



**REPUBLIC OF KENYA**

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

**Civil Appeal 59 of 2002**

**SIMON MUCHORA MITIINI ..... APPELLANT**

**Versus**

**SAMWEL MUCHORA KONDU ..... RESPONDENT**

***(Being an appeal from the decision of Nyeri Provincial Land Dispute Tribunal in case no. 12 of 1998 at Nyeri)***

**JUDGMENT**

The respondent filed HCCC No. 118 of 1990 against the appellant seeking for an order that the appellant held property NYERI/GATARAKWA 907 in trust for himself and the respondent. The court ordered the matter to be referred to the District Commissioner for arbitration. An award was filed in court on 1<sup>st</sup> September 1996 but it failed to deal with the whole of that property which comprises of 39 hectares. The matter was referred back for further arbitration and for an award to be made in respect of the remainder of the land. When the arbitration was completed another award was filed in court but by consent of the parties that award was set aside. On 21<sup>st</sup> March 1996 the parties entered into the following consent.

*“By consent this dispute which involves land is referred to land dispute tribunal for arbitration at Nyeri District. Status quo be maintained.”*

Following that consent the matter was arbitrated upon and an award was filed which is page 50 of the record of appeal. The appellant was dissatisfied with that award. He filed an appeal before the appeals committee. The appeals committee gave their award dated 4<sup>th</sup> November 1998. By that award the appeals committee ordered that the suit property be subdivided into two equal parts between the appellant and the respondent. The award further ordered that the farm houses should continue to be owned by both parties. It is that award which has aggrieved the appellant and as a consequence the appellant has filed the present appeal. This therefore is a second appeal. The appellant has filed the following grounds:-

- 1. That the appellate tribunal misapprehended the evidence of the appellant and consequently made an incorrect conclusion.*
- 2. The appellate tribunal erred in failing to appreciate the real issues in controversy between the parties.*
- 3. That it was a misdirection for the tribunal on its own motion to deliver into and rely on extraneous and irrelevant issues arriving at its decision and in absence of a reasonable ground for doing so.*
- 4. That the decision of the appellate tribunal is riddled with contradictions.*
- 5. That the appellate tribunal’s award contradicts the Law of Succession Act.*
- 6. That the appellate tribunal erred in failing to appreciate the appellant’s contribution to the settlement fund trustees for the suit land and a failure of justice was thereby occasioned.*

The background to this matter was that a Catholic Priest by the name of Joseph Gichuhi deceased was allocated the suit property together with Father Hillary. They however agreed that the land would be

registered in the name of Joseph Gichuhi deceased. The respondent's evidence was that Father Gichuhi deceased who was his brother invited him to reside on that land together with the appellant. The appellant was a nephew to the deceased. The evidence was that they continued to occupy that property and jointly resided in the farm house. The appellant however became violent towards the respondent which led to the respondent vacating the house but leaving his son in occupation. The appellant in evidence stated that he filed a Succession Cause in respect of the estate of Joseph Gichuhi deceased. A confirmed grant was issued by the High Court in Nyeri on 3<sup>rd</sup> April 1989. The appellant stated that by that confirmed grant he was registered as the owner of the suit property. Indeed the green card of that property shows that a title deed was issued to the appellant on 3<sup>rd</sup> July 1989. The respondent before the tribunal stated that it was the intention of Father Gichuhi deceased that the property should be divided equally between him and the appellant. That accordingly the respondent was holding the property, half of it in trust for him. The appellant in bringing the present appeal has argued that the appeals committee erred in making an award which was contrary to the High Court's ruling in the succession cause where the appellant obtained the suit property absolutely. By the time the respondent filed the plaint in HCCC No. 118 of 1990 the appellant was already registered as an owner of the suit property. That being the case the respondent could not seek the orders he was seeking in the succession cause. He was right in filing a suit against the appellant seeking declaration that the appellant held the property in trust for both of them. Having done so, it is clear that the parties then consented to that dispute being referred for arbitration. Having so consented, the appellant cannot now argue that the award went contrary to the succession cause. The tribunal in hearing the matter entertained the dispute that had been referred to it. That is the suit that had been filed in the High Court. I therefore do reject the argument of the appellant that the tribunal erred in entertaining the matter. In considering the grounds raised by the appellant, I find that the tribunal did indeed appreciate the issues that were in controversy between the parties and in its award the tribunal did not rely on extraneous or irrelevant issues as argued by the appellant. The evidence that came out very clearly was that the deceased had intended for the property to be shared between the two parties. It therefore followed that when the appellant filed the succession and in so doing failed to disclose the same to the respondent, the decision of the High Court was subject to the intention of the deceased. The appellant was entitled, as he did, to seek a declaration that the respondent held the property, half of it, in trust for him. It therefore follows that the appellant's appeal fails and the same is hereby dismissed with costs to the respondent.

***DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2008***

**MARY KASANGO**

**JUDGE**