REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, SHAH & OWUOR JJ.A)
CIVIL APPEAL NO. 183 OF 1997
BETWEEN

MWENJERA GICHUKA.....APPELLANT

AND

ALICE WANGUI GICHUKA.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi Hon. Justice E.M. Githinji) delivered on 30/5/97 in

H.C.C.C. NO.943 OF 1989)

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JUDGMENT OF THE COURT

Mwanjera Gichuka (the appellant) is aggrieved by the judgment of the superior court (Githinji, J) delivered on 30th May, 1997 whereby the learned judge entered judgment in favour of Alice Wangui Gichuka (the respondent) ordering the appellant to transfer three(3) acres from land title No.Escarpment (Jet Scheme/247 (the suit land) to the respondent withiTnh e3 0 adpapyesl.lant is the step son of the respondent. The respondent has three sons and three daughters. The appellant is the son of Wanjiru who was the co-wife of the respondent's father. Wanjiru died leaving only one son, the appellant, and five daughters. The appellant's father Gichuka was landless.

The respondent's case in the superior court was that when balloting was being done for landless people, she acted as agent for the appellant in balloting for the suit land. When she so balloted the appellant was working in Nyeri. Some three weeks after the balloting the appellant declined to accept the suit land as it was in Kiambu. The respondent was thereafter authorized to continue occupying and cultivating the suit land which she did by marking boundaries, clearing the bush and fencing it. She then built four mud houses roofed with iron sheets and has since lived on the suit land. She made the initial payment to Settlement Fund Trustees and continued paying for the suit land to the Government of Kenya in the name of the appellant and had fully paid for it. She produced receipts for such payments from her own possession. It is common ground that she was utilizing the entire suit land in question growing pears, pyrethrum and maize. The appellant has been living in Elburgon in Rift Valley Province, where he had bought land. In 1983 or thereabouts he started claiming possession of the suit land from the respondent. The dispute first went to the Assistant Chief. The appellant then filed a suit in Kiambu claiming ownership and possession of the suit land. The Kiambu magistrate's court, in Kiambu R.M.C.C. NO. 43 of 1984, referred the dispute to elders who decided in favour of the appellant. The application, by the respondent, to set aside the elders' award, was dismissed by the court at Kiambu. The High Court in Civil Application No. 33 of 1985 declared the elders' award a nullity and directed the parties to file an

appropriate suit in the High Court. As the respondent had already filed H.C.C.C. NO. 943 of 1989 she decided to continue with the same rather than file a fresh action.

At the time the parties went to the Assistant Chief in about 1983 the parties agreed that the respondent would keep three acres of the suit land and that the appellant have the rest of it. The appellant however failed to attend the Land Control Board meeting for sub-division as per the alleged agreement. The respondent was not aware, she said, of the fact of registration of the suit land in the name of the appellant.

The appellant's version of events as given in the superior court was that he had registered himself as a landless person in 1961/1962 and when people were called for balloting, his wife balloted for him and he got the suit land. He was required to pay a sum of Shs.504/= to the Government which sum the respondent paid for him in instalments after selling trees on the suit land. He allowed the respondent to cultivate the suit land until she could move to the land of her own son, Kigotho. He allowed her to build the four houses which, he said, were demolished after the decision in the Kiambu case. He denied agreeing to give three acres of suit land to the respondent. The respondent lives on the suit land with her daughter and daughters' children as well as Kigotho's children. They have planted, he said, fruit trees and pyrethrum and they also keep goats. The respondent's sons, Kigotho and Gathimba have their own land but Gathore (another son of the respondent) has no land of his own.

One witness called by the appellant who was the Assistant Chief of the area at the material time, and who is the brother-in-law of the appellant, confirmed the appellant's version of events in regard to the suit land. This witness however also confirmed that the appellant has never cultivated the suit land since 1963.

The abstract of title in respect of the suit land shows that the Government of Kenya was registered as first owner thereof on 14th February, 1970 and that on 27th October, 1980 the appellant was registered as owner at a consideration of Shs.504/=.

The superior court had no documents before it to show how the land was allocated. However, in our view, the learned judge correctly assumed that it was only after the payment of Shs.504/= that the appellant was registered as proprietor of the suit land and the learned judge on the evidence before him concluded that such payment was made by the respondent. She produced five receipts. One receipt, she said, was lost. The receipts show that the respondent made all the payments. At least it is common ground that the respondent made the payments although the appellant says she did so after felling and selling trees. The learned judge was not impressed by that version of the appellant. The learned judge was impressed by the respondent's version of events. The appellant contradicted himself when he first said that the respondent settled on the land illegally and without his consent and changed his story to say that he allowed her to settle on the suit land. The appellant himself has confirmed that the respondent is in possession of the suit land.

The appellant paid the registration and conveyancing fees only; it was then that the suit land was registered in his name. It was, we believe, a clever move on the part of the appellant as he was able to have the suit land registered in his name for a very small fee.

The respondent's cause of action, in the first instance, is based on a contract of sale between the parties. The agreement is not in writing. The respondent relied on part performance of the contract, by way of settling on the suit land and being there all the time. That is not sufficient and the respondent's cause of action of the alleged agreement for sale between the appellant and her rightly failed.

Just as the learned judge felt, we are of the view that the plaint is imperfect. It is most inelegantly drafted. But does it show, coupled with evidence which was before the learned judge, that the appellant could well have the title registered in his name but in trust for the respondent? It is trite law that under normal circumstances the court would not presume a trust. Mr. Mugo relied on the case of Marie Ayoub & others v. Standard Bank of South Africa Ltd & Another [1961] E.A. 743 to say that no trust could be presumed. Mr. Mugo relied on a decision which was overruled by the Privy Council. See *Ayoub and others Standard Bank of South Africa Limited & Another* (1963) E.A. 619. The Privy Council held that the law on the mater was accurately stated by Newbold, J.A., in his dissenting judgment in the 1961 case.

The Privy Council quoted from the case of Cook vs. Fountain (1) 36 E.R., at p. 987. The passage quoted from reads:-

> "***So the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this: the law never implies, the court never presumes a trust, but in the case of absolute necessity."***

We must point out at oncethat the claim under trust is not property pleaded. Again we say that the plaint is most inelegantly drafted and is slip-shod. What is pleaded in the plaint if proved amounts to facts which could lead a court to make a finding of trust, that is to say, that the registered owner was really registered as owner not for his personal benefit, but as trustee for the respondent.

In cases of absolute necessity the court can presume a trust. The learned judge found as a fact that it was the respondent who balloted for the suit land in the name of the appellant; that she paid the whole sum payable in respect of the suit land; that she was in continuous occupation and use of the suit land from the time of allocation; that she had very substantially developed the suit land plot; that she lived on the suit land without hitch at least from 1962 to 1983 when the appellant started laying a claim to the suit land. There can be no doubt that had the appellant not been holding the suit land as a trustee for his step-mother, he would most probably have not allowed her to stay for more than 21 years on the suit land.

Although trust was not properly pleaded the facts showing such a position were fully canvassed before the learned judge without any objection from the appellant. It was held by the predecessor of this court in the case of Odd Jobs v. Mubia [1970] E.A. 976 that a court may base its decision on an unpleaded issue if it appears from a course followed at the trial that the issue has been left to the court for decision. In all the circumstances of this case we cannot say that the learned judge was wrong in making a finding of trust. This appeal is therefore dismissed with costs.

Dated and delivered at Nairobi this 12th day of March,

1998.

R. O. KWACH .....

JUDGE OF APPEAL

A. B. SHAH .....

JUDGE OF APPEAL

E. OWUOR .....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.