



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU
Civil Appeal 89 of 2003

1. JOHN GITIBA BURUNA

2. AGNES NYAMBARE GITIBA APPELLANTS

AND

JACKSON RIOBA BURUNA RESPONDENT

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

Kisii (Mr. Justice I.C.C. Wambilyangah) dated 15th October, 2000

in

KISII HIGH COURT CASE NO. 260 OF 1997)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Wambilyangah J) dated 15th October, 2002 wherein the superior court awarded land title No. Bukira/Bwisaboka/729 comprising of 4.6 Hectares (suit land) to the respondent and in addition ordered the appellants to transfer the suit land to the respondent. The first appellant John Gitiba Buruna is the husband of the second appellant, Agnes Nyambare Gitiba. The suit land was at the material time registered in the name of the second appellant, Agnes.

The respondent is a step brother to the first appellant, Gitiba. Their father Buruna who died in about 1977 had two wives. The first wife, Robi, had four sons including the first appellant. The second wife, Gati, had five sons including the respondent. It was common ground at the trial that Buruna's land, after land adjudication, was registered as follows:-

FIRST HOUSE:

1. Makorere Buruna - Land Title No. Bukira/Bwisaboka

/499 – 6.4 Hectares.

2. Gitiba Buruna John (1st appellant) – Land Title No. Bukira

Bwisaboka/500 comprising of 11.8 Hectares.

3. Agnes Nyambare Gitiba (2nd appellant's wife) – Land Title No.

Bukira/Bwisaboka/729

comprising of 4.6 Hectares.

There was evidence that two of the first appellant's brothers bought their own land elsewhere and settled.

SECOND HOUSE

1. Muita Buruna - Land Title No. Bukira/Bwisaboka/

728 – comprising of 3.6 Hectares.

2. Mugana Buruna }

Tabani Buruna } - Land Title No. Bukira/Bwisaboka/

726- half share each comprising of 7.0 Hectares.

There was also evidence that two of the respondent's brothers from the second house bought their own land in another place where they are settled.

It was also common ground that no portion of Buruna's land was registered in the name of the respondent after land adjudication.

The respondent's case was briefly that during the land adjudication in about 1968 he was working in the Army and was living in Nairobi, away from home and that parcel No. 729 which was subsequently registered in the name of the second appellant was adjudicated as his. The first appellant fraudulently caused the land to be registered in his wife's name. He pleaded in paragraphs 4, 5 and 6 of the plaint, thus:

“4. The plaintiff's late father had sub-divided the said land into two amongst the houses where the Defendant was to get his share from the 1st house while the plaintiff was to get his share from the 2nd house.

5. That the plaintiff says that his late father died long before the process of adjudication had been completed leaving the plaintiff and his step brother (1st defendant) each with a share of his ancestral land and both were given their rightful shares.

6. That the plaintiff further avers that in 1968 the Defendant took advantage of the plaintiff's long absence from home and fraudulently registered land parcel No. BUKIRA/Bwisaboka/729 in his wife's name who is the 2nd defendant while he got registered in parcel NO. BUKIRA/BWISABOKA/500 which was his rightful share”.

He sought two main remedies viz;

(a) A declaration that land parcel No. Bukira/Bwisaboka/729 fraudulently registered in the 2nd defendant's name rightfully belongs to the plaintiff.

(b) An order directing the defendants to effect the transfer of land parcel No. Bukira/Bwisaboka/729

and the same in the plaintiff's name

The appellants denied the allegations of fraud and averred, among other things, that during land adjudication the first respondent and his brother Mwita Buruna were allocated parcel No. Bukira/Bwisaboka/728 but Mwita Buruna caused himself to be registered as sole proprietor. The second appellant pleaded in para 6 of the Amended Defence and counter-claim that:

“6. The 2nd Defendant states that she is the registered proprietor in possession of parcel NO. BUKIRA/ BWISABOKA/729 ON FIRST REGISTRATION since about May 1973 and her title to the same has never been challenged by the Plaintiff or any other person until the present unjustified claim by the Plaintiff”.

By the counter-claim the appellant's claimed Shs.32,487/= being the value of indigenous trees destroyed by respondent when he trespassed on the land, damages for trespass, eviction and mesne profits.

The second appellant asserted at the trial in the superior court that she was given the suit land as a gift by Buruna, her father – in – law during land adjudication. She said:-

“When I was married in Kuria land, my father-in-law Buruna loved me because I looked after them well. So one day my father-in-law the only reward he would give me (sic) was land in my name. This land was given to me during land adjudication. That is when I became registered as owner.”

Her evidence was supported by her husband, the first appellant. The respondent testified at the trial that he was working in the Army and living in Nairobi in 1968, when land adjudication took place. According to him he went home for christmas holiday in 1967 when his father told him that the suit land was his. He added that the land was given to his mother's house during land adjudication. He refuted the evidence that the second appellant could have been given the land by his father saying:-

“It is not true that the 2nd defendant cared for our father because my father died in 1977 leaving his wives still alive.”

He explained that under Kuria customary law, if a man has more than one wife, the sons are allocated the land which their mother was cultivating. He testified that his mother was cultivating the suit land.

He called three other material witnesses. **DAVID MAKORERE BURUNA** (PW2) is the eldest blood brother of the first appellant (that is eldest son of first wife, Robi). He supported the respondent's evidence that the suit land was part of the land that the respondent's mother was cultivating and that it belongs to the respondent. He stated that the 2nd appellant, who is the first appellant's third wife, was new and that it was a taboo in the clan for a woman to be given land by his father in law. The next witnesses **MWITA BURUNA** (PW3) is the respondent's blood brother. He supported the respondent's evidence that the suit land belongs to the first respondent and that the first appellant used his influence as a driver of the District Officer and as an Acting Chief during land adjudication to cause the land to be falsely registered in his wife's name adding that, it is against Kuria customary law *“to have a woman being given land by the father – in – law”*.

Lastly, **GABRIEL GAIBE** (PW4), claimed that the suit land belonged to the respondent and that an old Kuria man could not have given the second appellant land.

The first appellant insisted in his evidence that the respondent's land is included in land title No. Bukira/Bwisaboka/ 728 registered in the name of Mwita Buruna (PW3).

After reviewing the evidence of the witnesses, the trial judge believed the respondent's witnesses and disbelieved the appellants and concluded:

“Accordingly, I hold that the plaintiff and his witnesses were truthful and reliable. It is not possible

and permissible that these defendants should deprive the plaintiff of his only means of survival and inheritance. I hold that both defendants are liars. I infer a resulting trust from the registration of the land in the name of the 2nd defendant. She cannot keep what she holds on trust. She has to do her legal duty to the plaintiff and that means that she should deliver to him that which he is entitled to have”.

There are three main grounds of appeal, namely:

- 1. The learned Judge erred in law in failing to appreciate and find that the registration of the suit property in the name of the 2nd appellant was a first registration under the Registered Land Act, Cap 300 of the Laws of Kenya which would therefore not be defeated in the circumstance or at all.**
- 2. The learned Judge (erred) in law in finding that there was a resulting trust between the 2nd appellant and the respondent a fact that was not pleaded before the court nor evidence tendered to support the same.**
- 3. The learned Judge erred in law and fact in disregarding the evidence offered by appellant.**
4.
5.
6.
- 7. The learned Judge erred in not determining the defendants counter – claim”.**

It is clear from the judgment of the superior court that the court reviewed all the evidence including the evidence of the appellants and concluded that the evidence of the respondent and his witnesses was truthful and reliable. The superior court specifically found that the two appellants were liars. It is also clear from the judgment of the superior court that the court made findings of fact, *inter alia*, that a Kuria polygamist is bound by customs to share his land among his wives (houses); that sons of each of his wives would share between themselves all the land that their mother would have been allocated by their father; that under Kuria customary law, the first wife is allocated land on the right side of the main house while the second wife is allocated land on the left side of the main house; that the suit land was located on the section allocated to the mother of the respondent; that it is a taboo in Kuria custom for a daughter – in – law to be allocated ancestral land by her father – in – law and more particularly so at the expense of a son; that the second appellant was not given the suit land by her father – in – law and that the respondent has no land registered in his name, and, lastly, that the suit land belongs to the respondent but the first appellant caused it to be registered in the name of his wife when the respondent was in the army. The superior court disbelieved the evidence that the first respondent’s share of his father’s land is included in land title No. Bukira/Bwisaboka/728 registered in the name of his brother, Mwitwa Buruna.

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

There was evidence that the first respondent was an Acting Chief at the time of land adjudication and thus in a position of influence. There was also evidence that the second appellant is a third wife of the first appellant and that the wives of Buruna were alive at the time of land adjudication. It is not credible therefore, that the second appellant solely looked after Buruna’s welfare. Considering that Mwitwa Buruna, the respondent’s brother has a relatively small piece of land, it is not credible or probable that the respondent’s portion was included in that title.

On our own evaluation of the evidence, we are satisfied that the findings of fact by the trial Judge were supported by credible evidence.

Mr. Makoloo, learned counsel for the appellants is undoubtedly correct that a first registration cannot be impeached even if it has been obtained by fraud (see *section 143 (1)* of the **Registered Land Act – RLA**). Although the rights of a registered proprietor are indefeasible under *section 28* RLA, such registration does not, as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee. Mr. Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the respondent. Under *Rule 8 (1) (a)* of **Order VI Civil Procedure Rules**, a plaint should contain the specified particulars including particulars of trust on which a party relies. The respondent did not however, rely on a breach of a trust. The finding that there was a resulting trust was merely an inference arising from the facts as accepted by the learned Judge. The learned Judge however, with respect, erroneously categorized the trust arising from the circumstances of the case as a resulting trust rather than a constructive trust which arises by operation of law. Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.

In this case, the appellant pleaded facts and adduced evidence which proved that the suit land was his own share of his father’s land which the first respondent caused to be registered in his wife’s name (first appellant’s) in the absence of the respondent. The respondent sought a declaration that the land fraudulently registered in the name of the second appellant rightfully belonged to him.

The court upon being satisfied that the second appellant was so registered as result of unconscionable dealing was perfectly entitled to circumscribe the legal consequences of such unconscionable dealing – that is that the second appellant was a trustee (a constructive trustee). The superior court merely stated the law arising from circumstances proved by the respondent and did not thereby invent a new cause of action which was not pleaded.

Lastly, the appellants did not in their evidence testify that it is the respondent who cut down the trees. Thus, the counter – claim was simply not proved and should have been dismissed with costs.

On analysis, we do not find merit in the appeal. Accordingly, the appeal is dismissed with no order as to costs. We make an order that the counter – claim be and is similarly dismissed with no order as to costs.

Dated and delivered Kisumu this 9th day of February, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR