IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Apaloo & Masime JJA)

CIVIL APPEAL NO 52 OF 1985

BETWEEN

MBOGUA KIRUGA.....APPELLANT

AND

MUGECHA KIRUGA & ANOTHER.....RESPONDENT

(Appeal from a judgment/decree of the High Court at Nairobi, Todd J)

JUDGMENT

October 18, 1988, **Platt JA (Dissenting)** delivered the following Judgment.

The plaintiff/appellant lost his suit in the High Court and he now appeals. It was not a straight-forward case. Originally his claim to parcel No Ndeiya/Makutano/76 was based on this land having been registered in the name of the plaintiff's father Kiruga Kimani. The plaintiff pleaded that his father had died in 1957 while the plaintiff was in detention, and that on the death of his father the first defendant, his brother, Mugecha Kiruga, registered the land in his own name by fraud. Then the plaintiff took possession in 1958 and having been there ever since, he claimed that he had been in adverse possession for a period exceeding 12 years at the time of filing the suit, in September 1973. Then in the year 1971 Mugecha again fraudulently and without the knowledge of the plaintiff, sold and transferred the land to the second defendant George Karogo Njoroge.

Indeed at the time the suit was filed, George was the registered owner. Nevertheless due to the plaintiff's adverse possession acquired against both Mugecha and George, the title had passed to the plaintiff and George held the land on trust for the plaintiff in accordance with sections 37 and 38 of the Limitation of Actions Act (cap 22). Consequently, the plaintiff prayed for orders that the second defendant execute and transfer the land in favour of the plaintiff.

That was not strictly the case, but possibly there was a transferred sense in which it was partially right. The plaintiff's father had lived in Ndumberi area and Mugecha had a piece of land Ndumberi/Ndumberi/1045 registered in his name. Mugecha exchanged No 1045 with the owner of Ndeiya/Makutano/76 who was Waiti Ngara. So the latter became the owner of No 1045 and Mugecha became the owner of No 76. This exchange took place on January 26, 1959. It may be that what the plaintiff meant in a round-about way was that if Mugecha had received land as coming from his father and had exchanged it for No 76, the latter had, in a sense, been derived from his father. Mugecha and the plaintiff were full brothers and it appears that there was some opinion in the family that Mugecha ought at least to share No 76 with the plaintiff.

When the plaintiff gave evidence for the first time on March 6 1978, he claimed that his father who had died in 1957 while he was in detention owned No 76. When he came out of detention in 1958, Mugecha had already had No 76 registered in his name and he claimed the land to be his own. But then the plaintiff and Mugecha had agreed to divide the land into two pieces. The plaintiff took the matter to the elders of the family who were alleged to have said that the plaintiff being the elder son, the land should be registered in his name.

That position could not be maintained long. His father had never owned No 76. His father's lands had been consolidated and it was claimed that six portions of land, three in Ndumberi and three in Riabai were allocated by the committee. When Mugecha gave evidence for the first time he explained that Ndumberi/Riabai/432 was registered in the name of the plaintiff (ExhibitA). Another piece of land was registered in the name of Mbogua Kiruga the plaintiff's half-brother. A third piece of land was registered in the name of the plaintiff. Then in Ndumberi (Riabai is a part of Ndumberi), Mbogua got one piece of about seven acres; another portion was registered in Mugecha's name of about 5 acres; and the last portion was registered in the plaintiff's name. Mbogua received the most, and he had looked after their father; the plaintiff got about six acres; the defendant Mugecha got about five acres. The plaintiff was said to have sold his own portions of land, but went to stay with Mugecha and their mother first at No 1045, and then at No 76. Mugecha and their mother then left No 76 and the plaintiff developed the land, according to him.

When the plaintiff gave evidence first, the plaint was amended to allege a case of trust, viz: that when Mugecha procured the land No 76 he had it registered in his name in trust for the plaintiff who was the eldest son and other members of the family. After the defendant gave evidence, the defence was amended to read that the defendant allowed the plaintiff to cultivate a portion of the land in 1962, and not in 1960. A little later on, the important amendment was made to the plaint, that when the plaintiff's father who died in 1957, after his land had been consolidated, Mugecha proceeded to have their father's land in Ndumberi location registered in his name as Ndumberi/Ndumberi/1045, and later exchanged that land with one Waiti Ngara for No 76. When that amendment was allowed, there followed an adjournment after which the parties gave evidence again.

During this second attempt, the plaintiff agreed that he was present when the transfer to Waiti Ngara took place. He had entered land No 1045 as from 1960. He had gone to the Land Control Board with Mugecha and Waiti Ngara. Thereafter the plaintiff and his mother went to Makutano.

On that basis of course, the plaint was partially wrong. There was no case of fraud, at any rate as far as the transfer to Waiti is concerned, and there does not seem to be a case of fraud concerning the registration of No.1045 in the name of Mugecha either. Otherwise the plaintiff would have had No 76 registered in his name at once. He allowed No 76 to be registered in Mugecha's name. That was because of the trust in his favour one supposes, or because of the claim of adverse possession. The learned judge found that the plaintiff's case was that No 1045 had been registered in the name of Mugecha in trust for the plaintiff; so that when Mugecha exchanged No 1045 for No 76, the latter plot was to be held on the same trust in equal shares, as Mugecha had held No 1045. But the learned judge did not believe this submission. He was of the view that the plaintiff had acquired three plots – Ndumberi/Riabai/432, Ndumberi/Ndumberi/1092 and another plot (presumably at Riabai).

There was the evidence of Daudi Ndirangu (PW2) that the plaintiff had got No 1092 from his father and that the plaintiff had sold it to Daniel Kariuki the son-in-law of Daudi.

The Ndumberi/Riabai/418 was sold to Edward Ikonya.

Thirdly it was alleged that the last piece of land was sold to Nene Methe.

The learned judge did not believe that the plaintiff lived on No 76, from 1958 but only from 1962, and therefore as the plaint had been filed in September 1973, whether his possession was adverse or not 12 years had not passed.

Finally, there was no question of trust because the plaintiff had inherited his own land slightly greater in extent than the land inherited by Mugecha.

As each son, including Mbugua had been given land, and indeed Mbugua had been given more land than either the plaintiff or Mugecha, there was no question that any of the three sons held his land on trust for other sons.

But as the plaintiff had disposed of his land and had merely been allowed to cultivate on the land of Mugecha; the plaintiff had no claim to share Mugecha's land. It was up to Mugecha if he wished to do so.

The plaintiff now appeals on various grounds. Paraphrasing them, it would seem that the plaintiff challenges the learned judge's acceptance of the defence put forward by Mugecha and the rejection of the plaintiff's claim on the basis of trust as well as adverse possession. In general, the plaintiff claims that Mugecha being younger brother to the plaintiff held Ndumberi/Ndumberi/1045 on trust for him and that when No 1045 was exchanged for No 76, the trust was transferred to No76. Supporting that central contention were the following facts:-

> *(1) The plaintiff alone occupied No 76 while Mugecha had moved away (ground 1);*
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> *(2) The plaintiff began occupation in 1960 and not 1962; and on this point the judge had been wrong to allow the defendant to amend the defence in paragraph 4 inserting the year 1962 in place of 1960 (see grounds 3 and 6 of the memorandum);*
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> *(3) The plaintiff contested the finding that the plaintiff's father had died after the plaintiff had been released from detention (ground 4);*
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> *(4) The plaintiff pointed out that there was not enough evidence to show that the plaintiff had sold Ndumberi/Riabai/432, Ndumberi/Riabai/418, and Ndumberi/1092; (see ground 5);*
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> *(5) The learned judge failed to take into account the views expressed by the clan and the District Commissioner that under customary law Mugecha must hold the land for the plaintiff (ground 7);*
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> *(6) Indeed the defendant did not have any witness from the clan to support his claim; and*
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> *(7) The learned judge had not understood the size of the land; the secrecy with which the re-sale to the second defendant had been undertaken; the way in which the caution placed on the land by the plaintiff had been removed by Mugecha; so that altogether the second defendant could not lawfully claim to be the owner of the land.*

The apparent strength of the appeal, and the constant attack on Mugecha for lying in court and for cheating the plaintiff must all be seen in perspective with the plaintiff's own activities. There is no doubt that at first the plaintiff brought his suit on entirely wrong grounds as has been pointed here above. Nevertheless, it is necessary to consider the appeal with care because it is not all misconceived.

The first point to take up is the change from 1960 to 1962 in the defence. As the plaintiff points out, this was a fundamental change in the defence and it remains to be seen whether it was the "brain child of untold injustice." It was the only amendment which Mugecha asked for. It occurred while Mugecha was giving evidence, during his examinationin- chief. It was allowed because the learned judge thought that no prejudice had been caused. It is true to say, that the way in which the amendment was allowed left something to be desired, because the plaintiff had given his evidence. He had not been able to call witnesses since they were not ready and in court, and therefore he had not been able to challenge this change of dates. But fortunately the plaintiff also amended the plaint in material matters. His first amendment occurred while he was giving evidence in which he added the allegation of trust to the plaint, which had previously been concerned with the fraud of Mugecha in transferring No. 76, as their father's

land, to the second defendant. The first case put forward by the plaintiff, had been this fraud, and adverse possession from the year 1958. Now during the course of his evidence he introduced the idea that Mugecha having fraudulently procured the land of the plaintiff's father and had it registered in his name, he held it on trust for the plaintiff, the latter being the eldest son. That amendment had been allowed. Then later while Mugecha was giving evidence for the first time, the plaintiff now sought to change the basis of his case by admitting No 76 had not been his father's property, but that after consolidation Mugecha had proceeded to have the plaintiff's father's land No 1045 registered in his name and exchanged for No 76. This second amendment was also allowed. The result was that both sides had fundamentally changed their cases and the learned judge gave them both an adjournment, and after a lapse of time on March 7, 1978 to February 8, 1982 the parties started all over again.

At this stage, the plaintiff asked to refer the matter to arbitration but the defendants refused; so the trial continued this time with witnesses called. It was therefore possible for both sides to deal fully with the new issues. In this sense this court can say that there was no prejudice. Without the plaintiff's own amendments, he would have lost the case; and indeed these involved a change of date from 1958 to 1960. He cannot possibly complain about the defendant's amendments. It became simply a matter of proof. In deciding which side to choose, the evidential points raised by the appeal and tabulated above, show that the learned judge did not express himself carefully on all the matters he had to consider. When did Kiruga die? It was held that the plaintiff came out of detention before his father died. The plaintiff accuses the judge of not having heard any evidence on that point to support his finding. That is not right; both Mbugua and Mugecha say so, except that Mugecha in a sense conceded that though the plaintiff was out of detention, he was still restricted to the chief's camp, where he could be visited. Their father died while the plaintiff was in that camp. Mbugua says –

> "Kiruga, our father died after Kimani got back from detention."

But even if the judge did have Mbugua's evidence in mind, it is not clear what the judge derived from that fact. It seems that he thought that the plaintiff had understood and accepted what his patrimony was. Certainly the evidence of Mbugua does not support that sort of inference. Mbugua was adamant that his land had been given to him alone, while Mugecha would have to hold the land that he got on trust for his elder brother. That was also the recollection of Morris, (PW3). It may well be that Mbugua being the eldest son and the only son in his mother's house, the land shared out to that house would be his alone, and not subject to any claims by the sons in the house of the other wife of Kiruga. The plaintiff and Mugecha were the sons of the latter house. It may also be a correct view of customary law that normally the elder son of the house would be responsible to share out land. There is evidence on this point but there are decided cases which support it. The only question is whether an exception is to be made for such matters as detention. However, their father Kiruga was alive at the beginning of the consolidation and demarcation process.

He died before registration. It was possible that Kiruga had expressed his wish how his land was to be divided between the houses of his wives in Ndumberi and Riabai near the place where they used to cultivate. His lands had then been consolidated into what seems to have been generally agreed as six portions (or perhaps five) and it may be that Kiruga had been able to express his wishes as to the ownership of these portions. As I have said Mbugua was clear as to his rights saying:-

> "And neither Kimani nor Mugecha can come into my piece of land. I had our father's blessings that I could settle and live in that piece of land and nobody was to disturb me."

He was referring to his land of about seven acres in Ndumberi.

While this process was going on leading to the demarcation and registration of land, what role did the plaintiff play? That becomes the crucial contest. Mugecha alleged that the plaintiff had been given three portions of about two acres each but that he had sold off two portions before actual registration and the last portion in 1964. If Mugecha is right that the plaintiff had three portions of two acres each, he had more land than No.1045 afforded Mugecha. It could then be argued that the plaintiff had been catered for by his father separately from Mugecha. Abstracts of title of two of the plots do not bear out the acreages

alleged. They are small. Even so, the plaintiff is alleged to have sold off his three portions and now unfairly insisted on a share of No. 76. On the other hand, the plaintiff denied strongly that he had ever been allocated three portions of land or had sold them off. He claims that he had no other land than his share in No. 76. In point of time, it can be seen that it was not so important to find out whether Kiruga was still alive when the plaintiff emerged from detention, as whether there was time for the plaintiff to sell land before registration.

The three plots alleged by the learned judge were Ndumberi/Riabai/432, Ndumberi/Ndumberi/1092, and the third plot unnumbered which was sold to Nene Meta.

> Ndumberi/Riabai/432: The abstract of title shows that this parcel was registered in the name of the plaintiff on June 3, 1958, and was later transferred to Ikinya Waithaka on August 8, 1964, for the sum of Kshs 2,400 (Exh A).

The plaintiff flatly refused to have had anything to do with this sale, and suggested that Mugecha and his mother sold it fraudulently. Ikinya Waithaka did not give evidence. The plaintiff said that Mbugua knew about this witness but neither Mbugua nor Morris would agree that they knew anything about this matter. Indeed Morris, alleged that he knew nothing about Kiruga's land at Riabai. Perhaps he was not on the committee for land at Riabai but only for land at Ndumberi. However that may be, Morris did not even know that Mbugua had been given land at Riabai.

Mbugua acknowledges that allocation. Therefore Morris does not seem to have known all the affairs of this family. On the other hand, Daudi Ndirangu (PW2) remembered the sale by the plaintiff of No 432. Daudi is an uncle of the plaintiff, Mugecha, and Mbugua.

> **NDUMBERI/NDUMBERI/1092**
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> The abstract of title shows that on July 17, 1958 this land was registered in the name of "D Kariuki Gatirangu."
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> It was 1.6 acres in area (Exhibit 1). Mugecha said that the plaintiff sold it. Daudi Ndirangu (PW2) confirmed that the plaintiff had sold it to Daniel Kariuki, the sonin-law of Daudi Ndirangu. As an uncle of the plaintiff,and being connected with Daniel, Daudi's evidence understandably carried weight in the learned judge's opinion.

On the other hand the plaintiff denied this sale and his point is that if it had been his land, his name would have been registered in the abstract of title. The explanation given is that the plaintiff sold this land to Daniel after it had been allocated to him, as the consolidation and demarcation records would show, and then just before the registration the plaintiff sold it to Daniel. That would be a possible process but Mugecha did not produce the records. Yet the plaintiff says he came out of the camp in June or July and as the Riabai land No 432 was registered in June, it would appear that the plaintiff could have been present to sell the land to Daniel in July. It is very unlikely that Daudi would bear false evidence against the plaintiff.

> **Ndumberi/Riabai/418:**
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> There is an abstract of title in which Edward Ikonya was registered as owner on June 3, 1958. Mugecha at first said that the plaintiff sold this land to Edward Ikinya just before registration. Daudi Ndirangu did not support this sale but a sale to Nene Meta. A sale to Nene Meta was put to the plaintiff in cross-examination. The plaintiff denied it. Morris, of course, knew nothing about it. Mbugua denied having heard of Kimani the plaintiff selling land to Nene Meta. But the problem is how can one fit the abstract of title for No 418 in Edward Ikinya's name with a sale to Nene Meta. Looking through Mugecha's second piece of evidence, he has not explained how Nene Meta came to be involved instead of Edward Ikonya or whether they were different sales.

There were three certificates of, title (at folios 77,78 and 79) to which Mr.Mburu (who appeared for Mugecha, objected). He need not have worried. They only confirmed Edward Ikonya's ownership of 418, Mugecha of No. 1045 and Daniel of No. 1092. They simply corroborated the abstracts of title. What Mr Mburu does not seem to have done is to have clarified the difference between Edward Ikonya and Nene Meta.

The result is that there is no evidence to support Mugecha's allegation that the plaintiff owned a second parcel of land in Riabai, apart from No.432. Nor is there evidence that the plaintiff sold this second parcel of land to Nene Meta or indeed Edward Ikonya. In the light of this conflict the reasoning of the learned judge is defective. He simply brushed the conflict aside and concluded that the plaintiff had sold an unnumbered parcel of land to Nene Meta without any further explanation. This being a first appeal, and reviewing the evidence for myself, I have come to conclusion that the evidence was too conflicting and insubstantial for the learned judge to reach the conclusion that he did. He trusted Mugecha and Daudi, and while Daudi may be right, even though Mugecha does not speak of Nene Meta, without support this evidence cannot lead to the conclusion of the learned judge on a balance of probabilities.

That requires a cautious approach to the judge's other findings. What seems to be very clear is that the plaintiff inherited Ndumberi/Riabai 432 because his name was registered as the owner. In the case of Ndumberi/Ndumberi/1092 the evidence of Daudi Ndirangu shows that the plaintiff sold this land to the son in law of Daudi, namely Daniel Kariuki. In my view the learned judge was quite entitled to accept this evidence. It would seem to me that the idea of the plaintiff selling off small pieces of land is consistent with his position because he needed money to start again after many years in detention. Having thus answered points 2,3 and 4 above, I turn then to the final general issue whether the learned judge had been entitled to infer that Mugecha had been given his own land at Ndumberi/Ndumberi/1045 separate from the land given to the plaintiff at Ndumberi and Riabai. The other points tabulated above come within this general issue.

Judging from the abstract of title Nos. 1092 was 2 hectres or 4.8 acres. No.76 covers 2.2 hectres or 5.28 acres. To give the brothers parity 1.76 acresshould be allocated to the plaintiff out of No. 76. That would leave Mugechawith 3.52 acres. One must ask then whether such a division is justifiedand in general terms it would mean that the plaintiff's portion would be1/3 of the whole.

Looking at the evidence again and taking into account the facts now found, it is difficult to conclude that Mugecha had been given his land No 1045 entirely for himself. The plaintiff is, no doubt, right that at customary law, the plaintiff being the eldest of his house would be involved in the decision how to divide the land allocated to his house. As the plaintiff agreed when he first gave evidence, Mugecha had to receive some part of his father's estate after consolidation and that would require the land to be shared. Unless there were special reasons why the plaintiff should get a larger portion than Mugecha, they would get an equal share. In his first evidence that is what the plaintiff said. He acknowledged that they had agreed to divide No. 1045 into two pieces. His words were —"I also want half of the land." Later on in his second evidence he said he was claiming the whole of the land. That must be on the basis that in the case of a trust the land would be shared but in the case of adverse possession he would claim the whole. As far as Daudi, Morris and Mbugua are concerned, they generally agreed that the plaintiff was supposed to lead Mugecha in the inheritance of the land and not the other way round. It was also agreed that the committee could not finally decide on the division of the land within their house. The preponderance of evidence is that Mugecha was not given land for himself alone, but that he was to hold it until his elder brother emerged from detention, and would then carry out the customary division in their house.

The idea that the plaintiff had been given land of greater acreage than that given to Mugecha has not been proved. Even Nos 432 and 1092 do not amount to four (4) acres. Without a third piece of land being proved to have been allocated to the plaintiff, there is no likelihood of the plaintiff being shown to have been allocated 61/2 acres, upon which Mugecha's claim to separate allocations rested.

On the other hand, the way in which the brothers operated shows that they were prepared to accommodate each other. Yet the plaintiff talks of the disputed size of the land at No .6. It would be true that if No. 1045 was impressed with a customary trust it would carry over to No. 76, which the plaintiff agreed in his

second evidence, had been exchanged with 1045 with his concurrence and blessing. I may be wrong but the impression I got was that after the exchange there was found to be some discrepancy in the acreage of No. 76. The abstract is clear at 2.2 hectres. The plaintiff appears to have acknowledged that he had at first cultivated 2 acres of grass and then another three (3) acres with crops and grass. It would seem that No. 76 is about 5 acres in itself and that was the estimate of Mugecha. The buyer, George seems to have told the District Commissioner that the land was only about 21/2 acres. But that was not put in evidence nor was there cross-examination upon it. In the circumstances I have to rely upon the evidence in court. The result therefore on this aspect of the case, is that unlike the judge, I conclude that No. 76 was impressed with a customary trust and that all the lands should be aggregated and divided equally between the plaintiff and Mugecha.

The next question which falls for decision, is whether the plaintiff can claim the whole of No. 76, because apart from his customary share of it, he had been in adverse possession of the whole of the land. But his case is that he allowed his brother to cultivate the land and indeed that he, Mugecha, the plaintiff, and their mother, at first settled upon the land together. It seems to me that on any view of the evidence this family settled on the land which became their home even though Mugecha found employment in Nairobi. According to the plaintiff he arrived in 1960, according to Mugecha he arrived in 1962. I assume for the purposes of argument that it was 1960. According to him, he built two houses: one for himself, and one for his mother. In 1961 the mother went to Nairobi to stay with Mugecha who had found employment. After that Mugecha had never returned to the land. According to Mugecha the family lived together until he found work in Nairobi and then he used to return at weekends, but although he had tried to help his brother with clothes and shoes, because plaintiff was out of work, they had a disagreement and he left in 1963.

There were witnesses for the plaintiff who supported him on the point that the plaintiff had been largely in sole possession since 1960. The learned judge did not believe the plaintiff's case, because it seems that he held the plaintiff to his first account, whereby he had alleged that he went and lived on No. 76 from the time he came out of detention in late 1957 or early 1958. In the view of the learned judge, the plaintiff only came to live on No. 76 at the invitation of Mugecha in 1962. It was, of course, unfortunate that the plaintiff had started these proceedings on the basis that No. 76 had been his father's property and that he had gone to live there after he left detention. His change to accepting the exchange of 1045 for Number 76, involved the fact that that exchange had only occurred in January 1959. It seems that after the exchange, Mugecha and his mother moved to the area of No. 76, leaving the plaintiff behind in Ndumberi to try and do some business. Therefore the first case brought by the plaintiff was false and that influenced the learned judge. The second attempt does not seem to have impressed the learned judge either. He was firmly convinced that Mugecha was the more reliable witness.

The reasoning of the learned judge was rather short. It did not cover the period after Mugecha left No. 76. While one can see that there was evidence that the plaintiff had been welcomed to stay on No. 76 with the family, perhaps it was inferred by the plaintiff that Mugecha and his mother had abandoned the land. Hence, the plaintiff insisted on his sole occupation of the land by himself. Looking at the evidence again, I cannot accept that the plaintiff had adverse possession of the whole of the land. In my opinion the evidence only supports the case of invitation to the land where the two brothers and their mother agreed to live. It must have been necessary for Mugecha to find other occupation, and after a while Mugecha ceased to visit the land. If there is a case of abandonment, which I doubt, in any event, it could only have been from 1963 when Mugecha ended his visits to the land. I was not impressed with the evidence of the two ladies suggesting an earlier date, and I would hold that as the proceedings brought in 1973 or 1972 against George, the buyer, in the Resident Magistrate's Court, and by George as he says for the evidence of the plaintiff time had run in the plaintiff's favour. Those proceedings have been left pending the end of the suit in the High Court. In 1971 Mugecha established his claim to the land by selling it. There is no good ground for saying that because Mugecha had taken up employment he had abandoned the land to the plaintiff. I would hold that the plaintiff's occupation was throughout with the consent and help of his family.

If that be so, then the learned judge was right to discount adverse possession and the plaintiff's claim can only be based on trust together with possession of the land. Before I come to consider the ramifications of

that conclusion, I should deal with point number 5 arising from ground 7. The plaintiff called for a consideration of the view of the clan and the District Commissioner's view as recorded in proceedings before the District Commissioner. These proceedings have been placed on the record of appeal. Mr Mburu objected to them being looked at, as he could not recall whether they had been referred to at the trial. Certainly they do not seem to have been exhibited. Because his recollection is not entirely clear, I have looked at them. These proceedings were recorded in the absence of Mugecha who failed to attend. But the main point is that it is noticeable that Daudi, Morris and Mbugua gave short statements without real crossexamination and the abstracts of title being shown to them. There is no doubt that their evidence in the High Court was much fuller and by means of cross-examination revealed a broader picture of what really occured. It is quite clear that these witnesses did not give the District Commissioner a full picture and therefore with respect, it is the evidence in court which must guide this court, rather than the informal nature of those proceedings.

Nevertheless, I do agree that a family trust should be held to have been established at the time that Mugecha was registered as the owner of No. 1045. I turn now to the final issues and the focus falls upon George, the second defendant who bought No. 76 from Mugecha. Before George bought the land he visited it. He is a businessman in a nearby market. He would, of course, want to know what he was buying. He found it occupied with a house built upon it and cultivation of one acre and a further area with grass. He saw the plaintiff's wife but did not speak to her. He was satisfied he could purchase the land on the basis of what Mugecha told him. That is where in my opinion he went wrong. He ought to have asked the plaintiff's wife who was occupying the land and who was cultivating it.

In my judgment the plaintiff and his wife had an equitable interest in possession which qualified for an overriding interest as provided for in section 30(g) of the Registered Land Act (cap 300). That section ensures that the overriding interest in possession will bind a third party "save where enquiry is made of such person and the rights are not disclosed." If George saw that there were people in occupation and did not enquire what their rights were, he would be bound as a buyer of the land to acknowledge the overriding interest. He will have to settle with Mugecha for what he will lose due to the overriding interest.

The nature of such an overriding interest is well illustrated by *Hodgson v Marks* [1971] Ch 892. Mrs Hodgson's interest prevailed against Mr Marks who had bought the land from Mr Evans who held the title. Mrs Hodgson had the beneficial interest in the land, and being in possession was permitted to have the title transferred back to her from Mr Marks. So in this case the plaintiff's overriding interest would be sufficient to cause George to partition the land and transfer the plaintiff's share to him.

Then what is the position of the bank? The bank has a charge over the property, with, no doubt, a right to sell it. The bank entered into the charge presumably on the strength of the title of the purchaser. That title is defective. The bank is not a party to this suit. It will be necessary for the purchaser to put matters right with the bank. However, *Williams and Glyn's Bank Ltd v Boland*, [1981] AC 487 explains the bank's position as against the overriding interest of the plaintiff in this case. It is as well to recall Lord Scarman's remarks at p 510 where he drew attention to construing legislation concerning overriding interests in the light of current social policy. As a result of *Boland*'s case, banks were required to check on property that they were dealing with, or might deal with. The banks in Kenya also have teams of people to check on property. It will not be difficult to safeguard the bank's interests.

The result then is that I would allow the appeal and set aside the judgment of the High Court. I would not grant the prayer for adverse possession, but I would uphold the claim of a customary trust and I would order the second defendant to cause the property to be partitioned into portions of one-third for the plaintiff and two-thirds to the second defendant, and to transfer the one-third portion to the plaintiff. I would grant the plaintiff one-half of his costs in the High Court because he brought a false case to begin with, and he has been partially successful in the result. I would substitute judgment in the terms above with liberty to apply for consequential orders if necessary.

As far as this appeal is concerned, I would grant the plaintiff/appellant his costs of this appeal, as he was substantially successful. But the orders will be as proposed by Apaloo JA.

Apaloo JA. The view I formed on a first blush of this record, has survived, namely, the appellant having sold up his patrimony, has staked a less than honest claim to the suit land. He put his credibility to the test on facts which he deponed and in the process, that credibility was torn and tattered.

I agree with the finding of the learned judge that the appellant failed in his two wholly inconsistent claims. For myself, I do not see how I should reverse the learned judge on his finding of fact on oral conflicting testimonywhen it has not been shown to me that he misdirected himself in any way.

Mr Mburu for the respondent, submitted to us that the appellant's evidence was not credible and that the judge below was right in rejecting it. That is the view of the matter that I have independently formed. The appellant's first claim which he lodged with full professional assistance, was that he became owner of the suit land by adverse possession. After the 1st respondent gave evidence and related his version of the facts, the appellant made a complete summer-sault. He then said, in one breath, that the 1st respondent held the land in trust for him, and in the other breath, that he only held one half of that land as such for him. For my part, I would have been surprised, if the learned judge had accepted that evidence. He saw the witnesses and was the best judge of their credibility. Nothing that I heard in argument nor read in the record, persuaded me that the learned trial judge was wrong. Mr Mburu for the 1st respondent, categorized the cumulative grounds of appeal correctly when he said their sum total was a complaint that the judge was wrong in believing the 1st respondent.

The appellant and the 1st respondent told two diametrically opposite stories.

One must be true and the other false. The learned judge considered that the truth lay with the 1st respondent. When one puts the two divergent stories in juxtaposition to each other, it will not be difficult to see why the learned judge found for the 1st respondent.

The late Kiruga Kimani who died about 1957 or 1958, was married to two women. By them, he begat 3 sons and two daughters. The eldest of the sons was Mbogua Kiruga. He had a different mother from the parties to this action. The appellant and the 1st respondent were brothers of the full blood. The appellant was the senior in age. Sometime in 1958, the land in the area called Ndumberi was the subject of adjudication and demarcation under the Land Adjudication Act as a prelude to registration.

The late Kiruga Kimani, according to the 1st respondent, was found to have 6 plots of land. Of these, 3 were in a place called Riabai in the neighbourhood of Ndumberi and 3 in Ndumberi itself. The late Kimani did not wish to have those lands registered in his own name as owner. So he directed that they should be registered in the name of his three sons.

At that time, Kimani was in ill-health and may well have had a premonition of his impending death. So he was clearly making a gift *mortis causa* to his three male children. According to the testimony of the 1st respondent, his father directed that of the three pieces of land in Riabai section, 2 were to be registered in the name of the appellant. One was registered in the name of Mbogua. None was registered in the 1st respondent's name.

Of the pieces in Ndumberi proper, the parties' father directed that one each be registered in the name of his three sons. This was duly done. The 1st respondent said, Mbogua still had his two pieces of land. He said his elder brother sold all his three plots. He was detained at one time and when he returned and had no land to live on, asked and was allowed by the 1st respondent to share the land in dispute with him. So the appellant joined the 1st respondent and their mother on the land. That land was registered in the name of the 1st respondent. The 1st defendant said his elder brother, that is the appellant lived on this land with his permission.

It is clear from the evidence that the only plot of land that the 1st respondent swore that his father gifted to him, was No .1045. But that is not the land in dispute. On January 26th, 1959, the 1st respondent transferred that land to Waiti Ngara in exchange for Makutano 76 – the plot in dispute. The 1st respondent said he held that land in his own right until he sold it to the 2nd respondent on December 18, 1971. He said the sale to the 2nd respondent was open and when they went to the Land Control Board for

the usual consent, the appellant was present and raised no objection to the sale or indeed laid any claim to its ownership. In my opinion, this was a reasonable and inherently credible story.

The 1st respondent did not contradict himself in any way and a judge who saw and heard this story, was entitled to believe him. Indeed unlike the testimony of the appellant, the 1st respondent was not shown to have told one untruth. After a thorough review of the evidence, the learned trial judge expressed belief in that evidence.

As against the 1st respondent's clearly honest story, is the appellant's. The basis of his claim when he launched this suit, was that he took possession of this land when he returned from detention in 1958. He said behind his back, the 1st respondent fraudulently got the title registered in his name.

He said he remained in possession of this land notwithstanding its transfer in the 1st respondent's name. He said the 1st respondent again in fraud of him, transferred this land to the 2nd respondent in 1971. So the appellant said as he was in adverse possession against both his brother the 1st respondent and his trustee for 12 years, he acquired title to the whole of that land by prescription.

The appellant entered the witness box and having sworn, testified that the land in dispute belonged to his father and while he was in detention the 1st respondent registered this land in his name. He said his brother laid claim to it but he agreed to divide it into equal halves with him. The appellant denied on oath that any land was at any time registered in his name. He denied equally emphatically, that he sold any land he inherited from his father. He even denied on oath that extracts from the register which bore his name. These records show that at least two alienations were made by him. He said such sales must have been made by his mother jointly with the 1st respondent. He gave evidence, believing that Makutano 76 had always been his father's property.

When he finished giving evidence and closed his case, the 1st respondent went into the witness box and on oath related his version of the story as I narrated it above. He said Makutano 76 was at no time his father's property and that his patrimony was Ndumberi 1045 which he exchanged with Ngara, for the land in dispute. On the whole, his evidence harmonized with his pleading. After the 1st respondent gave evidence, the appellant's counsel realized that the latter's story that the land in dispute belonged to his father, could not be true. Leave was sought to amend the pleadings, to say precisely what the 1st respondent had denied in evidence, namely that the land in dispute was originally Ngara's but that the 1st respondent exchanged Ndumberi 1045 which his father gifted him for Makutano 76. Leave to make this amendment was opposed on behalf of the 1st respondent on the ground that the appellant was seeking to put a completely different case from the one pleaded. This was a serious departure in pleading and, in my opinion, the leave to amend ought to have been refused. The judge however, in my opinion, in error, granted such amendment. About 4 years afterwards, that is in February 1982, the appellant was to give yet another evidence on oath in support of his altered case. It is significant that in his second evidence, he said of this self-same land that:-

> "I did the transfer when I was in the land. I and my brother Mugecha and Waiti Ngara went to the Land Board. When my brother and I changed the land with Waiti."

This is a very significant change of front. If the appellant acted jointly,with his brother in exchanging the land with Ngara, could he possibly have forgotten this? And yet he did not explain why the exchanged land was registered, not in his name as the elder, but in his younger brother's name. But he maintained his incredible story that he acquired no land of any sort as a gift from his father. If he admitted that he had 3 plots or even two and sold them and yet wanted to go into shares with his younger brother who had a single plot, his story may be difficult to credit. But although the learned trial judge in error, allowed him to amend his claim and put up an entirely altered case, yet it is clear that the judge preserved a recollection of the impression the appellant made on him as a witness.

He entirely rejected his story and expressed belief in the 1st respondent's. The questions for decision in this court are three namely;

(1) on this simple issue of credibility, is there any ground for differing from the trial judge on the facts? And

(2) on the issues which were joined between the brothers, who bore the onus of proof? And

(3) which of the two divergent stories is the more likely of the two.

THE BURDEN OF PROOF

I take first the onus of proof. The issue joined broadly between the two brothers, was an assertion by the appellant that although in the register the 1st respondent was the registered proprietor of the land in dispute, he held that title as to one-half in trust for him. The 1st respondent denied this and said he held the whole in his own right. So the appellant must show by credible evidence that notwithstanding appearances to the contrary, the 1st respondent held one half of that land as his trustee. To show this, the appellant testified in one breath that the 1st respondent took advantage of his absence and got the land in dispute registered in his name. To make this story plausible, he swore that he had no land of any sort as a gift from his father. He did not alienate any land which came to his father. So his only patrimony was the one moiety of the land in dispute.

In the other breath, he said the land in dispute was jointly exchanged by himself and the 1st respondent with No. 1045 which they both inherited from their father. The 1st respondent denied this and said that land was his sole patrimony, registered in his sole name and he by himself made the exchange with Ngara. The burden was on the appellant to give evidence acceptable to the court, how they both jointly inherited the land and how they both exchanged it with Ngara. The learned judge disbelieved the appellant's story and preferred the respondent's. What showing is there that on this simple issue of fact, the appellant's story should have been preferred to the 1st respondent's. Even in this court, it seems to be accepted that the appellant inherited at least 2 parcels of land from his father and alienated them both despite his own persistent denial. That holding, merely put paid to the learned judge's disbelief of his story. As the registered proprietor of the land, section 27 of the Registered Land Act, confers on the 1st respondent, the absolute ownership together "with all rights and privileges belonging or appurtenant to". In view of the trial judge's finding, the appellant has entirely failed to show that the 1st respondent was his trustee as to one moiety.

At least, in view of the holding in this Court that two parcels of land were gifts to the appellant by his father, the system of disposition of the plots to his children by Kiruga Kimani seems clear. As Kiruga had two wives, he could, if he chose, make the gifts to the two houses rather than to the individual beneficiaries, or he could make the gifts to the children direct. It seems clear that it is the latter method that Kiruga adopted. Clearly, all the three children had plots registered in their individual names. Mbogua, the eldest, admitted that he had two plots, it was proved that at least 2 plots were registered in the appellant's name and only one plot was registered in the name of the 1st respondent. If Kiruga had wished to alienate the plots to houses rather than to individuals, the remaining 4 out of his 6 plots, would have been registered either in the appellant's name for the beneficial enjoyment of the two brothers or as the appellant claimed that he was in detention when the registrations were made, the remaining 4 plots would have been registered in the 1st respondent's name for his house. Yet the evidence is that three of the plots totaling in acreage 61/2 acres were registered in the appellant's name. At least 2 were shown by documentary evidence to have been registered in the appellant's name. Can Kiruga have wished that of the three sons who were the natural objects of his bounty, Mbogua should have 2 plots registered in his name, the appellant should have at least two registered in his name and one plot only should be jointly owned by the appellant and his brother the 1st respondent? Such a system of distribution is highly improbable. It simply does not fit the story of the 1st respondent holding one plot in trust for the two brothers.

Again, it should be remembered that the late Kiruga died possessed of 6 plots. Two were admittedly registered in the name of Mbogua. Two were proved by documentary evidence to have been registered in the appellant's name and one only was in the 1st respondent's name. What happened to the one plot? The evidence accepted by the trial court, was that it was also gifted to the appellant like the two others sold by

him. It is plain the appellant was taking advantage of the absence of written record of the sales or registration to deny this too. Dishonest denial was not beyond him. The evidence of the size of the land that Kiruga gifted to each of his 3 sons makes the 1st respondent's story highly probable. Mbogua had 7 1/2 acres; the appellant got 61/2 acres and the 1st respondent received 5 acres. This shows that Kiruga was minded to benefit his three sons almost equally but gave slightly more to each depending on his age. Yet the appellant would have the court believe, he had nothing and could only take half of his brother's though it was proved that he alienated three plots of land which came to him as gifts from his father. At all events, if I am right in thinking that inasmuch as the 1st respondent held the legal title to plot 1045 and later plot 76 as the registered proprietor, the appellant bore the onus of establishing that one half of that land was held by him as his trustee, has failed to discharge that onus. The learned trial judge's conclusion was:-

> "The plaintiff has not proved his case against either of the two defendants and so his case against the two defendants is dismissed with costs."

If my appreciation of the onus *probandi* is right, that conclusion was perfectly right.

THIS COURT'S ATTITUDE TO THE BURDEN OF PROOF

It seems there is a view here that it is not proved that the appellant received land greater in acreage than Mugecha and therefore what is registered in Mugecha's name must be trust property. To arrive at this "no proven" conclusion, all this Court did, was to add up the two pieces of land which appear in the register. But in doing so, this court seems to ignore completely the important fact that there was evidence given by the 1st respondent and accepted by the trial court, that there was a third plot which the appellant got as a gift from his father and which he sold to Nene Methe. What does "not proved" mean in the context of this case? It cannot mean that there was no such evidence.

The word "proof", as a legal concept, is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence.

If the evidence is available and accepted, unless the law directs that a certain fact should be "proved" in a certain way, it cannot, in my humble view, be the proper province of an appellate court merely to read that evidence and hold "it is not proved". That really is another way of saying it is not persuaded by that evidence. But the tribunal needs to be persuaded, is the tribunal of fact to which the evidence is given not one which merely reads it in print. The position adopted here was deprecated in the off-cited case of *Watt v Thomas* [1947] AC 484 whose authoritative guidance this court accepted in *Peters v Sunday Post* cited *infra*.

The main facts of that case were a claim by a husband that the respondent's wife was guilty of certain acts which amounted to cruelty. Was the husband's allegation true or not? The issue was mainly one of credibility.

The trial court felt satisfied that she did and found in the husband's favour.

On appeal by the wife to the Scottish Court of Appeal, that court held that the onus of proof was not discharged and reversed the trial court. On appeal to the House of Lords, the decision of the trial court was restored.

The House of Lords held that the Court of Appeal misconceived or disregarded the duty of an appellate court in regard to the decision of a judge sitting without a jury, on a question of fact (where there is no misdirection). Lord Thankerton who delivered the first speech, *inter alia* said:-

> "The only suggestion by Lord Mackay (the appellant judge) of the (Lord Ordinary) (the trial judge) having misdirected himself was as to the onus of proof; but the trial judge, quite rightly, makes no reference to the onus of proof, for, as has often been pointed out,

> no question of the burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The trial judge came to a definite conclusion on the evidence and no question of onus did or could, arise".

In this case, the 1st respondent's evidence that his father had 6 plots was supported by Mbogua, the appellant's witness. On the evidence, one plot could not be accounted for. The 1st respondent said, it was sold by the appellant. The learned trial judge accepted that finding. It was not suggested that there was no such evidence or that the judge misdirected himself in relation to it. So if the principle laid down by the House of Lords in *Watt v Thomas* and accepted by this Court in the *Sunday Post Case*, is still good law, it would not be right to reject that finding on the ground that it was "not proved". It certainly would not be the proper province of this Court so to do. It follows, in my opinion, that the holdings of "not proved" or its variant, not "proved on a balance of probability" could not be valid grounds for upsetting the finding of the court below.

The court accepted that issue as proved and there was evidence on which that finding could be based.

ISSUE OF CREDIBILITY

As I said, the issue joined between the appellant and his younger brother, was a simple one of credibility, namely, which of the two was telling the truth? Was it the appellant who denied that even one plot of land came to him as inheritance from his father, or was it the 1st respondent who swore that he had as much as three? This court is considering these two divergent stories by a mere perusal of the colourless and impersonal transcript of the recorded evidence. But the trial judge actually saw these two persons give evidence. Which of these two should be believed, the learned trial judge expressed himself quite positively. He said:-

> "… after a careful consideration of all the evidence in this case I just do not believe the evidence of the plaintiff. I do not believe that he came out of detention after the death of his father Kiruga. I believe he came out of detention before Kiruga Kimani died and that he acquired three plots of land from his father Kiruga two of which were Ndumberi/Riabai/432 and Ndumberi 1092 and the third he sold to Nene Methe all of which he denies and which denials I do not believe."

This is a positive finding on conflicting oral testimony. My understanding of the law, is that an appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. In the offcited case of *Peters v Sunday Post* [1958] EA 424 this court accepted the principle laid down by the House of Lords in *Watt v Thomas* [1947] 1 All ER 582.

Sir O'Connor who spoke for the court on this aspect of the case said:-

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; <u>it is not enough that the appellate court might itself have come to a different conclusion</u>."

I take as a guide to the exercise of this jurisdiction the following extracts from the opinions of their Lordships in the House of Lords in *Watt v Thomas*. Then the learned President quoted the speeches of Viscount Simon, Lords Thankerton, and Macmillan. The shortest for this purpose is Lord Macmillan who said:-

> *"So far as this case stands on paper it not infrequently happens that a decision either way*

> *may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."*

How does this case stand judged against this authoritative pronouncement of the proper appellate approach? The factual issue broadly in contention between the parties was: by what method did the late Kiruga dispose of his 6 plots to his three male children? Did he do so by houses or was it a distribution to them per capita? If it is the former method, then as it admitted that 2 parcels went to Mbogua of one house, then the remaining 4 plots will go to the house of the parties. The evidence accepted by the judge, was that Kiruga directed that the plots should be registered in the names of his three sons. It has been proven that Mbogua had registered in his name, 2 plots, the appellant had registered in his name 2 plots and the 1st respondent had registered in his name one plot. There was evidence that the appellant sold one plot before it could be registered in his name.

If that is the system of gifts Kiruga made to his children, then it negatived any suggestion that any of the sons of Kiruga held on trust the plots registered in his name. The appellant's claim that none of the plots was registered in his name was disbelieved by the trial court and apparently rejected by this Court. The trial court also disbelieved the appellant's evidence that a third plot was not gifted and sold by him. There is *viva voce* evidence by the 2nd respondent that a third plot was gifted and sold by the appellant. Mbogua's evidence of the extent of the gifts, his father made, substantially supported the 1st respondent's evidence as well as the total pieces of lands his father had in Riabai and Ndumberi. Mbogua said:-

> "After consolidation, our father had 3 pieces of land on Ndumberi side. I am the registered proprietor of one of the 3 pieces measuring 7 acres."

As to how his father disposed of the remaining two, he said:-

> "At Ndumberi as I have said, our father gave me one peice of land and he also gave Mugecha one peice of land. Mugecha was given the remaining peice of land to hold in custody until the arrival of his elder brother."

In Mbogua's terminology, my father "gave me" is synonymous with my father "caused to be registered in my name"– the land. So if his evidence is true, it means, each of the three sons got one plot each at Ndumberi. As Mugecha was given one piece in his own right, it must follow that the only one registered in his name was his own. Had he registered 2 pieces,

then on Mbogua's evidence, one would have been held in trust for the appellant. But the respondent said the appellant sold that plot.

Mbogua's evidence about his father's disposition of the Raibai land also impliedly supported the 1st respondent. Mbogua swore that after consolidation his father had three parcels there. He said his father gave him one parcel. He also gave the appellant one parcel. He could not say whether the third parcel was also given to Kimani. That one, according to him, measured 21/2 acres. It is significant that he did not say it was given to the 1st respondent. On this, the 1st respondent, was better informed. He swore positively that it was given to Kimani, the appellant. So that evidenceaccounted for the 6 plots. Two were given to Mbogua, one to Mugecha and 3 went to the appellant. The latter's mendacious evidence that he had none at all was rejected. The real acreage of the land is not the determinant of the truth. Nobody could say what was the size of the third land which the 1st respondent swore the appellant sold and which the judge found to be true. It would not be right to proceed on the basis that the acreage of the two plots which appeared on the register was the total the appellant got. It is known that Mbogua and Mugecha together had three plots. Two were shown to be registered in the appellant's name. Can it be said that the

remaining one plot disappeared in thin air? The evidence carried to my mind, a high degree of probability that the 6th unaccounted for plot was gifted to the appellant and was alienated by him just as he did the other two which he shamelessly denied. So the probabilities of this case, far from detracting from it, actually support the truth of the 1st respondent's evidence and wholly justified the trial judge's factual finding on this point.

I think, with respect, that one important aspect of this case, which those who think the judge's finding of fact should be reversed, seem to ignore, is the fact that while the 1st respondent told a consistent and inherently credible story which has not been faulted on any point, the appellant shown even by this Court's holding to have told untruth about the gifts of land he received from his late father. Whether he received any plots or nothing at all, is one fact on which he rested his case both in the court below and before us. There can be no doubt he told a deliberate untruth about that. It would, I think, be wrong to gloss over that in a case in which the relative truthfulness or want of it between the appellant and the 1st respondent was a vital issue – much so far an appellate court who feels disposed to differ from a factual finding of the trial court.

The appellant's total denial that he received any gift of land from his father, could not have been due to oversight, or honest but faulty recollection. It was a deliberate lie in which he sought to portray himself as one who was denied patrimony by his father and who must found himself on customary law to obtain a moiety of his younger brother's inheritance. It certainly would be wrong when a man falsely swore that he did not benefit even by one plot, to find, entirely on conjecture, that he sold two pieces of land because "he needed money to start again after many years in detention". To excuse untruth in that way, is to reward mandacity. If that were the truth, why did not the appellant honestly and frankly admit that he had only two small plots which he sold off and wanted a bit from his brother? If he admitted that he sold two pieces of land which his father gifted him, can he, with any plausibility, contend that what his father caused to be registered in his younger brother's name, was intended to be for their joint beneficial enjoyment? And if the appellant shamelessly lied about 2 plots, would it be beyond him to lie about a third? The curious position is that the trial court found that he lied about the three plots, this Court appears to find that he lied only about two. Is his credibility on this issue divisible?

RAMIFICATIONS OF THE FAMILY TRUST HOLDING AND THE EXISTENCE OF OVERRIDING INTERESTS

For myself, I respectfully doubt whether there was, in this case, an overriding interest within the true intendment of section 30 of the Registered Land Act – an interest which will bind *bona fide* purchasers for value of the legal estate. Such a holding must have some firm substratum and can only be based on the facts found by the trial judge or the facts that he must have found. On this particular issue, the learned judge's finding was expressed by him in these words:

> The appellant "went and lived on plot Ndeiya/Makutano/76 from the time he came out of detention in late 1957 or early 1958 but he only went to live there at the invitation of his brother Mugecha (ie the 1st respondent) in 1962 and that he continued to live there with Mugecha's approval and consent up until 1971 when Mugecha sold the land to George K Njoroge (the 2nd respondent) which he had right to do".

There is no suggestion that there was no evidence given to the court on which this finding could be made. The appellant thus occupied the suit land from 1962 to 1971. What right to the land did he acquire thereby? He was certainly not a tenant, not even one at will. He could only have been a licensee on that land. The overriding interest which binds the registered proprietor and his successors-in-title, is defined by the Act as that of a person.

> "in possession or actual occupation of land to which he is entitled in right of such possession or occupation save where inquiry is made of such person and the rights are not disclosed".

True, the 2nd respondent admitted that when he went to inspect the *shamba*, he saw the appellant's wife

there. She was in the act of cultivating but he did not talk to her. But in view of the facts found by the judge, neither the appellant nor his wife had any legal right to occupation of the land. The appellant who then had no land, was invited by his younger brother to live with him, apparently on grounds of pure humanity. His nine-year occupation did not turn his licence into any legal estate. In my opinion, he continued throughout to be a licensee of his brother. And this licence was revoked when the 1st respondent sold and transferred the land to the 2nd respondent. So the holding in *Williams Glyn Bank Ltd v Boland* [1981] AC 487 is distinguishable. A wife who contributes in buying property which is registered in the sole name of her husband and who is in actual occupation of that property, may have an overriding interest. But an elder brother who is permitted by his younger brother to occupy his land because he had none of his own acquires, in my judgment, no overriding interest which binds a purchaser. I have already held that the suit land was the 1st respondent's property which his father gifted him and to which he was solely beneficially entitled.

I respectfully agree with the learned trial judge that he was entitled to sell it and validly sold it to the 2nd respondent. The latter has also duly registered it under the Registered Land Act. Accordingly, section 27(a) of that Act vested in him "the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto". One such right, is the right to exclusive possession as against the appellant. The evidence is that he declined to yield up possession to the purchaser. In my opinion, the appellant is a trespasser on the suit land and ought to be ejected as such.

CONCLUSION

I am glad to find that my learned brother Masime's view of this matter coincides with mine. Accordingly, like him, I think no valid ground exists for interfering with the decision of the court below. My conclusion is that this appeal fails and should be dismissed with costs.

Masime JA. The facts of this case as they arise from the pleadings and the evidence have been stated in the judgments of Platt and Apaloo JJA which I have had the advantage of reading in draft. I have anxiously considered the near equally strong but opposing positions taken by my said learned brothers. I wish to indicate my own appreciation of the matter below.

The appellant and the first respondent are brothers and the dispute is over their rights of succession to their father's land. The second respondent is a purchaser of the disputed premises from the first respondent. The appellant as plaintiff claimed the suit premises from his brother the defendant on the basis of adverse possession and later alternatively on the basis of trust under Kikuyu customary law. The date of the alternative cause of action was the time of land adjudication and registration. The appellant had been in detention or had just been released from detention and was still under restriction.

The appellant claimed that the respondent took advantage of the prevailing circumstances and got himself registered over the family land that ought to have been shared out between the brothers. His claims based on the two limbs were dismissed the one because the appellant's occupation of the suit land did not amount to adverse possession against the respondent and the other because the learned trial judge did not believe the appellant.

In this appeal the appellant attacks the learned trial judge's decision whereby his claim of trust was dismissed. On the evidence adduced before the trial court it was proved on a balance of probability that the appellant inherited out the family land Title No. Ndumberi/Riabai/432 measuring 1.2 acres. He sold this land to Ikinya Waithaka on August 8, 1964 for Kshs 2400. It was similarly established that the plaintiff inherited title No. Ndumberi/Ndumberi/1092 comprising 1.6 acres; he sold this before registration to D Kariuki Gatiranga and it was first registered in the name of that purchaser on July 17, 1958. It was also alleged though not proved by the respondent that the plaintiff inherited Title No Ndumberi/Riabai/418 comprising 0.76 hectares out of the family land. The question that arises out of this evidence is: if the respondent was meant to be a trustee of the family land because of the appellant's absence in detention why would he be registered only over Title No. Ndumberi/Ndumberi/1045?

The evidence that the appellant, the respondent and their mother occupied and used that land cannot

therefore be interpreted without more to show that the respondent admitted that the appellant had interest in that land as a beneficiary under a trust aising from Kikuyu customary law. Rather, I would view it as an act of charity by the respondent to a brother that had been detained and who on his release found himself displaced and required to be resettled.

In any case the Title the subject of the proceedings was a first registration and section 143(1) of the Registered Land Act prohibits the court from interfering with the register in such a case except where under the provison to section 28 of the Act the court requires the proprietor to perform his duty or obligation where he is a trustee. It was for the appellant to prove that the respondent was a trustee under Kikuyu customary law; admittedly the appellant is the elder son and would be the one entitled to distribute the land and to have a slightly bigger share but in his absence the distribution seems to have been done by the family elders without any prejudice to his rights; the learned trial judge having heard all the evidence disbelieved the appellant and found for the respondent. I do not find that in doing so the learned judge erred.

In the result I would agree with Apaloo JA that there is no merit in this appeal and that accordingly it should be dismissed with costs.

Dated and delivered at Nairobi this 13th day of October , 1988

H.G. PLATT

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JUDGE OF APPEAL

F.K APALOO

.....

JUDGE OF APPEAL

J.R.O.MASIME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR