REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A)

CIVIL APPEAL NO. 186 OF 2003

BETWEEN

PETER KAMAU NJUGUNA...APPELLANT

AND

STEPHEN MAGICHU...1ST RESPONDENT

JOSEPH WARARI...2ND RESPONDENT

JULIUS NJOROGE...3RD RESPONDENT

FRANCIS MAGICHU...4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 3rd December, 1998

in

H.C.SUCC. CAUSE NO. 1014 OF 1993)

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JUDGMENT OF THE COURT

1. The appeal before us relates to the estate of ***Njuguna Kibuthu*** (*"the deceased"*) who died at the age of 70 on 4th June, 1974, in Githunguri, Kiambu. The deceased had four wives, two of whom predeceased him, and thirteen sons, who were all married. He owned a piece of land which was registered in his name and known as **Githunguri/Ikinu/287** (plot 287) measuring about 14.4 acres, where the whole family resided in his lifetime. He also had in his name an account with the Kiambu District Farmers Union for delivery of coffee berries. The coffee was planted on another neighbouring piece of land known as **Githunguri/Ikinu/320** (plot 320) measuring about 4.5 acres which was registered in the name of the first born son of the first wife ***Peter Kamau Njuguna*** (*"the appellant"*).

2. As soon as the deceased died, the appellant moved into plot 320 and forced out the rest of the family members who were cultivating thereon claiming that the land was his. He moved in and constructed a

house. He also applied, in his name and that of his mother, for grant of Letters of Administration of the estate of the deceased citing plot 287 as the only property of the estate. The grant was issued on 16th April, 1986 but was not confirmed before the rest of the family applied for their own grant in 1993 which was issued on 7th October, 1993. The appellant then applied to have that grant revoked on the basis that there was already another grant in respect of the estate. The family was also involved in other skirmishes in other courts and before elders.

3. Eventually in 1995, a consent was entered into in court revoking the two grants and agreeing on issuance of one grant which was made to the first born sons of the wives of the deceased, now the respondents in this appeal as well as the appellant. It is indeed common ground that all the issues in relation to the estate of the deceased have been settled leaving only one issue for determination by the court. The issue was first framed before Kuloba J on 10th July, 1997 as follows: -

"Order: By consent the issue on which the viva voce evidence shall be called is whether the objector in the succession cause was registered proprietor of the land in dispute on (sic) trust for the deceased, or whether it was his own land through purchase by him. The evidence on the issue is to start on the 1st and 2nd October, 1997."

It was reiterated by Ang'awa J. on 17th September, 1998 as: "*Whether land title No. Githunguri/Ikinu/320 is part of the estate of the deceased in this case*".

4. Ang'awa J heard evidence from the 3rd widow of the deceased, ***Teresia Kahuhia Njuguna*** (PW1), a neighbour and friend of the family ***Peter Muchiri Karuga*** (PW2), and a former Agricultural Officer, ***Fredick Nganga Muhuri*** (PW3). She also heard the appellant and his witness ***Benjamin Kimani Gachunga****,* a former teacher. The learned Judge in addition, heard lengthy oral submissions on the facts and law from the respective counsel for the parties M/S. Gichane and GBM Kariuki. In the end she disbelieved the appellant and his witness and accepted the evidence of the respondents that plot 320 was part of the estate of the deceased. She stated in part: -

"I find that the correct position is that the respondent was registered as the first son by the consent of other family members to hold in trust for them.

I also find it hard to understand why the respondent waited until 1974, the year the deceased died to move and claim the land. If he really did buy the land he would have long taken possession of it during his father's life time.

....

I am satisfied that the respondent held the said land in trust for the rest of the family. I am also satisfied that the land had previously been in possession of his deceased father and the land was therefore part of the deceased estate.

I hereby declare the land parcel Githunguri/Ikinu/320 is part of the deceased property by way of trust duly held by Peter Kamau Njuguna the respondent/objector in this case."

5. That finding aggrieved the appellant and he is now before us to challenge it on 16 grounds listed in his memorandum of appeal but learned counsel appearing for him Mr. P.M. Kahonge concentrated on the issue of "*Trust*" which in his view required proof, but none was offered by the respondents, to establish that the land was purchased by the deceased; that the deceased caused registration in the name of the appellant; and that the appellant held the land in trust.

6. We shall come to those grounds of appeal and the submissions of counsel presently, but first, we must, as the first appellate court reassess the evidence on record and re-evaluate it to arrive at our own conclusions in the matter. We must nevertheless bear in mind that we did not see or hear the witnesses who testified and consequently the trial court would be a better judge on any findings of fact based on credibility of the witnesses.

7. It was the evidence of Teresiah (PW1) that when she was married by the deceased in a year she could not recall, he had one parcel of land where the whole family settled. After she had three children, the deceased purchased another piece of land from one ***Gatuma*** also known as *"Kanini"*. He purchased the land together with his brother Muriuki, and two other persons (Njoroge and Ng'ang'a) who were also brothers. She was present when the purchase was made although she did not take part in the negotiations, since she was a woman. The four subsequently shared it out into four portions and the deceased identified portions of it for cultivation by his wives. The appellant at that time was young and had not gone to school. The deceased also planted coffee on a portion of the land.

Later on, when the land consolidation was introduced in the area, the deceased was registered as proprietor of plot 287 but since no one person could have two title deeds, the second parcel (plot 320) was registered in the name of the appellant, to hold in trust for the deceased. The deceased and the rest of the family continued to use the land and at no time during the lifetime of the deceased, did the appellant lay any exclusive claim to it.

8. Teresiah was cross-examined at length but she maintained that she was present when the parcel of land was purchased and even contributed some of the consideration for it as did the other wives of the deceased. The deceased also obtained a licence for coffee berry deliveries to the factory and Teresiah harvested and delivered coffee in the name of the deceased. She also testified that she was present when the deceased, shortly before his death, called the appellant and instructed him to subdivide the portion of land into three portions for the three wives who had sons. The second wife had daughters only who were all married. Instead of doing so, as soon as the deceased died, the appellant blocked the path to the parcel of land and prevented any other member of the family from accessing the land by accusing them of trespass before Githunguri court.

9. The evidence of Teresiah was supported by Peter Karuga (PW2), who was born in 1926 and was a little older than the appellant who was born in 1930. He was present in 1940 when the deceased and four others bought a larger piece of land from ***GATUMA MUROKI***. The appellant was barely 12 years old and had not gone to school. The land was then shared between the four purchasers and in 1956, the deceased planted coffee in his portion and was licensed to deliver his berries to the factory. All members of his family used to cultivate the land and did so until after the deceased died in 1974 when the appellant forced them out.

Cross-examined on how he could witness a land transaction at the age 14 years, the witness insisted that he knew how to read and write and had his own house. He knew how the land came to be registered in the appellant's name because at that time every family was only entitled to one Title Deed and the deceased had one Title already. His eldest son was then chosen for registration as a trustee and the deceased planted coffee thereon.

10. The person who was called by the deceased in 1956 to measure the land and pits for coffee planting was Fredrick Nganga Muhuri (PW3), aged 85 years when he testified in 1998. He was the Agricultural Officer in Githunguri between 1943 – 1958 and so the disputed parcel of land was within his jurisdiction. He established that the land was owned by the deceased before measuring it for planting of the first 100 coffee trees because no one was allowed to plant coffee in someone else's land and he verified that fact. He also testified that when land consolidation came into the area in 1958, no one was allowed to hold two Titles and therefore the deceased chose his eldest son to be registered.

11. The appellant was born in 1930 and he testified that he bought the land from one ***Muriuki*** in 1955 when he was 25 years old. There were witnesses to that purchase but all were dead except one, ***Benjamin Kimani Gachuga*** (DW2). He paid 70 goats for it since he was grown up although he was not married. He married in 1960. His father's three wives except Teresiah were aware of the purchase. He said his father was happy that he had bought his own land and therefore assisted him to plant coffee thereon. He then allowed his father to pick the coffee in order to assist in the education of the appellant's step brothers. In 1958 he was registered as the owner of the land during land consolidation process in Kiambu District. Between 1958 and 1974 when his father died, he did not settle on the land but moved in after his

father died because he chose to do so. When his step-brothers attempted to continue picking coffee he filed criminal charges for trespass and they were fined.

12. The appellant was cross-examined at length not only about his real name on the basis that there was a baptismal card indicating a different name and his date of birth as 1937 (which he denied) but also about his education. He said he went to school in 1944 and finished in 1979, a period of 35 years from Standard 1 to Form II. He claimed that he dropped out of school in 1950 and went on to study through correspondence. He obtained his National Identity Card in 1956, married in 1960 and had his first child in 1962. He admitted that between 1952 and 1955 when he allegedly bought the land, there was a state of war in Kikuyu land and no profitable farming or business was going on and therefore he could not raise 70 goats as purchase price. He explained that he bought the land by goat instalments over a period of three years (1955. 1956 and 1959). Asked how the land could be registered in his name in 1958 before completion of purchase, the appellant said he agreed with the seller and the land consolidation committee allowed it. His father was present at the time of registration but was not his witness. In rather confusing evidence, the appellant stated that he had planted coffee in his father's land in 1956, but when he bought his own land in 1955, and the land was registered in his name, the coffee was moved to his land. Pressed further to clarify, he said he planted coffee in 1956 and was given a certificate of planting. He changed to say that the certificate was issued to his father because the appellant allowed him to be given the same since he was not married. Pressed on the issue, he identified a passbook shown to him issued in 1956 in his father's name for delivery of coffee berries. He also talked about another passbook issued to him for the same coffee in 1963 but was unable to produce it. He changed to say his passbook was issued in 1974 not 1963. He agreed that the Agricultural Officer (PW3) is the one who measured the pits for coffee planting in 1956 on behalf of the deceased, but insisted that it was on his land. He never claimed the land during the deceased's lifetime because he had allowed his father to use it for education of his step-brothers and sisters. He and his mother had received 4.87 acres from plot 287 as their share of inheritance but none of the other family members were entitled to a share of plot 320.

Finally the appellant was cross-examined on the apparent hurry to rush to the Lands office and process the title deed for the plot within 16 days of his father's death, and proceeding to court to accuse his brothers of trespass. The appellant stated that he only allowed his father, his wives and employees to use the land but not his brothers.

13. The sole witness for the appellant (DW2) was a retired teacher from the same village of Ikinu. He testified that the appellant bought the land in 1955 and he was present when he finished buying it in that year. The appellant had paid 70 goats for it. There was also a written document on it but he could not tell where it was. In cross-examination he stated that the appellant and the deceased planted coffee on the land in 1956 and they were picking the coffee together. In his recollection the appellant entered the land between 1978 and 1980. He took his brothers to court for trespass in 1978 and he was a witness in that case.

14. That was the state of the evidence evaluated by the superior court before she found as facts, that the disputed land belonged to the deceased who was in physical possession of it since its purchase in 1940 and even long after it was registered in the appellant's name in 1958 at the deceased's request. It was also a fact that the appellant did not assert his rights as the absolute registered proprietor for a period of 16 years until his father died in 1974. The deduction from those facts was the legal position that the appellant held the parcel of land in trust for the deceased and it was therefore part of his estate.

15. We must now examine the submissions put forward by Mr. Kahonge on the issue of Trust. As stated earlier, he submitted that three prerequisites were necessary for proof of trust. The first one was proof that the land was purchased by the deceased. On this Mr. Kahonge submitted that there was no evidence since Teresiah (PW1) was not privy to the sale transaction and was not aware of the purchase. So too the second witness, Peter Karuga, who was only 14 when the purported purchase was made. In Mr. Kahonge's submission a 14 year-old could not participate in discussions of elders. Furthermore there was no written document produced to support the said sale. As for the Agricultural Officer (PW3), he had no first-hand knowledge of the purchase and his evidence was therefore irrelevant.

16. On the other hand, he submitted, the evidence of the appellant established that he was 25 years old when he bought the land. He was also planting coffee on the piece of land and it did not matter that he only moved in to occupy the land physically after the deceased's death. Undue weight ought not to be attached to that fact. His witness was known to both the seller and the buyer and was present when the transaction was finalized. In sum therefore, the absence of proof of purchase by the deceased rules out ownership by him. Consequently the land could not be part of the deceased's estate.

17. As to the second prerequisite for proof of trust, whether the deceased caused registration of the land in favour of the appellant, Mr. Kahonge submitted that the finding made to that effect was not supported by the evidence on record. Nor was the finding correct that the appellant was only 12 years old in 1955 and could not therefore purchase land. In point of fact he was 25 and was capable of owning property without the consent or involvement of other family members.

18. On the third prerequisite, whether the land was held in trust, Mr. Kahonge referred to the Registered Land Act, which confers absolute rights to the registered owner unless trust can be clearly demonstrated. He called for the appeal to be allowed.

19. The advocates on record for the respondents are M/s. John Mburu & Company but they sent Mr. F. Munyororo, Advocate to hold their brief, apparently without sufficient instructions to argue the appeal. When adjournment of the hearing was declined, Mr. Munyororo simply stated that the appellant did not prove that he purchased the disputed parcel, and he supported all the findings of Ang'awa J.

20. We have fully considered the evidence on record and the submissions of learned counsel. It is our view that the findings of fact drawn from the evidence on record depend largely on the credibility of the witnesses on both sides. The learned trial Judge believed the respondent's witnesses and on our own evaluation of the entire evidence we can understand why. None of the parties produced any documentary evidence on the alleged purchase of the disputed land. They and their witnesses, however, said they were present when the respective purchases were made 15 years apart; (1940) and (1955). What was lacking in written documentation in respect of the deceased's purchase was however compensated by evidence that he took possession and used the land together with his wives and employees for over 34 years until he died in 1974.

The deceased planted a perennial crop, coffee, as of right and had his own account for coffee berry deliveries. Even the appellant concedes to this possession and use of the land, saying only that he had allowed the deceased to do so, but offering no other proof. The possession was adverse to his title, at any rate after 1958 when it was registered, and there is no logical explanation why the appellant suffered the possession for so long. The conduct can only be supportive of the assertion made by the respondents, that the registration of the land was made in the name of the appellant in trust for the deceased. On a balance of probability, the parcel of land was owned by the deceased and was registered in the name of the appellant to hold in trust. We so find.

21. In answer to Mr. Kahonge's submission that the land was held by the appellant under the Registered Land Act as absolute proprietor, and therefore there was no trust, we refer to previous decisions of this Court which have examined similar issues and in particular, **Obiero v Opiyo & Others [1972] EA, 227**; **Esiroyo vs. Esiroyo [1973] EA 388**; **Gatimu Kinguru v Muya Gathangi [1976] KLR 253**; **Kanyi v Muthiora [1984] KLR 712** and **Muthuita v Muthuita (1982 – 1988) 1 KAR 42**. The latter cases in particular have recognized customary law trust in land which is a common feature particularly in Central Kenya. We may repeat what Madan J. (as he then was) said in the ***Gatimu Kinguru*** case: -

"Under section 143 (1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom, which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold."

The said decision was followed in the ***Muthuita case***, where Potter JA stated:

“In GATIMU KINGURU v MUYA GATHANGI [1976] KLR 253 Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126 (1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct.

In view of that misdirection it is perhaps not surprising that the resident magistrate concluded that the evidence supported the defendant’s case. He did not deal with the claim based on adverse possession.

In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.”

(underlining provided)

Those decisions were also considered by the superior court in arriving at its decision.

22. We think we have said enough, on the basis of those decisions and the facts on record, to show that we agree with the superior court in the finding that the appellant holds plot 320 in trust for the deceased. The said plot remains part of the estate of the deceased and forms part of his estate. The appeal is consequently dismissed with costs and we so order.

Dated and delivered at Nairobi this 14th day of April, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

....

JUDGE OFAPPEAL

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

DEPUTY REGISTRAR