



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 16 OF 1996

DAVID GACHOHI NGOTHO APPELLANT

VERSUS

BENSON MUNGAI RESPONDENT (DECEASED)

LYDIA NJERI MUNGAI)

JECINTA NGUHI MUNGAI)

ELLIS NJUGUNA MUNGAI)

{Being personal representatives of the estate of BENSON MUNGAI}

(An Appeal from the Judgment of F. N. Muchemi, SPM in

Kiambu Civil Suit No. 285 of 1991 delivered on 29th December, 1995).

JUDGMENT

By a Plaintiff dated 3rd July, 1991, the Appellant (Plaintiff in the lower court), sued his older brother, the Respondent herein for one-half of the share in land parcel Ndumberi/Ndumberi/649 measuring 5.30 acres (“the suit land”), which he claimed the Respondent held in trust for him.

The Respondent, in his defence dated 1st July, 1992 admitted ownership of the suit land, but claimed that he held only 0.95 of an acre in trust for the Appellant.

The Appellants case in the lower court was that the 5.30 acre suit land was formed by fragmentation of four parcels shown in P EX 1 produced by the Land Registrar, Kiambu. The parcels were situated in Riara (4.42 acres), Kiawandumba (0.01 acres), Iganjo (0.11 acres) and Riara (0.11 acres). All this was consolidated, and from it was carved out two small parcels – 0.25 acres which was occupied by the Appellant, and some 0.5 acres for road access. The Appellant claimed half of this suit land.

The Respondent’s case was that the Appellant was entitled to half of the 1.65 acres of land inherited from their mother. The balance of the land was acquired by him in his independent capacity – one acre from his grandfather as “uramati”; one acre from his father as “uramati”; and one acre of the Limuru land which he and all his brothers inherited from their grandfather, and which he exchanged with his brother for the Ndumberi land.

Having heard all the witnesses, the lower court, in an extensive and well reasoned Judgment, concluded that the Appellant had not established his claim on a balance of probability, and that he was only entitled

to half share of 1.65 acres, as established by the Respondent.

It is against that decision that the Appellant has preferred this appeal on the following four grounds of appeal:

“1. THAT the learned Magistrate erred in law and fact in failing to consider that the appellant was entitled to half share of land Registered Number Ndumberi/Ndumberi/649 which is registered in the name of the Respondent.

2. THAT the learned Magistrate erred in law and fact in failing to consider the appellant’s evidence and that of his defence witnesses remained unshaken during the proceedings in respect of appellant’s right over the land parcel No. Ndumberi/Ndumberi/649.

3. THAT the learned Magistrate erred in law and in fact in failing to consider that the Respondent though registered as a proprietor of parcel No. Ndumberi/Ndumberi/649 held part thereof in customary trust for the appellant.

4. THAT the learned Magistrate misdirected himself in that the appellant had no legal right to the parcel of land No. Ndumberi/Ndumberi/649.”

The Appellant filed a further Memorandum of Appeal dated 5th September, 2003 in which he outlined four additional grounds of appeal as follows:

“1. THAT the learned Magistrate erred in law and in fact by allowing the Respondents testimony concerning ancestral land allegedly bought by the grandfather of 57 acres in Lari.

2. THAT the learned Magistrate erred in law and in fact by relying on the Respondents allegation of the above mentioned 57 acres (Lari) in that the Respondent clearly failed to establish the land Registered Number of the said parcel and/or any proof of proprietorship and/or whether or not the grandfather of both the Appellant and the Respondent did in fact have and/or hold in trust any such parcel of land in Lari of 57 acres or at all.

3. THAT the learned Magistrate erred in law and in fact by relying on the Respondent and his witnesses testimony concerning the alleged ancestral land of 57 acres in Lari whereas the only registered parcel of land that was the suit property was NDUMBERI/NDUMBERI/649 of (5.30 acres) which the Respondent registered for himself without any due regard to the Appellants rights for a half (2.65 acres) share of the same.

4. THAT the learned Magistrate erred in law and in fact and by failing to establish that the suit property was trust property to which the Appellant is entitled to a share as clarified in his testimony and supported by his witness, in particular the land Registry officer.”

Both parties filed written submissions before this Court. The Appellant’s main submission is that he had clearly shown how the suit land was made up from four parcels at Ndumberi location and sub-location, and Kiambaa Division, Kiambu District. According to the Appellant, the Respondent had “confused” the Court by involving “another land in another division of Kiambu District”.

The Respondent submitted that he had properly explained how the suit land was made up, and how the Appellant was only entitled to half of 1.65 acres held in trust by him for both the parties.

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 he has not acted on wrong principles in reaching his conclusion.

Now, having warned myself of that and having assessed and re-evaluated the evidence before the lower court, I am satisfied that the learned Magistrate made the correct finding – based on evidence before the court. The Respondent’s evidence on how he acquired the suit land was credible. His evidence that he had two acres, one from his grandfather, and one from his father as “uramati” was not controverted. His evidence that he exchanged his one acre of Limuru land with his brother’s one acre at Ndumberi was fully corroborated. On the other hand the Appellant was not able to establish his claim. After hearing several witnesses, this is how the lower court expressed itself:

“The Court believed the defendant and his witnesses. The defendant analysed the source of each of the three acres. One of the plaintiff’s witness (DW 2) testified that the defendant took over the land of Ngotho from Kamiro Githuathi. Kamiro Githuathi took care of his father’s land and got four (4) acres as “uramati”. Defendant assisted Kamiro and got one (1) acre. When he took over his father’s land he was later awarded another one acre as uramati. He was older than the plaintiff and in a better position to look after his father’s land since his father died earlier before the land was shared out. I disagree with PW 2’s evidence that one cannot be given uramati if the owner of the land he was taking care is dead. Uramati may be given by the clan or any other person directly responsible of the land.

The evidence of DW 1 and DW 2 who are very close members of Ngotho’s family was very convincing. The plaintiff could not explain how himself and defendant got a larger share as opposed to DW 1 and DW 2 if plaintiffs testimony that he is entitled to half share was to be proved.”

As an appellate court, I cannot, and should not, interfere with the lower court’s findings of fact except in special circumstances. That court had the benefit of hearing and observing the demeanour of the witnesses, and for reasons that have been explained, chose to believe the respondent and his witnesses. I see no reason to interfere with that.

Accordingly, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 6th day of October, 2005.

ALNASHIR VISRAM

JUDGE