IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWILU & KIAGE, JJ.A.)

CIVIL APPEAL NO. 218 OF 2007

BETWEEN

KIMINDA KIROMO ……...…… APPELLANT

AND

JOSEPH NJUGUNA GICHANGA …….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Juma, J.) dated 20th September, 1999

in

H. C. C. C. No. 1663 of 1993)

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JUDGMENT OF THE COURT

The dispute that has given rise to this appeal involves a land dispute between family members. By a plaint that was originally filed before the Resident Magistrate's court at Kiambu way back in 1981, **Kiminda Kirome**, the appellant herein sued his father's brother or uncle (if that is an appropriate description as in many African customs a father's brother carries the title of a father). The person sued was **Gichana Njuguna**. The appellant sought an order that his uncle be evicted from land parcel no. **Lari/ Kiranga/ 545**. The defendant filed a defence denying that he was a trespasser on the suit land. He later filed an amended defence and counterclaim claiming that he was entitled to the suit land as of right.

The original defendant passed away in the course of the proceedings. He was substituted by his son **Joseph Njuguna Gichanga**, the respondent herein. It would seem that the suit was transferred to the High Court at Nairobi where it was heard and determined by the judgment supposedly dated 20th September 1999, the subject matter of this appeal.

The gist of the dispute as captured by the evidence adduced by the witnesses can be summarized as follows. There was no dispute that the suit land originally belonged to the appellant's grandfather one **Njuguna Kerimba**, a polygamist; there is also no dispute that the said Njuguna Kerimba was the father of Gichana Njuguna, (father of the respondent) **Karonge Njuguna** (father of the appellant) and **Joram Kangethe**. These three brothers have settled on the suit premises with their respective families; that the suit land is divided into three portions and each family is in occupation of a distinctive portion; the three

brothers were from the house of **Njeri** wife of Njuguna Kerimba. The appellant is the registered proprietor of the suit land from the 1st registration.

The following facts were disputed; the appellant contended that he was given the suit land by his grandfather Njuguna Kerimba way back in 1952 as a gift in consideration of the care he gave to both his grandfather and grandmother who were disabled; that the rest of the sons of Njuguna Kerimba had disappeared into the forest during the state of emergency and abandoned their parents who were left under the care of the appellant; when the Mau Mau war ended, the sons and grand children were all sent to school with exception of the appellant who remained behind to care for his grandparents and as a result and in consideration for his services he was given the suit land as a gift.

The appellant gave evidence but did not call any witness. On the part of the respondent, his evidence was supported by the mother of the appellant, one **Sera Wangari** who testified as DW2. Her evidence was quite profound and we reproduce what she told the trial Judge verbatim;

> **"l live in Mwimuto. The plaintiff is my son. He resides with me. The defendant's father and my husband are brothers. Gichanga Njuguna is the father of the defendant and he is dead. Another brother of my husband is Joram Kangethe. The family of brother in law all of us stay together in the same land. We were staying together even before emergency. The land is registered in the plaintiff's name who is named after my father. The idea was to forestall it being confiscated. He is registered on behalf of others. The land belonged to my father in law Njuguna Kerimba. Njuguna had 5 wives. Njeri was my mother in law Njeri had three sons.**
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> **Colonial administrator wanted to take that land. It was decided to subdivide it and have it registered in different names of the sons so that it appeared small. This way we saved it from being confiscated. Those who were registered were those who were given names from their mother's side. My brothers in law were well known Mau Mau so we did not use their names. My husband was hanged at Githunguri during the emergency. The father of the defendant was in the forest when my son was registered as owner of the land.**
>
> **It is wrong for my son the plaintiff to claim the whole land for himself. The land belongs to the three sons of Njeri. On the ground the land is divided into three portions as those portions are further divided according to {people in those families} my two sons live with me on the same land. I don't know why my son claims that I am not his mother. I have no place to go. I can see myself MFI A photograph. Taken during the burial of my son the defendant is also there with my other son"**

Samuel Kiburi Njuguna (DW3) uncle to both appellant and respondent also gave evidence in support of the respondent's case. This is what he said in a pertinent portion of his evidence;

> **"… all the sons of Njeri live on one plot of land. I know why the land is registered in the name of (sic) defendant. It was during demarcation I was in charge of demarcation for the family. The Chairman of demarcation found the land to be too big 41 acres. He advised my father to register it in the names of those children who do not bear family names. This was because the chief would not be able to tell from the register that the land belonged to our family. 6 acres of our land had been taken as punishment because my brother was in the forest.**
>
> **I was one of those people in whose names the land was registered, the other was Mbugi and Kiminda the plaintiff and my father. Three of us had 10 acres and my father 11 making a total of 41 acres. We chose those people who did not have Gichaga as their names. All these were named after their mother's father.**
>
> **The plaintiff was a child then. He even didn't know that he was registered as proprietor. It was I and my father who knew. My portion I have shared with those from my house (mother's). The land registered in the plaintiffs name has also been divided on the ground**

among other members of his house (Njeri's house) that land does not belong to plaintiff alone….."

Upon consideration of the entire evidence, the learned trial Judge was satisfied that the appellant was registered as proprietor of the suit land in trust for himself and the sons of Njeri. The Judge also found the appellant was only a boy at the time he was registered as proprietor; and that the land was not given to him as a present by his grandfather as his mother and uncle who testified as defence witnesses were better placed to know what took place than the appellant. The Judge also found the appellant was not a truthful witness especially when he disowned his own mother but later admitted she was the mother when he was confronted with a family photograph. With these conclusions the learned Judge dismissed the appellant's suit with costs and entered judgment for the respondent as was prayed in the counterclaim with costs.

This is the judgment that has provoked this appeal which is predicated on six grounds of appeal which we summarize as follows;

The learned Judge erred in law and fact in;

- **Holding the respondent was entitled to share land parcel no Lari/ Kirenga/ 545 without any supporting documents of ownership**

- **Failing to consider that the respondent and his family had their own land which was supported by an official search**

- **Admitted the respondent's evidence which was not corroborated**

- **Finding the appellant was untruthful witness without factual or legal basis**

- **Finding the appellant was registered as proprietor of the suit property in trust of himself and other family members despite the fact that the appellant is registered as the sole owner.**

- **Erroneously applying the doctrine of adverse possession.**

During the hearing of this appeal, **Miss Wachanga**, learned counsel for the appellant expounded on the above grounds by emphasizing that the evidence by the appellant that he was given the suit land by his grandfather as a gift was not challenged; there was no evidence before the court to show the existence of a trust. **Section 126(1)** of the Registered Land Act is specific that a trust should be indicated in the register; the appellant's title does not show any trust. Moreover **section 28** of the Registered Land Act provides for absolute right of ownership that is indefeasible and there was no allegation or evidence of fraud. Counsel further argued that the learned Judge did not give reasons as to why he concluded that the appellant was entitled to the suit property under the doctrine of adverse possession. The respondent did not establish that he was in adverse possession because the title was registered in 1971 and the suit herein was filed in 1981 therefore the respondent had not occupied the land for 12 years and the claim for adverse possession could not hold. Lastly counsel submitted that the order that the entire portion be transferred to the respondent was illogical because the entire parcel is about 8 acres which are divided into three portions and the appellant occupies one portion. Counsel urged us to allow the appeal.

On the part of the respondent, **Miss Mutegi** learned counsel for the respondent submitted that the suit premises was registered in the name of the appellant as trustee for his brothers under the Kikuyu customary law of trust. By the time the property was demarcated and allocated to the appellant he was merely a minor, and it was so registered to protect it from being grabbed by the colonialist. It was registered in the name of the appellant to disguise it as the appellant was named after his mother's family. The evidence regarding the trust was overwhelmingly given by the appellant's mother and uncle. Counsel submitted that the original suit was filed in 1976, it was amended in 1981 and further amended in 1994 when the counter claim for adverse possession and declaratory orders was added; both claims for adverse possession and trust were proved; the respondent has been in occupation of the suit land from 1957 to date, which is not denied by the appellant; counsel urged us to dismiss the appeal.

In response to the aforestated, **Miss Wachanga** contended that although the appellant did not admit there existed a trust as none is registered on the title, should this Court conclude there was a trust, then the trust should be declared for the portion that is occupied by the respondent and not for the entire parcel of land.

This is a first appeal, that being so, we are alive to our duty to reevaluate and analyze the evidence and come up with our own conclusions as stated by *Sir Clement de Lestang VP* in ***Sellev. Associated Motor Boat Company*** ***[1968] E.A. 123 at p. 126;***

> ***"…… An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.***

The above was cited with approval by this Court's decision in ***Jivani v. Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431.***

The claim by the appellant as captured in the only statement of claim pleading that we found in the record of appeal states as follows;-

> ***"In 1976 the defendant constructed a house in my land Lari/Kirenga/545. Since then I have asked the defendant to vacate the land and he has refused and neglected to move…I pray for judgment against the defendant for ;(1) eviction order (2) incidental expenses incurred shs 120.90 (3) costs of the suit."***

The respondent filed a statement of defence denying the appellants' claim and stated that he had lived on the suit land from 1957. This is what he pleaded in some pertinent portions of an amended defence and counterclaim that was filed on 24th November 1994;-

> ***"That further and without prejudice to the foregoing paragraph the defendant avers that the matters pleaded in the plaint are res-judicata being the subject matter in SRMCC 121 of 1976.***
>
> ***Further to paragraph 3 above the defendant contends that his honourable court has no jurisdiction to try and determine this suit by virtue of Nairobi High Court Appeal case no 49 of 1977 the same was disposed under section 18 (1) b of the Civil Procedure Act Cap 21 of the Laws of Kenya…***
>
> ***Counter Claim***
>
> ***The defendant states that during the land consolidation and demarcation the said parcel of land was clearly divided into three portions and allotted to this two brothers and him. That he resides in the said parcel of land known as Lari/ Kirenga/545 and he has resided in the said portion since the same was allotted to him by his father. The defendant will contend at the hearing hereof that the said*** *Kimida Kirome* ***was aware of the defendant's ownership and interest in the land but has refused to surrender the same. The defendant further states that he has been on the suit parcel since 1957 and prays that he be registered as owner under the doctrine of adverse possession"***

These were the pleadings that were before the learned trial Judge. The appellant gave evidence. The gist of his claim was that he was the registered proprietor of the suit land, for which he produced a copy of the title; he contended that the title was given to him by his grandfather in 1952; as a gift for caring for his grandparents while the rest of the family was in the forest and when they returned, they went to school

while he continued to care for the grandparents. The appellant did not call any witness.

On the part of the respondent, he gave evidence and called the appellant's mother and uncle who also testified as defence witnesses. From the evidence that was before the learned Judge, three issues stand out; that is whether the suit land was family land held by the appellant in trust; whether the respondent was in adverse possession of the suit land; and whether the Judge failed to regard the appellant's evidence.

The core of this appeal is whether there was a trust; and for this reason we have to revisit this issue against the undisputed fact that the appellant is the registered proprietor of the suit land. Counsel for the appellant relied on the provisions of ***sections 28*** and ***30*** of the Registered Land Act; but more particularly on ***section 143(1)*** of the said Act which provides:-

> ***"Subject to subsection (2) the Court may order rectification of the register by directing that any registration be canceled, or amended where it is satisfied that any registration (other than a first registration) has been obtained made or omitted by fraud or mistake."***

In the present case there was no question of fraud or mistake. The appellant's case was that the suit land originally belonged to his grandfather and it was given to him as a gift in consideration to the services he rendered to his grandparents. On the other hand the respondent, the appellant's mother and uncle gave evidence that convinced the trial judge that the appellant was registered on behalf of the members of the family to forestall the land from being taken from the grandfather by the colonial administrators.

To us just like the trial judge, this evidence alludes to a procedure or custom where a member of the family is trusted to be registered as trustee for others. It is not at all alien even in modern times, and more so during those volatile days of colonial suppression and moments of anxiety when land was being taken away by the colonial administration. The appellant did not offer any evidence as to how as a minor he was gifted a huge chunk of land, when no land was given to the members of his household (the house of Njeri). We find the situation in this case is well covered by the decision of Madan J. (as he then was) in ***Gatimu Kinguru v. Muya Gathangi [1976] KLR 253 at p.263*** where he said:-

> ***"Under section 143(1) a first registration may not be attacked even if it is obtained made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom, which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold***."

The above was cited with approval in ***Kanyi v. Muthiora [1984] KLR 712 at p. 721*** where **Chesoni, Ag. J.A**. (as he then was) said:-

> ***"Section 143 of the Land Registered Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under the Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Muthiora's land: See proviso to section 28 of the Act and Gatimu Kinguru v. Muya Gathangi [1976] KLR. 253.***
>
> ***There was overwhelming evidence of a trust in favour of Nyokabi."***

Upon reviewing the evidence, we agree the learned trial Judge correctly found that the appellant was registered as proprietor of the suit land as trustee for himself and his two brothers. There was ample evidence of the history of the suit land that fell squarely within the context of principle of customary trust.

On the issue of adverse possession, the trial Judge did not dwell on the doctrine perhaps because he

decided the case on trust. Under the doctrine of adverse possession, the respondent had to prove that he occupied the suit land as of right for a period of 12 years **Nec vi, nec clam, precario** (no force no ceasing no persuasion). The possession must be continuous, open and notorious. Looking at the evidence in this matter, the respondent was in occupation of the suit land from 1957. Even if the adversity can be said to have started in 1971 when the title was issued, he filed the counterclaim in 1994 well after 12 years. In our view the claim under adverse possession is not without merit.

The last issue is on the evaluation of the evidence; that the appellant's evidence was found unreliable. On this we can do no better than refer to the principle enunciated in the celebrated case of **Peters v. Sunday Post [1958] E.A.**

424 and **p. 429 E Sir Kenneth O'Connor P.** said:-

> **"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 hav**e **come to a different conclusion**"

It is the trial Judge who had the advantage of seeing the appellant as he testified to watch his demeanor and to determine whether he was speaking the truth. The evidence clearly shows that he stated his mother was dead and it was only after intense cross examination that he admitted DW2 was his mother. We find the conclusion drawn by the Judge was based on the evidence on record.

Although we find this appeal lacking in merit, we concede the learned Judge overlooked, when issuing the order allowing the counter claim, to specify the portion of land that was to go to the respondent. The suit land is occupied by three families of the appellant, respondent and **Joram Kangethe**. Accordingly the portion of land to be transferred to the respondent is the portion he has been occupying which according to the evidence is delineated on the ground. In the event the boundaries are not ascertainable, the portion to be transferred to the respondent is one third of LR Lari/Kirenga 545within the area where he has carried out his development.

This being a family matter, we order each party to bear their own costs of this appeal as we do not wish to set them against each other any longer.

Dated and delivered at Nairobi this 6th day of February, 2015.

M. K. KOOME

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JUDGE OF APPEAL

P. M. MWILU

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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