



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL 181 OF 1997

KANYIRI NGURE ALIAS ISAACK MWANGI APPELLANT

VERSUS

JOHANA GITHIAKA 1ST RESPONDENT

FRANCIS NGURE GITHIAKA 2ND RESPONDENT

(An Appeal from the Judgment of Hon. A. M. Macharia, RM

in Muranga RMCC No. 439 of 1995 delivered on 30th June, 1997).

JUDGMENT

By a Plaint dated and filed in the lower court on the 24th August, 1995, the Appellant (Plaintiff in the lower court) claimed from the 1st Respondent (his brother) and the 2nd Respondent (his brother's son), one-half of an interest in the suit land (Loc. 18/Gachochi/2969 and Loc. 18/Gachochi/2970) which he claimed was held by the Respondents in trust for him.

According to him the suit land was owned by his and the 1st Respondent's father, and that the same was registered in the 1st Respondent's name following the demarcation exercise in 1965. At that time, he says in his testimony before the lower court, he was away in the Rift Valley. He claims this is the family's ancestral land, and called witnesses to testify to that effect.

The 1st Respondent, on the other hand, led evidence to show that he purchased the suit land from one Solomon Macharia, (since deceased) who had actually sued him for the recovery of the purchase price. He claimed that at the time of the purchase of the suit land, his father was alive, and claimed that if the suit land did indeed belong to his father, then the same would have been registered in the father's name, not his.

Based on this evidence, the learned Magistrate chose to believe the 1st Respondent, and held that the suit land was purchased by the 1st Respondent, that he was the sole owner of the same, and that there was no trust arising in favour of the Appellant.

It is against that Judgment that the Appellant has preferred this appeal, based on the following three grounds of appeal:

“1. The judgment is against the weight of evidence.

2. The Magistrate erred in ignoring the judgment of the late Rauf Judge as he then was in Muranga RM Appeal Case No. 8 of 1975 had held that the land reference number Loc

18/Gachochi/2067 belonged to their father (father of plaintiff and first Respondent). The Magistrate was bound by this judgment.

3. The Magistrate erred in holding that the first defendant had bought the land reference number Loc 18/Gachochi/2067 which was not so.”

In his submissions before this court, Mr Kinuthia, Counsel for the Appellant, argued that the trial court was wrong in disregarding a previous Judgment of Hon. A. Rauf, SRM (as he then was) in Muranga RMCC 8 of 1978 in which the learned magistrate had ruled that the Appellant had the right to the suit land; that the lower court wrongly relied on RMCC 400 of 1968, which in his view had nothing to do with the recovery of the purchase price of the suit land; and that the Appellant had established a case of trust on a balance of probability.

Mr Ngungiri, for the Respondent, argued emphatically that if the land did indeed belong to the father of the litigants, it would have been registered in the father's name, as the father was very much alive at that time; that Hon. Rauf's Ruling did not give any ownership rights to the Appellant; and that there was sufficient proof to show that the 1st Respondent had purchased the suit land from Macharia.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

The Appellant/Plaintiff produced three witnesses in the lower court: Absolom Kuria and Isaack Kiragu, both from his village, and Stephen Mwangi Waite, a former Assistant Chief, from his area. These witnesses said that to their knowledge the suit land belonged to the father who had registered it in the name of the 1st Respondent in the absence of the Appellant, who was then in the Rift Valley. The Assistant Chief testified as follows:

“Formerly this land belonged to their father Ngure. During demarcation it was registered in name of Johanne Githiaka as he was the only one present and his brother plaintiff was in the Rift Valley. Plaintiff is the older one. When he came back from the Rift Valley he occupied some of this land. He even built there. Apart from the house he had bananas on this land. He also planted maize. In 1977 the 2 parties appeared before me when I was an assistant chief. There were other elders. I was the Chairman. We concluded that the 2 should share this land. We decided they should share in equal shares. Some of the elders present were Isaac Kiragu and Absolom Kuria and former assistant chief before me. These people are alive. I recommend that this land be shared equally between the 2 parties here”.

This probably was the Appellant's strongest evidence of his interest in land. And it is noteworthy that the witness stated that the other elders who sat with him to resolve the dispute were alive. As I indicated before, these two gentlemen were called as witnesses.

The Respondents' evidence, on the other hand, was led by themselves and one Kimani Macharia, who was from their village, and who knew their father well. They relied heavily on the fact that the 1st Respondent had bought the suit land from Macharia and that it did not belong to the father. According to the 1st Respondent he bought it in 1953 and completed full payment in 1963. He said he was sued at one point by Macharia for the recovery of the purchase price, and produced before the court proceedings in the said suit (No. 400 of 1968). The Respondent's last witness, Kimani Macharia, who said he knew the parties and their father, testified that he was present when the 1st Respondent was told by his father that the suit land could not be shared between him and the 1st Respondent because the same had been purchased by the 1st Respondent, who alone owned the same.

The learned Magistrate, having heard these witnesses decided to visit the suit land to verify the claim that

the Appellant had built on the suit land. On 3rd February, 1997, the Court and the parties visited the site, and the Court confirmed that the Appellant indeed lived on the suit land where he had built a house, albeit a temporary one.

Based on the evidence before the lower court, the learned Magistrate came to the conclusion that the Appellant had not established his claim on a balance of probability. I have looked at the record of proceedings, and have considered submissions made by Counsel, and I must say that I have to disagree with the lower court in its finding.

As I noted before, I have not had the benefit of observing the witnesses in the lower court, but I am satisfied that the findings of the lower court are not based properly on the evidence before it. I am persuaded in this conclusion for the following reasons:

The Appellant produced two independent witnesses who told the Court that the suit land belonged to the father, and that the elders who sat on this land dispute had decided that it be divided equally between the two brothers. The decision of the elders was read by the Assistant Chief who was also called as a witness. An extract of his testimony has been reproduced earlier in this Judgment. These three witnesses were elderly people who were fully aware of the history of the suit land, and who had no reason to take sides. I find their evidence quite powerful, and consistent, and one that should not have been disregarded by the trial Magistrate.

As opposed to this, the 1st Respondent produced only one independent witness, Kimani Macharia, who testified that the suit land did not belong to the father, but had been purchased by the 1st Respondent. He was only a neighbour at that time, and admitted that the elders had indeed discussed this dispute but that he was not present during that discussion. He also admitted that the Appellant lived on the suit land, and that he had also built a house on it. In the face of these admissions, the trial Magistrate ought to have believed the Appellant's two witnesses.

Secondly, the trial court seems to have relied heavily on the proceedings and Judgment in RMCC 400 of 1968 which is said to have been a case filed by Solomon Macharia against the 1st Respondent for the recovery of the purchase price. The entire proceedings and Judgment (on page 32 of the Record) is only six lines, and there is absolutely no indication there what that suit was all about, and certainly there is nothing to show that it was for the recovery of purchase price in respect of the suit land. Therefore, that Judgment cannot be relied upon to establish the 1st Respondent's claim to ownership of the suit land.

On the other hand, the Judgment of Rauf, SRM in RMCC 8 of 1978 (Muranga) sheds much light, and I will reproduce the same in full, as I believe it contains an important finding of fact made by that court.

“In this case the plaintiff (i.e. the 1st Respondent in this appeal) seeks to evict his brother from the land which is registered in the name of the plaintiff but is worked by both parties. The defendant is an old man. The land in question belonged to their father since 1941. During demarcation the plaintiff managed to get the title as the defendant was absent. But on his return in 1966 he peacefully cultivated the portion of the land he is now cultivating. The defendant claimed to have brought up the plaintiff since childhood and from their physical appearance the age differential between them makes it possible. In fact the plaintiff said he was 50 years and the defendant was 70 years of age. If the defendant is evicted he has no other land to go to.

The plaintiff impressed me as an angry and impatient man without compassion. The defendant impressed me as a truthful person. I am satisfied that he has established his right to stay on the land and cultivates the portion which is now in his possession. He will not be evicted. I dismiss the plaintiff's suit with costs.”

The learned trial Magistrate had the benefit of this Judgment, but chose to prefer the Judgment in RMCC 400 of 1968, believing, as she did, that if the latter Judgment had been brought to Hon. Rauf's attention, the latter may have decided differently. I am unable to agree with that proposition for the simple reason

that the Judgment in 400 of 1968 says absolutely nothing about the 1st Respondent having bought the suit land from Solomon Macharia.

Although the case before Rauf, SRM was not about ownership, he made an important finding – that the land belonged to the father, and that the 1st Respondent managed to get the title in the absence of the Appellant.

Accordingly, and for reasons cited, I am satisfied that the Appellant had satisfied his claim to half the interest in the suit land. I allow this appeal with costs; and I set aside the Judgment and decree of the lower court, and enter Judgment for the Appellant in the suit before the lower court as prayed, with costs.

Dated and delivered at Nairobi this 21st day of July, 2005.

ALNASHIR VISRAM

JUDGE