



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 1 OF 2015**

**MUTEMI NJERU .....1<sup>ST</sup> APPELLANT**

**NTHIGA NJERU .....2<sup>ND</sup> APPELLANT**

**MURYUNGI NYAGA .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**NGARI NYAGAH .....RESPONDENT**

**(Being an appeal from the Judgment of Kyuso Senior Resident Magistrate's Court in Civil Case No. 39 of 2011 delivered on 10<sup>th</sup> February, 2015 by Hon. B.M. Mararo -PM)**

**JUDGMENT**

1. In the Memorandum of Appeal dated 25<sup>th</sup> February, 2015, the Appellant averred that the learned Magistrate erred when he ruled that the suit land belongs to the Respondent and that the Magistrate erred when he failed to consider that the Respondent did not prove his case against the Appellants.
2. The Appeal proceeded by way of written submissions. The Appellants' advocate submitted that the parties herein share a common ancestor, one Kasinga, who owned land situated at Kavogo village, Syokireke Sub-Location, Ngongoni Location, Tseikuru District (*the suit land*) and that Kasinga had two sons, Nyaga, who is the father of the Respondent and Njeru, the father of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.
3. Counsel submitted that the Appellants and the Respondent all lived on the suit land; that the suit land is not adjudicated and that there was no land known in law or facts that was placed before the lower court. Counsel submitted that after obtaining the Judgment, the Respondent sought to evict all the Appellants from the suit land and that the court failed to consult the report of the Chief while delivering its decision.
4. The Appellants' counsel submitted that the Respondent did not call evidence to prove his claim on inheritance; that this was a succession dispute and that the trial court was not shown the decision of the Mwingi Land Dispute Tribunal. Counsel submitted that the suit land is ancestral land and that every member of the community, group or family has rights in the ownership of the suit land.
5. The Respondent's counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants did not file a Defence in the lower court; that the subject matter was fully described in the Complaint; that the alleged report of the Chief was of no evidential value and that the issue of the suit land being ancestral land was never raised in the pleadings.
6. Counsel submitted that from the evidence on record, the 3<sup>rd</sup> Appellant is from the Njeru Kasinga lineage and not the family of Nyaga Kasinga; that the Respondent inherited the suit land from his father and has been in occupation of the same since 1986 and that the Respondent was arraigned in the Mwingi Law Courts over the same land.
7. This being a first appeal, this court is obliged to re-evaluate the evidence that was tendered in the lower court and arrive at its own decision. While doing so, the court should be conscious of the fact that the trial court had the benefit of seeing the witnesses testify.
8. The Respondent herein commenced the suit in the Magistrate's Court at Kyuso vide a Complaint dated 21<sup>st</sup> December, 2011. In the Complaint, the Respondent averred that he is the rightful owner of land situated at "Syokireke Sub-Location, Ngongoni Location, Tseikuru District of Kitui County"; that the Respondent entered the suit land in 2011 and that the efforts to evict the Appellants from the land had been fruitless.
9. The Respondent further averred that the land was sub-divided and boundaries set in the year 2001 and that it was only in the year 2011 that the Appellants went to the Chief for his authority to put up new boundaries.

10. The Appellants/Defendants filed a Defence in which they averred that the suit land belongs to all the parties; that the land was sub-divided in the presence of the area chief; that the Respondent/Plaintiff shares a grandfather with the Appellants and that they are all blood relatives of Kasinga, the father of Nyaga and Njeru.

11. The record shows that after hearing the Respondent's Application for injunction; the trial court directed as follows:

**“As this is a land issue more particularly family land, I note that the provincial administration is on the ground. I henceforth direct that all parties appear before the Chief of Ngongoni location who will ascertain the allegations by both parties more particularly if there was any arbitration done in 1986 and what was the outcome if any and the authenticity of the deliberations involving sharing of the family land between 12<sup>th</sup> November, 2011 and 17<sup>th</sup> December, 2011 and the said chief is to furnish this court with his report within thirty (30) days i.e. on or before 4<sup>th</sup> April, 2012”.**

12. It is on the basis of the said order that the Chief of Ngongoni Location prepared a report dated 23<sup>rd</sup> March, 2012 in which he explained the facts pertaining to the suit land. The Chief also annexed on the Report the Minutes of the family members of 22<sup>nd</sup> October, 2011, 12<sup>th</sup> November, 2011 and 17<sup>th</sup> December, 2011.

13. According to the report of the Chief, which was based on the Minutes of the meetings held by the Appellants and the Respondent's family members, both parties share a common grandfather and that the suit land is family land.

14. According to the Chief's Report, there was no evidence presented to him to show that there was a dispute over the suit land in 1986; that the 1986 dispute was between Mutune Njeru and Kenga Mwonga and that Mutune Njeru is the uncle to both parties and was given a separate piece of land. The report further stated that the Appellant did not produce any evidence to show that the suit land was given to him by his father and that there was no evidence to show that the land was sub-divided on 6<sup>th</sup> May, 2001 as alleged by the Respondent/Plaintiff.

15. The evidence of the Respondent/Plaintiff was that he was given the suit land by his father in 1987 and that he built his house on the land the same year and that in 1992, several people were jailed by the Mwingi court for invading the land.

16. It was the evidence of PW1 that his father inherited the land from his grandfather Kasinga, who had two sons, Nyaga and Ngari; that each son was given his portion and that when the Defendants/Appellants encroached on the land in the year 2001, he reported them to the Chief.

17. PW2 stated that he was working as a Clerk in the Chief's office in 1987-1989 and that Ngari Nyaga had a dispute over the suit land with Mutua Mwonga.

18. DW1 testified on behalf of the 2<sup>nd</sup> Appellant. It was the evidence of DW1 that the land in question belonged to his great grandfather, Kasinga; that the family agreed on how the land should be sub-divided in the meetings of 19<sup>th</sup> October, 2011 and 17<sup>th</sup> December, 2011 and that the land was sub-divided into two portions with one portion going to the Respondent's father.

19. In his Judgment, the learned Magistrate found the sub-division that had been undertaken in the year 2011 as a nullity and held that the land actually belonged to the Respondent. The Judgment of the lower court was wholly based on the decision of the court in Mwingi Land Case No. 11 of 1992. According to the court, there was no evidence tendered to show that the Plaintiff/Respondent was acting on behalf of the Kasinga family in Mwingi Land Case No. 11 of 1992.

20. I have perused the record and I have not come across the proceedings in Mwingi Land Case No. 11 of 1992. Indeed, the Respondent did not produce the decision that was made in that matter as an exhibit when he testified in the lower court. It is therefore not clear who the parties in that matter were, or the issues that were litigated over and the Judgment thereof.

21. In the absence of the decision and proceedings in Mwingi Land Case No. 11 of 1992, it was a misapprehension of the law for the learned Magistrate to base his Judgment on the said decision.

22. The evidence that was before the court showed that before the year 2011, the suit land had never been sub-divided amongst the two sons of the late Kasinga. Indeed, the court appreciated the complexity of the dispute and called for a Report of the Chief to enable him ascertain if the land had ever been sub-divided and allocated to family members. Despite the Chief's Report, which was based on the minutes of the family, informing the court that indeed the land had never been sub-divided before 2011, the learned Magistrate completely ignored the said report and the Minutes attached on the report.

23. The Respondent failed to produce evidence to the Chief and the court to show that the land belonging to his grandfather, Mr. Kasinga, had been allocated to his father in 1986 or at all. The Respondent informed the trial court that his father was allocated the suit land in 1986 but in the absence of the other family members or elders. This is unlikely to have happened considering that in most cases, it is the elders who usually sub-divide ancestral land amongst family members.

24. The Report by the Chief dated 23<sup>rd</sup> March, 2012 shows that the suit land was not given to the Respondent's father in 1986 as alleged. The Report shows the sub-division of the land that was made by the elders and the family members of the patriarch, the late Kasinga, in the year 2011. The deliberation of the family members on 22<sup>nd</sup> October, 2011, 12<sup>th</sup> November, 2011 and 17<sup>th</sup> December, 2011 and the ensuing sketch map showing the sub-division of the land should have been adopted by the trial Magistrate. I say so because the suit land belonged to the late Kasinga, and his two sons, Nyaga and Njeru, were entitled to it. The Respondent cannot exclude the family of Njeru from inheriting their father's share of the suit land.

25. In the circumstances, I find that the Appellants' Appeal is meritorious and I allow it in the following terms:

a. The Judgment of the court in Kyuso PMCC No. 39 of 2011 be and is hereby set aside.

b. The Report of the Chief of Ngongoni Location dated 23<sup>rd</sup> March, 2012 together with the accompanying sketch plan to be implemented by the parties herein.

c. Each party to bear the costs of this Appeal and the costs in Kyuso PMCC No. 39 of 2011.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE