REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 75 of 2000

SAMSON M'ITWAMWARI MUMIIRA …….....…… APPELLANT

VERSUS

JACKSON KIBETERU ……....……..…… 1ST RESPONDENT

JOSEPH BUNDI M'ITHIRUAINE …...…….…...…. 2ND RESPONDENT

(An Appeal from judgment delivered on 11.7.2000 and Decree of N. H. Oundu, Resident

Magistrate in CMCC in No. 100 of 1994)

JUDGMENT

This is an appeal from the decision of the subordinate court (Mr. N. H. Oundu, RM) delivered on 11th July, 2000. In the suit giving rise to that judgment hence to this appeal, the appellant was sued by the respondents, who sought for a declaration that the former was registered the proprietor of parcel of land No.Nyaki/Kithoka/272 to hold the same in trust for himself and his two deceased brothers, M'Itewa Mumiiria and M'Thiruaine Mumiiria and their families.

The respondents also sought that the appellant's land, Nyaki/Kithoka/926 be subdivided and one acre to be transferred to the 1st respondent while three acres to be transferred to the 2nd respondent.

Finally they sought that the Land Registrar, Meru be ordered to effect the transfers in the register. After hearing parties and their witnesses the trial court found that the appellant held the suit property, Nyaki/Kithoka/926 in trust for the respondents, who were entitled to one and three acres respectively.

The appellant, being aggrieved by the decision preferred this appeal, listing 18 grounds, which were argued either separately or together. I will summarize them herebelow;

1. That there was no evidence to prove the existence of a trust, or that the suit land was bought jointly by the parties' fathers.

2. That the trial magistrate erred in finding that the suit land was a clan land.

3. That the learned trial magistrate erred in finding that the appellant's father did not own land.

4. That the learned trial magistrate erred in holding that whatever land the appellant and his two late

brothers had before demarcation was family land.

5. That the learned trial magistrate disregarded the evidence of the appellant while laying emphasis on the respondent's case.

6. That the learned trial magistrate erred when he held that the respondents did not need letters of administration in order to bring the suit

7. That the learned trial magistrate failed to find that the suit was time barred.

8. That the court failed to find that the respondents did not give particulars of trust.

To these arguments the respondent's counsel responded that the appellant has not demonstrated how the trial magistrate erred either in law or fact to warrant interference with his decision by this court. That there was evidence of trust, the particulars of which were included in the pleadings and referred to in the judgment. Further, on this point, it was submitted that trust can be inferred from the proceedings.

Learned counsel argued that the appellant's action of giving the 1st respondent 2 acres of land confirmed that indeed he (the appellant) must have been holding the land in trust for the 1st respondent.

Regarding limitation of the action, it was argued that a claim for trust cannot be time-barred, particularly when a person has been in occupation of the land for a considerable period of time. The Registered Land Act(Cap.300) has no provision for limitation. On the letters of administration, it was submitted for the respondents, that they did not require one as they were not claiming land on behalf of their deceased fathers, but they claimed it as of their own right.

These constitute arguments for the appellant and respondents. I have considered the same as well as the authorities cited and hold the following view. First being first appellate court, I must review the evidence in order to arrive at independent conclusion.

I have stated that the respondents' claim was specific and clear. In the plaint they sought for judgment against the appellant for;

(a) Declaration that the defendant (appellant) was registered the proprietor of Parcel of land No.Nyaki/Kithoka/272 to hold it in trust for himself and his two deceased brothers M'Itera Mumiiria and M'Thiruane Mumiiria and their families.

(b) That the defendant(appellant) be ordered to sub-divide his land Nyaki/Kithoka/926 and transfer one acre and three acres to the 1st and 2nd plaintiff respectively.

It was, therefore, incumbent upon the respondents to prove by evidence that the appellant held the suit land in trust not only for himself (the appellant) but also for the benefit of his two deceased brothers and their families.

The respondents testified before the trial court and called 2 other witnesses. The first respondent testified initially, before he was recalled, that the appellant and the 1st and 2nd respondents' fathers who were brothers sold a parcel of land given to them by their father and used the proceeds thereof to purchase the suit land, measuring 9 acres. In his testimony when he was recalled he clarified that the three brothers purchased the suit land from one M'Mbogori and members of his family between 1963-1965. He confirmed that he was about 25 years at the time the transaction was effected, and that both him and the 2nd respondent have permanent houses on the suit land.

On his part the 2nd respondent told the trial court that although the suit land was purchased from M'Mbogori, he never saw him. But he also asserted that the land having been bought jointly by the three brothers it was only equitable for the appellant to retain 3 acres, transfer to him (2nd respondent) three

acres and transfer 1 acre in addition to 2 acres already transferred to the 1st respondent. He also confirmed that he did not witness the land being purchased. That this fact he learnt from the clan elders in 1977. That when their parents shifted to the suit land between 1965 and 1966 he had not been born.

Their original land was parcel No.73 where the father of the three brothers was buried. Then there is the evidence of PW3, Dancan Mugwika(Mugwika), who said he respondents are his cousins. He was categorical that he was present when the land was purchased from one M'Imanyara.

The 4th witness, M'Muriithi Kairanya(Kairanya) testified that he is a cousin to the parties. That the suit land was purchased and registered in the appellant's name to hold in trust for the family. That the appellant only changed his mind after the death of the fathers of the respondents. His version was that the land was purchased from one M'Mbogori but said in cross-examination that he did not witness the transaction, although in the same breath he said he was present during the sale transaction.

The appellant gave evidence and called one witness. It was his case that he purchased the suit land from one Naituri in 1958 at Kshs.1,800/= and caused it to be registered in 1967. In 1976 he transferred to the 1st respondent two acres parcel after the subdivision of parcel No.272. 1st respondent's two acres was registered as Parcel No.927 while the appellant retained Parcel No.926, the subject of the dispute.

However, prior to the appellant transferring Parcel No.927 to the 1st respondent, the latter with the appellant's assistance had, in 1964, built a permanent house on that land. Regarding the 2nd respondent, the appellant explained that the former was named after him.

On that score, the appellant allowed the 2nd respondent to live on the suit land where he put up a semi-permanent house. The 2nd respondent's father was also buried on the suit land, while the 2nd respondent's mother had a house on the said suit land.

The witness called by the appellant, Nchebere Ikiugu, DW2 confirmed that the appellant purchased the suit land from his father at a consideration of Kshs.1,800/= in 1958, which consideration was paid in three installments.

The land in dispute, original No.Nyaki/Kithoka/272, and the subsequent sub-division of Nyaki/Kithoka/926 on which the respondents have laid claim are registered under the Registered Land Act (Cap 300) (the Act).

It is also noted that the appellant's ownership was a first registration. The basis of trust law under the Registered Land Act are Sections 28 and 126(1). It follows that although the appellant's ownership of the suit property is absolute by virtue of first registration, the same will be subject to a trust if the same was established.

As the learned trial magistrate correctly held, a trust can be declared on land even where the title relates to first registration under the Registered Land Act as was held in Limuli Vs Marko Sibayi(1979) KLR 251. Similarly it is not a mandatory requirement under the provisions of Section 126(1) of the Registered Land Act that the fact of the existence of a trust be endorsed on the instrument of acquisition. See Gatimu Kinguru V Muya Kathangi (1976) KLR 253.

The leaned trial magistrate found that the respondents had proved the existence of a trust on the basis of the following evidence.

(i) that the suit land was brought from the proceeds of sale of the family land.

(ii) that the 1st respondent has lived on the suit land for over 35 years while the 2nd respondent from birth

(iii) that the 2nd respondent's father has built on the suit land and the mother (to the 2nd respondent)

stays there, and finally;

(iv) that the respondents and the appellant occupy separate distinct parties of the suit land.

In arriving at that decision the learned trial magistrate dismissed the appellant's explanation that he had taken the 1st respondent as his own son because he had no son hence his gesture to allocate to him land. He also dismissed the appellant's assertion that he took the 2nd respondent into his care because he was named after him and also because the 2nd respondent's father had no place of abode.

What is the basis of Nyaki/Kithoka/272? According to the respondents it is a product of a purchase by their fathers and the appellant from the proceeds of family land.

The appellant on the other hand maintains that he purchased it with his savings from masonry work. It is the 1st respondent's case that the suit land was purchased between 1963-65 at a cost of Kshs.2,700/= from one M'Mbogori. That the vendor is now deceased. The 1st respondent further stated that he was 25 years at the time of the transaction. It is also in evidence that both the 1st and 2nd respondent's fathers were alive in 1976 when the original Nyaki/Kithoka/272 was sub-divided and eventually registered. It was also the evidence of the 1st respondent that they (himself and 2nd respondent) were shown their respective portions of the suit land which constituted their share of the land.

Although the appellant was younger than his two deceased brothers, according to the respondents, their fathers (the latter) agreed to have the suit land registered in the name of the appellant in order for them to qualify for land in the settlement scheme.

The evidence of the 2nd respondent is not helpful as in his own words the alleged sale took place before he was born. Whatever he knew regarding that land was information obtained from the clan elders in 1977. That leaves the 1st respondent's story that the suit land was purchased with funds from the sale of a family land. He however, did not give the details of the land which was sold or even where it was situated.

He did not explain why it was necessary to sell a family land and then buy another land. He stated that the land was purchased from one M'Mbogori who he claimed was dead, yet he did not call any of M'Mbogori's living children.

Although he explained that the suit land was registered in the name of the appellant to hold in trust for his brothers and their families and that this was done so that his father and the father of the 2nd respondent would qualify for land in the Settlement Scheme, that explanation was not persuasive for the following reasons. The 1st respondent was an adult at the time of the alleged purchase of the suit land. In 1965 he was 25 years and his father was alive. The 2nd respondent's father was also alive. The suit land is said to measure 9.60 acres before the appellant transferred 2 acres to the 1st respondent. At the time of the purchase what stopped the 1st respondent's father or the 1st respondent himself from insisting on having the 3 acres transferred at once to the 1st respondent instead of 2 acres. Nothing stopped the 2nd respondent's father from insisting on his son (2nd respondent) getting what was due to him at that stage.

It is also on record that only the 2nd respondent's father got land in the Settlement Scheme. That does not explain why the suit land was not registered in the name of the 1st respondent's father.

The respondents called two witnesses, Mugwika and Kairanya, both cousins to the parties. According to the former the suit land was purchased from one M'Imanyara from Kianjai. This is in contrast with the respondent's evidence that it was brought from M'Mbogori. The evidence of Kairanya is also not helpful as he gave a confused testimony at one time confirming that he was present when the land was being bought and at another time saying he was not present. Neither did he know the land number not the year it was purchased.

From the record it is clear that each of the three brothers had their separate parcels of land. Nyaki/Kithoka/73 appears to have been registered in the name of the 1st respondent's father's name.

The 2nd respondent's father had land-parcel No.560 at the Settlement Scheme while the appellant had the suit land. From the evidence I am persuaded that Nyaki/Kithoka/73 was the family land. This is where the whole family lived initially. At the time of the trial there was evidence that the 1st respondent's mother was living on this parcel of land. The respondents' grandfather and grandmother were buried on this land. Mugwika was categorical that Nyaki/Kithoka/73 belonged to the respondents' grandfather. Nyaki/Kithoka/73 in my view is the trust land. For these reasons, I find that the respondents did not adduce evidence on a balance of probability in support of their claim that the suit land was registered in the name of the appellant as a trustee to the family.

The learned trial magistrate erred in concluding that there was trust simply because the respondents lived on the suit land where they have put up houses. The mere living on land without move does not create a trust. The fact that the 2nd respondent's father was buried on the suit land, similarly is not evidence of the existence of a trust. The appellant has offered explanation as to why the respondents live on the suit land and why the 2nd respondent's parents lived on the said suit land. But significantly, the appellant has adduced sufficient evidence himself and through Nchebere that he bought the suit property.

For these reasons I find that there was no evidence of trust adduced. Then there is the question of limitation. Learned counsel for the appellant submitted that the learned trial magistrate erred in failing to find that the suit was brought outside the limitation period. Counsel relied on the provisions of Section 7 of the Limitation of Actions Act which relates to the recovery of land – within 12 years.

For the respondent's it was argued that there is no limitation period in matters of trust. Section 20(1) and (2) of the Limitation of Actions Act is instructive. It provides that

"20(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action;-

(a) in respect of fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use

(2) Subject to subsection (1) an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued".

The instant case falls within subsection (1) as it is the respondent's contention that the appellant was in fraudulent breach of trust – or – that the appellant converted to his own use the trust property. In that case then there is no limitation period.

The third matter for consideration is whether the respondents required grant of representation to bring this suit.

I have already set out the respondents' claim in the earlier paragraphs. But what they sought was a

" Declaration that the defendant was a registered the proprietor of parcel of land No.Nyaki/Kithoka/272 to hold it in trust for himself and his two deceased brothers M'Itewa Mumiira and M'Thiruane Mumiira and their families".

Their claim was, from the above, clear, that the suit land was held by the appellant in trust to himself, his two brothers and their families. It was their evidence that during the lifetimes of their fathers, they were

shown their respective portions of the suit land as their shares. Their deceased fathers, therefore, they claimed, gave them the shares they sought to enforce by this suit. They were, in my view, claiming the suit land in their own right and hence did not require any letters of administration.

Finally there is the question of Order 6 rule 8 of the Civil Procedure Rules. It provides that every pleading must contain the necessary particulars. That a party relying on pleading the existence of trust must plead the particulars of trust. Citing with approval the case of Captain Harey Gandy V Casper Air Charters Ltd (EACA) 1956 Vol.23, the Court of Appeal in Wilson Kenyenga V Joel Ombwori, the Civil Appeal No.96 of 1998, held that;

" We are satisfied that trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with Order 6 rule (8) of the civil Procedure Rules ……. *In the absence of a pleading of trust, this claim cannot be permitted to be raised on decree. As a rule, relief not founded on pleadings will not be given and cases must be decided on the issues on record".*

The respondent in their plaint, other than in paragraph 5 where they have averred that the suit land was registered in the name of the appellant to hold in trust for himself and his brothers, no particulars of how that trust arose, have been pleaded.

For the foregoing reasons, this appeal is allowed and the decree of the lower court of 11th December, 2000 is set aside with costs to the appellant.

DATED AND DELIVERED AT MERU THIS 24TH DAY OF MAY,2007

W. OUKO

JUDGE