



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 16 OF 2016

BETWEEN

EDWARD NJANE NG'ANG'A.....1ST APPELLANT

SAMUEL MWANGI NG'ANG'A.....2ND APPELLANT

AND

DAMARIS WANJIKU KAMAU.....1ST RESPONDENT

JOSEPH KAMAU MWANGI.....2ND RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nairobi

(Antony Ombwayo, J.) delivered on 9th day of July 2015

in

Misc. Cause No. 44 of 2014)

JUDGMENT OF THE COURT

From what we can discern from the record, there was a matter before a Land Disputes Tribunal which was heard and determined and on 28th April, 2006, and an award was filed at the Senior Resident Magistrate's Court at Kangema in LDT No. 7 of 2006. The parties in the case at the Magistrate's Court were **Sarah Warwatha Gachinga**, **Ruth Wanjiku Ng'ang'a** and **Mary Wanjiru Waweru** as Plaintiffs and **John Thumbi Njane** was the defendant. The said award was adopted as a judgment of the court on that date. The record also shows that an application was made and allowed by the Resident Magistrate of the said court on 10th January, 2007 authorizing the Executive Officer of that court to execute and facilitate all necessary documents for the subdivision and transfer of a parcel of land known as LOC 9/Kiruri/206. There is also on record proceedings in Principal Magistrate's Court at Kangema, being **Civil Case No. 124 of 2011**, where the appellants here **Edward Njane Nganga** and **Samuel Mwangi Nganga** were plaintiffs while the respondents **Damaris Wanjiku Kamau** and **Joseph Kamau Mwangi** were defendants. A hearing took place where the 2nd appellant, Samuel Mwangi Ng'ang'a testified on behalf of the appellants. His testimony was to the effect that the two appellants had carried out a search on a parcel of land known as LOC 9/Kiruri/2095 which was originally a subdivision from land parcel No. LOC 9/Kiruri/206 which he said had originally been registered in the name of his uncle, one **Nthumbi Njane**. Further, that parcel No. LOC 9/Kiruri/2095 was registered in his mother's name **Ruth Wanjiku Ng'ang'a**. According to him, his mother was registered as the owner of the parcel of land since his father had died in the year 2011, and that the land had been sold and transferred by his mother to a third party (the respondents in this appeal) without consent of the family. Further, that his mother had been unwell as was confirmed by medical documents produced before the trial magistrate and was not in a proper frame of mind to enter or conclude a transaction. According to him, his mother had been manipulated into selling the parcel of land which was family land.

Further he testified:

"My grandfather had three wives and during issuance of title to the houses, my uncle Nthumbi Njane was registered proprietor to hold in trust for the rest."

Joseph Kamau Mwangi, the 2nd respondent herein testified that he had bought the parcel of land from Ruth Wanjiku Ng'ang'a, the mother of the appellants.

Ruth Wanjiku Ng'ang'a also testified and confirmed that she had sold the land, which, according to her, belonged to her. She confirmed that she was a mother of 8 children; that she had sought the consent of two of her sons and not the rest to sell the land but that:

“the land was not family land. It was registered in my name. It was inherited land, I have diabetes. I have been on treatment.”

The evidence of the other witnesses is not helpful in determining this second appeal.

The trial magistrate delivered a judgment on 24th October, 2012 where she found that the plaintiff's suit had no merit and dismissed it, finding that the sale of the land was above board and the plaintiffs (appellants) complaints should not be entertained. A first appeal was filed at the High Court of Kenya at Nyeri being **Civil Appeal No. 8 of 2013. Anthony Ambwayo, J.** in a judgment delivered on 29th June, 2015 did not find merit in the appeal and dismissed it. The appellants were dissatisfied with those findings and filed this appeal through a Memorandum of Appeal drawn by their advocates M/s Ndiso Juda and Co. Advocates, where five grounds of appeal are set out. It is said that the learned Judge failed to give adequate consideration to the appellants' case; that the Judge erred in law in failing to find that the suit property was family land where the appellants, together with other family members had rights to the same; that the Judge erred in failing to find that the sale of the land was tainted with illegality as the seller was unwell during the sale and that should render the transfer null and void, and finally, that the case was decided against the weight of evidence to the detriment of the appellants. It was therefore prayed that the title deed for the land known as LOC 9/Karuri/2095 be cancelled and revert to the appellant's family and we are also asked to issue various declarations.

When the appeal came up for hearing before us on 9th October, 2018 both parties had filed written submissions and appeared to highlight the same. **Mr. Ndiso Juda**, advocate for the appellants repeated the history of the matter and submitted that the High Court had recognised the disputed property as being family land. According to him, the appellants' mother had admitted before the trial magistrate that she was influenced by her two sons to sell the land, but had not sought consent from the other children including the appellants. According to him, the parcel of land comprised family land and the rights of beneficiaries under the Law of Succession Act should have been recognised. According to him, there was a trust on the land and the same should not have been sold as it was.

In opposing the appeal, **Miss Lucy Mwai**, learned counsel for the respondents, submitted that all issues raised before us were matters of fact on which we had no jurisdiction in a second appeal like this one. In further submissions, it was Ms. Mwai's view that the original parcel of land had been subdivided through a court order and the court should not interfere. Further, that both courts below had considered the evidence and concluded that the appellants' mother was not unwell and had capacity to sell the land. In admitting that the issue of whether the appellants' mother held the land in trust for the family was a legal issue, learned counsel submitted that no evidence was led to show that the land was family land to be held in trust and for all those reasons, we should dismiss the appeal.

The mandate of this Court on a second appeal only permits us to only consider issues of law but not matters of fact which have been tried by the trial court and re-tried or re-evaluated on first appeal. See, for a judicial pronouncement on the jurisdiction of this court in a second appeal, the case of **Kenya Breweries Limited vs Godfrey Odoyo [2010]eKLR** quoting the oft cited case of **Selle & Another vs Associated Motor Boat Company Limited [1968] E.A. 123** where the following passage appears:

“in a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

We have considered the record of appeal, the submissions filed as highlighted by learned counsel and the law.

The only issue of law that is live for our determination, and, here, we agree with counsel for the respondents, is whether the parcel of land in dispute comprised family land and whether Ruth Wanjiku Ng'ang'a, mother of the appellants, held the same in trust for the family or not.

As we have shown earlier in this judgment, the 2nd appellant testified before the trial magistrate, stating amongst other things, that the parcel of land comprised family land which had originally been held by their grandfather. Their mother Ruth Wanjiku Ng'ang'a, however, testified that she was the registered owner of the land but admitted that the land was inherited land. It was part of the evidence before the trial magistrate that the appellants' father died in the year 2011 and that is how Ruth Wanjiku Ng'ang'a was registered as the owner of the land.

The **Registered Land Act, Cap 300 (now repealed)** recognised overriding interests as forming part of proprietorship in land. **Section 30** of that Act created various categories of overriding interests to which registered land was subject. This position is replicated and reproduced at **Section 28** of the Land Registration Act which repealed the said Registered Land Act and came into force on 2nd May, 2012.

The Supreme Court of Kenya in a recent judgment in the case of **Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & Another [2018] eKLR** had framed the following question for its determination:

“Is there a state of uncertainty in the law, arising from contradictory precedents, and warranting this Court's resolution of the doubt?” While the question of customary, or generational trust has been determined from time to time, the resulting body of precedent is not clear on the singular question, whether a claimant of a trust in customary law needs to prove actual physical possession, or occupation. Despite an overhaul of the previous land laws, and the enactment of a new Land Registration Act

(2012), to consolidate and rationalize the registration of titles, the manner of resolution of the said question will affect pending matters, as well as matters to be heard in the future (pursuant to Section 28(b) of the Land Registration Act). The issue, therefore, will continually engage the workings of the judicial organs.”

The Supreme Court considered the issue and various decisions of the High Court of Kenya and of this Court in relation to recognition of customary trusts under African customary law and whether customary trusts constituted an overriding interest as recognized by **Sections 28 and 30** of the repealed **Registered Land Act** and came to a conclusion at paragraph 45 of the Judgment as follows:

“In our considered view, the language of Section 117 (2) of the retired Constitution, was wrongly imported into Sections 27, 28 and 30 of the Registered Land Act (now repealed) by the Judges in the cited decisions. Had the judges’ view been informed by a proper appreciation of the nature, scope and content of the rights, interests and benefits to land under African customary law, subsisting before individualization of tenure, both the proviso to Section 28 and Section 30(g) of the Registered Land Act, would have been contextually interpreted. In this regard, there would have been no difficulty in construing a “customary trust” under the proviso to Section 28 of the Act. Surely, before a first registration, what other trust, if not “a customary one”, could have subsisted over land held under African customary law as to bind a registered proprietor”

The Court further found that courts in Kenya had hitherto, because of **Section 163** of that Act, been willing to import the doctrines of implied, resulting and constructive trust as known in English Law, into **Section 28** of the said Act:

“ ...but the notion of a customary trust, which should have been the first port of call, has only been gradually and hesitatingly embraced. Due to this judicial hesitancy, the vital elements and content of a customary trust have yet to be fully and clearly developed....”

In effect, the decisions reached in such cases as **Obiero vs Opiyo [1972] EA 277** and **Esiroyo vs Esiroyo [1973] EA 388** were found to have been wrongly decided, it being found that the rights of a person that subsisted at the time of first registration as evidenced by his being in possession or actual occupation were rooted in customary law. Those rights arose from African Customary Law and derived their validity from that law and were rights to which one was entitled in right only of such possession or occupation. The Court then declared in the said Judgment:

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore 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 as to bind the registered proprietor.”

The powerful and binding findings now form the new jurisprudence in the area of customary trusts and have cleared the way for all Courts on what constitutes an overriding interest as recognized by the laws relating to ownership of land in Kenya.

The trial Magistrate who heard the case subject of this second appeal only considered the fact that Ruth Wanjiku Ngáng’a had a title to the land and that she had sold the land. The learned Judge in the judgment appealed from, found that there was no evidence on record that the parcel of land was family land. According to the Judge, family land referred to land inherited from forefathers. There was evidence given, as we have shown in this judgment, that the land originally belonged to the appellants’ grandfather and had passed to the appellants’ mother because her husband, their father had died. Had he not died, he would have been registered as proprietor of the land which he had inherited from his father, grandfather of the appellants. Their mother Ruth Wanjiku Ng’ang’a admitted in evidence that the land was inherited land. There was therefore ample evidence before the trial court and the judge on 1st appeal that this was family land and the appellants’ mother had a duty in law to seek the appellants’ consent to effect a sale of their land. They had rights to the land as members of the family and were entitled to inherit the same under the provisions of the Law of Succession Act.

In the premises, we find that the trial magistrate was wrong in the findings that she made and the learned Judge erred in ignoring the evidence that was on record showing that he was dealing with family land. In the event, this appeal has merit and we allow it.

The title issued after the sale of the land by Ruth Wanjiku Ng’ang’a to the respondents Damaris Wanjiku Kamau and Joseph Kamau Mwangi shall be cancelled and the title that existed before that transfer is hereby reinstated. The appellants will have costs of this appeal and the costs below.

Dated and delivered at Nyeri this 13th day of February, 2019.

P.N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR