



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. 1 OF 2016**

**MACHARIA WARUINGE**

**MARY KAMWAGIRA**

**SUBSTITUTED WITH**

**SUSAN WANGARI MWANGI ..... APPELLANTS**

**-VERSUS-**

**NAGENYE GATONYE WARAGANIA ..... RESPONDENT**

**JUDGMENT**

1. The Respondent herein, **Nagenye Gatonye Waragania**, instituted a suit in the lower court to wit Murang'a PMCCC No.228 of 1999 seeking judgment against the Appellants herein for orders that the appellants held the parcel of land known as **Loc. 19/Kiawambo/806** (the suit property) in trust for him; dissolution of the said trust, if found, and an order for transfer of the suit property to him.
2. The respondent contended that the appellants' who are his relatives, held the suit property in trust for him.
3. The respondent blamed the appellants and in particular the 1st appellant for having defrauded him of his interest in the suit property by getting the suit property registered in the name of the 2nd appellant (his wife).
4. It was the respondent's case, that he had complained to clan elders and members of the Provincial Administration (area Sub-chief, Chief and District Officer) all of whom, found in his favour.
5. The appellants' filed a joint statement of defence denying all the allegations levelled against them.
6. Vide their statement of defence, the appellants also contended that the award in favour of the respondent was overturned by the Provincial Land Disputes Tribunal.
7. The trial Magistrate (hereinafter TM) upon considering the evidence presented before him, entered judgment in favour of the respondent in the following terms:

**“...I do not believe the testimony by defendants (read appellants). This land Loc.19/Kiambogo/806 belongs to the plaintiff (read the respondent). I order that 3 acres out**

**of this land be transferred to the plaintiff by the 2nd defendant. The rest of the land 1.7 acres can remain with the 2nd defendant for keeping the land and developing it. The plaintiff's case succeeds to that extent. The plaintiff shall also be entitled to the costs of the suit plus interest at court's rate."**

8. Dissatisfied with the decision of the TM, the appellants filed this appeal challenging the decision/judgment on twelve (12) grounds which can be summarised as follows, the learned TM erred by:-

1. granting relieves not sought;
2. failing to find that the respondent had not proved his case on a balance of probabilities;
3. Ignoring their evidence;
4. Misrepresenting the evidence of the witnesses;
5. Failing to follow proper procedures.

9. The appellants pray that the appeal be allowed with costs to them.

10. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the lower court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. In this regard See **Selle & Another vs. Associated Motor Co. Ltd & Others (1968) E.A. 123.**

11. The evidence adduced before the lower court and that led to the impugned judgment can be summarized as follows:-

12. The respondent left Kiambogo area (where the suit property is situated) for Rift Valley before demarcation. In 1962, the 1st appellant came to where the respondent was and told him that he had consolidated his portions of land next to his, on the Southern part. The respondent asked the 1st appellant to take care of the land until he came back.

13. The respondent gave the 1st appellant **Kshs.2000/=**; traditional liquor and two goats for the clan to slaughter and take care of his land. It was the respondent's testimony that the goats were slaughtered in presence of the area chief.

14. On another occasion the 1st appellant visited the respondent in Nyandarua and the respondent gave him a heavy coat and traditional liquor.

15. When the respondent came back to Kiambogo, the 1st appellant denied holding any land in trust for him. As a result, the respondent called clan members and the area assistant chief who decided that he should be given two acres out of the suit property.

16. Dissatisfied, the respondent referred the dispute to the area chief who ordered that he be given 2.7 acres.

17. The 1st appellant refused to comply with the decision of the chief and instead dared him to sue him if he wanted. At that juncture the respondent investigated and found that the suit property was registered in the name of the 2nd appellant and not the 1st appellant.

18. The respondent lodged a claim before the Mathioya Land Disputes Tribunal which decreed that the suit property belonged to him. The decision was, however, overturned by the Provincial Land Disputes Appeals Tribunal.

19. Claiming that he was denied audience by the Provincial Land Disputes Appeals Tribunal, the respondent filed the suit which is the subject matter of this appeal.

20. Upon being cross-examined by the 2nd appellant, the respondent maintained that he left his land with the 1st appellant and that he was unaware of how the 2nd appellant became the registered proprietor of the suit property.

21. The respondent availed three witnesses namely, Samuel Karuga (P.W.1); Peter Kuria (P.W.2) and Martha Nyambura (P.W.3).

22. Samuel Karuga (P.W.1) corroborated the respondent's testimony to the effect that he had left his land with the 1st appellant and informed the trial court that during land consolidation the 1st appellant told them that he held the land in trust for the respondent; that when the respondent returned, the 1st appellant refused to give him his land forcing the respondent to take the dispute to elders who determined that the 1st appellant held the suit property in trust for the respondent but decreed that he keeps a portion thereof for having taken care of the land.

23. Like P.W.1, P.W.2 informed the court that he was present when the suit property was being consolidated. According to him, his father was requested by the clan members to hold the land in trust for the Respondent but because he was already holding another piece of land in trust, his father declined the clan request. The clan elders then decided that the land should be held by the 1st appellant until the respondent came back.

24. P.W.3 corroborated the testimony of P.W.1 and 2 to the effect that the 1st appellant held the suit property in trust for the respondent and pursuant to a decision of the parties' family, that the 1st appellant should hold the land in trust for the respondent.

25. In his testimony, the 1st appellant told the court that even though he belongs to the same clan as the respondent, he is not in any way related to him. With regard to the suit property, he told the court that it is the 2nd appellant who had been using it since demarcation. He admitted that there was a dispute between him and the respondent but contended that the Appeals Tribunal found in his favour. He produced the proceedings of the Provincial Land Disputes Appeals Tribunal as **Dexbt-1** and pointed out that the suit land is registered in the name of the 2nd appellant.

26. Upon being cross-examined by the respondent, the 1st appellant acknowledged that the respondent had his own land and that he inherited the 2nd appellant following the demise of his brother in 1964.

27. On her part, the 2nd Appellant who is the registered proprietor of the suit property denied the contention that she holds the suit property in trust for the respondent. She informed the court that she is the one who has been using the suit property since demarcation and that she has been using it without interruption. She produced the abstract of title in respect of the suit property as **Dexbt-2**.

28. Upon being cross-examined by the respondent, she admitted that she constructed a house on the suit property after the respondent began claiming it. She further informed the court that she was inherited by the 1st appellant after her husband passed on.

29. The foregoing was the evidence on which the learned trial magistrate made the impugned decision.

### **Did the TM err in making the said decision?**

#### **Submissions by the appellant**

30. According to the appellants, the decision was wrong in the following aspects:-

- a) The TM ordered that the respondent gets 3 acres out of the suit property when the respondent's prayer was for declaration that the appellants' held the suit land in trust for him;

- b) The TM awarded the respondent the full costs of the suit yet he was only partially successful in his claim;
- c) The judgment violated the provisions of **Order 21 Rule 4** of the Civil Procedure Rules in that it did not provide reasons for the said determinations;
- d)The judgment violated the provisions of **Order 22 Rule 6** of the Civil Procedure Rules in that no certified copy of title was tendered before the court as by law required;
- e) There was no serious nexus between the title held by the 2nd appellant and the claim against the 1st appellant;
- f) The TM failed to consider the proceedings before the Provincial Land Disputes Tribunal.
- g) The TM failed to find that the 2nd appellant's registration having been first registration, it was indefeasible under the Registered Land Act, Cap 300 Laws of Kenya (now repealed);
- h) Failure to find out whether the decision of the Tribunal was appealed from;
- i) Failure to find that the suit property was not properly described, in terms of physical location and size;
- j) Failing to find that the the respondent lied to the court by claiming that he was not given audience by the appeals Tribunal.
- k) Failing to find that the appellant did not prove that the 2nd appellant was the 1st appellant's wife;
- l) Failing to find that the appellant did not prove that the suit property does not belong to 2nd appellant's deceased husband.
- m)Ignoring the appellants' evidence which is said to have been clear and unequivocal.
- n) Failing to find that the respondent did not establish a claim for trust because he did not prove occupation and relation which, according to the appellants, are key requirements for prove of trust.
- p) Failing to find that the suit was *res judicata* the proceedings of the Tribunal;
- q) Failing to find that no fraud was proved or even attempted to be proved in the registration of the suit land in favour of the 2nd appellant.
- r)Failing to find that the 2nd appellant was sued for gender reasons only.

### **Submissions by the respondent**

31. On behalf of the respondent, a brief overview of the cases of the parties to the dispute herein is given and submitted that although this court has jurisdiction to review the evidence adduced before the lower court and to make its own independent determination in respect thereof, it cannot properly substitute its own finding with that of the trial court unless there is no evidence to support the lower court's determination or unless the findings are shown to have been plainly wrong. In this regard, reference is made to the case of **Peters vs. Sunday Post Ltd (1958)E.A 424** and the court urged to dismiss the appeal with costs to the Respondent.

### **Analysis and determination**

32. The following facts about this case are either common ground or uncontroverted:-

- a) The respondent hails from Kiambogo area.
- b) The respondent had land in Kiambogo area
- c) That during land adjudication the respondent was absent.
- d) That the parties to this dispute belong to the same clan.
- e) That after the respondent returned from Nyandarua, he lodged a dispute before clan elders and the Provincial Administration against the 1st appellant claiming that he held the suit property in trust for him;
- f) That the clan elders and the members of provincial Administration namely area sub-chief, chief and the Mathioya Land Disputes Tribunal ordered the 1st appellant to transfer a portion of the suit property to the respondent.
- g) The appellants appealed to the Provincial Land Disputes Appeals Tribunal, which reversed the decision of the Mathioya Land Disputes Tribunal.
- h) That in the course of time, it emerged that the suit property was registered in the name of the 2nd appellant as opposed to the 1st appellant.
- i) That the respondent brought the suit which is the subject matter of this suit claiming that the appellants held it in trust for him.
- j) That the 2nd appellant was inherited by the 1st appellant after the demise of her husband.
- k) That its the 2nd appellant who has been using the land since demarcation.
- i) That the 2nd appellant only began putting up structures on the suit property after the respondent began laying claim to it.

33. The three witnesses called by the respondent and whose evidence the TM believed, were categorical that the 1st appellant held the suit property in trust for the respondent.

34. It is noteworthy that neither the 1st appellant nor the witnesses called by the appellants controverted the testimony of the respondent's witnesses that the respondent had land and that it is the 1st appellant who consolidated it on his behalf.

35. While admitting that the respondent had land, the 1st appellant contended that the respondent had sold his land to a Mr. Muguro, a claim which was contrary to the appellants' statement of defence and unsubstantiated.

36. Upon review of the totality of the evidence adduced before the lower court, I find that the respondent had land which was consolidated by the 1st appellant. I, however, find no nexus between the land which the 1st appellant consolidated and the land held by the 2nd appellant. In my view, it was not enough for the respondent to lead evidence of the relationship of the 1st appellant and the 2nd appellant as a man and wife, he ought to have laid a firm basis of how his land ended with the 2nd appellant as opposed to the 1st appellant. In this regard see the case of *George Roine Titus & Another - v- John P. Ngurai, Civil Appeal No. 107 of 1999*, where it was stated:

**“In adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further, that the reason why the claimant was not registered was because of some legal impediment which**

**precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered in the proprietor in trust.”**

37. Whereas the respondent has satisfied the court concerning the circumstances that could have led to the registration of his land in the name of the 1st appellant to hold in trust for him, he did little to satisfy the court concerning the circumstances that led to the registration of his land in the name of the 2nd appellant. Without any proper explanation of how his land ended up with the 2nd appellant as opposed to the 1st appellant, I am afraid the respondent cannot be said to have proved his case on a balance of probabilities especially as against the title held by the 2nd appellant.

38. Whereas the respondent's claim was for a declaration that the appellants held the suit property in trust for him, like the elders, the TM apportioned the property without being prompted by any of the parties. Although the court could, in the interest of justice do so, reasons for reaching such a determination must always be made.

39. Having determined that the respondent did not prove his case on a balance of probabilities, I need not say more to demonstrate that the appeal herein has merit. Consequently, I allow it as prayed.

**Dated, signed and delivered at Nyeri this 30th day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

N/A for the appellants

N/A for the respondents

Court clerk - Esther