IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO & LAKHA, JJ.A.)

CIVIL APPEAL NO. 73 OF 1986

BETWEEN

CHEGE MACHARIA alias

GACHOBE CHEGE.....APPELLANT

AND

MAINA MACHARIA.....1ST RESPONDENT

TOM THUITA MWANGI.....2ND RESPONDENT

JOHN PETER THUITA.....3RD RESPONDENT

(Appeal from the judgment and Order of the High Court of Kenya at Nairobi (Nyarangi, J.) dated 13th September, 1984

in

H.C. CIVIL CASE NO. 925 OF 1981)
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JUDGMENT OF THE COURT

In paragraph 4 of his plaint dated 25th March, 1981 and filed in the superior court on 3rd April, 1981 the appellant averred as follows:-

> "4.Between the year 1949 and 1951 the Plaintiff acquired and/or purchased five portions of land for which he paid with his own moneys amounting to 3 acres from divers vendors and due to natural love, affection and expediency, caused the same to be included and registered together with his father's family land and then all of them produced land parcel NO. Loc. 12/Sub-Location 5/399 the suit premises in the name of his deceased father Macharia Thuita without valuable consideration in the strict understanding that the deceased would hold the said pieces in trust for the plaintiff to be claimed by the Plaintiff at a later date. The Plaintiff has at all material times been in possession and cultivating the said portion of 3 acres up to now."

Land parcel NO. Loc. 12/Sub-Location 5/399, hereinafter referred to as the suit land, was registered in the name of the appellant's father, Macharia Thuita, as its absolute proprietor on 15th July, 1963. It measured

approximately 2.43 hectares or 6.3 acres.

On 26th September, 1966, Macharia Thuita who was then in very poor health invited his Locational Chief, Jonah Wagunya, to the suit land with a view to settling the issue of where each of his two wives and sons would cultivate on the suit land. In this exercise, Chief Jonah Wagunya was with the local Sub-Chief, Phinehas Kimari, Administration Police Constable Chege Kihia, clan elders besides Macharia Thuita and his step-brother, Simon Mugecha. The appellant, the first and second respondents are the sons of Macharia Thuita by his first wife while the third respondent who as on the date aforementioned was a minor, is his only son by his second wife and except for the first and third respondents, the appellant, the second respondent and the two wives of their father were present when the issue of cultivation on the suit land was being settled. Macharia Thuita pointed out where each of his two wives and the three sons of his first wife would cultivate while the third respondent's share in this regard was in the portion of land allocated to his mother. In this process, the appellant did not assert his interest in the 3 acres of the suit land which he alleged in paragraph 4 of his plaint in the superior court to have been held by his father in trust for him and which were to be claimed at a later date. Indeed, it does not appear that the same were delimited on the suit land nor was an equivalent of the 3 acres allocated to him for cultivation. In fact from his evidence in the superior court, the entire suit land was on the material date shared out amongst his father's family members and the resultant portions in respect thereof were respectively marked out for those to whom they were allocated for cultivation. After this exercise and during the same month of September, 1966 the appellant's father died.

Subsequent to the death of the appellant's father, succession proceedings were commenced in the Third Class District Magistrate's Court at Kangema on 21st June, 1978 the result of which was that the suit land was to be sub-divided into four equal shares amongst the four sons of the appellant's deceased father, namely; the appellant and the three respondents herein. Dissatisfied by this decision, the appellant and the second respondent appealed to the Resident Magistrate's Court at Murang'a and on 27th July, 1979 that court held that the suit land was to be shared equally amongst the two houses of the appellant's deceased father so that the house of the appellant's mother which had three sons, namely; the appellant, the first and second respondents, was to get one half share of the suit land while the other half share of the said land was to go to the house of the third respondent's mother which had only one son, namely; the third respondent.

This was expressed to be in accordance with Kikuyu Customary Law and the Murang'a Resident Magistrate's Court while dismissing the appeal ordered that one half share of the suit land be registered in the names of the appellant, the first and second respondents while the other half share of the said land was to be registered in the name of the third respondent and the Kangema Third Class District Magistrate was to prepare a share certificate in regard to the suit land accordingly.Their second appeal to the High Court of Kenya at Nairobi against this decision was on 24th July, 1980 summarily rejected. Thereafter, the appellant filed a suit in the superior court as is set out at the beginning of this judgment against the first, second and third respondents and in paragraph 6 of his plaint he averred as follows:-

> "6.The Plaintiff contends that the portion of the suit premises now held by the Defendants comprised of his late father's family land and his said portion of 3 acres which the Defendants are holding in trust for him and the same should be excised from the suit premises and registered in his name alone while the remainder of the land should be shared between the Plaintiff and the Defendants."

The appellant therefore sought inter alia the following reliefs from the superior court:-

> "a)A declaration that a trust exists and 3 acres from the said land parcel NO. Loc. 12/Sub-Location 5/399 now registered in the Defendants' names along with the Plaintiff are held by them in trust for the Plaintiff absolutely having been acquired by them from their deceased father who held them in trust for the Plaintiff.
>
> b)An order that the Defendants do transfer title to the said 3 acres portion of land parcel NO. Loc. 12/Sub-Location 5/399 to the Plaintiff and the register relating to the same be rectified so that the

Defendants' names as proprietors thereof be cancelled and substituted by that of the Plaintiff.

c)An order that the Plaintiff is the sole absolute and indefeasible proprietor of the said 3 acre-portion from land parcel NO. Loc. 12/Sub-Location 5/399 and an order that the same be transferred to the Plaintiff forthwith.

d)An order that the said portion of 3 acres be excised from the said land parcel NO. Loc. 12/Sub-Location 5/399, ascertained in identifiable boundaries, and registered in the Plaintiff's name absolutely."

Chief Jonah Wagunya recorded in Kikuyu language what took place on the suit land on 26th September, 1966. The document in connection therewith was tendered in evidence at the hearing of the appellant's suit in the superior court and was marked exhibit 1. Its content which reflected what transpired on the suit land including the deliberation related thereto was, according to the Chief, read to all those present including the appellant and none of them raised any querry. Subsequently, exhibit 1 was translated into the English language.

In his judgment dated 13th September, 1984, the learned trial judge observed that it was safe to accept exhibit 1 as an accurate record of what was said, discussed and agreed upon on 26th September, 1966 when Chief Jonah Wagunya, Sub-Chief Phinehas Kimari, clan elders, the appellant, the second respondent and the two wives of Macharia Thuita were shown by the latter where on the suit land each of his two wives and sons would cultivate. According to the learned trial judge, from the contents of exhibit 1 it was reasonable to hold that the appellant had bought about 3 acres of land for himself which was treated as part of his father's land. There was, therefore, no credible evidence that before the death of his father, the latter told him that the 3 acres that were separately acquired by him would be held in trust for him after the same was included and formed part of the suit land. There was no circumstance, according to the learned trial judge, upon which a trust in respect thereof could be implied and indeed, the very fact that the appellant did not actively claim the 3 acres of land while his father was alive was indicative of the non-existence of such a trust. It was on account of the foregoing that the learned trial judge concluded that there was no basis upon which a declaration could be made that a trust existed in respect of the 3 acres of land referred to above. It is against that decision that the appellant has appealed to this Court.

His appeal comprises of 14 grounds the gravamen of which is a complaint against the learned trial judge's rejection of the existence of a trust in respect of the 3 acres of land which he bought for himself and which were included in his father's family land forming the suit land.

At the hearing of this appeal on 8th May, 1996, Mr. Gaturu for the appellant submitted that the learned trial judge ignored the issue of trust in relation to the 3 acres of land the subject-matter of the suit before him notwithstanding the appellant's evidence in that regard. According to Mr. Gaturu therefore, the learned trial judge's conclusion on this issue was not supported by the available evidence before him and his dismissal of the appellant's suit was wrong.

There was no appearance by the first respondent at the hearing of this appeal. He appears not to have entered appearance in the suit before the superior court and from the record of this appeal, formal proof against him was fixed for 30th July, 1981 at 10.30 a.m. but it would seem that it was not disposed of. For that reason, the learned trial judge thought that the best and fairest course of action to adopt in so far as he was concerned was to exclude him from the judgment of the superior court and from such orders as would be made in that judgment. Accordingly, the learned trial judge so excluded him. Hence, the hearing of this appeal on 8th May, 1996 his absence notwithstanding. There was, however, no appearance for the third respondent on the date aforementioned despite that date having been taken by consent of his counsel.

The response of counsel for the second respondent to the submission of counsel for the appellant was simply that the second appellant was equally entitled to his 3 acres of the suit land.

The decision of the learned trial judge turned on the contents of exhibit 1 an English translation of which

where material read as follows:

> "I have been to Macharia's (Gichagu) land. I have been informed by the clan witnesses together with the land owners Chege Macharia, Mwangi Macharia and Njeri w/o Macharia the position. The whole land is 9.3 acres. 6.3 acres are kept separately in the name of Macharia and 3 acres in the name of his mother. Hence I am aware evidence is like this.

A. Mwangi Macharia has bought 3 acres.

> Source - Maina Tuti.
>
> Maina.
>
> Maina Wamacangi.

B. Chege has bought himself 2 acres. Also there are 5 pieces of land which have not been included in the 2 acres which was agreed upon by Chege, his mother and father.

> From - Enos.
>
> Kibunja.
>
> Muikuna.
>
> Maina s/o Kiemi.
>
> Hezron Mwogeki.

After this discussion Chege will count a loss in respect of survey fees amounting to about Shs. 2,000/- and Shs. 200/- which he paid on behalf of his mother and anything else that he would want as per his father's promise.

After the discussions we have felt that we should sub-divide this land to facilitate cultivation."

Clearly the issue of trust in relation to the appellant's 3 acres of land does not appear to have been deliberated upon when the suit land was being sub-divided for the purpose of cultivation as is outlined in this judgment nor does there seem to have been clear evidence that the appellant pressed on this issue when his father was alive. Not even on 26th september, 1966 when the issue of cultivation on the suit land was being settled. Small wonder therefore that in his judgment the learned trial judge was of the view that there was no credible evidence that the appellant was told by his father that the 3 acres which he had separately acquired would be held in trust for him after the same became part of the suit land. In the circumstances, despite what else the learned trial judge might have said in his judgment, we think that his holding that the appellant's father, Macharia Thuita, did not hold the appellant's 3 acres in trust for him cannot be faulted. In the result, the appellant's appeal must fail and the same is dismissed with costs to the second respondent.

Dated and delivered at Nairobi this 20th day of June, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR