

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 222 OF 2002

MWANGI KAINGI APPELLANT

VERSUS

JEDIDAH NJERI MAINA RESPONDENT

JUDGMENT

This is an appeal against the decision of A.M. King'oo, then a Resident Magistrate in the Senior Principal Magistrate's Court at Murang'a, in Civil Case No. 55 of 1989 where the original defendant was Maina Harun Kambogo. That defendant subsequently died and was substituted by his personal representative, his wife Jedidah Njeri Maina who is the Respondent in this appeal.

Reading grounds in the memorandum of Appeal, the impression given is that this is a dispute in a succession Cause but when evidence is looked at, the dispute in reality is not over succession.

Although the Appellant gives the impression that he is a brother of Maina Harun Kambogo and that they come from a common biological father Harun Muya alias Harun Kambogo, the correct position from the evidence before court is that the Appellant was born to his mother before his mother got married. His mother was subsequently married to Kaingi Muya a brother to Harun Muya alias Harun Kambogo. Although the parties have chosen to be vague, it is apparent that Kaingi Muya was the biological father of the Appellant. Following the marriage of his mother by Kaingi Muya, the Appellant and his mother lived with Kaingi Muya for a number of yeas until the relationship between Kaingi Muya and the Appellant's mother became bad and Kaingi Muya neglected the Appellant's mother to the extent of raising Harun Kambogo's sympathy. As a result Harun Kambogo gave shelter, at his home, to the Appellant's mother and she lived there with the Appellant as Harun Kambogo cared for them and subsequently started living with the Appellant's mother as husband and wife in addition to his first wife the mother of the Original Defendant in this suit Maina Harun Kambogo. Kaingi Muya died in 1977.

It was while that relationship existed that a document which was produced as plaintiff exhibit number 3 was made and signed on 27th February 1983. That document, described by the parties as an agreement, is in essence the basis of the Plaintiff's suit in these proceedings. Signed by 14 people who included the Appellant at number five, the original defendant at number four and Harun Kambogo at number three; was to the effect that the original defendant would transfer half of parcel of land number LOC.11/MARAGI/1043 to the Appellant and the Appellant would also transfer half of parcel of land number LOC. 15/GAKUYU to the original defendant. The particular number of LOC. 15/GIKUYU was not given but it was understood subsequently that the parties meant LOC. 15/GAKUYU/707 which belonged to Kaingi Muya as the Appellant thought he was to inherit the land following the death of Kaingi Muya. But the Appellant, not having been keen, only came to blame himself when he learned later that his step mother widow of Kaingi Muya had inherited the land following succession proceedings. The Appellant did not therefore have land to exchange with the Original defendant in terms of the agreement in Plaintiff exhibit number 3.

However, since the Original Defendant in readiness to complying with that agreement had already sub-divided parcel of land number LOC. 11/MARAGI/1043 into LOC. 11/MARAGI/2048 and LOC. 11/MARAGI/2049 with the intention of transferring LOC. 11/MARAGI/2048 to the Appellant and since the Original Defendant refused to go further to effect the transfer when he realized that the Appellant had no land from LOC. 15/GAKUYU/... to transfer to him in exchange and the Appellant being of the opinion that land parent number LOC. 11/MARAGI/1043 belonged to Harun Kambogo and that Harun

Kambogo had decreed that the Appellant gets half of that land whether in exchange or not as his right under inheritance and claiming that Harun Kambogo is his father and the Original Defendant his brother, the Appellant went to the court at Muranga and instituted these proceedings to press for his claim. That court did not grant the Appellant's claim. Hence this appeal.

Harun Kambogo died in May 1993. These proceedings were therefore instated in Muranga Court in 1989 when Harun Kambogo was still alive. But on 14th July, 1978 Harun Kambogo had transferred the whole of parcel of land Number LOC.11/MARAGI/1043 to the Original Defendant absolutely. No condition or any encumbrance was attached under the Registered Land Act (Cap.300 Laws of Kenya). From that date, Harun Kambogo ceased to have any interest in that parcel of land and could not therefore pass any interest to the Appellant on 27th February 1983 when exhibit Number 3 was signed even if it was Harun Kambogo's intention to pass some interest in that land on that day to the Appellant. It was no longer their fathers land to be inherited. The suit parcel of land was by then the absolute registered property of the Original Defendant.

By that time the fifth year was running from the date of the registration of the original defendant as absolute proprietor of that parcel of land. I have said what was signed on 27th February 1983 was an agreement. By the time these proceedings were instituted in Muranga Court on 1st March 1989 a period of more than six years had already run out thereby rendering the action time barred.

Moreover, the agreement involved agricultural land. Consent of the land control board was necessary. None was obtained thereby rendering the agreement void and, therefore, not enforceable in law.

Also consideration having failed, there was no obligation on the part of the Respondent to fulfill the agreement in exhibit 3. That was one agreement and left no room for the creation of two separate agreements from that one agreement so that the two separated portions of the agreement could each be performed separately as the Appellant wants it be done. It was an agreement to exchange portions of land and that exchange failed when the Appellant could not inherit the piece of land he thought would inherit from Kaingi Muya's estate.

From what I have been saying above, therefore, the Appellant's case had no merits. I have come to the same conclusion the learned trial Magistrate came to. I find nothing in this appeal to hold otherwise.

Accordingly, the Appellant's appeal herein be and is hereby dismissed with costs to the Respondent.

Dated this 15th day of May, 20003.

J.M. KHAMONI

JUDGE