



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 189 of 1996

BETWEEN

MURIUKI MARIGI
.....APPELLANT

AND

RICHARD MARIGI MURIUKI

LYDIAH NJOKI MURIUKI

SAMUEL MURIUKI (A MINOR THROUGH HIS NEXT FRIEND

RICHARD MARIGI MURIUKI
RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nyeri (Lady Justice Ang’awa)

dated 29th November, 1994

IN

H. C. C. C. NO. 104 OF 1991)

JUDGMENT OF THE COURT

Section 27 (a) of the Registered Land Act, Cap 300 laws of Kenya, provides:

Subject to this Act-

(a) the registration of a person as the proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

and section 28 of the same Act provides thus: -

“The rights of a proprietor, whether acquired on first registration or whether acquired 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) Unless the Contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register;

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Section 30, above deals with overriding interests which need not be noted in the register as attaching to any given parcel of land registered under the Act.

This appeal concerns a parcel of land known as Magutu/Gatei/153 registered under the Registered Land Act, Cap 300 Laws of Kenya with the appellant Muriuki Marigi as the registered owner. He is an old man with five wives and several children, among them Richard Marigi Muriuki and Lydia Njoki Muriuki, the first and second respondent respectively in this appeal. The third respondent, Samuel Muriuki, is a minor with Richard respondent, Samuel Muriuki, is a minor with Richard Marigi Muriuki as his next friend and is a grandson of the appellant. The appellant, as defendant, was the unsuccessful party in Nyeri High Court Civil Case No. 104 of 1991, in which the respondents were the plaintiffs. The respondents' claim in the suit was for a designated share of the above parcel of land which claim was based on customary law rights. Their case as pleaded was that the appellant intends to sub-divide and distribute the property in such shares that they will be disadvantaged, that such sub-division and distribution is contrary to Kikuyu customary law, it did not cater for the second and third respondents and in general and in general that it was inequitable. They therefore, wanted the court to compel the appellant to share the land amongst his wives and children in an equitable manner.

In his amended defence, the appellant averred, among other things, that as registered proprietor of the suit land he has an absolute and indefeasible right over the property, and no one had the right to urge, direct or compel him to share it in any particular manner.

The suit did not proceed to trial. The parties by consent agreed, on 10th October, 1991, to refer all the matters in dispute between them to arbitration under the chairmanship of the District Officer, Mathira Division of Nyeri District. Each side was to appoint two elders to assist in the arbitration, which was done. The parties appeared before the arbitration panel, they testified and called witness to testify in support of their respective cases after which an award was rendered. The appellant was dissatisfied with the award because, in effect, it required him to subdivide his above property against his wishes. After the award was filed in court and had been read to the parties, the appellant unsuccessfully moved the superior court by motion under XLV rules 15 and 19 of the Civil Procedure Rules, for an order setting it aside. The grounds he relied upon are not relevant here considering what we propose to say later in this judgment. Suffice it to state that the court (Ang'awa, J.) did not consider that the appellant had placed before her sufficient evidence which would constrain her to disturb the award. She dismissed the application and thereby provoked this appeal.

The memorandum of appeal on record has six grounds, but to our minds the only ground which is of substance is the sixth one which reads as follows:

“The learned judge erred in law and in fact in upholding that the respondents has any claim against the appellant known to any law although they were claiming land from the appellant because they were his children.”

As we stated earlier, the respondents based their claim on what they alleged was a customary law right. Section 3 (2) of the judicature Act, Cap 8 Laws of Kenya provides, in pertinent part, as follows:

“The High Court, the court of Appeal and all Subordinate Courts shall be guided by African customary law in Civil Cases So far as is applicable and is not repugnant to justice and morality or inconsistent with any written law.....”

We earlier set out the provisions of sections 27 and 28 of the Registered Land Act which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in section 30 of the Act. The evidence on record is silent on whether or not the respondents’ Kikuyu customary law rights over the suit property are noted in the Land register respecting the land. In absence of such evidence we may not properly infer or imply that they are. The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognize under that section. The issue was considered in the following two reported cases of Obiero – vs-opiyo & others [1972] EA 227 and Esiroyo –vs- Esiroyo & Another [1973] EA 388, and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of section 30, above. Moreover, considering the provisions of section 3(2) of the Judicature Act which we partly reproduce above, customary law rights being subject to rightly under a written law, the respondents’ rights are clearly excluded by the clear language of Sections 27 and 28 of the Registered Land Act.

It is, however, noteworthy that the law of Succession Act, (Cap 160 laws of Kenya) does recognise the rights of wives and children over their husband’s father’s estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise. Whenever they accrue the estate is shared either according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the Law of Succession Act. The appellant as the registered owner of the suit property is still alive. His property is not yet 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 among them. He may not be urged, directed or ordered to do it against his own will.

In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce. The dispute between the parties was, therefore, improperly referred to arbitration as on the face of the respondents’ amended plaint there was no dispute capable of being referred. The award which was rendered was therefore, a nullity. We accordingly set it aside and in its place substitute an order striking out the original suit with costs. The appellant shall also have the costs of this appeal.

Dated and delivered at Nyeri this 16th day of May , 1997.

R. O. KWACH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL