IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 239 OF 2009

MUNYU MAINA …….....…… APPELLANT

AND

HIRAM GATHIHA MAINA....…….……...RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Nyeri Kasango J.) dated 15th December, 2008 in

HC Civil Appeal No. 341 of 1996)

****

JUDGMENT OF THE COURT

1. The suit property is ***Ruguru/Kiamariga/711*** registered in the name of the respondent and it measures 3.2 acres. The appellant's claim is that the respondent holds the title to the suit property on trust in equal shares for both parties to the appeal.
2. The background to the suit as stated in the Plaint is that the appellant and the respondent are brothers and are the sons of a one Maina s/o Gathiha now deceased. Maina s/o Gathiha was a polygamous man with two wives. The first house had three sons namely the respondent, the appellant and a third son. The second house had two sons. That during land demarcation in 1959, Maina s/o Gathiha had two parcels of land bearing ***Land Reference Ruguru/Kiamariga/711*** and ***Land Reference Ruguru/Kiamariga/710***. That ***Land Reference Ruguru/Kiamariga/710*** was registered in the name of Maina s/o Gathiha and Land Reference ***Ruguru/Kiamariga/711***was registered in the name of the respondent who was the 1st born son to the said Maina s/o Gathiha .
3. The appellant alleges that in or about 1962, their father Maina s/o Gathiha decided to settle his family on the two parcels of land. On Land Reference **Ruguru/Kiamariga/711** which was registered in the name of the respondent, he settled the respondent and the appellant who both entered the land and have been in possession and occupation of the land since then. On **Land Reference *Ruguru/Kiamariga/710***, he settled the two sons from the 2nd house and one son from the 1st house. All his sons from the two houses have been living and cultivating the respective portions of land as given by their deceased father.
4. The appellant in his plaint contend that upon the demise of their deceased father, he requested the respondent to sub-divide ***Land Reference Ruguru/Kiamariga/711*** so that each of them could have a separate title. The respondent refused to sub-divide the land claiming that he is the absolute and indefeasible owner of the land. The appellant filed suit in the High Court at Nyeri being ***Civil Suit No. 341 of 1996*** seeking the following orders:

i. ***That the Defendant is the registered owner of land parcel Ruguru/Kiamariga/711 in trust for himself as well as for the plaintiff to the extent of 1.6 acres.***
ii. ***That the said trust be terminated and the defendant sub-divide land parcel Ruguru/Kiamariga/711 and transfer one half or 1.6 acres to the plaintiff free from any encumbrances, and in default of his signing the necessary documents, the Executive Officer do execute the same.***
iii. ***Costs of this suit.***
iv. ***Such further or better orders as this Honourable Court may deem fit and fair to grant.***

5. The respondent in his defence stated that he is the registered owner of **Land Reference Ruguru/Kiamariga/711** and denied the fact that he held the said land parcel in trust for himself as well as for the plaintiff and put the plaintiff to strict proof thereof. He further averred that if the appellant/plaintiff had any interest in the suit property, then the same would be as awarded by the panel of elders (clan) concerned.
6. Upon hearing the testimony of the appellant/plaintiff and respondent/defendant, the Honourable Judge correctly stated that the issue for the Court to consider was whether the defendant was registered as trustee of the suit property on his behalf and on behalf of the plaintiff. In determining this issue, the Honourable Judge (***Kasango, J***.) expressed herself as follows:

> ***"The burden of proof lay on the plaintiff. The defendant in submissions argued that the plaintiff's claim is defeated by the provisions of Section 143 of the Registered Land Act (RLA)…. Although I am not necessarily of the view that the plaintiff has proved his case, I do however wish to dissuade the defendant from the position he has taken in arguing the provisions of Section 143 of the RLA. Clearly, a claim in trust is provided for in Section 28 of the RLA… It is clear that a claim in trust can be brought even on first registration. Having considered the evidence tendered, I make a finding that the plaintiff has failed to discharge the burden of proof. The plaintiff did not prove that the defendant was registered as a trustee of the suit property. Accordingly, the plaintiff's case is hereby dismissed with costs being awarded to the defendant".***

7. Aggrieved by the judgment of the High Court, the appellant/plaintiff lodged this appeal seeking orders to set aside the judgment of the High Court. The memorandum of appeal lists several grounds of appeal which can be compressed into the following:

i. ***In spite of the overwhelming evidence adduced by the appellant in support of his claim, the learned Judge erred in law and fact in concluding that the appellant did not discharge the burden of proof.***
ii. ***That the learned Judge did not give reasons for the conclusion she reached that the appellant had not proved his claim of trust.***
iii. ***The learned Judge ignored the fact that for a period of over 35 years, the appellant has been in possession and occupation of the portion of suit property and the respondent has never required the appellant to vacate the said land if he did not have any interest in it.***
iv. ***That both the appellant and the respondent were in total agreement on the role their father played in deciding who was to settle where and the learned Judge ignored this aspect of evidence.***

8. At the hearing of the appeal, learned counsel Mr. Kebuka Wachira appeared for the appellant while learned counsel Mr. W. Muthuani appeared for the respondent.
9. Counsel for the appellant elaborated on the grounds of appeal and pointed out various aspects of evidence that the trial court ignored. He submitted that the appellant established by evidence that their late father Maina s/o Gathiha had two parcels of land being ***Land Reference Ruguru/Kiamariga/711*** and ***Land Reference Ruguru/Kiamariga/710*** and that the deceased had settled all his five children on the two parcels of land. That the deceased settled the appellant and the respondent on ***Land Reference Ruguru/Kiamariga/711*** to be held and occupied by his two sons in equal shares. That both the appellant and the respondent moved into the suit property in or about 1962 and they are still in possession and occupation of their respective portions of the suit

property. That the evidence on record clearly shows that it was the father of the parties who put both the appellant and respondent in possession of the suit property. Counsel for the appellant submitted that all these facts were ignored by the trial Judge who erred in arriving at the conclusion that the appellant had not discharged the burden of proving that a trust existed in relation to the suit property. Counsel for the appellant further submitted that the respondent prevaricated in his defence by admitting that if at all the appellant had any interest in land, the same was to be resolved by the clan. Counsel faulted the trial court in not giving any or sufficient reasons as to why a finding was made that the burden of proof was not discharged.

10. The respondent opposed the appeal reiterating that under the ***Registered Lands Act*** (*now repealed*); a proprietor is the absolute and indefeasible owner of the property. It was submitted that the appellant did not demonstrate how the trust was created. Counsel urged that the appellant's occupation of a portion of the suit property was on license and a licensee cannot challenge the title of the registered proprietor. Counsel supported the Judgment by the trial court noting that the appellant failed to prove that the respondent fraudulently registered himself as proprietor of the suit property. The respondent urged this court to find that the two parcels of land did not belong to their deceased father. It was urged that if indeed the two parcels belonged to their deceased father, why was he not registered as proprietor of both parcels of land? Counsel submitted that the learned Judge was right in finding that Land ***Reference Ruguru/Kiamariga/711*** was owned by the respondent without any trusteeship obligations.

11. We have considered the submissions by counsel and analyzed the judgment of the High Court. It is our view that there are two issues for determination in this case namely:

i. ***Is the respondent holding the title to Land Reference Ruguru/Kiamariga/711 as a trustee for himself and the appellant?***
ii. ***Did the learned Judge err in finding that the appellant had not discharged the burden to prove that a trust existed in relation to Land Reference Ruguru/Kiamariga/711?***

12. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

> "***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 an 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 witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).***

This Court further stated in ***Jabane – vs- Olenja [1986] KLR 661, 664***

664, thus:

> "***More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."***

13. In evaluating the evidence on record, this Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in ***Sections 3A*** **and** ***3B*** of the ***Appellate Jurisdiction Act*** and as stated in ***Douglas Mbugua Mungai -vs- Harrison Munyi –***

Civil Application No. Nai. 167 of 2010 :-

> ***"We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly" As was stated in <u>Stephen Boro Gitiha- vs- Family Finance Building Society & 3 Others,</u> Civil Application No. Nai. 263 of 2009. "The overriding objective overshadows all technicalities, precedents, rules and actions … and whatever is in conflict with it must give way."***

14. The respondent contends that his title to the suit property which is a first registration is absolute and indefeasible. We agree that the respondent's title is a first registration; however, his argument is fallacious. **Sections 27, 28** and **30** of the repealed **Registered Land Act** (RLA) provide exceptions to indefeasibility of title. First, there is nothing in the **Registered Land Act** which precludes the declaration of a trust in respect of registered land even if it is a first registration. **Second,** ***Sections 27, 28*** *and* ***30*** *of the* ***Act*** make provision for exceptions: Section 28 provides that:

> ***"28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –***
>
> ***(a) …..***
>
> ***(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.***
>
> ***Section 30 of the Registered Lands Act provides:***
>
> > ***30. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:***
>
> a. ***……...;***
>
> b. ***……...;***
> c. ***……..;***
> d. ***……...;***
> e. ***…….***
> f. ***the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.***

15. One of the overriding interests under **Section 30 (f)** is the right of the person in possession or actual occupation of the registered property. The evidence in this case shows that the appellant entered the suit property sometime in 1962; he has been living on the property and he is still in possession and occupation of a portion of the suit property. The evidence shows that both the appellant and the respondent were put in possession of the suit property by their deceased father.

14. The respondent has urged us to find that the appellant's occupation and possession of a portion of the suit property was based on a license. The evidence on record does not support this submission. There is no evidence on record to prove the license and it has not been shown if at all when the license was granted. There is no evidence that the respondent gave permission to the appellant to enter the suit property in 1962. There is a presumption of continuance and uninterrupted occupation; that the appellant occupied and has continued to live on the portion of the suit

property on the same terms upon which he entered in 1962, that is, without permission and consent of the respondent. The presumption stated above is a rebuttable presumption of fact and the burden of proof to shift the presumption is on the respondent; he has not discharged the burden. The actual occupation and possession by the appellant is recognized and protected under **Section 30 (f)** of the **Registered Land Act** as an overriding interest. We find that the appellant has an overriding interest over the suit property.

15. On the issue of trust, we find that the learned Judge erred in law and fact and failed to give sufficient consideration to the evidence on record that it was the father of the appellant and respondent who settled all his five sons on the two parcels of land being ***Land Reference Ruguru/Kiamariga/711*** and ***Land Reference Ruguru/Kiamariga/710***. The evidence shows that both the appellant and the respondent were settled on ***Land Reference Ruguru/Kiamariga/711***. We concur with the appellant's submission that the evidence on record disclosed a trust on ***Land Reference Ruguru/Kiamariga/711***. Our conclusion is fortified with our finding that possession and occupation of the suit property by the appellant can only be explained on a balance of probability that it was their deceased father who put both the appellant and respondent in possession of the suit property. The respondent did not controvert this critical item of evidence. Further, the respondent has not been able to prove the existence or basis of the alleged license granted to the appellant. The appellant has been in occupation of the suit property openly and without interruption by the respondent and by way of claim of right.
16. Our consideration of the judgment reveals that the learned judge erred in failing to appreciate that the respondent had the evidential burden to prove how he acquired the suit property in order to dislodge the appellant's testimony that the suit property belonged to their deceased father and that it was their deceased father who put both parties in possession of the property to be shared equally. It is true that the legal burden to prove the existence of the trust rests with the appellant. However, the moment the appellant testified that the suit property belonged to their deceased father, the evidential burden shifted to the respondent to dislodge this item of evidence.
17. Under ***Section 112*** of the ***Evidence Act***, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the respondent acquired title to the suit property is a fact within the personal knowledge of the respondent and it was incumbent upon the respondent to dislodge the notion that their deceased father was beneficial owner of the suit property and to explain how he appellant came to be in possession of a portion of the property. **(See *Anne Wambui Ndiritu – v- Jospeh Kiprono Ropkoi & Another, Nyeri Civil Appeal No. 345 of 2000).*** Likewise, Section 116 of the Evidence Act stipulates that where the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The appellant is in possession of a portion of the suit property. Section 116 of the Evidence Act requires the respondent to prove that the appellant has no interest in the suit property**. (*See John Kariri Mucheke – v – M'Itabari M'Arunga, Nyeri Civil Appeal no. 15 of 2003; Jennifer Nyambura Kamau – v- Humphrey Mbaka Nandi, Nyeri Civil Appeal No. 342 of 2010).*** During submissions, Counsel for the respondent submitted that the appellant was a licensee. The appellant denied he was a licensee. It is our considered view that the respondent did not discharge the evidential burden to rebut the testimony of the appellant that it was their deceased father who put both of them into possession of the suit property and to occupy the same in equal share. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property.
18. We are reminded of **Madan, JA** (as he then was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others[1978] KLR 143; [1976-80] 1 KLR 891** to the effect that:

> **"If the circumstances are such as to raise equity in favour of the plaintiff and the**

extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred".

19. The totality of our re-evaluation of the evidence on record is that the learned Judge erred in failing to find that the appellant had proved the existence of a trust over ***Land Reference Ruguru/Kiamariga/711***. The upshot is that we hereby set aside the Judgment and decree of the High Court issued pursuant to the Judgment dated 15th December, 2008, in ***Civil Suit No. 341of 1996***. We hereby substitute in its place judgment to be entered for the plaintiff against the defendant as prayed for in the plaint dated 3rd December, 1996. This appeal has merit and is allowed. The respondent shall bear the costs of this appeal.

Dated and delivered at Nyeri this 10th day of December, 2013.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR