



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GITHINJI, MUSINGA & M'INOTI, J.J.A)

CIVIL APPEAL NO. 227 OF 2005

BETWEEN

JOSEPH GITAU GITHONGO.....APPELLANT

AND

VICTORIA MWIHAKI MUNYA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mugo, J.) dated 14th July 2005

in

H.C.C.C. No. 810 of 1992)

JUDGMENT OF THE COURT

This appeal arises from the judgment of the High Court (Mugo, J.) by which the learned judge held on 14th July, 2005 that the appellant, **Joseph Gitau Githongo**, holds 3 acres of **Land Reference No. NGENDA/KIMUYU/181 (the suit property)** in trust for the respondent, **Victoria Mwhihaki Munya**. The primary facts of the appeal are not in serious dispute and may be stated thus:

The appellant and the respondent are brother and sister, the children of the late **Githongo** of Ngenda Location who died in 1940. The suit property, which is situate in Kiambu District and measures approximately 12 acres, belonged to the said Githongo before being registered in 1958 in the name of the appellant as absolute proprietor under the repealed **Registered Land Act, cap 300**. The respondent has lived all her life on the suit property, save, according to her, for a period of less than one year, and according to the appellant, of about four years, when she lived with one **James Munya Rieu (Rieu)**.

On 14th February, 1992, the appellant filed **High Court Civil Suit No 810 of 1992** seeking, on the main, an order for the eviction of the respondent from the suit property and general damages for trespass. His contention was that he was the registered proprietor of the suit property; that the respondent was married under Kikuyu customary law to the said Rieu and had 6 children with him; that she was in occupation of the suit property temporarily and courtesy of his magnanimity pending reconciliation and eventual return to her husband; that she had refused to vacate the suit property upon request to do so by the appellant; and that under Kikuyu customary law a married daughter can never inherit the property of her father.

The respondent filed her defence and counterclaim on 4th March, 1992 in which she contended that the suit property was family land; that the appellant was registered as proprietor of the same in trust for her; that she had never been married to Rieu; and that her 6 children were not his. She accordingly prayed for a declaration that the 3 acres of the suit property which she occupies were registered in the name of the appellant in trust for her and an order for subdivision and registration of the same in her name. In the alternative, she prayed for a declaration that she was the owner of the 3 acres by adverse possession.

The evidence in the proceedings before the High Court was taken by **Rimita, J.** who however was not able to write the judgment. Before **Rimita, J.** both the appellant and the respondent testified, but called no witnesses. The task of writing the judgement fell on **Mugo, J.** who, after considering the evidence on record, dismissed the appellant's suit as well as the respondent's counterclaim to the extent that it was founded on adverse possession. However, the court found in favour of the respondent regarding the trust and ordered that the suit property be subdivided and 3 acres thereof be registered in the name of the respondent. That decision precipitated the current appeal.

The appellant's memorandum of appeal listed some 12 overlapping grounds of appeal. In our view, the main issues raised in the appeal are 3, namely, that the learned trial judge erred by holding that:

- i) **the respondent was not married to Rieu,**
- ii) **the respondent was entitled to a share of the suit property under Kikuyu customary law; and**
- iii) **the appellant held 3 acres of the suit property in trust for the respondent.**

With the consent of both parties, the appeal was heard by way of written submissions under **Rule 100 of the Court of Appeal Rules**. Mr Gichuru, learned counsel for the appellant, submitted that the learned judge had erred by relying on the Kikuyu system of naming children to conclude that the respondent was not married to Rieu. In his view, there was credible evidence that Rieu had paid dowry to the appellant who was acting as the respondent's father for purposes of the customary marriage and that the respondent had thereafter cohabited with Rieu from 1948 to 1952. That period of cohabitation, counsel contended, was long enough for the court to presume marriage by cohabitation on the authority of the judgments of the former Court of Appeal for East Africa in **HORTENSIAH WANJIKU YAWE VS PUBIC TRUSTEE, Civil Appeal No 13 of 1976** and of the High Court in **VIRGINIA WAIRIMU WANJUI VS JAMES MBATIA WANJUI, Misc. Civil Case No 215 of 1979**.

Regarding the trust, learned counsel submitted that from the evidence, the suit property belongs exclusively to the appellant as his share from his deceased father and that the other children of the deceased had also been given their shares. Mr Gichuki criticized the learned Judge for holding that the appellant was a "Muramati" without any evidence and for compelling only the appellant, of all the children of the deceased, to share his inheritance with the respondent. In counsel's view, the respondent became a trespasser the moment the appellant withdrew permission for her to be on the suit property.

Counsel concluded by faulting the finding by the learned Judge that the respondent was in occupation of 3 acres of the suit property as one based on conjecture rather than evidence.

For the respondent, Mr Mureithi, learned counsel, opposed the appeal as bereft of merit. Counsel submitted that the trial court had, on the evidence before it, properly concluded that the respondent was not married to Rieu since, among other things, her children were named, in accordance with Kikuyu customary law, after persons from her father's side rather than that of her alleged husband. It was learned counsel's submission that confronted with conflicting evidence from the appellant and the respondent, the learned Judge had found the evidence of the respondent more credible and therefore there was no proper basis established by the appellant to interfere with the conclusion of the learned judge.

Regarding the right of the respondent to inherit from her father, Mr Mureithi submitted that having held that the respondent was not married, the learned Judge was right in holding that she could inherit from her father under Kikuyu customary law. In counsel's view, the suit property was registered in the name of the appellant as the eldest son in his capacity as "Muramati" to hold a share thereof in trust to the respondent. The judgement of this Court in **NJUGUNA VS NJUGUNA (2008) 1 KLR (G&F), 889** was relied upon for the proposition that under Kikuyu customary law the eldest son inherits land as a "Muramati" to hold in trust for himself and the other heirs.

Learned counsel concluded his submissions by addressing the share of the suit property that was awarded to the respondent. In his view, the respondent's averment that she was in occupation of 3 acres of the suit property was never controverted, either by pleadings or evidence and that in the circumstances the Court was justified in finding the issue as proved.

This being a first appeal, we are enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to our own independent conclusion. (See **EPHANTUS MWANGI AND ANOTHER VS DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278** and **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123**). The ordinary caution that we should equally always bear in mind and make allowance for the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, is diminished in this appeal because the hearing took place before a different Judge from the one who wrote the judgement. Nevertheless, we shall still bear in mind the caution that as an appellate court we have to be very slow in interfering with the trial judge's findings unless it is satisfied that either there was absolutely no evidence to support the findings or that the trial Judge had misunderstood the weight and bearing of the evidence that was adduced and thus arrived at an unsupported conclusion. (See **MUSERA VS MWECHELESI & ANOTHER (2007) 2 KLR 159** and **JOHN GATIBA BURUNA & ANOTHER VS JACKSON RIOBA BURUNA CA No. 89 of 2003**).

The burden is upon a party who wishes to rely on customary law to prove the custom in question. (See **NJOKI VS MUTHERU (2008) 1 KLR (G&F) 288**, **ATEMO VS IMUJARO (2003) KLR 435**), **GITUANJA VS GITUANJA (1983) KLR 575** and **KIMANI VS GIKANGA (1965) EA 735**). In **KAITTANY & ANOTHER VS WAMAITHA**, this Court stated that "**the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case**". The appellant set out to prove that the respondent was married under Kikuyu customary law and that by virtue of that marriage she was not entitled to inherit from her father. On the other the respondent set out to prove in her counter claim that the appellant held the suit property in trust for her as a "Muramati" under Kikuyu customary law. To succeed, each party was obliged to satisfy the court on a balance of probabilities in their respective claims.

In our opinion, the appellant did not adduce any credible evidence of the alleged marriage between the respondent and Rieu. The only witness on this issue was the appellant himself. His rather sketchy evidence was that the respondent was married to Rieu in 1948 and that he had acted as her father and received dowry from Rieu. That dowry comprised 6 goats, Kshs 800/- and traditional liquor. Following matrimonial disharmony, the respondent returned to her father's home in 1952 and the appellant permitted her to build on and cultivate a portion of the suit property, pending resolution of her matrimonial problems. The respondent has lived on that portion since. The appellant also testified that he had not returned Rieu's dowry, suggesting that the respondent was still married to him.

The appellant wished the trial court to conclude from the above scanty evidence that the appellant was married to Rieu under Kikuyu customary law and therefore excluded from inheriting any property from her deceased father. The essentials of a valid Kikuyu customary marriage are now well settled. In his pioneering work, **RESTATEMENT OF AFRICAN LAW: KENYA VOLUME 1 THE LAW ON MARRIAGE AND DIVORCE**, Sweet & Maxwell, 1968, Dr Eugene Cotran states that there can be no valid marriage under Kikuyu law unless a part of ruracio (dowry) has been paid and more categorically, that “No marriage is valid under Kikuyu law unless the Ngurario ram is slaughtered”.

The elaborate procedures entailed in the Ngurario ceremony are described in detail in **Jomo Kenyatta’s FACING MOUNT KENYA**, Heinemann Books, 1988, Chapter VII. Those procedures were also considered by **Madan, J.**, as he then was, in **ZIPPORAH WAIRIMU VS PAUL MUCHEMI**, HCCC No 1280 of 1970, where he concluded that “No Kikuyu marriage is finally valid unless Ngurario is performed.” The learned Judge observed that Ngurario is performed to show that the boy and the girl have been united and that Ngurario gives the marriage “the final sanction of validity”. The importance of Ngurario to a valid customary Kikuyu marriage has been emphasized in other judicial decisions including **CASE VS RUGURU (1970) EA 55**, **IN THE MATTER OF THE ESTATE OF GEOFFREY GITHU KAHORO (DECEASED)** HCSC No 2163 of 2011, and the decision of this Court in **ELIUD MAINA MWANGI V MARGARET WANJIRU GACHANGI**, CA No 281(A) of 2003.

The appellant did not adduce any evidence regarding the performance of this critical ceremony to a valid Kikuyu customary marriage. In **PRISCILLA WARUGURU GATHIGO vs VIRGINIA KANUGU KATHIGO**, HCSC No 31 of 2001 (Nyeri) which involved a protest by a lady alleging to have been married to the deceased under Kikuyu customary law, **Okwengu, J.** (as she then was), rejected the claim on the following basis:

“Having carefully considered the evidence I find that the evidence adduced by the Protester in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and 2 brothers there were no other independent witnesses to the customary formalities. There was no evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased’s relatives who participated in the alleged formalities.”

In similar terms, in rejecting the appellant’s contention in this case that the respondent was married under customary law, the learned Judge expressed herself as follows:

“A most elaborate and well established system of marriage was in place during the time the defendant is said to have entered into a marital union with one Mr Munya (Rieu), with the plaintiff acting as the father. The plaintiff has not adduced evidence to the effect that the various processes necessary for a conclusive marriage contract did take place. These would have involved the various steps in signifying negotiations between his family and that of the groom, betrothal of the parties and actual marriage ceremonies and formalities. A father is deeply involved in the same, particularly the negotiations stage and would be in a position to account in detail exactly what transpired. The plaintiff herein only says he received dowry the amount of which he could not say with certainty and also that traditional liquor was given. In my considered view and in light of what is known of a Kikuyu marriage, a marriage between the defendant and James Munya cannot be inferred on the basis of such scanty evidence which in any event is not corroborated by independent testimony.”

The learned Judge also found additional support to her conclusion that the respondent was not married to Rieu from the names given to the 6 children of the respondent. It is common ground that under Kikuyu customary law, children born to a married couple are named in a particular consistent sequence. Thus, if the first born is a son, he will be named after the father of the husband, or the mother, if it she is a girl. The next boy will be named after the father of the wife, and if she is a girl, after the mother of the wife. The naming of the children keeps alternating between persons in the two families.

In this case, the evidence before the trial court was that save for the second daughter, Regina Njeri, who was named after Rieu’s mother; all the other children were named after people from the side of the respondent’s father, including the appellant himself. The respondent explained that Njeri was named after Rieu’s mother during the short duration she lived with him, hoping that the relationship would develop into a marriage. The learned trial Judge accepted the explanation, which we do not find any basis for disagreeing with. The learned Judge also found that the 6 children of the respondent could not possibly have been born between 1948 and 1952, the period which the appellant alleges the respondent was married to Rieu. She concluded, which in our view cannot be faulted, that the respondent’s children were born out of wedlock.

In light of the particular facts of this appeal, the learned Judge cannot be faulted for finding that the respondent was not married to Rieu under Kikuyu customary law, or at all and we therefore uphold her finding in that regard.

Having failed to prove that the respondent was married to Rieu, the appellant faults the trial court for failing to presume a marriage between the respondent and Rieu based on cohabitation. It has been accepted in Kenya over a long time that cohabitation of a man and a woman for a considerable period of time in circumstances where the community treats them as husband and wife, can give rise to the presumption of marriage. In **HOTENSIAH WANJIKU YAWE VS PUBLIC TRUSTEE** (*supra*), it was held that long cohabitation as man and wife gives rise to a presumption of marriage and that only cogent evidence to the contrary can rebut such a presumption. The Court further stated that the presumption of marriage arising from long cohabitation applies even under customary law. The same point was emphasized by this Court in **MARY WANJIRU GITHATU VS ESTHER WANJIRU KIARIE**, CA No 20 of 2009 (Eldoret) where Bosire, JA stated that:

“in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife.”

The rationale behind the presumption of marriage was succinctly explained by the Court as follows:

It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband”, or because he dies, occurrences which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”.

Consequently the presumption of marriage has been applied in this country in the following cases, among many others; **PETER HINGA VS MARY WANJIKU, CA No 94 of 1977, MARY WANJIRU GITHATU VS ESTHER WANJIRU KIARIE (supra), and IN THE MATTER OF THE ESTATE OF GEOFFREY GITHU KAHORO-DECEASED, HCSC No 2163 of 2011.**

Once more, there was no credible evidence adduced by the appellant to prove cohabitation of the respondent and Rieu so as to enable the court to presume a marriage between the two. The respondent was adamant that she had lived with Rieu for less than one year while the appellant claimed that she had cohabited with him from 1948 to 1952. Even if the assertion by the appellant is accepted, the fact is that from 1952 to 2002 when Rieu died, the parties had not lived together. It is certainly odd to ask the court to presume a marriage in respect of people who had not cohabited as husband and wife for a period of 50 years. If this woefully inadequate evidence of cohabitation is taken into account together with the finding of the learned judge that the children of the respondent were born out of wedlock, there would be no basis to presume a marriage between the respondent and Rieu.

On the question whether the appellant was registered as proprietor of the suit property in trust for the respondent, the following facts stand out. It is not in dispute that before registration in the appellant's name in 1958, the suit property belonged to Githongo, the father of the parties in this appeal. When Githongo died in 1940 the respondent was living on the suit premises and she was still living on it in 1958 when appellant was registered as proprietor. She continues to live there today.

The registration of the appellant as proprietor under the repealed **Registered Land Act, cap 300** constituted him an absolute proprietor and conferred on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (**section 28**). However, the proviso to that section provided that registration as proprietor under the Act did not relieve the proprietor from any duty or obligation to which he is subject as a trustee.

In **KANYI VS. MUTHIORA, (1984) KLR, 712** this Court held that registration of land in the name of a proprietor under the Registered Land Act did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as trustee. The Court further held that the trustee referred to in **section 28** of the Act included a trustee under customary law. (See also **MUKANGU V MBULI, CA No 281 of 2000**).

One of the issues raised in **KANYI VS MUTHIORA (supra)**, was the right of unmarried daughters to inherit from their fathers under Kikuyu customary law. **Chesoni, JA.**, as he then was, speaking for this Court expressed the position as follows:

“It is settled Kikuyu customary law that the estate of a deceased intestate polygamous man is inherited according to the houses. Each house gets equal share and a house is constituted by each wife. The children of each house then share their portion equally. It is true among the Kikuyu land is inherited by sons to the exclusion of married daughters, but as the learned judge correctly held unmarried daughters are entitled to inherit land, save that if they have no child their share is for life, but if they have an illegitimate child then that child inherits their share. In the latter case the unmarried daughter acquires an absolute and not a life interest.” (Emphasis added).

From the above principles and the facts of this appeal, we find that there was no bar to the respondent inheriting land from her father.

The office or concept of “Muramati” under Kikuyu customary law, particularly his duties, responsibilities and obligations, was considered by this court in **NJUGUNA VS. NJUGUNA, (2008) 1 KLR 889**. The Court held, inter alia, that the eldest son inherits land as a “Muramati” to hold it in trust for himself and the other heirs; that the “Muramati” has a duty to distribute the shares to the heirs in accordance with the wishes of the deceased or in accordance with the rules of intestacy; and that the “Muramati” is not entitled to any remuneration for his services because his duty is a moral obligation. In this appeal, the appellant and the respondent were from one of the houses of Githongo. One of their sisters was long dead and the other was married, leaving the appellant and the respondent as the beneficiaries from that house. The appellant was the first born son from their house. In these circumstances, we are satisfied that the learned Judge did not err by holding that the appellant was a “Muramati” who held the suit property in trust for the respondent. In light of the applicable rules of intestacy under Kikuyu customary law, the appellant was obliged to distribute to the respondent her share, which we take to be the portion of the suit property that she has been in occupation of. Ultimately therefore, we find that upon registration of the appellant as the proprietor of the suit property, he held the portion of the suit property occupied by the respondent in trust for her.

We do not find any substance in the complaint that the respondent did not prove that she occupied 3 acres of the suit property. In her counter claim, that is what she pleaded to be the area of the portion that she had claimed and in respect of which she had sought a declaration. The appellant did not controvert the respondent's averment; in fact he did not file any answer and defence to her counterclaim, and even if issues had been joined, he never led any evidence to controvert the respondent's claim to 3 acres.

We have come to the conclusion that this appeal has no merit and the same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 3rd day of October, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR