 portions one portion to remain with the appellant and the other portion to go to the respondent as both lands were family land and according to kikuyu customary law, they should be shared equally between the two houses.

At the end of the trial, the learned Magistrate held;

"……The defendant agrees that that land and suit land are equal in size. Plaintiff called 2 witnesses who said that the plaintiff's mother cultivated suit land jointly with defendant. I find that defendant holds half of this suit land in trust for the plaintiff's mother. Naturally that share goes to plaintiff as she survives her mother. In this light I order defendant to transfer half of suit land which is Loc.20/Gikindu/Mirira/464 to the plaintiff….."

From this decision the appellant, still represented by J.M. Mbuthia & Co. advocates preferred this appeal. The appellant faulted the learned Magistrate's judgment on the following six grounds:-

1. That the learned trial Magistrate erred in law in allowing the suit while the respondent had no letters of administration while seeking to recover what would have been owed to her mother's estate.

2. The learned trial Magistrate misdirected herself on the law of trust and proceeded therefore to make a wrong decision that a trust existed in this case.

3. The learned trial Magistrate failed to address herself to the evidence regarding the registration of the appellant over her own land and also the registration of the respondent's mother over her own portion thereby setting out the complete and final shares of the two houses as the appellant and the respondent's mother were co-wives.

4. The learned trial Magistrate misdirected herself on the evidence that the late mother to the respondent had in her own life-time dealt with her own land while well knowing that the respondent was alive and unmarried.

5. The learned trial Magistrate erred in law in relying on an alleged decision arrived at before a chief sitting as an arbitration panel without a court order and in disregard of Cap 300 Laws of Kenya.

6. Without prejudice to the foregoing the appellant further raise the ground that the learned trial Magistrate failed to analyse the evidence adduced in a wholesome manner or at all thereby arriving at the wrong conclusion that the respondent had proved her case on balance of probabilities.

When the appeal came up for hearing, the appellant had changed advocates and she was now being represented by Messrs Kebuka Wachira & Company Advocates whereas the respondent was being represented by Gacheru J. & Company Advocates. Respective counsels agreed to argue the appeal by way of written submissions. Pursuant to that decision counsel filed and exchanged written submissions. I have carefully read and considered them together with the authorities cited.

This being a first appeal it is trite that it is my duty to re-evaluate the evidence and come to my own conclusion on the evidence of course without overlooking the conclusion reached by the trial Magistrate.

From the proceedings there is an issue of law which was raised in the defence of the appellant to the effect that the respondent had no locus standi to sue the appellant as she had not sought and obtained letters of administration before instituting the suit. It is clear from the pleadings and the evidence of the respondent during the trial that her claim was predicated upon what she alleged was her mother's share in

respect of Mirira land which though registered in the appellant's name, she held a portion thereof in trust for the respondent's mother. The appellant's contention on the other hand was that in the absence of letters of administration issued to the respondent in respect of her mother's estate her claim was doomed to fail. The issue came up for hearing via an application to strike out the plaint on that basis. The learned Magistrate's take on the issue in a rather shrift ruling and whose reasoning I am unable to follow held that;

"……..we are thinking of inheritance here. I look at the whole thing this way. Whatever share belonged to plaintiff's mother if any here belongs to the plaintiff herein. The plaintiff therefore can be fully and legally said to be holding this land for the plaintiff here. Trust can be constructed (sic) here. I therefore see no importance by plaintiff to obtain letters of administration……"

Is the learned Magistrate saying that in matters of inheritance, the law of Succession Act should be ignored. That in such matters one does not require letters of administration to commence and prosecute proceedings on behalf of deceased's estate. Nothing can be further from the truth. Much as she was pursuing her claim based on her mother's share, in the absence of letters of administration, her action was doomed to failure. I note from the submissions of counsel for the respondent that he is saying that the appellant is estopped and or precluded from raising this point in this appeal having failed to appeal against the ruling of the learned Magistrate dated 6th December, 1996. The issue regarding Letters of Administration is an issue of law and goes to jurisdiction. I am not aware of any situation where estoppel has been invoked to violate the clear, unambiguous and mandatory provisions of law or to oust the jurisdiction of the court or even confer such jurisdiction. That submission is therefore erroneous. Even if I am wrong in holding as aforesaid, as a first appellate court, it is my duty to subject the proceedings before the trial court to a fresh and exhaustive evaluation. In so doing I cannot close my eyes to a grave misdirection on the law by the trial Magistrate merely because the appellant did not deem it necessary to appeal from the interlocutory ruling refusing her application to strike out the plaint on that basis. I have to look at the proceedings in their totality.

The respondent's other submission on the issue is that the court of appeal has on occasions entertained claims by litigants without letters of administration where the cause of action is based on a trust. I am not aware of such proceedings. Counsel went on to submit that in the present case the respondent's interest was beneficial and the respondent could vindicate her rights despite claiming through her late mother and without Letters of Administration. For this proposition, counsel referred me to the case of Philicery Ndungu Mumo V Nzuki Mkau C.A. No.56 of 2001 (unreported). I have carefully read though the authority and I have not come across anything to the effect that if the claim is beneficial the requirements for letters of administration can be tossed out through the window.

I also entertain my own doubts whether the respondent could have maintained this suit against the appellant based on a beneficial interest through her deceased mother. I do not think that the respondent had a proper suit in court against the appellant because she was never made the claim directly. She is asking for what was meant for her mother. She used her deceased mother as decoy. What was so difficult for her to stake her claim directly? How can she even claim to be the sole beneficial owner of her mother's interest when she also has a sister? I am certain that if the learned Magistrate had carefully pondered over the foregoing, she would have come to the irresistible conclusion that the respondent's suit was unmaintenable.

The other issue for consideration is whether on the evidence tendered, a trust was proved. The appellant seems to argue that no such trust was proved. I agree with her. The respondent's mother had her own land at Kambirwa whereas the appellant had has at Mirira. The two parcels of land were of same acreage and each of them had separate titles. It would appear that their husband had determined the shares of his wives in his lifetime. If there was any trust to be created at the time each wife could not have been registered separately as proprietor of her respective parcel of land. Rather the two parcels of land would in my view have been registered in the name of either the appellant or the respondent's mother. Otherwise it does not make sense for the appellant and respondent's mother to have been registered separately as proprietors of their respective parcels of land when a trust was envisaged. One issue which the learned Magistrate failed to consider and which has caused me some anxiety, is the act of the

respondent's mother giving the appellant's only son 2.2 acres out of her Kambirwa land. To my mind the decision may well have been informed by the fact that the respondent's mother had only two girls for children. From the evidence she feared that they could get married, leave her parcel of land and go on and settle with their husbands. In the process she feared she may lose her parcel of land. It was on this basis that I belief, she gave out to her co-wives only son, a huge chunk of her land so that the land may be preserved within the family. One would have imagined that if indeed the respondent's mother had a claim on Mirira land she would have insisted that her share therein goes to the appellant's son. This was not case which is a further illustration that the respondent's mother had no claim over the Mirira land much as they used to cultivate it jointly with the appellant. From the evidence on record it would appear that the co-wives were friends and had decided to stay together in one piece of land and cultivate the other. The evidence is that they used to stay in small huts on Kambirwa land. I do not think therefore that the mere fact that the two used to jointly cultivate the Mirira land as they stayed on Kambirwa land should of necessity create a trust. It was for the sake of convenience of the two. The evidence adduced by the respondent's witnesses did not at all go to proving a trust. The witnesses merely said that the appellant and the respondent's mother were co-wives. Their husband had two pieces of land at Kambirwa and Mirira. They were registered in the names of the respondent's mother and appellant respectively. That whereas the co-wives resided on the Kambirwa land, they cultivated the Mirira land in their separate portions. That there was no dispute until the respondent's mother died. That is when the appellant stopped the respondent from working the Mirira land. The clan and the chief were involved in the dispute and resolved that the Mirira land be shared equally. It would appear that the decision was informed by the fact that before the respondent's mother passed on she had been cultivating half portion of the Mirira land. It was not on the basis that the land had been registered in the name of the appellant in trust for herself and also the respondent's mother. The Resident Magistrate relied heavily on the decision of the clan and the chief to find favour with the respondent. The proceedings were informal and of no legal effect. Accordingly, the same ought not to have influenced the decision of the trial Magistrate.

In the result and for the above reasons, I would allow the appeal, set aside the judgment and decree of the learned Magistrate and substitute therefor with the order dismissing the respondent's suit. As for the costs I do not consider this to be a proper case to award the appellant costs in this appeal as well as the suit in the subordinate court since the parties are close relatives. Consequently I make no order as to costs.

Dated and delivered at Nyeri this 30th day of June, 2008.

M.S.A MAKHANDIA

JUDGE

Delivered by;

MARY KASANGO

JUDGE