



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 20 OF 2017

ABDULLAHI OMAR SHANNO.....APPELLANT

VERSUS

ANO SHANO DAWE.....RESPONDENT

(Being an appeal from the judgment/decree passed in Marsabit PMCC No. 13 of 2015 on 26th July, 2017 by the Hon. T.M. Wafula, Resident Magistrate)

JUDGMENT

Background

1. The background to this appeal is as follows: the appellant filed a plaint dated **29th April, 2014** in the **ELC Meru No. 61 of 2014**. The case was transferred to **Principal Magistrate's Court in Marsabit in Civil Suit No. 13 of 2015**. In that case he sought the following orders against the defendant therein:-

- (a) A declaration that land parcel No. MARSABIT/MOUNTAIN/5 is family land held by the defendant in trust for the benefit of members of his family.**
- (b) An order of permanent injunction restraining the defendant from evicting the plaintiff from land parcel No. MARSABIT/MOUNTAIN/5.**
- (c) Costs of the suit.**
- (d) Any other relief.**

2. The defendant filed a defence dated **8/5/2014** and denied the plaintiff's claim. Judgment was issued on **26/7/2017** and the plaintiff's suit was dismissed with costs. The appellant is aggrieved by this judgment.

The Appeal.

3. The appellants filed a Memorandum of Appeal on **21/8/2017** in which he set out the following grounds:-

- (1) That the Learned Magistrate erred in law and fact in finding that land parcel number MARSABIT/MOUNTAIN/5 is held by the respondent in trust on behalf of his siblings only.**
- (2) That the Learned Magistrate erred in law and fact in failing to find that the respondent was under an obligation to provide land for the appellant under Burji Customs.**
- (3) That the Learned Magistrate erred in law and fact in failing to find that the appellant having occupied the suit land under the Burji Customs relating to land ownership could not be denied possession of the said land.**
- (4) That the Learned Magistrate erred in law and fact in finding that the law of succession applied to the dispute between the parties.**
- (5) That the Learned Magistrate erred in law and fact in failing to find that the proposed alienation of the suit land by the defendant would amount to eviction of the appellant therefrom.**

(6) That the Learned Magistrate erred in law and fact in failing to find that the proposed alienation of the suit land was contrary to Burji Customs relating to land ownership.

(7) That the Learned Magistrate erred in law and fact in finding that the appellant had not proved his case to the required standards.

(8) That the Learned Magistrate erred in law and fact in failing to evaluate the evidence offered.

4. The appellants pray that this appeal be allowed with costs and that the judgment by the lower court be set aside with orders that the appellant's case therein be allowed as prayed.

Submissions of the Parties

5. The appellant filed his submissions on this appeal on the 7/8/2018. The respondent filed his submissions on 6/9/2018.

Determination

6. The grounds in this appeal can be summed up as follows.

(a) Whether the appellant had occupied the suit land under the Burji Customs relating to land ownership.

(b) Whether the Learned Magistrate erred in law and fact in failing to find that the respondent was under an obligation to provide land for the appellant under Burji Customs.

(c) Whether the Learned Magistrate erred in law and fact in finding that the law of succession applied to the dispute between the parties.

(d) Whether the Learned Magistrate erred in law and fact in failing to find that the proposed alienation of the suit land by the defendant was contrary to Burji Customs relating to land ownership and would amount to eviction of the appellant therefrom.

(e) Whether the Learned Magistrate properly evaluated the evidence offered.

7. On the first issue above, it is proper to note that the appellant claimed in his plaint that the land was ancestral land held in trust by the defendant for the other members of his family and that he had always lived on the land.

8. The defendant having denied the claim, evidence was needed to establish a trust existed. The plaintiff claimed to be the respondent's son. The defendant stated that he was the eldest son to Shano Dawe and upon his death he was registered under their customary law to hold the land on behalf of himself and 7 others who are his siblings. The respondent admitted that the plaintiff is his eldest son whom the respondent has endeavored to educate, and who is no longer a dependant.

9. The appellant's evidence was that the respondent, his father, is the sole heir of the appellant's grandfather's land and those other persons said to be the respondent's siblings have no blood relationship with the respondent and the family land should therefore not be given out to them. He averred that he has lived on that **LR Number Marsabit/Mountain/5** since he was born, that the respondent bore ten children and that since **2001**, he has been living on a portion of land measuring approximately **90 by 50** (feet, I presume,) given to him by the respondent, that he built a house on the said portion, that his other brothers are living on **LR Number Marsabit/Mountain/5**; only one son, Gite Shano, was included in the list of persons in trust for whom the respondent allegedly held the land. When the appellant wrote a letter of complaint protesting the apparent disinheritance, the respondent served him with an eviction notice and he filed this suit in response.

10. From the evidence on the record I find that the appellant was in occupation of the land as a son to the respondent who had inherited the land from the appellant's grandfather and had lived there all his life save after he was engaged in the armed forces. By then he had built a house on a portion of the land. The occupation of the land, which the appellant had not bought for himself can only be attributed to the community customs which allow a son to live on land inherited by his father from their ancestor. As the respondent had not also purchased the land he was also deemed to be resident thereon by virtue of it being Burji customs.

11. The next issue is whether the Learned Magistrate erred in law and fact in failing to find that the respondent was under an obligation to provide land for the appellant under Burji Customs.

12. In contrast with other litigation such as **Mbui Mukangu vs Gerald Mutwiri Mbui 2004 eKLR** and **Muriuki Marigi vs Richard Marigi Nyeri CA 189 of 1996 (UR)** that preceded this case, there is no dispute, and indeed there is an admission by the defence in this case that the land is subject to a customary law trust. In the **Muriuki Marigi vs Richard Marigi Nyeri CA 189 of 1996 (UR)** court had held that claims by sons based on customary law could not be sustained to compel a father to share out land. The sons are according to the holding therein possessed of no right of cause of action as that right is excluded by the provisions of section 27 and 28 of the repealed Registered Land Act.

13. Therefore even if those overriding interests not noted would have otherwise been extinguished by registration under the Registered Land Act (see **Esiroyo vs Esiroyo 1973 EA 388**; **Obiero Vs Opiyo 1972 EA 227.**) in this case by the admission made by the respondent the land in question was expressed to have been registered in the name of the respondent to hold in trust for the family, the same is deemed to have been preserved by the express will of the parties.

14. The only question in the instant case is as to whether the appellant is entitled to a portion of the land under that trust.

15. It is noteworthy that the trial magistrate found only that the appellant held the land in trust only for his siblings. The trial magistrate also held that the issue of disinheritance could only arise after the demise of the respondent. This finding was the root of his holding that the appellant could only become a beneficiary after the respondent had distributed property among his siblings, effectively shutting out the appellant from claiming a share of the land while his father was alive.

16. The court stated that it agreed with the argument of Mr. Ringera that the respondent is not absolved from his duty as trustee under Burji customary law. It found that the appellant could only sit back and hope that the respondent would carve out a piece of land for him from his entitlement after sharing the land with his siblings – and named two of them as Hirbo and Sadia; that it is upon the respondent to choose whether to give his children a piece of his land; that the children could not prevent him from dealing with the land as he deemed expedient. The court observed that it was absurd for the appellant an adult to claim land from his father while his father was still alive.

17. It is notable that despite the naming of only two siblings by the court, the documentary evidence on record showed that the appellant had complained that the respondent intended to distribute the land amongst seven people- including himself. The discrepancy in the judgment is not accounted for.

18. The plaintiff's evidence is that the respondent did not have any siblings and he was an adopted child and the persons he intends to share the land with are strangers to the family. The appellant stated that his grandfather had no children with his two wives and that is why he adopted the respondent. The appellant called evidence of Hassan Bulge, (PW2) and Sode Welabo (PW3). Hassan testified that the respondent's father died before being blessed with any biological child but he had adopted the respondent before his death. His evidence is that of all the persons on the distribution list of the respondent only one is his biological son. He stated that according to the Burji custom a son can inherit and the appellant was entitled to inherit a share of the suit land according to the Burji traditions.

19. **Sode Welamo** described himself as a former chief of Dakabaricha location in **1981**, stated that he is **83** years old. He corroborated the evidence of Hassan that the appellant's grandfather did not bear any children with his wife, but adopted the respondent. He stated that the respondent is under an obligation to let his children occupy the land which is now registered in his names as is the Burji custom. While under cross examination he denied that Jibo Wonke was Shano Dawe's wife. He also did not know Hirbo and Sadia the purported siblings of the respondent.

20. The respondent testified that the deceased had two wives; that the first one had two children and the second one four; that only one child, Hadija, survived the second wife; the two children of the first wife, that is he and Hirbo, were still alive; that makes it three survivors purported to be borne of Shano Dawe's alleged unions with two alleged wives. The respondent was quite silent as to this discrepancy. He also called two witnesses. He also did not have any documents to prove that the two, Hirbo and Hadija were his siblings. None of the people he intends to share the land with have lived or built on the suit land.

21. **DW2 Hirbo Shanno Dawe** testified in favour of the respondent. I do not place much emphasis on his evidence as he is not in my view an independent witness. His Identity card reads **1968** as his date of birth. He admitted taking his first national identity card in **1986** at the age of **18**. If that is the case then it follows that though it is possible that he shares the same mother with the respondent, he can not be Shanno Dawe's biological son since Shanno Dawe is said to have died in **1964-65**, more than **21** years before he was born.

22. **DW3 Sadia Shanno Dawe** testified and stated that Shano Dawe was her father. She also stated that Basoye was her sister. According to the evidence on record Basoye, having died aged **22** in **2002**, must have been born in **1980**, **15** years after the death of Shanno Dawe.

23. I am more convinced that Hirbo, Sadia and the respondent were all not the biological children of Shanno Dawe owing to the above analysis. In my view, they have no better right than the appellant to the land the respondent inherited. In fact for now, they have no right at all. The learned trial magistrate erred in finding that they were, on the basis of the evidence before him, the respondent's siblings and by implication born of the ruling that he issued, Shanno Dawe's children having a right to inherit the land. In my view the only family members entitled to the use and occupation of the land by virtue of their being descendants of Shanno Dawe are the respondent and his children, including the appellant. What the appellant sought at the trial in the court below were two substantive orders:

(a) A declaration that the suit land is family land held by the respondent in trust for the benefit of members of his family;

(b) An order of permanent injunction restraining the respondent from evicting the appellant from the suit land.

24. These orders are by no means a claim that the land be immediately shared with the respondent. The second order only emphasizes that the appellant has recognized his customary law rights to occupy and work the land and wishes to have them preserved. There is nothing wrong with that. To quote the words of **Madam JA in Alan Kiama -vs- Ndia Mathunyo -vs- Others C.A. 42/1978:-**

“What meaning is to be given to section 30(g)” The rights under customary law may be argued to be extinguished by section 28 - Kneller, J. in Esiroyo v. Esiroyo [1973] E.A. 388, at p. 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Overriding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.

Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have

a customary law flavour or the concomitant aspect of cultivation, which is not listed in Section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for.”

25. In this case an examination of the evidence on record shows that the overriding rights of the appellant are already established to exist. Ultimately the appellant and his siblings being the only heirs of the respondent, would under the Burji customary law be entitled to land either before, if the respondent does a testate disposition, or after the demise of the respondent through transmission as it is ancestral land. the words of the court of appeal in **Mbui Mukangu vs Gerald Mutwiri Mbui 2004 eKLR** ring clearly regarding this situation as follows:

“It is significant, we think, that unlike the Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. It is also significant that unlike the Esiroyo case, where the sons invaded the land occupied by the father, Gerald in this case, was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land. The respondent is not ready to compensate him for those permanent developments. We think the superior court was right in distinguishing the authorities cited on that score. But more significantly, we think a trust arose from the possession and occupation of the land by Gerald which has the protection of sections 28 and 30(g) of the Act unless there is an inquiry made which discloses no such rights, which would be superfluous in this case.”

26. In that case Mbui had filed a suit attempting to obtain orders of eviction to force Gerald his son out of ancestral land. in the instant case the respondent has served a notice of eviction upon his son who is similarly in occupation of ancestral land just as Gerald was in the Mbui case.

27. On the third and fourth issues I find that since the parties had already agreed that the land was held in trust for the family members under the Burji customary law, there is no doubt that the land would have to be dealt with under that customary law. The proposed alienation of the ancestral land by the respondent to persons not established to be members of Shanno Dawo’s family was contrary to Burji Customs relating to land ownership and would amount to eviction of the appellant therefrom.

28. It is clear by now that the magistrate erred in the process of analyzing the evidence on record, for had he analysed it adequately, the evidence he would have come up with the above conclusions and would not have dismissed appellant’s the suit.

29. I find that the appellant’s suit in the subordinate court had merit. Accordingly, I allow the appeal and order as follows:

(a) The judgment and decree of T.M. Wafula issued in Marsabit PMCC No 13 of 2015 on the 26th July 2017 is hereby set aside and hereby substituted with an order that the appellant’s claim as contained in prayers (i), (ii) and (iii) of the plaint dated 29/4/2014 is allowed.

(b) The respondent shall bear the costs of this appeal.

Dated, signed and delivered at Meru this 1st day of March, 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE