



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 222 OF 2010

NAHASHON KARENGE1ST APPELLANT

JUSTUS THIRU ZAKAYO2ND APPELLANT

AND

LAWRENCE KARENGERESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Embu (W. Karanja, J.) dated and delivered on 10th June, 2010

in

HCCC No. 34 of 2004)

JUDGMENT OF THE COURT

1. There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents acquisition of title to the same.
2. The dispute in this case is a claim for land by a son (the respondent) against his father (1st appellant). The 1st appellant died after this appeal was filed and his appeal was abandoned. The appeal is now between the 2nd appellant and the respondent.
3. The original suit property is **Land Reference No. Kagaari/Kanja/1368**. At all material times, the suit property was registered in the name of the 1st appellant. The 1st appellant during his lifetime sub-divided the property into six plots and gave to his children but retained two plots one of which he sold to the 2nd appellant. **Plot No. Kagaari/Kanja/6392**, was retained by the 1st appellant and is registered in his name. **Plot No. Kagaari/Kanja/6391**, was sold to the 2nd appellant and is registered in the name of the said 2nd appellant. The 1st appellant obtained consent of the relevant Land Control Board to sell the plot to the 2nd appellant.
4. By a re-amended plaint dated 14th December, 2004, the respondent filed suit against the 1st appellant who is his father seeking a declaration that the 1st appellant hold **Land Reference No. Kagaari/Kanja/1368**, in trust for the 1st appellant's immediate family. The respondent further

sought a declaration that he is entitled to the area of 1 ¼ acre where his homestead is or alternatively that he is entitled to 1 ¼ acre of land in any part of **Land Reference Kagaari/Kanja/1368**, plus damages to his properties presently standing on his homestead and the value of tea harvested and sold. The respondent also sought orders to compel his father, the 1st appellant, to sub-divide and register in the name of the respondent the portion of land to which the respondent is entitled. The respondent sought an order rectifying the land register by cancelling the 2nd appellant's title to **Plot No. Kagaari/Kanja/6391**, and replacing it with the respondent's name.

5. The gist of the respondent's claim against the appellants as stated in the re-amended plaint is that the 1st appellant held the suit property in trust for his immediate family and jointly with the 2nd appellant, they fraudulent and illegally conspired to sub-divide the suit property and the 2nd appellant fraudulently purchased from the 1st appellant **Plot No. Kagaari/Kanja/6391**. That the 2nd appellant fraudulently obtained title to the respondent's portion of the suit property. Of relevance to this appeal is prayer (d) (i) in the re-amended plaint where the respondent sought orders as follows:

“A permanent injunction restraining the defendants their servants and or agents from trespassing, selling, charging, transferring, evicting the plaintiff or harvesting the plaintiff's tea or in any way interfering with peaceful occupation of the land occupied by the plaintiff unless otherwise directed by this court”.

6. The learned Judge upon hearing the parties to the suit made the following orders:

“I agree with counsel for the defendant that plot No. 1368 is no longer in existence. I also find that most of the plots have been registered to the other family members of the 1st defendant who therefore hold distinct titles which cannot be affected by this judgment. It would therefore be superfluous to declare that the 1st defendant holds their land in trust for them. The only declaration this court can make which is nonetheless not sought is that the 1st defendant holds plot no. Kagaari/Kanja/6391 in trust for the plaintiff and any other of his family members who have not been given their share of the said land. In sum, my finding is that the plaintiff has only managed to prove a fraction of his case on balance of probabilities. All his prayers are dismissed save for the prayer (d) (i) in the plaint”.

7. Aggrieved by the judgment of the High Court (*Hon. W .Karanja, J. as she then was*), the appellants lodged this appeal citing various grounds as follows:

- i. ***That the learned Judge erred in law in making a declaration a prayer that she concedes had not been sought by the respondent.***
- ii. ***That the learned Judge erred in law when she concluded by allowing the respondent's prayer (d) (i) in the plaint without stating which plaint she relied on as there is the original plaint, amended plaint and a re-amended plaint.***
- iii. ***That the learned Judge erred and failed to realize the prayer (d) (i) in the re-amended plaint is too nebulous, vague and ambiguous as it does not define the acreage of the portion occupied by the respondent and neither can the 1st appellant be permanently restrained from trespassing on his own land among other things.***
- iv. ***That the learned Judge erred in law when in her judgment she said that the 2nd appellant was the purchaser of the parcel of land which the respondent was claiming from the 1st appellant yet he had purchased a 0.5 acre portion while the respondent was claiming 1 ¼ acres.***
- v. ***That the learned Judge erred when she stated in her judgment that Land Control Board consent must be obtained within six months otherwise any land transaction is void. That the***

learned Judge further erred in law when she considered the date of granting of the consent by the Land Control Board to declare the transaction between the 1st appellant and 2nd appellant void instead of the date when the application for consent of the Board was made.

- vi. *That the learned Judge erred in law when she came to the conclusion that the sale of ½ acre being land reference no. Kagaari/Kanja/6391 to the 2nd appellant by the 1st appellant was void yet neither party to the transaction was complaining.*
 - vii. *That the learned Judge erred in law in ordering that the ½ acre portion of land do revert to the 1st appellant yet no party made such a prayer in their pleadings.*
 - viii. *That the learned Judge erred in law by finding that the respondent had equitable rights over land parcel no. Kagaari/Kanja/6391 yet the evidence were to the effect that earlier on he had been living in Mwea and not on the suit land.*
8. During the hearing of the appeal, learned counsel Mr. Joe Kathungu represented the 2nd appellant while learned counsel Mr. P. N. Mugo appeared for the respondent. The respondent filed a cross-appeal faulting the learned Judge for failing to award costs to the respondent against the 2nd appellant.
 9. Counsel for the appellant reiterated the grounds of appeal and submitted that the learned Judge erred in granting a prayer that had not been pleaded by any of the parties. It was submitted that prayer (d) (i) of the re-amended plaint as granted by the High Court was vague as it did not specify the acreage of land that the respondent was to obtain. Further, counsel stated that the learned Judge erred in her findings that the sale of land to the 2nd appellant by the 1st appellant was null and void for want of consent of the Land Control Board. The learned Judge was faulted for finding that consent of the Land Control Board must be obtained within six months of the sale agreement. It was submitted that the correct position in law is that an application for consent of the Land Control Board must be made within six months of the sale agreement and it is not mandatory that the consent must be obtained within six months. Counsel submitted that no evidence was adduced before the Judge to show that the application for consent was made six months after the date of the sale agreement. Counsel emphasized that the 2nd appellant was a *bona fide* purchaser for value of **Plot No. Kagaari/Kanja/6391**, and he had acquired the relevant consent of the Land Control Board and had title issued in his name. That the learned Judge erred in law in disregarding these material facts in relation to the 2nd appellant's title when the evidence on record showed that the respondent had his own land and he had never lived on the suit property. Pertaining to the cross-appeal, counsel for the 2nd appellant submitted that award of costs is at the discretion of the court and in the instant case; the learned Judge was right in not awarding any costs to the respondent. It was submitted that the learned Judge gave the reasons for not awarding costs indicating that she could not infer fraud on the part of the 2nd appellant.
 10. Counsel for the respondent in opposing the appeal submitted that the appellants had failed to prove that they obtained consent of the Land Control Board within six months of the sale agreement in relation to sale of **Plot No. Kagaari/Kanja/6391**. It was submitted that the sale agreement is dated 4th June, 2003, and the Land Control Board consent was given 16 months later on 15th October 2004. Counsel submitted that it was incumbent upon the appellants to produce in court the application form for consent of the Land Control Board. Counsel for the appellant reply stated that the issue of consent of Land Control Board was never pleaded and was raised by the respondent during cross-examination of the 2nd appellant. In any event, it was submitted that consent of the Board was obtained and both the seller and purchaser are not disputing or challenging the validity of the sale transaction and the consent that was obtained.
 11. Counsel for the respondent brought to the attention of this Court that the 1st appellant is now deceased and urged this Court to refer the dispute between the parties to a Succession Court where the respondent's claim and entitlement to inherit the estate of the 1st appellant can be considered. Counsel submitted that the learned Judge ordered that **Land Reference No. Kagaari/Kanja/6391**, should revert to the name of the 1st appellant and as such, it now forms part of the estate of the

deceased 1st appellant. For the respondent, it was submitted that the suit property was initially clan land and was held in trust and was to be shared among every member of the clan. That under **Section 40** of the **Succession Act**, the property of the 1st appellant should be shared equally amongst the beneficiaries. In relation to the cross-appeal, counsel for the respondent submitted that the learned Judge erred in not awarding costs against the 2nd respondent as cost should follow the event. Counsel concluded by urging this Court to refer the estate of the deceased to the Succession Court where the claim of the respondent shall be considered.

12. We have considered submissions by both counsels in this matter. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. It was put more appropriately in ***Selle v Associated Motor Boat Co., [1968] E A 123***, thus:

“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 an 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 witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial 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 (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)”

13. The dispute in this case pitted the respondent and the 1st appellant who are son and father respectively. The respondent claims land from his father. When the suit was filed at the High Court and when this appeal was lodged, the 1st appellant was alive. In the case of ***Marigi –v- Muriuki & 2 Others, Civil appeal No. 189 of 1996 [2008] 1 KLR 1073***, it was stated that the law recognizes the rights of children over their father’s estate. These rights are inchoate and accrue upon the death of the father.

14. The inchoate rights of the respondent to the land owned by the 1st appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1st appellant) died. It is our considered view that the learned Judge erred in making a declaration in favour of the respondent against his father (the 1st appellant) and enforcing rights that were inchoate that had not accrued. We find that the learned Judge erred in law in failing to note that the respondent’s right to claim any land from the 1st appellant were inchoate rights and she did not address this issue. Further, the learned Judge ignored the fact that the 1st appellant was the registered proprietor of the suit property and it was an error of law to restrain the 1st appellant from trespassing and dealing with his own land.

15. In the instant case, the learned Judge made a finding that the respondent’s claim as against the 1st appellant must be looked at as a customary law trust claim. The Judge correctly noted that the respondent’s interest in the suit property is not noted in the register. The Judge correctly observed that the 1st appellant was alive and he could not be compelled to transfer 1 ¼ of his land to the respondent who was his son. In the case of ***Muriuki Marigi –v – Richard Marigi Muriuki & 3 Others, (Civil Appeal No. 189 of 1996)*** this Court stated as follows:

“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute among them. He may not be urged, directed or ordered to do it against his will”

16. The dicta and law as stated in the above case of ***Muriuki Marigi –v – Richard Marigi Muriuki & 3 Others, (Civil Appeal No. 189 of 1996)*** still stands and is good law. Applying the dicta to the facts of the instant case, it is our considered view that the learned Judge erred in granting prayer

- (d) (i) of the re-amended plaint. In so granting prayer (d) (i) the learned Judge erred in law by restricting the free will of the 1st appellant as the registered proprietor of the suit property to do as he wishes with his property. The learned Judge further erred in law by issuing an order restraining a registered proprietor from entering and dealing with his own property and enforcing an inchoate right which had not accrued. Whereas a child cannot compel a parent to distribute his estate during his lifetime, we hasten to add that child who is in occupation of his/her parents' property that is held in trust has occupational rights that should be protected.
17. Pertaining to the sale transaction between the 1st appellant and the 2nd appellant, the learned Judge erred in law in finding that the sale transaction on plot **Kagaari/Kanja/6391**, was null and void for want of consent of the Land Control Board. The evidence on record shows that the sale agreement between the 1st appellant and 2nd appellant was made on 4th June, 2003, and consent of the Board was obtained on 15th October, 2004. There is no dispute that consent was obtained. The Land Control Act provides that the consent of the Board is final. Both the sale agreement and consent were not produced as exhibits in court. The learned Judge stated that “...*the law commands that the said consent be obtained within 6 months after the agreement is entered into. ... The consent must be obtained within 6 months of the transaction.*” It is our considered view that this is a misstatement of law. **Section 8 (1)** of the **Land Control Act** states that an application for consent shall be made within six months; it is the application for consent that must be made within six months. It is a misstatement of law to hold that **Section 8 (1)** makes it mandatory for the Land Control Board to give its consent within six months. To this end, we find that the learned Judge erred in holding that the sale transaction between the 1st and 2nd appellants was null and void. The sale transaction between the 1st and 2nd appellant was valid as the requisite consent from the Land Control Board was obtained. The 2nd appellant has a valid title to the **Plot Kagaari/Kanja/6391**, which he purchased from the 1st appellant and this **Plot Kagaari/Kanja/6391**, is not part of the assets or estate of the 1st appellant who is now deceased.
18. In **Michael Githinji Kimotho – vs- Nicholas Muratha Mugo, -Civil Appeal No. 53 of 1995** this Court differently constituted stated that:

“The protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser”.

19. In the instant case, the 2nd appellant is the registered proprietor of **Land Reference No. Kagaari/Kanja/6391**. There is no question of customary or constructive trust between the 2nd appellant and the respondent. If there is any trust or equitable rights in favour of the respondent, the same is to be claimed against the estate of the 1st appellant. The learned Judge found that no fraud was proved on the part of the 2nd appellant in his acquisition of title to **Land Reference No. Kagaari/Kanja/6391**. We uphold the sanctity of title of the 2nd appellant and we set aside the order and direction that **Land Reference No. Kagaari/Kanja/6391**, measuring ½ acre do revert to the 1st appellant. The 1st appellant of his free will sold the property to the 2nd appellant who has acquired a valid and indefeasible title thereto.
20. For the above reasons, this appeal has merit and we hereby allow the same and set aside the judgment dated 10th June 2010. We set aside all consequential orders and decree ensuing from the said judgment. We hereby substitute the said judgment with an order that the suit as filed by the respondent at the High Court be and is hereby dismissed with costs. The respondent shall pay the costs of this appeal.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR