REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 331 of 2003

BETWEEN
MAROA WAMBURA GATIMWA ……....APPELLANT

AND

SABINA NYANOKWE GATIMWA
SIMON MASABU NCHAMBA GATIMWA
JOSEPH MATINDE GATIMWA
JOHN CHACHA GATIMWA
JULIUS GATIMWA CHACHA
THOMAS GENTARION GATIMWA…….…RESPONDENTS

(Appeal from the judgment /decree of the High Court of Kenya at Kisii (Wambilianga, J.) dated 15th October, 2002

in

H.C.C.C. NO. 129 OF 2002)
****

JUDGMENT OF THE COURT

The matter before us is fairly odd in various respects and would have benefited from clearer pleadings by the parties, clearer evidence from the witnesses on both sides and thorough analytical judgment by the superior court. Nevertheless, this is a first appeal and it is the duty of this Court to re-examine the entire record, re-evaluate the pleadings and evidence on record and reach its own conclusion in the matter.

While this Court has jurisdiction to review the evidence in order to determine whether the conclusions reached by the superior court should stand, nevertheless, the Court cannot properly substitute its own factual findings for that of a trial court unless there is no evidence to support the findings or

unless the findings are shown to be plainly wrong. Indeed, 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 (see **Peters vs. Sunday Post Ltd. [1958] EA 424, Kirunga vs. Kirunga & Another [1988] KLR 438).** In **Selle v Associated Motorboat Co. [1968] EA 123** the predecessor of this Court also stated, thus: -

> **"an appeal from the High court is by way of retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take into account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally."**

The parties to the dispute hail from the Kuria community of Kenya which spills over to Tanzania. On the Kenyan side, they border with the Kisii community. ***Sabina Nyanokwe Gatimwa*** (Sabina) (1st respondent) was the plaintiff in the superior court and is the natural mother of the 2nd to 6th respondents who were enjoined in the suit as co-plaintiffs. On the pleadings and evidence, denied at first but found as a fact, Sabina was joined in a woman to woman marriage to one of the four wives of ***Gatimwa Chacha*** (Mzee Gatimwa) known as ***Wantiko***, who had two daughters but no male child of her own. No issue arises about the legality of such union under Kuria customary law. The custom locally referred to as *"ogotetwa busino"* is recorded in Cotran's *"Restatement of African Law"* Vol. 1 at page 74/75 as follows:

> **"WOMAN-TO-WOMAN MARRIAGE (ogetetwa busino). A woman who is barren or who has female children only, may marry a girl to pay ikihingo for her in the normal way. This can be done during her husband's lifetime or after his death. The woman appoints a man from her husband's clan to have sexual intercourse with the girl and any children born will belong to the woman who paid the ikihingo."**

We are not aware of any authoritative court decisions declaring such customs as repugnant in terms of ***section 3 (2)*** of the ***Judicature Act (Cap 8)***. The modern trend, however, as recorded by Cotran (supra) is that this form of marriage is rare. It would thus follow that Sabina and her offspring would legitimately belong to the house of Wantiko and share in the property and other rights due to that house.

Mzee Gatimwa's other wives were Nyabanande, Boke and Gati. Nyabanande the eldest wife had a son known as Wambura who was the father of Maroa, the appellant before us. Under Kuria customs therefore, Sabina would be the stepmother of Maroa, while her sons, would be Maroa's cousins.

On 13th November, 2000, Sabina and her five sons sued Maroa before the superior court in

Kisii. The plaint was subsequently amended on 20th June, 2001 and they pleaded the following case:

"5. The Defendant's Grandfather one, Gatimwa Chacha had four wives namely Wantiko Gatimwa, Nyabanande Gatimwa, Boke Gatimwa and Gati Gatimwa to whom he shared his ancestral parcel of land just immediately before adjudication, demarcation and registration.

6. That because Wantiko Gatimwa had no male child she decided to marry the 1st plaintiff through levirate marriage and/or woman to woman marriage and hence as a result the plaintiff became entitled to inherit her (Wantiko Gatimwa's) entire share.

7. That in (sic) sometime in 1966 before adjudication, the plaintiff's moved to Tanzania due to constant sickness to seek traditional treatment and came back in 1979 much (sic) after the adjudication had been done in 1974.

8. That upon return, the plaintiffs found some people occupying on the ancestral land and when they (plaintiffs) asked the defendant to surrender them to the plaintiff their share, the defendant refused and ignored thereby forcing the plaintiffs to rent (sic) in towns and stay there.

9. Upon investigations the plaintiffs found out that the defendant had sold part of the ancestral land which was registered upon adjudication as parcel Nos. Bugumbe/Bugumbe/Masaba/103 in the name of Ombeo Nyasemi 6.2 hectares, Bugumbe/Masaba/530 in the name of Richard Ratemo, 3.5 hectares.

10. That the defendant was on Land Parcel No. Bugumbe/Masaba/106 measuring 15 hectares of which he was registered to hold 10.5 hectares in trust for the plaintiffs.

10A. The defendant herein however retained the portion of the ancestral land that was registered as LR NO. Bugumbe/Masaba/106 measuring approximately 15 hectares which portion of land the defendant holds in trust for and on behalf of the plaintiffs entirely and/or a portion measuring 10.5. Hectares thereof.

PARTICULARS OF TRUST

(a) The plaintiffs and the defendant are blood relatives and kins.

(b) The defendant herein is a step brother-in-law of the 1st plaintiff.

(c) The defendant herein is uncle of the 2nd and 6th plaintiff.

(d) The parcel of land now registered and known as LR No Bugumbe/Masaba/106 was part of the ancestral land to which the plaintiffs were/are also entitled to.

11. The plaintiffs claim against the defendant was (sic) registered on that Land Parcel No. Bugumbe/Masaba/106 to hold 10.5 hectares thereof, (sic) on trust for the plaintiff's who were away in Tanzania, at the time of adjudication and the defendant be compelled to sign the necessary transfer documents to effect transfer of 10.5 hectares in favour of the plaintiffs and in default the executive officer of this honourable court be authorized to execute the same.

12. That notwithstanding demands, several requests and arbitrations by the administration, defendant has refused and or become adamant to surrender the plaintiffs share and hence necessitated the filing of this suit.

12A. Demand and notice of intention to sue in default have been made to the defendant but the defendant has failed, neglected and/or refused to heed the demand thus

necessitating the filing of this suit."

The plaintiffs prayed for judgment to be entered for them for:

> *"(a) A declaration that the defendant holds 10.5 hectares in LR No. Bugumbe/Masaba/106 in trust for the plaintiffs.*
>
> *(b) An order directing the defendant to sign the necessary documents to effect transfer of 10.5 hectares from LR No. Bugumbe/Masaba/106 in favour of the plaintiffs and in default the Executive officer of the court be authorized to sign them on behalf of the defendant.*
>
> *(c) Costs of the said suit be provided for.*
>
> *(d) Any other and/or further relief that this honourable court may deem fit and expedient to grant"*

That pleading was denied by Maroa in a "*defence to amended plaint"* stating:

> *"2. The defendants states that in Kuria Customary Law a woman to woman marriage doesn't exist and that the 1st plaintiff herein was truly and lawfully married to Nchama Gatimwa.*
>
> *3. The defendant will also aver that the plaintiffs husband Nchama Gatimwa, the mother-in-law to the 1st plaintiff moved to Tanzania after selling their porition of land to Masubo Gitobai in 1960.*
>
> *4. The defendant will aver at the hearing hereof that land parcel No. BUGUMBE/MASABA/106 is ancestral land inherited from his father WAMBURA GATIMWA and doesn't include the share of NCHAMA GATIMWA who sold his portion and left for Tanzania.*
>
> *5. On their return from Tanzania in 1981 the plaintiffs bought a portion of land on which they are now settled.*
>
> *6. The defendant denies the contents of paragraph 10A of the plaint and the particulars thereto and will put the plaintiffs to strict proof thereof.*
>
> *7. Save as herein before admitted each and every allegation fact is denied as if the same were set out and denied seriatim."*

The suit was thereafter set down for hearing and was fully heard before Wambilyangah J. Sabina testified and called three other witnesses, while Maroa testified and called no witness. The parties were represented by learned counsel who filed written submissions before the learned Judge delivered his judgment on 15th October, 2002. The judgment was short and sharp as the learned Judge believed the evidence tendered by Sabina and her witnesses and found that the land which Sabina was entitled to inherit was unlawfully sold away by Maroa and therefore she was entitled to compensation. The learned Judge delivered himself thus:

> **"These witnesses also said that the defendant acted wrongfully callously when he sold the land which was meant for the 1st plaintiff and her children; and as a**

result he rendered the 1st plaintiff and her off-spring landless. He himself has over 37 acres (or 15 Hectares) to his name. It is an ancestral land which was passed on to him from the same old man who had bequeathed to the 1st plaintiff the land which the defendant alienated wrongfully. I accept the evidence of the plaintiff and her witnesses as the truth. I find the defendant to be a liar.

So I hold that as soon the defendant wrongfully sold the land to which the 1st plaintiff was entitled he must have assumed the burden of giving and settling the 1st plaintiff and her off-spring on an alternative land. He was not entitled to deprive the plaintiff of their only source of livelihood. Accordingly I declare that the defendant shall excise 12 acres from his land Bugumbe/Masaba/106 and transfer the title in the said 12 acres to the plaintiffs in this case.

Under a custom of the Kuria no one has a right to alienate the land that belongs to another man. If you do so you must be ready to share what you own with him. For that reason I enter judgment for the plaintiff against the defendant for 12 acres to be excised from Bugumbe/Masaba/106."

Maroa was aggrieved by that judgment and that is why he is now before this Court challenging it on 8 grounds as follows: -

"1. The learned trial Judge erred in law and in fact in failing to adequately consider the pleadings, evaluate the evidence adduced before him and the submissions made before arriving at the decision.

2. The learned trial Judge erred in law and in fact in failing to find that the rights of the appellant being the first registered proprietor pursuant to adjudication was indefeasible.

3. The learned Judge erred in law and in fact in awarding the respondents 12 acres whereas in the plaint the respondents claimed 10.5 hectares.

4. The learned trial Judge erred in law and in fact in relying on the contradictory evidence of PW3 and PW4.

5. The learned trial Judge erred in law and fact in failing to find that the respondents claim if any was barred by the statutory law of limitation.

6. The learned trial Judge erred in law and in fact in awarding the 3 respondents 12 acres whereas there was no evidence led before him as to the exact acreage of the land of 1st respondent allegedly alienated by the appellant or that he held the land in trust for the respondents.

7. The learned trial Judge erred in law and in fact in failing to SUO MOTU come to a finding that the respondents claim was incompetent and the suit a nullity as the court should have been moved under the provisions of Order XXXVI of the Civil Procedure Rules by way originating summons and not by way of plaint.

8. Had the learned trial Judge taken into consideration all the above facts he should have come to a finding that the suit was misconstrued and dismissed the same with costs."

We shall revert to the submissions made by counsel on those grounds presently. First, we examine the evidence adduced by the parties.

It was Sabina's evidence that Mzee Gatimwa had a big piece of land in Masaba which he shared

out to the four houses represented by his four wives in the 1960's. Sabina was then entitled to the portion which was shared out to Wantiko. On unclear dates after the subdivision of the land by Mzee Gatimwa, a portion of Wantiko's land was sold by Mzee Gatimwa to one Joram Masubo Getubai, after which Sabina and her children, Wantiko and Mzee Gatimwa travelled to Tanzania to seek treatment from traditional healers. The rest of the land of Wantiko was left to Maroa to take care of in trust for Wantiko.

It would appear that the family which travelled to Tanzania took sometime there and eventually Mzee Gatimwa and Wantiko died and were buried there. Sabina then returned to Kenya but found no land to settle on with her children. That is because in her absence, the process of Land Adjudication had taken place in Masaba and Maroa had sold Wantiko's land to two Kisii tribesmen known as ***Ombeo Nyasame*** and ***Moraa Makori***. The land had been registered in the names of the two Kisiis as Bugumbe/Masaba/103 and Bugumbe/Masaba/530 measuring 6.2 hectares (about 15.5 acres) and 3.5. hectares (about 8.75 acres), respectively. Maroa himself had registered his own land as Bugumbe/Masaba/106 measuring 15 hectares (about 37 acres).

Sabina further testified that when she returned from Tanzania and found the land she was entitled to had been alienated by Maroa, she reported the matter to the local chief of Bugumbe location, the District Officers of Masaba and Kehancha, and the District Commissioner, Kuria District. Eventually the dispute was adjudicated upon by elders and a decision was made that the share of Wantiko's land should go to Sabina and her children.

On that evidence Sabina was supported by the chief of Bugumbe North, ***Joseph Nyamboto Mogesi*** (PW2) who handled the dispute through elders. The chief produced the written decision submitted to him by the elders on 7th March, 1994 as an exhibit. The chief confirmed that Mzee Gatimwa had sold a portion of the land to one Joram Masubo Getubai which was not in dispute, and that the portion that remained as part of Wantiko's share was sold to the two Kisiis. Further confirmation that it was Maroa who sold the land to third parties came from ***Marwa Chacha*** (PW3), a relative of both Sabina and Maroa. The land was sold before Land Adjudication was declared in the area and so the buyers were registered as the proprietors while Maroa was registered as the proprietor of the adjacent land which he had inherited from his father, Wambura Gatimwa. Finally, 81 year-old ***Mugita Nyamboto*** (PW4) testified that Sabina was lawfully entitled to inherit from Wantiko as she was married to her by custom. He

confirmed that Wantiko had a share of land given to her by her husband, Mzee Gatimwa. It was Maroa, he further confirmed, who sold that piece of land to one ***Ombeo Nyasemia*** and ***Kimanga***, leaving Sabina with nothing to inherit. His view was that Sabina should be given back the land sold to the two Kisiis.

In his defence, Maroa asserted that he is the registered proprietor of Bugumbe/Masaba/106 which he inherited from his father, Wambura Gatimwa. He confirmed that Sabina was given land by Wantiko, who had married her, but it was now occupied by two Kisiis – Ombeo Nyasemi and Moraa Kimanga. He denied that he sold Sabina's land to the two Kisiis, stating that he only sold some land to the Kisiis but that was the land he had bought from Masubo Getubai who had bought it from Mzee Gatimwa. He admitted that the dispute had been taken before elders and was decided upon but stated that he disputed the decision. He finally asserted that the witnesses who testified that he sold Sabina's land to the two Kisiis had lied.

It is on that evidence that the superior court delivered itself in the brief judgment reproduced above, which aggrieved the appellant. We must now revert to the grounds of appeal put forward by the appellant.

Maroa, the appellant was represented by learned counsel Mr. T.T. Tiego before us. Mr. Tiego abandoned ground 7 in the memorandum of appeal and sought to consolidate and argue grounds 1, 3 and 6 as one, and grounds 2, 4, 5 and 8 separately. In the end, however, he argued the appeal globally. The main ground of attack advanced by Mr. Tiego was that the judgment was not in tandem with the pleadings and the evidence tendered before the court. More specifically, he submitted, the pleading by Sabina was that Maroa held a portion of 10.5 hectares (26.25 acres) out of land parcel No. Bugumbe/Masaba/106 which was registered in his name in trust for Sabina and her children, and she sought a declaration for such trust and an order terminating it and transferring the portion to Sabina and her children. The evidence however was that although Maroa was the registered owner of Bugumbe/Masaba/106 which was his own inheritance from his father, he, Maroa, had sold away Sabina's entitlement of the ancestral land and should therefore compensate Sabina. The judgment, he submitted, accepted this evidence but surprisingly declared that Maroa was holding 12 acres which the learned Judge justified as due to Sabina under Kuria customary law. This finding, in Mr. Tiego's view, was not consonant with the pleadings and the evidence and therefore ought not to have been made. The fact of the

matter was that each house had its own parcel of land and therefore the issue of trust could not arise. In any case, he pointed out, the portion of land in dispute was registered in the names of other persons who were not parties in the suit.

Mr. Tiego further faulted the superior court judgment for giving judgment for 12 acres to Sabina when she had pleaded for 10.5 hectares (26.25 acres), a claim she did not prove; relying on contradictory evidence of Maroa Chacha (PW3) and Mogita Nyamboto (PW4) as against that of Sabina (PW1) on the person who sold away Wantiko's land; failing to make a fending that Sabina's claim was time barred under the Limitation of Actions Act; and relying on unproven customary law.

In response to those submissions, Mr. J. Oguttu Mboya, learned counsel for Sabina and her children, submitted that the totality of the evidence on record established a resultant or constructive trust in favour of Sabina. That is because the parties were admittedly related and shared one ancestral land which had been shared out on the ground. But on registration, Maroa took the land of Wantiko, which Sabina was entitled to, as his own, had portions of it sold and the rest was registered in his own name. In his view therefore, a resulting or constructive trust arose in favour of Sabina as pleaded in her suit. As for the discrepancy in the claim pleaded for 10.5 Hectares (26.25 acres) and the 12 acres decreed by the court, Mr. Oguttu Mboya submitted that the court had a discretion to exercise in the matter since it was not a case of special damages or liquidated damages, and therefore it was a non-issue. He further submitted that the fact of existence of first registration did not negate a trust; that trust can supercede a first registration under the Registered Land Act and therefore there can be no contention that the Title was indefeasible; that the issue of limitation was not raised in the pleadings or canvassed before the superior court and therefore it was not open for discussion on appeal; that the contradictions in the evidence, if any, were minor and did not affect the totality of the evidence or the issues for determination; and that there was a finding or fact, supported by evidence, that Maroa was a liar and therefore was not worthy of belief.

Both counsel cited various authorities in support of their respective submissions and we are grateful for their assistance. If we do not mention any of those authorities, it is not because of lack of relevance but because the decision we have to make is clear in our minds, after considering all the pleadings, submissions and the evidence on record.

We must on the outset dispose of the issue of limitation which was raised for the first time before this Court. The issue is certainly not a jurisdictional one which is amenable to consideration at any stage of the proceedings. It is dependent on pleadings and evidence and in this matter there was none before the superior court. Indeed ***Order VI rule 4(1)*** of the Civil Procedure Rules provides for matters which must be specifically pleaded and one of those matters is *"any relevant statute of limitation"*, which would render the claim of the opposite party unmaintainable. It has nevertheless been held by this Court, that the court may base its decision on an unpleaded issue, but only if in the course of the trial the issue has been left for the decision of the Court. It will be left for the decision of the court if evidence on it is led and submissions made by counsel – see **Vyas Industries v Diocese of Meru [1982] KLR 114**. As stated earlier, there was no pleading on the issue of limitation in this matter and no evidence or submissions made on it. In the event we decline to consider it.

The next issue is on Trust which was pleaded in paragraph 10A of the amended plaint. It is a specific and particularised pleading in respect of parcel No. Bugumbe/Masaba/106, a portion of which was alleged to be held in trust for the respondents. Unfortunately, as observed earlier, the judgment of the superior court was short and cannot be said to have been analytical. Perhaps that was a reflection of the brevity of the evidence tendered before the court. In the end however, the learned Judge made no finding on the issue of trust. We believe it was because the evidence adduced was not probative of the pleading made on trust as aforesaid. The evidence was rather that the appellant Maroa had alienated the whole of the land which the appellants were entitled to, by selling it to some two Kisiis who ended up as the first registered owners during land adjudication. The fact that Bugumbe/Masaba/106 was the land inherited by the appellant from his father was not specifically displaced. No witness testified that some portions of Wantiko's (and therefore the respondents') entitlement to land, were annexed and thereafter registered in the name of the appellant as Bugumbe/Masaba/106. In our view, without such evidence, it would be erroneous to make any finding that Bugumbe/Masaba/106 or any portion of it was held in trust for anyone else by the first registered owner. If such evidence was available, there would be no impediment in law to declare it, the first registration notwithstanding. – See **Mumo v Makau [2002] 1 EA 170**.

The learned Judge however resorted to Kuria customary law for the proposition that:

> **"……no one has a right to alienate the land that belongs to another man. If you do so, you must be ready to share what you own with him."**

On that basis alone, the learned Judge declared that some 12 acres be excised from the appellants land and be given to the respondent. With respect, that concept of justice may well be attractive but it could only have been considered if there was evidence laid on it. No pleading was made and no witness said anything about such custom and it would appear that it emanated from the Judge's own experience. We find in our assessment, that there was no basis for application of Kuria customary law with respect to land in this matter and we agree with Mr. Tiego's criticism of the judgment in that regard.

But that is not the end of the matter. There were clear findings of fact, supported by the evidence on record, that the ancestral land to which the respondents were entitled to was sold away by the appellant to two Kisiis who are now the registered owners thereof and were not parties to the suit. The denials by the appellant that he did not sell the said portion of land was disbelieved by the learned Judge who made another finding of fact on the demeanour of the appellant, that he was a liar. On our part we have no reason to depart from those findings of fact and we must therefore hold, as we now do, that the appellant wrongfully alienated the respondents' entitlement to their share of ancestral land. The only difficulty is the remedy to which the appellants are entitled, but a remedy there must be, because equity does not suffer a wrong to be done without a remedy.

Several options are open to remedy the situation: firstly, the portion of land which was found to have been sold to the two Kisiis, Ombeo Nyasemi and Moraa Makori, may be valued at the appellant's expense and the monetary value thereof be paid out to the respondents; secondly, the appellant may purchase for the respondents another piece of land of equivalent acreage and have it registered in the names of the respondents; thirdly, the appellant may excise a portion from his own parcel of land, Bugumbe/Masaba/106 equivalent to the land wrongfully sold away and transfer the same to the respondents; or finally the payment of a lump sum in damages assessed by this Court for payment to the respondents.

We think in the circumstances of this case, we should adopt a just and less cumbersome option to resolve the dispute. The choice is dictated by the desire to achieve finality in this long running family dispute, the overriding objective of civil litigation dictated in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act, and the desire to ensure that the respondents are not rendered landless. Consequently

the order that commends itself to us is that the appellant shall compensate the respondents for the loss of their land by excising a portion of twelve (12) acres from his land, Bugumbe/Masaba/106 which portion shall be transferred to the respondents. In effect, we are in agreement with the superior court in that respect but for different reasons. We also agree with the order that the parties shall equally bear the costs of subdivision and transfer of the 12 acres to the respondents. In default of compliance with this order by the appellant within sixty days from the date hereof, we direct that all necessary subdivision and transfer documents shall be executed by the deputy registrar of the superior court on behalf of the appellant at the appellant's cost.

The appellant did raise several issues in the appeal which were successful although in the end he failed in the appeal which is dismissed. Each party will therefore bear its own costs of this appeal. Those shall be our orders.

Dated and delivered at Kisumu this 30th day of April, 2010.

E.M. GITHINJI
……..……
JUDGE OF APPEAL

P.N. WAKI
…….…….
JUDGE OF APPEAL

ALNASHIR VISRAM
……..……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR