IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 55 OF 1991

JUSTUS NGURE KAMAU …………………………… 1ST APPELLANT

NJERI W/O NGURE ………………..……………….. 2ND APPELLANT

LABANSON KAMAU NGURE …………………..….. 3RD APPELLANT

VERSUS

JOHN KURIA MUNGE …………………………….. 1ST RESPONDENT

EVANSON KAMAU MUNGE …………………….. 2ND RESPONDENT

JUDGMENT

On 9th January, 1989 John Kuria Munge (hereinafter referred to as "John") and Evanson Kamau Munge (hereinafter referred to as "Evanson") filed a suit in the lower court seeking Judgment against the Appellants (Justus Ngure Kamau hereinafter referred to as "Justus", Njeri Ngure hereinafter referred to as "Njeri" and Labanson Kamau hereinafter referred to as "Labanson") as follows:

"That the Defendants d o transfer 3.0 acres of land either from land parcels Nos Loc 2/Gacharage/198 or Loc 2/Gacharage/1119 to the Plaintiffs "

Justus and the father of John and Evanson were brothers. Njeri the proprietor of land parcel No Loc 2/Gacharage/198 (hereinafter referred to as the suit land) is the wife of Justus. Labanson is the son of Justus and Njeri and proprietor of land parcel No Loc 2 Gacharage/1119.

According to the evidence adduced in the lower court, Njeri and Labanson admitted that Justus was chosen as the head to oversee consolidation of family land and was also aware that Njeri purchased some 6.6 acres of land which was consolidated with other pieces of land to make 11.7 acres. This makes up (Parcel Number 198) the suit land and 1119. Njeri was registered as the owner of the suit land.

The other piece of land No 1119 was registered in the name of Labanson. According to John and Evanson this land belonged to their late father and Justus. After the death of their father Justus held the land in trust for them as they were too young at the time. This fact was not disputed by Njeri and Labanson.

The learned Trial Magistrate delivered her Judgment on 19th March, 1991 and ordered as follows:

> "(a) The Plaintiffs are entitled to two acres of land from land parcel No Loc 2/Gacharage/1119 now registered in the name of Labanson Kamau (the 3rd defendant)

(b) The defendants do meet costs of this suit together with interest at court rates."

It is from this Judgment that Justus, Njeri and Labanson filed an appeal based on the following grounds:

1. The learned trial Magi strate erred in law and fact in holding that the Plaintiffs had not been awarded land measuring 2 acres by the first defendant/appellant which fact was admitted by the Plaintiffs.

2. The learned Magistrate erred in law in not sustaining the Defence preliminar y point objection that a first registration is indefensible sake for specific grounds as specified by Cap 300

3. The learned Trial Magistrate erred in law in finding that the Plaintiffs had beneficial interests while in their evidence and proceedings it was averred that their father bought the land together with the first defendant.

4. The learned Trial Magistrate erred in fact and in law and in fact making an award that was ultra vires the prayers in the plaint.

5. The learned Trial Magistrate erred in law and in fact in finding that the defendants were liable in costs.

6. The learned Trial Magistrate erred in law and fact in finding that the Plaintiff's were entitled to 2 acres of parcel No Gacharage/1119 in the name of third defendant.

However, this appeal did not proceed after being dismissed for want of prosecution by My Brother Justice Ransely on the 31st July, 2003. No application was made to reinstate the appeal, and that matter has now ended.

On the other hand, John and Evanson were dissatisfied with the Judgment of the lower court and filed a cross appeal based on the following ground:

"THAT the learned Trial Magistrate erred in law and in fact in holding, in the face of overwhelming evidence on record, that the 2 nd Appellant/Respondent did not possess land which belonged to the Respondents'/Appellants' father."

So, before me is this cross-appeal, in which John and Evanson are claiming their entitlement to three acres of land, as opposed to two which the lower court found for them.

Njeri gave evidence in the lower court that she bought the suit land during her girlhood and was then registered as the owner. There were different parcels of land which were consolidated to make one (the suit land).

PW 2 a village elder told the lower court that he knows both parties to this suit, and that Justus owned land that belonged to the father of John and Evanson. This land was later consolidated with other pieces of land and were registered under the name of Njeri. According to this witness and others who testified it was claimed that Njeri had 4 acres of land which belonged to John and Evanson.

In a carefully considered Judgment, and having analyzed the evidence before it, the lower court found that indeed John and Evanson had been brought up by Justus, and that Justus held some land in trust for them, in the same way as he had held some land in trust for his own son Labanson. There was clearly no dispute about that, and the only issue before the Court was which land, and how much.

After hearing all the witnesses, the lower court concluded correctly in my view that Njeri was the properly registered owner of parcel No 193, and that John and Evanson were not entitled to any portion of the same.

Based on the evidence before it, which I have reviewed, the lower court further correctly found that John and Evanson were entitled to two acres from parcel 1119 owned by Labason, and not three acres as claimed.

The claim for the third acre was based on a purchase of land from one Gitundu Munge. However, there was no such evidence before the court, and indeed no basis, in my view, to award the Plaintiffs more than the two acres.

I find that there is no reason to interfere with the Judgment of the lower court, which I am satisfied is based properly on the evidence before it, and I uphold the same. This cross-appeal, therefore, fails. I award the costs to the Respondents to cross-appeal.

Dated and delivered at Nairobi this 18th day of October, 2004.

ALNASHIR VISRAM

JUDGE