



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: MARAGA, AZANGALALA & KANTAI, J.J.A)

CIVIL APPEAL NO. 207 OF 2011

HELLEN NYABOKE OTOCHI APPELLANT

AND

CECILIA KERUBO SAMWEL1ST RESPONDENT

PAULINE BOGOMBA SAMWEL2ND RESPONDENT

(An Appeal a Judgment of the High Court of Kenya at Kisii

(Makhandia, J.) dated 15th July, 2011

in

H.C.C.A. NO. 221 OF 2009)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the High Court (Makhandia, J., as he then was) dated 15th July, 2011 allowing an appeal from the judgment of the Resident Magistrate - Kisii in Kisii C.M. Civil Case No. 218 of 2009.

In the plaint filed in the subordinate court the plaintiff **Hellen Nyaboke Otochi ("Hellen")**, sought among other orders a declaration that she was the only legal wife of one **Samwel Ogaro Mosoti** (hereinafter "the deceased") with the right to bury the remains of the deceased; a declaration that one **Cecilia Kerubo Samwel**, the 1st defendant in that court ("**Cecilia**"), was holding land parcel **No. Nyaribari Chache 1313/Boburia/3005** ("the suit land") in trust for her and her son and a permanent injunction restraining the defendants and others from burying the remains of the deceased.

By the time the dispute went before the High Court on appeal, the parties appear to have settled the issue of the burial of the remains of the deceased and the only issue the High Court dealt with concerned the suit piece of land. On that aspect of the dispute the subordinate court had held as follows:-

"...that the 1st defendant is holding land parcel No. Nyaribari Chache/B/B/Boburia/3005 in trust for the plaintiff and her son. The plaintiff is entitled to half of the portion of the said parcel of land"

At the trial, Hellen testified, among other things, that the deceased married her in 1968 and they were blessed with a son, **George Maisiba Ogaro**. Their marriage was solemnized in Church under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya. In 1972, the deceased married the 2nd defendant **Pauline Bogomba Samwel ("Pauline")** which event caused friction between Hellen and the deceased who sent her away. She went away to her parents in Nyamira and later to her brother's home in Kitale. She stayed away until the time the mother of the deceased died in 2002 when she came for her funeral. She stated that it is at that time that the deceased showed her portion of the suit land. She also claimed that that is when she met Cecilia now the respondent. After being shown her portion, she attempted to demarcate the same but the boundary marks were removed by Cecilia and her sons. She contended that having been married to the deceased under the African Christian Marriage and Divorce Act; the deceased had no capacity to enter into any other marriage with any other person including Pauline and Cecilia. She however acknowledged that the suit piece of land was registered in the name of Cecilia and was so registered before the deceased died.

The appellant called witnesses who supported her testimony that she was married to the deceased in church and was entitled to a share of the suit land.

Her son also testified at the trial and stated that the deceased was his father but he had not lived with him for long. He had lived mostly with his mother and maternal uncles and grandmother. He also said he was a secondary school teacher then employed at Kativo Secondary School in Machakos and that his mother was entitled to a share of the suit piece of land which the deceased had shown her. As for himself he stated:

"It is my mum who wanted land.

.....

I neither want the body nor land."

In the circumstances, the question whether, as a son of the deceased, he is entitled to inherit a portion of his estate does not arise.

Pauline also testified at the trial. She stated, among other things, that she is the 1st wife of the deceased having been married to him in 1966. She however, became sick and went to her parents for treatment and returned to the deceased's home in 1972 and found that Hellen was then married to the deceased. Hellen then left the deceased's home in the same year and never returned until the deceased's mother died. In the interim the deceased married Cecilia as his 3rd wife. According to Pauline, Hellen did not stay after the funeral of her mother-in-law; she left and only returned when the deceased had died. She acknowledged that the deceased purchased a separate piece of land for her and her children. In the end, she did not challenge the decision of the subordinate court or the High Court.

Cecilia also gave evidence at the trial. She testified that the deceased married her in 1980 as a second wife to Pauline. At that time, according to her, Hellen was not living with the deceased. Later the deceased transferred the suit piece of land to her absolutely and not in trust for anyone else. She stated that she lives on the suit land with her four sons and one daughter and Hellen is not entitled to a portion thereof or at all. She acknowledged that sometime when she was away, she found the local Assistant Chief having subdivided the suit land. She complained, as the proprietor, about that action to the local District Officer who ordered the removal of the boundary marks placed by the Assistant Chief.

She contended that she was legitimately married to the deceased who had freely transferred the suit land to her and that Hellen had no right to the same having been away from the deceased's home for over 34 years.

The High Court carefully analyzed and reviewed the evidence which was adduced before the subordinate court and after doing so came to the conclusion that there was no evidence to support the finding of a trust in favour of Hellen and allowed the appeal thereby substituting the order of the subordinate court awarding ½ the suit land to her with that of dismissing her claim. With respect to costs, the learned Judge considered that the parties were in some way linked to the deceased and ordered that each party bears its own costs of the appeal and the suit in the subordinate court.

It was the turn of Hellen to complain. She therefore filed this appeal premised upon seven (7) grounds which her learned counsel, Mr. Gichana, argued globally. In our view, the grounds of appeal raise the following issues:

"1) Whether the evidence adduced before the subordinate court disclosed a constructive trust in favour of Hellen and whether particulars of trust should have been pleaded.

2) Whether the marriage of Hellen with the deceased under the African Christian Marriage and Divorce Act rendered the unions between the deceased and Pauline and Cecilia illegitimate unions, unknown in law.

3) Whether the deceased left a valid will.

4) Who was entitled to the suit land?"

Mr. Gichana submitted that Hellen was the only legitimate wife of the deceased having been married to the deceased under statute which outlawed the other unions the deceased had. Learned counsel stated that the deceased had, before his demise, shown the appellant the portion of the suit land to which she was entitled and Cecilia therefore held that portion in trust for Hellen which event need not have been strictly pleaded. Learned counsel placed reliance upon three decisions of this Court (*which decisions we have considered*) for his proposition that a constructive trust need not be pleaded before a decision is founded on it.

Mr. Waiganjo, learned counsel for Cecilia, contended that Hellen left the deceased for over 34 years and when she returned the deceased had transferred the suit land to Cecilia. In counsel's view, no fraud, misrepresentation or undue influence was alleged or demonstrated touching on the transfer of the suit land from the deceased to Cecilia. In those premises, according to counsel, no trust could be implied and Cecilia was entitled to resist Hellen's attempt to lay claim to her piece of land. Learned counsel further submitted that the authorities relied upon by counsel for the appellant were distinguishable from the facts in this case since in those cases, evidence on trust had been adduced unlike in this case.

We have considered the record of proceedings, the judgment of the subordinate court and that of the High Court, the grounds of appeal, the submissions of learned counsel, the authorities cited before us and the law. As the second appellate court, only issues of law fall for our consideration and we think the issues we have identified above raise questions of law. (See **Section 72 (1)** of the Civil Procedure Act, Cap 21 Laws of Kenya.)

We shall first consider whether the marriage of the appellant with the deceased under the African Marriage and Divorce Act rendered the unions between the deceased and Pauline and Cecilia illegitimate unions unknown in law. Our perusal of the judgment of the subordinate court shows that the learned trial magistrate did not nullify the marriages of the deceased with Pauline and Cecilia. Instead she found that: ·

"In the present case the plaintiff has proved on a balance of probability that she was married to the deceased under the African Christian Marriage and Divorce Act Cap 151 Laws of Kenya. Legally she is therefore the first wife to the deceased who has the right to be given the remains of the deceased to bury as any other subsequent marriages though recognized under customary law cannot challenge the plaintiff's marriage."

Plainly therefore, the learned magistrate recognized that Pauline and Cecilia were also wives of the deceased under customary law. Hellen did not complain about that finding at the High Court. She cannot now complain against those unions before us. It is infact on the basis of the marriage of Cecilia to the deceased that the learned Magistrate allowed Cecilia to retain half of the suit piece of land and it was on the basis of that marriage that the deceased had transferred the entire suit piece of land to Cecilia. In those premises we find the appellant's complaints regarding the marriage of the deceased to Pauline and Cecilia without merit.

We turn now to the question whether the evidence adduced before the learned trial Magistrate disclosed a constructive trust in favour of Hellen and whether particulars of the trust should have been pleaded. Mr. Gichana, in our view, correctly submitted that registration of a title in the name of a party does not relieve that party of the duty or obligation to which he or she is subject as a trustee. The appellant was not alleging breach of a trust for which particulars should have been pleaded and proved as provided under **Rule 8 (1) (a) of Order VI** of the Civil Procedure Rules then applicable. The learned Magistrate however found a constructive trust proved in favour of Hellen. A constructive trust arises by operation of the law. It arises where property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.

In this case, did Hellen plead facts and adduce evidence which proved that the suit land was hers as the legal wife of the deceased? Did Cecilia deal with the suit land in an unconscionable manner resulting in Hellen's land being registered in her name? The reason why the learned trial Magistrate found a constructive trust in favour of Hellen was that she was the legal 1st wife of the deceased and the deceased had attempted to give her a portion of the suit land before he died. In the opinion of the learned trial Magistrate, the deceased controlled operations on the suit land thereby demonstrating that the suit land was his to which Hellen was entitled as much as Pauline and Cecilia were. Were those factors sufficient to create a constructive trust in favour of Hellen? We do not think so. We are of that view because, the purported attempt to give a portion of the suit land to Hellen was made when the deceased was no longer the registered proprietor thereof. The deceased had freely transferred the suit land to Cecilia during his lifetime and long before the belated attempt to give a portion of it to Hellen. Hellen was away and had been away for 34 years. It was not alleged and in our view it could not have been alleged that when the deceased transferred the suit land to Cecilia, he had Hellen in his mind. In our view therefore, the deceased decided of his own free will to transfer the suit land to Cecilia as her share of family land.

When Hellen attended the funeral of the mother of the deceased, it was alleged the deceased took the opportunity to show her a portion of the suit land and when Cecilia and her sons resisted, he told Hellen to be patient and that he would sort out the issue. That was in 2002. Hellen at that time came to know that the suit piece of land was registered in the name of Cecilia. She did not challenge that registration at all. Even the deceased during his lifetime took no steps to secure the purported interest of Hellen in the suit land, so, for nearly seven (7) years Hellen had knowledge that the suit land was registered in the name of Cecilia who did not recognize her interest therein. Yet, she took no steps to assert her claim in the suit land only remembering her interest on the demise of the deceased in 2009.

In those premises, we cannot find fault with the decision of the learned Judge on the issue of constructive trust. Cecilia was given the suit land by the deceased who did not challenge the transfer during his lifetime. The reason for the failure to challenge Cecilia's registration was no doubt that she was so registered lawfully and in circumstances which were entirely legitimate and not unconscionable. A constructive trust could therefore not be implied. Like the learned Judge, we find it significant that it was not only the respondent who was allocated land by the deceased. Pauline and her family were also settled by the deceased on a separate piece of land he acquired for valuable consideration. We, agree with the learned Judge that if the deceased intended to provide for Hellen during his lifetime, he would have had no difficulty in so doing just as he provided for both Pauline and Cecilia. In our view, to now purport to provide for Hellen as the learned Resident Magistrate purported to do, would be unconscionable. We are of that view because, Hellen only lived with the deceased as husband and wife from 1968 to 1972, a period of only four (4) years. She then left because the deceased married Pauline.

So, for over 37 years Hellen stayed away from the deceased. The deceased could not, in the circumstances, provide for her. In our view, the mere fact that the appellant was married to the deceased under the African Christian Marriage and Divorce Act which marriage had not been dissolved by the time the deceased died, was not reason enough to confer upon Hellen any right over the suit property lawfully registered in the name of Cecilia. We also venture to state that a customary practice which recognizes a marriage between a man and a woman who have not lived together as husband and wife for over 37 years merely because dowry has not been refunded is a practice which is repugnant to justice and morality. In this case the application of the practice by the Resident Magistrate produced a result which is repugnant to justice and morality and the learned Judge of the High Court was entitled to interfere. In our view our decision in the case of **John Jeleyio Ole Saweyo -Vs- David Omwenga Maobe [Civil Appeal No 297 of 2009]** does not support Hellen's case. In that case we found that it was inequitable to allow the appellant to assert absolute ownership of the suit piece of land given the evidence adduced before the trial court. We have found no such evidence in this case. To the contrary to allow Hellen's claim would clearly be unconscionable on the evidence adduced.

The case of **Maingi Nzioka -Vs- Mbuki Kiseri [Civil Appeal No. 97 of 2004]** is also distinguishable from the facts of this case. There, we found that the facts availed before the court clearly invited a finding of trust which is not the case here. For the same reasons the case of **Mutiso -Vs- Mutiso [1988] KLR 846** is distinguishable from the facts in our case. In that case a husband transferred his land to a wife while he was in jail to enable the wife obtain a loan to offset another mortgage with a bank. When the husband was released the wife left him and refused to re-transfer the land to him. The Court found that it was never the husband's intention to transfer the land to the wife absolutely hence the conclusion that the wife held the land on a constructive trust in favour of the husband. In our case the husband did not sue **Cecilia** during his life time as already discussed above.

With regard to the issue as to whether the deceased left a valid will, our brief answer is that he did not. Exhibit No.2 (a) and its English version, Exhibit 2 (b) cannot be described as the last will of the deceased. The document, although signed by the deceased, was not attested to by any witness. Failure to attest to the document by the requisite number of witnesses, rendered the document invalid as a Will. At any rate, we do not, think that the document was considered as a will by the learned Judge. The document was produced at the trial without objection and could not have escaped the scrutiny of the learned Judge acting as a first appellate court. It is significant that the learned Judge was not considering a succession cause in which the document was tendered as a Will. Notwithstanding the admission of that document, we think there was evidence upon which the learned Judge found for Cecilia. Our own independent consideration of the record convinces us that the appellant's claim was bound to fail.

The final issue as to who was entitled to the suit land has already been answered by our above analysis. The suit land lawfully belongs to Cecilia and the learned Judge's finding on the issue cannot be faulted.

In the end, we find no merit in the entire appeal. Accordingly the appeal is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF FEBRUARY, 2015

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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