



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, SICHALE & KANTAI, J.J.A.)

CIVIL APPEAL NO. 30 OF 2016

BETWEEN

ROBERT MAINA MUROGO.....1ST APPELLANT

SAMMY MUNENE MUROGO.....2ND APPELLANT

EPHRAIM KINYUA MUROGO.....3RD APPELLANT

JACKSON KINYUA.....4TH APPELLANT

ANTHONY NJAU MUROGO.....5TH APPELLANT

AND

SIMON MUNENE MBUGUGIA substituted party for

JOYCE WAGICHUGU MBUGUGIA.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Kerugoya (Olao, J.) dated 18th September, 2015 in E. L. C. No. 14 of 2014)

JUDGMENT OF THE COURT

The five appellants, all of whom are the sons of **Susan Wakanyei Murogo (Susan)**, were sued together with their mother by her sister **Joyce Wagichugu Mbugugia (Joyce)**, before the Senior Principal Magistrate's court at Kerugoya in a suit that was later transferred to the High Court there. Joyce later died and was substituted by her son Simon Munene Mbugugia. What that suit as amended sought as against Susan and her co-defendants sons were orders for;

“(a) The determination of trust.

(b) An order for consolidation of land parcels No. MUTIRA/KATHARE/774, 775, 776, 777 and 778 into a single unit and subsequent transfer of half (½) share out of the consolidated unit to the plaintiff.

(c) Costs of the suit.

(d) Interest on (c) above at court rates.

(e) Any other relief the court deems fit to grant to meet the ends of justice.”

Susan alone of the defendants filed a defence and so interlocutory judgment was sought and obtained against those who defaulted. The case proceeded to hearing before J. N. Onyiego SRM (as he then was) who entered judgment as prayed against the defendants. Susan was aggrieved and filed an appeal against the judgment. That appeal was on 2nd October 2007 dismissed by Khaminwa, J. and that was the end of Susan's quest as she did not appeal that dismissal.

The current appellants meanwhile applied on 23rd October 2008 to set aside the interlocutory judgment entered against them. They succeeded before S. N. Mbungi, Ag PM, who set aside the judgment and gave leave to defend. An appeal against that ruling having been dismissed, the brothers filed a joint defence and the suit was heard on its merits before Olao, J.

The plaintiff's case as presented by Simon Munene, the respondent herein, was that one Ngondi Gatongu, the father of Joyce and Susan, and grandfather to the parties herein, was the registered owner of a parcel of land known as **MUTIRA/KATHARE/21**. That land was later sub-divided into two pieces, **MUTIRA/KATHARE/534** (534) and **MUTIRA/KATHARE/535** (535). 534 was registered in the name of Susan. According to him, Susan was to hold it in trust for herself and Joyce who were their father's only children there being no son. 535 was registered in the name of Betha Wanjiku Ngondi the parties' grandmother and later sold to a third party.

The dispute arose when Susan, instead of sharing 534 with Joyce, proceeded to sub-divide it into six portions, namely **MUTIRA/KATHARE/774** to **779** the first five of which she apportioned to her sons the appellants herein. The last portion, 779, was sold to a third party. It was contended that while Susan conducted the sub-division and transferred the portions to the appellants, they were fully aware of Joyce's claim to 534 which gave rise to the portions they took.

The plaintiff also called one Ngugi Gacheru (PW2) whose testimony was along that of the plaintiff and added that the dispute had been referred to clan elders who said that the disputed 534 ought to have been shared equally between the two sisters.

On behalf of the appellants, Munene testified that there was nothing fraudulent about the sub-division of 534 into six portions, five of which were gifted to the appellants by their mother. He swore that Susan did not hold 534 in trust for Joyce because she obtained it by suing one Marko Kibugi who had attempted to appropriate it for himself. He admitted that Joyce was a witness for Susan in the said litigation but added that she did not herself make any claim on the land, doing so only much later in 1999. He also called his brother Anthony Murogo and one Stephen Muthike Macharia (DW5) to confirm that indeed Susan had sued Marko for the land and to deny that she held it in trust for Joyce.

Olao J, after finding that the issue of trust as between Susan and Joyce had been conclusively determined by Khaminwa J. on 2nd October 2007 when she dismissed Civil Appeal No. 13 of 2004, delivered himself as follows;

“The case before me therefore only relates to the plaintiff and the 2nd to 6th defendants and it cannot be true, as Ms Thungu had submitted, that the plaintiff is seeking a declaration against a deceased person and that this Court cannot make a judgment against a deceased person. The truth is that the claim against the 1st defendant was determined by Khaminwa J. on 2nd October 2007 when she up-held the trial court's judgment in favour of the plaintiff. This court cannot re-visit the case against the 1st defendant as to do so would amount to sitting on appeal against the decision of another Judge. This court can only interrogate the plaintiff's case against the 2nd to 6th defendants who were allowed to file their defence out of time which they did on 14th January 2009 some thirteen (13) months after the judgment against the 1st defendant had been confirmed upon appeal to the High Court.”

The learned Judge proceeded to find that fraud was specifically pleaded as against the appellants herein and that it was proved to his satisfaction. He in consequence entered judgment for the respondent herein as prayed in the plaint.

Aggrieved by that decision, the appellants filed this appeal raising some nine grounds of complaint which their learned counsel **Ms. Thungu** summarized and argued before us that the learned Judge erred by;

- **Proceeding as against the deceased 1st defendant without her being substituted.**
- **Holding that fraud had been established against them**
- **Failing to find that under Gikuyu Customary Law women could not be trustees over land.**
- **Failing to find that Joyce made no claim to 534 and did not contribute to its securing.**

On her part, **Ms. Waweru**, learned counsel holding brief for Mr. Kahigah for the respondent opposed the appeal by submitting, on the issue of trust, that Gikuyu Customary Law was silent on what would happen in a situation, such as obtained herein, when a deceased person had daughters only and no sons, and that the learned Judge was therefore right to hold that Susan held the land in trust for Joyce. She also defended the learned Judge for holding that the sub-division of 534 and subsequent registration of the appellants was fraudulent as expressly pleaded was amply proved. In the circumstances, contended counsel, the only remedy commensurate with the justice of the case was for the land to be divided equally between Susan and Joyce as was held by the Judge. She urged us to dismiss the appeal with costs.

As a first appellate Court, our mandate is to proceed with the matter before us by way of re-hearing on the basis of the record. We are to subject the entire evidence to a fresh and exhaustive re-appraisal and analysis with a view to making our own independent inferences of fact and drawing our own conclusions on the evidence. We do so alive to the fact that we have not had the advantage the trial Judge had of hearing and observing the witnesses as they testified. We thus make allowance for that, paying due homage to and being slow to disturb that court's factual findings, especially those turning on credibility of witnesses, but having no hesitation to depart therefrom if they are based on no evidence; precede from a misapprehension of the evidence; applied wrong principles or are otherwise untenable. See Rule 29 of the Court of Appeal Rules; **PETERSON VS. SUNDAY POST LTD** [1958] EA 424; **SELLE VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS** [1968] EA 123 and **SAMITAN SERVICES [EA] LTD vs. RENTOKIL (K) LTD & ANOTHER** [2006] 2 KLR 70.

Having gone through the record and carefully considered the rival submissions, both written and oral, presented before us, we find that this

appeal turns on just two issues: trust and fraud. On the question of trust, we have already observed that the learned Judge took the view, and correctly so, we think, that Khaminwa J. having dismissed H. C. Civil Appeal No. 13 of 2004 way back on 2nd October 2007 and there being no appeal against that dismissal, it was conclusively determined that Susan held 534 in trust for Joyce. In so finding, the learned Judge indicated that to reopen the issue of trust would be to sit in judgment over the decision of a judge of concurrent jurisdiction, which is plainly objectionable. We do not see how the learned Judge can properly be faulted for taking that position which is rather self-evident. What this means is that the appellants are evidently purporting to fault the learned Judge for making findings he did not make. All we understand him to have done is decline the invitation to revisit the decision of Khaminwa J. and in taking that stance, we are persuaded he did not err.

At any rate we have not been given any basis for interfering with the conclusion that Susan and Joyce, being the only offspring of their father, were entitled to 534 in equal shares. There seems to be no basis for the submissions made by Ms. Thungu but unbacked by any authority, that Susan could not have been found to hold the 534 in trust for her sister Joyce merely because she was a female. It was for the appellants to prove such custom, customary law being a fact to be proved by expert evidence (see **KIMANI vs. GIKANGA** [1965] EA 735) but they made no effort to do so. See also: **NGOKA vs. MADZOMBA** [2002] eKLR 968. We do not understand this Courts' decision of **NJUGUNA vs. NJUGUNA** [2008] 1 KLR (G&F) 889 casually mentioned by counsel and which dealt with the concept of *muramati* to be propounding that position. At any rate, there is no evidential or other rational basis upon which any court would accept the appellants' contention that Susan was entitled to dispossess her sister Joyce.

Turning now to the issue of fraud, we are satisfied that the learned Judge adopted the correct approach by first appreciating that it needed to be expressly pleaded with particularity and then seeking proof to a standard higher than the usual, civil preponderance of probability but not to beyond reasonable doubt, a standard reserved for criminal cases. See **R.G. PATEL VS. LALJI MAKANJI** [1957] EA 314; **URMILA W/O MAHENDRA SHAH vs. BARCLAYS BANK INTERNATIONAL LTD & ANOTHER** [1976-80] 1 KLR 1168.

We do find, as did the learned Judge that the appellants were fully aware of Joyce's claim and entitlement to half of 534 about which there was active pursuit on her part with an elders' pronouncement in 1998 albeit non-binding, that she be given the same. Indeed, she had filed a plaint in court on 15th July 1999 against the appellants' mother Susan, yet the appellants, quite without a qualm, and in all probability with intent to defeat that claim, consciously and deliberately proceeded to have themselves registered as owners of the various portions to which 534 was sub-divided.

We think that the conduct of the appellants was clearly fraudulent and it cannot be countenanced that they should be allowed to hold onto the proceeds of such fraud at the expense of the respondent who was the person entitled. They effected transfer during the pendency of litigation on the same subject matter of which they were admittedly aware. The sub-division and transfer to themselves ran afoul the *lis pendens* principal or doctrine and cannot be allowed to stand and defeat the rights of a litigating party. We find it apposite to reiterate what this Court stated in **NAFTALI RUTHI KINYUA VS. PATRICK THUITA GACHURE & ANOTHER** [2015] eKLR.

“Black’s Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

'It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.'

In the case of Mawji vs US International University & another [1976] KLR 185, Madan, J.A. Stated thus:-

'The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...'

In the same case ... it was observed inter alia that:-

'Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.' ”

See also **EMMANUEL NGADE NYOKA vs. KITHEKA MUTISYA NGATA** [2017] eKLR with which we also agree. We need only add that as a Court we shall remain resolute to ensure that parties mischievously minded who would with cynical disregard to subsisting court proceedings effect transfers and so purport to alienate the subject matter of suits *pendete lite* will be stopped in their tracks and their offending acts reversed.

For those reasons we find this appeal to be totally devoid of merit as the learned Judges' decision was based on evidence and achieved the only result that first would commend in the circumstances.

The appeal is dismissed with no order as to costs, noting that the parties to the appeal are relatives by blood.

Dated and delivered at Nyeri this 23rd day of May, 2018.

P. O. KIAGE

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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