IN THE COURT OF APPEAL
AT NYERI
(CORAM: O'KUBASU, GITHINJI & WAKI, JJ.A.)
CIVIL APPEAL NO. 281 OF 2000

BETWEEN

MBUI MUKANGU ……. APPELLANT

AND

GERALD MUTWIRI MBUI ……..……. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Meru (Omwitsa, Comm. Of Assize) dated 3rd August, 2000 in H.C.C.C. NO. 59 OF 1999)
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JUDGMENT OF THE COURT

This land dispute between father and son has been raging since 1993. The first salvo was fired by the son, **Gerald Mutwiri Mbui** (Gerald) when he sued his father in **Meru C.M.C.C. NO. 870 OF 1993** to stop him from alienating some two parcels of land and to force him to transfer portions of the land to him. Gerald did not succeed in that attempt but continued to occupy the land.

The father, **Mbui Mukangu** (Mbui) is the registered proprietor of parcel Nos. **Abothuguchi/Ruiga/1245** (plot 1245) and Abothuguci/Ruiga/214 (plot 214) measuring 3 acres and 4½ acres respectively. Both are held under the **Registered Land Act (Cap 300, Laws of Kenya)**. He resides on plot 1245 and so does Gerald. Gerald has also planted coffee on half acre of plot 214.

Three years after Gerald failed in his case (although he says it is pending appeal before the High Court, in Meru) Mbui instituted a case of his own – **Meru C.C.M.C.C. NO. 13 of 1998** pleading that Gerald had been threatening to harm him and had provoked him by cutting down his banana plants. For that reason, he wanted a court order evicting him from plot 1245. Those allegations were of course denied by Gerald who put his father to strict proof thereof. He also pleaded that his father was holding the land in trust for the whole family.

There are five sons in the family. Gerald was the eldest but his mother divorced Mbui in 1961. The second wife had one son but she was also divorced. The youngest wife, who was still living with Mbui on plot 1245, has three sons.

According to Mbui, plot 214 was ancestral land and he was not evicting Gerald therefrom. He was offering him the ½ acre he was cultivating. Plot 1245 was however acquired by him through purchase and he wanted Gerald out of it, despite Gerald having lived there with Mbui's consent and knowledge since his birth in 1956 and having made permanent developments thereon since 1979. Other than the bold

statement about the purchase, no other evidence was offered. For his part, Gerald denied that plot 1245 was acquired through purchase and averred that it was ancestral land. He denied assaulting his father and attributed their acrimony to the youngest wife who wanted to have the land left for her three sons.

Only the two of them testified before the Meru Resident Magistrate, (P. Okille, Esq,.) The learned Magistrate found that the cause of action pleaded by Mbui was threat of violence by his son but no evidence was tendered to prove the allegation. As there was thus no basis for seeking the eviction of Gerald with all attendant grave consequences of that eviction, the suit was dismissed.

Dissatisfied with that finding, Mbui challenged it on appeal on four grounds. We reproduce them as it was argued before us that those grounds were ignored by the superior court:

> **"1. The learned Trial Magistrate erred in law and fact in failing to appreciate that the Appellant as the registered proprietor of land parcel No. Abothuguchi/Ruiga/1245 has unfettered rights and privileges to deal with or dispose of that land the way he wishes and nobody can urge, direct or order him to do anything about that against his will.**
>
> **2. Though the Respondent is the son of the Appellant and has been living with the Appellant on that his land (sic), the Learned Trial Magistrate erred in law and fact in failing to find that the Respondent was just a licencee at will in the Appellant's land and the Appellant has a right to terminate that licence at will and without being required to establish the reasons for such termination.**
>
> **3. Whereas there is indisputable evidence that the relations between the Appellant and Respondent became sour after the Respondent failed in a bid to get the Appellant share and transfer portions of his lands to the Respondent, the learned trial Magistrate erred in law and fact in disbelieving Appellant's evidence that since that failed bid the Respondent has been provoking and threatening the Appellant.**
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> **4. The Learned Trial Magistrate misdirected himself in upholding without proof that the Respondent has done substantial development on the suit premises and went further to consider that Appellant should have offered to compensate for the alleged development."**

The Commissioner of Assize (Hon. Omwitsa), who heard the appeal agreed with the court of first instance that there was no proof of the cause of action pleaded to warrant an order for eviction of Gerald from the family land. The learned Commissioner of Assize went further to consider two authorities cited by the appellant and held that they were distinguishable. The self-same authorities were cited in aid before us and we shall comment on them presently. Omwitsa (Commissioner of Assize) dismissed the Appeal.

Mbui was still dissatisfied and therefore came before us. Being a second appeal, only matters of law can be raised. Although five grounds of Appeal were laid out, only four were argued before us. That is:-

> **"1. The learned Commissioner of Assize erred in law in failing to consider and analyze each ground set out in the appellants (sic) memorandum of Appeal and due to that failure he came to the wrong conclusions.**
>
> **2. The learned Commissioner of Assize failed to consider that the Appellant was the registered owner of the suit land and as such he was entitled to absolute ownership of that land together with all rights and privileges belonging thereto and due to that failure the learned Commissioner of Assize came to the wrong conclusion in his Judgment.**
>
> **3. The learned Commissioner of Assize erred in law in treating the Respondent as (sic) an overriding interest on the Appellant's piece of land and as a result of that failure he**

wrongly failed to order the respondent to be evicted from Land Reference Abothuguchi/Ruiga/1245.

4. The learned Commissioner of Assize erred in law and in fact in failing to hold that due to the bad blood between the Appellant and the respondent both of them could not occupy the same land and in that regards, (sic) the Respondent should be evicted from the suit land?"

Learned counsel Mr. Mwirigi, who appeared for Mbui in the superior court argued ground 1 on its own, ground 2 and 3 together, and made fleeting submissions on ground 4 which in our view relates to concurrent findings of fact made by the two Courts below. We cannot, of course, interfere with such findings unless there was a compelling reason to do so, such as the findings being so perverse that they are bad in law, which is not the case here.

For purposes of this appeal it is grounds 2 and 3 which raise fundamental issues of law, the determination of which will lay the matter to rest. The issue is this:

"Do sections 27 and 28 of the Registered Land Act confer such rights on Mbui as will entitle him to evict his son, Gerald, from the occupation and possession of the land?"

In answer to that issue, Mr. Mwirigi referred us to the two authorities he relied on before the superior court and submitted that the answer was in the affirmative. Gerald, he submitted, can only claim an interest in the land through customary law but the application of that law was extinguished upon registration of the land. No duty of care was owed to Gerald by his father Mbui because he was a grown up and ought to look for his own land elsewhere. Alternatively he can only wait until the father dies and then claim under succession.

On the other hand, learned counsel for Gerald, Mr. Omayo contended that there was no dispute and indeed there was a finding of fact that the two parcels of land were part of the ancestral or family land before Mbui was registered as a proprietor. As such he can only hold the land subject to a trust in favour of Gerald which entitled him to live on the land. Gerald was not claiming ownership of the land from his father but only the right to continue occupying it as he had always done with the father's consent and knowledge for years. There is no denial of the developments made by Gerald on the land. In his view the two authorities cited had no relevance and the superior court was right to distinguish them.

We now turn to those authorities. The first one is a decision of this court made in May 1997, Nyeri C.A No. 189/96 **MURIUKI MARIGI v RICHARD MARIGI MURIUKI & 2 others** (UR). The three sons of Muriuki Marigi (the father) who had five wives and several other children sued him in the High Court seeking to compel him to equitably subdivide and allocate to his wives a parcel of land registered in his name under the ***Registered Land Act Cap 300***. The sons feared that the father who was intending to subdivide the land, would do so in a manner that would disadvantage them. The father in his defence pleaded that as the registered proprietor he had the absolute and indefeasible right over the property and he could not be urged, directed or compelled to share the land in any particular manner. The suit however did not proceed to trial as the parties referred it to arbitration by consent and it was the award in favour of the sons which was being challenged before Ang'awa J who saw no reason to upset it. The father appealed and this Court examined the root cause of the dispute and found that there was no cause of action in the first place. The arbitral proceedings were declared a nullity ab initio . The court made a finding that the claim of the sons was based on a customary law right but held that such right was excluded under ***sections 27, 28 and 30 of the Registered Land Act*** . The Court stated:

"We earlier set out the provisions of sections 27 and 28 of the Registered Land Act which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in section 30 of the act. The evidence on record is silent on whether or not the respondents' Kikuyu customary law rights over the suit property are noted in the land register respecting the land. In

absence of such evidence we may not properly infer or imply that they are. The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that section. The issue was considered in the following two reported cases of Obiero -vs- Opiyo & others [1972] EA 227 and Esiroyo -vs- Esiroyo & another [1973] EA 388, and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of section 30, above. Moreover, considering the provisions of section 3(2) of the Judicature Act which we partly reproduced above, customary law rights being subject to rights under a written law, the respondents' rights are clearly excluded by the clear language of sections 27 and 28 of the Registered Land Act."

And concluded: -

"The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will."

The second case was **Esiroyo vs Esiroyo & Anor.** which also involved a father and his two sons. It has an uncanny similarity with this case because the father who was the registered owner of the land claimed that his two sons whom he sued for eviction from the land had had family rows and fights with him, hence his desire to exclude them from his land. The sons relied on Luhya customary law to lay their claim on the land which the court found was ancestral land. Kneller J (as he then was) applied ***sections 28 and 30 of the Registered Land Act*** to hold that rights under Customary law are extinguished upon registration of land under that Act and further that they are not among the interests listed in section 30 as overriding interests.

For completeness we now reproduce the relevant sections under discussion before we consider their application to the case before us.

"27. Subject to this Act –

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appur tenant thereto;

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, i f any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

(b) …….

(c) …….

(d) …….

(f) ……..

(g) the rights of a person in possession or actual occupation of land to which he is e ntitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

(h) ……

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefo re defined in such manner as he thinks fit."

It was the view of the superior court (Omwitsa, C.A) that the two authorities were distinguishable. The **Muriuki Murigi** case on the basis that the claim was based on customary law which the Registered Land Act did not admit of. Furthermore there was no cause of action in that suit since the father could not be forced to distribute his land when he was still alive. The **Esiroyo case** because the sons had alternative land and they had forcefully moved in to occupy the other parcel of land registered in their father's name thus constituting themselves trespassers by their conduct.

We have anxiously considered this matter and have reached the conclusion that the appeal is not meritorious.

We have no quarrel with the ***ratio decidend*** i in the two cases as indeed they accord with clear language of the relevant sections of the law. The court in the Muriuki Murigi case was right in reiterating that rights under Customary law are subjected to rights under written law and are excluded under the clear language of sections 27 and 28. The statement of law in Esiroyo's case has also received approval of this Court before, that Customary law rights in land are extinguished upon registration of that land under the Registered Land Act. The very purpose of subjecting land, hitherto held under customary tenure, to the process of land consolidation under the Land Consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is ipso fa cto to change the land tenure system. The assumption is that all rights and interests of persons in the land subjected to such new system would have been ascertained and recorded before registration.

It is nevertheless realized that although peremptory language is used in the registration Act, in **sections 27 and 28** there are built-in qualifications for the protection of other persons. Those that are express are discernible in the proviso to **section 28 and in section 30** of the Act. The qualifications have however received varying judicial interpretations. This Court for example in **Alan Kiama v Ndia Mathunya & others** C.A 42/1978 doubted that Customary law rights were excluded from **section 30** of the Act as overriding interests. In his usual flair and flamboyance, Madan JA referred to section 30(g) and stated:

> **"What meaning is to be given to section 30(g)? The rights under customary law may be argued to be extinguished by section 28 – Kneller, J. in Esiroyo v. Esiroyo [1973] E.A. 388, at p. 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Over-riding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any**

inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.

Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour or the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for."

The other members of the bench, Law and Potter JJA, did not use similar reasoning although they arrived at the same result. Potter JA in part stated:

"The learned Judge held that the suit land was transferred to the appellant subject to the resulting trust in favour of the respondent. I think that was correct, not because of any fraud, but because the land was subject to an overriding interest created by the trust, under section 30(g) of the Land Registration Act (sic). The respondents are in actual occupation of the land".

That is not what Kneller J (as he then was) strictly meant in **Esiroyo's** case or in agreeing with Bennnet J in **Obiero v Opiyo** [1972] EA 227. But in 1984, Kneller J.A joined Chesoni and Nyarangi Ag. JJ.A in holding that:

"The Respondent had rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellants proprietorship was subject to it, section 30(g)."

That was in **Kanyi v Muthiora** [1984] KLR 712. There the Respondent was enforcing the rights of an unmarried daughter under Kikuyu Customary law against her stepmother who had been registered as the absolute owner of the land after the death of her husband, the father of the respondent. As regards claims based on Customary law the same Court held:

"The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondents rights under Kikuyu Customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee. …….. The Trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated."

We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to **section 28** is that trusts arising from Customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act. After passionately and extensively analyzing the concept of Customary law trusts, Khamoni J. in **Gathiba v Gathiba**, Nairobi HCCC 1647/84 (decided in January 2001 and reported in [2001] 2 EA 342) at Pg 368 stated:

"The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in

them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee".

We respectfully agree with that conclusion. Which brings us to the case before us.

It is significant, we think, that unlike the Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. It is also significant that unlike the **Esiroyo case,** where the sons invaded the land occupied by the father, Gerald in this case, was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land. The respondent is not ready to compensate him for those permanent developments. We think the superior court was right in distinguishing the authorities cited on that score. But more significantly, we think a trust arose from the possession and occupation of the land by Gerald which has the protection of **sections 28 and 30(g)** of the Act unless there is an inquiry made which discloses no such rights, which would be superfluous in this case.

It is for those reasons that we answer the issue posed earlier in the negative. We consequently find the appeal lacking in merits. It is hereby dismissed but each party will bear its own costs as it is a family matter.

Dated and delivered at NAIROBI this 10th day of December, 2004.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR