



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Gachuhi, Apaloo JJA & Kwach Ag JA)

CIVIL APPEAL NO 153 OF 1987

WANJIRU MUTANDUKI.....APPELLANT

VERSUS

GATUI.....DEFENDANT

JUDGMENT

November 15, 1988, **Gachuhi, Apaloo JJA & Kwach Ag JA** delivered the following Judgment.

Wanjiru Mutanduki, the appellant in this appeal is the registered proprietor of the parcel of land known as No Kiambu/Kanunga/661. The respondent is the widow of Gatui, the appellant's son who died in 1974 leaving no male issue. He was survived by his wife (the respondent) and a number of daughters.

After the death of her husband, the respondent gravitated to Narok in order to earn a living for herself and her children but left one daughter behind to maintain a physical presence on the land. The evidence shows that at some time after the death of her son, the appellant decided that it was no longer desirable for the respondent to retain her right to stay on the land. When the respondent discovered the true intentions of her mother-in-law, she lodged a caution against the title in order to prohibit any dealing with the land. She did this in order to protect her interest and the interest of her children. The appellant then brought proceedings in the High Court seeking an order for the removal of the caution. The respondent delivered a defence in which she averred that she was legally entitled to maintain the caution.

In her evidence at the trial the appellant alleged that the respondent had left home and gone to Narok where she had got married to a certain Mr Mungai with whom she was now living as husband and wife and that therefore she had lost her right to live on the suit land. The learned judge did not accept this evidence, and rightly so in our view, because the appellant did not prove on a balance of probabilities that any marriage had taken place between the respondent and Mungai. The burden of proof lay on the appellant and she failed to discharge this burden.

Quite apart from the appellant failing to prove this second marriage to Mungai, she did not prove that the death of Gatui had brought to an end the respondent's marriage to Gatui under the Kikuyu customary law to which both of them were subject. Nor was any evidence adduced to show that by reason of Gatui's death his wife and children had lost their right to occupation over the parcel of land No Kiambu/Kanunga/661.

The appellant made her intentions perfectly clear. She told the judge that she wanted the caution removed and the respondent and her children to move out of the land. In the face of this hostility the respondent must have thought that discretion was the better part of valour and so decided to lodge the caution.

Looking at the evidence as a whole we cannot see in what way it can be said that the learned judge fell into error or arrived at conclusion insupportable on the material before him.

It follows that this appeal must fail and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 15th day of November , 1988

J.M. GACHUHI

.....

JUDGE OF APPEAL

F.K. APALOO

.....

JUDGE OF APPEAL

R.O. KWACH

.....

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

DEPUTY REGISTRAR