



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL 3 OF 2003

NGUTHU MUTAMBUKI APPELLANT

VERSUS

MUNYALO ISIKA 1ST RESPONDENT

ROBERT MWANGANGI 2ND RESPONDENT

JUDGMENT

1. The present Appeal arises from the ruling of M.N. Gicheru Esq. Principal Magistrate in **Kitui PM'S Court Succession Cause No. 7 of 1987** delivered on 29/11/2002. In that Ruling the learned magistrate found that;

- i. land parcels number **Nzambani/Kyanika/2196** and **Nzambani/Kyanika/2089** were to be inherited by all the descendants of the late Nzwili Nzenge;
- ii. that those land parcels do not belong to the children of Mutambuki Nzwili solely. (Mutambuki Nzwili was the deceased person in the Succession Cause aforesaid;)
- iii. that land parcels numbers **Nzambani/Kyanika/2087**, **1636** and **2093** should be inherited exclusively by the children of Mutambuki Nzwili.

2. The learned magistrate then proceeded to make the following orders;

“For these reasons I order that the estate of the late Ndambuki Nzwili be distributed as follows:

1. Land Parcel No. Nzambani/Kyanika/2196

To be sub-divided into two equal shares as follows:-

- a. Syokau Mutambuki to be appointed as the administratrix of the share of Mutambuki Nzwili (deceased);
 - b. Robert Mwangangi Mutunga to get the other half.
2. Nzambani/Kyanika/2089 to be sub-divided into three equal portions as follows:-
 - a. Syokau Mutambuki to distribute to the beneficiaries of Mutambuki Nzwili;
 - b. Robert Mwangangi Mutunga to get a 1/3;
 - c. Munyalo Isika to get a 1/3;
 3. Land Parcels No. Nzambani/Kyanika 2087, 1636 and 2093. Syokau Mutambuki to distribute to the heirs of the late Mutambuki Nzwili.

Since the parties are closely related, there will no order as to costs. Grant to be confirmed on expiry of six months.”

3. The Appellant, Nguthu Mutambuki who was the Petitioner in the Succession Cause, appealed against that decision on the following grounds;

- i. **“THAT the Learned Magistrate erred in law and in fact by finding that there was enough evidence to establish customary trust.**
- ii. **THAT the Learned Magistrate erred in law and in fact by failing to consider the appellant’s evidence (version of the facts) relying wholly on the Respondents evidence.**
- iii. **THAT the Learned Magistrate erred in law and in fact by failing to find that the mode of distribution directed by him is oppressive and inequitable.**
- iv. **THAT the Learned magistrate misdirected himself by failing to take into account the fact that the deceased was illiterate and could therefore not appreciate the documents produced as evidence.**
- v. **THAT the Learned Magistrate erred in law and in fact by failing to find that the Respondents were not candid in their evidence and/or presented such evidence in a manner to mislead the Court.**
- vi. **THAT the Learned Magistrate erred in law and fact in failing to find that the appointment of the Respondents and the deceased widow at the confirmation state was irregular and illegal.**
- vii. **THAT erred in law in failing to take into account the interests of the deceased beneficiaries and the provisions of the Succession Act (Cap. 160 Laws of Kenya).”**

4. From the above grounds, submissions by Mr Olonde and Ms Kinuthia as well as the evidence on record, the following issues need to be determined;

- i. was there evidence of a customary trust and did the late Mutambuki Nzwili hold such a trust?
- ii. were the Respondents in any way entitled to any of the five parcels of land in the names of the deceased person aforesaid?
- iii. were the claims by the Respondents statute time barred?
- iv. was the division as proposed by the learned magistrate inequitable and irregular?
- v. should the Appeal be allowed?

vi. costs.

5. On the first and second questions, the evidence tendered before the magistrate's court was that although the deceased had five parcels of land, only parcels numbers 2089 and 2161 were disputed. Munyalo Isika and Robert Mwangangi both stated that their claim was based on the fact that their grandfather Nzwili Nzenge initially acquired the land and it was agreed that the land parcels would be inherited by the descendants of Nzenge's three sons vis: Ngula, Ndumbu and Nzwili. That the registration in Mutambuki's name was done with that fact in mind and that Mutambuki indeed admitted so in agreements dated 19/4/1981 (Exh. P. 1 and P. Exh. 2) and further, that in proceedings before the clan on 21/9/1985, the clan confirmed that the sisal boundary which the family had placed on title no. 2087 ought to be reinstated after Kiilu Mutambuki uprooted it.

6. It was also their case that Mutambuki died before the agreements aforesaid could be actualized and that is when his son, Kiilu started uprooting the sisal boundary referred to above.

7. The position taken by the two was supported by James Mbuvi Mbuluu, their cousin who confirmed that the agreement on sub-division of the land parcels was arrived upon the family reaching the consensus that Mutambuki was only a trustee. That after the agreement, sisal boundaries were created to demarcate the land parcels and only after Mutambuki died did his sons breach the agreements and Kiilu uprooted the sisal boundary. The clan however restored it.

8. Pius Wambua Masila, a family member accepted the evidence that the land parcels were held in trust and stated thus;

“Mutambuki held the land in trust for the entire family.”

9. For their part and in an attempt at countering the evidence above, Syokau Mutambuki, wife of the deceased, Nguthu Mutambuki, son of the deceased, Kiilu Mutambuki, another son of the deceased denied that the land parcels were held in trust, denied any meeting to discuss the dispute and stated further, that the deceased had absolute right to the same and had in fact sold part of the land to Mutua Kamuti. That therefore only they and their families had the right to inherit the disputed parcels of land.

10. They were supported in their venture by Gideon Kaluku Kyongo, a member of the area Land Adjudication Committee who denied knowledge of the alleged trust claimed.

11. My view on the evidence set out above is that the agreements produced cannot be faulted. It is clear to me that the family of the late Nzwili Nzenge had a genuine dispute regarding the parcels of land now in issue. The late Mutambuki was alive at the time and decided to settle the matter by agreeing to the sub-division elsewhere reproduced above. I accept the evidence of the Respondents and I do not doubt the authenticity of the agreements as produced without objection, before the learned magistrate.

12. On the other hand, it is clear to me that the Appellants were and are acting in bad faith. I accept the evidence of the Respondents and especially that of James Mbuvi Mbuluu, a witness who had no direct interest in the matter, that the Appellants only changed their minds after Mutambuki died. That fact was shown when Kiilu then removed the sisal boundary created as a result of the agreements and which the clan had to reinstate. The witness for the Appellants, Gideon Kaluku Kyongo gave evidence which fell short of any credibility and I do not accept it as truthful.

13. If that be so, then a customary trust was clearly established because as was stated in **Wambugi vs Kimani (1992) 2 KAR 58** such a trust needs to be established and proved by evidence because it was a matter of fact. This was also the holding in **Phillicery Nduku Mumo vs Nzuki Makau C.A 56/2001**. I am further saying that in this case, the customary trust was properly proved when the Appellants gave the history of the land ownership from Nzwili Nzenge upto the registration in the name of Mutambuki and I accept that evidence as credible and truthful.

14. I will answer the first questions above in the affirmative, for the above reasons. Having so held, it

only follows that the sub-division by the learned magistrate is both just and fair because he only enforced the agreements made by the family and which in any event were properly supported by the evidence and history leading to the same. That the clan also followed the same path is telling.

15. The Respondents have failed to convince the magistrate's court and this court that they are entitled to the two parcels of land or any of the others exclusively and their case is weak and substantiated by nothing more than afterthoughts.

16. The Appeal is dismissed with no order as to costs. The Respondents although successful, are family members and relatives of the Appellants and costs will only fuel undue animosity. Each party should bear their own costs.

17. Orders accordingly.

Dated and delivered at Machakos this **3rd** day of **December** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Gichuka h/b for Mrs Kinuthia for Respondent**

ISAAC LENAOLA

JUDGE