REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

(CORAM:NYARANGI, GACHUHI & APALOO JJA:

CIVIL APPEAL NO 7 OF 1986

WAKHUNGU……..……APPELLANT

V

WEKESA…….……..RESPONDENT

JUDGMENT

This is an appeal by the defendant in the action against a judgment of Gicheru, J which he gave on November 26, 1984. By that judgment, the learned judge found for the plaintiff and granted *inter alia* an order that the plot no 162 at Ndalu Settlement Scheme, being family land shall be subject to succession proceedings under the Law of Succession Act (cap 160).

The history of the matter goes back for some years. The plaintiff, a school teacher and an uncle of the defendant, has lived on the material parcel of land since 1966 during which time he has fenced the land, put up houses, a diary and other buildings used as store, planted fruit trees and sugar can and has always kept cattle on the land. The plaintiff claims that the land belongs to his late father Chilikona Welemusaya – also known as Levi, Natembea, Sikunyiri, who was allotted the plot of land in 1965. According to the plaintiff, the defendant whose names are Henry Chilokona the son of Tandeyo Wakhungu was born in 1956 when the plaintiff's father was still alive. The defendant lived with his father at Naitiri Scheme and plot No 162 has never belonged ot the defendant. After the death of the plaintiff's father, Tandayo was agreeable to the plaintiff inheriting the land and he wrote a letter to the settlement officer to that effect which letter was the subject-matter of a criminal charge for giving false information to the settlement officer. Tandayo pleaded guilty to the charge and on conviction was imprisoned. An assistant chief who knew the parties told the trial court that Chilikona Welemusaya is the father of th epla, that he had a plot No 162 at Ndalu Scheme and that he witnessed Chilikona Welemusaya receive payment for the produce of his farm. The assistant chief said he did not see he defendant receive payment for the produce of the plot and that a child of 10 would not be given a plot of land in a settlement scheme.Another witness, Tom Wasike, knew the plaintiff and Chilikona Welemusaya the plaintiff's father. Tom Wasike saw the plaintiff's father on Ndalu Scheme on December 12, 1965 when the witness and Chilikona Welemusaya were allocated land. In 1966 Tom Wasike met Chilikona in the scheme when some cattle were given out to the persons who had been given land.

As against that there is the evidence of the defendant that he lives on plot 162 Ndalu Scheme, that he is known as Henry Chilikona Welemusaya, the plaintiff is his paternal uncle and that plot No 162 which his father Tandayo Wakhungu purchased in the defendant's name belongs to him. Further that the defendant's father and the plaintiff conspired to cause the plot to be transferred to the plaintiff as a result of which both the plaintiff and his father were arrested for giving false information. William Chiuli (DW 2), who said he knew the parties gave the defendant's name as Tandayo Wakhungu and that his father's name was Chilikona.

Those are the salient features. It is as well, at this stage, to state that the only question raised for our decision in this appeal is: which is of the two versions is true?

Mr Khaminwa invited us to approach this appeal on the basis that the appellant's version of the matter is

true. It was submitted that the judge misdirected himself on his finding that the plaintiff's father was known as Chilikona Welemusaya and that the material parcel of land was family property. We will deal first with the appellant's main argument, that is to say that he is the owner of plot No 162. We focus our attention on the evidence of two key witnesses: Tom Wekesa, who witnessed the allocation of land and stock to the plaintiff's father at Ndalu Settlement Scheme and Raymond Wekesa, the assistant chief who saw the plaintiff's father receive payment for the proceeds of the particular plot. The assistant chief also told the judge that a child would not have been given land on the settlement scheme. In our judgment the evidence of the two witnesses is clearly credible and decisive. Upon that testimony we reach the conclusion that the material parcel of land was the property of Chilikona Welemusaya, the plaintiff's father who died at Ndalu on December 1, 1980. The settlement fund trustees formally allotted the land to the plaintiff's father on December 29, 1965 having accepted his deposit of Kshs 1,240 towards the purchase of the land. The payment of Kshs 12,800 which was made in 1981 was after the suit was filed and therefore could not support a claim of ownership.

The defendant's claim that the land was allocated to him and that his father signed and accepted on his behalf is a falsehood. The defendant who was then a child could not have been given land in Ndalu Settlement Scheme whose land had been set aside for settlement of landless adults.

In the outcome, in our judgment, the defendant has not at any time had any lawful claim to the property and his ascertion that he was also known as Chilikona Welemusaya is not a tenable proposition.

We need not lengthen this judgment by expounding the passages in the Bantu of Western Kenya and Introduction to African Religion. That material is not vital in this case. The judgment of the trial judge was carefully reasoned and the plaintiff's version gave the true state of affairs.

The appeal is therefore dismissed with costs.

June 17, 1987.

NYARANGI, GACHUHI & APALOO JJA