



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Nyarangi, Gachuhi & Apaloo JJA)

CIVIL APPEAL NO 4 OF 1986

BETWEEN

MADEDE & ANOTHER..... APPELLANT

AND

AINEA FITA & 2 OTHERS..... RESPONDENT

(Appeal from a Judgment and Decree of the High Court at Kakamega, Gicheru J)

JUDGMENT

April 12, 1988, **Gachuhi JA** delivered the following Judgment.

The appellants are brothers who had sued the respondents in the High Court at Kakamega. The third respondent is the son of the first respondent.

The second respondent was the father of the appellants.

The dispute relates to a piece of Land No Bunyala/Namirama/196 originally registered in the name of the first respondent but at the time of instituting the suit the third respondent was included in the register. Plot No 195 is registered in the sole name of the second respondent. The appellants claimed that under Luhya customary law and before the land adjudication, they were, and still are beneficiaries and /or have beneficial interest in the said piece of land Bunyala/Namirama/196.

Under paragraph 11 of the amended plaint, the plaintiffs (appellants) allege that:-

“While plaintiffs were infants or not yet of age to claim or own land, the second defendant permitted the first defendant to take possession and user of nearly all the land now in question and continues to use it to the exclusion of the interest of any or all the plaintiffs in the trust land”.

and under paragraph 15 the plaintiffs claim that:

“By reason of matters stated in paragraph 7, 8, 11, 12 and 13 hereof the first and third defendants are accountable to the plaintiffs as constructive trustees of the land registered in their names as legal owner of parcel No 196.”

They asked the court to declare that the said pieces of lands plots No. 196 and 195 are held by the first,

second and third defendants in trust for themselves and the plaintiffs in equal shares in equity.

The first and 3rd defendants deny the plaintiffs' claims and listed eight previous land cases between the 1st defendant and the second defendant and other people in which the first defendant was in all cases that he was involved the successful litigant. The piece of land, Plot No. Bunyala/ Namirama/196 was registered in the name of the 1st respondent as absolute proprietor. They also claim that the suit is *res-judicata* and tends to reopen the whole question of ownership contrary to public policy and asked the court to dismiss the suit with costs.

The defence of the second defendant, in a way is not a denial of the plaintiffs' claim but supports their claim. The defence further alleges that the registration of the first defendant as the sole proprietor of plot No. 196 was without regard to the plaintiffs' right over the said piece of land and contrary to customary law. He asked for his name to be struck out from the suit with costs.

The facts of the disputed land are that Ayub Wasike (the 2nd defendant) and Ainea Fita (the first defendant) moved to no-man's land at Namirama in Bunyala sub-location in 1936. It is undisputed that at the time, Ainea was a boy but not so young because, as his name denotes he was born during the first world war. They left their original land and settled in the disputed land which at the time was virgin land.

It is alleged that Ayub Wasike allowed Ainea Fita to use the suit land which Ayub had acquired. It is not disclosed on what basis they shared the land between themselves. Ainea's version is not much different because he states that Ayub was cultivating on the other side with a common boundary in between since 1940.

When the dispute arose between them, they fixed a boundary marking their individual pieces of land which boundary is marked by a fig tree. In one of the exhibits produced by the parties, there is a letter from the District Commissioner North Nyanza dated December 20, 1960 addressed to the first respondent which, *inter alia*, reads:

"PC's Land Case 18/47, DO's Land Case 64/47. I have investigated your father's complaints and found that he had a land case with Khachonga in 1947 under the above case numbers and your father won.

Later, Ainea Fita, his relative, sued him up to the African Court of Appeal Land Case Number 336/57 and the Land was shared between them. Ainea has filed a viewing of land application in the Lurambi African Court vide the African Court of Appeal 336/57 and this is correct if he feels that your father is interfering with his portion.

As your father did not appeal against the decision the African Court of Appeal in 336/57 that was the end of the matter and no further action can be taken."

In 1967 there was Land Adjudication Committee Case No 38/67 between the appellants and the respondents. At the time the second respondent was alive. The second respondent did not claim the land from the first respondent. What the appellants stated in their claim presented by Noah's evidence in the proceedings before the committee and produced as Exhibits marked D9 is this:

"I claim from Ainea my father's piece of land, simply because he has taken the whole piece of land. He has not even left a small piece of land to us, as young brother. Even though it is not his piece of land. He did not buy this piece of land, my father Ayub was the one who found it, by then Ainea was a school boy. Ainea has left his father's land at a place called Kharanda.

He wants to use the whole land. He can go and claim his father's land Ekharanda, but this one of Ayub. Every one his sons has right of getting a piece from it."

The respondent herein resisted the claim.

The adjudication committee followed the decision of the African Court in Land Case No 13/66 which awarded the land to the first respondent.

Mr Khaminwa has referred to several authorities which are the accepted proposition of customary law. Unless there are very good reasons known to customary law, a father cannot disinherit his children.

In order for the children to inherit their father's land, the father must be in possession of the land at the time of his death. It has not been shown to the satisfaction of the court how a son or sons could inherit their father during his lifetime. They could be given land, for use which will be regarded as part of inheritance on their father's death.

When the respondent (1st respondent) sued the second respondent in Land Case No 13/66 the 1st respondent was asserting his right of ownership in the land. The first respondent having succeeded in the first court, the second respondent appealed to the African Court of Appeal which appeal was dismissed. There was no further appeal to the DO's court. The second respondent must have realised his inability to get the disputed land from the 1st respondent. For that reason, he could not lay any further claim to it before the Adjudication Committee. It is the appellants who claimed the land on behalf of the then living father. Following the decision of the adjudication committee, the first respondent was on first registration, registered as the sole proprietor.

After the first registration, the appellants can claim the land from the respondents if they can show that the registered proprietor holds the land in trust for them under either the proviso to section 28 or section 126 of the Registered Land Act (cap 300). How Ainea Fita became possessed of the land cannot be discussed now in the light of the decision of African Court of Appeal. The first respondent did not hold the land in trust for the second respondent. There was no constructive trust either in favour of the 2nd respondent or the appellants. There is no fiduciary relationship as between the appellants and the first respondent. Such relationship can only exist between father and sons, but the father must be possessed of the land first. Whatever relationship there could have been relating to land between the first and second respondents, came to an end when Ainea asserted his rights over the land. Furthermore, any agreement there could have been was nullified by the decision of the African Court.

There is no form of trust that can be inferred after the judgment, unless it was embodied in the judgment. There is nothing shown in this appeal that could indicate that the trial judge erred in not holding that the 1st and the 3rd respondents hold parcel No Bunyala/Namirama/196 in trust for themselves and the appellant and the 2nd respondent.

A question of *res-judicata* was raised by Mr Mukelle, Mr Khaminwa stated that this case is not covered by the doctrine of *res-judicata* since the parties to this suit were not the same parties in the suit before the African Court. Section 7 of the Civil Procedure Act (cap 21) deals with *res-judicata*. It bars suits which have already been decided by competent courts to be reinsituted.

The section provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Lurambi African Court which heard the dispute between the 1st and 2nd respondents had jurisdiction to hear and determine land dispute. The issue before the court at the time was the ownership of the land. One cannot claim the position of a boundary unless he owns what is bordered by the boundary. Ainea Fita the 1st respondent succeeded in getting the land with cost. Ayub Wasike, the 2nd respondent appealed to Kakamega African Court of Appeal which appeal was dismissed. There is no indication that when Ainea Fita succeeded, he was to hold the land in trust for Ayub Wasike and the appellants. The issue raised by this suit relates to the ownership of land. In my view, the question of ownership was finally determined

by the dismissal of the appeal filed by Ayub Wasike before the Kakamega African Court of Appeal in Land Case No 336 of 1957. On the principle of *res judicata* the issue of ownership in a subsequent suit as in the instant case could not be raised.

As to the parties under whom they or any of them claim, litigating under the same title, it is an undisputed fact that the appellants are the sons of the second respondent. They have sued the 1st, 2nd and 3rd respondents basing their claim on trust. The fact is that the appellant sued their father together with 1st and 3rd respondents and they are raising the same issue that was before the African Court in 1957. They are claiming the land through their father based on trust. Mr Wasuna for the second respondent readily conceded that the appellants' claim as far as the second respondent is concerned is justified but would not rely on the judgment of the African Court. What the appellants are really doing is to claim the land from the 1st and 3rd respondents on behalf of their father the 2nd respondent so that they can inherit it. They are certain that their father would be too happy not to defend the claim and possibly obtain judgment against him in default.

If their father had no connection with the subject matter, there would be no basis for the claim on trust. Their contention as put forward by Mr Khaminwa is that Ainea Fita was given land by Ayub Wasike and never bought it. They are now claiming that such gift was on trust. Mr Wasuna admits that the subject matter is the same land that was in dispute before the Lurambi African Court. The appellants being the sons of Ayub Wasike who was involved in the same land dispute with Ainea Fita, who was the defendant in the fresh High Court suit, are all parties within the meaning of section 7 of the Civil Procedure Act (ccap 21) who are barred from instituting a fresh suit over the same issue which was already dealt with by a former court and a decision given.

Thus, in *Salem Ahmed Hassan Zaidi v Faud Hussein Humeidan* [1960] EA 92 at page 99 letter D, Fobes VP stated:

“I see no reason to differ from the Indian decision on the effect of a decision under O XVII, r 3, and I think the same reasoning and conclusion applies equally to a “judgment pronounced” against a plaintiff under r 178 of the Rules of court, that such judgment must be deemed to be a decision on the merits and must have the same effect as a dismissal upon evidence; that accordingly the matters in issue in the suit must be deemed to have been heard and determined; and the decision operates as a *res judicata*.”

Another point which would be considered, though not argued, would be limitation. Under section 7 of the Limitation of Actions Act (cap 22) no suit based on the claim of Land should be brought after the expiration of 12 years. The appellants' claim in order to avoid the Limitation provision, filed the suit basing claim on trust. Their claim under trust has failed.

The learned judge's decision is based on the decision of Lurambi African Court and Namirama Land Adjudication Committee both of which decisions gave land to Ainea Fita the first respondent without any condition attached to it. It is my view that the decision of the High Court was also based on the principle of *res judicata*. It is my view, that the learned judge was right in dismissing the appellant's claim. Equally the same, I would dismiss this appeal with costs to the 1st and 3rd respondents.

Apaloo JA. I have reached the same conclusion as Gachuhi JA.

The question of substance raised before the court below and before this Court, is whether the plot of registered land No. 196 situated at Namirama village Namirama Sub-Location, Bunyala location in the joint names of the 1st and 3rd respondents is held by them as constructive “trustees” of the appellant? The learned trial judge answered that question in the negative. The appellants say, he was wrong and invite us to hold the contrary and thereby reverse him.

What are the facts and on what was the trust concept based? The first respondent is the father of the third respondent. The former was born in 1918 and when he was still very young, his own father died. This was said to be during the first world war. He was the older brother of one Ayub Wasike. He was sued as the

2nd defendant but he died during the pendency of the action in the Court below but was substituted by his wife. The late Ayub Wasike was the father of the appellants.

When the 1st respondent's father died, he lived as a child with his late uncle Ayub first at Kharenda village. This was about 1925. In 1936, they moved to Namirama and settled there. Ayub acquired a piece of forest land and the evidence shows that he carried on farming there. Ayub's mother who was the 1st respondent's grandmother was also with them. It seems clear that all the forest land then farmed upon by the family was acquired by Ayub. The 1st respondent also farmed his portion of land.

Although the 1st respondent claimed that he at that time acquired land independently of his uncle Ayub, this does not ring true. He was then just 18 and was too young to have acquired land in his own right.

It seems however, that both Ayub and the 1st respondent farmed on distinct portions of land. In 1940, the 1st respondent married. His uncle Ayub gave him a dowry and also seems to have allowed him keep the land on which he was farming for himself. Both the 1st respondent and Ayub carried on acts of husbandry apparently without incident till 1947. In that year, Ayub went beyond his own land into the 1st respondent's. This provoked a dispute which was taken to the village elders. The elders then settled the boundary between them and planted sisal to mark it. This was done in the presence of Ayub and his nephew the 1st respondent. Sometime after this – the evidence is not precise on the date - Ayub uprooted the marked boundary. So the 1st respondent sued him in Lurambi Court. The Court then restored the boundary which the village elders had fixed before.

According to the evidence, there was no serious incident between the parties until 1958. In that year, Ayub again uprooted the boundary. The 1st respondent reported his conduct to the authorities. He was accordingly prosecuted and fined for trespass. In 1967, the land in Namirama was demarcated under the Land Adjudication Act as a prelude to registration under the Registered Land Act. Ayub's children, that is the appellants, then attempted to assert title to the suit land. They failed and it was then registered in the sole name of the 1st respondent. This was in May 1970.

Sometime later on 1st September 1972, to be precise, the 1st respondent caused it to be registered in the joint names of himself and his son, that is the third respondent. That is plot 196. Plot 195 is registered in the name of Ayub alone. The respondents laid no claim to it or sought to exercise any rights of ownership on it. Its inclusion in the plaint seems to be a red herring.

On these facts, it seems, whatever may have been the original nature of the title acquired by the parties, since the dispute of 1947, 1958 and their settlements and the Land Adjudication proceedings of 1967 which resulted in the registration of the 1st respondent as the legal owner, neither Ayub nor any persons claiming title through him can assert any title, legal or equitable against the 1st respondents' ownership of the suit land. That seems to be the reasoning underlying the learned Judge's holding that the respondents did not hold the legal title to plot 196 in trust for themselves and the appellants.

The appellants say that the decision was wrong and invite us to reverse it.

The memorandum of appeal contains five grounds of appeal. If I may say so without disrespect to counsel, they are not particularly weighty ones. The one seemingly serious one and the only one argued with some earnestness, is ground one which is in these words: -

“The learned trial Judge erred in law in not holding that the defendants held and were registered as proprietors of all those pieces of land known as Title numbers Bunyala/Namirama/195 and Bunyala/Namirama/196 as trustees for themselves and for the plaintiffs.”

One would have thought that on this ground, legal argument would be presented to show that the facts found by the Judge, obliged him to hold that a trustee beneficiary relationship existed between the respondents and the appellants. It is conceded that the legal titles to the plots 195 and 196 are in respect of 195, vested in Ayub, the plaintiff's father and of 196, jointly in the 1st and 3rd respondent's. The

appellants did not provide the purchase money for buying these plots. The plots were not acquired because the respondents took advantage of a fiduciary duty which they owed towards the appellants and acquired the plots in dispute by exploiting that position.

Had the appellants provided the money with which the plots were purchased, there would have been a resulting trust in their favour. Had the respondents acquired those plots by taking advantage of a fiduciary position they held towards the appellants, there would be a constructive trust imposed on the respondents to hold the plots for the appellants. It is this latter species of relationship which the appellants posit because they pleaded in paragraph 13 of the plaint that: -

“The first, second and third defendants are legal owners of the properties registered as No. 195 and 196 respectively but they have some fiduciary position as regards the plaintiffs in respect of these properties and that the first defendant obtained some personal advantage from the position when he was allowed the user of the entire land.”

It is necessary to look at these matters closely and for the purpose of analysis, the claim against Ayub who held the registered title to plot 195 should be divorced from the claim against the 1st and 3rd respondents in respect of plot 196. The learned Judge thought the suit by the appellants against their father Ayub was cosmetic. I think it was more than that. The late Ayub did not alienate plot 195 before his death. If, as the appellants say they have no land, they have a customary right to its succession. Neither the 1st nor 3rd respondents entered upon plot 195 nor did or said anything about that plot which suggest they claimed any interest in it. Indeed they expressly disclaimed any interest in plot 195.

It is plain that the appellants had designs on plot 196 and not on 195 which the respondents did not claim. It is a much larger plot measuring 16 hectares whereas plot 195, was only 0.7 hectare. It seems clear that the appellant's real object in joining plots 195 to 196 in the plaint was to “wrench” plot 196 from the respondents. It is that plot that they covet. And the collusive nature of this action, is amply exemplified, by the attitude of Mr. Wasuna, Ayub's advocate. Before us, he readily conceded the appeal of the appellants.

As there was no dispute about the appellant's right to succeed plot 195 which was registered in Ayub's name, that concession in no way affects the 1st and 3rd respondents. The collusive nature of the appellants' joint action against their own father and the 1st and 3rd respondents, is also shown by the evidence of Alaila, the appellants' sister. She testified that her late father Ayub did his best to sub-divide plot 196 but was not successful. An appeal to the Minister for Lands yielded no result. So she said: -

“My father then filed this suit in this Court”

That is another way of saying, that Ayub's true role in the suit in view of the reliefs which his children, the appellants sought, was that of a plaintiff. In real truth, he desired the same relief that his children – the two appellants, sought namely, to subdivide plot 196 so he can give portion to the appellants. The reason why he was not joined as co-plaintiff seems plain.

Ayub had fought the 1st respondent on the identical land in 1947, 1958 and in the adjudication proceedings preceding the registration of the latter as the registered proprietor of plot 196 in 1967. If he joined his children, namely, the appellants to contest the 1st respondent's absolute ownership in 1975, that being the date of the plaint, he would be met with an unanswerable plea of *res judicata*. That is why, he procured his children, the 1st and 2nd appellants, to bring the present suit against both respondents and himself. If that is a correct appreciation of this matter, this suit is merely a device by Ayub to re-agitate through his sons, title to plot 196 which he was consistently lost to the 1st respondent and which by reason of its registration, is practically indefeasible.

But it is necessary to consider on what basis, the 1st and 3rd respondents are said to be trustees of the appellants. The appellants say, this arose by the prescription of the Luhya customary law by which being without land, they could not be disinherited by their father from enjoyment of his landed property. For authority, they relied on Vol. 2 page 48 of Cotran's *Restatement of African Law*. Dealing with

disinheritance according to Luhya customary law, the learned author states: -

“A person may not, however, through distribution to other heirs deprive one heir of his whole inheritance.”

The appellants say, the three other male children of Ayub were given land by him while they got none and that his father could not, consistently with Luhya custom, deny them land as that would amount to disinheritance.

That argument is predicated on the fact that plot 196 belonged to Ayub. That is demonstrably false. The result of the decision of the village elders in 1947 and that of the Lurambi Court and Ayub's successful prosecution in 1958 for trespassing on the 1st respondent's land was that as between Ayub and the 1st respondent, the latter was the owner of the land. Any lingering doubt that may exist was put to rest in 1967 when land in the area became the subject of adjudication under the Land Adjudication Act (Cap. 284).

It is common ground that plot 196 was adjudged to belong to the 1st respondent. Indeed the appellants' elder sister said Ayub did his best to have the land sub-divided and when he met no luck, he appealed to the Minister of Lands but was again unsuccessful. Under section 29(1) of the Land Adjudication Act, the Minister's decision was final. And it is because of the finality with which the Minister's decision was clothed, that the 1st respondent was on the 4th May 1970, registered in the Land Register as the absolute owner of plot 196.

So if instead of being a defendant, Ayub had joined his children in this collusive action as plaintiff, he would have been met and met completely with the plea of *res judicata*. As between him and the 1st respondent, the ownership of plot 196 was finally and conclusively decided. The fact that he was made defendant along with the 1st and 3rd respondents, made no legal difference. The appellants were equally estopped. Mr. Khaminwa objects that the plea of *res judicata* could not be invoked against the appellants because they were not parties to the earlier actions. True, they were not. But they clearly were privies to their father. They claim as his heirs and were accordingly privies in blood. It is a platitude that estoppel binds not only parties but their privies as well. (See *Sarkar on Evidence* 12th Edn. p. 196 and p. 1113). At all events, the appellants were themselves parties to the dispute on the identical plot before the Land Adjudication Committee. The 1st appellant admitted that it was case No. 38/67. The Committee's decision was against them. Of this decision he said in evidence: -

“I did not appeal against the decision of the Land Committee in case No. 38/67. I was satisfied with the decision.”

It was this decision that finally cleared the way for the 1st respondent to be registered as the absolute owner of plot 196 in the land register. So, aside from being bound as privies of their father Ayub, the appellants themselves contested the ownership of plot 196 in the right of their father, and similarly lost. It seems to me entirely inadmissible that the 1st respondent having successfully asserted his absolute ownership of the suit plot in actions against both Ayub and the appellants, should now be adjudged to hold that selfsame property as trustee for the defeated appellants. There is no warrant for the contention that the respondents hold the legal title in plot 196 as “constructive trustees” for the appellants. It is plain to me that they hold it as beneficial owners and in their own right.

I have listened to an exhaustive canvassing of this case for several days and I am certain of one thing, namely, the appellants have no merit whatsoever. I would dismiss this appeal with costs.

Nyarangi JA. I agree. The result, therefore, is that the appeal is dismissed with costs.

Dated and delivered at Kisumu this 12th day of April , 1988

J.O NYARANGI

.....

JUDGE OF APPEAL

J.M GACHUHI

.....

JUDGE OF APPEAL

F.K APALOO

.....

JUDGE OF APPEAL