



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox JA, Platt & Gachuhi Ag JA)

CIVIL APPEAL NO 23 OF 1985

LEONIDA NEKESA.....APPELLANT

VERSUS

MUSA WANJALA..... RESPONDENT

JUDGMENT

The appellant, Leonida Nekesa, a married woman states that she had a brother named Barasa Nduka, who had no wife or children or brother to inherit him. He had a piece of land referred to as W. BUKUSU/ KHASOKO/441 comprising of 4.4 hectares. He died in 1969. Leonida states that, before the death, the deceased had left an oral will that 3.5 acres out of his land should be sold to pay off his debts. Whatever remained should be shared among his brothers (cousins) including Leonida Nekesa the appellant.

After the burial of her brother, the family elders gathered to arrange for the sub-division of land. She learnt that Musa Wanjala, the respondent, had already registered himself as the proprietor of that parcel of land. Later in 1983 she lodged the dispute with the elders for arbitration, their chairman was to be the District Officer of Kanduyi Division. The arbitration was conducted under the Magistrate's Amendment Act, Act No. 14 of 1981.

Before the arbitration by the elders the respondent gave evidence that he had been given the deceased's land by the family elders. Judgment was entered in terms of the award. The respondent appealed to the High Court against the said judgment. The High Court (Gicheru J) reversed the said judgment on a point of jurisdiction and directed that the award be remitted to the Resident Magistrate for him to set aside the judgment and the orders made thereafter. The appellant now appeals to this court on five grounds against the said decision of the High Court; all based on the interpretation of the law.

The appellant filed supplementary Record of Appeal which contains 5 documents; namely, an order issued by the High Court dated 14th February, 1985; a Photostat copy of the Adjudication Register dated 25th March 1970; certified copy of the register under the Registered Land Act cap 300; and two Photostat copies of adjudication maps. The Adjudication Register, has several alterations and other writings. There is unexplained reference to No 35 of 1968; there is an alteration of West Bukusu to Bungoma the name of Barasa Nduka cancelled and the name of Musa Wanjala inserted and signed. The form is thumb-printed by Musa Wanjala as brother to Barasa; it is signed by the Demarcation Officer, witnessed, and dated 25th March 1970. At the bottom there is a note of objection which reads:

“Objection allowed. Land parcel No. 441 to be registered in the name of Musa Wanjala, Death Certificate

No. 2780/69 Registered.” Signed, Adjudication Officer, 3rd June, 1970.”

The effect of this note is that an unnamed person or Musa Wanjala himself had objected to the Adjudication Officer against the registration of the proprietorship of this parcel of land which objection was settled and the registration completed.

In the register maintained under the Registered Land Act (cap 300) Musa Wanjala was on 1st November, 1972 registered as proprietor of W. BUKUSU/KHASOKO/441 on first registration and the Land Certificate was issued on 26th January, 1973. The registration was long before the appellant took her complaint to the District Officer in 1983.

In considering the debts, if any, that were to be paid, it is in these arbitration proceedings that the appellant should have stated their extent. The period since the death to the time of these proceedings is 14 years. Some, if not all, of those debts, could have been statute barred. Nowhere in all these proceedings is the extent of the debt referred to. From the sequence of the events, if the discussion of the sale of land before the family elders, had taken place immediately after the burial, then it was in 1969. But because at that time, the consolidation and registration was not complete, it does not seem to have been in 1969 as the entries would have been different, probably reflecting the applicant’s claims.

The register under the Adjudication Act (cap 283) had at least been prepared and the deceased’s name entered which had to be cancelled and the death certificate number shown. The family elders must have given the land to the respondent later. It is also stated in the arbitration proceedings that for some time the appellant had gone to Uganda, but dates of her stay there have not been given. This idea of selling the deceased’s land to pay off debts must have been a recent one since proceedings commenced in 1983, and not immediately after the burial which was in 1969, because if it had been there, then the elders could have decided on the sub-division before allocating the entire piece of land to the respondent.

I quite agree with Mr Owinya that the arbitration by the elders is not intended to deal with matters connected with the title to the land or to reverse the provision of the law. The parcel of land is registered on first registration in the name of the Respondent Musa Wanjala. Section 143(1) of the Registered Land Act (cap 300) provides:

“Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration (be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

The elders had no jurisdiction to arbitrate over this parcel of land as per section 143(1) of the Registered Land Act, (cap 300) and whatever proceeding was taken by them is a nullity.

Even if the appellant could claim the land from the respondent, she is faced with other impediments; (1) under the customary law, it has not been shown whether a woman can inherit land. The respondent has stated that women do not inherit land, only men have the right to inherit. This statement was not challenged. It is even so indicated in the *Cotran’s Restatement of Customary Law* at page 47 of Vol 2. This proposition must be taken as true, though the elders ignored it. To circumvent this, she is asking for the sale. (2) By the Limitation of Actions Act (cap 22) registered land cannot be claimed after a period of twelve years from the time the cause of action arose unless the person claiming was under disability when the cause of action arose. Apart from the customary law nothing has been shown placing the appellant under disability.

The true position of this episode is that the appellant wants land for herself but has adopted as a base, claims which cannot be supported. Knowing that she is not entitled to land as a married woman, she alleges a will in her favour, for the sale of land to pay off debts which do not appear to exist. If there were debts, they must have been statute barred. Perhaps she intends to utilize money for herself since the piece of land she had with her husband, was sold to provide money for the education of her children.

As I have held that the elders had no jurisdiction for arbitration under the provision of the law, the

arbitration proceedings are a nullity. I would dismiss this appeal. The High Court should have ordered the setting aside of the proceedings before the elders and the judgment entered and orders made thereafter as nullity and not under section 9D(3) (a) of the Magistrates Jurisdiction (Amendment) Act 1981. The courts below have not awarded costs to any party. I would order that each party do bear its own costs of this appeal.

Hancox JA. I have had the advantage of reading the judgment of Gachuhi Ag JA in draft. As he says there are several indeterminate matters in this appeal, including the fact that the deceased Baraza Ndula was not registered as the proprietor of this land, the nature and extent of his debts and who objected to the adjudication register under section 26 of the Adjudication Act, cap 284. It is clear, however, that Musa Wanzala, the respondent in this appeal, was the first registered owner of West Bukusu/Khasoko/441 and that his title thereto was therefore indefeasible save in accordance with the Registered Land Act, cap 300, - see Bennett J in *Obiero v Opiyo and Others* [1972] EA 227.

I agree also that the procedure under the amendments introduced into the Magistrates Courts Act, cap 10, by the Magistrate's Jurisdiction (Amendment) Act, 1981 were not intended to affect title to land. The appellant, has been unable to show that she has any valid title to this land and, in my view, even if they had jurisdiction to do so, the arbitrators should not have decided the matter on the basis of the alleged oral will of the deceased so as to override the clear evidence of registration of it in the name of the respondent.

The arbitration, proceedings were a nullity, there being no other valid reference under which the arbitrators could act. They should accordingly be set aside, though not under section 9D(3)(a) of the Magistrate's Courts Act, because there was no evidence of any corruption or misconduct by the arbitrators as that paragraph requires. I would therefore dismiss the appeal, but I would vary the order of Gicheru J by deleting the reference to section 9D(3)(a) of the Magistrates' Courts Act.

I agree with the view of Gachuhi Ag JA as regards costs. As all the members of the court are agreed in the result, the appeal is dismissed, and the award of the arbitrators dated the 25th October, 1983, and the ruling of the Resident Magistrate dated the 29th February, 1984 are both set aside with no orders as to costs.

Platt Ag JA. I agree with each of the conclusions reached by Gachuhi Ag JA and I have nothing to add, every aspect of the appeal having been covered.

Dated and Delivered at Kisumu this 9th Day of August, 1985

A.R.W HANCOX

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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Ag. JUDGE OF APPEAL