



IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 135 OF 2010

BETWEEN

WAGECHE MARIYU.....APPELLANT

AND

MUTURI MARIYU.....RESPONDENT

(Being an Appeal against the Judgment and Decree in the High Court of Kenya (Juma, J.) dated 17th December, 2002 in

H.C.C.A. No. 45 of 2000

JUDGMENT OF THE COURT

This is a second appeal from the original judgment of the Principal Magistrate, Murang'a (F.F. Wanjiku) in Muranga **Civil Case Number 54 of 1994. Wangeche Mariyu (appellant)**. The appellant filed the aforesaid suit against his brother, **Muturi Mariyu (respondent)**. The appellant claimed that during the land consolidation, the respondent was registered as proprietor and trustee of land known as **Loc.9/Kanyenyaini/274** and **Loc. 9/Kanyenyaini/T134**, for himself and the appellant. The appellant contended that he made demand to the respondent to transfer a half share of the aforesaid parcels of land, but the respondent refused or neglected to do so.

The appellant sought for a declaration that the respondent was holding the said parcels of land in trust for himself and the appellant and an order that the respondent do transfer, a half share of the two parcels of land to the respondent. In his statement of defence, the respondent denied the allegation that the two parcels of land were family land or he was holding them in trust for the appellant.

On 28th June, 1994, Mr. Nyaga Njage, the Senior Resident Magistrate, Murang'a, recorded a consent by both appellant and respondent to the effect that the dispute over the suit properties be referred to a panel of elders under the chairmanship of the District Officer, Kangema, to determine the dispute and make an award which was to be filed in Court within a period of 60 days. The panel was to be assisted by two elders to be appointed by each of the parties. On 7th November, 1994, an award was filed in court by which the elders made the following findings:

“There is very strong and corroborated evidence that the parcel of land in dispute was

bought by the mother to the parties in dispute. The defendant on his part, admits that the plaintiff still cultivates a portion of this land although he owns his own, which he started buying or he bought in 1966. If the land belonged to the defendant alone, his brother, the plaintiff, would have moved out as soon as he bought his. The defendant has not made any efforts to remove him. We find that all three brothers should share the parcel.

RULING

The panel of elders unanimously felt that parcel No. Loc.9/Kanyenyaini/274, should be owned jointly in the following manner:

1. *Mr. Muturi Muriyu (Defendant) – 1 acre.*
2. *Mr. Wageche Muriyu (Plaintiff) – 0.7 acres.*
3. *Mr. Chege Mureyo (brother) - 0.7 acres.*

Sub-division may be carried out to give Mr. Wageche, the plaintiff his portion.

Plot No. Loc. 9/Kanyenyaini/T.135, should be left for the defendant because the plaintiff and Mr. Chege their brother, have other pieces of land elsewhere.”

The respondent objected to the said award on the grounds that the panel of elders considered a claim by Chege Mureyo who was not a party to the suit and awarded him 0.7 acres when he had not filed any pleadings. The learned trial Magistrate was satisfied that the panel misdirected itself by allocating the respondent's land to a person who was not a party to the proceedings. He proceeded to set aside the award and ordered the matter to proceed for hearing.

During the hearing, the appellant gave evidence and narrated how the suit premises was registered in favour of the respondent who was his eldest brother to hold in trust for himself and the appellant. He contended that he lived on the land since 1962 and although he subsequently bought another parcel of land for himself, he has continued to live on the suit land. He claimed the land belonged to his father and that is why the clan and the District Officer ordered that he should be given 0.7 acres.

The proceedings thus far were conducted by Nyaga Njeru, (SRM) but on 26th June 1998, another magistrate, FF Wanjiku (PM) took over the conduct of the matter. On the same day the learned magistrate recorded a consent that the dispute be referred to Muranga District Land Tribunal for hearing and determination. An award was filed in court on 27th November 1998, but the parties agreed it be set aside by consent. FF Wanjiku, heard the evidence of Maina Wambage (PW2) who testified on the part of the appellant and was also his witness when the matter was heard by the D. O Kagema. He testified that both the appellant and respondents were brothers and the parcels of land in dispute were purchased by their mother and registered in the name of the respondent as the eldest brother because their father died in the 1930's.

The learned magistrate also heard the evidence of the respondent who admitted that the appellant was his brother. Their father died in 1935, but their family had no land. He claimed that he bought the suit land and the appellant did not assist him to purchase the same. He claimed that he bought several pieces of land which were consolidated during the land demarcation and given the title **Loc. 9/Kanyenyaini/274**. He however accommodated his mother who lived on this land until she died and was buried there. He contended that the appellant moved into the land in 1986, and occupied the portion that the respondent's mother was cultivating. The respondent admitted in his evidence that he gave some tea bushes to the appellant when he got a wife but denied that the land was held in trust for the appellant.

The respondent also relied on the evidence of Dishon Muya, (DW3) a cousin who gave evidence in his support. He told the learned trial magistrate that their fathers did not have any land so he and the respondent decided to buy land and that is how they purchased the suit land and the appellant had bought his own land.

After considering the evidence, the learned trial magistrate concluded as follows:

“The Court has considered the evidence adduced by both sides and the Court finds that there is no doubt that the land in issue is for the defendant and that their father had no land as he died long before land consolidation and demarcation. The Court also finds that this is not a family land because even the brother of their father, the father of DW II did not have land. The Court is satisfied that the plaintiff went into the land of the defendant in 1986, to occupy the portion his mother had been given by the defendant. The court finds that the plaintiff did not prove his case against the defendant as no evidence was tendered to show that the land in dispute was a family land. The Court, therefore, finds no merit in the plaintiff’s case and the same is dismissed with costs.”

The appellant was aggrieved by that decision and appealed in High Court **Civil Appeal Number 45 of 2000** Juma J. evaluated the evidence before the learned trial magistrate and in a very brief judgement of barely two pages made the following conclusions:-

“It was the evidence of the respondent that he bought the suit land and allowed his mother to cultivate a portion of the same and the appellant then came later to join his mother and put up a house where his mother cultivated. The tea bushes on the land had been planted for the benefit of his crippled brother.

The appellant had difficulty in proving trust for the following reasons:

- 1. The suit land is not part of the clan land as evidence shows that the father of the parties herein had five brothers and none of them had any piece of land.***
- 2. There was no documentary evidence or any other evidence to show that their father had any land. In fact, the evidence on record is that the suit land belongs to the respondent and is registered in his name while the appellant has also his own piece of land elsewhere registered in his name.”***

That is the judgment that has provoked the present appeal in which the appellant raised the following four grounds:-

- 1. The learned Judge erred in law and in fact in making a finding that the appellant did not prove that a trust existed just because he allegedly did not make it clear how the two parcels of land were acquired and by who.***
- 2. The learned Judge erred in law and in fact in failing to accept the appellant’s contention that this was family land and the respondent was only registered as a trustee because he was the eldest brother.***
- 3. The learned Judge did not establish how the appellant could have lived in Loc. 9/Kanyenyaini/274, since 1962 and planted 1800 tea bushes if he had no claim over the same.***
- 4. The learned Judge failed to make a finding that since the appellant had occupied the land for almost 40 years, if he did not have other legal right, he must have acquired half of Loc. 9/Kanyenyaini/274, by adverse possession.***

All the above grounds were argued together by Mr. Kebuka Wachira, learned counsel for the appellant. He submitted that the appellant was pursuing a claim based on customary trust and adverse possession. The appellant and respondent are brothers and the two brothers occupied the land in 1962, immediately after the land demarcation to date. It is common ground that the appellant has planted about 1,000 tea bushes. He has also built a permanent house where he lives with his family. The respondent never objected to the appellant’s occupation of the suit premises until he died and left his family who are hostile to the appellant.

Counsel faulted both the Principal Magistrate and the High Court Judge for failing to evaluate the

entire evidence. If they had done so, they would have arrived at the conclusion that the appellant had beneficial interest and that is why he occupied the land without any interruption as it is usual and customary for a first born brother to be registered as trustee of another brother. He referred to the provisions of **Section 28 (g)** of the **Registered Land Act**, which recognizes customary trust. Also the case of **Mukangu vs Mbui, Civil Appeal No. 281 of 2000**. In that case, the appellant was registered proprietor of two parcels of land under the **Registered Land Act Cap 300**. He and his son who was the respondent resided on one of those plots. The respondent planted coffee on half an acre on the other plot. The appellant filed a suit in the Magistrate's Court seeking to evict his son from the land which he occupied claiming that he had been threatening to harm him. The son denied the claim, claiming the land was ancestral and it was admitted that the son had lived on the plot with the consent of the appellant's knowledge since he was born in 1956 and had carried out permanent developments on it since 1979. The Magistrate's Court dismissed the case by the appellant which decision was upheld by the High Court and on appeal, this Court held *inter alia*:

1. *...The very purpose of subjecting land held under customary tenure to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act ipso facto to change the land tenure system. The assumption is that all rights and interests of persons in the land subjected to such new system would have been ascertained and recorded before registration.*
2. *Rights under customary law are subject to rights under written law and are excluded under the clear language of Sections 27 and 28 of the Registered Land Act. Customary law rights in land are extinguished upon registration of that land under the Act and rights under customary law are not overriding interests under Section 30 of the Act.*
3. *However, since the same registration recognizes trusts in general terms without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, according to the proviso to section 28, such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee."*
4. *A trust arose from the possession and occupation of the land by Gerald which had the protection of Sections 28 and 30(g), of the Act.*

Counsel also submitted the doctrine of adverse possession applied in this case as the appellant had lived on the suit property for many years and if the two courts below evaluated the evidence they would have concluded that the appellant was entitled to one half share of the suit property.

On the part of the respondent, this appeal was opposed. Mr. Gacheru, learned counsel for the respondent supported the judgment by the learned Judge. He submitted that there was no evidence to support the claim that the suit property was family or clan land or it was held in trust for the appellant. On the other hand, the respondent was able to explain how he acquired his land and registered it in his name. This is the scanty evidence that was analyzed by the learned Judge and it led to the conclusion that the appellant was unable to prove the claim of trust. He was unable to prove the land belonged to the clan or it was purchased by his mother.

Mr. Gacheru relied on the case of ***Muchungu vs Muchungu***, which citation involved a dispute by two brothers. One brother seeking a transfer of a half share of the suit land on the basis that the appellant held it as trustee. The appellant denied that land belonged to their father and since there was no evidence the land belonged to their father, the Judge nevertheless, held that the respondent had established the existence of a trust and gave judgment in respondent's favour. On appeal, Potter, Hancox, JJ.A. & Chesoni, Ag. J.A., held that there was no proper trial as the court failed to investigate how the appellant was registered as proprietor of the suit property. There was no evidence to support a finding of trust. It was held there was no proper trial and the matter was referred for retrial. He also cited the case of ***Kanyi***

vs Muthiora, Civil Appeal No. 19 of 1982.

This being a second appeal, only issues of law fall for consideration. **Section 72(1) of the Civil Procedure Act, Cap 21 Laws of Kenya**, provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court. A careful reading of the section shows that such appeals are, as a general rule, confined to issues of law and this Court would not interfere with the concurrent findings of fact of the two courts below unless there was a compelling reason to do so, such as the findings being so perverse as to be bad in law.

The only issue raised in this appeal is whether the respondent held the suit property in trust for the appellant. The learned Judge of the High Court has been faulted and rightly so for reasons we shall demonstrate later, for failing to re-evaluate the evidence, subject it to fresh analysis and arrive at his own independent conclusion as mandated by law. Firstly the matter before the subordinate court was handled by two magistrates, **Nyaga Njeru (Senior Resident Magistrate)**, dwelt with the matter from 14th February, 1994, he is the one who referred it for arbitration by an order made on 28th June, 1994. He also presided over the setting aside of the arbitral award and went on to hear the evidence of the appellant.

The record shows that **F. F. Wanjiku, a Principal Magistrate**, took over the matter on 26th June, 1998 and by a strange twist of things made this order referring the matter before a panel of elders as follows:-

“By consent, this case is referred to the Murang’a District Land Tribunal for hearing and determination.”

An award was read in court on 24th November, 1998, but the award was also set aside by consent as the court remarked that the Land Dispute Tribunal had no jurisdiction to determine the issue of trust. The court proceeded to record the evidence of Maina Wambugu PW 2, and recorded the defence evidence. In a fairly short judgment, the learned trial Magistrate dismissed the appellant’s suit. Similarly, the High Court, after hearing the appellant’s appeal, Juma J., issued a page and half of a judgment dismissing the appeal with costs.

We agree the learned Judge failed in his duty as the first appellate court to re-evaluate the evidence and arrive at his own independent conclusion. Several issues that are pertinent to customary trust were not considered and analyzed. For instance, it was common ground that the appellant’s mother had occupied the suit land. It was also common ground that the father of the parties herein died on or about 1935 before the land consolidation. When their mother died she was buried on the suit land. Another significant aspect was that the appellant had planted permanent crops, 1,000 tea bushes and built a permanent house where he lived with his family. The respondent admitted that he allowed the appellant to grow tea bushes to support his wife after he got married.

This is what the respondent said in his evidence in chief before the subordinate court:-

“Plaintiff came to that land in 1986. He came from Kanyenyaine. He had not occupied that land before. He came to the portion I had given my mother to cultivate. He uses that portion by force. My mother and all of us had planted tea bushes for that brother who was (sic) that cripple. I gave the plaintiff some tea bushes when he got a wife to be assisting the family..”

The appellant contended that the suit property was acquired through their father while PW 2, said in his evidence that the suit premises was purchased by their mother and was registered in favour of the respondent as the first born brother. To us the issue of whether the land was family land through the father or the mother was not such a material contradiction such that the two courts concentrated on it and failed to evaluate the other evidence. Both courts failed to analyse all the other evidence touching on the claim of customary trust.

For instance, there were no investigations or interrogations of how the appellant, his mother and a

crippled brother were in occupation of the suit premises. How did the appellant get permission to plant permanent cash crops on the suit land, to build a permanent house and occupy it with his whole family? If the two courts below had interrogated these issues, they would have come to the conclusion that the appellant's rights to occupation and possession of the land were protected under **Sections 28 and 30(g)** of the **Registered Land Act Cap 300** (now repealed). See the case of *Mukungu v Mbui*, (supra), where this court while dealing with a similar issue of a son in occupation of the father's land observed on page 631 as follows:

“It is nevertheless realized that although peremptory language is used in the Registration Act, in Sections 27 and 28, there are built-in qualifications for the protection of other persons. Those that are express are discernible in the proviso to Section 28 and in Section 30 of the Act. The qualifications have however received varying judicial interpretations. This Court for example, in Alan Kiama v Ndia Mathunya & Others, CA 42/1978, doubted that customary law rights were excluded from Section 30 of the Act as overriding interests. In his usual flair and flamboyance, Madan, J.A. referred to Section 30(g) and stated:

“What meaning is to be given to Section 30(g)? The rights under customary law may be argued to be extinguished by Section 28 – Kneller, J in Esiroyo v Esiroyo [1973], EA 388, at p 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Over-riding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore, on the registered owner of it. Under Section 30(g), they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case, the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.

Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour or the concomitant aspect of cultivation, which is not listed in Section 30. Equity always protects the just rights of the oppressed. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for.”

Another significant issue that was not even mentioned by the learned Judge in his judgment was the proceedings before the court supervised arbitration by a panel of elders under the chairmanship of the District Officer Kageama. Although the award was set aside, those proceedings formed part of the record of appeal and the appellant and his witness referred to them in their evidence. The award under the chairmanship of the Kageama DO was set aside, because it purported to allocate a portion of the suit property to another brother of the respondent who was not a party. It is also noteworthy that both courts did not all mention the fate of the appellant's developments which were carried out with the permission of the respondent.

In our own appreciation of the history of this matter and the undisputed evidence that the appellant and his family were in occupation of the suit land, he developed a permanent house and planted permanent crops like tea with the permission of the respondent who was the registered proprietor, this was done because the respondent as the elder brother had a customary obligation which gives rise to a trust.

Counsel for the appellant submitted that the appellant was also in adverse possession of the suit property, which cannot be ruled out in this matter; however the plaint filed by the appellant was not based

on a claim for adverse possession. Since parties are bound by their pleadings we will say no more regarding the issue of adverse possession.

We think we have said enough to show the findings by the two courts below, were rather perverse, they overlooked vital evidence and the judgment was bad in law. The appellant's prayers were to be given one half share of **Loc. 9/ Kanyenyaine/ 274** and **Loc. 9/ Kanyenyaine/T/ 135**. The evidence shows that the appellant was not the only brother of the respondent. The elders allocated the appellant 0.7 acres and ordered that **Loc. 9/ Kanyenyaine/T. 135** which is presumably a plot should remain with the respondent. On our part, we are of the view that the appeal should be allowed to the extent that the appellant is allocated 0.7 acres out **Loc. 9/ Kanyenyaine/ 274** where he has carried out his developments.

Accordingly, we allow the appeal, set aside the judgment by the two courts below and substitute with an order that the respondent do transfer 0.7 of an acre from parcel of land known as **Loc.9/Kanyenyaini/274**. This being a family matter, we do not desire to set these litigants any more against each other, each party should bear their own cost.

Dated and delivered in Nyeri this 4th day of July, 2013.

R. NAMBUYE

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JUDGE OF APPEAL

M. K. 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