



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NYERI

Civil Appeal 162 of 2003

SHELMITH NYAMBURA KARIUKI .....APPELLANT

AND

MUTURI WAMBUGU ..... 1<sup>ST</sup> RESPONDENT

GAITA NDEGWA ..... 2<sup>ND</sup> RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Juma, J.) dated 27<sup>th</sup> February, 2002*

in

**H.C.C.C. NO. 70 OF 1971)**

\*\*\*\*\*

*consolidated with*

**H.C.C.C. NO. 99 OF 1987)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

By his amended plaint dated 11<sup>th</sup> May, 1989, **Gibson Kariuki**, now deceased, prayed for two main reliefs:

“(1) *An order that the defendant, Muturi Wambugu, quit and deliver vacant possession of land known as Pesi Settlement Scheme No. 50.*

(2) *An order for the said defendant to pay to him general and special damages to be assessed by the court for obstructing the appellant from carrying out improvements on the aforesaid plot.”*

Gibson Kariuki died during the pendency of his suit in the High Court and his widow as the legal representative of his estate was substituted and in this appeal she is the appellant.

The aforesaid defendant is the 1<sup>st</sup> respondent in the appeal, in which two grounds have been raised in support of the appeal, namely:

“(1) *The learned trial Judge of the superior court erred in law when he held that the suit plot was acquired by the appellant in partnership with Gaita Ndegwa and Muturi Wambugu.*

(2) *The learned trial Judge erred in law when he held that the Law of Limitation did not apply to the claim of the respondents against the appellant.”*

The subject property was originally owned by the Settlement Fund Trustee and measured about 82 acres. It was allotted to the appellant on 9<sup>th</sup> June 1965 on the understanding that the appellant would pay to the Settlement Fund Trustees a designated sum of money, which the appellant said he paid in full. The dispute which arose and which was the basis of the High Court suit is whether the appellant met the purchase price alone or in partnership with **Gaita Ndegwa** and **Muturi Wambugu**.

The appellant in his amended plaint has averred that he allowed the respondent to occupy part of the suit premises as a mere licensee in exchange for occupation by him of 2 acres of the 1<sup>st</sup> respondent's land known as **Muhito/Njiru-ini/29**.

The 1<sup>st</sup> respondent filed a written statement of defence and counterclaim. He, therein denied he was a licensee on the suit property, and averred that although in the official records of the Settlement Fund Trustee the appellant was the allottee of the subject land, the property belongs to the appellant, himself and John Gaita Ndegwa in equal shares. Payment for the land was by the three of them in unequal shares but the balance was paid from the proceeds of the farm produce which was jointly produced. In his counterclaim he prayed for a declaration that he is entitled to 1/3 of the suit property, an order that the appellant transfer one third of the land to him and costs of the suit.

It should be noted that there was another separate suit which was filed by John Gaita Ndegwa (2<sup>nd</sup> respondent) against the appellant's deceased husband in which, like Muturi Wambugu, he prays for a declaration that the suit property was registered in the appellant's name in trust for himself and the said John Gaita Ndegwa. He also prayed for the revocation of the trust and sub-division of the property into three portions and each of the three partners be given a portion thereof each.

J.V. Juma, J. heard the matter. As at the date of trial, Gibson Kariuki had died and had been substituted by his widow, **Shelmith Nyambura Kariuki**. The two suits were consolidated and heard together with Shelmith as the plaintiff, Muturi Wambugu as 1<sup>st</sup> defendant and Gaita Ndegwa as the 2<sup>nd</sup> defendant.

Shelmith testified that only Gaita Ndegwa assisted her deceased husband to get the land. It was her evidence that Gaita gave Kshs.1300/=. Her son testified and produced copies of receipts to show that the land in question was bought on loan and his father singularly repaid that loan. It was further his evidence that one **Titus Nyamu** assisted his father to repay the loan, but that his deceased father refunded the money Titus had contributed which amounted to Kshs.600/=. He conceded that Gaita was at one point occupying part of the land and was keeping his animals on the land. Gaita and Muturi built houses on the land but when Gaita left he sold the building materials to the witness's father. It should however be noted that Muturi still resides on the land.

**Titus Nyamu Ngatia** was the third witness. This witness gave a different version of the issue. Gibson, himself and Gaita are the ones who teamed up to buy the suit property. However Gibson refunded his money. He denied being aware of Muturi contributing any money towards the purchase of the land in issue.

Muturi Wambugu testified that he contributed Kshs.1300/= towards the initial deposit of the purchase price, and Gaita raised Kshs.1500/=. The money was given to Gibson to repay part of the loan. Returns from the farm produce were also used to repay the remaining part of the loan. The repayment of the loan was being made in Gibson Kariuki's name and hence their failure to produce any receipts to show they contributed money towards the purchase of the land.

**Abdon Karoki Gathua** testified for the defendants. He used to be the Secretary of Pesi Farmers Co-Operative Society Ltd, through which members sold their farm produce. The three parties herein were members and at their request he divided the suit land on paper into three portions: 50A, 50B, 50C and 50D with Gibson Kariuki being assigned 50B, John Gaita Ndegwa 50C and Muturi Wambuga 50D. 50A was for the land and 50 for loan repayment. The witness then concluded his evidence thus:

*“There were some dairy cows given by Settlement Fund Trustees and milk was channeled to the A/C. They had pyrethrum – proceeds also for loan repayment. They had pyrethrum in common and also individually. The dispute arose around 70 – 71 – 72. This dispute was not unique in that in early days land was bought by a group with one person being registered as owner. In 1980 too many (sic) of such cases and it was decided to sub-divide the land to the shareholders. The arbitration was done by D.C. Nyandarua Mr. Haji by then.”*

**Mr. Samuel Rukwaro Gitahi**, a former Assistant Chief of the area, confirmed that there was an arbitration over the dispute between

the parties herein and through the arbitration the land was divided into three portions with each separate portion going to each of them.

John Gaita Ndegwa, like Muturi Wambugu, testified that the suit property was bought jointly by him, Gibson Muturi, Titus and Gaita. He further testified that after Titus pulled out they remained three of them with the result that each of them would become entitled to a third share of the land. He said he has workers on the land and one of them, Ndirangu Muturi testified. It was his evidence that he lives on the land and his assignment is to look after Gaita's livestock which are on the land, and also to cultivate the land for him. It was also his evidence that he is the son of Muturi Wambugu, the 1<sup>st</sup> respondent, but he lives on the land by virtue of being Gaita's employee.

In his judgment Juma J, after setting out the evidence which was tendered before him rendered himself, thus:

**“I am satisfied on the evidence before me that the suit land was acquired by Gibson Kariuki, Gaita Ndegwa and Muturi Wambugu as partners. Gaita Ndegwa and Gibson Kariuki were employed by Ministry of Agriculture and the land was being farmed and supervised by Muturi Wambugu who was a farmer. I am also satisfied on the evidence that the produce from the farm was used to repay both the development loan and the land loan. These loans had to be paid through the name of Gibson Kariuki as he was the registered owner and the one who was shown as having taken the loan from the Settlement Fund trustee. He held the suit land in trust for himself, Gaita, Ndegwa and Muturi Wambugu. The issue of limitation period does not arise.”**

The learned Judge then proceeded to consider each partner's contribution and found as fact that Muturi Wambugu contributed Kshs.1662/40 while Gaita Ndegwa and Gibson Kariuki, contributed Kshs.2140/= and Kshs.3495/45 respectively, towards the purchase of the land. Upon calculation he concluded that if they were to share proportionately according to their respective contributions, Gibson Kariuki would get approximately 16.70 Ha, Gaita Ndegwa 10.06 Ha and Muturi Wambugu 8.15 Ha. The learned Judge rounded off the acreages and decreed that the parties would get 16 Ha, 10 Ha and 9 Ha respectively. He reasoned that although Muturi Wambugu's share was 8.15 Ha, he needed to be compensated for managing the farm, since the other two were employees of the Government and could not therefore be available to manage the farm.

It is against the aforesaid decision that this appeal was lodged. We earlier set out the two grounds upon which the appeal is based. This being a first appeal we are obliged to re-evaluate the evidence ourselves and come to our own independent conclusion or conclusions on the evidence, without overlooking the findings and conclusions of the trial court. We are at the same time to bear in mind that unlike the trial court, we neither saw nor heard the witnesses testify. It is by seeing and hearing witnesses testify that it is possible to reasonably assess their credibility as witnesses. The parties are entitled to expect and to receive our view on the issues raised in the appeal. (Selle v. Associated Motor Boat Co. Ltd [1968] EA 123, Okeno v. R [1972] EA 32).

Whether or not a partnership existed between the parties is a question of fact. We have read carefully the judgment of the superior court. It is quite clear that it was based on credibility of witnesses. A decision in this appeal, too, will depend on credibility of witnesses. Evidence was presented to the trial court by all the parties, which that court assessed. It was common ground that each of the parties has been in occupation of the suit land at one time or another. The appellant is still in possession of part of the land. Likewise Gaita and Muturi. At one point in the course of the proceedings in the superior court there was an attempt made to evict Muturi. The court declined to order his eviction. How and in what circumstances did the respondents enter the land? The explanation is provided by Abdon Karoki Gathua, in particular. As stated earlier he was the Secretary/Manager of Pesi Farmers Co-Operative Society Limited. He was in a position to know who was occupying any particular piece of land owned by a member or members of his society. He gave a graphic account as to how the land in dispute was managed. He was not challenged on the issue regarding the management of the land in question, more specifically, how the proceeds of produce presented to the society were applied.

Titus Nyamu Ngatia supported that testimony. The appellant's son, *Silas Gichuki Kariuki*, too testified that 1<sup>st</sup> respondent is still on the land and occupies about 9 – 10 acres, which coincidentally agrees with the acreage the trial Judge apportioned to him. The witness

further testified there were crops which were grown on the land jointly, but this evidence runs counter to what the manger of the Co-Operative Society said. The trial Judge quite properly accepted the evidence showing that the land was bought jointly, some produce from it was being jointly produced, and that each of the parties occupies a portion of the land. The length of time the respondents have been on the land, the fact that they have homes on it and keep animals is evidence that they did not just move to stay there for a short time. The foregoing, among other aspects of this case, clearly shows that although the appellant's husband was the one who was allocated the suit land, the respondents were invited by him to join him so that together they would pay for the land and work on it for their mutual benefit. It was the intention of the parties that the land would be shared among themselves. The Secretary/Manager of Pesi Farmers Co-Operative Society Ltd, testified that the arrangement between the parties to this appeal was not isolated. There were many more similar cases, and following several disputes arising from them and the Provincial Administration had to intervene.

We find no merit in this appeal. From the evidence adduced a trust could be inferred. Accordingly, this appeal must be and it is hereby dismissed.

As regards costs, the trial Judge did not consider it appropriate to condemn any of the parties in costs. We too are disinclined to make any order on costs, with the result that each party will bear own costs.

*Dated and delivered at Nyeri this 11<sup>th</sup> day of December,2009.*

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**