



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 127 OF 1998

MIRRIAM MUTHONI KIROGOAPPLICANT

VERSUS

BENSON NGARUYA KIHURESPONDENT

JUDGMENT

This appeal arises from the Judgment (order) of the Senior Principal Magistrate (F.N. Muchemi (Miss)) delivered on 29th August, 1997.

In the original case, the deceased Kirogo Kariuki owned land known as Githunguri/Githiga/679, said to measure 2.17 acres while the respondent herein owned Githunguri/Githiga/209 said to measure 1 acre.

The two agreed to exchange these parcels with the deceased taking over the respondent's land and the respondent taking over the deceased land. The transactions took place between 1972 to 1979 when the respondent got title to the portion transferred to him by the deceased – (see def. Exh. 2).

The deceased died in 1986 and his wife, the appellant, went to court to claim part of the deceased land given to the respondent claiming that L.R. No. Githunguri/Githiga/679 was bigger than Githunguri/Githiga/209 and that the respondent, holds the extra portion in trust for her.

The appellant put the extra portion at 1.17 acres and prayed for it to be transferred to her on such terms as the court deems suitable.

In a defence filed by the respondent, he averred that according to the agreement for the exchange he was to pay an extra Kshs.4000/= and a further Kshs.5125/= to the deceased to compensate him for his bigger land and for coffee plants on the land.

The learned magistrate heard the case on 1st July 1997 and delivered her judgment on 29th August 1997 dismissing the suit with costs.

This is the cause of this appeal the memorandum whereof has two grounds of appeal; namely that the magistrate failed to appreciate that once the appellant had established that there was an exchange of the two parcels of land, the deceased of which was bigger than that of the respondent, the only remaining issue which ought to have been decided in the appellant's favour was whether or not the respondent compensated the appellant for the excess piece of land measuring about 1.17 acres; and that she erred in failing to find that the respondent held the excess portion of land measuring 1.17 acres in trust for the appellant and her family and ought to have reconveyed it to her in the absence of the evidence on a balance of probabilities to show that the respondent paid for the excess portion.

The appeal was heard in this court on 13th May 2002 with counsel for the appellant reiterating that the

excess land exchanged by deceased was and is still held by the respondent in trust for the appellant and her family since the respondent did not pay for it; nor did he pay for the coffee trees.

Counsel for the respondent countered that this transaction started in 1972 and ended in 1979 and that the deceased died 7 years after the transaction without having any dispute with the respondent over this transaction.

That if anything it was the deceased who should have filed this action.

Counsel stated that there was no evidence of respondent holding excess portion of Githunguri/Githiga/1149 in trust for the appellant.

That there was no reason for the deceased to give a stranger land to hold in trust for his wife.

He also submitted that there has been an inordinate delay in making this claim in court and no reason has been given for this delay; and called for the dismissal of the appeal.

The plaintiff (appellant) case was that she had sued the respondent claiming from him a portion of Githunguri/Githiga/1149 which belonged to her husband and his brother Kingoiru Kariuki jointly in the original title before subdivision, known as Githunguri/Githiga/679.

That the respondent had been given a portion of that land by her husband. That the respondent had land known as Githunguri/Githiga/209 which he exchanged with that of her husband and that the latter was bigger than the former.

That the deceased portion had 150 coffee trees which the respondent did not pay for.

That the deceased land was 2.17 acres which the respondent took by way of exchange but that the deceased did not ask the respondent to pay for the excess acreage so she claimed the excess portion of 1.17 acres from the respondent which she claimed to be her family land and asked the court to make an order for the respondent to subdivide the land and transfer 1.17 acres to her.

That was all the evidence the appellant adduced, but this evidence was given against the back ground that the deceased died about 7 years after this transaction had taken place and that for all those seven years the said deceased had not complained that the respondent owed him any money or land arising from that exchange.

In the lower court the appellant simply testified and testified about what she thought the respondent owed her but made no attempt at all to lay the basis for this claim.

Where, for example, did she get the idea that out of the exchange which took place 15 years earlier – note, she filed the suit 8 years after the deceased death, the respondent did not pay for the excess land of 1.17 acres?

And for the 7 years the deceased lived after the transaction why did the appellant not ask him to claim for this excess if indeed such issue existed then, rather than wait 8 years later to lay the claim?

And if this transaction took place in 1979 – 80 how can the appellant purport to make this claim for land when over 12 years have passed, purporting that she is making the same claim under the law of trust when she offered no evidence to prove the same? (see Section 7 of Law of Limitation Act).

After the magistrate considered all these circumstances, she was right in saying that the appellant had not proved her claim against the respondent on a balance of probabilities and I have no reason to differ from her finding.

In my view the appellants was a far fetched remote claim not worth a reasonable court's consideration.

I dismiss this appeal but in view of the advanced age of the appellant I direct that each party pays his/her costs of this appeal and the case in the lower court.

Delivered this 23rd day of May, 2002.

D.K.S. AGANYANYA

JUDGE