REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJA)

CIVIL APPEAL NO. 51 OF 2014

BETWEEN

MWAI KABUTHI.....APPELLANT

VERSUS

KARIMI KABUTHI.....DEFENDANT

(*Appeal from the Judgment and Decree of the High Court of Kenya at Kerugoya (B.N. Olao, J) Dated 15th March , 2014*

in

Kerugoya H.C.E.LC Case No. 393 of 2013)

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JUDGMENT OF THE COURT

By a plaint dated the 22nd day of September, 2011, the respondent **Karimi Kabuthi** sued the appellant **Mwai Kabuthi** vide Kerugoya HCCC No.393 of 2013 seeking a declaration that the appellant held Land Parcel No.Mutira/Kaguyu/145 (the suit property) in trust for himself and the respondent; determination of trust in the suit property and the Land Parcel No. Mutira/Kaguyu/145 to be divided into two equal portions and registered in the names of the Respondent and the appellant; a permanent injunction against the appellant restraining him through himself, his agents and/or in any other way interfering with the respondent's possession of Land parcel No. Mutira/Kaguyu/145; costs and interest at court rates.

The appellant resisted the respondent's claim vide a defence dated the 3rd day of June, 2013 in which he denied the respondent's allegation that he had been registered as a proprietor of the suit property in trust for himself and the other siblings; that his late father was alive and not in detention hence there was no reason for the appellant to be registered as trustee for his father's share and lastly that the suit property was his rightful share of the clan land given to him after fulfilling the chores assigned to him by the clan elders.

Parties were heard on merit, at the conclusion of which the learned trial Judge B.N. Olao, J found in favour of the Respondent.

The appellant was aggrieved. He is now before us on a first appeal raising five (5) grounds of appeal namely, that the leaned judge erred both in law and fact and occasioned a miscarriage of justice:-

(i) in holding and finding that a trust had been created while in the real sense a trust never existed.

(ii) by failing to analyze and give reasons as to how the appellant acquired the suit property.

(iii) by relying on the evidence of the respondent and disregarded the material evidence of the appellant hence arriving at the wrong conclusion.

(iv) by holding that the burial of the parties parents in the subject matter connoted a trust.

(v) in holding that a trust was created by virtue of the respondent having tea bushes in the subject matter.

Learned counsel **Mr. Ikahu Ngangah** argued all the five (5) grounds as one, and submitted that the learned Judge misdirected himself and thereby arrived at a wrong conclusion, on the issues in controversy before him because the respondent never adduced any evidence to show that there was a trust over the suit property as all he did was to simply say that his late father was alive when the appellant was registered as proprietor of the suit property, allegedly in trust for the other siblings without explaining why his father was never registered as proprietor. In **Mr. Ngangah's** view, the evidence tendered was scanty and could not therefore support the respondent's assertions of existence of a trust over the suit property. In contrast, the appellant set out his defence and adduced evidence in support thereof, which went to establish how he came to be registered as the proprietor of the suit property, which evidence was not given much weight by the learned judge who never gave reasons as to how he arrived at the conclusion reached. The learned Judge also never gave reasons as to who between the appellant and the respondent was more believable and why. It was further **Mr. Ngangah's** submission that the learned Judge was not correct in his analysis as he went beyond the evidence on the record and used extraneous factors to find in favour of the respondent, namely, the fact of the burial of the disputants parents on the suit property as a basis of establishing trust and yet there was no evidence adduced that the father contributed either in money or in kind to the clan elders for him to get a share of the clan land.

In response to the appellant's submissions, learned counsel **Mrs. Wangechi Munene** for the respondent submitted that there was sufficient evidence on the record to demonstrate that the suit property was clan land; that the disputants father was away during the land demarcation and that is why the appellant was registered as trustee on behalf of the entire family; that the respondent grew up on the suit property and that is how he came to gather information on how the land was acquired; the whole family utilized the land without any objection from the appellant and that both parents were buried on the suit property.

Learned counsel, continued to submit that the appellant admitted in his testimony that the respondent planted tea bushes on the suit property; that all the family members utilize the suit property and that he had no objection to his sisters utilizing the same. In **Mrs. Munene's** view, the appellant could not have made such admissions in his cross-examination if he had not known that the suit property was family property. The learned Judge rightly rejected the appellant's assertions that he earned the suit property from the clan elders by rendering services and by monetary contributions as his testimony was contradicted by his own witnesses and was therefore rightly rejected by the learned judge as untruthful.

This is a first appeal. Our mandate is as was set out in the case of **Sumaria & Another versus Allied Industries Limited [2007] 2KLR 1** wherein the Court held inter alia that:-

1. Being a first appeal, the court was obliged to reconsider the evidence, re-evaluate it and made its own conclusions. A court of Appeal would not normally interfere with a finding of fact by the trial court unless;

(a) It was based on no evidence; or

(b) It was based on a misapprehension of the evidence or

(c) The Judge was shown demonstrably to have acted on wrong principle in reaching the finding he did.

We have given due consideration to the record, in the light of the impugned judgment, and the rival submissions set out above. In our view, only one issue falls for our determination and that is whether the learned judge fell into error when he held that the suit property was trust property and then proceeded to share it between the appellant and the respondent.

In arriving at that conclusion the learned Judge made findings *inter alia* that the appellant and the respondent were brothers, being sons of the late **Kabuthi Karii;** that the respondent had laid claim to the suit property alleging that it was family land and therefore held in trust by the appellant for himself and the respondent. Relying on the case of **Mumo versus Makau [2004] 1KLR 13**, the learned judge opined that trust is a matter to be determined from the evidence and if such evidence is available, the court must declare a trust. The appellant had admitted in cross-examination that the respondent had tea bushes on the suit property contrary to his earlier denial in his examination in chief that the respondent had no crops on the suit property; that the parties' father was working in Eldoret and he was the one who made contributions towards the acquisition of the suit property and even directed that it be registered in the appellant's name to hold in trust; that there was no evidence that the appellant was himself engaged in any employment that enabled him to raise any contributions towards the acquisition of the suit property. Neither did he explain how much he had raised or made as contributions towards the acquisition of the suit property. Relying on the case of **Henry Mwangi versus Charles Mwangi CA Civil Appeal No.245 of 2004 NB1,** the learned Judge found that under Kikuyu customary law to which both parties herein were subject, the eldest son inherits clan land as a *Muramati* to hold in trust for himself and others.

On the basis of the above reasoning the learned Judge then rendered himself thus:-

"Taking into account all the evidence herein including the fact that the father of the parties moved and worked on the suit land following his retirement in Eldoret where he was working, the fact that he and his wife were both buried on the suit land and also that the plaintiff has all along worked on his tea crop on the said, I am satisfied that the only reason the suit land was registered in the defendant's names was so that he could hold it in trust for himself and the family given the fact that he is the first born and their late father was working away from home during the demarcation period. I reject the defendant's claim that the land was given to him by the clan because of the contributions that he made to the clan. Indeed the defendant and his witness ZAKARIA GAKUYA (DW1), contradicted each other as to what exactly was the defendant's contributions towards the acquisition of the Land.

On this issue, the defendant's evidence was as follows:-

"I cannot tell the exact amount that I contributed since I had to do it in stages. The amount of contribution could be 20/= or 10/=. It was random"

However, the defendant's witness had this to say in cross-examination:-

I know that defendant is the one who made the contributions. His contribution was the work. I don't know about the money

Clearly, the defendant and his witnesses were not being candid on this issue and I am satisfied that the plaintiff has proved his case as required in law. I accordingly enter judgment for him as prayed in the plaint. As the parties are family, each shall meet his own costs.

It is so ordered."

We have considered the learned Judge's observations on the pleadings of the findings on the evidence

tendered by either side and the conclusions drawn from those findings. They are not in error. Our reasons for holding so are as follows:-

(1) The respondent had pleaded in his plaint that the suit property was originally clan land, a fact admitted by the appellant and his witnesses.

(2) The learned Judge made a finding that the existence of a trust over the suit property was based on sound evidence as it was not disputed that the parties' father was working in Eldoret from where he used to send money back home to pay to the clan elders for the suit property. The learned Judge found that this evidence ousted the appellant's evidence that he was the one who paid contributions both in kind and money to the clan elders for the suit property, as his (appellants) evidence was contradicted by his own witnesses. The learned Judge had reason to disregard the appellant's evidence as untruthful. There was a basis for disregarding the appellant's testimony as his own witnesses who contradicted it were persons from the same locality and therefore conversant with the history of the suit property. Once excluded, there was nothing to counter the respondent's assertions that the appellant got registered as proprietor of the suit property with the blessings of their late father and that such registration was meant to benefit the entire family.

(3) The parties' parents came and settled on the suit property upon their late father's retirement. They all used the land inclusive of the respondent who planted tea bushes on it without any protestation from the appellant, a matter the appellant denied in his examination-in-chief, only to admit it in cross-examination. This formed a sound basis for the learned Judge's view on how the appellant came to be registered as proprietor of the suit property as being truthful as it went to corroborate the testimony of the respondent.

(4) The learned judge also properly appreciated the pleadings of and the evidence on the record in support of either sides' version. The learned judge correctly applied the principles of law applicable to the said evidence and arrived at the correct conclusions.

The upshot of all the above is that we find no merit in this appeal. It is accordingly dismissed. Being a family dispute, we direct that each party bears own costs.

DATED, AND DELIVERED AT NYERI THIS 1ST DAY OF MARCH, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR