



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 17 OF 2017

M'INOTI NTHAI.....APPELLANT

VERSUS

NAOMI KAREGI M'IMANYARA

(BEING THE LEGAL REPRESENTATIVE OF ELIJAH M'IMANYARA...RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. MAYAMBA, SRM, in Githongo SRMCC No. 1 of 2015 delivered on 30/6/2015)

JUDGMENT

1. The genesis of this appeal is the decision of the Senior Resident Magistrate's Court in **Githongo SRMCC No 1 of 2015**. The appellant and the respondent were both parties in **Githongo SRMCC No 1 of 2015**. In that case, the respondent herein was the defendant and the appellant herein was the plaintiff. The appellant sought the following orders:

- a) **A declaration that the defendant is holding half of land parcel No. Abothuguchi/Katheri/ 734 in trust for the plaintiff.**
- b) **An order that the defendant do transfer half of land parcel No. Abothuguchi/Katheri/734 to the plaintiff.**
- c) **Costs and interest.**
- d) **Any further or better relief.**

2. The appellant's case was that he was the brother to **Elijah M'Imanyara**, the respondent's husband who died before the suit was commenced and that at all material times land parcel **Abothuguchi/Katheri/734** (hereinafter referred to as the suit land) was ancestral land and was registered in the name of the deceased to hold the same in trust for himself his family and for the plaintiff and his family.

3. The appellant further pleaded that his father, whose name was Nthai, had several sons and had directed how his sons would occupy his various parcels of land. The appellant stated that he developed his portion of the suit land and the deceased developed his. The particulars of development are given in the plaint. He averred that he and his family live on the land. However after the demise of his brother the respondent denied the trust and called for the eviction of the appellant. The particulars of the alleged breach of trust are also stated in the plaint as follows: refusing to transfer half portion of the suit land; dealing with the suit land against the interests of the appellant; breaching the trust; giving notice to the appellant to vacate the suit land and planning to dispose of the said land to the detriment of the appellant.

4. The respondent denied the claim. In her defence dated **5th May, 2015** she prayed that the appellant's suit be dismissed with costs. According to her defence the appellant had land elsewhere just like other sons of the deceased and thus he was not entitled to any share the deceased's land. The respondent further averred in her defence that the appellant had never lived on the suit land and that he only laid a claim on it after the demise of the deceased. further, it was pleaded in the defence that the appellant's claim had been canvassed and refused in **Meru Succession Cause Number 50 of 1996** whereupon the appellant appealed against that refusal and the appeal was also rejected, and that the case was thus improperly before the court.

5. The appellant filed a reply to the defence on **20/5/2015** and reiterated the matters in the plaint.

6. Judgment was issued on **30/6/2017** dismissing the appellant's claim. It is this judgment that the appellant is aggrieved by.

The Appellant's Appeal

7. The appellant's Memorandum of Appeal in this appeal is dated **24/7/2017**; in it, he raises the following grounds which I will replicate verbatim herein:-

1. The Learned Magistrate's judgment is bad in law and in fact in that he failed to evaluate and understand the evidence and the law placed before him;

2. The learned trial magistrate erred in law and in fact in that he failed to understand the difference between opinions observations of the other courts and decisions and therefore put bundles (sic) to prevent himself to freely deciding the case on its merits and fairly.

3. The Learned Magistrate erred in law in that he failed to take or take proper account of the legal precedents placed before him and failed to apply the correct legal principles applicable to the case before him.

4. The judgment of the learned trial magistrate is bad in law and against the clear provision of the constitution.

8. The appellant prays that his appeal be allowed and the decree passed by the lower court be set aside and the respondent be condemned to costs in this appeal and in the lower court.

Submissions of the Parties on the Appeal.

9. The appellant filed his submissions in the appeal on **7/8/2018** and the respondent filed his on the **19/2/2019**. I have perused through the record and found no submissions filed on behalf of the respondents. I have considered the filed submissions.

DETERMINATION

Issues for Determination

10. The issues that arise for determination in this matter are as follows:

(a) Did the Learned Magistrate err in evaluating the evidence and the law placed before him, unduly fettering his judgment and in so doing, arriving at a judgment that may be termed as contrary to any clear provisions of the Constitution?

(b) Who should bear the costs?

11. The issues are addressed as hereunder.

(a) Did the Learned Magistrate err in evaluating the evidence and the law placed before him, unduly fettering his judgment and in so doing, arriving at a judgment that may be termed as contrary to any clear provisions of the Constitution?

12. This is a first appeal and the principle is that in such an appeal the evidence given at must be re-evaluated by this court in order to establish if the conclusions reached by the trial court are proper. The Court of Appeal stated as follows in **Civil Appeal No. 156 of 2013 - Elizabeth Wambui Githinji & 29 Others -vs- Kenya Urban Roads Authority & 4 Others [2019] eKLR**:

“Before undertaking the evaluation of those arguments, evidence and the law, it is apposite at this point to restate that the role of this Court on a first appeal is to re-evaluate the evidence on record before it can determine whether or not the conclusions reached by the learned trial Judge are to stand and to give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212.”

The Appellant's Evidence at the Trial Court

13. The appellant filed three witness statements including one in his name, all dated **7/4/2015**. All the appellant's named witnesses adopted the statements as their evidence-in-chief and they were cross examined on the contents thereof.

14. The evidence in the appellant's statement is that his father gathered the suit land; that the suit land was registered in the deceased's name; that the deceased was to hold the land in trust for himself and for the appellant; that in **1994** the deceased informally subdivided the land in the presence of the respondent and other persons and gave the appellant half of it and retained the other half; however the actions of the respondent which occurred after the demise of the deceased gave the appellant cause for alarm; she allegedly closed the access road that the appellant and his family had used to access the main road and refused to transfer half of the suit land to him. The appellant averred that he and the deceased had lived peacefully on the land without any disputes. He adopted that statement as his evidence in chief at the trial on **13/10/15**.

15. **PW2's** evidence is that he is a neighbour to the appellant; that he was present when the deceased subdivided the suit land and gave half of it to the appellant who has been in possession thereof since then; that the deceased stated that he would transfer the land to the appellant but died before he could do so. According to him the disputed portion of land belongs to the plaintiff.

16. **PW3's** evidence was that the deceased and the appellant who were brothers were his neighbours ; that the deceased and the appellant lived on the same piece of land registered in the name of the deceased; that in June **1994** the deceased informed him of his intention to

subdivide the land parcel.

17. PW4, a son to the appellant also testified in the appellant's case and adopted his witness statement as part of his evidence-in-chief. However on cross examination he averred that he did not know how the deceased acquired the land.

The Respondents' Evidence at the Trial

18. DW1's evidence was that her husband had 5 brothers who included the appellant; that the appellant's land parcel is in Kiirua where he stays; that upon her husband's death the appellant entered into her land without her consent and cultivated a portion of it and then sued her; that the appellant has two other brothers who have their own land but he does not demand any land from them; that those brothers have sons but the deceased had only two daughters and the absence of sons in her family prompted the appellant into aggression against her; that at the appellant's instance criminal proceedings of assault were preferred against her but she was acquitted; that a succession cause was filed which ended up in the Court of Appeal at Nyeri. That according to her her husband gathered the land for his own use and he did not inform her of the existence of any share of the appellant in the land.

19. DW2 adopted his written statement as evidence. His evidence is that he is a neighbour to the respondent; that the respondent has lived with her husband and children on the land and the appellant only entered the land upon the death of the respondent's husband; that he knew that the appellant has land in Kiirwa; that he never learnt at any time of subdivision of the land in favour of the appellant yet the deceased used to employ him to work his land.

20. DW3 a daughter to the respondent adopted her witness statement. Her evidence is that her father never informed the family of his holding of any land in trust for the appellant. She corroborated PW1's evidence that the appellant came onto the land upon the demise of her father and that thereafter a dispute erupted between the appellant and the respondent.

21. In his judgment the learned magistrate reviewed the evidence of the witnesses as above. He framed the issues for determination as follows:

- (a) Whether the plaintiff was and is still in active possession of the suit land.*
- (b) Whether the suit land was an ancestral land.*
- (c) Whether the deceased held the land in trust for himself and the plaintiff.*
- (d) Whether the plaintiff had developed the land.*
- (e) Whether the defendant was in breach of the land.*
- (f) Whether the magistrate's court had the jurisdiction to hear the matter.*
- (g) Whether the suit was res judicata Meru Succession Cause No. 50 of 1996.*
- (h) Whether the plaintiff owned his parcel of land in Kibirichia just like his brother and had no claim to the land.*

22. The Magistrate noted that PW1 had possession of a portion of the land for an unspecified duration and then inquired as to whether the land was an ancestral land. In this regard he found that the appellant's father died before any gathering of the land was done and while the appellant was still a young child and therefore the land could not have been rightfully declared his. Further the land was not registered in the appellant father's name to warrant the court's findings that it was ancestral land. The trial magistrate also found that land gathering was done in the year 1960 and registration was done in 1965 yet the appellant had alleged that he fought in the Mau Mau war in 1952; in the Learned Magistrate's view, the question therefore arose as to why the portion he claims was not registered in the appellant's name. The magistrate also noted that PW4 did not corroborate the appellant's evidence that the gathering of the land was done by certain members of his clan. On the basis on the above findings the trial magistrate concluded that the land was only ancestral in so far as the family of the deceased was concerned and the appellant could not lay any ancestral to it.

23. Referring to **Nyeri C.A. No. 154 of 2011** the trial magistrate observed that the Court of Appeal did not reconcile the fact that the appellant herein moved to Kibirichia in 1950 where he established a home with his decision to stake his claim over family land 37 years later and that it wondered whether why the appellant did not pursue his claim during the deceased's lifetime; he also noted that the Court of Appeal took the above circumstances as persuasive evidence that the respondent herein was being looked down as a widow as she was survived by any male children. In his opinion the magistrate stated that in the light of the Court of Appeal decision in **Civil Appeal No. 154 of 2011** the appellant's claim of trust could not arise and that in any event it was not supported by any evidence to warrant a re-determination by his court and therefore he could not make any decision contrary to that of the Court of Appeal. He also found that the suit was *res judicata*.

24. As to whether the appellant owned land in Kibirichia the learned magistrate, drawing from Court of Appeal decision found that the appellant's claim to having bought the Kibirichia land was not supported by any evidence and that the fact that the appellant's brothers had not laid claim to the deceased's land showed that there was a gap in the plaintiff's claim and evidence.

25. Bearing in mind that the trust claim by the appellant before the lower court was not shown to have been noted on the land register, the existence of the trust which must be considered as a customary trust, is a matter of evidence.

26. The burden of proof of the existence of the trust vested on the appellant's shoulders.

27. The very fact that all defence evidence pointed to the appellant's taking of possession of a portion of the suit land only after the demise of the respondent's husband raises questions as to why his claim was not lodged much earlier. The appellant himself never called evidence that could properly identify the date on which he took possession of the suit land. All he could say is that the deceased subdivided the land in his favour in 1994. That is contained in the statement he filed in the suit. In his oral evidence he stated that he is 52 years old and his father had died before the Mau Mau war in 1952.

28. In my view the evidence called by the appellant in the trial court was weak and did not support his claim that the suit land was ancestral land. The observation by the trial magistrate that the appellant did not establish that his father, or alternatively his clan, were involved in the gathering of the land and that therefore the deceased could not have obtained the land through either his father or the clan was correct and therefore no trust could be implied in the circumstances.

29. The appellant's claim having been based on trust must in the circumstances fail. I therefore find that this appeal has no merit and I hereby dismiss it.

(b) Who should bear the costs?

30. The appellant shall bear the costs of this appeal and of the trial in the lower court.

It is so ordered.

Dated and signed at Kitale this day of 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered in open court at Meru this 31st day of October, 2019.

HON. LUCY. N. MBUGUA

ELC JUDGE

JUDGE

ENVIRONMENT AND LAND COURT, MERU