



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, GITHINJI & WAKI, J.J.A)

CIVIL APPEAL 129 OF 2002

BETWEEN

JOHN MUNGAI MURANGO)..... 1ST APPELLANT

JEREMIAH KIARIE MUKOMA).....2ND APPELLANT

AND

SAMSON NJENGA MUNGAI.....RESPONDENT

(An appeal from the Judgment of the High Court

of Kenya at Nairobi (Juma, J.) dated 08.05.1998

in

H.C.C.C. NO. 1105 OF 1987)

JUDGMENT OF THE COURT

This appeal relates to two parcels of land in Githunguri, Kiambu which, since completion of the process of land demarcation and consolidation in 1958, were registered under the **Registered Land Act**, Cap 300, in the name of one **MURANGO NDUNGU**. These are: -

- 1) **Githunguri/Githiga/675** measuring approximately 10.5 Hectares (about 26 acres).
- 2) **Githunguri/Githiga/T.383**, a town plot.

Murango Ndungu died on 6th January, 1974 and on 30th September 1985, his two sons **John Mungai Murango** the 1st appellant, (hereinafter **John**) and **Njenga Murango** were lawfully appointed as the administrators of his estate. **Samson Njenga Mungai**, the respondent, (hereinafter **Samson**) stood surety for them and the grant of the Letters of administration was subsequently confirmed by the court. Upon confirmation of the grant Samson sought to have it revoked, asserting that **Murango Ndungu** was his step-brother (later clarified as "step-father") and that he had proprietary interest in the two parcels of land, which he asserted were ancestral lands. He was in physical possession of both parcels of land and therefore registered a caution against the titles claiming an interest as "licencee" on 29.11.85. His application for revocation of the grant was made in Kiambu Resident Magistrate's Succession Cause No. 115/1985, but in a ruling delivered on 24th February, 1987, the Court, Ombonya S.R.M, dismissed it, stating that **Samson** was not the deceased's heir, and in any event, he had not objected to the grant before

confirmation.

The two parcels of land were subsequently transferred into the name of **John** to hold in trust for the rest of the family. Soon after, L.R. No. Githunguri/Githiga/T.383 was sold to **Jeremiah Kiarie Mukoma** the 2nd appellant (hereinafter “the purchaser”). It is not clear, since no evidence is on record, whether the transfer to the purchaser was effected, but there is evidence of a Court order issued on 27.05.87 for maintenance of the status quo.

Samson then moved to the High Court and filed suit against the two administrators and the purchaser. His plaint filed on 13th March 1987 makes a double barreled claim. He pleaded that he was actually the son of **Murango Ndungu** (hereinafter “the deceased”) although his mother was the deceased’s brother’s wife, one **Wairimu**. He then laid a claim to the two parcels of land on the legal basis of “trust” in paragraph 5 and 6 thus:

“5. In the year 1959 during the land demarcation and consolidation it was agreed between the deceased and the plaintiff that all family land be consolidated and registered in the name of the deceased to hold the same on trust for himself and the plaintiff in equal shares.

6. The said family land was consolidated and registered as parcels Githunguri/Githiga/675 and Githunguri/Githiga/T. 383. Both parcels of land were registered in the name of the deceased to hold the same in trust for himself and the plaintiff in equal shares.”

On that basis he sought the following: -:

“(a) a declaration that the first and second defendants hold a half equal share of each of L.R. No. Githunguri/Githiga/675 and Githunguri/Githiga/T. 383 on (sic) trust for the plaintiff;

(b) a declaration that the third defendant holds one equal share of L.R. No. Githunguri/Githiga/T. 383 on trust (sic) for the plaintiff;

(c) an order for determination of the said trust.

(d) an order for transfer of a half equal share of each of L.R. No. Githunguri/Githiga/675 and L.R. No. Githunguri/Gathiga/T. 383 by the defendants and each of them to the plaintiff.”

In the alternative, **Samson** pleaded entitlement to the two parcels of land through adverse possession, pleading in paragraphs 7 and 8:

“7. The plaintiff has since the land consolidation and registration (sic) in 1959 been in exclusive and complete adverse possession of the parcels of land known as L.R. No. Githunguri/Githiga/675 and Githunguri/Githiga/T.383 till now which is a period of over twelve years.

8. The third defendant with the full knowledge and knowledge (sic) of the plaintiff’s interests as laid out in this plaint secretly contracted with the first and second defendants to buy and transferred to himself L.R. No. Githunguri/Githiga/T. 383.”

He sought the following orders:

“(i) A declaration that the deceased’s titles in L.R. No. Githunguri/Githiga/675 and L.R. No. Githunguri/Githiga/T. 383 were distinguished (sic) by the plaintiff’s adverse possession of over twelve years;

(ii) An order that the plaintiff be registered as sole proprietor of L.R. No. Githunguri/Githiiga/675 and L.R. No. Githunguri/Githiga/T. 383 in place of the deceased and/or the defendants.”

The two sons of the deceased, **John and Njenga Murango**, denied in their defence that **Samson** was the son of the deceased and referred to his earlier affidavit claiming that he was the deceased’s step-brother. They referred to him as **Samson Njenga Mukobobo**. Admitting that the plaintiff had been in exclusive physical possession of the two parcels of land, the deceased’s sons nonetheless averred that he was only there at the mercy of the deceased and he himself had acknowledged that he was a mere “Licencee” in Cautions filed against the Titles. They further admitted common ancestry with **Samson** through his grandfather, but averred that the grandfather had sold all his land thus rendering his descendants, including **Samson**, landless. For his part, the purchaser pleaded that the purchase was open and lawful and that he was a bona fide purchaser for value without notice of any interest in the plot by the plaintiff or any other person.

Issues were joined on the pleadings and the matter came before Juma, J. for hearing on 27.01.98. Prior to the hearing an attempt was made to have the suit struck out on the basis that it was *res judicata* in view of the earlier Ruling by Ombonya SRM in the Succession Cause. The arguments on that issue were made before Kuloba J. who apparently delivered a ruling on 30.05.96 but none of the parties here made that ruling available to us. That the suit proceeded to hearing subsequently however must follow that the objection was overruled. At all events, we express our doubts, and indeed the point was conceded by counsel, that an application for revocation of a confirmed grant of letters of administration would be made before the subordinate court. The decision in the succession cause is therefore of no relevance here. Be that as it may, Juma J. heard **Samson** and his two witnesses, **Musa Kuria (PW2)** and **Samwel Kiarie Karanja (PW3)**. He also heard **John Mungai Murango**, **Jeremiah Kiarie Mukoma** (the purchaser), and one other witness **Shadrack Njenga (DW3)**. **Njenga Murango**, the 2nd defendant had died during the pendency of the suit in 1991. In a considered judgment delivered on 08.05.98, the learned Judge accepted the plaintiffs’ version of events and allowed the claim. He found sufficient evidence to establish a family relationship between **Samson** and the deceased as his uncle. He further found that **Samson** had exclusively taken possession and developed the two parcels of land since 1959, but in his honesty, **Samson** invited the family of the deceased who were living far away in the Rift Valley and in Bibirioni where the deceased was buried, to share the land when he could have lawfully claimed the entire land by adverse possession. In the Judge’s own words: -

“It should be noted that in the present case it is the plaintiff who caused the registration of the land in question to be in the name of the uncle, Murango. He did this being fully aware that it was a family land. The defendants should be grateful to the plaintiff for preserving the family land. I therefore hold that the plaintiff is entitled to a declaration that the defendants hold half equal share of each of L.R. No. Githunguri/Githiga/675 and L.R. No. Githunguri/Githiga/T.383 on (sic) trust for the plaintiff.”

It is that decision that provoked this appeal. The duty of this Court on a first appeal has been reiterated on many occasions and we are alive to it. It is this:

“..... 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.” -

- See **Selle vs. Associated Motorboat Company [1968] EA 123** at page 126 and **Jivanji v Sanyo Electrical Company Ltd [2003] KLR 425** at page 431. Seven grounds of appeal were laid out in the

Memorandum of appeal but learned counsel for the appellants Mr. Nyaga argued them as four. He however revisited the issue of *res judicata* but in the end conceded that it did not arise. His first challenge was on the finding that the respondent was a member of the 1st appellant's family. Samson's evidence on that relationship is this: -

“I know the 1st defendant and 2nd defendant. They are the sons of Murango. Their mothers are different. My mother was Wairimu. She was wife of Njenga. Njenga and Murango are step brothers. When Njenga died my mother was left on the farm. Murango family went to live in Nakuru. My mother was pregnant with me. I was not born. My mother also followed Murango to Nakuru. My mother returned to Kiambu during the emergency. I came with him (sic) to the land. I came to Githigi. It is where my mother was buried. Murango went to Bibirioni in Limuru. He is buried there. He went there with his family.”

In cross-examination he said he did not know his father because he was born after the husband of his mother, one **Njenga**, died. **Njenga** was one of the four brothers of the deceased and the deceased was the last born son of their father **Ndungu**. The respondent was nevertheless, named after **Njenga** in accordance with Kikuyu customs and his mother accompanied Murango **Ndungu** to the Rift Valley before returning to occupy the family land in Kiambu during the emergency. His witness Musa Kuria (PW2) born in 1929, a villager in Githiga and Chairman of the Land Demarcation Committee there when the consolidation process took place in 1957, confirmed that indeed Samson was a member of the deceased's family and litigated over the land on the same side as Murango **Ndungu** against another family and they won. The rebuttal evidence on family relationship was given by John as follows: -

“I know the plaintiff. His mother is Wairimu. He is not the son of Murango **Ndungu. Husband of Wairimu is Njenga. Murango had 4 brothers. Eldest – Njenga, Ayueya, Ngari, Kiruku and Murango. Njenga husband of Wairimu belongs to a different family altogether – but related through grandfather. I know the 2 plots in dispute. Registered owner Murango. The land belongs to the family of Anjiru. Murango had his own land at Bibirioni Limuru. He bought it. The house of the plaintiff was given land by the elders. Thereafter the brother of the plaintiff Mungai sold the land. Mungai was the son of Njenga. Njenga the plaintiff was born later after his father had died. His father was Mukoboko. His mother was Wairimu but Wairimu named his son, the present plaintiff after Wairimu's husband who had died. Plaintiff was named after Wairimu's former husband under Kikuyu custom. Mukoboko was the brother of Njenga. When Njenga died, his brother Mukoboko inherited his wife – Wairimu.”**

In essence, while the Samson traces his name to one Njenga the brother of the deceased, John says it was a different Njenga who nevertheless was related to the family through their grandfather. Cross-examined however, **John** knew nothing about that grandfather. His sole witness, **Shadrack Njenga** (DW3) who said he knew both Samson and John as his paternal uncles could only give hearsay evidence on the relationship as follows: -

“I do not know the parents of the plaintiff. I was told by my uncle Mukorino that **Ndungu the father of Murango and the grandfather of the plaintiff came from same family but different mothers. The one who had married the mother of the plaintiff was Njenga and his father was **Ndungu**. Mukoboko and father of the plaintiff were brothers. Plaintiff's mother is Wairimu, she was married to Njenga. She had another son called Mungai. Plaintiff named after Njenga because when Njenga died wife inherited by his brother and child be named after deceased husband to revive his spirit.”**

That is all the evidence the superior court had before it on the parties' relationship and it chose to believe the plaintiffs' account. The main attack directed at the evidence is that Samson did not know his biological father; he had previously referred to the deceased variously as his “step-brother”, step-father” or “uncle”; and had acted as a surety during the Succession Cause. On our own evaluation however, we think, on a balance of probability, that **Samson** was a member of the same family as John. The degree of certainty as to whose biological father one is, of course remains a matter for DNA science or confession by the mother, but samson's mother had long died. We do not think the manner of addressing the

deceased or participation in a Succession Cause in the deceased's estate as a surety deprived Samson of the right to lay a claim against the administrators of the estate of the deceased. We are fortified in this conclusion by events subsequent to Samson's birth which are admitted by the appellants. The family of the deceased, which had shifted from Kiambu to the Rift Valley, including Samson's mother, returned to Kiambu but it was only **Samson** and his mother who settled on the disputed land which was ancestral land. The mother died and was buried there. The deceased on his death was not buried there but in Bibirioni. He had not questioned Samson's occupation of the land since 1959 until his death in 1974. John and his brothers never settled there as they continued to live in the Rift Valley. As we will see shortly they only came to Kiambu for the Succession Cause, 11 years after their father's death, on the invitation of **Samson**. Indeed it was Samson who had retained the title documents and he produced them in evidence. From all that information, it is more probable than not that Samson was more of a relative than a stranger in that family and we consequently do not find any merit in that ground of appeal.

The second ground argued by Mr. Nyaga was the finding that it was Samson who registered the disputed land in the name of the deceased. In his submissions, Samson could not have done so since he was not a member of the deceased's family and knew little about it.

With respect this argument is not tenable. There was evidence, largely unchallenged, that Samson and the deceased had jointly disputed the land with another family and they succeeded in that dispute. That was in the presence of **MUSA KURIA** (PW2) who was a resident of Githiga village since 1929. When the process of consolidation and demarcation subsequently came to the area, it was again mzee **Musa Kuria**, this time as the Chairman of the demarcation committee who witnessed Samson on his own overseeing demarcation of the family land and having it registered in the name of the deceased on behalf of the family. **Samson** himself said he took charge of the family land and signed the records on behalf of the deceased. He kept the certificates which he produced in court as exhibits 1 and 2. On that evidence, the superior court, which had the advantage of hearing and seeing the witnesses, stated:

“The plaintiff and PW2 are old men. They are however still mentally alert. They impressed me as honest old men. They were frank in the giving of their evidence.

The defendants and their witnesses were relatively very young people who did not have much knowledge of their ancestors. The plaintiff's honesty is demonstrated by the fact that he supervised the demarcation of the land in question. He registered his uncle's name MURANGO as the owner of the land on behalf of the family. He went ahead and signed for Murango. Murango was in the Rift Valley at the time. The plaintiff had the opportunity to have the land registered in his own name but he did not do so. When his uncle Murango died and his sons started raising problem, the plaintiff had the opportunity to claim ownership of the land by adverse possession, but he did not choose this option. Instead he wanted to get his rightful share.”

We agree with that assessment of the evidence and reject that ground of appeal also.

Finally it was argued on behalf of the purchaser that he knew nothing about the respondent's interest in the town plot before he purchased it. The learned Judge applied the doctrine of “*caveat emptor*” in rejecting that claim. It was argued that there was a search made in the registry before the land was sold and there was nothing to warn the purchaser about a dispute. The purchaser took possession only to be stopped by a court order obtained after the filing of the suit.

We have looked at the record but we cannot find the Title document produced in evidence in respect of the town plot. Nor is there evidence of any searches having been made in the registry. The Title abstract exhibited is on Githunguri/Githiga/675 which shows that Samson had registered cautions on 29.11.85 and 05.09.86. These cautions were referred to in cross-examination by Samson but the purchaser says there was no caution without offering evidence of that removal. He only said there were some people in occupation of the land when he bought it but he could not identify them. He denied knowing Samson although they came from the same village. There was evidence however from Samson and his witness, as well as John, that the two plots were occupied by Samson. We think in those circumstances the learned

Judge was right in doubting the purchaser's protestations and ignoring them. That ground of appeal is also rejected.

We have dealt fully with the grounds of appeal raised in the matter and we do not find them meritorious. We thank both counsel Mr. Nyaga for the appellant, and Mr. Kiania Njau for the respondent, for their assistance and clarity of argument in the appeal. It was not argued before us, and we do not therefore belabour the point, that if the land in issue was found to be family land, which indeed it was, then a customary trust would not arise and the declarations sought in the plant would not issue. Suffice it to say that there is ample authority for holding that such trust can be implied despite a first registration under the Registered Land Act. See for example Gatimu Kinguru v. Muya Gathangi [1976] KLR 253 at p. 263 where Madan J. (as he then was) stated: -

“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 superior court was right in its findings of fact and in granting the orders sought in the plaint.

For those reasons this appeal fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of October, .2005.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR