IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 119 OF 2013

BETWEEN

MUNGAI NJOROGE..... 1ST APPELLANT

NG'ANG'A WAINAINA.....2ND APPELLANT

AND

KIARIE NJOROGE ..... 1ST RESPONDENT

MUNGAI MUHINDI .....2ND RESPONDENT

(An appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (Koome, J.) delivered on 11th *February, 2012* **in H.C.C.C. No. 92 of 1991)**

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JUDGMENT OF THE COURT

When this appeal came up for hearing on 12th May, 2020 we allowed a Motion that prayed for joinder of a party – **John Fredrick Njau** who claimed to have purchased part of the suit land.

The dispute before the High Court in **H.C.C.C. No. 92 of 1991** has had a long chequered history. By the time Koome, J (as she then was) was delivering a Judgment on 17th February, 2012 she observed that the dispute had been raging for almost 30 years. And we are here over 8 years later meaning the dispute which we hope to finally resolve is about to celebrate a 40th birthday! Yet the parties to the original suit were siblings.

The original suit (as amended) was filed by 2 brothers **Kiarie Njoroge Wainaina (the 1st respondent)** and **Mungai Muhindi (now deceased)** against their brother **Mungai Njoroge (the 1st appellant).** The 2nd appellant **Ng'ang'a Wainaina** came into the scene later to protect an interest he claimed as a purchaser of part of the land.

The whole dispute revolved around a parcel of land known as **Gatamaiyu/Nyanduma/203 ("the suit land")** and it was claimed that the suit land had been purchased by the plaintiffs' and defendants' father from one **Kamau Makumi** and that the land was registered in the name of the 1st appellant to hold in trust for the respondents (original plaintiffs) in equal shares. It was further claimed that the 1st appellant, to effect the said trust and bring it to an end, had in 1988 appeared before Githunguri Land Control Board and had obtained the consent requisite for subdivision of the suit land but had thereafter changed his mind and refused to transfer portions claimed by the respondents. It was for those reasons that the High Court was asked to declare that the 1st appellant held the suit land in trust for the respondents in equal shares; that the trust be brought to an end and each of the 3 parties be registered as owner of 1/3 share of the suit land and the court was asked to give such further or other relief as it deemed fit to grant.

The claim was denied in the amended defence. The 1st appellant claimed that it was he who bought the suit land; he denied existence of any trust; he admitted that the suit land had been subdivided but denied that such subdivision was into equal shares stating, also, that the subdivision was subsequent to a decree by a Magistrate's court at Kiambu which decree had been set aside on appeal to the High Court. He therefore prayed that the suit be dismissed.

During its long journey through the High Court the suit was handled by many Judges and finally by Koome, J, as we have seen.

Testimony of **Kiarie Njoroge Wainaina** (the 1st respondent) was taken by Githinji, J. (as he then was) on a date which is not clear on the

record, stating that the 2nd respondent was his step brother while the 1st appellant was his brother. He stated that he had sued the 1st appellant because the suit land had been bought by their father, each acre at Kshs.250, in 1965. He produced various documents including an agreement made on 5th June, 1965. The whole purchase price was Kshs.2250 which comprised cash and two cows, each cow agreed to be worth the then hefty sum of Kshs.200. As a sum of Kshs.200 remained unpaid when his father died in the same year 1965, he (the 1st respondent) paid it to the original seller to complete the transaction. This witness did not complete his testimony as the case was adjourned. Many adjournments followed and on 4th November, 2010 Okwengu, J. (as she then was) took it over when the 1st respondent continued his testimony. According to him the suit land had not been transferred to his father by the time he (the father), died and, soon thereafter, the 1st respondent, who was also called Karanja Kimani, had relocated to Tanzania. Further, that the reason why the respondents could not be registered as owners of the suit land was that they were young and not entitled to hold national identity cards. This witness further testified that it had always been agreed between the 1st appellant and the respondents that the land would be subdivided, the 1st appellant to take 3.4 acres and each of the respondents 3 acres. Although that arrangement or agreement was informal each of the 3 of them occupied their respective parcels, lived and worked the land. The land was subdivided in 1988 but transfers were not effected as the 1st appellant failed to cooperate to complete the issue. As time went the 1st appellant sold to him 1.5 acres which was transferred and he (the 1st appellant) also sold other portions to 3rd parties.

The hearing was adjourned and on resumption Koome, J. had taken the driving seat. The lawyers for the parties had all since withdrawn from representing the parties who now acted in person, probably for the reason that the matter was taking too long to be concluded.

In further testimony before the Judge the 1st respondent testified that the 1st appellant had sold his part of the suit land to various persons who he named and that the suit land was subdivided after consent of the land board had been obtained creating three parcels of land – Gatamaiyu/Nyanduma/1376, 1377 and 1378 where he (the 1st respondent) got the parcel 1376; 1377 went to one John Njau and 1378 went to the 1st appellant and to Stephen Mugo and Ng'ang'a Wainaina. After producing various documents into evidence he prayed that his elder brother (the 1st appellant) be evicted from that part of the suit land that he (the 1st respondent) claimed.

To fortify his case, the 1st respondent called a witness, **Kihage Kahindi,** then aged 75 years who testified that he witnessed the 1st respondent paying Kshs.200 in 1965 as balance of purchase price for sale of the suit land. He stated in cross-examination that it was the 1st appellant who asked the 1st respondent to make that payment which was paid in his presence.

The 2nd respondent agreed with all that his brother the 1st respondent had said, adding that their father had benefitted from dowry paid in cows when their sister was married and it is some of these cows that had been given to the seller of the suit land as part of purchase price.

Then it was time for the 1st appellant to counter the case by the respondents. Relying on the statement of defence filed on his behalf he denied truthfulness or authenticity of all the documents tendered in evidence by the respondents. He recalled a ruling of Tank, J. who had set aside a decision of elders in a land case and of the agreement for sale made in 1965, he said that it could not be valid as his father had died in 1968, not 1965 as claimed by his brothers, the respondents. In cross examination he denied attending a meeting of the Githunguri Land Control Board where the issue of subdivision and transfer of the suit land was considered.

The 2nd appellant testified that he bought 2 acres of the suit land from the 1st appellant and the suit land was then transferred to be in their joint names. Then he bought 1 more acre but transfer in his favour had not been effected by the 1st appellant.

That was the evidence that Koome, J., had to contend with and in the Judgment we have referred to, the Judge found that the 2nd appellants' claim was not denied and he was entitled to the 2 acres he claimed. Of the balance of 7.4 acres of the suit land, the Judge found that the 1st appellant had borne the burden of holding the land in trust so the court gave him 3.4 acres and gave to each of the respondents, 2 acres ordering that the suit land be subdivided as per those orders.

We have tracked that long journey in reviewing and re-evaluating the evidence as we are required to do in a first appeal like this one. **Rule 29** of the **rules of this Court** says that we should, on first appeal from a decision of the High Court in first instance, re-appraise the evidence and draw our own inferences of fact. We must, however, remember that the Judge who heard the case had the advantage of observing the demenaour of witnesses and must give allowance that we do not have that advantage but we can depart from findings of the trial Judge if on our own assessment the Judge reached the wrong conclusion based on the material presented – See the case of **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123.**

There are 10 grounds of appeal taken by the appellant in the Amended Memorandum of Appeal drawn by his lawyers **Kiratu Kamunya & Company Advocates.** In sum they are to the effect that the decision reached by the trial Judge was unjust as it deprived the appellant of his land; that the Judge erred in finding existence of a trust in favour of the respondents; that the findings reached by the Judge were not supported by the evidence; that the Judge erred in the findings reached because the respondents had benefitted from another parcel of land – Komothai/Gathugu/600; that there was a shifting of the burden of proof against the law; and, finally, that the Judge erred in allocating 2 acres of the suit land to the 2nd appellant.

In a highlight of the said submissions when this appeal came up for hearing before us on 12th May, 2020 **Mr. Kamunya**, learned counsel for the 1st appellant submitted that the trial Judge had erred by shifting the burden of proof from the respondents who had filed the case and bore the burden of proving the case. According to counsel the respondents should have proved the authenticity of agreements made in 1965 by the father of the parties to the suit, the 1st appellant bearing no burden at all to prove those documents or agreements. Counsel faulted the Judge for awarding land to the 2nd appellant.

We have considered the whole record and have perused written submissions filed by the appellant on 18th December, 2019 and those filed for the 1st respondent and for the (proposed) interested party on 17th December, 2019.

In opposing the appeal **Mr. Muriuki**, learned counsel for the 1st respondent and the interested party relied wholly on the decision of the **Supreme Court of Kenya in Petition No. 10 of 2015 Isaak M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another** which dealt with the issue of customary trust where that court identified issues relevant to the finding of a customary trust to be – was the land in question

before registration family, clan or group land? Is the claimant a member of that family, clan or group? Is the claimant's relationship of that family, clan or group so remote as to make his claim idle or adventurous? Was the claimant entitled to be registered as an owner of the land but for some intervening circumstances? Is the claim directed against the registered owner of the land who is a member of the family, clan or group?

According to Mr. Muriuki all those issues were resolved in favour of the respondents going by the evidence given before the trial Judge.

Upon our own consideration, all the grounds raised in the amended Memorandum of Appeal can be resolved together.

The respondents testified that the suit land was bought by their (and the 1st appellants') father in 1965 and the land was subsequently registered in favour of the 1st appellant as they (the respondents) were minors without requisite documents to entitle them to be registered as proprietors of land. There is on record an agreement dated 5th March, 1965 which is made by Kamau s/o Makumi "and my step brother" which states that they have sold to Njororge Wainaina "our piece of land Gatamaiyu/Nyanduma/203" – 9.4 acres at Kshs.2,250, each acre at Kshs.250. The vendors acknowledge receipt of Kshs.1650, with the balance being kshs.600. The original agreement was written in Kikuyu language and is signed by Kamau Makumi and David Thiaka Kungu and is witnessed by Pual (probably Paul) Njihia and Kinage Njau who also sign it. There was produced before the trial Judge that agreement and a translation of it to English language.

There is another agreement made on 20th April, 1965 where the said Kamau Makumi and his step brother David Thiaka Kungu acknowelge receipt of two cows "…equivalent of Ksh.400 that is 200/- each" and they sign that agreement as does Njoroge Wainaina and to confirm the same it is witnesses by Paul Njihia and Kinage Njau.

Then there is an agreement dated 2nd June, 1965 where Kamau Makumi and his step brother David Thiaka Kungu acknowledge receipt of Ksh.200 from "… the son of Njoroge Wainaina deceased". It is stated that the cash payment is the final payment for the suit land and it is signed by Kamau Makumi and David Thiaka Kungu and the "giver", who also signs, is Kiarie Njoroge (we remember this man to be the 1st respondent before us) and witnessed by Runana Kahandi. The original agreement, written in Kikuyu language with an appropriate translation were produced into evidence before the trial Judge.

There is a letter on page 111 of the record from the District Officer, Githunguri, to the following effect:

> **"OFFICE OF THE PRESIDENT**
>
> **GITH/DVD.16/6/VOL.XV/4 THE DISTRICT OFFICER**
>
> **P.O. BOX 33**
>
> **GITHUNGURI**
>
> ***7TH* September, 1999**
>
> **TO WHOM IT MAY CONCERN**
>
> **RE: GATAMIYU/NYANDUMA/203**
>
> **Appended herebelow is the extract from the minute book.**
>
> **"Proposed partition by Mungai Njoroge – 3.40 acres, Kiarie Njoroge Wainaina – 3.0acres and Mungai Muhindi – 3.0acres.**
>
> **Consent approved on 21/9/88 under LCR No. 781/88".**
>
> **(Signed)**
>
> ***R. O. ONYANGO***
>
> **DISTRICT OFFICER**
>
> **GITHUNGURI."**

The learned Judge considered the testimony presented by both sides and the documents produced into evidence and reached the conclusions that she did.

We have considered the grounds of appeal and the submissions made and cannot see any error made by the Judge.

The 1st appellant and the respondents are brothers. The respondents produced sufficient evidence to show that the suit land was bought by their father in 1965. It is their father who paid substantial part of the purchase price and when he died later that year, the 1st respondent paid

the balance of purchase price Kshs.200 which had remained unpaid to the sellers of the land. The respondents were minors who could not be registered as proprietors of the suit land as they lacked the required age and documents necessary for ownership of the land. The 1st appellant, being of mature age was registered as proprietor of the land and he had a duty to hold the same in trust for himself and his siblings, the respondents. He indeed agreed to transfer portions to the respondents in 1988 and even attended the land control board and obtained necessary consent for subdivision and transfer, but we do not understand why he changed his mind. We can only assume that he was motivated by greed and selfish motive. The respondents occupied their respective parts of the suit land for many years and cultivated crops on the suit land which they considered and inherited as their home/land. The 1st appellant could not in law divest them of their rightful inheritance and the Judge made correct findings.

The Supreme Court of Kenya in the case of ***Isack M'Inanga Kiebia*** (supra) set out the principles which should be satisfied for a customary trust to be established – a customary trust, as long as the same can be proved, is one of the trusts to which a registered proprietor is subject under **Section 28** of the **Registered Land Act (repealed)** adopted by the Land Registration Act 2012. Rights of a person in possession or actual occupation under Section 30 of that Act are customary rights. A customary trust can take many forms and the category is not closed – it is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists to bind the registered owner. The court further found that under The Land Registration Act, 2012, customary trust as well as all other trusts are overriding interests and need not be noted in the register. The respondents were able to show that their father bought the suit land; it was family land; they were in actual possession of the suit land and were entitled to their rightful shares of the land. They successfully showed that, although the 1st appellant was registered as proprietor of the suit land, he held the same in trust for himself and his brothers, the respondents.

On the finding that 2 acres of the suit land be transferred to the 2nd appellant – the Judge found, and we agree, that the 2nd appellant's claim was totally unchallenged. The 2nd appellant proved that he had purchased 2 acres of land from the 1st appellant. The appeal has no merit and is dismissed. Let the parties meet their own costs considering their close relations.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. WARSAME

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JUDGE OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR