IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, AZANGALALA & M'INOTI JJ.A.)

CIVIL APPEAL NO. 327 OF 2009

BETWEEN

NGATUNI MURUGU……………………………………….....……....………..APPELLANT

AND

MUKINDIA MAGAMBO …....…………………………...…………….. 1ST RESPONDENT

NTIBA MBURUGU ……………………………..………………….. 2ND RESPONDENT

WILFRED MBAKA …………………………………………...…….. 3RD RESPONDENT

DELFINO MUKUBA …………..……...……………………..……. 4TH RESPONDENT

MERU COUNTY COUNCIL ……………………...….……………….. 5TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Meru (Sitati J.) delivered on 28th January, 2008.)

in

H.C.C.A. No 56 of 1997)

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JUDGMENT OF THE COURT

The appellant, **Ngatuni Murugu,** was the plaintiff in **High Court Civil Case No. 556 of 1997,** which he instituted at **Meru** against the respondents: **Mukindia Magambo** (*Magambo*), **Ntiba Mburugu** (*Mburugu*), **Wilfred Mbaka** (*Mbaka*), **Delfino Mukubi** (*Mukubi*), and **Meru Country Council** (*the council*). After instituting the suit, **Magambo** died and was substituted by **Harriet Kaguna Mukindia** (*Harriet*).

In his amended plaint, dated 1st January, 2001 the appellant sought the following main orders:-

1. **A declaration that the deceased Magambo held land parcel numbers Karingani\Mugirirwa/1015, 1016, 1017, 1018, 386, 383, 596 and 623 (hereinafter "the suit**

lands") for the plaintiff and the plaintiff's family;

2. **A declaration that the suit lands were unlawfully and fraudulently allocated to the defendants and registered in their names.**
3. **The defendants be ordered to transfer the suit lands to the plaintiff and in default the Honourable court do sign and execute all the relevant documents to effect the transfer of the suit lands to the plaintiff.**

The foundation of those prayers was pleaded in paragraphs 4A, 5A, 5C, and 6A of the amended plaint. In paragraph 5A, the appellant averred that **Magambo,** the deceased, unlawfully colluded with **Mburugu**, **Mbaka Mukuba** and the Council and illegally caused the suit lands to be sub-divided and allocated to themselves. In paragraph 5B, the appellant pleaded that the said **Magambo** breached the trust he had bestowed upon him by failing to safeguard the suit lands from being allocated to the respondents. In the particulars of breach of the said trust, the appellant alleged, *inter alia*, that the said **Magambo** used his position as a member of the Land Adjudication Committee of the area to "*grab"* and or cause and/or aid the "*grabbing"* of the suit lands and further failing to account for the suit lands after the gathering, adjudication, consolidation and registration process.

In paragraph 5C, the appellant averred that the respondents fraudulently allocated themselves and/or caused the allocation to themselves of the suit lands. In the particulars of fraud, the appellant alleged, *inter alia*, that the said collusion was without his knowledge or consent and further that the respondents failed to return the suit lands to him.

In paragraph 6A, the appellant pleaded that the respondents had denied him the use and ownership of the suit lands.

The respondents delivered a defence which they amended and later further amended. They denied the appellant's claim and specifically stated that they were strangers to the averments in paragraph 6A and that their titles were indefeasible. The particulars of trust and fraud were also specifically denied. In paragraph 8(b) of the further amended defence, the respondents averred that the appellants claim was, *inter alia*, statute barred.

At the trial before the High Court, the appellant testified, *inter alia*, that he had sued **Magambo** because he had left him to take care of his land at the time of consolidation and registration as he went to **Ciakariga** in **Tharaka** on business. After 10 years, he returned only to find other people in his portion of land. He also found a nursery school constructed on another part of his land. Only 4 acres were registered in his name. He therefore sued those who were occupying his piece of land which he estimated to be about 25 acres.

During cross-examination, the appellant stated that he did not complain during the adjudication process because he had left the matter to **Magambo**. He further testified that he took 23 years to file the suit because elders had advised him to wait as the dispute was being discussed. He also stated that the registration of his land in the names of the original respondents was effected by **Magambo** using his position as a member of the Committee responsible for adjudication in the area. The appellant also admitted that since leaving for Tharaka, to the date he was testifying, the defendants had been in possession of the suit lands.

The appellant called **Francis Mbore** (PW2) and **Ndereva Miridia** (PW3) at the trial. The two witnesses testified that they were present when the appellant left the suit lands to **Magambo** and went to Tharaka. They also testified that when the appellant returned from Tharaka, he found the lands being used by the respondents.

By the time the respondents' defence hearing commenced before the High Court, **Magambo** and **Mukube** had died and had been substituted by their widows: **Harriet Kaguna** and **Paulina Mukubi.** It is clear, from the record that the two widows had not by then obtained letters of Administration in

respect of their deceased husbands estates. No one however, appears to have raised any objection to their substitution.

Harriet testified that her late husband and the appellant were cousins as they had a common grandfather. She denied that her husband had held the suit lands as a trustee for the appellant and contended that no part of the appellant's land was given to her husband.

Mburugu, the 2nd respondent, also denied the appellant's claim. His case, at the trial before the High Court, was that he owned parcel number 386 (one of the suit lands) and had lived thereon since demarcation of land in the area. He denied holding the land parcel in trust for the appellant and all the particulars of trust and fraud. He testified that the appellant was his neighbour and had his own distinct title upon which he had built a house.

During cross-examination, he denied colluding with **Magambo** to have the appellant's land registered in his name.

Mbaka, the 3rd respondent, also testified at the trial. He stated that parcel number 623 (one of the suit parcels) was his and was passed on to him by his father. He denied having any land for the appellant who, according to him, had his own parcel of land, number 387, on which he lives. He denied colluding with **Magambo** to defraud the appellant of his land.

Paulina Makubi, the substituted 4th respondent, also denied the appellant's claim. She told the High Court that her late husband and herself did not hold any land in trust for the appellant and further that her parcel of land is occupied by her children who have built permanent houses thereon.

During cross-examination, she denied any fraud involving the gathering of parcel number Mugirirwa/596(one of the suit parcels).

The 1st 2nd 3rd and 4th respondents called three witnesses: **Francis M'Abita** (DW5), **Gabriel Ntigai Ruigi** (DW6) and **Stanley Mutai Mugambi** (DW7).

DW5 testified that the process of land demarcation, consolidation and registration, in the area incorporating the suit titles, took place in 1967, 1968 and 1969. During that process, the appellant, according to DW5, was registered against parcel number 387 upon which he has his home. His brother **Samuel** and **Fausto** also had their parcels registered in their names and so did **Magambo**. During the said process, the appellant according to DW5, never raised any complaint although he was present at the time.

During cross-examination, DW5 denied colluding with the respondents to take away the appellant's land. He also remembered the original defendants being registered as owners of their respective parcels of land during the demarcation, consolidation and registration process in the area. He said he was then the Chairman of the local Adjudication Committee.

DW6, testified that **Magambo** and the appellant separately gathered their respective lands and had them consolidated and adjudicated in their names during the process of consolidation and adjudication in their area. DW6 said he never heard any complaint from the appellant.

During cross-examination, DW6 acknowledged that at the time of testifying his son had married **Magambo's** grand-daughter. He however, denied being called to assist **Magambo'**s family. He further denied that the respondents got their parcels of land from **Magambo.**

The 5th respondent's case at the trial was presented through **Stanley Mutai Mugambi** (DW7). At the time of his testimony, he was the clerical officer in-charge of legal matters with Meru Central County Council which was created from the larger Meru County Council which, according to DW7, was no longer in existence. He confirmed that parcel number **Karingani/Mugiriwa/623** was registered in the

name of Meru County Council on 30th September 1969 but was reserved for **Kiungune Nursary School.**

During cross examination, DW7 stated that the Council had no interest in the said parcel which could be transferred to the local community at their request.

On the conclusion of the evidence, counsel filed written submissions in which they reiterated the stand-points taken by their clients in their testimonies.

The learned Judge (**Sitati J**.) who took over the trial from **Mulwa J**.(retired) after analyzing the evidenced placed before the court, accepted the evidence of the respondents and concluded that the appellant had not proved, to the required standard, the existence of a trust in his favour in respect of the suit lands. She came to that conclusion because at the time of adjudication, consolidation and registration of land in the area, the appellant had also been registered as proprietor in respect of his piece of land number **Karingani/Mugirirwa/387** just as **Magambo,** the 2nd respondent, the 3rd respondent, in **Mukubi** and the 5th respondent were registered as owners of their respective parcels of land. The learned Judge further accepted the testimony of DW5 that as Chairman of the local Adjudication Committee, he was not aware of any complaints or objections by the appellant to the registration of the suit lands in the names indicated above.

It was also the conclusion of the learned judge that upon registration of the suit lands after the process of consolidation and adjudication, the registered proprietors got indefeasible titles and the appellant's claim was not maintainable.

Finally the learned judge found that the appellant had slept on his rights for over twenty (**20**) years before commencing the suit before the High Court and his claim was consequently statute barred.

In those premises, she dismissed the appellant's claim with costs.

That decision triggered the appeal before us by the plaintiff who has cited eleven (11) grounds of appeal. The main issues raised can however be summarized as follows:-

1. Failure of the trial judge to evaluate the entire evidence placed before her.

2. Reliance of the trial judge upon the testimonies of Harriet (DW2) and Paulina (DW4) and yet they had no personal knowledge of the events of the time.

3. Failure of the trial judge to appreciate the relationship between the 2nd and 3rd respondents and the status of Magambo and the 3rd respondent at the time of adjudication and registration in the area.

4. Unbalanced treatment of the entire evidence by the trial judge.

5. Incorrect application of the law on fiduciary relationships by the trial judge.

6. Failure of the trial judge to consider submissions made on behalf of the appellant.

Mr. **Kioga**, learned counsel who argued this appeal on behalf of the appellant, submitted that the learned Judge of the High Court (**Sitati J.**) did not appreciate the difference between gathering and consolidation which, according to counsel, were distinct processes. He stressed that the appellant, during the said process, gathered his lands and left the rest of the process of adjudication, consolidation and registration to be completed by his relative **Magambo** who happened to be a member of the Land Adjudication Committee. The appellate then left for Tharaka where he was engaged in beer business. He did not think that **Magambo** would bring other people to the land. Yet, according to counsel, that is exactly what happened, but was not understood by the trial judge probably because, according to counsel, she did not understand the local dialect and therefore failed to evaluate the evidence of trust adduced before her. Counsel, relying on the cases of **<u>Ndiritu v. Ropkoi and Another</u> [2005] 1 EA 335** and

<u>Kenya Ports Authority v. Custom (Kenya) Ltd</u> [2009] 2 E.A, stated the obvious that it is the duty of this Court, as the first appellate court, to reconsider the evidence which was adduced before the trial judge and evaluate the same afresh.

Mr. Kioga also submitted that the trial judge also misunderstood fraud as it applied in the case before her. According to counsel, the appellant demonstrated breach of the fiduciary relationship between him and **Magambo** and was entitled to judgment on the evidence adduced before her. In the same vein, counsel also argued that the trial judge misunderstood the principle of adverse possession which could not apply in this case.

It was also counsel's contention that the submissions made on behalf of the appellant were not considered.

With regard to the appellant's case against the 5th respondent, counsel argued that no evidence was adduced to demonstrate how the 5th respondent had acquired the parcel of land reserved for a nursery school.

We received no submissions on behalf of the 1st, 2nd 3rd and 4th respondents as neither their counsel nor themselves attended the court when this appeal was called out for hearing before us. We therefore, proceeded with the appeal because we were satisfied that a hearing notice had been served upon counsel.

Learned counsel **Mr. Kariuki** contended, on behalf of the 5th respondent, that parcel no. **Karingani/Mugirirwa/623** was registered in the name of his client but was reserved for use of a nursery school. In counsel's view, at no time had the said parcel of land been owned by the appellant and there was no nexus between **Magambo** and the 5th respondent. Counsel concluded that no fraud was demonstrated against his client and the appeal lacked merit and should be dismissed.

We have now considered the pleadings, the evidence adduced before the trial judge and the submissions of counsel. We have further given due consideration to the authorities cited and the main issues raised in the appeal.

We think we should first consider the treatment by the trial judge of the evidence which was adduced by the parties before her. The learned judge of the High Court, in her judgment, summarized the evidence which the parties presented before her. She also summarized counsels' submissions and considered, in some detail, the authorities cited to her. After that analysis, she framed the following issues for determination:

> **"(a) Whether the plaintiff has proved that a trust either existed and/or was created between himself and Magambo.**
>
> **(b) Was the suit land family land.?**
>
> **(c) Was there agreement by the clan that the suit land be held in trust by Magambo for himself and Ngatuni?**
>
> **(d) Has the plaintiff proved that he had equitable rights in the suit land which rights were binding on Magambo and by extension to all the other defendants in this case as provided under sections 28 and 30 of the Registered Land Act?**
>
> **(e) Have the 2nd- 4th defendants acquired title by adverse possession over the suit land even if the plaintiff has shown that the land was held in trust for him.?**
>
> **(f) Was any fraud committed by the defendants in this case"?**

Save for issue number (e) the learned trial judge answered the rest of the issues in the negative. With regard to issue number (e) the learned judge answered the same in the affirmative. Given those answers, the inevitable conclusion and which conclusion was made by the learned trial judge was that the appellant had failed to prove his claim against the respondents on a balance of probabilities. She therefore dismissed it with costs.

On our own independent evaluation and reconsideration of the evidence as summarized above we observe that the learned trial judge, as already stated, outlined the entire evidence and concluded that the appellant had not proved the existence of a trust over the suit land. The learned judge went further. She explained her conclusion. In her own words:-

> **"The evidence on record shows that Ngatuni as well as the defendants were registered for their respective parcels of land round about the same time:- 30th September, 1970, for Karingani/Migirirwa/383 belonging to Wilfred Mbaka; 30th September, 1969 for Karingani/Mugirirwa/623 in the name of Meru County Council, the 5th defendant; 30th September, 1969 for Karingani/Mugirirwa/386 belonging to Bernard Murugu Ngatuni, the plaintiff herein; 30/9/69 for Karingani/Mugirirwa/32 for Fausto Murugu, one of Ngatuni's brothers; 30th September 1970 for Kaningani/Mugirirwa/387 for Gatunyu Murugu. It is my view that whether as family or otherwise, Ngatuni and the defendants were registered for their respective shares on completion of the consolidation and adjudication process. DW6 Gabriel Nthigai Ruigi DW5, Francis M'abata or Francis Mbandi both testified that Ngatuni and Magambo each gathered their respective parcels of land. DW5 stated in particular that as chairman of the Local Adjudication Committee, he was not aware of any complainants or objections by Ngatuni to the registration of the various suit lands. I have no reason to doubt that testimony and also [do] find that Ngatuni went to Chuka (sic) after he had already got his land duly registered in his name."**

The above passage clearly, in our view, demonstrates that the learned trial judge gave reasons for her conclusion that a trust had not been proved by the appellant. She did so after ***"carefully sifting through the evidence on record"*** and after setting out the evidence in outline.

We do not think that the fact that she highlighted the evidence of DW5 and DW6 in her judgment, in any way suggested that she had not considered the appellant's testimony and that of his witnesses. She had, after all, expressly stated that she had carefully sifted through the entire evidence on record before coming to her conclusion.

The learned trial judge had the advantage of seeing and hearing the witnesses testify before her which advantage we unfortunately do not enjoy. The passage quoted above suggests that she preferred the evidence of the respondents and their witnesses to that of the appellant and his witnesses. She was perfectly entitled to do so. That is a decision which judicial officers must make all the time in their daily function of dispensing justice.

In **Peters v. Sunday Post**, [1958] EA 424, **Sir Kenneth O'Connor** (P) said as follows at page 429:

> **"It is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court had indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."**

On our own independent consideration and evaluation of the evidence adduced before the learned trial judge, we have found no misdirection on the part of the learned trial judge on any question of fact

nor do we find the reasons given by the judge for her conclusions unsatisfactory.

We also think that it was not lost to the learned trial judge that two of the brothers of the appellant, had their parcels gathered, demarcated, consolidated and registered in their names at the same time **Magambo** and his co-defendants had the suit lands registered in their respective names. The evidence also showed that, **Fausto Murugu**, one of the appellant's brothers, was alive at the time of institution of the suit. The appellant did not call him to support his case. His brother also does not appear to have raised any objection to **Magambo** and the other respondents occupying the suit lands. It is significant that their occupation, as the recorded evidence shows, had been prolonged.

In the premises, we have come to the conclusion that the recorded evidence justified the conclusion made by the learned trial judge and the grounds of appeal that the learned judge failed to evaluate the entire evidence placed before her are without merit and must fail. For the same reasons we do not find, as unjustified, reliance upon the testimonies of **Harriet** (DW2) and **Paulina** (DW4). Nothing should also turn on the treatment, by the learned trial judge of the evidence of the 3rd respondent. We have detected no bias or lack of appreciation of the relationship or the status of the 3rd respondent and **Magambo.**

With regard to the finding, by the trial judge, that the defendants had, by the time the action was brought, acquired title to their respective parcels of land by adverse possession, we, with respect, agree with counsel for the appellant that that could not be the case. We say so, because the recorded evidence shows that the original defendants were the registered proprietors of their various parcels of land. As registered proprietors, they could not be in adverse possession of their own parcels of land. The learned trial judge was therefore clearly wrong to say that "**the defendants were put in adverse possession by the effluxion of time."**

We however do not think that that fault of the learned judge would have effected the final result. We say so, because the learned judge came to the conclusion that the appellant had slept on his rights. In her own words:

> **"By the year 1993, when this suit was initially filed, the defendants had been in possession and occupation for over twenty (20) years. Ngatuni has alleged that he only became aware of the fraud committed by the defendants much later, but it is not clear from the evidence when it was that Ngatuni left his land in the hands of Magambo for safe keeping and how big the land was. Further apart from saying that he was away in Chuka (sic) for ten (10) years Ngatuni does not say when it was he returned home. I have found Ngatuni's evidence unsatisfactory and unconvincing."**

Two crucial points arise from the above passage. Firstly, that the learned judge found, as unsatisfactory and unconvincing, the testimony of the appellant. Secondly, that the appellant had taken more than twenty (**20**) years from the time of registration of the suit parcels to the time of filing his suit. With regard to the second point we can do no better than refer to the appellant's own evidence before the trial judge. During cross examination, he, *inter alia*, said as follows:

> **" I was informed that my land had been sub-divided and given out. I did not complain to adjudication process since I had left everything to defendant No. 1. I am not telling lies and I could take oath. I went to the clan when I learnt of it. I took 23 years because I was told by clan elders to wait as negotiations may resolve the matter."**

And in his evidence in chief he said, in part as follows:

> **" I had left the home for Tharaka where I was selling beer. I lived at Ciakariga for 10 years. I came back and found that there were people in my shamba. I met Mukindia, Mbaka Karani. There was a nursery school already constructed by Mukindia."**

On the basis of the answer given by the appellant in cross-examination, the appellant waited for 23 years from the time of registration before instituting his suit whilst on the basis of his testimony in chief, he came back from Tharaka after ten 10 years and found other people in his shamba (land). If the appellant left the area before registration, it must have been about the year 1969 because that is the year he was registered as proprietor of land parcel number **Karingani/Mugirirwa/386**. If he took ten (**10)** years to return, that would be about 1979. This suit was filed on 16th May, 1997, 18 years after his return.

The respondents, in their further amended defence filed on 28th May, 2002, averred as follows:

> **"8B. The defendants state in defence that the plaintiff's claim is statute barred, bad in law and an abuse of the due process of the court and discloses no cause of action against the defendants."**

The record does not show that the appellant filed a reply subsequent to the filing of the further amended defence aforesaid.

Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) provides as follows:

> **"7. An action may not be brought by any person to recover land after the end of twelve years from the date which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person"**

And **section 26** of the same Act reads as follows:

> **"26. Where, in the case of an action for which a period of limitation is prescribed, either**

a. **the action is barred on fraud of defendant or his agent, or of any person through whom he claims or his agent; or**

b. **the right of action is concealed by fraud of any such person aforesaid; or**

c. **the action is for relief from the consequences of a mistake,**

> the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it."

Given the evidence of the appellant at the trial before the High Court, which evidence we have outlined above, the appellant's claim was clearly statute barred. The learned trial judge found that fraud had not been demonstrated. However, even if it had, the recorded evidence shows that the appellant discovered the same on his return from Tharaka or could, with due diligence, have discovered the same on his return. We say so, because on his own testimony, when he returned, he found the respondents occupying the suit lands and they, have been in such occupation to date.

We have, in the premises, come to the conclusion that the learned trial judge had in mind the **Limitation of Actions Act** when she erroneously found that the original defendants had acquired the suit lands by adverse possession. What was on her mind was that the appellant's right to claim the suit lands was barred by the said Act.

Moreover, although the respective counsel did not raise this issue the appellant's claim was inherently incompetent in as much as it in essence sought the nullification of the respective respondent's property acquired and registered after the process of land adjudication under the Land Adjudication Act (*Cap 284)(Act).* The High Court made a finding which we have affirmed that the appellant and the respondents were registered for their respective shares on completion of a consolidation and adjudication process.

The Act prescribes an elaborate machinery for recording and ascertainment of rights and interests in Trust and also the determination of disputes arising in the course of the adjudication process. When the adjudication process is completed and a final Adjudication Register is prepared and ultimately forwarded to the Chief Land Registrar, the latter is required by *Section 28* of the Act to cause the registration to be effected in accordance with the adjudication register.

Further by section 11(2A) of the Registered Land Act (Cap 300 – now repealed (RLA) the Chief Land Registrar was required to forward the Adjudication Register to Land Registrar in-charge of the District concerned who was in turn required to register each person shown in the adjudication record. This is what happened in this case.

The effect of such registration is that the person so registered becomes the absolute proprietor and his rights could not be defeated except as provided by RLA (*see section 27 and 28 of RLA*).

Lastly, by ***section 143(1)*** RLA, a first registration such as obtained by the respondents herein could not be rectified for fraud or mistake. Any person suffering damage by such first registration which cannot be rectified has only a claim for indemnity against the Government (section 144(1) RLA).

The appellant failed to employ the machinery under the Land Adjudication Act to claim the parcels of land he now claims. His claim which is clearly intended to re-open not only the adjudication process but also the first registration is not maintainable and the High Court had no jurisdiction to grant the reliefs sought.

We have said enough to show that this appeal is for dismissal. Accordingly we order that the same be and is herewith dismissed. As neither the 1st, 2nd 3rd and 4th respondents nor their counsel attended the court at the hearing of this appeal, and the 5th respondent is a public body, we make no order as to costs.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY 2013.

E.M. GITHINJI

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JUDGE OF APPEAL

F. AZANGALALA

……………………….

JUDGE OF APPEAL

K. M'INOTI

……………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR