



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 43 OF 2013**

**BETWEEN**

**ERIKA GATHONI KARIITHI ..... 1<sup>ST</sup> APPELLANT**

**TERESIA MUMBI KARIITHI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHARLES NGATIA NGUYO (Suing on behalf of the**

**Estate of Wairimu Nguyo) ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nyeri (Ombwayo, J.)***

***dated 1<sup>st</sup> October, 2012***

**in**

**H. E.L.C No. 217 of 2012)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The respondent herein filed suit in the Environment and Land Court against the respondents seeking *inter alia*:-

- ***A declaration that the late Gerishon Kariithi Weru alias Kariithi Weru was registered as the proprietor of Land Parcel No. Magutu/Gaikuyu/261 measuring 9.25 acres to hold a portion measuring 2.62 acres in trust for the late Wairimu Nguyo Weru.***
- ***A declaration that the plaintiff (respondent) is entitled to a portion of 2.62. acres out of the resultant subdivisions of LR. No. Magutu/Gaikuyu/ 952, 953, 955 and 956.***
- ***A transfer of the whole of L.R No. Magutu/Gaikuyu/952 and 953 and a portion measuring 0.159 Ha of L.R No. Magutu/Gaikuyu/955 to the plaintiff.***

2. The background of the said suit is that the appellants' husband, Gerishon Kariithi Weru (deceased) and the respondent's father, Nguyo Weru (deceased) were brothers. It was the respondent's case that during the demarcation period, his grandfather's land, that is L.R No. Magutu/Gaikuyu/261 (suit property) measuring 9.25 acres, was registered in favour of Gerishon who was the eldest to hold the same in trust for the entire family. According to the respondent, his parents were entitled to a portion measuring 2.62 acres which Gerishon refused and/or neglected to surrender. Consequently, the respondent's mother, Wairimu Nguyo Weru (deceased) filed a claim at the Mathira Land Dispute Tribunal. The tribunal entered an award in favour of the respondent's mother directing Gerishon to transfer a portion of 2.62 acres to her. The said award was adopted as a judgment of the court on 29<sup>th</sup> July, 1993 at the Senior Magistrate's Court at Karatina.

3. However, Gerishon appealed to the High Court. Following a consent order dated 12<sup>th</sup> February, 1997 recorded in the said appeal, the award of the Mathira Land Dispute Tribunal and the decree of the subordinate court were set aside and the dispute was referred to Nyeri Land Dispute Tribunal for determination. Unfortunately, before the matter was concluded the respondent's mother passed away on 7<sup>th</sup> May, 2000. It was the respondent's case that thereafter Gerishon subdivided the said land into seven portions, transferred three portions to his children and remained with four portions registered in his name. The said four portions are L.R No. Magutu/Gaikuyu/952, 953, 955 and 956. According to the respondent, the said portions were not administered as part of the deceased's Estate in the succession cause filed by the appellants.

4. In response, the appellants' filed a replying affidavit sworn by the 1<sup>st</sup> appellant. The appellants denied the existence of any trust as far as the suit property was concerned. The appellants deposed that the aforementioned portions were not listed as part of Gerishon's (deceased's) Estate because they had been transferred by the deceased in his lifetime to his children as follows:-

- L.R No. Magutu/ Gaikuyu/ 952- Christopher Muraguri Kariithi.
- L.R No. Magutu/Gaikuyu/953- James Weru Kariithi.
- L.R No. Magutu/Gaikuyu/955- Solomon Ngatia Kariithi.
- L.R No. Magutu/Gaikuyu/956- Simon Kariithi Waweru.

Mr. Nguyo Kariithi, the 1<sup>st</sup> appellant's son, testified on behalf of the appellants. He stated that before the demise of his father there was a family dispute over the suit property between his father and the respondent's mother.

5. After considering the case on its merit, the trial court found that the appellants' husband (Gerishon) held the suit property in trust for the respondent's father. The learned Judge (Ombwayo, J.) issued orders cancelling all dealings in respect of the suit property and directed rectification of the register to reflect the original position as at 12<sup>th</sup> January, 1959 when it was registered in favour of Gerishon (deceased). The trial court further ordered a portion of 2.62 acres from the suit property to be transferred to the respondent on behalf of his family. It is that decision that has provoked this current appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in ordering cancellation of titles to parcels of land registered in the names of third parties who were not parties to the suit.***
- ***The learned Judge erred in law and in fact by declaring that the deceased, Kariithi Weru (deceased) (sic) was registered as trustee for and on behalf of Wairimu Weru(deceased) whereas there was no evidence to support such a declaration and the approach used by the respondent was incurably defective(sic).***
- ***The learned Judge erred in fact and in law in placing reliance on findings of a Land Dispute Tribunal on the issues before the court which findings had been reversed on appeal.***
- ***The learned Judge erred in fact and in law by invoking the provisions of Section 143 of the***

**Registered Land Act whereas the said provision of the law had no application or relevance to the proceedings before the court.**

- **The judgment and orders made by the learned Judge are a violation of the Constitution and against the principles of natural justice.**
- **The learned Judge erred in fact and in law in failing to appreciate that the suit properties were not vested in the administrators of the estate of Kariithi Weru (deceased) and thereby occasioned grave injustice in ordering the cancellation of titles registered in the names of persons who were not parties to the suit.**
- **The learned Judge erred in overlooking that the suit as filed was incurably defective having regard to the provisions of the Civil Procedure Rules and legal precedents.**

6. When this appeal came up for hearing for the first time it was brought to our attention that the rights of persons who were not parties to the appeal may be affected by the outcome of the appeal. This Court directed the appellant to comply with **Rule 77(1)** of the **Court of Appeal Rules** and serve all the interested parties with the Notice of Appeal. When the matter came up for hearing again, the interested parties were present and indicated that Mr. Muthigani, learned counsel for the appellants', would represent them. From our observation we note that the interested parties and the parties to this appeal are members of the same family.

7. Mr. Muthigani reiterated the facts of the case and submitted that the interested parties were never enjoined in the suit at the lower court and were condemned unheard. This is because the trial court ordered cancellation of their titles to the suit properties without hearing them. He argued that there was no evidence to justify the trial court's finding of a trust. He urged us to allow the appeal. The respondent appeared in person and opposed the appeal. He submitted that his family had nowhere to settle since they were evicted from the suit property by the appellants and their agents. The respondent urged us to dismiss the appeal.

8. We have considered the record, the grounds of appeal, submissions made on behalf of the parties and the law. In **Selle -vs- Associated Motorboat Company [1968] EA 123**, it was held,

**“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.”**

See also **Jivanji -vs- Sanyo Electrical Company Ltd [2003] KLR 425**.

9. In **Mumo -vs- Makau (2002) EA 170**, this Court held that trust is a question of fact and has to be proved by evidence. Therefore, what falls for our consideration is whether the evidence tendered at the trial court established a trust in favour of the respondent. From the record, we note that it is not in dispute that the respondent's father and the appellants' husband were brothers; the appellants' husband was the eldest; the suit property belonged to the respondent's grandfather; the parties herein are members of the same family. We further note that the appellants' did not deny that Gerishon (deceased) was registered as the proprietor of the suit property during the demarcation period. The respondent's family was in occupation of the suit land until 1987 when the appellant evicted them after the matter went to Court. We are of the view that the aforementioned, coupled with the fact that Mr. Nguyo Kariithi, the 1<sup>st</sup> appellant's son, admitted that there was a family dispute over the suit property between his father and the respondent's mother justifies the finding by the trial court of the existence of a customary trust; that the appellants' husband was holding the suit property in trust for the rest of the family. In **Njuguna -vs-**

*Njuguna (2008) 1 KLR 889*, this Court observed that under Kikuyu customary law the eldest son inherits land to hold in trust for himself and the other heirs. Further, 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* (repealed) as in this case did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as a trustee.

10. Having expressed ourselves as herein above, the next issue that falls for our consideration is whether the said trust is enforceable? It is not in dispute that the suit property was subdivided into seven portions and transferred to third parties. It was the appellants’ contention that the trial court erred in cancelling the titles of the third parties in respect of the suit properties without hearing them. As we had noted above, the third parties who were enjoined in this appeal as interested parties and the parties herein are members of the same family. From the record, it is clear that the suit property was subdivided while the dispute was still pending before the Land District Tribunal. The appellants’ herein represented the interested parties who are their children in both the succession cause in respect of Gerishon’s Estate as well as in the suit in the lower court, the subject of this appeal. We find that the said interested parties were well aware of the dispute over the suit property at the time the subdivisions were registered in their favour. We also find that the interested parties were aware of the respondent’s claim over the suit property. We concur with the High Court’s finding that *Section 143* of the *Registered Land Act* (repealed) was applicable in this case. *Section 143* provides:-

**“ 143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than the first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

Based on the foregoing provision, we find that the trial court correctly rectified the register of the suit property by cancelling any dealings therein and reverting the registration in Gerishon’s (deceased’s) name.

11. The upshot of the foregoing is that we see no reason to interfere with the trial court’s orders in respect of the enforcement of the customary trust in favour of the respondent. Consequently, we find that the appeal has no merit and is dismissed with costs to the respondent.

***Dated and delivered at Nyeri this 5<sup>th</sup> day of November, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**