IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & KIAGE, JJA)

CIVIL APPEAL NO. 120 OF 2006

GICHIMU NGARA..... APPELLANT

VERSUS

THUO NGANGA.....1st RESPONDENT

NJUGUNA NGANGA.....2nd RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi delivered

by Honourable Justice Alnashir Visram on 13th May 2004

in

H.C.CA NO. 368 OF 1999)

JUDGMENT OF THE COURT

1. GICHIMU NGARA (appellant) was the defendant in Thika CMCC Suit no. 1524 of 1997 and the appellant in Nairobi HCA no. 368 of 1999. He is the elder brother of the respondents in this appeal who were the Plaintiffs and respondents in the Chief Magistrate's and High Courts, respectively. The appellant lost before the trial magistrate and repeated that fate in the High Court.

2. Being aggrieved by the High Court (Visram, J. as he then was), the appellant now raises some four (4) grounds of appeal as we repeat them hereunder:-

> "1. The learned appellate judge in the superior court erred in law by failing to treat the hearing of the appeal as a retrial therefore weigh the evidence before him carefully and thereby failed to appreciate that:-
>
> a. The plaintiff did not have proper and accurate information on the land subject matter of the litigation.
>
> b. The plaintiffs witnesses did not have hand information on both the history of the family or the history of the land subject matter of the litigation; much of their evidence was hearsay thus their evidence was unreliable.
>
> c. The glaring contradictions in the evidence adduced by the witnesses before the trial court.

2. The learned appellate judge of the superior court erred in law by failing to carefully peruse and construe the land sale agreement exhibited before the trial court and thereby misdirected himself on its actual contents and legal import thereof.

3. The learned appellate judge in the superior court erred in law by finding it permissible for the lower court to enter judgment which was not based on contents of pleadings and the prayers sought by the litigants in the trial court.

4. The learned appellate judge erred in law by failing to give any legal significance to the respondents conduct over the years which made the existence of a trust most unlikely."

3. At the hearing of the appeal Mr. Mbigi, learned counsel appearing for the appellant, submitted that the High Court did not re-assess and re-evaluate the facts before it because had it so done, it would have found that a claim based on customary trust required consistent, credible evidence for that evidence to be regarded as reliable yet there were many gaps and contradictions in the evidence at the trial. Counsel gave as examples of that failure the fact of certain witnesses talking of the parties' migration to Eldoret while others said they were not aware of such an eventuality, there was also contradictory evidence on the consolidation of parcels of land.

We heard submission that there was uncertainity as regards the identity of the suit land prior to consolidation as well as discrepancies on the actual size of the same.

Counsel for the appellant saw as the greatest misdirection of the two courts below their dealing with the evidence regarding the Sale Agreement and their failure to understand the 3rd November, 1958 Sale Agreement by which a portion of the land was transferred to the appellant.

4. Further submission for the appellant's case was that it was not disputed that the appellant had bought land and that there was no evidence that the parties' father ever owned land that could be shared between his sons. Counsel told us that the two courts below failed to consider the conduct of the respondents who migrated to Eldoret, then to Tanzania and who upon their return to the suit land did not claim any share of the same. He told us that presumption of a trust depended on everything the two courts below failed to consider. Counsel relied on some decided cases, placing real weight on that of Muchungu V Muchungu [1984] KLR 1 for the proposition that there is no automatic trust merely because one member of the family was in possession. We were urged to allow the appeal.

5. On his part, learned counsel for the respondents, Mr. Macharia, submitted that the High Court clearly analysed the evidence and came to the conclusion it did, which was the correct one. Counsel added that the suit land was properly described in the Plaint and proper acreage of the same given as 1.21 hectares which the trial court gave as 3 acres. Mr. Macharia further added that the two courts below understood the sale agreement and that in 1958 no land consolidation had been done and when the same was finalized during 1961 the appellant had bought 0.4 acres and the trial court correctly found that the acquisition of the excess land was not explained.

Mr. Macharia urged the court to take judicial notice of and consider evidence of the migration of people from Central Kenya to the Rift Valley. Counsel relied on authorities to show that the courts below were right in finding the existence of a customary trust.

6. This now is a good point to render ourselves after the above analysis and a full consideration of the entire matter. This being a second appeal we are constrained to considering matters of law only courtesy of the provisions of section 72 of the Civil Procedure Act cap. 21 Laws of Kenya. For completeness of record that section provides:

"72(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely -

a. the decision being contrary to law or to some usage having the force of law;

b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

Section 72(1) Civil Procedure Act above has found applicability in many cases, suffice here to cite only that of KENYA BREWERIES LTD V GODFREY ODOYO C.A. No. 127 of 2007 wherein Onyango Otieno JA (as he then was) stated;

"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 not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

Needless to say, the Court will not disturb findings of fact by the two courts below as we are obliged to loyally accept (unless based on no evidence) those courts' concurrent findings of fact and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law.

7. The High Court (Visram J as he then was) found as proved that the appellant's own purchased piece of land measured 0.4 acres, just as the Chief Magistrate had done, and that the surplus from the entire 1.21 hectares was not explained. Both courts accepted the adduced evidence that the extra land is what was proved as having belonged to the parties' father and which the appellant had registered himself as sole proprietor of, instead of as trustee for himself and his siblings. That, being a matter of fact, and being based on evidence, is not one we can legally interfere with.

8. The only grounds that properly fall for our consideration are those that concern themselves with failure to re-analyse and re-assess the evidence in the manner of a retrial and that the trial court's judgment was not consistent with the reliefs sought in the pleadings. Quite apart from the fact that we were not shown what reliefs not sought were nevertheless granted, the two judgments below in their analysis of the evidence and the relevant sale agreement came to the right conclusion that the appellant's own land measured 0.4 acres only and clearly nothing turned or still turns on the claim for 7.4 acres which plainly was a wrong conversion of 1.21 hectares to acres and the trial court very aptly demystified that aspect of evidence.

9. As concerns a failure by the High Court to treat the appeal to it as a retrial, we have found nothing in the judgment to support such a ground and submissions on the same. Instead, we find that the Judge dutifully discharged his mandate by analyzing and evaluating the trial court's proceedings. This he did from page 5 of his judgment through to page 6 before agreeing with the trial court on the matters in issue. Sample this:-

"The Appellant and the Respondents are brothers. The Appellant is the eldest. At the trial, the Respondents alleged that the suit land originally belonged to their father and the Appellant was registered in trust for himself and them. The Appellant's case was that he bought the suit land from a third party and that the same belonged to him alone. He produced in evidence an agreement of sale to prove this (see D Exhibit 2). That agreement showed that the Appellant bought 0.4 acres of the land known as Githumu/180 from one Gaitho Njau. However, the learned trial magistrate said that the extra portion of the suit land in excess of 0.4 acres was held in trust for himself and the Respondents since he did not explain how he obtained the difference thereof. In my view, she did not err. The witnesses called on behalf of the Respondents testified that the suit land used to belong to the parties' father. According to PW3 who was a cousin of the parties said that the parties were born on the suit land which belonged to their father. Their father had inherited the same land from his father. PW4 said the same. He is an uncle of the parties. PW5, who was a neighbour also said

the suit land belonged to the parties' father. Based on the testimony of these witnesses, I am satisfied that the trial magistrate made the correct decision.

For the conclusiveness of record, I would like to consider the submissions made on other issues as follows. Miss Machio, who argued the appeal on behalf of the Appellant, argued that the magistrate entered judgment against what was prayed for in the plaint even though the plaint was not amended. The short answer to this is that this was not one of the grounds of the appeal. However, even if it were, the same has no merit whatsoever as the judgment under consideration awarded the Respondents less land than had been prayed for. To avoid an unjust decree, the trial magistrate was perfectly correct in looking at all the surrounding circumstances and evidence. That she did and Miss Machio did not show before me that the act complained of resulted in any grave injustice. In any event, the action complained of was favourable to her client.

Miss Machio also argued that the Respondents' claim in the lower court was time barred. I did not understand the basis of this argument. What the Respondents sought to do in the lower court was to enforce a trust. This they did after the Appellant refused to give them their share of the suit land when they demanded that he does so in 1996. In my view, that is when the trust was breached and the cause of action accrued. The action was, therefore, brought in time."

10. Clearly the above demonstrates a full understanding of the proceedings and a proper analysis and evaluation of the same and if that is not a retrial then we do not know what is.

At any rate we were not given the model of a proper analysis and evaluation of the proceedings and we are not aware of the existence of one. As a result we are satisfied that a proper analysis and assessment of the proceedings was accorded to the appeal by the High Court and we must, as we hereby do, dismiss, for lack of merit, this appeal with costs.

Dated at Nairobi this 14th day of November, 2014.

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR