



CHARLES KIMAITA MWITHIMBU.....APPELLANT

V E R S U S

JOSEPH R.C. MWIRIGI MUGUNA.....RESPONDENT

JUDGEMENT

1. The Grounds herein are:

- (a) The learned Chief Magistrate, erred in law and fact in failing to determine fully the Appellant claim against the Respondent.
- (b) The learned Chief Magistrate erred in law and fact in failing to find that the Respondent share of land parcel L.R. No. NTIMA/NTAKIRA/429, was in excess of 0.37 acres and that the excess share belonging to the Respondent, should actually belong to the Appellant.
- (c) The learned Chief Magistrate erred in not accepting the Appellant's evidence that he did not sign any documents in joining the Respondent as a joint proprietor in the suit premises, although all the necessary documents to that effect were produced and marked as exhibits.
- (d) The learned Chief Magistrate, erred in accepting the Respondent's evidence of an agreement, which the Appellant denied having drawn and/or witnessed.
- (e) The learned Chief Magistrate erred in law and fact in refusing to give time and/or allow submission, which submission would have given him the real picture, of the whole case before him.

2. Kasanga J. delivered a judgment in this matter on 3.7.2003 but referred the matter back to the lower court for determination of only one question; whether the "signatures appearing on the sale agreement dated 14.9.1979 and those appearing in the other documents acknowledging the receipts (of) the various amount belonged to the Appellant"

The learned Judge further ordered that the learned magistrate would send his findings to this court which was done and on 19.6.2006 I gave directions to parties to make submissions on the above single point to enable me write this final judgment. Parties made the submissions on 5.7.2006 and the Appellant appearing in person reiterated the matters argued before the lower court and on the single matter before me, he argued that his evidence that he was mentally ill or in his own words "sick at the time of the alleged transactions," was unchallenged and that his evidence that he does not ordinarily sign documents was also unchallenged. He urged that his Appeal be allowed.

3. Counsel for the Respondent in his submissions argued that the skeletal submissions filed by the Appellant were unrelated to the issue at hand and that all the evidence before the trial court pointed to the simple fact that the Appellant was capable of writing and that although he might have had a mental condition at one point in his life, at the time of the sale agreement, he was sane and mentally stable. He urged that the decision of the lower court be upheld.

4. To put matters into perspective, this judgment must always be read with that of Kasanga Mulwa

delivered on 3.7.2003. In that Judgment the learned Judge summarized the dispute between the parties as having arisen from alleged sale of land to the Respondent which was the basis for CMCC 149/89 (Meru) and that the Appellant's claim was that in fact he sold no land to the Respondent and that the Respondent's land parcel No. L.R. Ntima/Ntakira/429 was in excess of 0.37 acres and whatever that extra land was, it belonged to the Appellant. CMCC 149/89 was concluded in favour of the Respondent and one Andrew Munyi Muchiri but the Appellant choose to appeal against the present Respondent only.

5. Kasanga Mulwa J. found that there was indeed a sale transaction between the Appellant and the Respondent but he wanted the one issue before me clarified first. When the matter was taken for retrial, the Chief Magistrate J.R. Karanja Esq concluded on 14.5.2006 that "Most likely than not the disputed documents i.e. the sale agreement (D.Exh.A) and the payment acknowledgement receipts (D.Exh.B) were signed by the Plaintiff. His contention that he did not sign the said document and was incapable of doing so due to illness of the mind was undoubtedly intended to conceal the actual truth and defeat the course of justice".

6. In the plaint before the lower court, the Appellant was claiming from the Respondent 0.36 acres and the sum of Ksh.14,188.70. The basis for this is unclear from that Plaint which is rather jumbled up but in his statement of Defence filed on 4.7.1989 the Respondent averred that he lawfully bought title No. Ntima/Ntakira/2216 having entered into a sale agreement with him on 14.9.1979 and that he does not owe the Appellant any money as a result of that sale transaction and that consequent upon the sale agreement the Appellant lawfully transferred the land to him.

7. In evidence before the lower court, the dispute is much clearer than the pleadings because apparently title No. Ntima/Ntakira/429 was initially registered in the names of the Appellant and later Andrew Muchiri Munyi entered the land as proprietor in common with the Appellant with their respective undivided shares being 4/9 and 5/9 respectively. The Present Respondent joined the two on 21.1.1982 when he was registered together with them with his share being equal to the Appellant while the other Andrew Muchiri Munyi held on 5/9 share all of which were undivided. The dispute has its genesis in the events of 8.11.1985 when the land was sub-divided and the Respondent became registered proprietor of Ntima/Ntakira/2216 measuring 0.248 hectares. The Appellants evidence was that the Respondent was entitled to 0.101 hectares and that the extra acreage ought to be transferred back to the Appellant. The Respondent in response produce D.Exh.A a sale agreement of the Appellant's share (i.e.5/18) of Ntima/Ntakira/429 which is equivalent to 0.248 hectares. The documents were found by both Esq. Aggrey Muchelule Chief Magistrate and J.R. Karanja Esq. Chief Magistrate to have been authentic from evidence before them. That portion of land was later registered as L.R. No. Ntima/Ntakira/2216 measuring 0.248 hectares.

8. As I stated earlier, the Appellant and the Respondent in their pleadings admit that there was a sale transaction between them. The Appellant's case was that he sold 0.101 hectares and not 0.248 hectares to the Respondent. I should pause here and state the lower court has already awarded him 0.248 hectares to be excised from land parcel Number Ntima/Ntakira/2217 in the names of Andrew Muchiri Munyi. I have read the proceedings of the lower court and I am satisfied with the finding of both Muchelule Esq and Karanja Esq that the Appellant signed the sale agreement of 0.248 hectares, which was 5/18 of his 5/9 shares in Ntima/Ntakira/429. I have seen nothing in the submissions made in the Appeal to warrant a finding other than that. These being my view, grounds 2, 3 and 4 of the Memorandum of Appeal must fail. Ground 1 and 5 relate to contentions that the Appellant was not properly heard by the lower court. From where I sit and from the record, that cannot be true. The record of Muchelule Esq is detailed and thorough and I see no evidence that from 1997 to 2002 when the case was constantly before the lower court, any injustice was occasioned to the Appellant. He had a second bite at the cherry in any event when the matter was referred back to the lower court and again Karanja Esq gave the Appellant a chance to restate his case and reached the decision reproduced elsewhere above.

9. On the whole and having evaluated the evidence on the one issue referred to me, I think that the Appellant's Appeal is unmeritorious and having obtained 0.248 hectares from Andrew Muchiri Munyi, there is no basis for the lower court or this court in the face of the clear evidence against him to order that the Appellant should get another 0.37 hectares from the Respondent. If there was evidence to back up his

claim, no doubt he would get a favourable judgment but the documentary evidence against him is overwhelmingly persuasive and that being the case, sadly his crusade must come to an end.

10. In the event, I agree wholly with Kasanga Mulwa J. and the lower court decision must stand and the Appeal is hereby dismissed with costs to the Respondent.

11. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF September 2006

ISAAC LENAOLA,

J U D G E

In the Presence of

Appellant in person

Mr. Akwalu Advocate for Respondent

ISAAC LENAOLA

JUDGE.