IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Cockar & Akiwumi JJ A)

CIVIL APPEAL NO. 170 OF 1993

BETWEEN

MACHARIA KIHARI.....APPELLANT

AND

NGIGI KIHARI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice Mbito) dated 21st day of April,1993

in

Civil Appeal 283 of 1991)

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JUDGMENT

The respondent filed a suit against his younger brother in the Resident Magistrate's Court at Gatundu claiming ownership over half of the plot of land Ngenda/Githuguchu/332 which he said in evidence had belonged to his father who, on purchasing the said property, had got it registered in the name of his younger brother the appellant, to hold in trust for both the appellant and the respondent. The reason for his father so doing was because the respondent had at the material and in fact most of the time been employed away from home. The Resident Magistrate dismissed the suit but on appeal Aluoch J ordered a retrial which followed at Thika Resident Magistrate's Court before the acting Resident Magistrate Mr Awino. The acting Resident Magistrate at Thika rejected the appellant's evidence that he had bought the suit land for 100 goats and one *Ngoima* and instead had accepted the evidence of the respondent and his witnesses that their father had bought the land from the dowry he had received from the marriage of their sisters. His conclusions were also reinforced by the undisputed facts that both the parents of the parties had been living on the suit premises and were buried there after their deaths – the father having died in 1981. Likewise the respondent and his family also were living on the suit premises and the wife of the respondent, after her death, was also buried there. Mbito J on appeal upheld the findings and judgment of the acting Resident Magistrate.

This appeal, being a second appeal, is subject to the provisions of section 72(1) of the Civil Procedure Act the effect of which is that no appeal lies from findings of fact. Of the six grounds of appeal the third,

fourth and fifth grounds of appeal are directed against the findings of fact and are, therefore, incompetent. Mr Thiongo, for the appellant, very properly did not pursue any of them. The first two grounds of appeal have complained that the claim was time-barred and the sixth ground of appeal has claimed that the 1st appellate court had erred in its application of the Kikuyu customary law.

On the issue of the claim being time-barred Mr Thiongo said that the land was registered in the name of the appellant in 1958 and the suit was filed in 1990. Under section 20(2) of the Limitation of Actions Act the claim was time barred after a lapse of 6 years from the date on which the right of action accrued. Likewise if it was to be argued that the right of action accrued on the death of the father in 1981, even then the suit became time-barred in 1987. The Statute of Limitation was an absolute bar. When reminded of the fact that the subordinate court and the 1st appellate court had concurrently found that the land was family land which had belonged to the deceased's father who had got it registered in the name of the appellant to hold it in trust for himself and the respondent under the customary law Mr Thiongo responded that in that event also time should have started running from the date of the father's death. We are unable to accept Mr Thiongo's contention that the suit was time-barred. Limitation prescribed in section 20(2) of the Limitation of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of appeal.

Mr Thiongo's claim that the learned judge of the 1st appellate court had erred in his application of the Kikuyu customary law with regard to his upholding of a finding of a customary trust by the subordinate court, was based on the fact that the land had been registered in the name of the younger son. Under the Kikuyu customary law land is always held in trust by the eldest son. With respect that may be the custom but if the eldest son on account of unavoidable circumstances is not available at the time of the creation of the trust, that will not make the appointment of the younger son as a trustee so utterly unacceptable under the custom as to render the trust invalid. Both the acting Resident Magistrate and the judge of the 1st appellate court dealt with this issue at length and we agree with their concurrent findings. Mr Thiongo queried that if creation of trust had been in the mind of the deceased father why did he not have the land registered in his own name in the first instance? No evidence was led in that direction nor was this point canvassed in the lower courts. Except to

say that the deceased father must have had his own reasons which during the trial neither party endeavoured to probe into, we have no comment to make. We do, however, observe that in view of the exceptional type of undisputed evidence that was produced at the trial there was no reason whatsoever for the lower courts on balance not to have made concurrent findings that the suit land was family land being held by the appellant in trust for both himself and the respondent in equal shares. There is no substance in this appeal and we therefore dismiss it with costs to the respondent.

Dated and Delivered at Nairobi this 13th day of July 1994.

R.O.KWACH

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JUDGE OF APPEAL

A.M.COCKAR

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR