



IN THE COURT OF APPEAL

AT NYERI

Civil Appeal 151 of 2005

MATE NTUARA 1ST APPELLANT
NJUE NTUARA 2ND APPELLANT
NJAGE NTUARA 3RD APPELLANT
NJERU NTUARA 4TH APPELLANT
CHABARE NTUARA 5TH APPELLANT
JEBI NTUARA 6TH APPELLANT

AND

RITHAA NTUARA 1ST RESPONDENT
MICHENI RITHAA 2ND RESPONDENT
RITHI NTUARA 3RD RESPONDENT

(An appeal from the Decree and Judgment of the High Court of Kenya (Sitati, J) dated 19th April, 2005

In

H.C.C.A. No. 139 of 2001)

JUDGMENT OF THE COURT

By plaint dated 13th December, 1995 and lodged in the Court of the Chief Magistrate at Meru on 14th December, 1995, the six appellants herein, namely Mate Ntuara, Njue Ntuara, Njage Ntuara, Njeru Ntuara, Chabare Ntuara and Jebi Ntuara, sued three people, namely Rithaa Ntuara, Micheni Rithaa and Rithi Ntuara, the respondents herein, over two parcels of land known as Karingani/Mugirirwa/273 and Karingani/Mugirirwa 567 or 569 which the appellants claimed had belonged to their late father Ntuara Amundi who died sometime in 1972. The appellants are apparently step-brothers of Rithaa Ntuara and Rithi Ntuara, the first and the third respondents respectively. The second respondent, Micheni Rithaa is the son of the first respondent. The appellants claimed in their plaint that their late father had had, during his life time, three pieces of land the first being parcel No. Karingani/Mugirirwa/520 plus the other two over which the suit was brought. Karingani/Mugirirwa/520 had been subdivided and distributed in equal shares to all the sons of the deceased, Ntuara Amundi, in Succession Cause No. 28 of 1985; there was, accordingly no dispute over that land.

According to the appellants, though the disputed lands were registered in the names of the 2nd and 3rd respondents, they were so registered in trust for all the sons of the late Amundi. Parcel No. 273 was apparently registered in the name of the 2nd respondent; the appellants claimed that it had originally been registered in the name of the 1st respondent who had in turn transferred it to his son the 2nd respondent. The appellants said their late father had registered the land in the name of the 1st respondent as a trustee for all the sons of deceased. The 1st respondent's case had always been that he had himself bought the land, registered it in his name and thereafter transferred it to his son. The land had never belonged to his late father.

The other disputed land was registered in the name of the 3rd respondent. The appellants similarly claimed that their late

father had registered the land in the name of the 3rd respondent to hold it in trust for all the brothers. But the 3rd respondent stated he had bought the land from Njagi Thirikwa and Njagi Thirikwa testified before the trial Magistrate as D.W.2; he confirmed to the Magistrate that he had sold the land to the 3rd respondent and another man he named as Njagi Nahashon. According to the 3rd respondent and his brother the 1st respondent, the two pieces of disputed parcels had never belonged to their late father as claimed by the appellants.

Dealing with these conflicting versions, the trial Magistrate found and held:-

“Having evaluated all the evidence adduced herein I find that the issues of (sic) determination herein are whether land parcels Nos. 567 and 273 were lands of Ntuara Amundi and whether the said lands were supposed to be shared out to all the sons of Ntuara Amundi who are the 1st defendant and the 3rd defendant.

In the light of the evidence adduced herein, it has come out clearly that land parcel No. 520 belonged to Ntuara Amundi. It was subject to succession cause No 28 of 1995. Each of the sons of Ntuara Amundi were required (sic) to get an equal share of that land.

However, it has come out also that land parcels No. 567 and 273 were bought and they did not belong to the late Ntuara Amundi. I was satisfied by the evidence on record that land parcel No. 567 was bought by the 3rd defendant and it has nothing to do with the late Ntuara. I was also satisfied with the evidence of the defence that land parcel No. 273 was bought and registered in the name of the 1st defendant. As such, the two lands were not supposed to be shared out to the sons of Ntuara and the plaintiffs have no grounds to claim the two pieces of lands or any portion thereof.”

These are clear and unambiguous findings by the trial court on the issues which were placed before that court for its determination.

The appellants were, however, dissatisfied with the determination by the trial court and they appealed to the High Court and by her judgment dated and delivered on 19th April, 2005, Sitati, J found and held:-

“The learned trial Magistrate considered all that evidence in his judgment. I have also found from that evidence that parcel numbers 567 and 273 did not form part of the estate of Ntuara Amundi so as to entitle the appellants to a portion thereof. The learned trial Magistrate considered the whole of the evidence adduced before him, both the appellants’ case and the respondents’ case, and rightly found in favour of the respondents. The appellants did not establish the existence of a trust in parcel Nos. 567 and 273. Those parcels were bought by the 1st respondent and did not form part of the estate of the late Ntuara Amundi. In the result, I find no merit in the appeal -----.”

Against this finding the appellants now come before us by way of a second appeal and in their joint memorandum of appeal they complain:-

“1. THAT the learned Judge erred in law in failing to record the proceedings accurately and therefore ended in making an erroneous Judgment.

2. THAT the learned Judge erred in law and in fact in discrediting the evidence of the Appellants and relying only on the green cards produced by the Respondents.

3. THAT the Learned Judge erred in law and in fact in giving credence and/or weight on the evidence of the Respondents in that they bought Land Parcels NOS. KARINGANI/MUGIRIRWA/567 and 273 whereas the said parcels were registered in the names of the 1st Respondent as elder brother of the Appellants for future transmission to the younger siblings.

4. THAT the Learned Judge erred in law and in fact in failing to consider a simple fact that this matter had been adjudicated upon by the land dispute tribunal who were much familiar with the state of the family.

5. THAT the Learned Judge erred in law and in fact in assuming that the Learned Magistrate sifted the burden of proof from the Plaintiff to the Defendant which was not the case.”

At the hearing of the appeal on 28th October, 2010 only three out of the six appellants appeared, namely the 1st, the 4th and the 5th. They told us to proceed with the appeal in the absence of the other appellants whom they said had been served but had no money for traveling to Nyeri for the hearing of the appeal. Two out of the three respondents appeared. We agreed to hear the appeal in the absence of other appellants and one of the respondents because the claim is an indivisible one; if the claim fails for one appellant, it fails for all of them. If it fails for one respondent, it fails for all of them.

The appeal being a second one to the Court, we can only deal with issues of law. In their submissions before us the appellants merely repeated what they had told the Magistrate and in the superior court. Being lay litigants, they understandably thought the Court was hearing the dispute afresh. We nevertheless pointed it out to them that we would only consider what is in the record before us.

In ground one they complain that the learned Judge did not accurately record the proceedings before her. We do not know and none of the appellants present before us told us exactly what the Judge who was in any case hearing an appeal did not correctly record. We cannot allow the appeal on that ground.

In ground two the complaint appears to be that the Judge only based her decision on some green-cards. We have checked the record of appeal but are unable to find any such card or cards. The record of the trial Magistrate shows that some exhibits were produced but they are not in the record before us. The learned Judge's judgment does not at all refer to any green card. It appears that the 1st respondent had produced some receipts in the trial court but even those are not included in the record. The record was prepared by the appellants themselves. But the issue is that whether there were or there were no green cards the question was whether the two disputed parcels of land formed part of the estate of the late Ntuara Amundi and were available for distribution to all the sons of Amundi. On this point the two courts below were in total agreement: the two parcels never belonged to Ntuara Amundi and were never part of his estate available for distribution. No legal basis was shown to us upon which we could interfere with this finding.

Ground three of the grounds of appeal simply questions why the two courts below chose to believe the respondents and not the appellants. There was more than sufficient evidence on record upon which the two courts could and did come to the conclusion that the disputed parcels of land did not belong to the late Ntuara Amundi and, therefore, were not available for distribution as part of his estate. The appellants did not show us any legal basis upon which we could interfere with that conclusion.

Ground four complains that the Judge did not consider the fact that the dispute had been adjudicated upon by a land disputes tribunal. First, there was no such adjudication produced in the trial court or in the superior court. In any case, it was the appellants themselves, represented by counsel, who had filed a plaint in the magistrate's court. In the plaint, they were not asking the Magistrate to enforce a decision already made, whether by a panel of elders or by a land disputes tribunal. The appellants had asked the Magistrate for:-

“(a) A declaration that land title NO. KARINGANI/MUGIRIRWA/273 and 569 in the hands of the 1st and 2nd Defendants are held in trust for the benefit of the plaintiff (sic) and the 1st & 3rd defendant (sic).

(b) An order that the land titles NO. KARINGANI/MUGIRIRWA/273 and 569 be registered in the names of the plaintiffs and the 1st and 3rd defendant (sic) each with an equal share.”

These were the orders sought before the Magistrate; the Magistrate was not being asked to enforce some prior decision. The Magistrate refused to make the orders sought and the High Court confirmed that refusal and it is now too late in the day to complain that the two courts had failed to take cognizance of a prior decision, the record of which was not even produced during the trial.

Ground five complains about the Judge assuming that the Magistrate had “sifted” the burden of proof from the appellants to the respondents. We do not quite understand what this complaint is about but we can only point out that it was the appellants who were making claims to lands registered in the names of the 2nd and 3rd respondents and the burden was naturally upon the appellants to prove on a balance of probabilities the claims they made. The two courts below found that the appellants had failed to prove their claims as required by law. Once again, the appellants failed to point out to us a legal basis upon which we could interfere with that conclusion on a second appeal.

In the event, all the five grounds of appeal proffered by the appellants fail and the consequence of that must be that their appeal fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 19th day of November, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.