



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A)
CIVIL APPEAL NO. 277 OF 2001
BETWEEN**

ISAYA MOGONCHI MOGONCHI APPELLANT

AND

SAMWEL ONDARI MOGONCHI RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Waweru, J) dated 2nd August, 2001

in

H.C.C.C No. 271 of 1997)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Waweru, J) wherein the appellant’s claim to half share of land title No. Majoge/Bosoti/1143 was dismissed with costs.

The appellant is the elder brother of the respondent. Their father, Isaya Mogonchi, died before land adjudication. Their mother, Trafena Bina Mogonchi died in or about December, 1990. The suit land which measures about 11 acres was registered in the name of the respondent after land adjudication on 22/5/1969. The appellant owns land title No. Majoge/Bosoti/1213 measuring approximately 7 acres, which was registered in his name on the same day, that is on 22/5/1969.

The appellant’s case in the superior court was that the land in dispute was an ancestral land and that the respondent was registered to hold the land on his own behalf and in trust for the appellant. He claimed that he bought the land on which he resides, title No. Majoge/Bosoti/1213 in 1963 from one Mokuia Simba for 12 heads of cattle, which had been paid as dowry for their eldest sister, Esther Nyaboke Ogotu. He called four witnesses at the trial to support his case, Eunice Nyambeki Nyakwara - his sister; Jephta Mokuia Simba – the seller of land title No. Majoge/Bosoti/1213; Isaiya Mogonchi Nyaanga – his cousin, and Zachariah Nyariongi Okiomere – his uncle.

The respondent’s case was that it is his mother who told the land adjudication committee to register the land in the name of the respondent in the presence of the appellant and that this was not ancestral land but land given to his mother by his father’s eldest brother. He asserted that land title No. Majoge/Bosoti/1213 was bought by his mother using the dowry paid for the eldest sister – Esther Nyaboke. He called Nelson Kingoina Nyangira (Nyangira) as an expert witness on Abagusii Customary Law. The learned Judge made four firm findings of fact as follows:

“1. Land parcel L.R. Majoge/Bosoti/1143 was family land owned by the parties’ parents before it was registered in the name of the defendant.

2. Land parcel L.R Majoge/Bosoti/1213 was purchased at the directions of the parties’ mother using dowry proceedings owned by her. It was therefore family land when it was registered in the plaintiff’s name.

3. Parcel No. 1213 was given to the plaintiff exclusively by the parties’ mother as his share of the family estate.

4. The suit land (parcel No. 1143) was similarly given to the defendant exclusively by the parties’ mother as his share of the family land.”

From those findings of fact, the learned Judge reached the decision that the respondent was not registered as the proprietor of the suit land in trust for himself and for the appellant.

There are five grounds of appeal in the memorandum of appeal but we will quote only three thus:

“1.

2.

3. That the learned Honourable Judge erred in law and in fact by failing to make a finding that L.R. No. MAJOGEBOSOTI/1213 was purchased by the Appellant in view of the overwhelming evidence in support thereof.

4. That the learned Honourable Judge erred in law and fact by failing to make a finding that the fact that the Appellant had been using L.R. No. MAJOGEBOSOTI/ 1143 upto 1994 pointed to the existence of a trust between himself and his brother the respondent.

5. That the findings and conclusions of the learned Honourable Judge are not supported by the evidence on record and constitute misdirections and wrong conclusions.”

This being a first appeal is in fact a re-trial and the Court is required to reconsider the evidence, re-evaluate it and come to its independent conclusion bearing in mind that the trial Judge had the advantage of seeing and hearing the witnesses – **see Selle and Another v. Associated Motor Boat Co. Ltd and Others [1968] EA 123, and Ogol V. Muriithi [1985] KLR 359.**

We are also alive to the principle that a court of appeal will not normally interfere with the findings of fact by the trial court unless it is based on no evidence or on a misapprehension of evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusions – see Makube v. Nyamuro [1983] KLR 403.

The second and third findings of fact by the learned Judge are to the effect that land parcel No. Majoge/Bosoti/1213 was purchased at the directions of the mother of the parties using dowry proceeds owned by her, that it was therefore family land and that the mother of the parties gave it exclusively to the appellant (plaintiff) as a share of the family estate.

The appellant’s evidence that he bought land title No. Majoge/Bosoti/1213 in 1963 from his share of dowry was supported by evidence of Eunice Nyambeki Nyakwara and Jephta Mokuwa Simba. The latter, who was the seller, categorically stated that he sold the land to the appellant alone; that it is the appellant who paid the consideration and that he never sold the land to the appellant’s mother.

The respondent’s evidence showed that he knew very little about the purchase of the land. He admitted that he does not know what his mother paid for it and that it is the appellant who told him that 12 heads of cattle were paid. When cross-examined, he stated that he was too young in 1963 and that he was not

present during the negotiations for the purchase of the land parcel No. Majoge/Bosoti/1213. He contradicted his earlier evidence when he asserted that he drove the cows to the home of the vendor.

The respondent stated at the trial that according to Abagusii customary law, the dowry paid for the first daughter belongs to the parents of the girl. The appellant denied this and stated that the parents are entitled to take the dowry of any of their daughters. He further stated that in this case, their mother did not take the dowry of any of the eight daughters because she did not need any and that dowry was shared by the appellant and the respondent. The expert witness called by the respondent, Nyangira, supported this aspect of the custom. According to this witness, dowry paid for any of the daughters belongs to the parents and the parents can use the dowry as they please and can lawfully give dowry paid for the first daughter to a son. It does not therefore necessarily follow that because the appellant was given dowry for the first daughter and bought the land with that dowry, the land was bought by their mother and is therefore family land.

We would agree with the appellant that there was no evidence to support the findings of the learned Judge. Indeed, there was overwhelming and credible evidence, which we accept, that land title No. Majore/Bosoti/1213 was solely bought by the appellant using his share of dowry given to him by his mother. We are satisfied that the learned Judge misdirected himself and reached wrong conclusions on this aspect of the dispute.

The first finding of fact by the learned Judge is not disputed in this appeal as the respondent did not file a cross-appeal. Even if the respondent's assertion that land was given to his mother by the brother of her deceased husband, the land is still ancestral according to the evidence of the expert Nelson Kingoina Nyangira.

The fourth finding of fact by the learned Judge is that the suit land was exclusively given to the respondent by his mother as his share of the family land. That finding is solely based on the evidence of the respondent. The evidence of the appellant that he was entitled to a half share of the land and that his mother had called elders in 1981 and caused the suit land to be divided between the parties and a boundary planted was supported by Eunice Nyambeki Nyakwara and Isaiya Mogonchi Nyaanga, a sister and uncle of the parties respectively.

There was also consistent evidence that although the appellant moved to the land he bought in 1965, he still continued using the land in dispute until 1994 when the respondent evicted him. But according to the respondent, the appellant never occupied the suit land after he left in 1965. The learned Judge did not conclusively decide on this issue but said that the appellant may have cultivated the suit land before the defendant (respondent) married and his family grew in number. The learned Judge however rejected the evidence that the mother of the parties had sub-divided the land into two portions. He did not give any reasons for rejecting the overwhelming evidence of the appellant and two of his witnesses. The respondent's evidence was inconsistent with his evidence before the District Officer and the elder where he said in part:-

“After my elder brother shifted to his new land, which was bought for him by our mother, I was left behind with our aging mother in our ancestral land. Before he left he had his portion of ancestral land which he was cultivating. After he shifted he continued cultivating that section until 1994 when I ordered him to cease cultivating”.

The proceedings of the arbitration before the District Officer and elders which arbitration was ordered by court is part of the record. The respondent is estopped by that record from denying that the appellant did not continue cultivating the suit land after he moved to the other land.

The appellant agreed that it is unusual for a younger son to be registered as proprietor of land in trust for an elder brother and that in the absence of an elder brother, a parent is usually registered. He explained that the respondent was registered as proprietor because he was staying with his mother, the appellant having moved to the land that he had bought. The expert witness, Nyangira, also stated that it would be

unusual under Abagusii Customary Law for a younger brother to hold land for his elder brother. It is indeed unusual but all the circumstances of this case do not show that the mother of the parties by causing the respondent to be registered as proprietor of the land intended to deny the appellant his rightful share of the family land. The fact that the Register of the suit land does not show that the respondent is registered as a trustee does not affect the enforceability of a trust (**GATUMU KINGURU V MUNYA GACHANGI [1976]** Kenya L.R. 253) or relieve the respondent from any duty or obligation to which he is subject as a trustee (see proviso to section 28 of the Registered Land Act).

On our own evaluation of the evidence, we are satisfied that the appellant proved that the respondent was registered as a proprietor of the suit land as a trustee.

There is evidence from Eunice Nyambeki Nyakwara and from Isaiya Mogonchi Nyaanga that when the land was subdivided between the appellant and the respondent in 1981, the respondent got a slightly bigger portion. There is also the evidence of the appellant and Isaiya Mogonchi Nyaanga which the respondent repeats that the respondent has planted tea bushes in the portion which was given to the appellant. The appellant should ideally get an equal portion of the ancestral land as the respondent. But to compensate him for the loss of tea bushes he has planted in the portion which should go to the appellant and other developments, it is just that the respondents gets one acre more.

For those reasons, we allow the appeal, set aside the judgment and decree of the superior court. We give judgment for the appellant for -

(a) A declaration that the respondent owns 5 acres out of land title No. MAJOGE/BOSOTI/1143 in trust for the appellant.

(b) An order for subdivision and transfer of a portion measuring 5 acres out of land title MAJOGE/BOSOTI/1143 to the appellant.

We give the costs of this appeal and the costs of the suit in the superior court to the appellant. We further order that each party do bear the partition and transfer charges equally.

Dated and delivered at Kisumu this 26th of November, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR