REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

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KIMANI GITUANJA ……...……...……...….APPELLANT

AND

JANE NJOKI GITUANJA ……..……...…..…….……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Gachuhi, J) dated June 12, 1980

in

Civil Case No 1995 of 1980)

JUDGMENT OF CHESONI, AG JA

The appellant, Kimani Gituanja, is the registered proprietor of the piece of land known as Kabete/Nyathuna/53 which by measurement is 7.44 hectares. On July 24, 1980, the respondent filed a suit in the High Court against the appellant for the orders that:

(a) the said piece of land be registered in the respondent's and appellant's names as joint owners in common in equal shares;

(b) alternatively, the piece of land be subdivided into two equal portions end one of the two portions be transferred to and registered in the name of the respondent and the other in the name of the appellant, and

(c) the land registrar at Kiambu be authorized to effect the transfer in (b) above. In his written defence the appellant stated that the disputed land was originally occupied by his grandfather who upon his death left it to the appellant's father who in turn left the land for the appellant.

After hearing the respondent and her three witnesses and the appellant Gachuhi, J gave judgment for the respondent and made the following orders:-

1) The defendant is registered as proprietor of a parcel of land Kabete Nyathuna/58 as trustee for himself, his mother and the plaintiff.

2) The plaintiff has brought the said trust to an end by this suit in claiming half share of the said land.

3) The said parcel of land to be sub-divided into two equal portions;

4) The defendant do transfer to the plaintiff one half share of the sub-division.

5) The parties to make the necessary application to the divisional land board for the subdivision and transfer.

6) The defendant will pay to the plaintiff the cost of this suit to be taxed.

From that decision the appellant has appealed to this court on four grounds.

Ground 1:

That the learned judge erred in law in holding the view that the parcel of land known as Kabete/Nyathuna/58 was registered in the name of the appellant (the original defendant) as a trustee for his mother's house and the respondent (original plaintiff).

The respondent Jane said in her evidence that the land in dispute belonged to her husband, who disappeared during emergency and has never been seen again. She called three witnesses, Henry Kione (PW 2) told the court that Jane was the appellant's father's second wife. The appellant's mother, Elizabeth was the first wife. He further stated that Jane's marriage to the appellant's father was valid under the Kikuyu customary law as he witnessed the slaughtering of the "ngurario." According to Henry the land belonged to the two wives and their children. Geoffrey Kabuthia (PW 3) said that the land belonged to the appellant's father and it was registered in the appellant's name because the father was not there. He confirmed what Henry said that Jane and Elizabeth were the two wives of the appellant's father and the appellant was registered as trustee of the two wives and children of his father. He added that the land should be divided between the two houses. Wilfred Kamau Gatua (PW 4) told the court that Gituanja who died during emergency had two wives who survived him and Jane was one of them. The appellant was Gituanja's eldest son and though he was the registered proprietor of the disputed land he was required to share it with the two wives and children of Gituanja.

The appellant gave evidence and told the court that he inherited the land from his grandfather and he gave permission to his mother Elizabeth Njoki and Jane Njoki among other persons, to build on the land. This was in contradiction to what the written statement of defence said ie that the appellant's father inherited the land from his father and left it to the appellant. Wilfred said in his evidence that it was contrary to the Kikuyu customary law for a man to inherit from his grandfather, except in the case of the son of an unmarried daughter. The learned judge, correctly rejected the appellant's contention of inheriting from his grandfather. The correct customary law of inheritance is as Wilfred said.

The appellant himself had referred to Jane as his mother which corroborated the evidence of Henry, Geoffrey and Wilfred beside that of Jane herself that Jane was the second wife of the appellant's father. Indeed these witnesses' evidence required no corroboration in law or as a matter of practice. The learned judge, again, correctly found that the appellant's father had two wives.

Land inheritance among the Kikuyu is as stated by Jomo Kenyatta in his book Facing Mt Kenya page 32 (1965 Edition). The position has been as follows::-

"After the death of the father the land passed on to his sons, the eldest son took his father's place. At this juncture the system of land tenure changed a little, there was no one who could regard the land as "mine," all would call it "our land." The eldest son who had assumed the title of moramati (titular or trustee) had no more rights than his brothers, except the title; he could not sell the land without the agreement of his brothers who had the same full cultivation rights on the piece of land which they cultivated as well as those which were cultivated by their respective mothers."

That being the position the appellant was registered as moramati for "mbari ya Gituanja" (land for the family of Gituanja). He was a trustee for his mother's and the respondent's houses and the learned judge'

finding on those lines was correct both in law and fact.

Ground 2:

That the learned judge erred in law and in fact in holding the view that the respondent was legally married to the appellant's father.

The existence of a marriage is a matter of fact which is proved with evidence. I have already said that the respondent's three witnesses Henry, Geoffrey and Wilfred all testified that Jane was a legal wife of the appellant's father. The customary "ngurario" was slaughtered. The learned judge accepted the respondent's witnesses' evidence and correctly found as a fact that Jane had proved her marriage to the appellant's father. I can see no reason for disturbing that finding.

Ground 3:

That the learned judge erred in law and in fact by failing to take into consideration the fact that the registration of the appellant as the proprietor of the said parcel of land vested in him the absolute ownership of the said land.

The evidence on record including that of the appellant himself showed that Jane is in possession and actual occupation of the disputed land. That being the position the registration of the appellant as the proprietor was subject to the overriding interest and rights of the house of Jane, which did not have to be noted on the register - (section 30(g) of the Registered Land Act - cap 300).

Ground 4:

The learned judge erred in law and in fact in failing to take into consideration the fact that the respondent was living in the said parcel of land as a "muhoi" and/or licencee.

"Muhoi" is one who is given cultivation rights on the "ng'ondo" or lands of another man or family unit, on a friendly basis without any payment for the use of the land – see Facing Mt Kenya ibid.

Among the Kikuyu a woman has no rights over "ng'ondo" or land, except in the case of an unmarried daughter and widows who have a life interest in the land given to them for cultivation, but their life interest is not that of a "muhoi". Therefore a woman can never be a "muhoi".

Furthermore one cannot be a "muhoi" on one's family land. The respondent was not a "muhoi" on the disputed land of the family of Gituanja.

The succession of land belonging to a deceased Kikuyu man with more than one wife is by houses. The land is divided equally among the houses and each house shares equally amongst its male children. A house consists of one wife with her children. Of course even a Childless wife constitutes a house.

In this case the appellant holds "mbari ya Gituanja" on trust for the two houses ie the house of Elizabeth and the house of Jane, which must share the land equally.

As all the grounds of appeal have failed I would dismiss this appeal with costs in both courts.

Delivered at Nairobi this 10th day of May, 1983. Z R CHESONI

AG JUDGE OF APPEAL

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JUDGMENT OF KNELLER J A

Kimani Gituanja, the appellant, asks this court to set aside with costs the judgment of the High Court (Gachuhi, J) so he alone can continue to own and occupy Kabete/Nyathuma/T53.

Gachuhi J gave judgment, in effect, for Jane Njoki Gituanja, the respondent, on June 12, 1981 because, although he first affirmed that the appellant was the registered proprietor of the land, he then asserted that he was so as trustee of it for himself, his mother and the respondent. He went on to declare the respondent, by claiming a half share of it in her suit before him, had brought the trust to an end. The land, he continued, was to be subdivided into equal portions and the appellant was to transfer one half to the respondent. All this was to be subject to the consent of the Local Land Control Board. Finally, the appellant was to pay the respondent the taxed costs of the action.

The appellant's grounds of appeal are (in my phrases) the learned judge erred in law in declaring that the appellant held the parcel as a trustee for himself, his mother and the respondent, in finding she was married to his father, by failing to hold his registration as the proprietor of this land made him its absolute owner and the respondent was only a licencee.

Evidence was recorded by the learned judge from the respondent and her witnesses, Henry Kione, the chairman of the land consolidation committee of the area, Geoffrey Kabutha, a farmer and relative of the parties and another neighbour, Wilfred Kamau Gatura. The appellant testified but called no witness.

The following facts were sifted by the judge from all this. The Land is about eighteen acres in all. It was owned by Gituanja Muthee who married, first, Elizabeth Njeri and, secondly, in 1951 the respondent. The appellant is the eldest son of Gituanja Muthee and Elizabeth Njeri, and it is significant the Elizabeth Njeri, who is alive, did not give evidence for the appellant or at all.

Gituanja Muthee was a nationalist and during the emergency he took up arms and was never heard of again.

The process of land consolidation, demarcation and registration reached this area about 1958 and this land was, by a decision of the clan, registered in the name of the appellant as trustee of it for himself, his mother Elizabeth Njeri, her other sons, and the respondent and her sons according to the custom of the wa-Kikuyu.

It was the land of the house of Gituanja and his land was to be held by the appellant, Gituanja's first wife's eldest son, in trust for all dependant on Gituanja Muthee when he was alive which included himself, the two wives and their children. They all lived on these acres in amity and in accordance with the arrangement. The respondent and her children were not evicted. When she asked for her share, however, the appellant denied she was a wife of his father (though he had heard it said she was) or that he held the land on trust for anyone. He was its registered owner and it was his and his alone, all of it, for the last twentyfour years. When she gave evidence he claimed he inherited these acres directly from his grandfather and not his father. This was contrary to what he pleaded in his home made written statement

of defence of August 20, 1980.

He had allowed the others to put up houses and cultivate gardens on this land. These included the respondent and his mother Elizabeth Njeri who were there only by his permission.

The facts, as found by the trial judge, are based on his assessment of the credibility of the parties and the witnesses. He made this on what he heard them say about all this and the manner in which they said it. He made the right assessment, if the written record is anything to go by for the respondent and her supporters were consistent and cogent in their evidence while the appellant is unconvincing when he claims he inherited the land from his grandfather and he does not after twenty-four years occupation of it with the respondent know her children by his father who live on it too, or how she can claim any share in it. Finally, in evidence, he admitted to Gachuhi J the respondent was married to Gituanja.

Those facts are sufficient to show that the learned judge did not err when he found the respondent was lawfully married to the appellant's father, she was not a licencee on the land and the appellant, although the registered owner of the land, was holding it in trust for himself and his mother and the respondent and their children by his father.

His mother and the respondent have a life interest in a half each of this land and each half passes to their male children and unmarried daughters in equal shares according to their customary law.

See Restatement of African Law Kenya 2 Succession Eugene Cotran, 1st edition, 1969, pp 8, 13 and 17. The learned judge did not err in fact or in law in all this so the appeal should be dismissed with costs.

Delivered at Nairobi this tenth day of May 1983.

A A KNELLER

JUDGE OF APPEAL

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JUDGMENT OF POTTER, J A

I agree fully with the judgments of Chesoni JA and Kneller JA which have just been read. Accordingly this appeal is dismissed with costs.

K D POTTER

JUDGE OF APPEAL