IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 172 OF 2011

BETWEEN

SAMUEL NDIBA SENIOR & SAMUEL NDIBA JUNIOR SUED as Administrators of the Estate of

PETER KIHARA GATHOGA (DECEASED).....APPELLANTS

AND

ESTHER WANGARI KIHARA.....RESPONDENT

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Nambuye, J.**) given on the 24th day of September, 2010*

in

H.C.C.C. No. 3859 of 1979)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the judgment and decree of the High Court (**Nambuye, J.** as she then was) delivered on 24th September 2010 whereby the High Court entered judgment for the respondent as follows: -

> **"1. An order is hereby made and given that the administrators and or executors of the estate of the deceased, late Peter Kihara Gathoga hold parcel number Githunguri/Githiga/1121/comprising 10.025 acres or 4.01 hectares in trust for the benefit of the plaintiff Esther Wangari Kihara irrespective of whether the trust was expressly stated in the title or not.**
>
> **2. That an order be and hereby made and given that the said trust be and is hereby ordered to be brought to an end and land parcel number Githunguri/Githiga/1121 comprising 10.025 acres or 14.01 hectares be and herby ordered to be transferred forthwith into the name of Ester Wangari Kihara.**

3. The plaintiff will have the costs of the suit and interest on costs paid by the estate of the deceased defendant.

4. On the motion of the court and in view of the length of the time the litigation has taken the administrators and executors of the estate of the deceased defendant are ordered to execute the transfer form in favour of the plaintiff ordered in number 2 above failing which the Deputy Registrar of this Court be at liberty to execute the same on their behalf.

5. There will be liberty to apply."

[**2**] On 5th November 2010 the respondent filed an application for stay of execution of the decree pending the hearing and determination of the intended appeal. The application was placed before **Mwera, J**. (as he then was) on the same day, who granted an *ex parte* order staying the execution and ordered that the application be served and be mentioned on 12th November, 2010 for directions as for the course of the *inter parties* hearing. However, the Deputy Registrar executed the transfer and the appellant was registered as the proprietor of the decreed land on 2nd February, 2011 and title deed given to her on the same day, 2nd February, 2011. On 11th February, 2011 the respondents filed an application in the High Court seeking an order that the transfer be revoked. Although the record does not disclose the fate of that application, the respondent's counsel maintains in this appeal that the decree has already been executed.

[**3**] The dispute was originated by a plaint dated 28th November 1979 filed by Esther Wangari Kihara against the defendant Peter Kihara Gathoga. She claimed in the plaint that the defendant held 15.75 acres out of land title No. Githunguri/Githiga/13 and sought judgment for the transfer. The plaint was later amended and later further amended. The latest plaint filed before the suit was heard is the further amended plaint amended on 11th June, 2007 and filed in court on 15th June, 2005. The plaintiffs averred that during land demarcation in 1957, it was orally agreed within the family that 15.75 acres to which her husband was entitled be registered in the name of the defendant as the eldest brother to hold in trust and later transfer it to her; that the defendant was subsequently registered as the owner of land title No. Githunguri/Githinga/13 measuring 12.16 hectares; that defendant subsequently sub-divided the land into five different portions – land titles Nos. Githunguri/Githiga/1119, 1120, 1121, 1122, and 1123 and refused to transfer 15.75 acres held in trust for her. By the further amended plaint amended on 11th June, 2007 the plaintiff now claimed 10.75 acres instead of the original 15.75 acres.

[**4**] The defendant in the original defence dated 29th December, 1979 denied sub-dividing the land and averred that the plaintiff was married to **Kihara Gathoga** who died in 1954; that after her husband's death she was married to **Waweru Gathoga** – a step brother of the deceased with whom she has several children; that during land demarcation and consolidation the land of Gathoga Kihara, (father to Waweru and the defendant) was divided into two portions and Waweru Gathoga (alleged husband of plaintiff) registered as owner of the 16 acres then known as Githunguri/Githiga/14 and the defendant was registered as owner of 10.5 acres; the defendant consolidated his own land measuring 20 acres with his father's share in the land now known as Githunguri/Githiga/13 and that Waweru Gathoga has now sold his land to various people with the connivance of the plaintiff.

The defendant died on 23rd February, 2003 and as a result, the two respondents in this appeal were joined in the suit as parties as the legal representatives of the deceased defendant. The respondents amended the defence denying any oral agreement and the creation of trust.

[**5**] The hearing of the suit commenced before **Shields, J**. on 19th May, 1993. Four witnesses namely **Esther Wangari Kihara** (PW1 – Plaintiff); **Waweru Gathoga** (PW2), **Samuel Kamau Gathoga** (PW3) and **Kihara Kahuthu** (PW4) testified before Shields, J. between 19th May, 1993 and 26th May, 1993. The hearing of the suit was to continue on 8th June 1993 but it was adjourned. Thereafter the suit was adjourned for various reasons including the death of the defendant, various applications and the retirement of Shields, J., delayed the hearing and conclusion of the dispute.

[**6**] On 13th June 2002 **Waki, J.** (as he then was), in essence, ordered that the suit to proceed from where Shields, J. left it pursuant to **Order XVII Rule 10(1) Civil Procedure Rules.** The last of the plaintiff's witnesses **Kimata wa Konga** (PW3) gave evidence before **Kubo, J.** on 12th November, 2008 after which the plaintiff's case was closed.

[**7**] Thereafter, one witness **Samuel Ndiba Kihara** (DW1) – a son of the deceased defendant and the first legal representative of the deceased defendant) gave evidence in support of the defence case after which the case was closed. The trial judge then directed the counsel for the parties to file written submissions. Apparently Kubo J. retired before the proceeding was completed and on 27th May, 2009 **Osiemo, J**. recorded a consent order as follows:

> ***"By consent, judgment pending before Kubo, J. to be written and delivered by any Judge in the Land Division."***

Thereafter the Chief Justice by a letter dated 9th July, 2009 allocated the case to **Nambuye, J.** to write and deliver the judgment.

[**8**] From the evidence of the plaintiff, her four witnesses, and the evidence of Samuel Ndiba Kihara the following facts were not in dispute.

The land claimed by the plaintiff was a portion of the family land owned by Gathoga Kihara who died on or about 1957. He had three wives – **Wangari** (1st wife who had 8 children two of them sons – **Peter Kihara Gathoga** (deceased defendant); and **Ndirangu Gathoga) - Njambi** (2nd wife) who had 4 children two of them sons, including **Waweru Gathoga** (PW2) - **Wanjiru** (3rd wife – who had 9 children, two of them sons **Kihara Gathoga** – (deceased husband of plaintiff) and **Samuel Kamau Gathoga** (PW3). The three wives of Gathoga Kihara predeceased him. The husband of the plaintiff, Kihara Gathoga died in about 1954 and thus predeceased his father. In about 1956, and before the land demarcation and consolidation, Kihara Gathoga subdivided his land amongst his three households and fixed boundaries. The land demarcation and consolidation process started in 1957 after the death of Kihara Gathoga. The acreage of the portion which was identified by Kihara Gathoga as belonging to house of Njambi was ascertained to be 14 acres and registered in the name of Waweru Gathoga as Title No. Githunguri/Githiga/14. That land is not in dispute.

[**9**] The land allocated to house of Wangari and to the house of Wanjiru respectively by Kihara Gathoga, was also demarcated and both registered in the name of Peter Kihara Gathoga (defendant) as land title No. Githunguri/Githiga/13. That is the land in dispute. The plaintiff's case was that the acreage of the land demarcated for house of Wanjiru was 15.75 acres and Wangari was 16 acres – total 31.75 acres which were registered in the name of the deceased defendant as land title No. Githunguri/Githiga/13 and that the defendant was to hold 15.75 acres in trust for the house of Wanjiru (the land in dispute).

The deceased defendant's case was that the land registered in his name comprised his own portion of 20 acres which he acquired independently of his father and 10.5 acres which was registered in his name in trust for the house of Wangari and Wanjiru. It was also his case that during the pendency of the suit, he transferred a portion of five acres to Samuel Kamau Gathoga (PW3) registered as Githunguri/Githiga/1123 which he held in trust for the house of Wanjiru. It w*as* the defendant's case that the plaintiff was inherited by Waweru Gathoga (DW2) and has been living in the Waweru's portion until Waweru sold his land after which plaintiff shifted to the portion of Samuel Kamau Gathoga. The latter admitted in his evidence that the deceased defendant indeed transferred the land to him but claimed that the deceased defendant still held the balance of 10.75 acres in trust for the plaintiff.

[**10**] All the evidence was considered by Nambuye, J. who made findings in summary inter alia:

(i) Plaintiff never remarried but had more children out of wedlock after the death of her husband.

(ii) Plaintiff remained in the portion of land where her late husband left her and still resides in the

same place today.

(iii) The house of Wanjiru had been allocated 15.75 acres to be shared amongst two sons and the acreage demarcated by the demarcation committee for house of Wanjiru was 15.75 acres.

(iv) The inference to be drawn from the conduct of the deceased defendant of the sub-dividing land into approximately 5 acre portions except for portion No. 1121 of 10.25 acres is that deceased knew that it was the reminder of the 15.75 acres belonging to the house of Wanjiru.

(v) The appellants were aggrieved by the findings and decision of the trial judge in respect of the extent and mode of ownership and trust, whether it is a resulting trust or otherwise. That is what triggered the appeal under our determination.

[**11**] The amended memorandum of appeal contains 10 grounds of appeal. Two reliefs are sought namely; that the appeal be allowed with costs and the judgment of Nambuye, J. be set aside *ex debito justitiae* and two, that the suit be heard *de novo*.

The respondent died on 13th August 2011 during the pendency of the appeal. On the application of the appellants and with the consent of the parties, Samuel Kamau Gathoga and Hannah Nyambura Kihara were substituted for the respondent.

[**13**] The first ground of appeal states the learned judge erred in law and on facts in failing to find that the plaintiff's claim was time barred. **Mr. Kyalo Mbobu**, learned counsel for the appellants cited section 7 of the Limitation of Actions Act in support of that ground which section provides that an action may not be brought by any person to recover land after the end of 12 years from the date the cause of action accrued. He submitted that time started to run in 1964 when the defendant's husband died. He further submitted that even in the case of action to recover trust property, the limitation period under **section 20(2)** of the **Limitation of Actions Act** is 6 years and that time started to run at the time of demarcation and not at the time of sub-division. **Mr. Chebii,** learned counsel for the respondent submitted that the issue of limitation should have been raised before the hearing of the suit as a preliminary issue; that trust was admitted and that right to recover land accrued in 1979 when the trustee failed to honour the trust.

The plea of limitation is being raised for the first time in an appellate court. The general rule is that a party cannot take up a new plea or new contention in an appeal unless it is pleaded in the plaint, or unless the issue has been considered by the trial court. It is contended by the appellants' counsel that limitation is a point of law which can be raised at any stage. That is not, with respect, entirely correct for it may be necessary to establish facts on which plea of limitation is based, for example, as to when the cause of action accrued. Limitation is a mixed question of fact and law. The submissions before us indicate that there is controversy as to when the cause of action on breach of trust accrued. By rule 4(1) of former Order VI (**now rule 4(1) of Order 2 CPR 2010)**, limitation must be specifically pleaded. That was not done.

The rules of procedure require that issues arising in a suit should be framed and that the court should state its decision on each issue (Order XX rule 5 now Order 21 rule 5).

[**14**] The rules of procedure also have inbuilt mechanisms to ensure procedural fairness and a just determination of cases. It is trite law that cases are decided on the issues on record. It is a cardinal rule that parties should place and point out all facts that they intend to rely as a point of attack of defence. Essentially, parties are mandatorily required to place all issues for determination in order to eliminate instances of ambush and belated points of attack and defence. To entertain the limitation of time as a central issue that can tilt the case of the parties at this late stage would be giving one party an undue advantage which he/she is not entitled. Time and again, we have stated the purpose, object and essence of pleadings, which is to inform parties the case for trial and determination. If a party, like the appellants intended to derive an advantage from a point of law, it was their duty to raise it before the trial judge. The defendant was throughout represented by a counsel and had opportunity over the years to raise the issue of limitation in the trial court. It would be a travesty of justice for an appellate court to entertain a plea of

limitation at this late stage. It would also undermine the administration of justice if the Court were to fault the judge for failing to decide an issue which was never raised before the trial court. We decline to entertain this ground of appeal.

[**15**] The appellants' counsel argued grounds 2, 3 and 4 together. The appellants aver in essence that they were denied a fair trial as Nambuye, J. delivered a judgment without consent of the parties and without substantively hearing the case. It is submitted that by writing a judgment in a case in which the judge had not heard the witnesses, the judge breached the constitutional principles of fair hearing.

The respondent's counsel submitted, amongst other things, that the parties submitted themselves to the jurisdiction of any judge to write a judgment and that the appellants have not shown that the judgment failed to capture or excluded the defence evidence.

It is correct that the evidence at the trial was recorded by two judges – **Shields, J.** and **Kubo, J. Nambuye, J.** who wrote and delivered the judgment did not hear any of the witnesses and relied on the record of the proceedings.

However, the submissions by the appellants' counsel that parties did not give their consent is disproved by the record. The record shows that on 27th May 2009 respective counsel for the parties recorded a consent order agreeing that the judgment pending before Kubo, J. be delivered by any judge in the Land Division. As already stated, the Chief Justice subsequently allocated the case to Nambuye, J. The judgment was written and delivered in accordance with the prescribed procedure.

Order XVII rule 10(i) now order 18 rule 8(1) provides:

> "***Where a judge is prevented by death, transfer, or other cause from concluding suit or the hearing of an application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it."***

[**16**] The evidence of witnesses recorded by Shields, J. and Kubo J. was recorded in accordance with the prescribed procedure. Such procedure gives the judge a discretion to record remarks he/she thinks material respecting the demeanour of any witness while under cross-examination (**see order VI rule – now order 18 rule 7**). Indeed, Shields, J. recorded remarks on the demeanour of Waweru Gathoga (PW2) under cross-examination thus:

> "***the witness herein became confused. Not know what to say next."***

The official record of the trial is permanent and immutable public record. By **section 84** of the **Evidence Act,** there is a presumption *inter alia* that the record of evidence given on judicial proceedings is genuine and that such evidence was duly given. It is not contended that the record of the evidence relied by Nambuye, J. is not genuine or that the learned Judge did not evaluate all evidence or that actual prejudice was occasioned to the appellants. It is also not contended that the judgment was incompetent for any reason. The judgment was written and delivered pursuant to the consent of the parties and in accordance with the law. We have not been informed which provision of the Constitution the trial judge breached in concluding the matter in accordance with the consent and permission of the parties recorded before the court. In our view, no principal of fair trial was violated by Nambuye, J. In rendering her decision, the judge was faithful to the consent of the parties. The allegation of breach of the principles of fair hearing is an afterthought which has no basis.

[**17**] The third set of the grounds of appeal (Nos. 5, 6 and 7) fault the learned judge for granting relief which was not specifically asked. It is contended that the plaintiff prayed for judgment for 15.75 acres and not for 10.75 acres awarded. It is further contended that the learned judge erred by awarding land parcel Githunguri/Githiga/1121 to the plaintiff when there was no specific prayer for that and.

It is true that the plaintiff originally claimed 15.75 acres. However, as already stated, when plaintiff later realized that the defendant had already transferred 5 acres to Samuel Kamau Gathoga from the same house of Wanjiru, she amended the plaint with leave of the court and claimed the balance of 10.75 acres. Therefore, it is not factually correct to say that she did not claim 10.75 acres. Secondly, the plaintiff pleaded that the defendant had already sub-divided the original land into five portions. Indeed, she filed an application for injunction dated 12th September 1980 to restrain the defendant from alienating, disposing of land parcels Nos. Githunguri/Githiga/1119, 1120, 1121, 1122 and 1123 until the determination of the suit and the court on 2nd October, 1980 granted injunction in respect of land parcels Nos. 1119, 1120 and which excluded parcel Nos. 1121 and 1123.

The plaintiff's claim encompassed all the five sub-divisions and the High Court in its discretion awarded sub-divided parcel No. Githunguri/Githiga/1121 whose acreage closely corresponded to the acres claimed by the plaintiff. It follows that the grounds of appeal have no merit.

[**18**] The last set of grounds of appeal argued (that is grounds 8 and 9) relate to the reliance by the learned judge on copies of the register in respect of five sub-divisions and the award of parcel No. Githunguri/Githiga/1121. Reference has been made to passage in the judgment where the learned judge stated:

> ***"DW1 did not divulge the acreage of the portions but the court has traced copies of their respective green cards on the record and the acreages are as hereunder"***

The following finding of the learned Judge has also been cited:

> ***"It is on record that the plaintiff is claiming 10.75 acres out of parcels number Githunguri/Githiga/1119, 1120, 1121, 1122 with no specific emphasis on any of the portions. The acreage of each was not given in the pleading or evidence but as mentioned earlier the court has traced them…"***

It is contended by the appellants that the court undertook a search on its own motion, usurped the role and duty of litigants and acted on contested evidence without including parties input, thus rendering the outcome a mistrial. On the other hand, the respondent's counsel submitted that there was evidence on record presented by the parties indicating the acreage of each portion of land.

[**19**] By order XX rule 5A, CPR (now order 20 rule 6):

> "***Where there is a prayer for judgment which would result in some alteration of the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced before any such judgment is delivered."***

The plaintiff's prayers fell within that provision and it was imperative that the learned judge should have access to certified copies of the title or register before delivering judgment. The contention by the appellants that the learned judge undertook a search on her own motion is not supported by the record. On the contrary, the court stated that it had traced copies of green cards on the record, meaning that, it did not obtain green cards (that is, copies of the register) from an outside source but from the record of the court itself. The copies of the register of the sub-divisions were in the court record. They were annexed to the affidavit of plaintiff sworn on 11th September, 1980 in support of the application for injunction already mentioned above. The accuracy of the respective copies of the register is not impugned. In the premises the grounds of appeal lack merit.

[**20**] The last ground of appeal (No. 10) stated that the learned judge erred and misdirected herself by finding that the plaintiff had proved her case on a balance of probability against the foregoing glaring omissions. We have already made a finding that grounds of appeal based on the alleged omissions have no merit.

[**21**] Although the grounds of appeal do not go to the merits of the dispute, it is necessary, for

completeness, to briefly comment on the findings of the learned judge. It is clear, and learned judge so found that most of the facts were not in dispute. It was not in dispute that Gathoga Kihara had three wives and that before his death and before land demarcation he sub-divided his land amongst his three households and fixed boundaries. It was common ground that during land demarcation, the three portions were demarcated and the acreage of each portion ascertained. There was evidence that the portion which belonged to house of Wangari and the portion belonging to house of Wanjiru were registered under the name of the deceased defendant. This evidence was admitted by the deceased defendant who also admitted that he held some land in trust for the house of Wanjiru. The real dispute was about the acreage of the land ascertained by demarcation to belong to his mother's house and to Wanjiru's house.

The deceased defendant claimed that the land registered in his name comprised of 20 acres which he had acquired. There was ample evidence from the plaintiff's witnesses including **Kimata wa Konga** (PW5) who was a member of the demarcation committee that upon demarcation, Wangari's portion was ascertained as 18 acres and Wanjiru's portion as 15.75 acres which were all registered under the name of the deceased defendant. The reason why Wanjiru's portion was registered in the name of the defendant in trust was given. The only surviving son in the house of Wanjiru-Samuel Kamau Gathiga was too young and his mother Wanjiru was young and it was feared that she might remarry.

The learned judge made a finding that Wanjiru did not marry Waweru Gathoga the step brother of her deceased husband as claimed by the deceased defendant. The learned judge rejected the evidence that the deceased defendant had acquired 20 acres on his own. The learned judge reasoned that there was no concrete evidence adduced to support the claim nor was the issue put to the witnesses in cross-examination. In the end, the court accepted the evidence of witnesses regarding the acreage of the portion given by Gathoga Kihara to each of his three households.

We have reconsidered and re-evaluated the evidence in totality. We are satisfied that the learned judge properly apprehended the evidence, considered and evaluated it, and ultimately reached the correct decision

[**22**] For the foregoing reasons the appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 9th day of December, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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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