



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 29 OF 2003

HENRY OGONGO

MAGETO APPELLANT

AND

NYAMIOBO OGONGO RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Wambilyangah, J.) dated 16th day of October, 2002

in

H.C.C.C. NO. 320 OF 1998)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Wambilyangah, J.) delivered on 16th October, 2002 in which the learned Judge made a finding that the appellant herein, **Henry Ogongo Mageto**, was registered as proprietor of the suit land as a trustee for himself and his two brothers.

The dispute herein concerns three brothers and in order to appreciate the nature of the dispute, we are constrained to go back to the plaint filed in the **High Court Civil Suit No. 220 of 1998** at Kisii in which **Nyamiobo Ogongo**, the respondent herein, was the plaintiff and **Henry Ogongo Mageto** the defendant. Since the plaint filed in the superior court captures the nature of the dispute, we reproduce the salient paragraphs of the same which stated:-

- “3. The plaintiff swears that the defendant is the eldest brother and their family they are three brothers only and the other one who is the plaintiff’s follower is called MOSES IMBUNIE MAGETO.**
- 4. The plaintiff avers that their mother was married to one OGONGO NYAMASEGE under Kisii customary laws.**
- 5. The plaintiff further states that the said OGONGO NYAMASEGE passed away after only getting one daughter with the plaintiff’s said mother and that the plaintiff together with the defendant and the said other brother were sired by one MAGETO NYAMASEGE who is a brother to the late OGONGO NYAMASEGE and who inherited the plaintiff’s said mother.**
- 6. The plaintiff avers that parcel No. MAJOGGE/BOKIMONGE/296 was purchased by the aforesaid**

foster father MAGETO NYAMASEGE after he was given cows by the plaintiff's mother which cows came from dowry of the plaintiff's eldest sister called KERUBO OGONGO and other cows belonging to the plaintiff's mother.

7. The plaintiff further states that upon purchase of the aforesaid parcel, the same was registered in the name of the defendant as the eldest son of the family to hold the same in trust for the plaintiff and the said MOSES IMBUNE MAGETO and in accordance with Gusii customary laws.

8. The plaintiff avers that parcel No. MAJOGGE/BOMBABA/1605 which is the ancestral parcel had already been registered in the name of the plaintiff's mother KEMUMA OGONGO, now deceased.

9. The plaintiff states that at the time when the parcel No. MAJOGEE/BOKIMONGE/296 was being registered in the name of the defendant the defendant was not working but was in school while the plaintiff was working as a house servant for one ZEPHANIAH M. ANYIENI and from which earnings the plaintiff was educating or paying school fees for the defendant.

10. The plaintiff states that on the ground both of the aforesaid parcels of land viz Majoge/Bokimonge/296 and Majoge/Bombaba/1605 are clearly subdivided or demarcated and each person given his share or portion which he has been cultivating and that all of the said involved brothers stay in parcel No. Majoge/Bombaba/1605.

11. The plaintiff states that because of minor family differences between the plaintiff and the defendant, the defendant threatened to forcibly evict the plaintiff from parcel No. Majoge/Bokimonge/296 and has refused to transfer to the plaintiff the plaintiff's aforesaid portion.

12. The plaintiff's claim against the defendant is for a declaration that the defendant is holding parcel No. Majoge/Bokimonge/296 in trust for himself, the plaintiff and the other said brother MOSES MBUNDE MAGETO.

13. The plaintiff further seeks for an order directing the defendant to apply and take the plaintiff to the relevant land control board for consent and further transfer to the plaintiff the plaintiff's said share and in default thereof the plaintiff prays that the Executive Officer of this court be empowered to execute all the requisite forms to effect the said subdivision already done on the ground.

14. The plaintiff further prays for a permanent injunction to restrain the defendant from in any way interfering and or evicting the plaintiff from his lawful portion on parcel No. Majoge/Bokimonge/296.

15. Despite demand and notice to sue the defendant has failed to admit liability necessitating the filing of this suit.

16. The cause of action arose within the jurisdiction of this Honourable Court."

Having so pleaded in his plaint, the plaintiff (*respondent herein*) concluded the plaint thus:-

"REASONS THEREFORE (sic) the plaintiff prays that judgment be entered against the defendant for:-

(a) A declaration that the defendant who is registered as owner of parcel No. MAJOGGE/BOKIMONGE/296 in trust for the plaintiff, his other young brother Moses Munde Mageto and the defendant himself."

To counter the foregoing, the appellant (*as the defendant in the superior court*) filed a defence in which he stated inter alia:-

"3. The defendant admits the contents of paragraph 3, 4 and 5 of the plaint.

4. *The defendant denies the contents of paragraph 6 of the plaint and puts the plaintiff to strict proof thereof.*

5. *The defendant denies the contents of paragraph 7 of the plaint and avers that land parcel No. MAJOGE/BOKIMONGE/296 belongs to him and has stayed in that land for the last 30 years without any interference whatsoever and hence acquired the same through prescriptive rights.*

6. *The defendant admits the contents of paragraph 8 of the plaint.*

7. *The defendant is a stranger to the contents of paragraphs 9, 10 and 11 of the plaint and puts the plaintiff to strict proof thereof.*

8. *The defendant denies the contents of paragraphs 12 and 13 of the plaint and avers that land parcel No. MAJOGE/BOKIMONGE/296 belongs to him alone and the plaintiff does not have a share in it and the claim is baseless.*

9. *The defendant further denies the contents of paragraph 14 of the plaint and puts the plaintiff to strict proof thereof.*

10. *The defendant denies the contents of paragraph 12 of the plaint and avers that parcel No. MAJOGE/BOKIMONGE/296 is not held in trust by him and dismisses the claim against the plaintiff in toto.*

11. *The defendant further denies that the suit (sic) in parcel of land is sub-divided and avers that the land is not divided at all and puts the plaintiff to strict proof thereof.*

12. *The defendant avers that he has been in occupation of the above mentioned suit land for over 30 years now wherein the plaintiff had not raised any claim against the suit land.*

13. *The defendant avers that this suit is frivolous, vexatious and bad in law and or is an abuse of the process of the court as a suit having been filed in the Kisii High Court Civil Case No. 105 of 1997 for the same cause of action is not yet determined.*

14. *Jurisdiction of this Honourable Court is admitted.*

REASONS WHEREOF *the defendant prays that the plaintiff's case be dismissed with costs.*

The hearing of the suit commenced before Wambilyangah, J. on 14th November, 2001 when the plaintiff (*respondent herein*) testified to the effect that **Henry Ogongo Mageto** (*appellant herein*) was his elder brother and that there was another brother known as **Moses Imbunde Ogongo**. The respondent further testified that the family had two pieces of land – **No. Majoge/Bombaba/1605** which was ancestral land and **Majoge/Bokimonge/296** which was land bought with the dowry received from their sister's husband. This second piece of land which is the suit land was bought by their mother who went on to subdivide it into three portions so that the appellant got one portion, the respondent another portion and the other brother got the other portion i.e. each son got a third of the suit land. In concluding his evidence in chief the respondent stated:-

“The land in Bokimonge is in the name of the defendant. I am not sure of my age. Nor do I know the age of the defendant who is our eldest brother. The defendant became registered owner while I was still very young. I have asked the defendant to transfer the title in my share of the Bokimonge land into my name but he keeps on refusing. I ask the court to order him to transfer to me the title in my portion of the Bokimonge land. He assaulted me once and that is why I was forced to bring the suit. We have not had any other case before.”

Charles Abuya Nyaoga (PW2) was called to testify in support of the respondent. This witness described himself as a *farmer* aged 58 years and that he knew the parties in the dispute. In the course of

his evidence, *Nyaoga (PW2)* stated:-

“I know them since their youth. Their father was Mageto Nyamansenge. The one who married their mother was Ogongo Nyamasege. They are the sons of Ogongo Nyamasege not of Nyamasege. Henry is older than the plaintiff. Mosese Ogongo is not here. Their sister is called Kerubo. They have a shamba at home. It is at Bombaba. It is No. 1605 is (sic) was ancestral land. The other land is in Bokimonge. It is in Bokimonge. It was bought with cattle obtained as dowry in respect of their sister Kerubo. The defendant is a teacher. He is about 52 years. It is the plaintiff who did casual jobs and succeeded in educating the defendant. It is their mother who directed that the eldest son be registered as a trustee for the smaller boys. Each of the three boys has his own specific section. We have tried to sub-divide the Bokimonge land amongst the 3 brothers but the defendant refuses to agree. The land was purchased in 1959 when the defendant was in primary school.”

Juma Omagwa (PW3) describing himself as a *clan elder* aged about 69 years testified in support of the respondent and went on to ask the superior court to subdivide the land into three portions as pleaded by the respondent. In the course of his evidence this clan elder stated inter alia:-

There was a land which their mother bought with dowry from their sister. We have sub-divided both land into 3 portions but the defendant refuses to transfer the titles to the younger ones. That is what we ask this court to order him to do.”

Oliber Abinja (PW4), a sister to the parties in the dispute, testified in support of the respondent. In her evidence before the learned Judge this lady stated:-

“I know the plaintiff and the defendants as they are my brothers and am older than them. They have a dispute over land. The land is in Kiango Sub-location. It is the dowry of 12 head of cattle paid to my father by my husband which was used to pay for that land. It is my mother who bought that land and caused it to be registered in the name of the defendant. My 3 brothers are:-

1. *Ogongo Mageto*
2. *Mose Mbunde*
3. *Nyamiogo Ogongo*

They used that land. They are on the land at Kiango but cultivate on the disputed land. It is not true that Henry Ogongo Mageto bought the disputed land with his own property. The truth is that it was bought with dowry paid in respect of me. The 3 brothers are equally entitled to that land.”

With the evidence of *Abinja (PW4)*, the respondent closed his case in the superior court.

The appellant then took the witness stand. He testified that he was the registered proprietor of the suit land and that he bought that land from the previous owner. It was the appellant's evidence that his brothers had no right over the suit land and he therefore asked the superior court to dismiss the suit with costs. The appellant did not call any witness to support his side of the story in the superior court.

The learned Judge considered the evidence before him and came to the conclusion that the respondent was entitled to the relief sought in the plaint. In concluding his judgment the learned Judge expressed himself thus:-

“It is clear to my mind that in his desperate effort to deny his brothers any share of the land the defendant was prepared to perjure himself to any height. He is a pathetic liar.

Accordingly I found no truth in his evidence. On the other hand the plaintiff and his brother Charles and their witnesses (PW2 and PW3) impressed me as very honest people. So I find and hold that the defendant was registered as proprietor of the suit land for the express purpose of being a trustee for

himself and for the 2 plaintiffs. In the premises I enter judgment for the plaintiffs to the effect that the defendant shall cause the suit land to be subdivided into 3 equal portions and then proceed to transfer titles in the respect two portions to the plaintiff and Charles Imbunde Ogongo respectively. He shall thereafter cease to be the owner of those 2 portions. He shall be the owner of the remainder plot. He shall pay to his brothers the costs of the suit. It is ordered accordingly.”

It is the foregoing that triggered this appeal. When the appeal came up for hearing before us at Kisumu on 13th June, 2007 Mr. S.M. Sagwe appeared for the appellant, while the respondent appeared in person.

In arguing this appeal Mr. Sagwe reminded us that the appellant’s registration as the proprietor of the suit land was a first registration and that there was no word “**trustee**” in the title. It was Mr. Sagwe’s contention that the learned Judge based his judgment on history, and social issues and in so doing failed to base his judgment on law.

In asking us to dismiss the respondent’s claim Mr. Sagwe relied on **OBIERO V. OPIYO [1972] E.A. 227** and **ESIROYO V. ESIROYO [1973] E.A. 388**.

In his last ground of appeal, Mr. Sagwe attacked the findings of the learned Judge submitting that there was nothing to show that the suit land was purchased by the appellant sister’s dowry.

The respondent in his brief address to us stated that evidence was given in the superior court and that he sought to rely on that evidence.

This being a first appeal it is our duty to re-evaluate the evidence, analyse it and come to our own conclusions but in so doing we must give allowance to the fact that we have neither seen nor heard the witnesses – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123** and **JIVANJI V. SANYO ELECTRICAL COMPANY LTD [2003] KLR 425**.

The dispute herein related to a piece of land known as **Majonge/Bokimonge/296**, hereinafter referred to as the suit land. This piece of land was registered in the name of the appellant herein. Evidence tendered in the superior court showed that the appellant had two younger brothers and that the suit land was subdivided into three portions so that each son had his own marked portion. It was the respondent’s case that the suit land was bought from the proceeds of the dowry that was paid for their sister Obier and this lady gave evidence in support of that contention. Two elderly witnesses testified and we have reproduced portions of their evidence elsewhere in this judgment. Our evaluation of the evidence tendered in the superior court leads us to the conclusion that the respondent and his witnesses told the truth and that the appellant was a stranger to the truth. We are not surprised that the learned Judge declared him (the appellant) “**a pathetic liar**”. Hence from the facts of the case the scenario is that the appellant was registered proprietor of the suit land without purchasing it as he had claimed. His two brothers were using portions of this land. They were demanding subdivision and transfer of their respective portions. The clan elders supported them but the appellant would not oblige. The issue now is whether the learned Judge was right in declaring that the appellant was so registered as a trustee for himself and his brothers.

We have carefully considered the facts and the law involved and it is our view that the learned Judge reached a correct decision. The issue of registration of one member of the family on behalf of the other members has been a vexed question. In **GATIMU KINGURU V. MUYA GATHANGI (1976) KLR 253** at p. 263 Madan J. (as he then was) said:-

“Under section 143(1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established.”

The above was cited with approval in the later decision of this Court in **MUTHUITA V. WANOE**

(1982) KLR 166 in which Potter JA said:-

“In GATIMU KINGURU V. MUYA GATHANGI [1976] KLR 253 Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct.

In view of that misdirection it is perhaps not surprising that the resident magistrate concluded that the evidence supported the defendant’s case. He did not deal with the claim based on adverse possession.

In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.”

(Underlining provided)

We observe that the respondent’s claim in the superior court was based on trust and that being so it was upon the respondent to prove that trust. The learned Judge was satisfied that the respondent had proved such a trust – see MUIRURI V. KIMEMIA [2002] 2 KLR 677.

Mr. Sagwe had relied on the High Court decisions in OBIERO V. OPIYO AND OTHERS [1972] E.A. 227 and ESIROYO V. ESIROYO [1973] E.A. 388. In our view submissions relating to these two decisions are adequately answered by this Court’s decision in KANYI V. MUTHIORA [1984] KLR 712 at p. 723 where Chesoni Ag. JA (as he then was) said:-

“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under the Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Muthiora’s land: See proviso to section 28 of the Act and Gatimu Kinguru v. Muya Gathangi [1976] KLR. 253. There was overwhelming evidence of a trust in favour of Nyokabi.”

Considering the facts of this case and those in Muthuita’s case (supra) we find many similarities. Both cases relate to a dispute in which members of the same family are involved. They relate to registration of land under Registered Land Act. Evidence consisted of the long history in respect of the suit land. Different considerations might well apply where the dispute is not among family members.

We think we have said enough in this appeal. We have dealt with various aspects of the appeal and it is our hope that we have adequately dealt with the salient points. For the reasons we have given, it is our view, as already stated, that the learned Judge was right in his judgment. Accordingly, this appeal is dismissed with costs.

Dated and delivered at Nairobi this 13th day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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