REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA NO. 3 OF 2018

M'RINGERA M'ABURIA.....APPELLANT

VERSUS

JACOB MWIRIGI NGARI.....1ST RESPONDENT

ALICE NGARI.....2ND RESPONDENT

DAVID KINOTI NGARI.....3RD RESPONDENT

PHILIPH MUTHOMI NGARI.....4TH RESPONDENT

KOOME ISAAC NGARI.....5TH RESPONDENT

LYDIA KATHURE ISAAC.....6TH RESPONDENT

JUDAH KIMATHI NGARI.....7TH RESPONDENT

(APPEAL FROM THE DECISION BY HON. C.A. MAYAMBA S.R.M – GITHONGO DELIVERED ON 8TH DECEMBER, 2017 IN S.R.M.C.C NO. 60 OF 2015)

JUDGMENT

BACKGROUND

The Respondents were the Plaintiffs in the subordinate Court Case No. 60 of 2015 in Githongo Senior Resident Magistrate's Court while the Appellant was the Defendant. In a plaint dated 29th August 2013, the plaintiffs sought the following orders:

> ***(i) An order compelling the defendant to allocate the plaintiffs their part of the family lands wherein to construct their residential houses and practice farming.***
>
> ***(ii) Costs of this suit and interest.***
>
> ***(iii) Any other relief the Honourable Court may deem fit to grant.***

In a statement of defence dated 10th October 2013, the defendant denied the plaintiffs' claim and sought to have the same dismissed with costs. The brief facts of the claim before the lower Court is that the plaintiffs who are daughters and sons of the defendant wanted to be given their share of the family land to

construct their houses and practice farming. The trial magistrate heard the case and rendered himself on 18th December 2017. The defendant/Appellant was dissatisfied with the judgment and decree and preferred the present Appeal citing the following seven grounds of Appeal:

> ***(1) That the learned trial magistrate erred in law and facts by holding that L.R No. ABOTHUGUCHI/KITHIRUNE/549 and 1338 are ancestral and family lands.***
>
> ***(2) That the learned trial magistrate erred in law and facts by holding that the Appellant was registered as the owner of L.R No. ABOTHUGUCHI/KITHIRUNE/549 and 1338 in trust for the Respondents.***
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> ***(3) That the learned trial magistrate erred in law by issuing substantive orders not prayed for.***
>
> ***(4) That the learned trial magistrate erred in law by considering extraneous issues not pleaded or framed for trial.***
>
> ***(5) That the learned trial magistrate erred in law by ordering that the Njuri Ncheke to supervise the judgment dated 18/12/2017 WHEREAS no party had pleaded such issue.***
>
> ***(6) That the learned trial magistrate's judgment completely obliterated the provisions of Section 24 & 25 of the Land Registration Act.***
>
> ***(7) That the judgment delivered on 18/12/2017 is against the weight of evidence and the law placed before the trial magistrate.***

APPELLANT'S CASE

When this matter came up for directions on 27th November 2018, the parties agreed by consent to canvass the Appeal by written submissions. The Appellant was to file and serve his submissions within 21 days from the said 27th November 2018 and the Respondents were also to file and serve their submissions within 21 days from the date of service thereof. The Court file was to be forwarded for writing of judgment on 21st January 2019. When the Court file was received from this end, none of the parties had filed submissions.

RESPONDENTS CASE

The Respondents did not file any submissions presumably because the Appellant did not file and serve them with submissions as per the directions given on 27th November 2017.

DECISION

I have considered the materials contained in the record of Appeal and the law. It is now established that the role of this Court on first appeal is to re-evaluate all the evidence availed in the lower Court and to reach its own conclusion. ***Section 78 (2) of the Civil Procedure Act*** gives the appellate Court the same powers as the trial Court. The section reads as follows:

> ***"Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on the Courts of the original jurisdiction in respect of suits instituted therein".***

In the case of **Oluoch Eric Gogo Vs Universal Corporation Limited (2015) e K.L.R,** the Court restates the duty of an appellate Court as follows:

> ***"As a first appellate Court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal Case***

of Selle & Another Vs Associated Motor Boat Co. Ltd & Another (1968) E.A 123, my duty is to evaluate and re-examine the evidence adduced in the trial Court in order to reach a finding taking into account the fact this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect ……

From the above decisions which echo Section 78 of the Civil Procedure Act, it is clear that this Court is not bound to follow the trial Court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally".

I agree with that decision.

From the proceedings before the trial Court, the plaintiffs called three (3) witnesses who testified as follows:

PW1 Koome Isaac M'Ringera. The first plaintiffs' witness who was the 5th plaintiff adopted his statement dated 6th June 2017. In that statement, the witness stated that the defendant who is their father is the registered owner of land parcels No. ABOTHUGUCHI/KITHIRUNE/549 and 1338 which parcels of land he acquired from his father who is also their grandfather one M'ABURIA MUNYUANGOMBE who had also gotten the same from their great grandfather MUNYUANGOMBE MURIGARU. He stated that he is in occupation of the suit land as a family ancestral and that one of his co-plaintiff has also occupied and utilizes part of the suit land with the full knowledge of the defendant but without his permission. He stated that on 24th April 2013, they held clan members deliberations at the defendant's home in land parcel No. ABOTHUGUCHI/KITHIRUNE/549 wherein the defendant/Appellant agreed to have his brother JOSEPH MIRITI to be the administrator of the sub-division of the suit lands to his children and also the appointment of one of his siblings JACOB MWIRIGI NGARI (1st plaintiff) to find a surveyor to sub-divide the suit land. The witness further stated that the defendant/Appellant later denied the agreed resolutions made on 22nd April 2013 and on 19th July 2013, there was another meeting attended by the plaintiffs, the defendant, Njuri Ncheke elders and the acting District officer for Abothuguchi West. He stated that in that meeting, it was resolved that the defendant was to sub-divide the suit lands between his children and retain one (1) acre in his name. He stated that the suit lands are family land and that the defendant should allow the plaintiffs to construct residential houses, practice farming and allow the plaintiffs right to occupation, utilization and free access in the suit lands without any disturbances.

PW2 was Joseph Miriti M'Aburia. He is brother to the defendant an uncle to the plaintiffs. He stated that the suit lands parcels No. ABOTHUGUCHI/KITHIRUNE/549 and 1338 are registered in the names of the defendant and that he obtained the same from their father M'ABURIA MUNYANGOMBE who had also obtained from their grandfather MUNYUANGOMBE MURIGARU. He stated that the suit lands are family lands and that the plaintiffs as the defendant's children are entitled to occupy, farm and erect residential structures in the same. The witness also stated that the defendant and plaintiffs have on numerous occasions held negotiations which the defendant agreed to abide by sub-dividing the suit lands between him and the plaintiffs but later reneged on the same. The witness further stated that he had laid a claim on the defendant's land parcel No. ABOTHUGUCHI/KITHIRUNE/549 and the clan ruled that he was entitled to get a share but he has since lost interest in the same.

PW3 was Julius Kinoti Kirigia who is a Senior Chief of the area. He was referred to his statement recorded on 6th June 2017 which was also adopted. In brief, the witness stated that in July 2013, he was the acting D.O. Abothuguchi West when the plaintiffs who are the children of the defendant came to his office with land issues. He stated that their father who is the defendant had refused to give them share of their parcels of land. He constituted a committee who held a meeting on 1st July 2013 in the defendant's land for sub-division. He produced the report on the resolution of the meeting as Plaintiff's Exhibit No. 5. He was also referred to the minutes of another meeting where resolutions were reached which was not produced.

DEFENDANT'S CASE

The defendant alone testified on oath and stated that two of his children have constructed their houses on his land being Koome Isaac Ngari (5th plaintiff) and David Kinoti Ngari (3rd plaintiff). He has never barred them from constructing. He stated that his children disturb him a lot and he has made complaints to the Police. His children have been damaging his property. He has written them letter for cutting trees without his permission. He stated that he has criminal cases against them at Nkubu Law Courts and O.B. numbers. He said that his children have damaged his tea bushes while purporting that they were creating a path. He produced the same as Defence Exhibit 1 – 4 respectively. He stated that according to Meru Customs, a child is shown where to build his house out of love with no coercion.

RE-EVALUATION AND ANALYSIS OF EVIDENCE

The learned trial magistrate in his judgment delivered on 18th December 2017 gave the following orders:

> ***(a) The plaintiffs are allowed to construct their houses in any portion of the parcels herein but the same must be done in consultation of Njuri Ncheke elders who shall play the role of identifying the positions.***
>
> ***(b) The plaintiffs are allowed to farm in that portion of land but the same should not interfere with the economic interest of the defendant, having said that, the aforesaid elders should also decide on portions to be used or farming by the children.***
>
> ***(c) Costs of this suit shall be borne by the parties themselves as a measure of ensuring unity amongst them.***
>
> ***(d) For the avoidance of doubt, the orders herein does not amount to sub-division of the parcel of land.***
>
> ***(e) The report by the elders to be filed in this Court for adoption within the next 60 days.***
>
> ***(f) Any party disobeying these orders shall be cited for contempt as stipulated by law.***

Looking at the proceedings and the evidence adduced by both the plaintiffs and the defendant, I find that the plaintiffs have not proved their case on a balance of probabilities. The plaintiffs are laying claim on the defendant's parcels of land to construct their houses and practice farming. There is no law which compels a father to give land to his children to construct houses or practice farming. ***Section 25 of the Land Registration Act*** provides as follows:

> ***"25 (1) The right of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-***
>
> > ***(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
> >
> > ***(b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.***
>
> ***(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee".***

The plaintiffs' claim is not based on any known law. Even under the African Customary Law, a father or parent on his/her own volition may show his son(s) where to built or farm at the appropriate time but is

not compelled or coerced to do so. I also find that the plaintiffs did not prove before the trial Court that the suit properties being L.R. Nos. ABOTHUGUCHI/KITHIRUNE/549 and 1338 were ancestral family land acquired and held by the defendant/Appellant in trust for himself and the plaintiffs/Respondents. In my view, African Customary law which is applicable to this case required a parent to show his son or children area of his land at an appropriate age and time. It was an obligation to every father/parent which was being performed voluntarily without any compulsion. A parent usually shows his son a place to built or farm once he was satisfied that he has reached a certain age and espouse some maturity and respect for him. However, there was no law which would compel a parent to show his son/child a place to built or farm. It was usually an act of volition and not compulsion. I have also looked at the prayers sought by the plaintiffs/Respondents in their plaint and the final orders in the judgment issued on 18th December 2017 and note that the trial magistrate misdirected himself by granting substantive orders not prayed for by the plaintiffs/Respondents. The defendant/Appellant is the registered owner of the two parcels of land being L.R. Nos ABOTHUGUCHI/KITHIRUNE/549 and 1338. He has stated in his evidence that he has allowed his two sons Koome and Ngari to build on the suit property. What the plaintiffs are seeking are to inherit their parents during their lifetime. The Court in the case ***of Edward Kipkosgei Chemurbil & Another Vs Charles K. Kosgei & Another (2014) e K.L.R*** was faced with a similar conundrum where **Munyao J.** (as he then was observed as follows:

> ***"A case whose facts are not far from those in this suit is that of Marigi Vs Muriuki & 2 others (2008) 1 K.L.R 1073. This was a suit by sons and grandsons to the appellant, who wanted the appellant to distribute his land in a certain way. The Court of Appeal held that since the appellant as owner of the property was still alive, there was no law upon which he could be compelled to distribute his property. The Court of Appeal held that his property was not available for sub-division and distribution among his wives and children except if he personally on his own free will, decided to sub-divide and distribute it. He could not be urged, directed or ordered to do it against his own will. The rights of the respondents to the property could only accrue after the death of the proprietor".***

Again the learned Judge in the same case went further and held:

> ***"In the instance of this case, I am afraid that no evidence has been led to suggest that the 1st plaintiff holds the land on behalf of the defendants and that therefore, the defendants must be consulted before the 1st plaintiff deals with the land. Without there being any proven trust, or any other overriding interest in favour of the defendants, how the 1st plaintiff decides to arrange the affairs of his home must be left to his discretion as absolute proprietor of the suit land. The defendants cannot be heard to complain that their father is not allowing them to use the land as they (the defendants) wish".***

I totally agree with the thoughts and decision by the learned Judge and apply mutatis mudandis to this case. In the upshot, I make the following orders:

> ***(1) This Appeal is allowed and the judgment delivered on 18th December 2017 be and is hereby set aside with the lower Court suit being dismissed with costs.***
>
> ***(2) The costs of this Appeal is awarded to the Appellant.***

DATED and SIGNED at Kerugoya Court this 7th day of February, 2020.

E.C. CHERONO

ELC JUDGE, KERUGOYA

READ and DELIVERED in open Court at Meru this 10th day of February, 2020.

L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: