



IN THE COURT OF APPEAL

AT NYERI

(Coram: Gachuhi, Cockar & Muli JJ A)

CIVIL APPEAL NO 117 OF 1990

WANGAI.....APPELLANT

VERSUS

NJERU.....RESPONDENT

(Appeal from an order of the High Court of Kenya at Nyeri (Abdulla J)

dated 28th September, 1989 in HCCC No 120 of 1983)

JUDGMENT

The respondent, a married woman and the registered proprietor of a piece of land, filed a suit praying for eviction of the appellant from the land registered as Kagaari/Kigaa/259 situated in Embu. The suit was contested by the appellant on the ground that, the respondent being a married woman could not inherit land from the appellant's husband according to custom. It came out clearly from the pleadings that the respondent was given the said land during the lifetime of her father, the husband of the appellant. The appellant pleaded that if the respondent was given land then she became registered proprietor as trustee and so she held the land on trust. By consent of the parties, the dispute was referred to a single arbitrator. The land in dispute comprises of approximately 10 acres.

The evidence before the arbitrator was that Jackson Karucho (the deceased) a polygamist, the senior wife is the mother of the plaintiff/respondent and the other wife is the defendant/appellant. The senior wife has four daughters, all married while the appellant has 4 sons and 5 daughters three of whom are married.

The respondent stated that she was given the land by her father before death as a gift. They went to the Divisional Land Control Board Embu, where consent was obtained. She holds a land certificate issued to her by the Embu Land Registrar, dated 16th November, 1979. She further stated that after the death of her father the children of the appellant started beating and harassing her mother. Armed with the title to the land, she filed the action for eviction of the appellant.

The dispute between the two houses is tense due to the fact that the first house of the senior wife does not have a male child while the appellant's house has four male children three of whom were born out of wedlock. The arbitrator did a thorough job to resolve the dispute in the way he dealt with the matter, though as would be expected not to the satisfaction of either of the parties.

The award was filed in Court which rejected the prayer for eviction but recommended that the land be divided equally between the parties an order which neither the respondent nor the appellant prayed for. The appellant did not apply for the setting aside of the award, but instead applied by Chamber Summons under order 45 rule 15 to have the award amended so that she could be awarded 8 acres instead of 5 acres awarded by the arbitrator. In dismissing that application, the Court observed that it had no jurisdiction to amend the award in terms prayed for because of the provisions of order 45 rule 13 which is summarized as:

“An award may be modified or corrected under rule 13 where an award is on a matter not referred to arbitration, is imperfect in form, or contains clerical mistake or an error from accidental slip or omission.”

The amendment sought being not on any of the above grounds but on matters of hardship and contrary to customary law that the appellant requested the Court to award more than what was awarded by the sole arbitrator, the application was incompetent and was dismissed, hence this appeal.

What was pleaded and submitted by the respondent that she was given the land by her father during his lifetime cannot be challenged on customary inheritance basis. Section 27 of the Registered Land Act (Cap 300) under which the disputed land is registered, the proprietor has an absolute ownership of the land together with all rights and privileges belonging or appertaining thereto. Under sec 85 (1) a proprietor may transfer his land, lease or charge to any person (including himself) with or without consideration by an instrument in the prescribed form. A transfer by way of a gift would be under this section. The transfer as a gift was never challenged before the action for eviction was instituted and the customary inheritance could not be a ground for amending the award. As a gesture of compromise. Luckily in these proceedings, the respondent does not challenge the arbitrator’s award. Though the register does not indicate that she was registered as trustee, she admits that she was regarded by her father as a son. Having accepted the notion of an elder son from house of the senior wife, she could be regarded as a trustee for the benefit of her mother’s house as well as that of the second house. For this reason she accepted the award and agreed to share the land between her mother’s house and that of the appellant as a means of resolving the dispute.

We agree with the trial judge that the appellant did not apply for the setting aside of the award. The award is binding on the parties and should remain so. We cannot find in the record an application for entry of judgment in terms of the award and we are not told whether or not judgment was entered, but this is a matter which the parties can pursue in the High Court. Because no judgment was entered under rule 17 (2) this gave an opportunity to the appellant to appeal to this Court as of right as provided by order 42 r (1) (b). We do not find any merit in this appeal which we order to be dismissed. As the parties are related, we further order that each party bears her own costs of the appeal.

Dated and delivered this 29th day of July, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL