IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 344 OF 2014

BETWEEN

KALONDU MBUSYA.....APPELLANT

AND

MARTIN KIMWELI KIKOI.....1STRESPONDENT

PAUL MBITHI.....2ND RESPONDENT

PATRICK N. KILONZO.....3RD RESPONDENT

JASPER MULANDI.....4TH RESPONDENT

DICKSON M. MUTIE.....5TH RESPONDENT

SIMON K. NGOLOLO.....6TH RESPONDENT

WAMBUA KIMWELI.....7TH RESPONDENT

JOHN KIMWELI.....8TH RESPONDENT

MWOLOO KINYOO.....9TH RESPONDENT

SHEM MASIO.....10TH RESPONDENT

NELSON MASIO.....11TH RESPONDENT

(An appeal from the Judgment and Decree of the

High Court of Kenya at Machakos (Mwera, J.)

delivered on 29th July, 2003

in

HCCC NO. 228 OF 1999

Consolidated with

HCCC NO. 48 OF 1998)

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JUDGMENT OF THE COURT

This is an appeal against the judgment of **Mwera, J.** (as he then was) delivered on 29th July 2003.

The background to this appeal is that the 1st respondent, **Martin Kimweli Kikoi** filed Machakos HCCC No. 48 of 1998 against **Kalondu Mbusya** the appellant herein vide a plaint dated 26th February 1998. In the Plaint the 1st respondent averred that on 3rd April, 1970 he paid for three shares in **Kiene Ngundu Land Buying Group** (hereinafter the Group) which was formed principally for purposes of purchasing a piece of land known as **Marwa Sisal Estate** and registered as Land Parcel No. 1755 (hereinafter the mother parcel). He contended that whilst one share was in his name, the other two were in the names of his brother who was the appellant's husband, **Mbusya Kikoi** (now deceased) and his son **F K K** (then a minor); that as his deceased brother, had no land of his own, he allowed him to till on part of the land known as **Kiene Ngundu 16/70** (hereinafter the suit land). The 1st respondent sought a declaration that he *"….. is the lawful owner of all the parcel of land known as KIENE NGUNDU/16/70 measuring 27.2 acres or thereabouts"*.

In response, the appellant filed a defence and counter-claim dated 27th March 1998 in which she contended that each member of the Kiene Group was entitled to one share each, entitling a member to a parcel of land measuring 30 acres upon division of the mother parcel; that her husband was a member of Kiene Group with his parcel of land being No. 16/70 measuring 27.2 acres whilst that of the 1st respondent was No. 70 measuring 30 acres. Other facets of the appellant's defence were that during the life time of her husband, the 1st respondent who is her brother-in-law, had never raised a claim on the suit land and that she and her family had resided on the suit land peacefully with the knowledge that it belonged to her husband.

The appellant further averred that the 1st respondent acting in collusion with clansmen had harassed her and forcefully relieved her of the receipt for payment of the one share comprised in the suit land thereby facilitating the subdivision and the sale to a third party, PAUL MBITHI, the 2ndrespondent herein. In her defence and counter-claim the appellant sought *"A declaration that the parcel of land known as KIENE NGUNDU 16/70 measuring 27.2 acres belongs to …"* her and that the receipt for the payment of the disputed parcel which was snatched from her be returned to her.

However, in spite of the pendency of the suit filed by the 1st respondent, on 29th July, 1999 the appellant filed Machakos HCCC No. 228 of 1998 vide a plaint dated 15th July 1999. She named the 1st and 2nd respondents herein as the 1st and 2nd defendants. There were eleven other defendants namely **Patrick N. Kilonzo, Jasper Mulandi, Dickson M. Mutie, Simon K. Ngololo, Wambua Kimweli, John Kimweli, Mwoloo Kinyoo, Shem Masio, Nelson Masio, Patrick Ndolo** and **Ndivo Ndolo**. In the suit filed by the appellant she maintained the position that she was the owner of the suit land as she and *"… her late husband fully paid for their share"* in Kiene Ngundu Land Buying Company. The 2ndrespondent was sued in his capacity as a purchaser of part of the suit land whilst the rest of the defendants were accused of harassing the appellant in their capacity as clan members. In particular, in paragraph 16 of the plaint she averred "*that the 11th to 12th and 13th defendants on or about the 30th September 1997 went to the plaintiffs home and forcefully obtained from the plaintiff the original receipt of Ksh. 1950/= paid by the plaintiff's late husband to Kiene Ngundu for the parcel of land known as Plot No. 16/70"*. The 1st respondent denied the appellant's claim vide a defence filed on 2nd December, 1999. On 7th April 1999 and by consent of the parties the two suits were consolidated by Mwera, J. who proceeded to hear the dispute touching on the suit land. In his judgment of 29th July 2003, the learned judge found that the suit land belonged to the respondent. The learned judge further expressed a wish that the appellant though not entitled to any part of the suit land, should be allowed to have the 6 acres offered to her by the 1st respondent. The learned judge condemned the appellant to pay costs of the suit to the 1st respondent.

The appellant was dissatisfied with the outcome of the trial, hence this appeal. In a memorandum of

appeal dated 4th December 2014 the appellant listed not less than 12 grounds. These are that: the learned trial judge erred in not finding that Mbusya Kikoi was a member of Kiene Ngundu; in failing to find that Mbusya Kikoi balloted for the suit property; in failing to find that the appellant's family had been in continuous occupation of the suit land for over 20 years; in imposing a trust which was neither pleaded nor proved; in failing to find that the register of members of Kiene Ngundu reflected the name of the appellant's husband as the owner; and finally in failing to find that the 1st respondent had no colour of right to enter into a sale/purchase agreement of the suit land with the 2nd respondent.

The appeal came before us for the plenary hearing on 3.5.2017. **Mr. Mutula Kilonzo Junior** learned counsel appeared for the appellant while **Mr. Makundi,** learned counsel, appeared for the respondents. In urging the appeal Mr. Kilonzo delved into the fact that Mr. Mbusya Kikoi participated in the balloting process of 1973; that upon Mbusya Kikoi's demise, the register of members of Kiene Ngundu was amended to reflect the appellant as the owner of the suit land; that although the court imposed a trust on the deceased, none was pleaded nor proved; that each member of the Kiene Group was allocated one share and that a letter from the Kiene Group was addressed to the 1st respondent directing that he conforms to one share per member but the 1st respondent refused to adhere to the instructions and vide a letter dated 10.3.1983 the membership sought to expel the 1st respondent from the membership of the Group; that the 1st respondent declined to sign the letter to signify his concurrence with the instructions of the Group.

Learned counsel assailed the 1st respondent's alleged special membership of the Kiene Group. Furthermore, counsel submitted that in the event of a dispute the Group had a dispute resolution mechanism which the 1st respondent should have taken advantage of before the demise of his brother, who was buried on the suit land. Counsel also submitted that while the dispute was still pending the respondent invoked the assistance of his clan which ruled that the appellant be banished from the suit land. In conclusion, Mr. Kilonzo submitted that the decree of the trial court could not be extracted in the absence of Kiene Group as a party to the proceedings and hence the futility of the judgment of the trial court.

Mr. Makundi learned counsel for the respondents in opposing the appeal submitted that the appellant and the 1st respondent were related and that the 1st respondent was a special member of the Kiene Group alongside 4 other members by virtue of being founder members. He further submitted that some of the founder members got more than one plot upon subdivision of the mother parcel by using names of their relatives, a fact which tallied with the testimonies of DW4 Aloys Munyao Mutemwa and that of PW2, Paul Matenge Nzioki. It was counsel's further submission that apart from the suit land the 1st respondent used the name of Francis Kimweli his son who was then a minor to purchase a third share; that the 1st respondent having made payments thereof, kept the receipts of all the shares purchased by himself in the names of his brother (the deceased) and his son. He also retained the ballots of the 3 shares. It was also submitted that the deceased was impecunious and could not pay for the suit land. It was contended that due to his impecunious position, the deceased's children were educated by the 1st respondent. It was the 1st respondent's further contention that he had always been in possession of the suit land and he sold part of it to the 2nd respondent. Finally that the trial court's judgment was enforceable as titles had been issued and hence there was no necessity of enjoining the Kiene Group as a party to the suit.

On our part, we have perused the record, the judgment of the High Court, the submissions by learned counsel both written and oral, the authorities cited and the law. Alive to our role as a first appellate Court, we have reconsidered the evidence, assessed it and drawn our conclusion therefrom, whilst bearing in mind that we did not have the benefit of seeing and hearing the witnesses as they testified. See ***Sumaria & Another Vs. Allied Industries Ltd (2007) KLR 1***. We also remind ourselves that this Court will not normally be in haste to interfere with a finding of fact by a trial court unless it is based on no evidence or unless it is based on a misapprehension of evidence or the judge is shown demonstrably to have acted on the wrong principle in reaching the findings he arrived at. See ***Ephantus Mwangi & another vs. Duncan Mwangi Wambugu (1982-99) 1 KAR 278***.

The crux of this appeal centres on the ownership of the suit land. In determining the question of ownership both the Appellant and the Respondent had to tender evidence in support of their respective

claims and discharge the burden of proof as encapsulated at **Section 107** of the **Evidence Act** to wit:-

> ***"107.***
>
> *1.* ***Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> *2.* ***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

Suffice to state that the burden is on the one who alleges and the standard of proof in civil claims is on the balance of probabilities. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable. In ***Palace Investments Ltd. V Geoffrey Kariuki Mwenda and another (2007)eKLR,*** this Court adopted the dictum of Denning J., in ***Miller v Minister of Pensions (1947) 2 All ER 372*** discussing that burden of proof as follows;

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.***
>
> ***Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

The appellant's main contention was that proprietary rights to the suit land accrued to her by virtue of being a wife to the deceased who according to her, was a member of the Kiene Group. She also anchored her claim on her late husband's alleged participation in a balloting exercise which preceded the sub-division of plots from the mother parcel in 1973. According to her, the deceased acquired the suit land and paid for it thereby entitling her to the same following his demise. On the other hand the 1st respondent testified that he was a founding member of the Kiene Group, and by virtue of his position as a special member he acquired more than one plot including the suit land. He contended that he was not the only special member as there were others namely; **Mutungi Maliti, Ngori Mbatya, Mutiso Muio a**nd **David Ngata Maku**. The 1st respondent's evidence was that he allowed the deceased to use the suit land during his lifetime as he settled on an adjacent parcel of land. This was however after building a house and a garage on the suit land, which house he later allowed the deceased to use. He contends that he paid for the suit land, retained the receipts and balloted for the shares and retained the ballot receipts as well.

It is uncontroverted that the 1st Respondent was a founder committee member of Kiene Group while the deceased was not. By virtue of his position, the appellant acquired more than one parcel of land as can be seen from the testimony of PW2 **Paul Matenge Nzioka** (Paul), who stated in his evidence:*"The initial members, some of them got more than one plot by giving names of their relatives for balloting. But I was not in the committee so I do not know."* This evidence is corroborated by the evidence of DW4 **Aloys Munyao Mutemwa**, the then secretary of Kiene Ngundu Group who testified that the 1st respondent purchased shares in his name, name of his two brothers namely Mbusya & Titus and in the name of his two sons.

Turning to the question of the actual acquisition of the suit land, the financial means or otherwise of both the deceased and the 1st Respondent comes into play. The appellant testified under cross-examination that the deceased used to work for the owner of Marua Sisal Estate but ceased to work at the end of 1970. Excerpts of her testimony are as follows-

> ***"When he married me he was working there. I was married in 1959,***
>
> ***He ceased working at the end of 1970".***

She continues thus:- "He went to his land at Kiboko Kalie. That is where I used to live when the deceased was working at Marua Estate. We went to Kiboko in 1964 up to 1971 when we came to wait to buy and get the land. We occupied a house on that white man's estate. We were waiting for allocation of numbers. He bought land, paid for it and then left employment. We had been chased from that estate in 1964 when our houses were burnt, we went to Kiboko.

<u>This estate was sold in 1959 and all processes ended in 1970. I did not personally take part in this.</u> I was at Kiboko but my husband was at Marua Estate. He came to collect me saying that he had bought land, paid for it and we could (sic) not go to occupy it." *(Emphasis added)*

When the foregoing excerpt is contrasted with the testimony of the 1st Respondent both under examination-in-chief and cross examination it clearly emerges that the appellant was not privy to the dealings leading to the acquisition of the suit land as she was elsewhere at the time. In her further evidence, the appellant told the trial court:

"Kimweli never paid any money from his packet (sic). He was sent by my husband who was working to go and pay"

Suffice to say that the appellant's evidence on whether her late husband paid for the suit land is hearsay. It is also not lost to us that the 1st respondent kept the receipt for the payment of the share of the suit land. During the balloting for the plots on 22nd July 1973, which was graced by Jeremiah Nyagah, the then Minister of Agriculture, the 1st respondent balloted for 4 plots that he had paid for but in the name of the deceased, his son Francis Kimweli and in the name of his other brother Peter Mutiso. Francis Kimwele testified as DW7 and told the trial court that although Plot No. 68 was in his name, at the time of the purchase he was a minor and did not pay for the plot. This evidence is supported by the evidence of DW4 Aloys Munyao Mutemwa, the then Secretary of Kiene Ngundu who stated that the 1st respondent, who was a promoter of the land buying company bought shares in the names of his two brothers and two sons. He stated: *"Kimweli paid for them in full and I received the money from him."* It was also his evidence that the deceased did not take part in the balloting. Hence, the 1st respondent having balloted for the 4 plots, retained the ballot receipts, including for the suit land. To counter this evidence, the appellant contended that the receipt for the payment of the suit land was snatched from her by the clan elders. However, she called no evidence to this effect and neither did she make a report to the police. Indeed, in an attempt to explain why the 1st respondent had the receipt for the payment of the suit land, the 1st appellant stated that her husband used to send the 1st respondent to pay for the land. There was also evidence that the deceased worked as a herdsman and did not have the financial wherewithal to buy the suit land and that his children were educated by the 1st respondent. It was not disputed that the 1st respondent had receipts for payment of the deceased's children's school fees. PW5 Justice Mutua Mbusya, the deceased's son knew that his father was a herdsman. He testified that his father used to send the 1st respondent to pay their fees and the 1st respondent kept the receipts. Similarly, the appellant's explanation as to why the 1st respondent had the receipts was because the deceased used to send him to pay the fees. The trial judge did not believe the appellant and was so incensed with the appellant and her son's conduct that he ordered the appellant to pay the costs of the suit inspite of the fact that the dispute was between close family members. In so doing the learned Judge remarked:

"In this circumstance where a man is pitted against his brother's wife, a brother he was always minded to help, except that the one here is another one, the court would have been minded to let each side pay its own costs or reduce them in favour of the wife, Kalondu. But her general conduct does not incline that way. It has already been remarked upon. His own sons are no better either. They were educated by Kimweli as an uncle and yet they came to court to say otherwise. He produced the receipts he got when he paid their fees and levies. If Kimweli was only a paying messenger one would expect Mbusya to get the receipts from him for his own keeping. Anyway human nature is that way. Kalondu will pay the costs here to Kimweli."

What do we make of the foregoing analysis? In brief, taking all the evidence cumulatively, we have come to the conclusion that the 1st respondent paid for the share of the suit land, and hence he is the owner of it. We note that the 1st Respondent had gone to great lengths with the aid of his clansmen to spare the

appellant the vagaries of destitution by allocating her 6 acres of the suit land, before selling 14 acres to the 2nd Respondent. The upshot of the above is that we find no merit in this appeal and it is accordingly dismissed.

We note, however, that the learned trial Judge remarked that the respondent's actions of offering 6 acres to the appellant were noble and he hoped that the 1st respondent would not withdraw the offer. On our part, we shall not say more on this, save to state that since the dispute herein involved close family members, we direct each party to bear his/her own costs.

Dated and delivered at Nairobi this 28th day of July, 2017

G.B.M. KARIUKI

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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