



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND COURT

ELC APPEAL NO.40 OF 2011

JULIAH NCHEKEI MBERIA.....APPELLANT

VERSUS

ROBERT KIAMBI MAGIRI.....RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment in CMCC No.56 of 2010 (Meru) by Hon. Kiarie Waweru Kiarie SPM on 18.03.2011)

BACKGROUND

The appellant Julia Ncekei Mberia filed this appeal against the judgment by Hon. Kiarie Waweru Kiarie (as he then was) delivered on 18.03.2011 citing the following grounds:-

- 1. He misapprehended, and failed to address his mind to the applicable principles which establish existence of a customary trust, for instance prolonged occupation and development of the suit land.**
- 2. He failed to address himself to the reasons advanced why the suit land was registered in the name of the respondent, yet, a minor then, that is, to enable the appellant's husband acquire another parcel of land elsewhere since one person was not allowed to hold more than one title then, amongst others.**
- 3. He disregarded all the judicial authorities in buttress the appellant's claim based on customary trust.**
- 4. He held that the appellant failed to prove utilization of the suitland, yet the amended plaint and evidence on record give a water-tight account of the appellant's utilization of and developments on the suit land, including burying her relatives therein.**
- 5. He failed to take into account that the respondent did not plead in his amended statement of defence or allege in evidence, being in occupation, utilization and/or development of the suit land or any part thereof.**
- 6. He failed to take into account that the respondent did not establish why the appellant's (now deceased) husband allegedly gifted the suit land to the respondent who was quite tender at the time of registration, yet none of the respondents witnesses buttressed the reasons(s) advanced by respondent.**
- 7. He failed to appreciate that the evidence of the appellant and her independent witnesses was not rebutted vis-à-vis the evidence of the respondent and this witnesses, one of whom was an interested relative who stated that the suit land ought to be shared amongst, the sons of the appellant's (now late) husband.**

The appellant who was the plaintiff in the lower court case CMCC No.56 of 2010 had sued the respondent who was the defendant in that case for a declaration order that the respondent/defendant was holding L.R. No.NYAKI/MULATHANKARI/84 in trust for the plaintiff/appellant. The appellant/defendant had also sought an order of permanent injunction restraining the respondent/defendant his agents or assigns or anybody else acting for or on his behalf from selling transferring or in any manner whatsoever dealing with the said parcel of land.

The plaintiff/appellant had also sought an order compelling the defendant to transfer LR No.NYAKI/MULATHANKARI/84 to the plaintiff/appellant. In an amended statement of defence filed on 13/08/2010, the defendant (respondent denied the plaintiff/appellants claim and put her to strick proof thereof. The plaintiff/appellant had filed that suit together with a chamber summons under certificate of urgency

seeking temporary injunction orders pending the hearing and determination of the suit. When that application was placed before the duty magistrate Hon. Ndubi on 12/2/2010, the application was certified urgent. Temporary injunction orders were also granted restraining the defendant/respondent, his agents or assigns or anybody whatsoever from dealing with parcel No.NYAKI/MULATHANKARI/84 pending hearing and determination of the suit. At the hearing of that case, the plaintiff explained that the suit property number NYAKI/MULATHANKARI/84 was registered in the name of the defendant on 25/10/1967. The land was registered by her late husband M'Rimberia M'Mugambi. The plaintiff stated that the defendant's father John Magiri was mentally unstable and that explained why the land was registered in the name of the son. She stated that the land was registered in the name of the defendant to hold in trust for her. The defendant was born out of wedlock and lived in that land with his father John Magiri until he passed on and got buried in the suit land. The plaintiff further averred that the suit property is an ancestry land which was given to her husband by his father. Since her husband was looking for another land in Ruiru and could not be registered in both parcels of land, he opted to have the suit land registered in the name of the defendant. The plaintiff also stated that they left the defendant and his father living in the suit land and they moved to Ruiru land where they are living to date. The plaintiff called the second witness namely Francis M'Igweta who testified saying that the defendant is grandson to the plaintiff. The witness also stated that the suit property previously belonged to the plaintiff's father-in-law one M'Rimberia who had acquired it from his father. The suit property was registered in the name of the defendant so that he (M'Rimberia) could look for another land. The defendant was to hold the land in trust for the plaintiff. He testified that in early 2010 the defendant started to chase Julia (plaintiff) from the suit land claiming the land belonged to him.

The plaintiff called James Nkumbuku as the third witness who gave similar testimony saying that the suit property is an ancestral land which was acquired by the plaintiff's husband from his father M'Rimberia. M'Rimberia registered the suit property in favour of the defendant to hold in trust for the plaintiff. He said that both the plaintiff and the defendant shifted to Ruiru in 1997 during El nino. In early 2010, the defendant started claiming ownership of the suit property.

The defendant testified and stated that the plaintiff is her grandmother. He also stated that he was given the suit property in 1963 by his grandfather. He said he was born in 1953. He was given the land as a gift because he used to herd his grandfather's animals. He used to live with his father John Magiri in the suitland until 1982 when he passed on. His grandfather also passed on in 1997 and both were buried in the suit land. The defendant said that the plaintiff was not using the suit property but that she lives in Ruiru where she uses one acre.

DW1 was Joyce Mbombua M'rimberia who stated that M'Rimberia had land in Mulathankari which he gave to Robert Kiambi (defendant) and Robert Murithi. By then M'rimberia was residing in Mulathankari with his eldest wife Rebeca and the plaintiff but the plaintiff later moved to Ruiru. She was left with Rebeca on Robert Murithi's portion of land. The plaintiff is her step mother and the defednat is her husbnad's brother's son. She stated that the plaintiff uses 3 acres in the Ruiru land with her son Murithi. Her husband was one of the administrators of M'Rimberia estate. M'Rimberia had another land in Rware measuring 15 acres. Muthuri's sons uses the land. She is not claiming the suit land and nobody else is claiming except the plaintiff.

DW2 was Zavario M'Ikiao who stated that the suit land was registered in the name of the defendant. M'Rimberia was residing in the suitland and later moved to Ruiru between 1960 and 1963. Nobody was left in the Mulathankari land.

DECISION

I have re-evaluated the evidence adduced by the plaintiff and his witnesses as well as that of the defendant and his witnesses. I have also evaluated and analyzed the evidence afresh and the applicable law. I agree with the analysis by the then trial magistrate Hon. Kiarie Waweru Kiarie that the plaintiff/appellant did not prove her claim that the defendant/respondent was registered as proprietor of the suit property to hold in trust for her. The defendant/respondent Robert Kiambi Magiri was not the only person registered as proprietor by the plaintiff's/appellant's late husband. The other grandson registered as proprietor in another land by the appellant's late husband was one Robert Murithi. The appellant has not shown how the respondent/defendant was to hold the suit land in trust for her and not Robert Murithi or the other people who were registered as proprietors in their individual names. It is also curious to note that when the appellant's late husband registered the defendant/respondent as proprietor of the suit land in 1967, he was hardly ten (10) years. I find it not logical for the late M'Rimberia to register a minor as proprietor of the suit land to hold in trust for an adult. If the late M'Rimberia wanted to gift the land to her wife who is the appellant, nothing could have been easier than to do so right there and then. The mere fact that the appellant planted maize and did other development on the suit property was natural. Before migrating to Ruiru, the appellant and her family were living on the suit property where they were farming. It is practicable and expected to do what she did on the land. There is no evidence that she continued doing that after they moved to Ruiru land where they live todate. It is also curious that when succession was being done on the estate of the late M'Ribmeria, the appellant did not raise the issue as that could have been the most appropriate to me to list all the assets left undistributed by the deceased. To keep quiet and raise the issue much later in the suit is an afterthought. The appellant should have re-opened the succession cause if she believes that the estate of her husband M'Rimberia was not properly distributed. I agree with the testimony of the defendant respondent that his grandfather the late M'Rimberia gave him the suit land as a gift in 1963 for looking after his cattle. This is supported by the evidence that when the appellant and the rest of the family left to Ruiru, the late M'rimberia was left behind in Mulathankari farm with the defendant/respondent. I also find the testimony credible because the late M'Rimberia may have wanted to have his grandson Robert Magiri (respondent) to use the suit land to take care of his son John Magiri who was born out of wedlock and who was mentally unstable. I find the testimony given by the defendant/respondent and his witnesses credible and unchallenged.

In the upshot, I find this appeal lacking merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

READ DELIVERED and SIGNED in the open court this 6th day of July 2018.

E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Mbijiwe for appellant

2. Respondent/advocate – absent

3. Galgalo/Janet CC - present