**REPUBLIC OF KENYA**
**IN THE COURT OF APPEAL OF KENYA**
**AT NAIROBI**

**Civil Appeal 191 of 1994**

**MBUGUA NJOROGE…….....…..……**
**APPELLANT**

**AND**

**1. CHEGE NJOROGE "A"**
**2. KUNGU NJOROGE**
**3. KAIGAI NJOROGE "A"**
**4. GICHUKI NJOROGE**
**5. KAIGAI NJOROGE "B"**
**6. KANENE NJOROGE**
**7. CHEGE NJOROGE "B"**

**8. MUIRU NJOROGE…….....…….….RESPONDENTS**

**(Civil Appeal from the judgment of the High Court of Kenya at Nairobi of (Mrs. Justice Owuor) dated 2nd February, 1993**

**IN**

**H.C.C.C. NO. 1731 OF 1974**

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**DRAFT JUDGMENT OF THE COURT**

This is an appeal by the defendant from the judgement of the superior Court (Owuor, J.) in which she entered judgment for the plaintiffs (respondents) and declared that the defendant holds the land parcel Gatamayu/Gachoire/592 (the suit property) in trust for himself and the plaintiffs equally and that the same should be distributed between the plaintiffs and the defendant in equal shares.

The facts which give rise to the appeal are that the plaintiffs claim 5.7 acres, the suit property, on the basis that the defendant holds the same in trust for himself and all the plaintiffs although during the land consolidation the defendant was registered as the sole proprietor of the suit property. The defendant denies he plaintiffs' claim and asserts that he was the sole proprietor of the suit property. At the hearing before the learned Judge, evidence was given by Fredrick Gachoka Njoroge (plaintiff No. 4) and one Kinuthia Githuri on behalf of the plaintiffs whilst the defendant gave evidence and called one witness. Kinuthia knew the plaintiffs and the defendant as well as their late father. He comes from the same village and he knew when the land was bought and the person who sold it. He also gave evidence to the effect that he had dealt with this case it was being heard at Githunguri D.O's office to whom the court

had referred the matter. The award was that the piece of land had been bought by the father and it should be sub-divided amongst his sons. The defendant was there and so was even his real mother. She is the one who gave evidence that the piece of land belonged to the father. The fourth plaintiff giving evidence stated as follows:

"The issue of Mbugua being a younger son was put to Mzee Kinuthia. He said in as far as he was concerned Njoroge could have used any of his sons. The main consideration was that it should be a son who was not likely to sell the land. There is no doubt that Mbugua seemed more enterprising."

On the other hand the defendant gave evidence on his own behalf and claimed that the suit property belonged to him personally as he had himself bought it and he did not hold it on trust for any other person. His witness did not advance his case in any particular way.

In these circumstances, the court was confronted with a conflict of testimony between the plaintiff on the one hand and the defendant on the other. After a careful consideration of the matter before her, the learned Judge made a finding when she stated as follows:-

"I accept he eight plaintiffs' story as supported by Mr. Kinuthia that Njoroge bought this piece of land from one Wainaina. He had registered (during consolidation) in the defendant's name in trust and on behalf of the defendant and his eight brothers. On this basis I enter judgment for the plaintiffs against the defendant and declare that the suit premises he holds belong equally to him and all his eight brothers. The same should be accordingly divided so, unless any of the plaintiffs decline their share."

Before this Court the appellant challenged the finding of the Judge. Now, the first observation which falls to be made is that the Superior Court was manifestly and indeed admittedly confronted with a pure question of fact for determination. Secondly, there is no question of law at issue between the parties. Thirdly, there is ample evidence to support the finding of the learned Judge and it cannot be seriously contended that the finding in favour for the plaintiffs was, on the evidence led, unreasonable.

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide:

See Watt v. Thomas, (1947) 1. All E.R. 582; (1947) A.C. 384.

But an appellate court, on an appeal from a case tried before a judge alone, as this was, should not lightly differ from a finding of the trial judge on a question of fact.

The appellant is exercising a right of appeal which is his by right, and we recognise that we cannot, merely because the question is one of fact, and because it has been decided in one way by the learned trial judge, abdicate our duty to review her decision, and to reverse it, if we deem it to be wrong, None the less, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope. This is familiar law. It has received many illustrations – and, in particular, in the House of Lords – one of these being the case of Powell and Wife v. Streatham Manor Nursing Home (1935) A.C.243. In that case it was held that:-

"Where the judge at the trial has come to a conclusion upon the question which of the witness, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed".

LORD WRIGHT, in the course of his speech at p.265, said:

"Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal "must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

Applying the above principles to the present case, we are not persuaded that the learned Judge was wrong in any way or that there was no evidence to support her findings or that she failed to take account of any circumstances or probabilities materially to estimate the evidence or that the impression based on the demeanour of a witness was inconsistent with the case generally. On our own evaluation of the evidence we find ourselves in full agreement with the conclusion of the learned Judge.

Accordingly and, for the reasons above stated, the appeal fails and must be, as it hereby is, dismissed with costs.

Dated and delivered at Nairobi this 28th day of June 1995

R. S. C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL.