REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 808 OF 2001

GITAU NJOROGE …… APPELLANT

VERSUS

BERNARD THIONGO NJOROGE …….…. RESPONDENT

(Appeal from Judgment of the Learned Resident Magistrate Mr.

P.N. Morigori in the Senior Principal Magistrate's Civil Case No. 317 of 1999 at Kiambu delivered on 25th October 2001).

JUDGMENT

The Appellant, as the registered proprietor of the suit parcel of land No. Kiambaa/Muchatha/T. 182 filed this suit against the Respondent, his own brother, asking for orders:

> That the Respondent do give vacant possession of the premises known as plot No. Kiambaa/Muchatha/T. 182 to the Appellant forthwith.

Mesne profits;

> and Costs of the suit.

The suit parcel of land measures approximately 0.22 acre.

Although in the Plaint the Appellant did not say how he acquired ownership of the suit parcel of land, during the hearing his case was that he bought the land on his own from one Mbugua Wamagini for Kshs 800/=. The Appellant, therefore, claims absolute ownership of the land.

Sometime in 1989, the Appellant's father, one Njoroge Ngaru, instituted civil suit No. 7 of 1989 in the Senior Resident Magistrate's court at Kiambu the case having been filed as an award from a decision of a panel of elders who had ruled that the suit parcel of land be transferred to Njoroge Ngaru.

The Senior Resident Magistrate at Kaimabu ruled that the elders had no jurisdiction and that, therefore, the proceedings and the award were a nullity. The learned magistrate, Mr. S.A. Wamwayi, set the award aside and advised that any aggrieved party was at liberty to file suit in a court of competent jurisdiction. He further granted right of appeal to the High Court.

That ruling was delivered on 18th July 1989 and thereafter everything seems to have been quiet until

after Njoroge Ngaru had died. The Appellant therefore filed the instant suit on 1sy July 1999.

The Respondent's case is that the suit parcel was bought from Mbugua Magiri, by and did belong to the father of the parties Njoroge Ngaru and that the Appellant was registered as the proprietor instead of their father because their father wanted to be seen, by the Government, as landless so that he could benefit from the then expected allocation of land to landless people by the Government. Other adult members of that family also wanted to benefit from the Government scheme, and like their father, also wanted to be seen as landless. The suit parcel of land was therefore registered in the name of the Appellant, then a minor about 13 years old, who could not qualify for the expected Government's allocation of land to adult landless people. By so holding the suit parcel of land, the Appellant held it in trust for the whole family of Njoroge Ngaru.

The learned trial magistrate agreed with the Respondent's case holding that even at the age the Appellant claimed of 18 years in those early years of 1960s, the Appellant could not have obtained Kshs 800/= to purchase the suit parcel of land. Indeed in the evidence the Appellant did not show how he obtained the money to buy the land. No side produced evidence of a written contract concerning the sale transaction each side alleged. But curiously Mr. Wandugi, counsel for the Appellant, has been at pains to convince the court that since the respondent produced no such evidence, it means there was no written agreement between the seller and father of the parties and that without such a written agreement, the Respondent's case failed because under the Registered Land Act (Cap. 300 Laws of Kenya), there could be no valid contract of sale where that contract is not in writing. He did not refer to any provision of the Registered Land Act to that effect.

He relied on a copy of the land register (green card) which the Appellant produced showing he is the registered owner and did not therefore think that if the validity of the contract of sale between the Respondent's father and seller were questioned for lack of evidence that the contract was in writing, the position could be similar with respect to the contract of sale between the Appellant and his seller notwithstanding the fact that the Appellant is the registered proprietor, a fact not disputed.

I should point out that although counsel for the Appellant seems to think the Appellant got registered as proprietor on a first registration, that is not so because a look at the green card produced by the Appellant clearly shows that the Appellant got the land on transfer from Kiarii Magiri who had the first registration.

From the evidence before the trial magistrate, the Appellant was the only witness who gave evidence on his side to say that he bought the land. His other two witnesses only came to say that they knew the Appellant was in occupation of the suit parcel of land. They knew nothing about the alleged purchase of the suit piece of land by the Appellant.

On the side of the Respondent his evidence that it was the father of the parties who bought the land was supported by the evidence of DW2, Peter Kimani Njoroge and DW 4,Karuri Ngugi.

Karuri Ngugi said he knew that Njoroge the father of the litigants bought the suit parcel of land for Sh 800/=. The witness saw Njoroge pay the money to the seller Mbugua although he did not know the source of the money. He saw the whole family live on the suit piece of land. The witness knew why the land was registered in the name of the Appellant then a minor. It was because adult members of the family wanted and expected, as landless people, to be given land by the Government.

DW2, Peter Kimani Njoroge, a brother of the Appellant in his evidence told the court that he knew that his father was buying the suit parcel of land from Mbugua Magiri for Kshs 800/=. He said that by then he was working as a driver and gave his father the money to buy the land. He said that the Appellant was registered the owner of the land as a trustee for the family so that their father could get land. He wanted the suit piece of land to be shared.

Apparently, these are parties who are not keen about use of names. The Appellant talks of the seller of the land as Mbugua Wamagini while the Respondent mentions the name Mbugua Magini while the Respondent mentions the name Mbugua Magiri as a copy of the relevant land register (green card) shows

the transferor as Kiarii Magiri. Are those three not names of one and the same person? In any case, looking at the situation, it could be asked why the Appellant's parents as well as the Appellant's brothers could have gone to live on a piece of land bought by the Appellant, a minor, on his own and from his own resources. Was it not because the land belonged to them all having been purchased by their father?

If the land was bought by the father of the parties and it was decided that it be registered in the name of the Appellant to hold it for the family, that was a proper situation where the Appellant should have been described in that capacity in the instrument of acquisition and according to section 126 (1) of the Registered Land Act, the Appellant's registration as a proprietor should have been with the addition of the words

"as trustee".

But this was a family of non lawyers who were doing things by themselves. They could not think of those technicalities and even if anyone of them had that idea, the cordial relationship then existing among them could make them see those technicalities as mere bothers to be ignored without any danger of loss. None of them could imagine that the then small innocent teenager would, in the closing years of 1990s, turn out to be what the Appellant is to-day. None of them could imagine the Appellant would be telling them to-day that they should have complied with section 126 (1) of the Registered Land Act.

Section 126 (1) is not, however, mandatory. It does not say that where there is a trust, that section must be complied with. This is because the section recognizes that there are different types of trusts, some of them, difficult to handle under that section. The implied or constructive trusts for example, may not be shown under section 126 (1).

It means therefore that there are trusts which cannot or may not be shown as stipulated by section 126 (1) yet they remain trusts to be recognized by a court of law and the trust alleged by the Respondent in this suit is one of those trusts.

From the evidence before the ourt, I am satisfied that even on the balances of probabilities, the Appellant did not succeed in establishing his claim. On the contrary, the balance weighs in favour of the Respondent and in the circumstances the learned Resident Magistrate, P.N Morigori, was entitled to come to the conclusion he came to in his Judgment delivered on 25th October 2001.

As I find no lawful ground to interfere with that judgment, this appeal be and is hereby dismissed with costs to the Respondent.

Dated this 23rd Day of May 2003.

J.M.KHAMONI

JUDGE

Present:

Mr. Wanddugi for the Appellant.

Mr. Ngugi for the Respondent.