

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2454 OF 1977

MWANGI MUTITUPLAINTIFF

VERSUS

NGUGI CIIRA.....DEFENDANT

JUDGMENT

The facts of this case present no difficulty. The plaintiff, Mwangi, and the defendant, Ngugi, are first cousins who share a common paternal grandfather and grandmother. The plaintiff alleges that the suit land (location 14/Kairo/269) is family land passed from the parties' grandfather, Mwangi, to his only two sons, Mutitu (the plaintiff's father) and Ciira (the defendant's father). The land which the plaintiff claims was originally sixteen acres, and the defendant sold four acres. The plaintiff is asking to be given eight of the remaining twelve acres. The defendant has denied that the suit land is family land. He said that he redeemed it from Kihika Muteru.

The plaintiff lives on another piece of land (four acres) which he inherited from his father. The defendant too has another six acres besides the suit land which at first he said he inherited from his father; but later in evidence he said that he had bought it. Although there was a suggestion by one of the witnesses for the plaintiff that the goats to be paid to Kihika were promised and have not to date been paid, it was agreed by most of the plaintiff's and defendant's witnesses that the defendant paid to Kihika five goats to redeem the suit land. Although the Court was told that the dispute over this land was discussed before the Assistant Chief and the Chief with clan elders and the plaintiff called Wambake, who said he attended the meetings, neither the Chief nor his assistant was called to tell the Court what transpired. It appears that whatever was discussed was not reduced to writing as no document was tendered in evidence by either party on the discussions before the Chief or his assistant.

Kamondo Wambake was a confused witness from the beginning to the end. Whatever he stated was the case, he denied later; and whatever he denied, he admitted later. This witness told the Court that both the plaintiff's and defendant's fathers paid Kihika five goats; but later he said that the goats were contributed or came from Mutitu's property, although Mutitu himself was dead. Mutitu was said to have died in 1930s, whereas the goats were paid in the 1960s; that is more than thirty years later! The same witness told the Court that redeemed land which belonged to the family remained family land, regardless of who redeemed it. During cross-examination he told the Court that the person who redeems family land retains it as his own land, and that when the defendant redeemed the suit land from Kihika he was doing so as his land and not family land. In one breath he said there has never been any dispute between Kihika and the defendant. In another he said there was a dispute. Both Kariuki and Ngugi Mwangi who were other two witnesses of the plaintiff were too young to have known the plaintiff's property. They could tell the Court only what they had heard, apart from land consolidation in which they participated, and which evidence added little to the case.

During the demarcation of land in the parties' location and district the plaintiff's son assisted the defendant to consolidate all the land registered in the names of the various family members of Mwangi. This was in 1962 when the suit land was also registered in the name of the defendant. The plaintiff took no action to rectify the matter (if there was a claim on his part) until 1977, some fifteen years after the registration of the defendant as proprietor of the suit land!

The defendant told the Court that his father had sold the land in question, which he had bought from Mahu, to Kihika for five goats and that is why the defendant was redeeming the land. It was not Mwangi

family land, but Ciira family land. Ephantus Waiharo, one of the elders on the land adjudication committee, said that there had been a dispute between the defendant and Kihika about the suit land and he could remember five goats being delivered to the Sub-chief for payment to Kihika. He further said that one member of the family may redeem family land although the practice is for all members of the family to redeem such and jointly.

Nevertheless, if family land is redeemed by only one member of the family the land becomes the personal property of the redeemer and is not subject to inheritance or sharing by the other members of the family. Thus, under the Kikuyu customary law family land which is redeemed by one member of the family ceases to be family land and is not available to other members of the redeemer's family for sharing.

Neither counsel made any submission; so the clear statement on the Kikuyu customary law on redeemed land by Ephantus Waiharo was not challenged. This witness impressed me as a man who knew what he was talking about. He is an old man of more than seventy years of age. In my opinion, and I accept his statement that he is conversant with the Kikuyu customary law on the issue of redeemed land, the position is as I have put it in the preceding paragraph.

On the case in general there was not sufficient evidence adduced by the plaintiff to establish the suit land as family land of the family of Mwangi (the parties' grandfather). The land not having been proved to be family land of a common grandfather it was not subject to sharing between the families of Mutitu (the plaintiff's father) and Ciira (the defendant's father).

On the other hand, I accept as true the statement that under the Kikuyu customary law family land which is held by a third party who is not a member of the family to whom the land belongs and which is redeemed by only one member of the family (after the other members have been requested to join in the redemption, but they have declined to join) ceases to be family land on redemption and becomes the personal property of the redeemer. So, in this case, even if the land in question had been family land it ceased to be so when only the defendant redeemed it from Kihika Muthuru. The evidence shows that the plaintiff knew about the plans and steps to redeem the land, but was not interested in joining in the redemption.

The land in question, through redemption, would belong to the defendant as his personal property, and it so belongs.

For the reasons I have given the plaintiff's claim must fail. Accordingly the suit is dismissed with costs.

Judgment for the defendant.

Dated and delivered at Nairobi this 29th day of June 1979.

Z.R CHESONI

JUDGE.