



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 405 OF 1993

RICHARD MWANGI APPELLANT

VERSUS

GRACE GAGUU MARUA

JANE WAMBUI MARUA RESPONDENTS

J U D G E M E N T

The deceased Marua Gathurwa, died on 3rd October, 1985 leaving behind two widows, namely, Grace Gakuu and Jane Wambui Marua, the respondents in this appeal.

During his lifetime, the deceased owned a piece of land registered in his name and known as MUTIRA/KAGUYU/33. The land measured either 6 or 8 acres.

After his death, the widows set about and filed a Succession Cause (No. 56 of 1989) seeking letters of administration intestate to his said land.

It would appear the widows obtained the grant of letters of administration intestate but before the same was to be confirmed the deceased younger brother Richard Mwangi Gathutwa filed a protest to such confirmation claiming a share of the land on the ground that the deceased had been allocated this land by the clan as trustee for himself and also for his brothers, the said Richard Mwangi Gathutwa and another called Kanandu.

The latter, it is noted was not a party to the succession cause and is not to this appeal either.

The dispute was head by the Resident Magistrate (E.N. Maina) on 26th August 1993 and 4th October 1993 when evidence was taken from the widows (respondents) and Richard Mwangi the appellant and his witnesses.

The Magistrate wrote and delivered his judgment on 4th November, 1993 disallowing the appellants' claim to this land – the suit property, and confirming letters of administration to it in the names of the respondents, hence this appeal.

The memorandum of appeal filed in this court on 11th November, 1993 listed four (4) grounds of appeal, namely that the learned Magistrate erred in law and fact in finding that the respondent's late husband did not hold the suit property in trust for himself and the appellant and his brother: that he erred in holding that the appellant and his brother were licensees on the land held in trust for them and their late brother; that he erred in failing to appreciate that the respondent's husband was registered as the proprietor of the suit property instead of his father the late Muthutwa Munyotu who was dead at the time

of land demarcation and that he erred in failing to appreciate the fact that the appellant and his brother had been in possession even during the lifetime of their deceased brother, Marua Gathutwa.

Counsel for the parties appeared in this court on 16th September, 2002 to submit in the appeal either for or against it.

Counsel for the appellant referred this court to the evidence of the appellant in the lower court and that of two clan witnesses to show that the deceased held the suit property in trust for himself and his brothers, the appellant and Kanandu.

Counsel also referred to the case of *Gatimu vs Gachangi* (1976) KLR 253 to persuade the court about a Kikuyu custom where land is registered in the name of the eldest son to hold in trust for himself and his other brothers.

Counsel also submitted on the occupation and usage of the suit property by the appellant and his other brother for a long time without the deceased intervention during his lifetime to show that the latter held the suit land in trust for himself and his other brothers.

He discounted suggestions that the appellant was using the land as a licensee.

Counsel prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and said there was no evidence to establish a trust either expressly or impliedly.

She submitted further that both the appellant and his brother Kanandu had their own plots on which they had built houses at Gatwe and Kagumo respectively which implied that they must have been given these plots because they were landless.

She stated that though the appellant alleged he had planted coffee or tea on the suit property, he tendered no documents to prove this.

According to counsel, while the appellant had no crops on the suit plot, it was Kanandu who had planted coffee thereon when the deceased was away in Nakuru.

She prayed that this appeal be dismissed with costs. These are the submissions made before me by counsel for both parties on which I should make a decision.

In the first place and as I have stated earlier, though the appellant attempted to drag the name of Kanandu in the lower court proceedings and even on this appeal, the said Kanandu did not see it fit to have his name enjoined therein.

This really means that Kanandu knows the suit property is solely that of the deceased and that he has no share in it.

Otherwise from 1989 when the Succession Cause was filed up to 1993 when the judgment subject to this appeal was delivered, he should have made an application to enjoin himself in the suit, particularly if it is true that he had planted coffee or tea thereon as alleged.

Secondly though the appellant stated in his testimony that the deceased had accepted that he would give him and his other brother Kanandu a share of the suit property, he, in the same evidence, stated that the said deceased had tried to evict him from the same property in June 1985 and this is why he went to the lands office to place a caution on the said property.

And if the deceased had indeed accepted to give the appellant a share of land in June 1985, the latter did not pursue this matter to its logical conclusion until the former died in October 1985.

What would a reasonable court make of this rather than to conclude that there was no such agreement from the deceased to share out his land to the appellant.

Then in cross examination the same appellant said that even before 1985, the deceased in 1971 stopped the appellant from planting crops and to build on the suit property.

Then he went to Gatwe where he said he was given or allocated a plot where he put up a house in which he lives with his family.

And that before he was allocated this plot he was living in Nakuru.

This evidence would have given the impression to the lower court of a person who was nowhere and did not know when or how the deceased acquired this suit property.

In those circumstances, the evidence of the two elders that one of them (Evans) took part in the clan deliberations which allocated the suit property to the deceased in trust for himself and his other brothers was bound to be rejected as false.

Thirdly, although the second witness for the appellant in the lower court stated that he was not a member of the committee giving out land, he however said during cross examination that they used to hold clan meetings and would discuss how the land would be allocated.

That minutes of meetings would be taken and that if it was decided that Marua (deceased) would hold land in trust for his brothers this would be recorded.

This was an important piece of evidence in the case subject to this appeal and it would be expected that such record would be produced to confirm that the deceased held the suit property in trust for himself, the appellant and his brother Kanandu. No such record was produced, hence the evidence of the appellant and his witnesses that the deceased held the suit property in trust went without the required support.

Fourthly, the evidence that the appellant had tea or coffee crops on the suit property was not supported by any concrete evidence. If this was true, he would have produced any number or card to show the factory where he delivers the tea or coffee.

In any event, this alone would not prove that the deceased held the suit land in trust for him his other brothers.

Fifthly when the appellant lodged a caution against the title to the suit land on 5.10.84, he claimed a licensee's interest and not a proprietary one.

And when he testified in the lower court, he did not explain why he claimed a licensee's interest in the caution only to come up in the succession cause to claim a proprietary one.

When all these matters are considered, this court comes to the conclusion that the lower court was right in observing that the appellant waited for the deceased to die to start harassing his widows and that he had no right of proprietorship over the suit land.

In my view the authority of **Gatimu Kinguru vs Muya Gachangi [1976] KLR 253** was not applicable to the facts of the case subject to this appeal.

This appeal has no merit and is dismissed with costs.

Delivered this 23rd day of September, 2002.

D.K.S AGANYANYA

JUDGE