REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 569 OF 1999

KARANJA WANJIHIA ……..…….
APPELLANT

VERSUS

DUNCAN KIWARA WANJIHIA

KARIUKI WANJIHIA

JOHN KAGO WANJIHIA

MICHAEL WANJIHIA ONESMUS

ELIUD MUTHUNGU ……
RESPONDENTS

JUDGMENT

(An appeal from the Judgment of Hon. Mr. E. O. Owino, SRM in

Thika CMCC No 316 of 1991 delivered on 3rd December, 1991)

. By a Plaint filed in the lower court on the 2nd January, 1991 the Plaintiffs/Respondents claimed that the 10 acre parcel of land being L. R. No Ndarugu/Karatu/255 (hereinafter referred to as "the suit land") was registered in the Appellant's name in trust for the Appellant and all the Respondents, and sought sub-division and transfer of 7.5 acres to themselves. They are all members of the same family. The 1st and 3rd Respondents are brothers; the 2nd, 4th and 5th Respondents are their nephews while the Appellant is the eldest brother to the 1st and 3rd Respondents. According to the Respondents the suit land measures about 30.4 acres. They admit that 20 acres of this properly belongs to the Appellant. However, the balance of 10 acres or so is held by him in trust for all the parties – the Appellant as well as the Respondents, and ask that the Appellant transfer 7.5 acres to the Respondents. According to them the suit land was originally owned by their common father, Mr Njihia Wanjema, who died in 1932. Upon his death, all the six sons inherited 20 acres each, and according to the Respondents there was a balance of 10 acres which was registered in favour of the Appellant to hold in trust for them.

The Appellant, on the other hand, claims that there was no such "balance" of land left; that he inherited

the said 10 acres of land from his mother; and has been its registered owner since 1957.

The parties submitted the dispute for resolution before the Chief and Elders who found that the Appellant did indeed hold the aforesaid 10 acres in trust, and ordered that he transfer 7.5 acres to the Respondents. The Appellant refused to do so and the Respondents went to the lower court. The trial magistrate, in a brief and unreasoned Ruling, agreed with the elders, but with a slight difference. He felt that because the Appellant had "cared for the land in question" a "token" of 4 acres should be awarded to him, while the Respondents should take 1.2 acres each.

The relevant part of the trial magistrate's brief Ruling is as follows

> ***: "I have duly considered the evidence on record and the exhibits in the court file and I am inclined to believe the Plaintiffs and their witnesses that 10 acres of land is held in trust for themselves out of land parcel No. Ndarugu/Karatu/255, I do not have any reason to make a departure from the finding of the elders and the local chief. So even if the Plaintiffs sold what they inherited, that cannot be used as a bar to stop them get a share from the balance of 10 acres. Because the defendant cared for the land in question I would consider a token of 4 acres to the defendant and 1.2 acres to each of the Plaintiffs."***

It is against that Ruling that the Appellant has appealed to this Court, citing the following grounds of appeal:

> ***1. The learned trial magistrate erred in both law and fact in holding and for not giving reasons and/or grounds why he so held that the Appellant held 10 acres out of land parcel Ndarugu/Karatu/255 in trust for the Respondents.***
>
> ***2. The learned trial magistrate erred in law in making a finding that the Respondents had proved their case based on trust.***
>
> ***3. The learned trial magistrate erred in fact and law in not finding that the Appellant was the registered owner of land parcel Ndarugu/Karatu/255 absolutely and held an indefeasible title in regard thereof being a First Registration under Registered Land Act Cap 300 Laws of Kenya.***
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> ***4. The learned trial magistrate erred in law and fact in not finding that the Appellant had been in an interrupted occupation and use of the alleged 10 acres held in trust for more than 30 years since First Land Registration in exclusion of any other party(ies) i ncluding Respondents.***
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> ***5. The learned trial magistrate erred in law and in fact in giving undue weight to the evidence of the Respondents specifically the evidence of the local Chief who was never even called as a witness to verify, justify or even clarify the grounds upon which he based to give land to the Respondents from the Appellants' land parcel Ndarugu/Karatu/255.***
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> ***6. The learned trial magistrate erred in law and in fact by making findings on speculations instead of fully and adequately analyzing the evidenc e tendered before him by both the Appellant and Respondents.***
>
> ***7. The learned trial magistrate erred in law and in fact in not considering at all and analyzing the evidence given by (and for) the Appellant and in not giving any grounds or reasons why he so disr egarded the Appellants' evidence.***
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> ***8. The learned trial magistrate erred in law in making an order for subdivision and transfer of resultant 1.2 acres to each of the Respondents out of the Appellants' land parcel Ndarugu/Karatu/255 without any supporting evide nce whatsoever.***

9. The learned trial magistrate erred in law in deciding the case against the weight of evidence and not requiring that the Respondents prove their case on a balance of probability.

10. The learned trial magistrate erred in law in not making an or der to condemn the Respondents meet the costs of the suit.

The only issue in this appeal is whether on a balance of probability, the Respondents had established that the Appellant held the suit land in trust for them.

The Appellant's Counsel, Mr Kugwa, argued that no such trust had been established; that the Appellant was the 1st registered owner, having indefeasible title, and in possession of the suit land for over 20 years; that there had never been a claim of trust from 1957 when the Appellant was registered as owner until 1991 when the suit was commenced; that there was no evidence before the trial court establishing a trust; and that the trial court had treated the case "casually".

Mr Ngaruiya, representing the Respondents, submitted that the evidence relating to trust was led before the Elders, whose record of proceedings was relied upon by the trial court; that the register of ownership need not stipulate that the title was held in trust (See **Kanyi vs Muthiora (1984) KLR 712**) ; that the suit land had been occupied by all the parties until the Appellant commenced action, indicating that it was trust land; and that the Respondents had established a case of trust on a balance of probability.

Looking at the evidence on record it is clear that the Appellant is the registered owner of the suit land. He produced various title deeds showing that each Respondent was given his land and that the suit land is absolutely owned by him. He testified before the lower court that some Respondents sold their parcels of land and that was the reason for claiming a share from his land. The Appellant's witnesses corroborated his evidence and testified that he did not hold any land in trust for the Respondents. The Respondents admitted in the lower court that each of them got a share of inheritance but that there was a 10 acre parcel registered in the name of the Appellant for subsequent division between all the parties.

After hearing all the witnesses, the trial court came to a quick conclusion, summarised in a 9-line paragraph of what I believe is a completely unreasoned ruling. There was indeed no proper evidence led to demonstrate "trust", and the Magistrate essentially relied on the findings of trust by the elders. "Trust" is an issue both of fact and law. It is a serious issue, and needs to be demonstrated through proper evidence and verification of evidence. Instead of testing the evidence thoroughly in Court, and providing a reasoned Judgment about why he believed some witnesses, and outlining what facts and factors led to the establishment of a trust, the Magistrate simply relied on the findings of the Elders. Those findings were not evidence before the court, and had very little evidentiary value. Those findings made no logical sense when seen in the context of the background of this case. For instance, why would a father who has carefully divided land between his six sons, giving them 20 acres each, actually leave 10 acres in trust to one son (the Appellant) to be divided later? It simply makes no logic. Secondly, if indeed the Respondents had a claim for trust, why did they wait 20 years to advance their claim? The fact is that there was no evidence of any such claim. The Appellant has been the registered owner since 1957, his title in indefeasible; there is no clear evidence that he holds it in trust for anyone, and I completely agree with the Counsel for the Appellant that the trial court treated this case in a very casual manner, and its Judgment was contrary to the evidence before it.

Accordingly, and for reasons outlined, I set aside the Judgment of the lower court, and allow this appeal with costs to the Appellant both here, and in the lower court

. Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE