REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL NO. 80 OF 1996

MWANGI NJIHIA AND ANOTHER ……………………………………….APPELLANTS

VERSUS

MICHAEL MAINA MUCHIRI ………………..……RESPONDENT

J U D G M E N T

This appeal arises from the decision of the Resident Magistrate (E.O. Awino) delivered on 4th March 1996 wherein he ordered the appellant evicted from L.R. No. Chania/Mataara/1628 registered in the names of the respondents.

Previously this parcel was part of land number Chania/Mutaara/440 – registered in the name of the appellant's father.

It was later sub=divided to give rise to Chania/Mutaara/1627, 1628 and 1629. Plot Number Chania/Mataara/1627 (2) acres was allocated and registered in the name of Njuguna Gucu; Chania/Mutaara/1628 (2) acres registered in joint names of the respondents and Chania/Mutaara/1629 (7.40 acres) in the name of Muchiri/Gucu – the appellant's father.

I note from the abstract of Register (exh. 1) that the parcel Chania/Mutaara/1628 was initially registered in the name of the 1st respondent before being transferred to joint names of the two respondents five (5) months later. It would appear the 2nd respondent had purchased one (1) acre thereof.

The first respondent, the appellants father and Njuguna Gucu were brothers. Another brother, Waweru Gucu, had apparently, died before the sub-division of the land and he left behind no wife or child.

In the meantime, the appellant lived on plot number Chania/Mataara/1628 before and after subdivision and when the respondents sued him in the appeal subject to this case to have him evicted from that parcel, he alleged Waweru Gucu had given it to him before he died, as a gift and that he had lived thereon for more than twelve (12) years.

The case was heard by the Resident Magistrate, aforesaid, on 22nd September, 1993, and 29th October 1993 when parties testified thereon. The magistrate wrote his judgment on 4th March1 996 in which he ordered the eviction of the appellant from the suit land and also awarded the respondents Kshs.15,000/= as general damages plus costs of the suit.

An appeal filed herein on 30th April 1996 listed four (4) grounds of appeal; namely, that the learned magistrate flouted the provisions of Section 6 of the Civil Procedure Act, that he disregarded Material

evidence to arrive at a bad decision; that he failed to analyse all the evidence and that he erred in awarding the respondent general damages of Kshs.15,000/= without any basis.

The appellant (in person) and counsel for the respondent appeared in this court on 18th September, 2002 to submit on the appeal either for or against it.

The appellant repeated that it was wrong for the magistrate to proceed with the lower court case when there was a similar case between the same parties pending in the High Court. That the first respondent did not prove that he had anything on the suit land to entitle him to own it.

That the respondents and their witnesses were not reliable and that a deceased brother of the appellant's father had given him the 2½ acres before he died in 1975 but that he – the appellant had occupied it in 1971.

According to the appellant the magistrate should have considered the developments he had made on the suit land and that he should have been allocated that area where he had carried out developments.

And that the magistrate erred in awarding general damages to the respondents when they had not made any developments on the suit land.

The appellant submitted about the death of the 1st respondent and lack of substitution for him and prayed that this appeal be allowed with costs.

Counsel for the respondents opposed the appeal and submitted that the judgment delivered by the magistrate was not unlawful.

That though the learned magistrate had stayed the lower court case pending the finalization of the High Court case, it was later brought to his notice that the High Court case involved different parties; that in any case, the High Court case had been dismissed and what was pending were taxation of costs therein.

Counsel submitted that the appellant was a licensee in plot number Chania/Mataara/1628 and this licence had been terminated. That since during the sub-division of the original land Chania/Mataara/440 the appellant's father got a bigger share, he, the said appellant should not be complaining, that infact he had been given a portion of land by his father but he had refused to take possession of it.

That there was no evidence of the appellant's assertion that he was given the suit land by the deceased, or that if it was as a gift it should have been registered or that there was no evidence of such gift in the lower court.

That since Waweru – deceased had not been registered owner of the suit property, it having sub-divided and given title after his death, he had no land to pass to the appellant.

Counsel supported the award of general damages of the developments the 1st respondent had made on the land and had been denied the right to pick that tea.

Counsel submitted that this appeal was filed out of time nonetheless and it should be dismissed with costs.

These are the submissions I have heard and recorded for consideration and decision.

As regards the award of damages of Kshs.15,000/= to the respondent, there was no evidence or basis for awarding these.

General damages are such damages as the law will presume to be the direct natural or probable consequences of the act complained of.

In the plaint, there was a claim for general damages for trespass. However, during evidence, it emerged that neither of the respondent's had ever occupied the suit land and that the appellant had been in occupation of the same before demarcation and that it was after subdivision and allocation of portions to 3 brothers that it was found he was occupying a portion not allocated to him or to his father. This is why he was asked to move out therefrom and go to his father to ask for his share.

Before this sub-division, the respondents could not validly allege the appellant had trespassed on their portion of land as they had no title to it to talk of the alleged trespass.

Even during the evidence, the respondent made no allegation of an act the appellant had committed on the land Chania/Mataara/1628 from which general damages would follow as a natural or probable consequence.

In those circumstances, I am not convinced there was a sound basis for the lower court to award the respondents general damages in the sum of Kshs.15,000/=. The appeal in regard to this claim be and is hereby allowed.

As regarding the appeal against an eviction order issued by the lower court, the appellants main contention is that his uncle Waweru, had given to him the portion now bearing the number Chania/Mataara/1628.

However, it was generally agreed that the subdivision of the original land Chaania/Mataara/440 was undertaken after the said Waweru had died. He left no wife or children.

And even when the sub-division was done, only 3 portions were created, numbers Chania/Mataara/1627, 1628 and 1629 for the 3 surviving brothers, namely Njuguna Gucu (1627), Mwangi Njihia (1st respondent) (1628) and Muchiri Gucu, the appellant's father (1629).

No portion was allocated to set aside for Waweru, hence he had no land at the time of his death to give to the appellant as a gift in 1975 when the same appellant alleged he settled therein 1971!

The appellants father was allocated 7.4 acres of the land and it would only have been prudent for the appellant to go to his father and ask for a share of it for himself, and if he was lucky to get, he would persuade the 1st respondent to exchange it with the latter's portion number Chania/Mataara/1628 instead of instituting this, otherwise unfruitful litigation.

It is true to say that though the learned magistrate had stayed delivery of judgment in the case subject to this appeal pending the outcome of the High Court Civil Case No. 3904 of 1992, it was later brought to his notice, infact through an application, that the High Court case did not involve the same parties as those in the case subject to this appeal, and or that that case had been determined; hence Section 6 of the Civil Procedure Act did not apply.

As to the burden of proof, the respondents adduced sufficient evidence to prove on a balance of probabilities that they were legal proprietors of the suit land, having acquired a joint title thereto on 23rd November, 1992 – *see Section 27 of the Registered Land Act.*

It is not clear which particular year the appellant settled on the suit land, but whichever year that was, there have been prolonged disputes thereon either in court or through clan elders such that he cannot benefit from the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Weighing the evidence adduced in the lower court either way and even the submission on this appeal, I am convinced the lower court judgment was sound and that except what I have already send above the appeal against the award of general damages, this appeal has no merit.

It is dismissed with no order for costs.

Delivered this 1st day of October, 2002.

D.K.S. AGANYANYA

JUDGE