IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL APPEAL NO 368 OF 1999

GICHIMU NGARA ……..…… APPELLANT

VERSUS

THUO NGANGA & ANOTHER ……..…… RESPONDENT

JUDGMENT

On December 12, 1997 the Respondent filed the suit in the lower court seeking Judgment against the Appellant as follows:

> ***"(a) A declaration that the … Appellant holds 4.74 acres out of the land parcel Loc.3/Githumu/381 (hereinafter referred to as "the suit land") in trust on behalf of the … (Respondents)***
>
> ***(b) An order directing the (Appellant) to transfer 2.47 acres out of Land Parcel Loc.3/Githumu/381 to each of the …***
>
> ***(Respondents) and in default thereof the Executive Officer of this Honourable Court to eff ect the said transfer***
>
> ***(c) (Costs)***
>
> ***(d) (Other relief)"***

After hearing the evidence presented by the opposing parties and the submissions of their Counsel, the Learned Trial Magistrate delivered her Judgment on August 18, 1999 against the Appellant by ordering as follows:

> **"(a) That the (Appellant) gets 0.4 acres of Loc.3/Githumu/381 and (b) the remaining part to be shared equally between the two Plaintiffs (Respondents) and the Defendant (Appellant)**
>
> **(c) That the … Appellant transfers 1/3 share of the balance to each of the … (Respondents) and in default the Executive Officer of this Court do sign the necessary forms**
>
> **(d) (Costs to be borne by the Appellant).**

The Appellant was aggrieved by that decision and appealed to this court. In his Memorandum of Appeal, the Appellant set forth as his grounds of appeal:

"1. The Learned Trial Magistrate erred and misdirected herself by finding that the basic issue for dete rmination before her was whether the Defendant held the land in trust for the Plaintiffs while there existed an equally basic issue as to whether the Plaintiffs had established the existence of the alleged trust.

2. The Learned Trial Magistrate erred in law and fact in the way she weighed the evidence particularly the circumstances under which the land was registered in the name of the Defendant and specifically failed to note from the Plaintiffs evidence that

(a) No evidence was adduced as to why though the Plaintiffs were adults and married by the time of registration, they did not demand their share at that time.

(b) No evidence of the parties intentions to create a trust was given.

(c) The Plaintiffs' disappeared to Tanzania instead of settling on the alleged clan land.

(d) The land in dispute is alleged to be 7.6 acres by the Plaintiffs while in fact it is only 3.0 acres.

(e) The Plaintiffs have never resided on the land in dispute.

3. The Learned Trial Magistrate erred in not taking into account the conduct of the Plaintiffs in relation to the suit land since the registration thereof to the Defendant which in itself does not establish and or prove a pattern where a court of law can simply and or pressure (sic) a trust.

4. The Learned Trial Magistrate erred in not taking into consideration the Defendant's evidence and specifically the fact that:

(a) The Defendant bought an undefined and demarcated piece of land from one WAINAINA MUHIA KANYI on 3rd November, 1958 jointly with one GAITHO IRUNGU which was later subdivided among the two buyers each taking 2.6 acres.

(b) The Plaintiffs were present as witnesses when the Defendant bought the said land.

(c) At the time the Plaintiffs and the Defendant and their parents used to live in the village due to the sta te of emergency.

(d) At the time of demarcation in 1961, the Defendant bought an extra 0.4 acres from one GAITHO NJAU to make the whole land 3.0 acres so as to be allowed to live in the land in dispute as was the directive then.

(e) The Defendant having be en an agricultural officer was in a position to buy the land.

(f) At the time land had not been surveyed and demarcated and was only identified by beacons.

5. The Learned Trial Magistrate erred in not finding as a fact that:

(a) The father to the parties h erein had no land and had been given a place to live by one MBAE NONO.

(b) The parents migrated to the Rift Valley Province and specifically Eldoret in the

Republic of Kenya where the parties herein grew up until the state of emergency was declared and the y were returned to the already created "villages" in Central Province.

(c) None of the parties to the suit went to detention and they were all alive and adults at the time of demarcation

(d) Since their father had no land, there was nothing for the partie s to this suit to inherit.

6. The Learned Magistrate erred in failing to find that the defendant had in any event established a title to the land in dispute by adverse possession.

7. The Learned Magistrate erred in failing to consider the Defendant' s exhibits.

8. The Learned Trial Magistrate erred in failing to find that each of the Plaintiffs has their own piece of land where they have lived with their families since demarcation.

9. The Learned Trial Magistrate erred in failing to consider the contradictions in the Plaintiffs' evidence.

10. The Trial Magistrate erred in law in not finding both agreements to buy land valid."

In the submissions which were made before me, Mr Macharia for the Respondents, argued that the appeal was defective as the Appellant failed to file a certified copy of the decree as required by Order XLI Rule 1A of the Civil Procedure Rules. In the interests of justice, I deferred my decision and directed the Appellant to file a certified copy of the decree which has now been filed. I now propose to deal with the appeal on merit.

The Appellant and the Respondents are brothers. The Appellant is the eldest. At the trial, the Respondents alleged that the suit land originally belonged to their father and that the Appellant was registered in trust for himself and them. The Appellant's case was that he bought the suit land from a third party and that the same belonged to him alone. He produced in evidence an agreement of sale to prove this (See D Exhibit 2). That agreement showed that the Appellant bought 0.4 acres of the land known as Githumu/180 from one Gaitho Njau. However, the suit land measures 1.21 hectares. In delivering herself on this point, the Learned Trial Magistrate said that the extra portion of the suit land in excess of 0.4 acres was held in trust for himself and the Respondents since he did not explain how he obtained the difference thereof. In my view, she did not err. The witnesses called on behalf of the Respondents testified that the suit land used to belong to the parties' father. According to PW 3 who was a cousin of the parties said that the parties were born on the suit land which belonged to their father. Their father had inherited the same land from his father. PW 4 said the same. He is an uncle of the parties. PW 5, who was a neighbour also said the suit land belonged to the parties' father. Based on the testimony of these witnesses, I am satisfied that the Trial Magistrate made the correct decision.

For the conclusiveness of record, I would like to consider the submissions made on other issues as follows. Miss Machio, who argued the appeal on behalf of the Appellant, argued that the Magistrate entered Judgment against what was prayed for in the Plaint even though the Plaint was not amended. The short answer to this is that this was not one of the grounds of the appeal. However, even if it were, the same has no merit whatsoever as the Judgment under consideration awarded the Respondents less land than had been prayed for. To avoid an unjust decree, the Trial Magistrate was perfectly correct in looking at all the surrounding circumstances and evidence. That she did and Miss Machio did not show before me that the act complained of resulted in any grave injustice. In any event, the action complained of was favourable to her client.

Miss Machio also argued that the Respondents' claim in the lower court was time barred. I did not understand the basis of this argument. What the Respondents sought to do in the lower court was to

enforce a trust. This they did after the Appellant refused to give them their share of the suit land when they demanded that he does so in 1996. In my view, that is when the trust was breached and the cause of action accrued. The action was, therefore, brought in time. In the result, I do not find any reasonable ground to entitle me to interfere with the decision of the lower court. I, therefore, dismiss this appeal with costs to the Respondents and affirm the decision of the lower court.

Dated and delivered at Nairobi this 13th day of May, 2004.

ALNASHIR VISRAM

JUDGE