REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 122 OF 2013

REGINA KARIMI MBUCHI

CHARITY BIBI MBUCHI

FAITH WANJIRA MBUCHI.....APPELLANTS

VERSUS

FRANCIS MBUCHI KITHAKA.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 31ST JANUARY 2012 BY HON E.M. NYAGA – R.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL SUIT NO. 48 OF 2009)

JUDGMENT

Land parcel No. KABARE/NYANGATI/3071 (the suit land) has been registered in the names of the Respondent **FRANCIS MBUCHI KITHAKA** since 27th March 1998 and measures 4.14 Ha about ten (10) acres. It is a resultant sub-division of the original land parcel No. KABARE/NYANGATI/495 and which measured about thirty (30) acres and was registered in the names of **FRANCIS MBUCHI GATINDI** the deceased father to the Appellants **REGINA KARIMI MBUCHI, CHARITY BIBI MBUCHI** and **FAITH WANJIRA MBUCHI** and grandfather to the Respondent **FRANCIS MBUCHI KITHAKA**.

FRANCIS MBUCHI GATINDI had three (3) wives namely:

1. **TABITHA WANGOMBE – mother to the Appellants**
2. **JANE MURIKO**
3. **MARGARET NJIRU** both deceased

Emboldened by his registration as proprietor of the suit land, the Respondent moved to the **SENIOR RESIDENT MAGISTRTE'S COURT** at **KERUGOYA** and filed **CIVIL CASE No. 48 of 2009** claiming that the Appellants had, without his consent, been cultivating the suit land and even placed a caution thereon taking advantage of the fact that he was registered as proprietor while still minor. He therefore sought the main order being:

> ***"A permanent injunction restraining the defendants jointly from trespassing, cultivating and/or in any way interfering with the said land and removal of all or any caution or restriction placed in the suit land and a declaration that he is the sale proprietor of the suit land".***

The Appellants resisted the claim by filing a defence and a counter-claim of their own. They pleaded that the Respondent was registered as the proprietor of the suit land when he was a minor to hold it in trust for the house of **TABITHA WANGOMBE** (deceased) the third wife to **FRANCIS MBUCHI GATINDI** and mother to the Appellants who pleaded further that they were born and brought up on the suit land which is ancestral/family land which they cultivate.

They therefore sought the dismissal of the Respondent's suit and in their counter-claim, pleaded that the original land parcel No. KABARE/NYANGATI/495 measuring about thirty (30) acres was apportioned to each of the three houses of **FRANCIS MBUCHI GATINDI** with each getting ten (10) acres and the suit land is therefore held in trust for the defendants all of them being from the third house. They therefore sought the following order:

> ***1. "A declaration that the plaintiff holds land parcel number KABARE/NYANGATI/3071 on his behalf and on behalf of the***

defendants, all of them being from the family of the third house of MBUCHI GATINDI, deceased, and the trust be determined. The plaintiff and each of the defendants to get 2.5 acres"

The suit was heard by **HON. E.M.NYAGA** – Resident Magistrate who, after hearing four (4) witnesses, and in a three (3) page judgment delivered on 31st January 2012, entered judgment for the Respondent as prayed in the plaint. No reference was made to the Appellants counter-claim.

That judgment led to this appeal in which the Appellants have raised the following nine (9) grounds of appeal in seeking to have the judgment set aside and substituted with an order that the suit land be divided into four (4) equal portions with each of the parties getting one portion:

1. The learned trial magistrate erred in law and in fact in failing to appreciate the overriding interests created by Section 30 (g) of the Registered Land Act Cap 300 Laws of Kenya thus arriving at an erroneous conclusion of the applicable laws.

2. The learned trial magistrate erred in law in failing to indicate the issues for determination contrary to the mandatory provision of Order 21 Rule 4.

3. The learned trial magistrate erred in law and in fact in failing to make any determination over the counter-claim hence a miscarriage of justice was occasioned.

4. The learned trial magistrate erred in law and in fact in failing to make a finding that the suit land was ancestral land held by one generation for the benefit of future generations hence occasioning a miscarriage of justice by denying the Appellants a share of ancestral land.

5. The learned trial magistrate erred in law and in fact in failing to address himself to the facts and applicable law particularly Article 27 (1) (2) (3) (4) (5) and Article 60 (1) (f) of the Constitution and failed to appreciate that failure to consider the counter-claim would dis-inherit the Appellants simply because of their gender/sex.

6. The learned trial magistrate erred in law and in fact in failing to make a finding that since the Appellants have all along occupied and utilized the suit land, they were entitled to a share of the land equal to that of the Respondent.

7. The learned trial magistrate erred in law and in fact in failing to make a finding that he had no jurisdiction to determine issues of trespass and eviction despite the same having been clearly highlighted in the Appellants/Plaintiffs' submissions.

8. The learned trial magistrate erred in law and in fact in failing to consider the evidence and the submissions of the Appellants/Defendants.

9. The judgment was against the weight of the evidence adduced and the cited case laws.

The appeal was canvassed by way of submissions which have been filed by the firm of **BWONWONGA & CO. ADVOCATES** for the 1st and 2nd Appellants, **MAINA KAGIO ADVOCATES** for the 3rd Appellant and **A.N. CHOMBA & CO. ADVOCATES** for the Respondent. I have considered the appeal and the submissions by counsel.

This being a first appeal, my duty is to evaluate and re-examine the evidence adduced in the trial Court in order to make a finding. I must also take into account the fact that this Court did not have the opportunity of hearing or seeing the parties as they testified and, therefore, make allowance for that. In addition, this Court will not normally interfere with a finding of fact by the trial Court unless the same is founded on wrong principles of fact or law – ***SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 1968 E.A 123.***

Section 78 of the Civil Procedure Act also sets out the powers of an appellate Court as follows:

78: (1) "Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power –

a. to determine a case finally;

b. to remand a case;

c. to frame issues and refer them for trial;

d. to take additional evidence or to require the evidence to be taken;

e. to order a new trial.

(2) subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein".

I will first consider ground No. 7 as it questions the jurisdiction of the trial magistrate "***to determine issues of trespass and eviction".*** The issue of the trial Court's jurisdiction to determine this dispute appears not to have been raised at the trial but was only brought up in the submissions at the end of the trial. An issue of jurisdiction is central to the conduct of a case and must be raised at the earliest opportunity because without jurisdiction, the Court must lay down its tools – ***OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL (K) LTD 1989 K.L.R 1.*** Indeed the trial Court can itself raise the issue of its jurisdiction to handle a particular dispute suo motto – ***LIVINGSTONE OMBETE VS KENYA POWER & LIGHTING CO. LTD C.A CIVIL APPEAL No. 354 of 2014 (2017 e K.L.R).***

In questioning the trial Court's jurisdiction to determine the dispute before it, **Mr. KAGIO** counsel for the 3rd Appellant has cited the case of ***MILTON K. NJUKI VS EDWARD IRERI MUGO EMBU HIGH COURT CIVIL CASE No. 38 of 2004*** where **LENAOLA J.** (as he then was) held that in view of the provisions of ***Section 3 (1) of the now repealed Land Disputes Tribunals Act,*** a subordinate Court could not handle a dispute relating to trespass to land. That case is however distinguishable from the matter that was before the trial Court. In the ***MILTON NJUK***I case (supra), the plaintiff had sought only the order for the eviction of the defendant from a parcel of land on the basis that he was a trespasser. **LENAOLA J.** (as he then was) had no difficulty in finding that jurisdiction to determine a dispute of trespass to land lay with the then Land Disputes Tribunal and not the subordinate Court.

In this case however and from what I have already stated above, the Respondent had sought the main order of a permanent injunction to restrain the Appellants from trespassing onto the suit land and also the removal of all cautions and restrictions placed thereon and a declaration that he was the sole proprietor of the suit land. The Appellants had by their counter-claim sought an order that the Respondent holds the suit land in trust for them. The reliefs of permanent injunction, removal of caution and declaration sought by the Respondent could not have been determined by the Land Disputes Tribunal as they are not among those set out in ***Section 3 (1) of the repealed Land Disputes Tribunal Act.*** Similarly, such a Tribunal could not determine a dispute relating to trust – ***JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL No. 256 of 2002.*** In the circumstances, the trial magistrate cannot be faulted for assuming jurisdiction in the matter because at the core of this dispute is the ownership of the suit land which is registered under the ***repealed Registered Land Act.*** The issue of trespass is really peripheral. A Land Disputes Tribunal established under the ***repealed Land Disputes Tribunals Act*** could not have been seized with the jurisdiction to determine a dispute relating to ownership of registered land. And if the trial magistrate had downed his tools, the consequences would have been that the parties would have been left without a forum to determine their dispute. The trial magistrate did not therefore error either in law or fact by hearing the dispute which was clearly within his jurisdiction. That ground fails.

Grounds 2 and 3 can be considered together. They relate to failure by the trial magistrate to indicate the issues for determination contrary to the mandatory provisions of ***Order 21 Rule 4 of the Civil Procedure Rules*** and failure to make a determination on the Appellants counter-claim.

> ***Order 21 Rule 4 of the Civil Procedure Rules*** provides as follows:
>
> ***"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions".***

Looking at the brief judgment delivered by the trial magistrate, it is clear that there was no compliance with the above mandatory provision of the law. A judgment, first and foremost, belongs to the parties in the suit who should be satisfied that all the issues brought out for determination by the Court have been considered. They need to know how and why a particular decision was arrived at as this will also enable them to know whether or not to appeal the decision. While there is no requirement of how long or short a judgment should be, the trial magistrate could hardly have addressed all the issues raised by the parties in their pleadings, oral evidence and submissions in the three (3) page judgment that he delivered on 31st January 2012. That explains why he made no reference to any of the judgments that were binding on him and which had been cited by counsel. He only considered the Respondents claim and declared him the registered proprietor of the suit land. The Appellants claim to the suit land through trust was not considered. Indeed the only reference to the Appellants counter-claim is where he said:

> "***The defendants claim that the plaintiff was registered as the proprietor of the said land as an owner to hold in trust for the third house of Mbuchi Gatindi (deceased) i.e. Tabitha Wangombe who is also deceased. Their claim against the plaintiff is dispensation of trust and that the plaintiff and each of the defendants to get 2 ½ acres".***

Other than that fleeting reference to the Appellants' counter-claim, the trial magistrate did not make any determination on the issue of trust. If he was minded to dismiss the Appellants counter-claim, he ought to have done so and given the reasons why. The judgment only granted the Respondent the remedy that he sought. There was no mention of the Appellants counter-claim on which evidence had been led and submissions made including case law. Those grounds of appeal succeed and in my view, are sufficient to dispose of this appeal.

Section 78 of the Civil Procedure Act which I have already referred to above gives this Court the power to determine a case fully. That is what I propose to do and in the process, determine the remaining grounds of appeal which in summary, take issue with the trial magistrate for not considering the Appellants evidence in support of their counter-claim that the Respondent held the suit land in trust for both himself and the Appellants. What was the evidence placed before the trial Court on this issue?

The 3rd Appellant **FAITH WANJIRA MBUCHI** testified on behalf of the Appellants. Her evidence was that her late father **FRANCIS MBUCHI GATINDI** was the registered proprietor of the suit land parcel No. KABARE/NYANGATI/495 and that he had three (3) wives namely **TABITHA WANGOMBE** (mother to the Appellants), **JANE MURIKO** and **MARGARET NJIRU** who are all deceased. That the Respondent's father **KITHAKA MBUCHI** who is also deceased was her brother and that the land parcel No. KABARE/NYANGATI/495 which measured thirty (30) acres was to be shared equally between the three (3) houses of her late father and that the share of her mother's house was registered in the Respondent's names since his father was deceased. This is what she said in her evidence in chief:

> ***"My father had title No. KABARE/NYANGATI/495. It was 30.6 acres. The plaintiff's father was KITHAKA MBUCHI. He***

was my older brother from the same mother. The 30 acres was divided between the 3 wives each to get 10 acres. The land of my mother was given to the plaintiff. At the time he was 2 years old. After sub-division, the title number became 3071. Title No. 3071 is occupied by FAITH WANJIRA, CHARITY BIBI and REGAIN (sic) KARIMI. Yes we have developed the place. The plaintiff does not occupy the land. He stays with the auntie – MARY KAMBA. He went when he was about 5 years old. He has never returned. WANGOMBE family decided to have registered in the plaintiff's name to hold in trust and we sub-divide later. All parties to share equally including the plaintiff. We should not be evicted as we have no where to go. I want the suit dismissed and allow the counter-claim"

The Appellants called as a witness **JOSEPH MBUCHI** their brother from the house of the 2nd wife **MARGARET.** His evidence was as follows:

"My father had 30 acres. Each wife was to get 10 acres. The last wife's property was registered in the names of his grandson to hold in trust for FAITH REGINA and CHARITY"

The Respondent's evidence on this issue was as follows:

"I know the defendants. They are my aunties. I am aware of land parcel No. KABARE/NYANGATI/3071. It belongs to me. I have a certificate of official search dated 7.3.11. I wish to produce the same"

Further on he said:

"***My grandfather gave the shamba to me. He is MBUCHI GATIMBI but my grandmother passed it to me. She is called MARGARET. My grandfather was deceased. There was a Succession Cause. I wish to produce the proceedings at Kerugoya No. 160/94. I also with the application (sic) for confirmation produced. It was not true that I was to hold the land for myself and them. I also want the caution lodged removed. I pray for costs"***

It is clear from the above that whereas the Appellants evidence was that the Respondent holds the suit land in trust for them being the share of their mother, the Respondent's challenge to that case was that firstly, the suit land is registered in his names and therefore it is his property. Secondly, that since succession proceedings were conducted in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE No. 160 of 1994** and he was awarded ten (10) acres, the Appellants can lay no claim to the suit land. Indeed the Respondent's counsel has submitted on this issue and stated that since the grant in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE No. 160 of 1994** has not been revoked to-date, the Appellants counter-claim could not succeed and they should have raised their claim in that Succession Cause.

It is now well settled that the registration of a party as the proprietor of land does not relieve him of his obligation as a trustee. See for example:

1. MUMO VS MAKAU 2004 1 K.L.R 13

2. KANYI VS MUTHIORA 1984 K.L.R 712

3. MUKANGU VS MBUI 2004 2 K.L.R 256.

Section 28 of the repealed Registered Land Act under which the suit land is registered makes it clear that such registration shall not relieve the proprietor from any duty or obligation to which he is subject as a trustee. ***Section 25 of the new Land Registration Act 2012*** is in similar terms. The Respondent could not therefore defeat the Appellants claim to the suit land by simply waving to the trial Court the title document thereof. However, he seems to have done so successfully because, after referring to ***Sections 27 and 28 of the repealed Registered Land Act***, the trial magistrate said:

"***The aforementioned provision of the law leave no doubt that the plaintiff is the registered proprietor of land parcel No. KABARE/NYANGATI/3071"***

In doing so, the magistrate made no mention of the fact that whereas ***Section 27 and 28 of the Registered Land Act*** vests in the registered proprietor all the rights and privileges appurtenant and belonging thereto, there is a provisal in ***Section 28*** that:

"***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee".***

Therefore, while a title document is prima facie evidence that the person registered therein is the absolute owner, that can be rebutted where for example, evidence is led that he is infact only a trustee.

That is what the Appellants were required to do. Trust is a question of fact which has to be proved by evidence. In ***GICHUKI VS GICHUKI C.A CIVIL APPEAL No. 21 of 1981***, the Court of Appeal held that it is trite law that trust is a question of fact to be proved by evidence. See also ***MUMO VS MAKAU*** (supra) and ***SALESIO M' ITONGA VS M' ARITHI M' ATHARA & OTHERS C.A CIVIL APPEAL No. 6 of 2013 NYERI (2015 e K.L.R).*** ***Section 109 of the Evidence Act*** provides that:

"***The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is***

provided by law that proof of that fact shall lie on any particular person".

Did the Appellants lead sufficient evidence to prove that the Respondent holds the suit land in trust for them? I am satisfied from the evidence on record that they did. I have already reproduced above excerpts of what the Appellants told the trial Court. Although the Respondent denied holding the suit land in trust for the Appellants, the following salient issue stick out like a sore thumb:

Firstly, the Appellants were born on and utilize the suit land. The Respondent does not. This is what he said in cross-examination by counsel for the Appellants:

> ***"I am sole registered proprietor and I was registered as a minor. Yes the defendants are sisters to my late father. They all do not stay on the property. They are married. They only come to cultivate. I stay with my mother's aunt"***

Evidence of possession and occupation of land in dispute can be relied upon to prove trust. In the circumstances of this case, it must mean that the Appellant could only have been put in occupation of the suit land by their deceased father and therefore have overriding interests in the same. The fact that one of the orders sought by the Respondent was to evict them confirms the Appellants claim that they have been and remain in occupation of the suit land with interests thereon.

Secondly, there is the Appellants evidence that their late father was the proprietor of the original land parcel No. KABARE/NYANGATI/495 measuring thirty (30) acres which was sub-divided into three (3) portions each measuring ten (10) acres and which was to be shared equally among the three (3) houses and that the share of the third house to which the Appellants belong was registered in the names of the Respondent to hold in trust because their only brother, and father to the Respondent, was also deceased. The Respondent of course denied this. He did not however explain why in **KERUGOYA SUCCESSION CAUSE No. 161 of 1994** only he got ten (10) acres out of all the beneficiaries. The only conclusion that any Court can arrive at on that evidence is that the Respondent was to hold the suit land in trust for the third house to which the Appellants belong. There is no other conclusion that can be made from that evidence. Counsel for the Respondent has made heavy weather of the fact that the Appellants did not seek the annulment of the grant issued in **KERUGOYA SENIOR RESIDENT MAGISTRATE SUCCESSION CAUSE No. 161 of 1994**. In many cases, disputes regarding trust property only come to light when the trustee abuses his or her obligation as a trustee and starts treating the property as his own private property and ignores the beneficiaries' interests therein. That appears to me to be what happened in this case. Indeed I dare say that had the Respondent not moved to the subordinate Court seeking the orders that he did, this matter would not have ended up in Court. It was therefore not necessary for the Appellants to file protests in the Succession Cause or even seek the annulment of the grant because there was nothing wrong with it. They expected and trusted that the Respondent would be faithful to his obligation as a trustee. After all, they were and still remain in occupation of the suit land.

Thirdly, the Respondent did not purchase the suit land as his private property. It was given to him in circumstances that clearly demonstrate that he was to hold it in trust for the third house of his father and brother to the Appellants. He cannot therefore claim any greater interest therein than the Appellants.

Finally, there was a suggestion by the Respondent's witness **JUSTUS NJUGWA** (PW2) that the Appellants, being daughters, were not entitled to any land. This is what he said:

> ***"The plaintiff is a grandson to my late brother. Yes he was the one who received the land. The land should have been given to his father. At the time of sub-division, his father was deceased. He was to receive the land over (sic) his own behalf. Yes I know the defendants. They are daughters of WANGOMBE. They were not to receive any land. No daughter of FRANCIS MBUKI GATUNDU received any land"***

When he was cross-examined, he said:

> ***"One of the daughters of WANGOMBE occupies 10 acres. She is WANJIRA. Yes the 2nd defendant cultivates the same land and she stays there too. REGINA (the 1st defendant) workers (sic) there too. The plaintiff stays with the aunt from the time he was young. He doesn't stay in WANGOMBE's land nor cultivate it"***

The fact that no land was not given to any daughter does not mean that it could not be held in trust for them. If the Respondent's case is that the Appellant, being women, are not entitled to the suit land, he must be disabused of that notion by being reminded that under ***Article 27 (3) of the Constitution,*** women and men have the right to equal treatment and none should be discriminated against on the basis of sex or marital status.

Having re-evaluated all the evidence that was available before the trial magistrate, it is clear to me that had he considered all the above, he would have come to the inevitable conclusion, which I hereby do, that the Respondent's claim was doomed to fail. On the other hand, there was sufficient evidence upon which the trial Court should have determined that the Respondent holds the suit land in trust for the Appellants.

Ultimately therefore, this appeal is allowed in the following terms:

> ***1. The judgment of the lower Court is set aside and substituted with an order that the land parcel No. KABARE/NYANGATI/3071 be divided into four (4) equal portions. The Appellants and Respondent to get one portion each.***
>
> ***2. As the parties are family, each shall meet their costs here and in the Court below.***

B.N. OLAO

JUDGE

13TH MARCH, 2018

Judgment delivered, dated and signed in open Court at Kerugoya this 13th day of March 2018

Mr. Ngigi for Mr. Chomba for the Respondent present

Mr. Kagio for 1st Appellant absent

Ms Bwonwonga for 2nd and 3rd Appellants absent

2nd and 3rd Appellants present

Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

13TH MARCH, 2018