



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 4 of 1997

MACHARIA KIIGE.....APPELLANT

VERSUS

MACHII KIIGE.....RESPONDENT

(From original Judgment of the Senior Resident Magistrate's Court at Murang'a (A.M. MACHARIA – R.M) in R.M.CC. NO.171 of 1998 dated 16th November, 1995.)

J U D G M E N T

The appellant in this first appeal, **Macharia Kiige** sued the respondent, **Machii Kiige** by way of a home made plaint dated 16th December, 1988 in which he sought judgment against the respondent for:

“.....an order against the defendant to vacate my land Loc.14/Kagumoini/1448 plus costs of this suit.....”

His claim was premised on:

“.....During the year 1971 at Kagumoini village, I gave a piece of land to the defendant who is my brother to erect a house land Loc.14/Kagumoini/1448. The defendant has refused to vacate the said land to his own land.....”

The respondent filed a defence to the claim dated 13th February, 1989 in which he denied the appellant's claim and stated that the subject land belonged to their late father and he was therefore entitled to half share of the same.

The dispute was thereafter referred to three different arbitration panels between 3rd August, 1989 and 23rd January, 1992. On each of those occasions the award was filed in the trial court and read out to the parties; however one of the parties would thereafter successfully apply to have it set aside. Following the setting aside of the third arbitration award, it would appear that the trial court opted to seize the matter and hear it on merit itself.

The appellant called a total of three witnesses. From the evidence tendered the appellant's case would appear to be as follows: The respondent is the appellant's biological brother. The appellant is the

registered owner of land parcel **Loc.14/Kagumoini**

/1448 hereinafter referred to as “*the suit premises.*” He was issued with the title deed in respect of the suit premises on 17th August, 1988. The respondent has occupied an acre of the suit premises with the permission and consent of the appellant after he had come back from Nyeri landless. The suit premises was not part of the family land that would have entitled the respondent to a share thereof as the appellant bought the same with his own finances. Apparently, the respondent had sold the family land and moved elsewhere. After a long stay he came back landless and out of the appellant’s sympathy and concern for a landless brother and due to the clan intervention he offered him an acre of the suit premises to put up a house and to cultivate. The appellant now wishes to have the respondent relocate to his other parcel of land known as **Loc.14/Kagumoini/1447** which he has surrendered to him absolutely but the respondent has declined to do so hence the suit. The appellant maintained that the suit premises did not belong to their father and he could not therefore, share it with the respondent. To buttress his case, the appellant referred to some proceedings in the Districts Magistrate’s Court at Kangema being DMCC.NO.226 of 1973 between the parties in which he had sued the respondent for ksh.500/= being the costs of 11 trees and sweet potatoes vines that the respondent had damaged on the suit premises. He was successful in that litigation. To him this confirmed that the land was his absolutely.

As for the respondent he testified that the appellant was his elder brother. He confirmed that in the Kangema case he was ordered to pay the appellant for the damage he caused to the suit premises but maintained that the said court had found that he was entitled to a portion of the suit premises. He testified further that he had been living on the suit premises since 1970 as it belonged to his father. He was therefore entitled to half of the suit premises upon giving the appellant a ram and traditional brew. He conceded that during land consolidation he was living in Nyeri. That he did not know that land consolidation was taking place as he was serving jail term between 1965 and 1968. From jail he went back to Nyeri town as his parents had died. He denied having sold the family land to **Gachiri Nguru** and **Kangema Co-operative Society**.

In a judgment delivered on 16th November, 1995, **A.M. Macharia (MRS) Ag. RM** found for the respondent holding thus

“.....It was common practice in Murang’a district during consolidation and demarcation for the first born sons to be registered as owners of land to hold in trust for their families. I find this to be the case here. Plaintiff holds suit land in trust for his brother. In this light an eviction order cannot stand. It is hereby denied with costs to the defendant.....”

The appellant felt aggrieved with that decision and filed this appeal premised on the following 5 grounds.

- 1. The learned trial magistrate erred in holding that the appellant was registered in trust.**
- 2. The learned trial Magistrate erred in law and fact in failing to hold that the appellant had bought the land in dispute while there was evidence to do so. (sic)**
- 3. The learned trial Magistrate erred in law and fact in not considering the appellant had given the respondent parcel No.LOC.14/**

KAGUMOINI/1447.

- 4. The learned trial Magistrate erred in law and fact in not considering that there was no counter claim made by the respondent to claim any part of the land in dispute.**
- 5. The learned trial Magistrate erred in law and fact in not analyzing all the evidence in record and gave her own opinion supported by no evidence.**

On 3rd March, 2008 this appeal came up for hearing. Parties agreed however to have the appeal argued by way of written submissions. Subsequent thereto, parties filed their respective submissions which I

have carefully read and considered.

I have considered the record, the rival submissions and the law. The appeal before me is a first appeal. In law, and as this matter is coming as a first appeal, I have the duty to consider both matters of fact and of law. On facts, I am duty bound on first appeal to analyse the evidence afresh, evaluate it, and arrive at my own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing the witnesses and seeing their demeanour and making allowance for the same. **See Mwangi V Wambugu (1984) KLR 453.**

The dismissal of the appellant's suit by the trial court was on the premises that the suit premises were registered in the appellant's name in trust for the family. In other words, the learned Magistrate did not deem the respondent a stranger and or trespasser to the suit premises liable to be evicted as demanded by the appellant. This finding was informed by the evidence which had been tendered by both the appellant and his witnesses as well as the respondent. The appellant wanted the respondent evicted from the suit premises solely because the suit premises were registered in his name and had the title deed to it. In pursuing that remedy, I want to assume that the appellant had in mind the provisions of *section 27 (a) and 28* of the Registered Land Act. In effect these provisions of the law state that the rights of a registered proprietor of land registered under the said Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in *section 30* of the Act. **See Muriuki Marigi V Richard Marigi Muriuki & Anor. C.A. No.189 of 1996 and Mbui V Mbui (2005)1 E.A 256.** However, customary law rights may give rise to a trust, which would be subject to protection under the act and would constitute an overriding interest recognizable under *section 30* of Act. **See Kanyi V Muthiora (1984) KLR 712 and Gathiba V Gathiba (200) 2 EA.342.** It was the case of the respondent therefore that the suit premises which the appellant had registered in his name was their father's land. He had been in occupation of a portion of the same since 1970 long before the appellant had it registered in his name as the proprietor in 1988. He had built house on the same with the permission and consent of the appellant. The suit premises being family land, the appellant had no superior claim to it as would entitle him to evict the respondent from the same or order him to another piece of land owned by the appellant. The learned Magistrate in refusing to order the eviction was on the evidence, satisfied that the respondent had made out a case that the appellant had been registered as the proprietor of the suit premises in trust for himself, the respondent and members of the family. Much as I have my own doubts whether the learned Magistrate had jurisdiction to entertain the issue of trust, however she had to be satisfied that the suit premises solely belonged to the appellant if she was to order the eviction of the respondent.

The respondent raised the issue of trust in his defence and I do not think that the learned Magistrate should have closed her eyes on the issue merely because of jurisdictional concerns. After all the appellant did not even consider it a serious issue as to concern him. He never raised any objection when the issue was canvassed during the hearing.

The appellant has contested the issue on the basis that it was not pleaded in the defence nor was there a counterclaim as would have warranted the learned Magistrate to entertain it. First and foremost it is not correct to allege that the issue of trust was not raised in the defence nor particulars given. A careful perusal of the defence will no doubt reveal in paragraphs 4 & 5 that the issue of trust is pleaded. It must be remembered that the pleadings were drawn by the parties in person. It cannot therefore be expected that such pleadings will be in conformity with the requirements of the Civil Procedure Act and the rules made thereunder as regards such pleadings.

Was trust proved in any event? The appellant takes the view that it was not and relies on the case of **Gichuki V Gichuki (1982) KLR 282** to the effect that a party relying on the existence of trust must prove through evidence the existence and creation of such trust. The appellant claims that the defendant alone testified on the issue. He could not therefore have proved trust as there was no corroboration. Who said that a fact can only be proved by a plurality of witnesses and who said that every fact alleged must be corroborated? In any event a plurality of witnesses and corroboration was unnecessary given the judgment by the district Magistrate's court at Kangema in civil case number 226 of 1973 involving the parties herein which judgment was conveniently not included in the record of appeal before me. In that

judgment delivered on 20th February, 1974, which I have had access to, **Hon. J.M. Njoroge** the learned District Magistrate delivered himself thus:

“.....Before I could reach a reasonable conclusion. I deemed it reasonable to ask clan elders to view the land and consider the affair in a clan and then report to me. This has been done and two witnesses from the clan elders i.e. PW1 and PW2 have given evidence. According to them the land belongs to the father of the two parties and each of them has a right to it but since the plaintiff has been the custodian of the land in the absence of the defendant from home their father said that the defendant must give the plaintiff a ram and liquor if he wanted his share of the land. Now he has disregarded the words and wishes of his deceased father and decided to take his share of the land without giving the plaintiff his dues.....Though the defendant has a right to the land he has violated rights of the plaintiff and for that reason he cannot escape from liability. I come to the conclusion that the defendant has a right to the land according to the wishes of their father but he has not given the plaintiff a ram and liquor.....”

It should be noted that in that case the appellant was the plaintiff whereas the defendant was the respondent. That decision holds to date for neither the appellant nor the respondent appealed nor applied for a review and or setting aside of the same. It would appear that the issue as to the ownership of the suit premises was thus settled and could not be reopened in the proceedings leading to this appeal as it was *res judicata*. Once again a question arises as to whether the Kangema Court had jurisdiction to make such a finding. However since none of the parties challenged it on appeal and or review, it stands as a decision of the court which cannot be overlooked.

In my view the learned Magistrate scrupulously went through the evidence on record and declined to give the orders for eviction. Who can blame her given the evidence and the material placed before her. All that was required of the learned Magistrate was to be satisfied on balance of probability before she could make the order for the eviction of the respondent that the land solely belonged to the appellant. She however came to the contrary conclusion having discounted the evidence of the appellant regarding the alleged purchase of the same. Incidentally, the appellant argued this appeal as though the learned Magistrate had ordered the appellant to give the respondent ½ of the suit premises. That was not the case. On the evidence given by the parties, there was nothing more the learned Magistrate could have done. The parties had contrasting claims to the suit premises which in the suit before her she was not called upon to decide. The learned Magistrate was called upon to decide whether the appellant could evict the respondent from the suit premises which the respondent also laid claim to on the basis that it was his father's land. I think that in refusing to order the eviction of the respondent from the suit premises, the learned Magistrate was right in the circumstances. That being my view of the matter, this appeal stands dismissed with costs to the respondent.

Dated and delivered at Nyeri this 3rd day of June, 2008.

M.S.A. MAKHANDIA

JUDGE