



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KWACH, TUNOI & LAKHA JJ A)

CIVIL APPEAL NO 131 OF 1995

BETWEEN

JALUO MANDIRAAPPELLANT

AND

JUMA KWALANDA JOSEPH.....RESPONDENT

(Appeal from the decision of the High Court of Kenya at Kakamega (Mr Justice B K Tanui) dated 31 day of May, 1995 at Kakamega

in

HCCC No 122 "A" of 1990)

JUDGMENT

By his plaint the respondent (plaintiff) sought a declaration that the appellant (defendant) holds half of land parcel South Kabras/Chemuche/7 in trust for him and wanted the superior court to order the appellant to execute the necessary documents to effect transfer of the said portion in his favour.

The appellant is a step brother of the respondent being the sons of one mother but different fathers. The appellant is the son of one Mandira Memeti who died when the appellant was only one year old. The said Mundira Memeti was a brother to Kwalanda Muchina who on the death of his brother inherited the mother of the appellant and the respondent was begotten out of that relationship. In 1957 the appellant instituted a suit in the divisional Court at Lurambi (Case No 366 of 1957) seeking land from Kwalanda Muchina. That Court in its decision gave the appellant a portion of land and directed that he occupy it with his step brother, the respondent. The Court, further, delineated the portion of land awarded to the appellant from that held by Kwalanda Muchina. However, during the adjudication process the appellant alone was registered as proprietor of the whole portion of the land which was eventually registered and given title number South Kabras/Chemuche/7. The appellant is therefore indisputably the registered owner of the land under a first registration.

It is contended by Mr Siganga on behalf of the appellant that under section 143 (1) of the Registered Land Act the Court may not make an order for rectification of the register since this is a first registration whether or not the title thereof was obtained, made or omitted by fraud or mistake. While this submission is correct, section 143(1), however, does not preclude the recognition of a trust provided it can be

established. The learned judge was correct when he so held that the trust created in 1957 would not be defeated by the registration of the respondent as proprietor of half of the suit land.

Mr Siganga's other main ground of appeal is that the learned judge failed to consider the customary law which most prevailed in the case before him. With respect, this ground of appeal is misconceived. In the case of *Kimani v Gikanga* [1965] EA 735 at page 742, Newbold VP said:-

“When it is alleged that by any particular African customary law a result follows different from that which would follow under the ordinary law of Kenya then the existence of that African customary law has, unless it has become of such general notoriety that judicial notice may be taken of it under section 60 of the Evidence Act, 1963, to be proved by the person invoking it in precisely the same way that a person invoking customary rights has to prove the custom. In proving such African customary law opinion evidence is admissible under section 51 of the Evidence Act, 1963, and, in accordance with section 60 (2) of that Act, it may also be proved by the production of a book or document. Once proved, the Courts must be guided by it in accordance with Reg 4 of Proceedings) Regulations, 1963.”

In the instant case the appellant did not prove the customary law he desired to invoke. He neither called witnesses to testify on his behalf nor did he make any submissions on it before the learned judge. In our view this ground of appeal lacks merit and is rejected.

The other grounds of appeal incorporated in the memorandum of appeal do not, in our view, merit any consideration as they do not assail the learned judge's otherwise well considered judgment.

This appeal is dismissed with costs.

DATED and delivered at Kisumu this 23rd day of November, 1995

R.O KWACH

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL