



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O’KUBASU, WAKI & DEVERELL, J.J.A.)
CIVIL APPEAL NO. 322 OF 2003

BETWEEN

NJENGA CHOGERA

(The Administrator ad Colligenda bona of the Estate

of the Late Chogera Kimani) APPELLANT

AND

MARIA WANJIRA KIMANI 1ST RESPONDENT

CHEGE KIMANI 2ND RESPONDENT

ELIZABETH WAMBUI KIMANI 3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi

(Justice Mitey) dated 12

th

April, 2002

in

H.C.C.C. NO. 633 OF 1997)

JUDGMENT OF THE COURT

This is a family dispute involving a mother, **Maria Wanjira Kimani** (1st plaintiff) and her children, **Chege Kimani** (2nd plaintiff), Elizabeth Wambui Kimani (3rd plaintiff), on one side, and her other son, Chogera Kimani (defendant). By their Amended plaint dated *22nd September 1997* the three plaintiffs (the respondents in this appeal) filed a suit against the defendant (now deceased but substituted with his son **Njenga Chogera**) seeking judgment against the said defendant for: -

- (a) The land parcel No. LIMURU/BIBIRIONI/148, be registered under the name of Maria Wanjira Kimani (the first plaintiff) and the mother of the second and third plaintiffs and also the mother of the defendant.**

(b) The Town plot No. LIMURU/BIBIRIONI/T.573 be registered under the name of the first plaintiff Maria Wanjira Kimani (the first plaintiff) and the mother of the second and third plaintiffs and also the mother of the defendant.

(c) Costs of this suit.

(d) Interest on and/or any other relief may this Honourable Court deem fit to grant.”

The hearing of the suit commenced before the learned Judge (Mitey, J.) on 15th January, 1999 when the (1st plaintiff), **Eliud Mbutia Kitaranga** and **Kimani Wa Kaheri** testified after which the hearing was adjourned to 4th March 1999 when **Elizabeth Wambui Kimani** (3rd plaintiff) testified. The plaintiffs closed their case after which **Chogera Kimani** (the defendant) took the witness stand. After several adjournments the hearing resumed on 3rd April 2001 when **Joseph Njenga Chogera**, **Kirongi Kimani** and **Eunice Wanjiku Chogera** testified. The defendant closed his case. This was later followed by submissions from counsel appearing for the parties. The gist of the dispute may easily be captured from the following paragraphs of the Amended plaint: -

“5. On or about 17th day of May, 1943 the first plaintiff’s husband and the second and third plaintiff’s father also who is the defendant (sic) Father Kimani Chogera (now deceased) bought land parcel No. Limuru/Bibirioni/148.

6. During the land consolidation since my late husband who died in year of 1947, the land was officially numbered LIMURU/BIBIRIONI/T.573 were (sic) registered under the name of my eldest son Chogera Kimani (who was a minor by then) and certificate of freehold Title was issued on 27th day of April, 1963.

7. The defendant having known that the Title Deed which was registered under his name was in the custody of his mother, the first plaintiff, he went ahead and convinced the various authorities that his Title Deed got lost and the same was advertised in the Kenya official Gazette Notice No. 4282 of 11th September, 1987 and he was issued with a copy of the same and started threatening the first, second and third plaintiffs with eviction.

7A. The plaintiffs have asked the defendant to transfer to them their share of the suit land but he has refused to do so and instead continues to issue threats of eviction.”

What was the defendant’s stand in this dispute? The answer is to be found in the following paragraphs of the Statement of Defence: -

“3. The defendant further avers that he is the one who bought the suit premises and does not hold the same upon trust for himself and the plaintiffs.

4. The defendant further states that he did not obtain the title deeds to the suit premises by fraud but in accordance with law.

5. The defendant further avers that it is only the 1st plaintiff who he has given a place to build a house and her house is still intact and denies allegation of threats to evict the plaintiff.

6. FURTHER AND WITHOUT PREJUDICE to the foregoing, the defendant avers that even if he issued notices as claimed in paragraphs 7, 8 and 9 of the plaint, the same were rightful and legal given that he is the owner of the suit premises to the exclusion of the plaintiffs and/or any intruders and/or trespassers.”

From the foregoing, the gist of dispute was whether the suit premises had been bought by the deceased husband of the 1st plaintiff or the deceased son of the same lady.

After hearing the evidence from the two opposing sides the learned Judge of the superior court preferred

the version of the plaintiffs and their witnesses. In the course of his judgment the learned Judge stated: -

“It clearly emerges from the evidence that all the parties to the suit had been using the final (sic) property as the family, had no other piece(s) of land. The only issue is whether the suit property belongs to Kimani Chogera or his sons (sic) Chogera Kimani (deceased). The first plaintiff gave a graphic account of how her husband acquired the suit property and why it had to be registered in the names of the deceased. She obtained the title deeds to the suit property and has been keeping the same in her custody.

The deceased claimed the title deeds were stolen and cause (sic) an advertisement for purposes of issuance of other titles by Gazette Notice No. 4282 of 11th September, 1987. He changed his story and stated that the plaintiff took the title deeds while he was in hospital

The first plaintiff impressed me as an old, honest and unassuming witness. I believe her testimony and that of her daughters the third plaintiffs (sic) plus her witnesses. They had nothing to hide.”

Having so said and having rejected the defendant’s version, the learned Judge gave judgment in favour of the plaintiffs. In concluding his judgment the learned Judge said:-

“From the available evidence the plaintiffs have persuaded me that the suit property help (sic) to remain Chogera the father of the defendant. The reason why the suit property was registered in the name of the defendant was sufficiently explained. The defence case in my view was made up. I decline (sic) that the defendant (deceased) and now his estate holds the suit property in trust for himself and the plaintiff. Such trust will be (sic) terminated and I order that the suit property to be registered in the name of the first plaintiff who will declare the respect (sic) shares her children should get after such registration.

”It was that judgment that triggered this appeal in which the appellant filed 39 grounds of appeal!

The appeal was meticulously argued by Ms. K.D. Kilonzo, learned counsel for the appellant. We must commend Ms Kilonzo for her industry and in-depth research exhibited by her handling of this appeal. She addressed the Court on four key issues viz, pleadings and procedure, provisions of the Registered Land Act, nature and proof of trust and lastly whether plaintiff’s evidence established the claim as pleaded.

We would deal with the issue of evidence first before we deal with the other major grounds raised by Ms. Kilonzo.

Evidence

We are alive to our duty on a first appeal as stated by Sir Clement de Lestang VP in **SELLE V. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123 at p. 126;**

“..... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The above was cited with approval by this Court’s recent decision in **JIVANJI V. SANYO ELECTRICAL COMPANY LTD [2003] KLR 425 at p. 431.** During the hearing of the suit in the superior court, **Maria Wanjira Kimani**, as the 1st plaintiff, testified that her husband **Kimani Chogera** (deceased) had purchased a piece of land from **Karanja Mororo**. She explained that the purchase price was

Shs.836/=which amount was paid by way of instalments. This sale transaction was recorded in a small book. During land consolidation, the deceased **Kimani Chogera** had left the piece of land and a plot which, according to **Maria Wanjira Kimani**, were registered in the name of her eldest son, **Chogera Kimani** (the defendant in the superior court, now deceased).

The old lady kept the titles to the two pieces of land and produced them in evidence as *Exhibits 2(a) and 2(b)*. It was her evidence that the defendant was registered as a trustee for herself and other members of the family.

Eliud Mbutia Kitaranga gave evidence on behalf of the plaintiffs stating that he was born in 1910 and that he knew the parties to the suit. He testified that he knew **Kimani Chogera** in 1943 when he (Chogera) was buying land from one **Mororo. (Mororo)** This land was later registered in the name of the defendant because, according to this old man, the defendant's mother had taken an oath and hence the land could not be registered in her name. The next witness was **Kimani wa Kaheri** (PW2) who testified to the effect that he knew the plaintiff and her husband (deceased) in 1943. He went on to testify that the deceased bought a piece of land from one, **Karanja Mororo wa Kaheri** told the superior court that he was a member of the Land Adjudication Committee in the area and that by the time of demarcation, the defendant as the first son of the deceased husband of the 1st plaintiff was registered proprietor of the piece of land and the plot. Lastly there was the testimony of **Elizabeth Wambui Kimani** – the third plaintiff. She testified that she was sixteen years old when they moved to this land in dispute where they lived in one house with the defendant. She stated that the land was registered in the defendant's name as her mother had taken an oath and so the land could not be registered in her name. She concluded her evidence in chief by saying that the defendant chased her from the land in 1996 when he uprooted her crops.

Chogera Kimani, the defendant (now deceased) took the witness stand after the plaintiffs had closed their case. He confirmed that the 1st plaintiff was his mother, 2nd plaintiff his brother and 3rd plaintiff his sister. He stated that he was born in 1930 and that the land in dispute was his, which he purchased some 40 years earlier. He could not remember the name of the person from whom he purchased the land but he could remember that the purchase price was Shs.1,460/= .He stated that he fulfilled all the requirements that had to be observed at the time of sale like slaughtering of goats. He did not know whether his father had any land. He concluded his evidence in chief by emphasizing that both suit properties were his.

Joseph Njenga Chogera (DW2) testified to the effect that he was the defendant's son. His testimony was merely to assert that his father told him that he had purchased the suit land from one, **Peter Kirugu**.

Kirongi Kimani (DW3) testified that the first plaintiff was his step mother and the defendant was his step-brother. It was Kimani's evidence that the suit land belonged to the defendant who purchased it in 1958, although this witness (Kimani) admitted that he was not a witness to the sale.

The last witness on the defendant's side was **Eunice Wanjiku Chogera** (DW4) a wife of the defendant. She testified that she was married in 1960 and that there were two houses on the suit land. She occupied one house while the 1st plaintiff occupied the other house. She went on to testify that there was a dispute over the road across the plot which dispute was resolved by the chief who ruled that the land belonged to the defendant.

The matter went up to the D.O's office who ruled that the land belonged the defendant. The first plaintiff was dissatisfied by the D.O.'s decision and hence filed the suit in the superior court. The foregoing is the summary of the evidence that was adduced before the learned Judge of the superior court. This is the evidence we are required to reconsider, evaluate and make our own conclusions, but remembering that we have neither seen nor heard the witnesses.

As already stated the dispute relates to two parcels of land known as **LIMURU/BIBIRIONI/148** and **LIMURU/BIBIRIONI/T.573**. These two parcels of land were registered in the name of **Chogera Kimani** (the original defendant in the suit who is now deceased). The plaintiffs' case was simple and straightforward. It was their case that the defendant as the first born in his family was registered

proprietor of the suit land with the intention that he holds it as a trustee for himself and other members of the family. The suit land had been purchased by the husband of the 1st plaintiff which contention is opposed by the defendant who claimed the land to be his. What emerges from the evidence on record is that all the parties to the suit land had been using and living on this land as family land. The plaintiffs and their witnesses were able to demonstrate that the suit land had been purchased by the husband of the 1st plaintiff and further that the same land was registered in the name of the defendant as a trustee. It is to be noted that the defendant was unable to name the person who sold him this land. On the issue of ownership, we have already reproduced above the findings of the learned Judge of the superior court.

The learned Judge had the advantage of seeing the parties and their witnesses. He was impressed by the old lady, the 1st plaintiff and her witnesses. On our part, all we can say, is that from the evidence on record, there can be no doubt that the defendant was an unreliable witness. He was not able to tell the superior court how he acquired the suit land. He went as far as stating that he did not know whether his father had his own land! We are, therefore, satisfied on the evidence, as the learned Judge was, that the defendant was registered as proprietor of the two parcels of land as a trustee for himself and other members of the family.

Pleadings and Procedure

The main complaint by Ms. Kilonzo was that the suit in the superior court was commenced by a plaint which was subsequently amended. It was her contention that no trust was pleaded and that there were no particulars of trust. This, in her view, was contrary to **Order XXXVI rule 1** of the Civil Procedure Rules. For these reasons, she contended, it was wrong for the learned Judge to have given reliefs, which were not claimed.

We must go back to the genesis of this dispute. The plaintiffs and their legal adviser chose to proceed by way of a plaint. The reliefs sought were set out. In the plaint they were claiming that the two parcels be registered in the name of the 1st plaintiff. The defendant in response pleaded in paragraph 3 (supra) that the disputed land was not held in trust. When the parties adduced evidence it became even clearer that the plaintiffs' claim was based on trust. Ms. Kilonzo submitted that as defendant's registration of the suit land was under the Registered Land Act (Cap.300 Laws of Kenya) the defendant's title cannot be defeated. She relied on the provisions of **sections 28 and 30** of the Registered Land Act; but more particularly on section 143 (1) of the said Act which provides:-

“Subject to subsection (2) the Court may order rectification of the register by directing that any registration be canceled, or amended where it is satisfied that any registration (other than a first registration) has been obtained made or omitted by fraud or mistake.”

In the present case there was no question of fraud or mistake. The plaintiffs' case was that the suit land belonged to the husband of the 1st plaintiff, the mother of the defendant and that the defendant was registered on behalf of the members of the family since the owner of the land had died by the time of registration. The situation in this case is well covered by the decision of Madan J. (as he then was) in **GATIMU KINGURU V. MUYA GATHANGI [1976] KLR 253 at p.263** where he 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. Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold.”

The above was cited with approval in **KANYI V. MUTHIORA [1984] KLR 712 at p. 721** where Chesoni, Ag. J.A. (as he then was) said:-

“Section 143 of the Land Registered 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."

We have considered the authorities cited by M/s Kilonzo in urging us to fault the procedure adopted by the plaintiff in this matter, but we are satisfied that it was not fatal to the claim. Indeed the suit in **KANYI VS. MUTHIORA** (supra) was commenced by way of a plaint. As correctly submitted by learned Counsel for the Respondents, Mr. Kimani, the defendant was under no illusion as to what case he was to answer.

Registered Land Act

Ms. Kilonzo's submissions under this heading were to the effect that the learned judge did not address himself to the provisions of the Registered Land Act and in particular **sections 28 to 30 and section 143**. She pointed out that the defendant was an absolute proprietor of the suit land and that customary law rights are not overriding interests. She 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, those submissions are adequately answered by this Court's decision in **KANYI VS. MUTHIORA** (supra) which cited with approval the decision of Madan, J. (as he then was) in **GATIMU KINGURU** case (supra). The case made out here is one of customary law trust. The defendant as the eldest son of the deceased was registered proprietor of the suit land as a trustee as we have held above under the heading "**evidence**". The husband of the 1st plaintiff acquired the land in dispute by purchase and as the defendant was his eldest son when the process of land registration took place he (defendant) was registered as proprietor. It is not a custom or procedure without precedent. The defendant failed to show how else this land could have been acquired. His feeble attempt to claim the land as his own was not supported by evidence. This is why the case had to be decided in the spirit of the decision in the **Gatimu Kinguru** case as approved by a line of authorities of this Court

. Nature and Proof of Trust:

It was argued on behalf of the appellant that there was no sufficient evidence to prove a customary law trust. On our own re-evaluation of the evidence we are satisfied that 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.

Conclusion:

The dispute herein, as already stated, related to family land, registered in the name of the defendant who was the eldest son of the deceased who had purchased the suit land. The plaintiff as the wife of the deceased and the mother of the defendant filed this suit by way of a plaint. It was argued that as the plaintiffs' claim was based on trust the suit should have been brought by way of Originating Summons pursuant to **order XXXVI** of the Civil Procedure Rules. We have already dealt with the issue of procedure elsewhere in this judgment. If emphasis was necessary however, we would refer to the decision of the predecessor of this Court in **Boyes vs. Gathure** [1969] E.A. 385 in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant.

Njenga Chogera v Maria Wanjira Kimani & 2 others [2005] eKLR 13

As regards evidence of customary law trust vis-à-vis the provisions of the Registered Land Act, we can do no more than refer to the decision in **MUTHUITA V. MUTHUITA** (1982-88) 1 KAR 42 at p. 44 where Potter J.A. 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)

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 the Registered Land Act. Both suits were commenced by way of a plaint. Evidence consisted of the long history in respect of the suit land.

We have considered the learned and able submissions by Ms. Kilonzo for the appellant and Mr. Kimani for the respondents and we are very grateful for their assistance. We have dealt with the various aspects of the appeal raised on both sides and Njenga Chogera v Maria Wanjira Kimani & 2 others [2005] eKLR 14 it is our hope that we have adequately dealt with the salient points. For the reasons we have given, it is our view that the learned Judge was right in his judgment. Accordingly, this appeal is dismissed with costs.

Dated and delivered at Nairobi this 16th day of September, 2005.

E.O. O'KUBASU

JUDGE OF APPEAL

P.N. WAKI

JUDGE OF APPEAL

W.S. DEVERELL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR