IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Potter, Hancox JJA & Chesoni Ag JA)

CRIMINAL APPEAL 41 OF 1982

BETWEEN

NJOROGE MUCHUNGU.....APPELLANT

AND

WAKIHA MUCHUNGU.....RESPONDENT

(Appeal from the High Court at Nairobi, Guillemard J)

JUDGMENT

The appellant Njoroge Muchungu is the elder brother of the respondent Wakiha Muchungu. Njoroge is the registered proprietor of a piece of land known as Limuru/Rironi/171 acres. He was registered on November 21, 1958, but the land certificate was issued on July 20, 1976 (Exhibit 1 by plaintiff). On September 7, 1978 Wakiha lodged a caution against the title claiming a right as a licensee, and on October 17, 1978 he filed a suit against Njoroge asking the High Court to order Njoroge to transfer to him 2 acres of Rironi/171/Gatina in Kiambu district.

The basis of Wakiha's claim was that the parties' father Muchungu Muema owned Rironi/171/Gatina which was 4 acres and Wakiha and Njoroge were to inherit that piece of land in equal shares. It was in evidence that their father had three more other sons as they were five brothers altogether. Wakiha further stated in the plaint that during land demarcation in 1958 Njoroge was registered as proprietor of that piece of land to hold for himself and as Wakiha's trustee. Wakiha was then too young to be registered. He said he was then only 13 years old. Njoroge through his lawyer Mr Kimiti filed a written defence and stated that the correct recital of the land is Limuru/Rironi/171 and that the parties' father Muchungu Ndiko had never owned that piece of land. He further stated that Muchungu Ndiko owned Limuru/Rironi/227 and a certificate of ownership (Exhibit 1 by defendant) produced in evidence supported him as to the ownership of the latter piece of land which measures 4.3 acres. Njoroge said in his defence that that was the piece of land the sons of Muchungu Ndiko ought to share.

At the hearing of the case Wakiha told the court that his father owned land adjacent to the suit land and he said the land was 171. He called his brother Mburu Muchungu (PW 2) as a witness. Mburu said that during land consolidation the plaintiff (Wakiha) gave a portion of this land to the defendant, but that was of course not Wakiha's case. Mburu agreed that his father owned plot 227. The evidence of Chui Gititi which was recorded *de bene esse* added nothing to either party's case. That was all that was said for the respondent. For his case Njoroge told the court that he owned Limuru/171 and it had been firm since 1958 and it was a first registration. He denied being a trustee for the respondent. Guillemard, J who heard the suit held that Wakiha had established a trust. Njoroge appealed to this court on the following grounds:

1. The learned judge erred in law in holding that a trust had been proved in favour of the respondent whereas there was no evidence. The appellant could be a trustee for the respondent only over family land ie in this case land owned by Muchungu Muema or Muchungu Ndiko whoever he was, the parties father. The evidence before the court was that Muchungu Ndiko owned Limuru/Rironi/227. There was no evidence that whoever the father was, Muema or Ndiko ever owned Limuru/Rironi/171 and Wakiha never adduced any evidence to show how, apart from claiming through his father, Njoroge, could be his trustee over any land including Limuru/Rironi/171. I, with respect to the learned judge, agree with the appellant that there was no evidence at all to support a finding of a trust in favour of the respondent, and the learned judge erred in reaching his finding of such a trust.

2. The learned judge erred in law in his application of the provisions of Registered Land Act as regards a first registration of land under that Act.

I have been unable to read in the learned judge's judgment any application of the provisions of the Registered Land Act in relation to a first registration.

3. The learned judge erred in law in his evaluation of the evidence of the whole case.

I would agree with the appellant on this ground for had the learned judge correctly evaluated the evidence he recorded he would have reached no other conclusion but that no evidence had been adduced to establish a trust over Limuru/Rironi/171 by the appellant in favour of the respondent.

4. The learned judge erred in law in failing to consider the law of limitation. Paragraph 6 of the defence pleaded section 7 of the Limitation of Actions Act (cap 22), but the learned judge appears not to have considered the question. As the appeal ought to succeed on the first and third grounds there is no need to consider this ground.

Although we did not allow the respondent to give new evidence he told us that the learned judge appeared not to have recorded all what was said in court. He said that he told the judge how his father allocated the land before his death.

There was indication in the evidence before the learned judge that the parties' father had five sons. Chui Gatiti's evidence was that the parties' father was called Muchungu Muema. Although Wakiha said that his father was also known as Muchungu Ndiko his brother Mburu (PW 2) denied Muchungu Muema was also known as Ndiko. The respondent said that his father owned only plot 171. Mburu agreed that the registered proprietor of plot 227 was Muchungu Ndiko and that that was what his father owned, but he denied that that was the land Wakiha was to claim. This witness is recorded having said that the other three sons had their own piece of land and added:

"this land was given into Njoroge so that we share it."

The lower court's records then reads:

"Case finished judgment tomorrow."

But the defendant Njoroge had not testified so he gave his evidence and apart from saying that he was the owner of Limuru 171 since 1958 and denying a trustee for the plaintiff he said nothing further. There was no investigations even by the court on how he acquired that land.

Mr Menya for the appellant was not at the trial but he would not strenuously resist the request for a retrial. From the record and what the respondent said in court before us it is apparent this case was not properly tried. For example if Muema was also Ndiko and he owned plot 227 what has happened to that plot? Did Njoroge acquire plot 171 from the family and if so was that the entire family land? If plot 171 belonged to Muema why was it not registered in his name since when it was registered in Njoroge's name Muema was still alive? Since I am of the opinion that the case was not properly tried I would allow the appeal, set aside the High Court judgment and in the interest of justice remit the case back to the High Court for

retrial. To avoid ambiguity I would add that the case involves proof of title of land (Limuru/Rironi/171) and in the circumstances it ought to be tried by the High Court. I would award the costs of this appeal to the appellant.

Hancox JA. I am in respectful and complete agreement with all that has been said by Chesoni Ag JA, whose draft judgment I have had the advantage of reading. There was not a shred of evidence to support the learned judge's finding that the parties' father, Muchungu Ndiko, ever owned the suit land at Limuru/Rironi 171, which was incorrectly referred to as Rironi/171/Gatina/Kiambu district in the plaint filed by the respondent to this appeal. It is manifest from the two extracts from the title that plot 171 was registered in the name of the appellant as proprietor on November 21, 1958, and that another piece of land, Limuru/Rironi/227 was registered in the name of Muchungu Ndiko on the same date. Consequently, I agree with Mr Menye, who now appears for the appellant, that there was no justification for Wilkinson-Guillemard of a conclusion that a trust had been established in favour of the respondent in respect of the suit land. The respondent who has been unrepresented throughout the proceedings, said that on September 1, 1978 the parties agreed in front of the elders to divide this piece of land, that is to say plot 171, as to two acres each and that they would choose a date for demarcation. From the 4 acres comprised in the plot, 0.25 of an acre was to be set aside for building in pursuance of a general scheme for building a village in that area. Three copies of that agreement were made, one each for himself and the appellant, and one for the elders. He said that their father, either on that occasion or a subsequent occasion, told them to be satisfied, as he had nothing other than land to leave to them. He also alleged that his father was not Muchungu Ndiko but Muchungu Muema, despite the name appearing on the second extract of title in the record.

It will be observed first that plot 171 did not measure 4 acres, and secondly that none of this appears in the record of the High Court proceedings. This court of course, could only record evidence exceptionally, but the respondent said that he had told all this to the judge. Ordinarily it would be rare to entertain a statement from a litigant that a court had failed to record the substance of that which he had said before it. But as Chesoni Ag JA has pointed out there are many unsatisfactory features about this case, and I instance the passage in the record of the respondent's evidence which reads:

"My father was known as Muchungu Muema – also as Muchungu Ndiko. Witness say – my father only known as Muchungu Ndiko. My father is dead. He was an old man. He owned land adjacent to the suit land? I only know the suit land, the one before the court".

The first part of that passage is capable of bearing three interpretations: that the respondent's father was Muchungu Muema, that his father was Muchungu Ndiko, or that he was Muchungu Muema alias Muchungu Ndiko. The witness Chui Gititi said the parties' father was Muchungu Muema, and Mburu Muchungu, another brother, said their father was not known by the name of Ndiko. The second part of the passage quoted indicated in the same breath, as it were that the deceased did and did not own a piece of land other than plot 171. Then again the substance of the respondent's case is not recorded, but merely that he was taken through the plaint and "confirmed the contents of the same seriatim".

There were of course some equally unsatisfactory aspects of the respondent's statement, for instance he could not explain why the land was to be held in trust only for himself and the appellant, but not for the three other brothers, who were minors, and under the care of their mother at that time. All the more reason it might be thought, that they should share beneficially. Nevertheless the manner of the recording of the evidence, as I have attempted to demonstrate above, and the obvious gaps in it, lead me to conclude that there is substance in the respondent's claim that not all of that which he said was recorded, and that justice would not be done in this case merely by allowing the appeal (as it must be) and the setting of the High Court judgment aside. Mr Menye says that he would not strenuously resist an order for a new trial, and I would additionally order that the case be reheard by the High Court and determined according to law. Accordingly I agree in all respects with the orders proposed by Chesoni Ag JA.

Potter JA. I agree with the judgments herein of Hancox JA and Chesoni Ag JA and accordingly this appeal is allowed and the orders of the court will be as proposed in the judgment of Chesoni Ag JA.

Dated and Delivered at Nairobi this 16th day of June 1983.

K.D.POTTER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

.....

AG. JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR