REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 47 OF 2019

JACKSON MWITI M'RINYIRU...APPELLANT

VERSUS

SILAS M'RINYIRU MBUI...RESPONDENT

(Being an appeal from the judgment and decree of the Honourable J. Irura, principal Magistrate in Nkubu – PMCC No. 9 of 2012 delivered on 6.2.2019)

JUDGMENT

1. The parties herein are family, whereby the appellant is a son of the respondent. On 7/2/2012 the respondent filed the suit in the chief magistrate's court at Nkubu civil case number 9 of 2012 seeking an order of eviction of the appellant from the land parcel no. Abogeta/L-Kiungone/809 (the suit land). It was the respondent's case that he is the lawful owner of Abogeta/U-Kiringa/1283 and Abogeta/L-Kiungone/809. The appellant had entered Land parcel Abogeta/L-Kiungone/809 and started damaging the plaintiff's properties and chasing away the plaintiff's servants working on the suit land.

2. The appellant in his statement of defense opposed the plaint and claimed that the suit land is family and customary land which initially belonged to the plaintiff's father. The plaintiff was at all times a trustee of the defendant and therefore he has proprietary interest in the suit land. The appellant also claimed that he has continuously occupied, developed and utilized part of the suit land since his childhood and the respondent does not cultivate or utilize the part of the suit land which is occupied by the appellant.

3. During the hearing of the case before the trial court, the respondent stated that the appellant had always lived with him on the suit land. His father also used to stay with him on the same parcel of land. He started buying land in 1942 and only a small portion of the suit land belonged to his father which portion was about 1 acre. The respondent desired to have his son evicted because of sour relationship between them. The appellant had apparently chased away, the workers employed by the respondent to work on the land. This evidence was corroborated by PW2, one Francis Kiambi Mwarania. The respondent added that he had given his son the appellant another piece of land, Abogeta/U-Kiringa 1283, but the latter refused to relocate there.

4. The appellant testified and told the court that he has lived on the suit land Abogeta/ L-Kiungone/809 since he was born a fact which was corroborated by DW2 and DW3. The said piece of land was left to his father by his grandfather. He utilizes about 4 acres of the suit land and on about 1 ½ acres he has planted bananas and there is also a portion where he has planted napier grass. The suit land is where he calls home which he has fully developed. Thereon, he has a semi-permanent house, a zero grazing unit, a chicken house and a house for his son and daughter.

5. On 6/2/2019 the Learned Principle Magistrate Hon J. Irura in her judgement declared that Parcel No. ABOGETA/L-KIUGONE/809 belongs to the plaintiff and does not hold it in trust for anyone. The appellant herein was given 60 days to move from the said parcel of land.

6. Being aggrieved by the said decision, the appellant has appealed to this court on 9 grounds which can be collapsed into 3;

> *a. That the learned trial magistrate erred in law and in fact by finding that the appellant did not pass the test of intergenerational equity despite the evidence from the appellant and his witnesses.*
>
> *b. That the learned trial magistrate erred in law and in fact by finding that the appellant had become a menace by chasing away the respondent's employees and sued them in court when there was no evidence before court to support such a finding.*
>
> *c. That the learned trial magistrate erred in law and in fact by finding that suit land L.R No. ABOGETA/L-KIUNGONE/809 belonged to the respondent and that he did not hold it in trust for anyone.*

Analysis

7. I have considered the grounds of appeal, submissions and evidence given in the trial court and the issue to be determined **is whether the respondent held the suit land in trust for the appellant, whether the judgement delivered on 6/2/2019 should be set aside and whether the appellant is entitled to the suit land via the doctrine of adverse possession.?** This being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and make its own conclusions, See-**Selle & Another vs. Associated Motor Boat Co. Ltd (1968).**

8. The gist of the appellant's case is that the suit land is ancestral land and therefore the appellants occupation is protected by section 28 (b) of the Land Registration Act which states that *"**unless contrary is expressed in the register all registered land shall be subject to trusts including customary trusts".*** In support of this argument, the appellant has relied on the case of **Mbui Mukangu vs. Gerald Mutwiri Mbui C.A NO. 281 of 2000**, and the case of **M'Ikiugu M'mwirichia & Moses Marangu Kiara vs. Esther Nthiira M'Ikiugu & 2 Others C.A No.95 of 2009.**

9. As an alternative relief, the appellant is claiming entitlement to parcel number Abogeta/L- Kiungone/809 (the suit land) herein by way of adverse possession. On this point the appellant has averred that he has been in active occupation of the suit land for a period of over 50 years and that this is the place he calls home.

10. On the other hand, the respondent's case is that the suit land was gathered by the respondent by purchasing parcels of land in the neighbor-hood, then he consolidated all the parcels. The respondent has relied on the case of **Muriuki Marigi vs. Richard Marigi Muriuki & 2 Others C.A NO. 189 of 1996.**

Adverse possession

11. The claim for adverse possession was only raised in the submissions of the appellant in this appeal. This is a fresh claim which is not anchored in the pleadings. A party is bound by his or her pleadings whereby each party knows the case he has to meet and cannot be taken by surprise at the trial. See- **IEBC & Another V Stephen Mutinda Mule & 3 Others [2014] e KLR.** In the circumstances, this court declines to consider the appellant's claim on adverse possession which is hereby dismissed.

Customary trust

12. It was not in dispute that the appellant has lived on the suit land all his life and that the suit land is registered in the name of the respondent herein. However, he who alleges must prove- see section **107 of the Evidence Act**. Trust be it customary, is a question of fact which must be proved and it cannot be imputed. – See case of **Salesio M'Itonga vs M'Ithara & 3 others (2015)eKLR (COA).**

13. In the case of **Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others (19 of 2007) eKLR** Justice M.S.A Makhandia stated that:-

> ***"As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs".***

14. A claimant therefore has to lead evidence on how the customary trust was created as rightly submitted by the respondent.

15. The appellant averred that he was born in 1958 and his grandfather had died in 1956. Thus, the appellant knew not his grand father. Neither the appellant, nor his witnesses were able to give evidence which shows that the father of the respondent is the one who gathered the 22 acres of the suit land for the family. The respondent was 97 years old as at the time of his testimony which means that he was around and about during the time of gathering of land. He was therefore capable of buying his own land.

16. In **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** the supreme court stated as follows on matters customary trust;

> ***"Each case has to be determined on its own merits and quality of evidence*** *(emphasize added).* ***It is not every claim of a right to land that will qualify as a customary trust".***

17. Thus, it was not sufficient for the appellant to state that the suit land belonged to his grandfather. He was duty bound to adduce evidence to support his claim, which evidence did not meet the threshold of a customary trust on a balance of probabilities.

18. This case is also distinguishable from the authorities cited by the appellant in the following terms; In the case of **Mbui Mukangu vs. Derald Mutwiri Mbui (2004)eKLR,** the court of appeal while distinguishing **Mbui Mukangu case** and that of **Muriuki Marigi vs Richard Marigi Muriuki Civil Appeal 189 of 1996** stated as follows:

> ***"It is significant we think that unlike the Muriuki Marigi case where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of the father….".***

19. In the case of **M'Ikiugu M'Mwirichia and another vs. Esther Nthiira M'Ikiugu and 2 others, Nyeri Court of Appeal Case No. 95 of 2009,** the court stated thus;

> ***"whether as an issue of inter-generational equity arising from ancestral land, or trust arising from rights under customary law, the conclusion is that the first appellant held the suit land in trust for the respondents and that he was not at liberty to dispose of the same without prior approval of the ultimate beneficiaries".***

20. Thus, in both the aforementioned cases, the court had arrived at the conclusion that the suit parcels had their roots in ancestry. Not so in the present case. The appellant has not proved that his grandfather who died in 1956 was the one who gathered the 22 acers of the suit land I therefore find that the trial Magistrate arrived at a correct decision in holding that the suit land belongs to the respondent.

21. I must add that land is a very emotive subject in Kenya where conflicts of great magnitude are manifested through the decades. However, this court does not condone a rampant practice in this region where children turn against their centenarian parents denying them a right to live in dignity and respect in their sunset years. For instance in the case of **Paul Kirinya vs. Delfina Kathiri ELC NO. 44 OF 2012**, where a son had sued the mother, I stated that; ***"Defendant deserves peace and tranquility in her sun set years and she has the right to use her small piece of land in the manner she pleases"***, while in the case of **Moffat Gichuru VS. M'Imanyara M'Muriithi and 2 Others**, **Meru ELC No. 54 of 2015** where a son had sued his father amongst others, I had decried the fact that plaintiff's father was very old (90 years as at 2017) and sickly too. This court has a constitutional duty to uphold the national values of human dignity, equity & social justice.

22. My conclusion is that the appeal is not merited. The same is dismissed with costs to the respondent save to add that the 60 days given by the trial magistrate shall run from the date of delivery of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

Muthomi holding brief for Kiogora A. for the appellant

Appellant

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE