



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 151 of 2007

M'IMANYARA M'MURITHI APPELLANT

AND

NKANATA MURITHI 1ST RESPONDENT

JAMLICK MURITHI MURUMIA 2ND RESPONDENT

(Appeal from the decree and judgment of the High Court of Kenya at Meru (Sitati, J.) dated 17th day of May, 2007

in

H.C.C.C. NO. 89 OF 2001)

JUDGMENT OF RAWAL, J.A.:

The appellant **M'IMANYARA M'MURITHI** was the plaintiff in *High Court Civil Case No. 89 of 2001*. By a plaint dated 10th April, 2001 and filed in the High Court of Kenya at Meru on 2nd May, 2001 the appellant sued his brother **NKANATA MURITHI** (1st Respondent) and **JAMLICK MURITHI MURUMIA** (2nd Respondent) praying for judgment against them jointly and severally for:-

“(a) A declaration that the 1st defendant’s dealing and transfer of LR. NO. ABOGETA/UPPER KITHANGARI/4 to the 2nd defendant was wrongful as it was done in breach of the rust bestowed upon the 1st defendant.

“(b) An order that the 2nd defendant to transfer half share of the suit land LR. NO. ABOGETA/UPPER KITHANGARI/4 to the plaintiff and in default the Executive Officer of the court to sign all necessary documents leading to the transfer of the same to the plaintiff.

“(c) Costs and interest at court rates.”

In order to appreciate the nature of the dispute in the High Court, it may be necessary to set out the salient paragraphs of the plaint which were as follows:-

“1. The plaintiff is a male adult of sound mind residing in Meru Central District whose address of service for the purposes of this suit is care of:-

KIOGORA ARIITHI & ASSOCIATES

ADVOCATES

KINGORA BUILDING

FIRST FLOOR

P O BOX 3279

TEL: 31322

MERU

2. The 1st defendant is a male adult of sound mind residing in Meru District of the Republic of Kenya whose address of service is P O Box 6 KIONYO MERU (Service of summons to be effected through the plaintiff's Advocates office).

3. The 2nd defendant is an adult male of sound mind residing at Kionyo Meru Central District and is the son to the 1st defendant. (Service through the plaintiff's Advocates Office).

4. The 1st defendant is the elder brother to the plaintiff.

5. The 2nd defendant is the registered proprietor of the parcel of land known as LR NO. ABOGETA/UPPER KITHANGARI/4 measuring 6.99 Hectares the same having been the property of the plaintiff and the first defendant as it belonged to their deceased father one M'MURITHI MURATHI.

6. The said suit land to wit ABOGETA/UPPER KITHANGARI/4 being family land having been handed down generations after another and the 1st defendant transferred the same to the 2nd defendant. On or about the 18th day of November, 1997, the plaintiff avers that the 2nd defendant holds the said land in trust for the plaintiff and his family as the same belongs to the plaintiff and the 1st defendant

PARTICULARS OF TRUST

(a) The land was family land and previously belonged to the plaintiff's deceased father M'MURITHI MURATHI.

(b) The land belongs to the plaintiff and the 1st defendant.

(c) The land belongs to the plaintiff and the 1st defendant the same having been the land of the plaintiffs' father.

(d) The land is family land.

(e) The 1st defendant was a trustee of the plaintiff.

(f) The 2nd defendant holds the suit land as a trustee of the plaintiff.

7. On or about 18th November, 1997, the 1st defendant while intending to defeat the plaintiff's interest and entitlements to the suit land in breach of the trust and 2nd defendant obtained the Title Deeds for the said parcel of land. The plaintiff avers that the 1st defendant is in breach of trust for

transferring the trust land to the 2nd defendant his son.

PARTICULARS OF BREACH OF TRUST

- a) *Colluding to defeat the entitlement of the plaintiff in respect of the said land which is half share thereof.*
 - b) *Failing to transfer half share of the land to the plaintiff.*
 - c) *Transferring the Title Deeds without the consent of the plaintiff on 18th November, 1997.*
 - d) *Refusing to surrender the Title Deeds to the plaintiff.*
 - e) *Refusing to comply with the family's verdict.*
 - f) *Failing to respect the customary law norms pertaining to ownership of family and trust land.*
 - g) *Failing to request the 2nd defendant to give half share to the plaintiff.*
- 8. *The plaintiff avers that he has always utilized part of the said parcel of land and he is entitled to half share thereof.***
- 9. *The plaintiff's (sic) prays for a declaration that the 1st defendant's dealing with the suit land was in breach of Trust and the transfer to the 2nd defendant was in breach of trust.***
- 10. *The plaintiff prays that the 2nd defendant to transfer half of LR. NO. ABOGETA/UPPER KITHANGARI/4 to him as the 2nd defendant has no right over the same.***
- 11. *The plaintiff prays for half share of the said land from the 2nd defendant.***"

The defence filed by the two defendants denied all the foregoing and asked for the dismissal of the suit.

The hearing of the suit commenced on 16th October, 2002 before Kasanga, J. who heard the evidence of the plaintiff (appellant) and his two witnesses. After several adjournments, the suit was placed before Sitati, J. on 10th May, 2006 when the parties agreed that the hearing proceeds from where the matter had stopped. Sitati, J. then took over the hearing of the case and heard the evidence of the two remaining witnesses for the appellant and the defendants' witnesses.

The learned Judge considered the evidence and the submission by counsel appearing for the parties and came to the conclusion that the appellant had not proved his case; and ordered that it be dismissed. In concluding her judgment delivered on 17th May, 2007, the learned Judge said:

"46. I have considered the evidence in support of the plaintiff's case against the evidence adduced by the defendant and in my considered view, the plaintiff has not proved that the land in dispute was ancestral or family land. There is ample evidence from DW1, DW2 and DW3 that the suit land was allotted to the 1st defendant after the Mau Mau emergency and upon application by the 1st defendant. This evidence is corroborated by the evidence given by PW3 to the effect that only the people who were living on the land were given the land on application. Applications made by the plaintiff and their father were unsuccessful. DW2 stated that he too got land parcel number 2 while DW3, who was the chairman of the land allocation committee did not apply for a parcel of land from the special area because he had his own parcel of land.

47. *Having thus found that the suit land was not ancestral or family land, the 1st defendant's title which was passed on to him by the 2nd defendant on 18th November, 1997 (as per D Exhibit 1) was*

indefeasible. I also find that the plaintiff has not proved the existence of any kind of trust that would lead me to the conclusion that the manner in which the 1st defendant dealt with his land was in any way fraudulent or in breach of any trust because no such trust has been shown to have existed or was proved to be existing. Evidence that the suit land was part of the special area is overwhelming and I do find that it indeed was part of the special area.

48. There is now the final issue of how Moffat Gichuru came to be on the suit land. The plaintiff himself and his first two witnesses said nothing on the issue. PW5 Moffat Gichuru Manyara, stated that he occupies two (2) acres out of the suit land, and that it is his father the plaintiff who instructed him to go and live there. He also stated that it was only later that his father told him that the suit land was ancestral land. Although PW5 stated that the suit land belonged to his grandfather, my reading of the evidence tells me that PW5 forced himself onto the defendant's land at the instigation of the plaintiff. The claim that he is settled on the suit land because it was ancestral land is therefore not proved by evidence. Since neither the plaintiff nor his son Moffat Gichuru made any claim in adverse possession, I make no orders regarding Gichuru's occupation of the two acres of the suit land.

49. In the result, I find that the plaintiff has not proved his case against the defendants on a balance of probabilities and I accordingly dismiss the case with costs to the 2nd defendant.

It is the foregoing that provoked this appeal. Counsel for the appellant filed a Memorandum of Appeal consisting of the following 12 grounds:-

“1. The learned Judge of the Superior Court erred in law and fact in failing to find that LR NO. ABOGETA/UPPER KITHANGARI/4 was ancestral family land and therefore the plaintiff is entitled to get a share therefrom.

2. The learned Judge of the Superior Court erred in law and fact in that she failed to evaluate the entire evidence on record with the resultant conclusion that the appellant did not prove the existence of any kind of trust in spite of overwhelming evidence from the evidence of the appellant and his witnesses.

3. The learned Judge of the Superior Court erred in law and fact in that she found that the suit land was part of the special area when there was no evidence on record to support such a finding.

4. The learned Judge of the Superior Court erred in law and fact in that she made a finding that MOFFAT GICHURU MANYARA (PW5) forced himself into the suit land at the instigation of the plaintiff while there was no evidence to support such a finding.

5. The learned Judge of the Superior Court erred in law in failing to find that the evidence of JAPHET MARETE (PW4) was convincing and the same was clear that the land in question was ancestral land.

6. The learned Judge of the Superior Court erred in law and fact in disregarding the exhibits produced by the appellant and in particular the exhibits produced by MOFFAT GICHURU MANYARA (PW5) which supported the appellant's case that PW5 had occupied the suit land for considerable long period of time hence the evidence that the suit land was ancestral land.

7. The learned Judge of the Superior Court erred in law and fact in that she found that the plaintiff did not prove his case against the defendants on a balance of probabilities in spite of overwhelming evidence to the contrary.

8. The learned Judge of the Superior Court erred in law and fact by failing to consider and analyze the entire evidence of the appellant's witnesses and thereby arrived at the wrong finding on the issue of the suit land being trust land.

9. The learned Judge of the Superior Court erred in law and fact in that she disregarded and failed

to consider the weight of the evidence of the appellant's submissions and judicial authorities tendered before the court.

10. The learned Judge of the Superior Court erred in law in that she failed to find that the evidence of the respondents and their witnesses was of no probative value.

11. The learned Judge of the Superior Court erred in law in that she found that there was ample evidence from DW1, DW2 and DW3 that the suit land was allocated to the 1st defendant after the Mau Mau emergency and upon application by the 1st defendant when there was no evidence to support such a finding.

12. The decision of the Learned Judge of the Superior Court was against the weight of evidence and the same is bad in law."

When the appeal came up for hearing on 10th February, 2012, Mr. Kiogora Ariithi appeared for the appellant, while Mr. B.G. Kariuki appeared for the respondent.

Mr. Ariithi argued grounds 1 and 2 together, ground 3 separately, grounds 4-8 together and finally grounds 9-11 together.

In arguing the first two grounds of appeal, Mr. Ariithi submitted that the appellant was the younger brother of the 1st respondent (now deceased) and that the land was registered in the name of the 2nd respondent and that this land Abogeta/Upper Kithangari/4 was ancestral family land. Mr. Ariithi further submitted that the appellant was expelled by members of his family as supported by the evidence of PW2, PW3 and PW4.

On the third ground of appeal, it was Mr. Ariithi's submission that the land in dispute was subject to a trust.

On grounds 4 to 8, it was submitted that the learned Judge erred in believing the evidence of PW2, PW3 and PW4 to the effect that the suit land was not family land.

On grounds 9-12, it was submitted that a trust had been created on behalf of the appellant and 1st respondent.

To buttress his submissions, Mr. Ariithi referred us to his list of authorities.

In response to the foregoing submissions, Mr. Kariuki was of the view that the appeal should be dismissed as it had no basis both on facts and law. He submitted that the appellant's claim was based on the fact that the suit land was ancestral land but Mr. Kariuki pointed out that this same suit land was a settlement scheme. It was Mr. Kariuki's view that the land belonged to the respondent.

Mr. Kariuki further submitted that the learned Judge had analysed the evidence presented by the parties and came to the conclusion that the 2nd respondent was the rightful owner of the land in dispute. He also submitted that there was no trust involved in this dispute and that the decision of the High Court should not be disturbed.

Finally, Mr. Kariuki submitted that upon the death of 1st respondent the suit against him abated and the appeal against the 2nd respondent cannot stand on its own. Mr. Kariuki asked us to dismiss this appeal with costs.

This being a first appeal, it is the duty of this Court to re-evaluate the evidence, assess it and make its own conclusions but remembering that it neither saw nor heard the witnesses and making due allowance for that – see ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] E.A. 123, WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.1 and ARROW CAR***

LIMITED V. BIMOMO & 2 OTHERS [2004] 2 KLR 101.

I have set out the pertinent paragraphs of the plaint which was filed in the High Court. The appellant who was the plaintiff set out his case in the pleadings as reproduced elsewhere in this judgment and he called four witnesses to support his case. The gist of the testimony of the appellant and his witnesses was that the suit land was ancestral land to which the appellant was entitled. On the flip side of the dispute was the evidence of the 1st respondent (now deceased), 2nd respondent and their witnesses to the effect that the suit land belonged to the 1st respondent after he had applied for it from the Government.

In my own assessment of the evidence, it would appear that the appellant and his family had lived on the suit land just before the Mau Mau uprising and that the family was removed from the area for sometime after which the family was allowed back to this land. That is my assessment of the evidence of all those who testified about this land. For example, **Samuel M'tombui** (PW2) testified that he was related to the appellant and the 1st respondent and that the suit land was ancestral land which had been registered in the name of the 2nd respondent. **M'Imanene M'Ituankure** (PW3) gave similar evidence. **Japhet Marete** (PW4) went further and testified that the land in dispute should be shared equally by the two families.

The 2nd respondent's evidence was to the effect that the 1st respondent was his father who died on *15th December, 2004*, who had been the registered owner of the suit land and transferred the same to him. The 2nd respondent further testified that the transfer of the suit land into his name was not fraudulent in any manner. His witnesses **Cyrus M'Ithinji M'Rinchuni** (DW1), **Justus Muthamia** (DW2) and **M'Guantai M'Mwithirwa** (DW3) all supported the 2nd respondent's stand that the suit land belonged to the 1st respondent who transferred it to the 2nd respondent.

As already stated, the evidence on record shows that the parties herein were all members of the same family, who lived on this land in dispute before Mau Mau uprising. The evidence also shows that the entire family and others were removed from the area and only came back after the Mau Mau uprising. I am satisfied that the land remained ancestral before and after the Mau Mau uprising. The fact that the family was temporarily moved out of the suit land did not change the status of the land. In that case, the 1st respondent was registered in trust of other members of the family and it would appear that the quick transfer of the suit land from the 1st respondent to the 2nd respondent was intended to put the land out of reach of the appellant.

As I have come to the conclusion that the suit land remained ancestral land, it must follow that the appellant was entitled to a share of this land. That being the case, I find that the learned Judge erred in her conclusion that this was not ancestral land. I must, therefore, interfere with the findings of the learned Judge.

For the foregoing reasons, I allow this appeal and set aside the judgment and decree of the High Court and order the 2nd respondent to transfer half share of **L.R. No. ABOGETA/UPPER KITHANGARI/4** to the appellant.

The costs of the appeal and those in the High Court are awarded to the appellant. Those shall be the orders of this Court. This judgment is delivered pursuant to the provisions of **Rule 32 (3) of the Court of Appeal Rules, 2010**.

Dated and delivered at Nyeri this 25th day of October, 2012.

K. H. RAWAL

JUDGE OF APPEAL

JUDGMENT OF KOOME, J.A.

I have perused the Judgment made by *Hon Rawal, J.A.* in this appeal.

In absence of any fruitful addition to be made, I concur with the said Judgment wholly.

Dated and delivered at Nyeri this 25th day of October, 2012.

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR