



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, TUNOI & BOSIRE JJ A

CIVIL APPEAL NO. 56 OF 2001

BETWEEN

PHILLICERY NDUKU MUMO APPELLANT

AND

NZUKI MAKAU RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Justice Mwera) dated 1st February, 2001

in

CIVIL CASE NO. 368 OF 1995)

JUDGMENT OF THE COURT

The appellant, Phillicery Nduku Mumo, is the unsuccessful plaintiff in Civil Suit No 368 of 1995 instituted by her against the respondent, her step-brother Nzuki Makau, in the High Court of Kenya at Machakos. By her plaint dated 26th September, 1994, originally filed in the Principal Magistrate's Court but later ordered transferred to the High Court for trial and determination, the appellant averred that she is the registered absolute proprietor of all that parcel of land known as Machakos/Kiandani/3013, "the suit land", and that sometimes in or about April, 1994, the respondent without any colour of right, authority or permission from her trespassed on to the suit land as a consequence of which the appellant has suffered inconvenience, loss and damage. She therefore claimed general damages, an order for eviction and costs of the suit.

The respondent delivered a home-made written statement of defence which he later amended. Together with the defence he lodged a counterclaim. In the defence he pleaded that the suit land is part of land parcel number Machakos/Kiandani/403 which parcel, before adjudication and registration, belonged to his late father Makau Mbwana. This parcel was later sub-divided into parcels numbers Machakos/Kiandani/3012, 3013 (suit land) and 3015. All these parcels were registered in the names of the appellant and her deceased mother Anna Wayua and they held them in trust for the other members of the family of their late father Makau Mbwana.

In the counterclaim, the respondent sought, amongst other prayers, a declaration that the appellant held the suit land in trust for herself and the other members of late Mbwana's family, an order for rectification of the register to reflect the trust and an injunction.

Though the appellant disowned any relationship with the respondent, the following facts clearly manifested themselves in the course of the trial.

The suit land originally belonged to the late Makau Mbwana who had married two wives, namely, Anna Wayua who was the mother of the appellant and Mueni, the mother of the respondent. The appellant who is married, is the sole surviving child of her mother. By the time Makau Mbwana passed away in or about 1969, his land had not been demarcated nor sub-divided and his two wives continued to occupy and till it in common.

At the end of a rather somewhat protracted trial, the learned judge held:

"Having heard both sides and reviewed the whole case this Court is inclined to find that plot No 3013 is held by the plaintiff on trust for the defendant. First because evidence has it that Makau had two wives - Wayua, the plaintiff's mother and Mueni, the defendant's mother. Makau died before the land was adjudicated and registered in his name. His two wives lived on it and it transpired that registration came out in the plaintiff's mother's name. According to Mueni, Wayua told her that adjudication had taken place in their joint names. It cannot be said that in these circumstances the plaintiff's mother got a first registration as the absolute owner of the original plot No 403. She had her co-wife and this was their late husband's land. It was bound to belong to the two wives. So if Wayua got registered, it was on her own behalf and on that of her co-wife Mueni the mother of the defendant."

The learned judge also held that the appellant unilaterally and surreptitiously effected a subdivision of the original plot (No 403) and sold off three portions of it. Further, he found that as a married daughter it was against the tenets of Kamba Customary Law for the appellant to inherit a portion of her deceased's father's family land. Consequently, the learned judge dismissed the suit with costs. He upheld the respondent's counterclaim and decreed:

"Although it may not have been a subject of this suit, this Court is inclined to observe that while plot No 3013 should go to the defendant (and his mother) it is similarly proper and fair that they also get plot No 3012 on which they live and which is in the name of the plaintiff's mother. The plaintiff's mother sold 3 portions of original plot No 403. It is fair that the other house enjoys the two portions comprising plots Nos 3013 and 3012."

From this decision the appellant, represented by Mrs Nzei, has preferred this appeal. Her main submission is that the suit land had been lawfully and validly transferred to the appellant by her deceased mother, Anna Wayua, who held the title absolutely and not in any form of trust.

In our view, there is ample evidence to show that Makau owned the original parcel of land, that is plot No 403. His entire family lived on it. The appellant's mother as the first wife of Makau took active part in the demarcation and registration of the suit land since Makau was dead. She was to hold the suit land in trust for the entire family of Makau. She acted fraudulently in trying to deny the house of Mueni of its natural inheritance. On our own consideration of the evidence on record we agree with the learned judge that Customary Law trust had been proved. It is trite that trust is a question of fact and has to be proved by evidence. This Court said so in *Wambugi v Kimani* [1992] 2 KAR 58.

Mrs Nzei further submitted that the appellant as the registered proprietor of the suit land had a good and indefeasible title which could not be challenged in Court. This argument, we think, is fallacious for two reasons. Firstly, there is nothing in the Registered Land Act Cap 300 Laws of Kenya, (the Act) which precludes the declaration of a trust in respect of registered land, even if it is a first registration. Secondly, section 28 of the Act, which reads as follows:

"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, if 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.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee"

contemplates the holding of land in trust. We reject this ground of appeal.

The learned judge and rightly so in our view, held that under Kamba Customary Law, the appellant would only have been entitled to inherit some land from her deceased father if she was unmarried. This is so because like the majority of the Kenyan tribes inheritance under Kamba Customary Law is patrilineal. Both the appellant and the respondent being Kamba Africans the Court took judicial notice of their Customary Law as applicable and being guided by section 3(2) of the Judicature Act Cap 8 which provides:

"(2) The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay".

It was urged before us that the learned judge fell into a grave error in awarding land parcel No Machakos/Kiandani/3012 to the respondent when the said parcel was not a subject matter in the suit before him. It is clear from the record that in awarding the respondent the parcel, the learned judge was motivated by the fact that parcel No 3012 was occupied by the respondent and his mother and they had constructed houses on it. The course of action adopted by the learned judge was not only equitable but also did bring about an expeditious disposal of the long simmering dispute. He was not oblivious of the fact that the parties to the dispute are very close members of the same family. To waste money on prolonged litigation would benefit nobody and can only damage family unity which both parties to this litigation wish to promote. It is true as Mrs Nzei submitted that parcel No 3012 was not the subject matter of the dispute between the parties. But from the course the parties adopted at the hearing of their suit, the parcel of land was also considered and evidence was given on it. The learned judge in these circumstances should not be vilified.

In the result and for the above reasons the appeal is ordered dismissed. As for the costs, we do not consider this to be a proper case to award the respondent costs since the parties are close relatives. Consequently, we make no order as to costs.

Dated and delivered at Nairobi this 28th day of June, 2002.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR.