



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appeal 15 of 2003

JOHN KARIRI MUCHEKE APPELLANT

AND

M'ITABARI M'ARUNGA RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Meru

(Kasanga Mulwa J) dated 21st November, 2002

in

H.C.C.C. NO. 108 OF 1999)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Kasanga Mulwa J) dated 21st November, 2002 dismissing an appeal from the judgment of the Senior Resident Magistrate, Maua, Meru in *Civil Case No. 22 of 1997*.

According to the adjudication record the appellant John Kariri Mucheke is the proprietor of the land parcel No. 280 comprising 3.15 acres situated in Kangeta Adjudication Section. **Section 30 (1)** of the Land Adjudication Act, bars any person, except with the consent in writing of the Land Adjudication Officer, from instituting a suit and divests the court of jurisdiction to entertain a suit concerning an interest in land in an adjudication section until the adjudication register has become complete in all respects under **Section 29 (3)** of the Act.

The respondent M'Itabara M'Arunga after allegedly obtaining a Consent of the Land Adjudication Officer, Nyambere District dated 23rd January, 1997 filed *S.R.M.C.C. No. 22 of 1997* at Maua on 13th February, 1997 claiming half share of the suit land from the appellant on the basis that the appellant was registered as a trustee of one half share for the respondent. The appellant filed a defence denying that he held the half share of the land on behalf of the respondent and asserted that the parcel of land was self acquired.

At the trial, the respondent testified, among other things, that the appellant is a son of his elder brother Mucheke; that the land in dispute was given to his deceased father M'Ulunga by Antubilinki clan; that his father died when he was very young; that he has four sons; that he lived on the land with the appellant's father; that the defendant gave him a portion of the land and marked the boundary according to Meru traditions; that the appellant later refused to transfer the land; that he cultivates the land in dispute and that he has other land elsewhere. The respondent called three witnesses at the trial, namely, John M'Ikiamba (PW1); Misheck M'Blongi (PW2) and Stanley M'Barutua (PW3).

The appellant testified at the trial, *inter alia*, that he was registered in the adjudication register as proprietor of the suit land 32 years ago; that the respondent did not file any objection to his registration; that the land does not belong to his father; that there is another family land parcel No. 285 where the respondent has been given a share; that he has built a permanent house and has installed electricity, telephone, piped water and has built a canteen on the suit land; that the respondent never complained when he was developing the land; his father died in 1991 and the land dispute arose in 1996 and that the respondent has built on the land but does not cultivate the land. He called one witness at the trial –

John M'Imaria (DW1).

The appellant testified that the land in dispute is a consolidation of three parcels, that he had acquired. He produced a letter from the Land Adjudication Officer dated 11th September, 1997 verifying that the suit land is a consolidation of three parcels. The letter states in the relevant part:

“RE: MR. JOHN KARIRI MUCHEKE

P/NO.280

Please be informed that according to our Adjudication records, Mr. John Kariri Mucheke is the proprietor of P/No.280 whose acreage is 3.15 ac.

The source of the said acreage is as follows:

1. ***Gathered at Mwomalai – 0.79 Acs. After % cut-loss – 0.04 = 075 acs.***
2. ***Court case award – C.C. No. 250/84 at Meru – 2.40 acs.***
3. ***Bought P/No. 150 0.25 ac (ref. Transfer from No. 145 from Mr. Ethenya M'Tunyuki – Total acreage under this P/No. 280 measures 3.15 acs.***

The said parcel is already demarcated both on the map and on the ground. Kangeta Adj. Section is in M.R. stage of Adjudication work. Titles are yet to be issued.

.....

Signed”.

The appellant also produced a copy of the plaint and court proceedings in *Meru S.R.M.C.C. No. 250 of 1984* where he had sued one Ciomere M'Itakua and obtained judgment for 2.40 acres.

In the instant case, the subordinate court Maua gave judgment for the respondent for half share of the land for two reasons, firstly, that, the respondent had proved that he was in possession of half share of the land for a long time and by **section 116** of the Evidence Act, possession is ownership and, secondly, that the respondent as a son of M'Ulunga, was expected to share their father's land equally with the appellant's father.

The superior court without re-appraising the evidence dismissed the appeal in two sentences, thus:

“I have taken the trouble to look at the proceedings, the evidence of all the witnesses and the judgment of the subordinate court.

I find that the trial court did not misdirect itself on the findings of both matters of law and fact and I see no reason to disturb such finding”.

There are seven grounds of appeal. The appellant withdrew the 6th ground. In grounds 1 and 4 of the grounds of appeal the appellant avers that the superior court erred in law in not finding that the suit was incompetent as there was no valid consent from the Land Adjudication Officer and that the judge erred in law in failing to find that the respondent ought to have exhausted the machinery for settling disputes under the Land Adjudication Act. Mr. Kariuki, learned counsel for the appellant submitted that the consent of the Land Adjudication Officer in the record is not signed. Mr. Mugambi, learned counsel for the respondent countered that the original consent of the Land Adjudication Officer was produced at the trial. A copy of the consent of the land adjudication officer pursuant to **section 30 (1)** of the Land Adjudication Officer which is dated 23rd January, 1997 is on the record. It has the name stamp of S. N. Kathurikumi – identified as the District Land Adjudication Officer, Nyambene District. The record of the proceedings in the subordinate court shows that the appellant was represented at the trial by Miss. Gatobu and that the appellant's lawyer did not raise the issue of the validity of the consent at the trial. Miss Gatobu only submitted that the consent had no objection number thereby indicating that there was no case before the adjudication officer between the parties. It seems to us that the validity of the consent produced in court by the respondent was never made an issue at the trial.

Section 30 (1) of the Land Adjudication Act requires that the consent be in writing. The consent in this case is in

writing and bears the name of the Land Adjudication Officer, Nyambene District. It has not been contended that the Land Adjudication Officer did not in fact grant the consent filed in court. The consent which was filed in court is *ex facie* valid. We find no merit in this ground of appeal.

It is further submitted that the respondent should have exhausted the machinery for resolving disputes prescribed in the Land Adjudication Act. Under the Land Adjudication Act a person who has an interest in land, makes a claim to the recording officer and points out boundaries to the demarcation officer (s. 13). If he is aggrieved by their decision, he refers the dispute to the Adjudication Committee, (s.21) then to the Arbitration Board (s.22). From the decision of the Arbitration Board he can file an objection to the Land Adjudication Officer (s.26) and if he is aggrieved by the decision of the Land Adjudication Officer, he can file an appeal to the Minister for Lands (s.29).

It is clear in this case, that the respondent did not make any claim to the land in dispute during the land adjudication. It is also apparent that the adjudication process in respect of the land in dispute is complete. It appears from the evidence of the appellant at the trial that the adjudication process in the area started in about 1967. By the time the respondent filed the suit on 13th February, 1997 the adjudication process had long been completed and the respondent could not therefore utilize the machinery for resolving claims to land under the Land Adjudication Act. The clock could not simply be wound back. The time scales for raising complaints prescribed in the Act had long expired.

In grounds 3 and 5 of the appeal, the appellant raises the question of proof of trust. It is contended that the respondent did not prove trust as required by the law and that the superior court erred in law in upholding the decision of the subordinate court that possession is ownership.

In the first appeal the superior court was not bound by the findings of fact by the subordinate court. It had a duty to re-appraise the evidence and make its own findings of fact. As we have already observed, the superior court did not re-appraise the evidence. It is true that the subordinate court stated, thus:

“Under section 116 of the Evidence Act, possession is ownership”.

That was a misdirection in law. Section 116 of the Evidence Act only deals with the burden of proof where the question is whether any person is the owner of anything he is in possession of. In such a case section 116 of the Evidence Act casts the burden of proving that the person in possession is not the owner on the person who affirms that he is not the owner. It is true in this case that the respondent was in possession of a portion of the suit land. The burden was on the appellant to show that the respondent was not the owner of the portion he was occupying. The appellant denied that the land was clan land.

There was no concrete evidence that the Antubalinki clan had given the land to M’Ulunga the father of the respondent and the appellant’s grandfather. The evidence tendered on this aspect was hearsay. The respondent even said that he was told by elders that the land was given to his father by the clan. There is also no explanation by the respondent why he allowed his nephew – the appellant to claim the ownership of the land during the land adjudication. There is no explanation by the respondent why he did not claim an interest in the suit land during land adjudication. The appellant gave credible evidence of how he acquired the three portions of land which were later consolidated during the land adjudication to form the suit land. It is evident that the appellant occupies a bigger portion of the suit land which he has extensively developed. John M’ikiamba a witness called by the respondent testified in part.

“I do not know the acreage occupied by the plaintiff. The defendant has a larger share than the plaintiff. The plaintiff occupies less than an acre”.

The respondent admitted at the trial that he has another land which he acquired during land adjudication. Indeed, the appellant testified that the respondent owns a portion of his fathers land – parcel No. 285 where the respondent has a tea plantation and miraa.

On our analysis of the evidence, we are satisfied that the appellant proved by credible evidence that the suit land is not clan land and that he is not a trustee of the respondent for half share of the suit land.

However, there is clear evidence that the respondent occupies a smaller portion of the land with his son and that he has built a house on the land. There was uncontroverted evidence that it was the appellant who gave the land to the respondent voluntarily. The appellant did not explain the full circumstances under which the respondent came to occupy the land. There is evidence that the respondent has occupied an identifiable portion for a long time. In the circumstances, the respondent is entitled to a portion of the suit land. There is evidence that the respondent occupies less than one acre. It is just that the respondent should be awarded one acre.

In the result, we allow the appeal and set aside the judgment of the subordinate court and the superior court awarding the respondent half share of the suit land. We substitute therefor judgment for the respondent for one acre to be excised from parcel No. 280 Kangeta Adjudication Section. The portion of one acre awarded to the respondent shall be demarcated from the portion that the respondent is occupying. The appeal has partially succeeded and we award the appellant half of the costs of the appeal in this Court and in the superior court. Those are our orders.

Dated and delivered at Nyeri this 6th day of June, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR