



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL APPEAL NO. 112 OF 2000

MWANGI NDUBI ::: APPELLANT

VERSUS

MWAURA MUNOGU ::: RESPONDENT

JUDGMENT

On April 15, 1992 the Appellant filed a Plaintiff in the subordinate Court at Muranga (PMCC No.106/92) seeking Judgment against the Respondent as follows:

“(a) An order for transfer of 4.88 Hectares out of land Loc.2/Maini/40 (hereinafter referred to as the “suit land”).”

In his Plaintiff, the Plaintiff averred that the Defendant, who is his stepbrother, was the registered proprietor of the suit land. He claimed that the same was family land measuring 9.76 hectares. That land had been the subject of consideration by clan elders who resolved that it should be sub-divided between the parties to the appeal. The Respondent refused to accede to the subdivision.

That Plaintiff was later amended to state that the Respondent obtained registration over the whole of the suit land contrary to an agreement between his house and that of the Appellant’s. According to the Amended Plaintiff the two houses had agreed that the suit land be divided into two equal portions and the Defendant be registered as proprietor of one half of the same in trust for his house while the plaintiff’s eldest brother, one Mwaura Ndumbi, now deceased, be registered as the Proprietor of the other half in trust for his house.

In his defence, the Respondent denied that the Appellant was his stepbrother and further denied that the suit land was family land.

Upon hearing the case the Learned Trial Magistrate (ALICE KINGOO, RESIDENT MAGISTRATE) dismissed the Appellant’s claim on May 13, 1999 with costs to the Respondent.

The Appellant was aggrieved by the decision of the lower court and filed this appeal seeking to have the same reversed and for Judgment to be entered in his favour as sought in the Plaintiff. His appeal was based on the following grounds as set out in his Memorandum of Appeal.

“1. THAT the Learned Trial Magistrate erred in law by not disclosing the reasons for her Judgment

2. The Learned Magistrate erred in disregarding the weight of the evidence of the Appella nt and his witnesses.

3. The Learned Magistrate erred in fact in holding that the Respondent is the son of the Deceased Defendant .

4. The Learned Magistrate erred in holding that the land subject of Civil Suit No.80 of 1949 at Kigumo was the suit land.

5. The Learned Magistrate erred in holding that the Deceased Defendant was a party to Civil Suit No.80 of 1949.

6. The Learned Magistrate erred in fact in mis - interpreting the evidence of the Respondent and his witness D.W.2.

7. The Learned Magistrate erred i n law and fact by failing to take into account the submission made on behalf of the Plaintiff.”

At the hearing of the appeal, Mr. Gatuguta for the Appellant argued only grounds 1,2,3 and 4. As was properly argued by Mr. Kinuthia for the Respondent it must be taken that the Appellant abandoned the other grounds of appeal.

Mr.Gatuguta relied on the Written Submissions made on behalf of the Appellant in the lower court and argued that the Trial Magistrate erred when she failed to hold that the Respondent held the suit land in trust for himself and the Appellant when there was ample evidence for holding as such. He referred the court to the evidence of the Appellant at page 74 and that of P.W.3 and P.W.2 at pages 83 and 81 of the Record of Appeal respectively.

In dealing with Ground No.3 of the appeal, Mr. Gatuguta argued that the Respondent was not the son of the original Deceased Defendant but his nephew contrary to the Trial Magistrate’s findings.

Finally, with respect to Ground 4 of the appeal, Mr. Gatuguta argued that the Trial Magistrate erred that the suit land was the same land in dispute in Kigumo Tribunal Case No.80 of 1949 as per DEX2.

Mr. Kinuthia for the Respondent, on the other hand, argued that the Appellant’s appeal must fail as he himself disowned his case at Page 80 line 17 of the Record of Appeal. He argued that the trial Magistrate gave sufficient reasons for her decision as she was persuaded by the Respondents evidence that he had been in constant occupation of the suit land for 18 years. He further argued that according to the Appellant’s own testimony, he had no connection with the suit land as neither his deceased parents nor his deceased elder brother were buried on it and further that he himself (the Appellant) did not have a home on the suit land.

I have carefully considered the record of the lower court and the rival submissions of the Advocates for the parties and I do not think that the Learned Trial Magistrate properly guided herself in coming to the decision which she came to. The main question for consideration before her was whether the Appellant had on a balance of probability established a case that the Respondent held the suit land for himself and in trust for the Appellant. The Appellant alleged that the Respondent was his stepbrother and that the suit land previously belonged to their father who was then deceased. The Respondent denied these claims. The resolution of those matters would have greatly assisted the Trial Magistrate in coming to a proper decision. I am afraid that instead of investigating those important matters, she took a different direction and misled herself and then came to a wrong decision. The Appellant called three witnesses to support his case. P.W.1 (Peter Mwangi Kibocho) said he was a cousin of the Appellant and the original Respondent. This was not disputed. He said he knew that the Respondent was registered as owner of the suit land on his behalf and in trust for others who were the Respondent’s siblings including the Appellant.

P.W.2 (Simon Njoroge Ndumbi) who is the uncle of the parties also confirmed that the parties were stepbrothers and that the Respondent was registered as owner of the suit land and was to hold the same on his behalf and in trust for other family members.

P.W.3(Samuel Kamau Macharia) who is a neighbour of the parties also testified that the parties were stepbrothers and that the suit land belonged to their father who was then deceased.

The Respondent who was brought in to replace the original Defendant who was deceased at the time of trial stated that he was a nephew of the original Respondent. The defence called a total of three witnesses including the Respondent.

Looking at the general record of the lower court, it is my view that a proper decision of this case depended a great deal on the demeanour of the witnesses who were called before the trial court. The trial magistrate does not say why she believed the Respondents witnesses and not those of the Appellant. From the record, the Appellant presented a simple and, in my view, straightforward case. The testimony led on behalf of the Respondents, on the other hand, appeared to be half baked and designed to complicate the trial. For instance, D.W.1 complicated simple family relationships for no good reason. Although the Trial Magistrate had the opportunity to observe the witnesses called before her, I do not think that her findings can be supported by her record. In my view, the Appellant's case was more credible than that of the Respondent. It is not true, as was advanced by Mr. Kinuthia, that the Appellant disowned his own case. The testimony he referred to was that of another witness who was not the Appellant and it was an answer given in cross-examination. It is unclear from the record the circumstances under which that answer was given but I do not think that the statement alone could destroy a good claim which was properly pleaded and supported by adequate testimony.

In the circumstances, I am compelled to interfere with the finding of the Trial Magistrate and I hereby allow this appeal and set aside the findings of the lower court and substitute therefore, Judgment in favour of the Appellant for an order against the Respondent to transfer 4.88 Hectares of the suit land to the Appellant. The Appellant will also have the costs of this Appeal and the costs in the Court below.

Dated and Delivered at Nairobi this 24th day of February 2004.

ALNASHIR VISRAM

JUDGE