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Mahugu v Watari & 8 others (Civil Appeal 205 of 2019) [2024] KECA 1015 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1015 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 205 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

JULY 26, 2024

BETWEEN

JEREMIAH GITHINJI MAHUGU .... APPELLANT

AND

ELIZABETH WAITHIRA WATARI .... 1ST RESPONDENT

ISAAC MBUGUA .... 2ND RESPONDENT

SABINA WAMBUI .... 3RD RESPONDENT

HANNA WANJIRU .... 4TH RESPONDENT

BENJAMIN WATARI RWIMBO .... 5TH RESPONDENT

MARY NJERI .... 6TH RESPONDENT

JEREMIAH GITHINJI MAHUGU .... 7TH RESPONDENT

SOLOMON MURAYA MAHUGU .... 8TH RESPONDENT

TABITHA WAKONYO MAHUGU .... 9TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Kerugoya (B.N Olao, J.) dated 31st March 2017inELC No. 704 of 2013)

JUDGMENT

1. On 31st March 2017 the learned B.N. Olao, J. of the Environment and Land Court (ELC) at Kerugoya delivered a judgment in which he held that:-

    a. the appellant Jeremiah Githinji Mahugu (then the defendant) held land parcel No. LR. No. Loc. 19/Gacharageini/1402 (the suit land) in trust for the respondents (then plaintiffs);

b. the trust be terminated and the respondents declared to be the rightful owners of the suit land;

c. the name of the appellant be cancelled from the register of the suit land which shall then be registered in the name of the 1st respondent in trust for the other respondents;

d. the appellant's counterclaim is dismissed; and

e. each party to meet own costs, this being a family dispute.

2. This is the decision that aggrieved the appellant and led him to appeal before this Court. The grounds of the appeal were as follows:-

> " 1) The Honourable Judge erred in law and in fact in presuming there was a marriage between the 1st respondent and Moses Rwimbo Muraya.
>
> 2. The Honourable Judge erred in law and in fact in presuming constructive trust on a parcel of land LR. No. Loc.19/Gacharageini/1402.
>
> 3. The Honourable Judge erred in law and in fact in not considering ownership of parcel of land LR. No. Loc.19/Gacharageini/1162 and LR. No. Loc.19/Gacharageini/1163.
>
> 4. The Honourable Judge erred in law and in fact by not considering the agreements to vacate the suit land dated 23rd May 2013.
>
> 5. The Honourable Judge erred in law and in fact by dismissing the appellant's counterclaim."

3. The remit of the first appellate Court is to reconsider the evidence that was tendered before the trial court, evaluate it and draw conclusions thereon on points of law and fact, while bearing in mind that it did not have the benefit of seeing and hearing the witnesses as they testified (See Gitobu Imanyara & 2 Others v Attorney General [2016]eKLR and Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 23).

4. The background of this case is that Moses Rwimbo Mahugu (the deceased) died intestate in 2004. He married several times during his life. He married Ruth Wangui and got six daughters and one son with her. He then married Loise Wanjiku and got one daughter and two sons from her. One of the sons by Loise was the appellant. One of the issues that the trial court was confronted with was whether the 1st respondent Elizabeth Waithira Watari, who was the 1st plaintiff, was the deceased's third wife, and, two, whether her children (Isaac Mbugua, Sabina Wambui Hannah Wanjiru, Benjamin Watari Rwimbu, Mary Njeri, Jeremiah Githinji Mahugu, Solomon Muraya Mahugu and Tabitha Wakonyo Mahugu) were children of the deceased. In the trial court, they were the 2nd to 9th plaintiffs and here they are the 2nd and 9th respondents.

5. The trial court found that, although the 1st respondent was previously married to one Simon Ndungu on 4th November 1979 and they had a marriage certificate, she subsequently came to stay with the deceased for long, and therefore became the deceased's wife by repute. According to the 1st respondent, and the trial court agreed with her, when she came to stay with the deceased she already had the 2nd to 6th respondents and that with the deceased she got the 7th to 9th respondents; and that the deceased accepted the 2nd to 6thchildren as his children and took care of them. According to the appellant, the 1st respondent was the deceased's employee, although she stayed in his home and on his land. The appellant's case was that the rest of the respondents were not among the family of the deceased.

6. The appellant was the registered proprietor of LR. No. Loc. 19/Gacharageini/1402 (the suit land) that measured about 2 acres. The respondents filed a suit before the ELC at Kerugoya claiming that the deceased had in 1999 registered this land in the appellant's name to hold in trust for them and that he would, upon the 2nd and 9th respondents becoming of age, transfer the suit land to them as he had his own land. However, that, upon the death of the deceased, the appellant had beginning 2005 begun interfering with their quiet possession on the suit land. This had caused the respondents to file a claim against him at the Mathioya Land Disputes Tribunal in the Case No. 15 of 2004 in which the Tribunal had ordered him to transfer the suit land to them, but that, at his instance, the High Court at Embu had quashed the decision. This is what had led the respondents to sue him in the instant suit.

7. The appellant filed a defence denying that he was registered to hold the suit land in trust for the respondents, as alleged, or at all. He filed a counterclaim, on the basis that he was the owner of the suit land and that the respondents were trespassers. He sought their eviction therefrom.

8. The trial court received the evidence of the 1st respondent and the 7th respondent, and then that of the appellant.

9. The evidence of the 1st respondent was that she got married to the deceased in 1989 and since then she had been living with him on the suit land until his death. During his testimony, this is what the appellant stated:-

> " I cannot recall when I met the 1st plaintiff. What I know is that she was working for my father. I knew her in 1990. I also use the land. I was last there two years ago. The area chief told her to vacate. I know she is living in the land and that is when I wrote letters to her to vacate. I do not recall when she started working for my father but it could not have been in 1990...
>
> My father died in 2004 and at that time, he was living with my mother on parcel No. LR. No. Loc. 29/Gacharageini/1164.
>
> The 1st plaintiff has been living on parcel No. LR. No. Loc. 19/Gacharageini/1164 before the subdivision. After subdivision the 1st plaintiff continued to live on LR. No. Loc. 19/Gacharageini/1402 because this is where the house of the 1st wife had been constructed.
>
> The 1st plaintiff lives on LR. No. Loc. 19/Gacharageini/1402 but I do not know who else lives with her there. I do not now if she ever lived with my father. I only came to hear about her living with my father after he had died."

10. If the appellant first saw the 1st respondent with the deceased in 1990, and she lived on the suit land until his death in 2004, that was for 14 years. The 1st respondent stated she got married to the deceased in 1989.

11. It was common ground that the suit land came from what was originally LR. No. Loc. 19/Gacharageini/388 which was registered in the name of the appellant in 1963. LR. No. Loc. 19/Gacharageini/388 was 166 acres. This is what the appellant told the trial court:-

> I know that the land parcel No. LR. No. Loc. 19/Gacharageini/388 was registered in my names because my father had just come from jail and my grandfather feared that my father would sell it. So to protect it, it was registered in my names..."

12. In 1978, the appellant stated, LR. No. Loc. 19/Gacharageini/388 was subdivided into four portions: LR. No. Loc. 19/Gacharageini/1161, 1162, 1163 and 1164. LR. No. Loc. 19/Gacharageini/1161 was registered in the name of the deceased, LR. No. Loc. 19/Gacharageini/1162 in the name of his

son Solomon Muraya and LR. No. Loc. 19/Gacharageini/1163 in the name of his other son Charles Mahugu. LR. No. Loc. 19/Gacharageini/1164 was registered in the name if he appellant. The deceased then subdivided LR. No. Loc. 19/Gacharageini/1161 into LR. No. Loc. 19/Gacharageini/1401, which he gave to his son Solomon Muraya, and LR. No. Loc. 19/Gacharageini/1402 (the suit land) which he gave to the appellant. This is the parcel that the 1st respondent lived on and which, according to her, was registered in the appellant's name in trust for them. This is because the deceased had already given him LR. No. Loc. 19/Gacharageini/1164.

13. It was the evidence of the appellant that:-

> "When the subdivision was being done, the 1st plaintiff, myself and my father went to the Land Board and the 1st plaintiff never complained...
>
> She was carrying things for my father like her worker because my mother was very old..."

14. On the question of marriage, the trial court considered the evidence and this is what it held:-

> "In those circumstances, the defendant cannot feign ignorance of the fact that the deceased had sired children with the 1st plaintiff who for all intents and purposes, is the deceased's wife. The 1st plaintiff indeed testified that the deceased built her the house in which she lives. It is also not lost to this court that the 7th plaintiff and the defendant share similar names. This Court therefore finds that there is cogent evidence, which has not been rebutted, that a presumption of marriage can be assumed in the circumstances of this case between the 1st plaintiff and the deceased......."

15. I have reconsidered the evidence. I accept that the deceased and the 1st respondent begun living as husband and wife from 1989 to when he died in 2004. The 1st respondent had been married elsewhere and the marriage had not been dissolved. In this earlier marriage, she had five children that she came with to live with the deceased. The deceased brought up these children. The two got three children (the 7th, 8th and the 9th respondents). The deceased settled her on the suit land and built a house for her thereon. On these facts, I agree with the learned Judge in his conclusion that it was safe to presume that there was a marriage between the deceased and the 1st respondent. I further find that, on the evidence, the 2nd to 9th respondents were children of the deceased, and beneficiaries of his estate.

16. In reaching the decision on the presumption of a marriage, I take note of the decision by this Court in Mary Njoki v John Kinyanjui Mutheru [1985]eKLR. which Ms. Ndorongo for the respondents make reference to. In the decision, the Court observed as follows about the presumption:-

> "It is a concept born from the appreciation for the needs of the realities of life when a man and woman cohabit for a long period without solemnising their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the "husband", or because he dies, occurrences which happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".

17. It was further observed that:-

> "The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.

In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still, children, that the man could be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage."

18. Mr. Kagwi, learned counsel for the appellant, submitted that there was no presumption of marriage given that the 1st respondent had admitted to having been married to Simon Ndungu, and that the marriage had not been dissolved. It is true that there was no formal dissolution of the marriage between the 1st respondent and the said Simon Ndungu. The marriage was in 1979. However, in 1989, the 1st respondent deserted the marriage with her five children and went to live with the deceased. They begun to cohabit and got three children. For all purposes the marriage of the 1st respondent to Simon Ndungu ended, and a new relationship begun between the 1st respondent and the deceased which crystalised into a marriage.

19. The next question for my consideration is whether the learned Judge erred in finding that the appellant held the suit land in trust for the respondents. It was submitted by learned counsel for the appellant that the suit land belonged to the appellant going by the title document, and that the registration was done in the presence of the 1st respondent who did not object. It was submitted that, if the suit land was registered in trust for the respondents, then they should also be claiming LR. No. Loc. 19/ Gacharageini/1162 and 1163. According to learned counsel for the respondents, the leaned Judge was correct in finding that the registration of the appellant over the suit land was that of a trustee.

20. I consider that it was the appellant's own evidence that the original land from which the suit land was hived was not his property. The learned Judge noted this fact. The appellant acknowledged that the original land belonged to his grandfather, and was registered in his name to protect it. Otherwise, it was meant for the deceased. The learned Judge correctly observed that such family land is, under the principles of inter and intra generational equity under section 18 of the *Environment and Land Court Act*, held for the benefit of the family; to benefit the present and future generations of the family.

21. It was admitted that the appellant benefited from this family land by being given LR. No. Loc. 19/ Gacharageini/1164 by the deceased. The suit land was registered in his name by the deceased. Upto the time the deceased died, he was living on the suit land with the 1st respondent and their children. According to his own evidence, the appellant was not living on this suit land and had not stepped thereon for two years prior to the case. I have found that the 1st respondent was the deceased's wife. It is clear that she was all the time with the deceased and the appellant when the former undertook the subdivisions.

22. It is emphasized that a trust has to be proved by cogent evidence. In Mumo v Makau [2002] IEA 170, it was held that:

" trust is a question of fact to be proved by evidence......"

This Court in Twalib Hatayan Twalib Hatayan & Another v Said Saggar Ahmed Al-Heldy & Others [2015]eKLR. cited with approval the Black's Law Dictionary, 9th Edition as follows:-

"A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong-doing.......It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for

his own benefit (See Halsbury's Laws of England supra at page 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settler. Imposition of a constructive trust is thus meant to guard against unjust enrichment...."

23. Lastly, it was reiterated by this Court in Godfrey Githere v George Kagia & Others [2008]eKLR, which the learned Judge made reference to, that a constructive trust is an equitable remedy by which the court can enable any aggrieved party to obtain restitution.

24. On my own reconsideration of the evidence that was placed before the learned Judge, I agree with the finding that the appellant was registered to hold the suit land, that is parcel No. LR. No. Loc. 19/ Gacharageini/1402, in trust for the 1st to 9th respondents.

25. With that finding, it follows that the allegations contained in the appellant's counterclaim, that this was his suit land in which he had absolute claim and from which the respondents should vacate, were without basis.

26. The result is that I find no merit in the appeal, which I dismiss with costs.

Concurring Judgment ofL. Kimaru,J.A.

1. I have read in draft the Judgment of A. O. Muchelule, J.A., and I am in agreement. I have nothing else to add.

Dissenting Judgment of W. Karanja, JA.

1. I have read in draft the judgment of my brother, A.O. Muchelule, JA. I agree with the in-depth factual analysis given in the draft and the re-evaluation of the record of appeal in its entirety in obedience to Rule 31(1)(a) of the Court of Appeal Rules. I will not, therefore, repeat the same for purposes of this short judgment.

2. It is not disputed that the first respondent was statutorily married to one Simon Ndungu on 4th November, 1979 and she was issued with a marriage certificate. She was blessed with six children from that relationship. Ten (10) years later, she walked out of that relationship with her children and somehow found solace in the hands of the deceased herein who took her in with her five (5) children. In the course of time, the 1st respondent and the deceased got three (3) children together.

3. After the deceased died, the 1st respondent and her children lodged a claim as wife and children of the deceased, respectively, that Land parcel No LR. No. Loc. 19/Gacharageini/1402 (the suit land), which was registered in the name of the appellant, was held in trust for them.

4. The Environment and Land Court (ELC) Olao, J. found that there was a presumption of marriage between the deceased and the 1st respondent, and further that the five (5) children the 1st respondent had with her husband, Simon Ndungu, had been accepted by the deceased as his own, and they too were entitled to a share of the deceased's Estate.

5. My brothers L. Kimaru and A.O. Muchelule, JJ.A. are of similar view. They have cited this Court's decision in Mary Njoki v John Kinyanjui Mutheru [1985]eKLR where this Court observed as follows about presumption of marriage:-

> "It is a concept born from the appreciation for the needs of the realities of life when a man and woman cohabit for a long period without solemnising their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left

stranded either by being cast away by the "husband", or because he dies, occurrences which happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".

It was further observed that:-

"The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.

In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still, children, that the man could be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage."

6. I have no problem with the above finding and it reflects the correct position in law. In my view, however, the presumption only arises where the parties concerned have capacity in the first place to enter into the marriage, by presumption or otherwise.

7. In this case, the 1st respondent admitted that she was in a statutory marriage that was never dissolved. That marriage could only be dissolved in accordance with the provisions of the law that created it in the first place. I hold the view that the 1st respondent lacked the requisite capacity to enter into any other marriage, by presumption or otherwise, as long as her other husband was alive. Presuming another marriage would, in my view be encouraging bigamy. I am not persuaded that a statutory marriage can be dissolved by presumption, or by effluxion of time. I may add that, in my view, the only marriage that can be ended through presumption is one that was created through presumption in the first place.

8. For reasons given above, I would allow the appeal.

9. However, as my brothers Kimaru and Muchelule, JJ.A. are of a different view, the judgment of Muchelule, JA. as adopted by Kimaru, JA. will be the judgment of the Court, and the orders of the Court will be as proposed therein.

DATED AND DELIVERED AT NYERI, THIS 26TH DAY OF JULY, 2024.

A.O.MUCHELULE

....

JUDGE OF APPEAL

L.KIMARU

....

JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

Certify that this is the true copy of the original.

Signed

DEPUTY REGISTRAR