



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 6 OF 2013

BETWEEN

SALESIO M'ITONGA..... APPELLANT

AND

M'ARITHI M'ATHARA.....1ST RESPONDENT

RAPHAEL MWEBIA.....2ND RESPONDENT

PHINEAS KIMATHI ARITHI.....3RD RESPONDENT

SILAS MURIUNGI.....4TH RESPONDENT

(An appeal from the decree and judgment of the High Court of Kenya

at Meru (Lessit, J.) dated 3rd March, 2013

in

H. C. C. C. No. 20 of 2009)

JUDGMENT OF THE COURT

1. This is the second appeal from the judgment of the High Court (Lessit, J.) dated 3rd March, 2012 wherein the learned Judge set aside the trial court's judgment, dismissed the appellant's suit and entered judgment in favour of the respondents.

2. In order to appreciate the nature of the dispute, it is necessary to set out the salient facts of this case. By a further amended Plaint, the appellant filed suit in the Chief Magistrates court at Meru. He sought *inter alia* an order compelling the respondents to transfer 3 acres from Abogeta/U-Kithangari/28, (original parcel); an order directing the land registrar Meru to cancel the subdivisions of the original title being Abogeta/U-Kithangari/1495, 1496, 1497 & 1498 (suit properties).

3. The appellant and the 1st respondent are brothers. It was the appellant's case that the original parcel belonged to their late father, M'Athara Mutiambia; during the demarcation period the original parcel was registered in the 1st respondent's name; the 1st respondent held a portion of 3 acres of the original parcel in trust for the appellant. The appellant claimed that during their father's lifetime, his father gave him possession of 3 acres of the original parcel and he developed the same by planting tea bushes. The appellant contended that in breach of the aforementioned trust, the respondents served him with a notice to vacate the original parcel. The appellant further averred that during the pendency of the suit at the trial court, the 1st respondent subdivided the original parcel into four, Abogeta/U-Kithingai/1495, 1496, 1497 & 1498; the 1st respondent transferred the said subdivisions to his sons, the 2nd, 3rd & 4th respondents, and remained with Abogeta/U-Kithangari 1498.

4. In their defence, the respondents filed a statement of defence and counter-claim. The respondents denied the allegations made by the appellant. The 1st respondent maintained he gathered the original parcel in the year 1960 and became the first registered owner of the same on 27th May, 1965. He contended that the original parcel never belonged to their late father; their late father only gathered and was registered as proprietor of two parcels namely Abogeta/U-Kithangari/219 and Abogeta/U-Kithangari/193.

5. It was the respondent's case that the appellant trespassed onto the original parcel and planted tea bushes thereon. Consequently, a dispute arose and was referred for arbitration by the clan elders. The clan elders resolved that the 1st respondent would compensate the appellant for the tea bushes planted on the original parcel by planting an equivalent number of tea bushes in a parcel to be identified by the appellant and the appellant would in return vacate the original parcel. The 1st respondent claimed that he planted tea bushes on parcel No. Abogeta/U-Kithangari/219 which was pointed out by the appellant. However, the appellant refused and/or neglected to vacate the original parcel.

6. The respondents maintained that the 1st respondent was the registered owner of the original parcel and therefore he had the authority to subdivide the same and transfer the suit properties to his sons. The respondents in their Counter-Claim sought *inter alia* an order of eviction against the appellant and a permanent injunction restraining the appellant from trespassing on the suit properties.

7. During the trial, the appellant reiterated the averments in his Complaint. He testified that his late father gave him a portion of 3 acres from the original parcel in 1988; he had been in possession of the parcel since 1969. He maintained that the original parcel was ancestral land.

8. The 1st respondent testified that the original parcel was a special parcel; before demarcation, the special parcels were allocated by the clan to successful applicants; he applied and was granted the original parcel in 1958 by the clan; subsequently, he acquired title in the year 1965. He maintained that the original parcel was not ancestral land; their late father gathered and was registered as the owner of parcels No. Abogeta/U-Kithangari/219 & 193; their late father bequeathed the appellant Abogeta/U-Kithangari/219. He further testified that he planted 11,000 tea bushes on Abogeta/U-Kithangari/219 as compensation to the appellant for the tea bushes he had planted on the original parcel.

9. The trial court found that the 1st respondent held a portion of 3 acres of the original parcel in trust for the appellant and entered judgment in favour of the appellant. Aggrieved with the decision, the respondents preferred an appeal in the High court. The High Court (Lessit, J.) vide a judgment dated 3rd March, 2012 found that the appellant had not established the existence of a trust. The learned Judge set aside the trial court's judgment, dismissed the appellant's suit with costs and entered judgment in terms of the respondents' Counter-Claim. It is that decision that has provoked this appeal based on the following grounds:

- ***That the learned Judge erred in law and in fact in interfering with the findings of facts of the trial Magistrate in Meru CMCC No. 890 of 1999 who had heard the evidence and evaluated the credibility of the witnesses, a privilege the learned Judge did not have.***

- *That the learned Judge erred in law and in fact in holding that the appellant had not proved that L.R. NO. U-KITHANGARI/28 was held by the first respondent in trust for the appellant and further erred in not holding that the appellant had not proved the existence of a trust.*
- *That the learned Judge erred in law and in fact in ignoring and or not taking into account that the appellant had lived in the suit land for a long period of time to the exclusion of the first respondent.*

That the learned Judge erred in law and in fact faulting the trial Magistrate's exposition on the existence of a trust.

- *That the learned Judge erred in law and in fact in importing the provisions of the then Section 28 of the Registered Land Act to justify her finding that no trust existed in favour of the appellant.*
- *That the learned Judge erred in law and in fact in holding that the learned trial Magistrate misapprehended the evidence or that the trial Magistrate acted on wrong principles in holding that the appellant had not proved the existence of a trust in his favour in respect of the suit land.*
- *That the learned Judge erred in law and in fact in setting aside the judgment of the lower court and further erred in allowing the respondents' counter-claim. The judgment and the decree of the learned Judges against the weight of the available evidence and the law.*

10. When the appeal came up for hearing before us, Mr. B. G. Kariuki, appeared for the appellant while Mr. Alex Muthomi appeared for the respondents. Mr. Kariuki submitted that the trial court was correct in finding that the 1st respondent held a portion of 3 acres of the original parcel in trust for the appellant. This is because firstly, the appellant and the 1st respondent are brothers. Secondly, the appellant has been in possession of the said portion and planted tea bushes without any interference. According to Mr. Kariuki, the evidence at the trial court clearly indicated that the original parcel was ancestral land.

11. Mr. Kariuki argued that the High Court should not have interfered with the findings of fact by the trial court. He submitted that by virtue of **Section 116** of the **Evidence Act**, the burden lay with the respondents to establish that despite the appellant being in possession of the aforementioned portion he was not the owner of the same and that the parcel was not ancestral land. Mr. Kariuki further submitted that the 1st respondent in cross-examination had admitted that the original parcel belonged to their late father. To buttress his submissions, Mr. Kariuki relied on the decision of this Court in **M'Imanyara M'Muruthi -vs- Nkanata Murutti & Another – Civil Appeal NO. 151 of 2007.** He urged us to allow the appeal.

12. Mr. Muthomi in opposing the appeal submitted that the High Court as the first appellate court had a duty to re-evaluate the evidence and come to its own conclusion. He argued that the High Court correctly exercised its jurisdiction as the first appeal court. He argued that the appellant did not adduce any evidence to support his claim. He contended that the 1st respondent was given the original parcel by the clan and the same was registered in his name with the knowledge of the appellant; the appellant had failed to explain why, the 1st respondent who was younger than him was registered as the proprietor of the original parcel if the same was ancestral land. Mr. Muthomi submitted that the learned Judge was correct in holding that the appellant's evidence was contradictory.

13. Mr. Muthomi argued that the appellant did not dispute the fact that the 1st respondent compensated him for the tea bushes he had planted on the original parcel. According to him, **Section 116** of the **Evidence Act** did not and could not shift the burden which lay with the appellant to prove the existence of the alleged trust. Mr. Muthomi further submitted that the appellant's appeal did not raise any issue of law and that this Court being the second appellate court could only deal with issues of law.

14. This is a second appeal and by dint of **Section 72 (1)** of the **Civil Procedure Act**, Chapter 21, Laws of Kenya this Court's jurisdiction is restricted to matters of Law. In ***Kenya Breweries Ltd -vs- Godfrey Odoyo – Civil Appeal No. 127 of 2007***, Onyango Otieno, J.A expressed himself as follows:

“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 in a second appeal, confines itself to matters of Law unless it is shown that the two courts below considered matters they should have considered or looking at the entire decision, it is perverse”. (See also this Court's decision in Maina vs. Mugiria (1983) KLR 78.)”

15. We are of the considered view that the following issues arise for our determination;

- ***Did the appellant prove the existence of the alleged trust?***
- ***Did the High Court properly exercise its duty as the first appellate Court?***

16. It is trite law that trust is a question of fact and has to be proved by evidence. In ***Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981***, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust. See also ***Mumo -vs- Makau - Civil Appeal No. 56 of 2001***. In this case the appellant claimed that the original parcel belonged to his late father and was ancestral land. He also claimed that the 1st respondent was registered as proprietor and held a portion of 3 acres in trust for him. On the other hand, the 1st respondent refuted the appellant's claim and maintained that the original parcel belonged to him. The trial court made the following findings on the issue of trust:-

“I am persuaded that the 1st defendant (1st respondent) was registered as the owner of the suit land as a trustee for the family. I say so for the following reasons. There is evidence on record to show that the plaintiff (appellant) had one of the parcels of land belonging to his father registered in his name. This means that there was a high possibility that the suit land belonged to the father of the plaintiff and the 1st defendant even though the same was registered in the name of the 1st defendant. Secondly, the plaintiff planted tea bushes on the land without any interference by the 1st defendant. This means that it was common knowledge that the suit land belonged to the family. Thirdly, the 1st defendant was not given any family land. That means it was understood by everybody that he had already benefited by way of the suit land”

17. Having perused the record and taking into account the evidence therein, we find that the trial court erred in finding that the appellant had proved the existence of a trust. This is because firstly, the burden was upon the appellant to prove the creation and existence of the alleged trust. The fact that the appellant had one of the parcels of land, Abogeta/U-Kithangari/219 which belonged to their father did not prove the allegation that the original parcel was family land. Secondly, the fact that the appellant had also planted tea bushes thereon did not by itself establish a trust. Thirdly, we are unable to find any justification on record for the trial court's finding that the 1st respondent was not given any family land because he had already benefited by way of the original parcel. The 1st respondent in his evidence clearly indicated that his late father bequeathed both the appellant and himself parcels of land which he owned. This fact was not disputed by the appellant.

18. The appellant testified that the original parcel belonged to his father and was ancestral land. He has lived on the said land from 1969 and his father gave him a portion of 3 acres from the said land in 1988. He also testified that both he and his father were present when the 1st respondent was registered as the proprietor of the original parcel. He further testified that he was the eldest son. Based on the foregoing, we are of the considered view that the appellant did not prove how the alleged trust was created. This is because as correctly pointed out by the 1st respondent in his evidence, the appellant did not give any explanation why the original parcel was registered in the 1st respondent's name yet both his father and himself were present during the registration. Further the appellant in his evidence testified that at the time of registration he had an identification card while the 1st respondent did not. The question that arises is why was the original parcel registered in the 1st respondents name if it was ancestral land? We believe it was imperative for the appellant to have given evidence in this respect in order to prove how the alleged

trust was created.

19. PW2, Phantus Magiri, testified that the original parcel belonged to the appellant and 1st respondent's late father and that it was family land. We find that his evidence did not prove the existence of the alleged trust. This is because he admitted in his evidence that he never discussed anything with appellant and 1st respondent's father regarding the parcel. So how did he know that the parcel belonged to the appellant' father and that it was family land? This brings into question the credibility of the said evidence.

The appellant also contended by virtue of the fact that he was in possession of a portion of the original parcel and by dint of **Section 116** of the **Evidence Act**, the burden shifted to the respondents to prove that there was no trust. **Section 116** provides:-

“When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

20. In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same. We find that **Section 116** of the **Evidence Act** is not applicable in this case.

21. We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra. In this case, the respondent had to adduce evidence to establish on a balance of probabilities that a trust exists in his favour over the suit property. I did consider the respondent's evidence at length. He did not explain on what basis he believes that a trust existed. All he said is that he did not know why the land was registered in the 1st appellant's name and not his father's name. In fact if one critically analyses the respondent's evidence, it becomes abundantly clear that why he believes that there was a trust in his favour is because in 1982 or 1988 their father gave him a portion of 1st appellant's suit land. Yet he says he has been in occupation since 1969 when he planted tea trees. The evidence that it was his father who gave to him the land needs substantiation. This is because he was utilizing the land anyway. So what unique thing happened in 1982 or 1988 to signify he was given the land by his father? In any event the respondent admits he knew that the land was registered in the 1st defendants/appellant's name. How could his father give him land which did not belong to him? The respondent's evidence was full of contradictions. It is however clear that he did not adduce any evidence to prove trust to the required standards. Mere utilization of the land is not proof of the existence of a trust. The only conclusion one can reach from this set of facts is that the land was not family land and the 1st appellant was not registered as proprietor on any fiduciary capacity.”

22. Having expressed ourselves as above, we find that the trial court properly exercised its jurisdiction as the first appellate court. In ***Peters vs. Sunday Post (1958) EA 424, Sir Kenneth O'Connor P at page 429*** stated:

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion”.

23. The upshot of the foregoing is that we find no merit in this appeal and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 26th day of February, 2014

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR