IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.

CIVIL APPEAL NO. 245 OF 2004

BETWEEN

Henry Mukora Mwangi ……. Appellant

And

Charles Gichina Mwangi ....…….…… Respondent

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Khamoni and Ransley, JJ) dated 27th June 2003 in H.C.C.C. NO. 128 OF 1992)

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JUDGMENT OF THE COURT

This appeal is yet another illustration of the enduring tension between statutory law and customary law. It is a case of competing claims to land in which one party asserts rights founded on the fact of registration as proprietor and the other asserts rights founded on customary law. It is also a case of human greed, so common in inheritance cases, that trashes family bond, love and harmony. The only issue in the appeal is whether the respondent, Charles Gichina Mwangi, who is the registered proprietor of Loc.16/Kigoro/197 under the Registered Land Act, Cap 300 (now repealed) holds approximately 7.5 acres of that land in trust for the appellant, Henry Mukora Mwangi.

The following facts of the case are settled. The appellant and the respondents are brothers, the sons of Mwangi Gichina and his first wife, Kanyi Mwangi. Mwangi Gichina died in 1958 before completion of land adjudication and registration in Murang'a. He had two other wives namely Mugure Mwangi and Wanjiku Mwangi. He owned 195 acres of land. When it was time to register that parcel of land, the same was registered in the name of the respondent, because he was the first son of the first wife of Mwangi Gichina.

In or about 1962, the respondent shared out the land between the three wives/houses of the deceased. The house of Kanyi got 75 acres and that of Mugure and Wanjiku got 60 acres each. The reason for allocating the house of Kanyi 15 acres over and above the other two houses was because she was the eldest wife. This distribution was agreed upon by all the parties. The houses of Mugure and Wanjiku appear to have been satisfied and settled peacefully. We shall not hear of them again in this appeal.

Out of the 75 acres that were allocated to the house of Kanyi, the respondent transfered 30 acres to his younger brother, the appellant and retained 45 acres. The 45 acres were registered in the name of the respondent as Loc.16/Kigoro/197 (hereafter the suit property). The bone of contention in this appeal is

the 15 acres that the respondent ended up with more than the appellant. Did those 15 acres belong to the respondent, or were they meant for his mother, Kanyi? If they were for the mother, should they be divided equally between her two squabbling sons following her death?

To set this appeal in context, a short background to the litigation is necessary since the case has been moving back and forth in these courts for the last 42 years. In 1971, Kanyi Mwangi filed Civil Suit No. 97 of 1971 against the respondent in the Resident Magistrate's Court, Thika, seeking an order to compel him to transfer to her the said 15 acres from the suit property. She contended that the respondent held them in trust for her. In his defence, the respondent denied that the 15 acres belonged to his mother. He pleaded that all the 75 acres that were said to belong to the house of Kanyi were in fact his from his father, and therefore registered in his name as of right. He had out of his own volition given 30 acres to the appellant and magnanimously allowed his mother to live in and utilise the 45 acres, he asserts.

The full judgment of the Resident Magistrate Court has not been availed, because the court file was destroyed under the ***Records Disposal Act, Cap 14 Laws of Kenya***. All that remained and was availed from the magistrate court was a summary of the record that reads: ***"There is no need to sub-divide the land any more parts" (sic).***

Matters appear to have rested there until Kanyi died in 1990. The following year the appellant filed Thika Senior Resident Magistrate's Court Civil Suit No. 305 of 1991 against the respondent. He prayed for a declaration that 15 acres comprised in the suit property were held by the respondent in trust for himself, Kanyi (deceased) and the appellant and an order for excision of 15 acres from the suit property and subdivision of the same between himself and the respondent. In his defence, the respondent pleaded that he was the absolute and sole owner of the suit property and did not hold the same or any party of it in trust for the plaintiff or any other person. He also contended that in any event, the suit was *res judicat*a because of Thika Resident Magistrate's Court Civil Suit No. 97 of 1971.

After hearing evidence, the Acting Resident Magistrate, on 14th April, 1992 held that the suit was not *res judicata* and found on a balance of probabilities that the appellant had proved that he was entitled to half of the 15 acres comprised in the suit property. At the hearing of this appeal, we were informed that in compliance with the order of the Resident Magistrate's Court the suit property was subdivided in 1999 to create Loc 16/Kigumo/1871 measuring approximately 7.5 acres.

Aggrieved by that judgment, the respondent filed Civil Appeal No. 128 of 1992 in the High Court of Kenya, Nairobi. On 25th June, 1998, that appeal was dismissed by Owour, J (as she then was), prompting the respondent to mount an appeal in this Court (Civil Appeal No. 180 of 1999), which succeeded on the ground that the appeal before Owour J had been heard by written submissions, while the rules of the court did provide for such hearing then. This Court directed that High Court Appeal No. 128 of 1992 be heard *de novo.*

The High Court appeal was heard afresh by Khamoni and Ransley, JJ who on 27th June, 2003 allowed the same on the ground that the appellant had not proved before the Resident Magistrate's Court the existence of a trust in respect of 15 acres in the suit property and that Kanyi held the 15 acres under a life interest which was extinguished upon her death in 1990. That decision led to the present appeal to this Court.

This being a second appeal, ***section 72(1) of the Civil Procedure Act*** requires consideration of issues of law only. ***(See KITIVO VS. KITIVO (2008) KLR 119).*** Before us the appellant contended that the High Court misdirected itself to such an extent as to raise an issue of law. The High Court, as the first appellate court, was entitled to re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion ***(SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126 paras H-I***, However, the appellant contended that in the present case the conclusion arrived at by the High Court regarding the non existence of a customary trust was contrary to the evidence on record and amounted to a misdirection raising a question of law.

In our opinion this appeal turns on whether or not there is evidence from which, on a balance of probabilities, a customary trust in favour of Kanyi and ultimately the appellant may be founded.

Mr Kiarie Njuguna, learned counsel for the appellant submitted that there was clear and cogent evidence in support of a customary trust. He further submitted that, in relation to the estate of Mwangi Gichina and the land in dispute, the respondent was what in Kikuyu customary law is called a ***muramati***, or trustee. He relied on the following passage from Eugene Cotran's ***Restatement of African Law: (Law of Succession), Sweet & Maxwell, London, 1969, Pg 12:***

> *"A slightly larger share may go to the eldest son, but otherwise the sons share the land equally. The larger share is unspecified and will only be received if the eldest son proves in the eyes of the muhiriga elders to be a good muramati. In other words, the larger share is not a right but may be given at the discretion of the elders…"*

Mr Njuguna submitted that the respondent had in fact been a bad *muramati* who could not have been entitled to a whole 15 acres for *uramati*.

On his part, Mr S. Wandaka, learned counsel for the respondent contended that the respondent got 15 acres more than the appellant because he was a *muramati*. He further contended that the High Court was right in holding that Kanyi had a life interest in the 15 acres which was extinguished upon her death because under Kikuyu customary law women did not own land and for that reason no trust could arise. Lastly Mr. Wandaka submitted that while the respondent held 195 acres in trust for the family of Mwangi Gichina, that trust came to an end in 1962 when the land was distributed to the three wives/houses of Mwangi Gichina and the appellant had not raised any complaint then. To allow the appellant to raise his complaint so late in the day is to perpetuate unnecessary disputes, he asserted.

We have considered the rival submissions of the parties as well as the authorities presented to the Court. There is no dispute that the original 195 acres did not belong to the respondent. They belonged to Mwangi Gichina, the father to the parties herein. The respondent did not claim that land as his own even after he was registered as proprietor. He had no problem transferring 60 acres to the house of Mugure and another 60 acres to the house of Wanjiku. He retained 75 acres for the house of Kanyi that is to say, for Kanyi, himself and his younger brother, the appellant, before transferring 30 acres therefrom to the appellant.

Regarding the 15 acres, the evidence is clear that the house of Kanyi got them, not because of the appellant or the respondent, but because of Kanyi as the senior wife of Mwangi Gichina. The totality of the evidence also shows that during her lifetime Kanyi lived on a clearly identifiable portion of 15 acres of land part of the larger parcel registered in the name of the respondent. She had her house on that land and cultivated the same. She planted coffee and wattle trees on that land. Upon her death, both the appellant and the respondent started using the 15 acres she had occupied.

The argument that Kanyi had a life interest in the 15 acres which was extinguished upon her death, thus making the same unavailable for inheritance by her sons, is not borne out by Dr Eugene Cotran's ***Restatement of African Law*** which we have already cited above and which this Court has severally cited with approval. On page 12, it is stated as follows:

> *"The widow is entitled to remain on that piece of land given to her by the deceased on marriage. She has full rights of use and cultivation over this land during her lifetime. On her death and in the absence of a will to the contrary, her portion is divided equally among the sons." (emphasis added).*

The respondent's claim to the entire 15 acres is based more on the fact of his registration as proprietor of the suit property as well as his status as *muramati*. It is true that at all material time he was the registered proprietor under the ***Registered Land Act, Cap 300 Laws of Kenya (now repealed)***. That fact alone does not negate the possibility that he holds the land under a customary trust; after all, the fact that he was previously registered as the proprietor of the entire 195 acres did not preclude the trust that led to distribution of that land to the three wives/houses of Mwangi Gichina. 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 stated that the trustee referred to in ***section 28 of the Act*** included a trustee under customary law.

In ***NJUGUNA VS. NJUGUNA, (2008) 1 KLR 889*** this Court had occasion to consider the concept of *muramati* in Kikuyu customary law and his obligations and responsibilities. The respondent in that appeal, the eldest son in a family, was registered as owner of a parcel of land which he held under customary law trust for himself and his six brothers. The land was divided into eight pieces. The other brothers were given one piece each, but the respondent took two pieces ostensibly because he was a *muramat*i.

On appeal challenging that distribution, the Court allowed the appeal holding that under Kikuyu customary law the eldest son inherits land as a *muramati* to hold it in trust for himself and the other heirs; that a *muramati* is not entitled automatically to an extra share or *uramati*, 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; that the *muramati* is not entitled to any remuneration for his services because his duty is a moral obligation; that in certain specific circumstances the *muramati* may get a slightly larger share if he proves in the eyes of the *muhiriga* elders that he has been a good *muramati* and that the extra share is not a right but is given at the discretion of the elders.

There was absolutely no evidence that the 15 acres were given to the respondent herein as a *muramati*. Other than the respondent claiming and appropriating them for himself, there was no evidence of any members of the *muhiriga* recommending an award of a larger share to the respondent. On the other hand, the evidence strongly suggests that those 15 acres were meant for Kanyi, the first wife of Mwangi Gichina and the mother of the parties to this appeal. In light of the exposition above on the duties and obligations of the *muramati*, we do not see how the respondent could claim to be a good *muramati* entitled to the 15 acres when he had exhibited rapacity by encroaching on the land occupied by his late mother and cutting down her wattle trees to the point of compelling her to seek the intervention of the local chief. In fact there is evidence that was not challenged that the respondent had even assaulted his own mother, forcing the chief to take her to the hospital. Clearly the respondent did not discharge his moral duty as a *muramati* to entitle himself to a larger share, let alone 15 acres.

We are satisfied that the High Court misdirected itself regarding existence of a customary trust in favour of Kanyi and the appellant. We accordingly allow the appeal, set aside the judgement of the High Court dated 27th June 2003 and affirm the judgement of the trial magistrate. We also award the costs of the appeal and those of the High Court to the appellant.

Dated and delivered at Nairobi this 21st day of June, 2013.

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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