



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 14 OF 2014

GATHINJI GACHOKI NJOKA.....APPELLANT

VERSUS

PETER MURIITHI GITHINJI.....1ST RESPONDENT

ANTHONY WACHIRA GITHINJI.....2ND RESPONDENT

JOHN KAMINA GITHINJI.....3RD RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT OF THE HON. A.K. ITHUKU – S.R.M

KERUGOYA DELIVERED ON 13TH MARCH 2006 IN CMCC NO. 388 OF 2005)

JUDGMENT

BACKGROUND

This is an appeal from the judgment of the Senior Resident Magistrate Hon. A.K. Ithuku delivered on 13th March 2006 in CMCC No. 388 of 2006. In that case, the Appellant who was the plaintiff in lower Court had sued the Respondents who were also the defendants to remove a caution they had placed on his parcel of land registration No. MUTIRA/KAGUYU/524. The plaintiff and the defendants testified before the trial magistrate and were cross-examined in equal measure. In his sworn testimony, the plaintiff stated that he is a farmer and that he as a coffee miller. He said that the defendants have prevented him from building the miller and that he might lose his number. The plaintiff also stated that the defendants who are his sons have been insulting him. He said that he has given them their portions.

DW1 was Peter Muriithi Githnji who is also the first defendant. he admitted having put a caution on the suit land. He said that the plaintiff who is his father wanted to sell.

DW2 was Anthony Wachira Githinji. He is also the 2nd defendant. He said that they are not in good terms with his father. He said that they were not consulted when the plaintiff wanted to take loan.

DW3 was John Kamina Githinji. He is also the 3rd defendant. he stated that his father who is the plaintiff wanted to take loan from Agricultural Finance Corporation. He stated that if the loan is given, the land will be sold in the event of default.

DW4 was Juliana Githinji. She is the mother of the defendants and wife to the plaintiff. She said that the plaintiff has obtained loans against the suit property and they had to raise funds as a family to repay the loan. She said that the caution should not be removed.

DW5 was Jane Waithera. She is the sister-in-law to the plaintiff and niece to the defendants. She stated that the plaintiff wants to buy a coffee miller. She stated that the plaintiff wants to take a loan using the title to the suit land.

In his analysis and evaluation of the evidence, the learned magistrate held as follows:

“The land in question belongs to the plaintiff. The defendants are sons. They live and farm in the land. They have planted tea on the land. They are apprehensive that they will lose their land. I find that their fear is justified. There is danger of them loosing their land. Owing to the above, I find the caution lodged herein justified. In the upshot, the suit is not proved on a balance of probability. It is dismissed”.

Following that decision, the Appellant was provoked and filed this appeal on the following grounds:

- 1. The learned Resident Magistrate erred in law in not adhering to the known law particularly Section 26, 27 and 28 of the Registered Land Act Cap 300 Laws of Kenya.***
- 2. The learned Resident Magistrate erred in fact in assuming that the Appellant would sell the land without any evidence whatsoever.***
- 3. The learned Resident Magistrate did not take into account the fact that the Appellant has gone to the extent of allocating them land portions.***
- 4. The learned Resident Magistrate’s ruling and judgment was against the weight of the evidence.***

SUBMISSIONS BY APPELLANT

The Appellant through the firm of Ann Thungu & Co. Advocates filed their submissions on 25th August 2017 in which they submitted that the issue in this appeal is one of conflict between the Appellant and his children who are asserting and forcing their father to use his land according to their wishes. He stated that the law has given rights to a registered proprietor to use his land as he wishes subject to overriding interests set out in Section **28 of the Land Registration Act**. The Appellant submitted that the Respondents did not allege that the Appellant held that land in trust. He submitted that there was no evidence of any customary trust and no evidence was adduced that the land was ancestral land. The Appellant stated that there cannot be a general kind of trust as between parents and children which would make parents not deal with any land they own without first involving their children. The Land Registration Act has no provisions that parents hold land in a general trust for their children. The Appellant cited the following cases:

- 1. Marigi Vs Muriuki & 2 Others (2008) 1 K.L.R 1073.***
- 2. Edward Kipkosgei Chemurbu & another Vs Charles K. Kosgei & Another (2014) e K.L.R.***
- 3. Mwai Ndathi Vs Bernard Mwai C.A No. 19 of 2007 (Embu) (Unreported).***
- 4. Section 26, 27 and 28 of the Land Registration Act.***

RESPONDENTS’ SUBMISSIONS

The Respondents who are acting in person made oral submissions. The 1st Respondent stated that he had

nothing to say. The 2nd Respondent submitted that he had good reasons why he defended the suit in the lower Court. He stated that he had to place the caution because he heard that the land was being sold after the Appellant failed to repay some bank loan. The 3rd Respondent on his part submitted that the trial Court was right when it declined to remove the caution. He wants the appeal dismissed.

RE-EVALUATION AND DECISION

I have considered with anxious care the submissions by the Appellant and the Respondents. I have also re-evaluated the evidence adduced by the parties in the lower Court. The subject property of this appeal is land registered in favour of the Appellant being L.R No. MUTIRA/KAGUYU/524 measuring approximately 1.25 Ha. The Respondents placed caution on 24th March 1995. Under **Section 25 of the Land Registration Act, 2012**, the law provides that the rights of such a proprietor shall not be liable to be defeated except as provided for in that Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto. The Act gives exceptions to interest shown in the register or such liabilities rights and interests which do not require to be noted in the register which include customary trust. Nowhere in the pleadings or their evidence have the Respondents claimed that the Appellant is holding the suit property in trust for them. The analysis by the learned magistrate that the defendants/Respondents were justified in placing the caution on the suit land is not based on any known law. There was even no evidence adduced by the Respondents that the Appellant wanted to sell the suit property. Even if the Appellant wanted to sell the suit land, it was within his right to do so since no evidence was adduced that he was holding it in trust for the Respondents. The evidence on record shows that the Appellant wanted to borrow loan from Agricultural Finance Corporation to inject into his coffee miller. There is no contrary evidence adduced by the Respondents that the Appellant wanted to sell the land. As a proprietor, the Appellant has an absolute right to deal with his land the best way he deems just to improve his life and that of his family. In the case of **Edward Kipkosgei Chemurbii & another Vs Charles A. Kosgei & another (2014) e K.L.R, Hon. Sila Munyao J.** held as follows:

“..... I have looked at the Land Registration Act and the Land Act, and I have not seen any provision stating that parents hold land in a general trust for their children without there being any proven trust or any other overriding interest in favour of the defendants, how the 1st defendant decides to arrange the affairs of his home must be left to his discretion as absolute proprietor of the suit land. The defendants cannot be heard to complain that their father is not allowing them to use the land as they wish”.

In the case of **Edward Kipkosgei Chemurbii** (above), **Justice Munyao** quoted with approval the case of **Murigi Vs Muriuki & 2 others (2008) 1 K.L.R 1073** where he held as follows:

“This was a suit by sons and grandsons to the Appellant, who wanted the Appellant to distribute his land in a certain way. The Court of Appeal held that since the Appellant as owner of the property was still alive, there was no law upon which he could be compelled to distribute his property. The Court of Appeal held that his property was not yet available for sub-distribution among his wives and children except if he personally in his own free will decided to sub-divide and distribute it. He could not be urged, coerced or ordered to do it against his own will. The rights of the Respondents to the property could only accrue after the death of the proprietor”.

I am of the same persuasion that unless a party proves the existence of a customary law, trust or any other trust recognized in law, a proprietor of land cannot be directed or advised on how he wants to use his land including disposing the same. I find that the decision by the learned magistrate was not supported by the evidence adduced by the Respondents. I also find that the learned magistrate misdirected himself on the applicable law. I therefore find the appeal merited and do hereby allow the same as prayed with costs to the Appellant.

It is so ordered.

READ, DELIVERED and SIGNED at Kerugoya this 14th day of December 2018.

E.C. CHERONO

ELC JUDGE

14TH DECEMBER, 2018

In the presence of:

1. Ms Ann Thungu
2. Anthony Wachira Githinji – present
3. John Kamina – present
4. Peter Muriithi – absent
5. Juma Court clerk – present