REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 107 OF 2005

KANGOGO KIBETT……..APPELLANT

VERSUS

JAMES CHANGWON KANGOGO…….....RESPONDENT

JUDGMENT

The appellant was the defendant in **RMCC No.7 of 2005** at Eldama Ravine and the respondent was the plaintiff. The respondent is like an adopted son of the appellant. Before the trial court, the respondent claimed that the appellant wanted to force him out of a parcel of land known as number **119/102** Sabatia Settlement Scheme, hereinafter referred to as "***the suit premises***". The suit premises were in 1994 registered in the mane of the appellant, having purchased the same from the Settlement Fund Trustees. The appellant had given to the respondent 1½ acres of the suit premises for cultivation of subsistence crops but the respondent claimed that he was entitled to 4 acres thereof. He sought a permanent injunction to restrain the appellant from interfering with his quiet occupation of the 4 acres.

The appellant stated in his defence that he had allowed the respondent to cultivate 1½ acres of the suit premises and that he was not entitled to 4 acres as he had claimed. He further stated that he had given to the respondent 2 acres of land at a place known as Chelele and constructed a house thereon for him but the respondent had adamantly refused to move out of the suit premises. The appellant further stated that he was under no legal obligation to give any part of the suit premises to the respondent. By way of a counter-claim, he urged the trial court to dismiss the respondent's suit and make a declaration that he was the absolute owner of the suit premises.

After a full trial, the case was decided in favour of the respondent. The trial court relied on a Court of Appeal decision in ***MUKANGU VS MBUI Civil Appeal No. 281 of 2000 (unreported)*** where the court held that in that particular case, there was inter-generational equity where the land in dispute was held by one generation for the benefit of succeeding ones. The trial court therefore granted the permanent order of injunction as sought by the respondent and dismissed the appellant's counter-claim.

The appellant was dissatisfied with the said judgment and preferred an appeal to this court. Miss Njoroge for the appellant submitted that the learned trial magistrate based her decision on the wrong premise of the law. That the learned trial magistrate dealt with the matter as though the appellant held the suit premises under a customary trust whereas he had led evidence to show that he had actually bought the land and was registered as the absolute proprietor thereof. It was a first registration and his interest could therefore not be defeated, counsel submitted. She cited the provisions of Sections **27** and **28** of the **Registered Land Act.**

The appellant's counsel further faulted the learned trial magistrate for dismissing the appellant's counter-claim without giving any reasons for so doing, yet there was no defence to the counter-claim.

Mr. Mosoti for the respondent submitted that the learned trial magistrate arrived at a correct decision. The appellant's contention was not equitable in that the suit premises measured 49 acres and the respondent was claiming only 4 acres thereof and the appellant wanted to evict the respondent from the land altogether, counsel submitted. He stated that the main consideration by the trial court was equity. He however admitted that the respondent did not file any defence to the counter-claim. He urged this court to uphold the judgment of the trial court.

From the evidence that was tendered before the trial court, the respondent had lived with the appellant since his childhood, though not formally adopted as a son. He had been educated by the appellant and even took up the appellant's name as his surname. Serious difference then arose between the two and their differences went before a panel of elders chaired by the Eldama Ravine District Officer.

Although the appellant had initially settled the respondent on a portion of the suit premises measuring about 1½, acres, when their differences intensified, the appellant gave to the respondent some other parcel of land in an area known as Chelele and built a house for him but the respondent refused to move out of the suit premises.

In determining this appeal, the court has to consider the nature of interest which each of the parties has over the suit premises. The appellant purchased the suit premises from the Settlement Fund Trustees and on 13th December 1994 he was registered as the absolute proprietor of the same and issued with a Title Deed. Such registration conferred upon him absolute right of ownership of the land together with the rights and privileges that go with the registration in terms of the provisions of Sections 27 and 28 of the Registered Land Act.

The Land in question is not an ancestral one which has been passed on from one generation to another. If that were the case, the concept of inter-generational equity which was ennunciated by the Court of Appeal in ***MUKANGU VS MBUI (supra)*** would have been applicable. But in the circumstances of the case, the aforesaid doctrine was not applicable.

On the other hand, the respondent's claim over the land was based on equity and no more. He said that the appellant had given him 4 acres leaving 45 acres to himself and his children but now the appellant wanted to evict him from that parcel of land which he had occupied. He claimed that he had beneficial interest over the parcel of land.

The learned trial magistrate was persuaded by the decision of the Court of Appeal in ***MUKANGU VS MBUI*** and further relied on principles of equity in issuing a permanent injunction to restrain the appellant from evicting the respondent or interfering with his quiet enjoyment of the parcel of land which he occupied.

With respect to the learned magistrate, doctrines of equity cannot be applied to defeat express provisions of written law. I have already held that the concept of inter-generational equity was not applicable because the suit premises were not an ancestral land. The respondent could not in law force the appellant to give him a portion of his land. By granting a permanent injunction in favour of the respondent, the trial court was interfering with the appellant's proprietary interest over the suit premises and that was contrary to the law. In ***CHERUIYOT VS BARTIONY [1988] KLR 422,*** the Court of Appeal held that the legal owner of a parcel of land was entitled to its possession against the whole world. I am satisfied that the learned trial magistrate misdirected herself in law in granting a permanent injunction to restrain the appellant from evicting the respondent from the suit premises.

The appellant had also filed a counter-claim and sought a declaration that he was the sole and absolute owner of the suit premises. He adduced sufficient evidence to prove the same. The respondent did not file any defence to the said counter-claim.

In the circumstances, there was no basis upon which the appellant's counter-claim could have been dismissed. I therefore allow the appeal and set aside the judgment of the trial court and substitute therefor an order dismissing the respondent's suit before the subordinate court and allowing the appellant's

counter-claim therein. The respondent should move out of the suit premises within the next thirty (30) days and relocate to the parcel of land which he was given by the appellant at Chelele, failing which the appellant shall be at liberty to evict him. The appellant will have the costs both in the trial court and in this court.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Gai holding brief for Miss Njoroge for the appellant and Mr. Wahome holding brief for Mr. Onkoba for the respondent.

D. MUSINGA

JUDGE