



IN THE COURT OF APPEAL

AT NYERI

CORAM: GICHERU, SHAH & OWUOR, JIJA

CIVIL APPEAL NO. 19 OF 1999

BETWEEN

1. MUKINDIA KIMURU

2. SILAS P. MWITHIMBU KIMURU.....APPELLANTS

AND

MARGARET KANARIO.....RESPONDENT

(An appeal from the Judgment and decree of the High Court of Kenya at Meru (Hon. Justice J.V. O. Juma) dated 7th November, 1998

in

H.C.C.C. NO. 380 OF 1994

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JUDGMENT OF SHAH, J.A.

The respondent, Margaret Kanario Mbaru (who I will refer to as Margaret hereinafter), is the daughter of the first appellant Mukindia Kimuru (who I will refer to as Mukindia hereinafter) and is the half-sister of the second appellant Silas P. Mwithimbu Kimuru (who I will refer to as Silas hereinafter).

As far as this appeal is concerned the undisputed facts (I will go into disputed facts later on in this judgment) are that one Sarah Mbaru Kimuru (who I will refer to as Sarah hereinafter) died in 1979. Sarah was, during her life-time the owner of a parcel of land known as L.R. ABOTHOGUCHI/KATHERI/1633 (hereinafter referred as "the suit land"). Sarah had purchased the suit land from one Mugambi S/O Shaangu. It was therefore not ancestral land. Sarah had adopted Margaret as her child. Such adoption, as I understand it, was a customary adoption.

When Sarah died, Mukindia filed a succession case (Succession Cause No. 57 of 1979) in the District Magistrate's Court at Meru which court (D.M. Muchunku D.M. 11) decided that the suit land ought to be granted to Mukindia and that court so ordered.

As a result of the order of the District Magistrate's court the suit land was registered in the name of Mukindia. That was on 13th February, 1980. The Land certificate for such registration was issued on 15th April, 1980. On 21st April, 1981 the suit land was registered in the name of Silas and the Land Certificate in respect thereof was issued on 6th August, 1981. The suit land was charged to Barclays Bank to secure a current account, loan, obviously in the name of Silas, with that bank, on 28th April, 1992. The charge still stands as there is no entry showing discharge thereof. Silas has built a stone house on the suit land and the house is served by electricity and piped water.

One of the most important aspects of dispute between the parties is as regards whether or not Mukindia was holding the suit land on trust for Margaret, that is to say, whether or not Mukindia was granted the suit land as a trustee for Margaret. An issue also arises and which needs to be answered and it is: can land be held in trust for a beneficiary who cannot, per Kimeru Customary Law, inherit such land? I am posing this question because if (assuming) Kimeru Customary Law does not provide for inheritance of land by an unmarried daughter can she get round that law by asking a court to declare that her father is holding the whole parcel of the land in trust for her?

It is well established that customary law is a matter of fact. The existence of such law, unless it has become of such general notoriety that

judicial notice may be taken of it under section 60 of the Evidence Act Cap.80, must be proved by the person invoking it in precisely the same way that a person invoking customary rights has to prove the custom. See Kimani vs. Gikanga [1965] E.A. 735.

It is a matter of general notoriety that inheritance under Kimeru Customary Law is patrilineal. It is also a matter of general notoriety that under the said law the property of an unmarried girl (as Sarah was at the time of her death) is inherited by her father, or in his absence, by her eldest full brother, who is expected to share in unspecified amounts with her other full brothers. See Cotran's Restatement of African Law, volume 2, page 37.

The Kirncru Customary Law recognizes the patrilineal system for inheritance of land. Women do not inherit land on their father's side; they play their part in the family or clan in which they marry.

The sum total of the Meru customary law as regards inheritance of land as set out by Cotran is in his Restatement of African Law, volume 2 at page 8 which reads:

***"Daughters are normally excluded, but may also receive a share if they remain unmarried."***

I have set out the position as regards inheritance of land by daughters. Generally they cannot inherit land. Such customary Law sounds discriminatory but the Constitution of Kenya permits such limited discrimination. **Section 82(1) of the Constitution provides as follows:**

***"82(1) - Subject to subsection (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect."***

**Subsection (4) of Section 82 of the of the Constitution provides:**

***"(4) Subsection (1) shall not apply to any law so far as that law makes provision -***

***(a) .....***

***(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.***

***(b) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons, or"***

As I read and understand the above-mentioned subsections of section 82 of the Constitution I am bound to say and I do say that exclusion of daughters' from inheritance of land is 'sanctioned' by the constitution when a court is applying customary law in regard to devolution of property on death of the owner of that property.

My answer therefore to the question I posed earlier in this judgment is that if a female cannot inherit land she cannot be said to be beneficiary of such land upon an implied trust. I will later during the course of this judgment revert to the share Margaret can have in the suit land, and for what duration?

When the District Magistrate's court at Meru granted the suit land to Mukindia it did not expressly create trust in favour of Margaret. Mr. Muriithi, counsel for the respondent urges this Court to infer a trust in favour of Margaret. Existence of a trust is to be proved by evidence. Mr. Muriithi relied on certain portions of the proceedings before Mr. Muchunku to show that Margaret was the beneficiary of the suit land. He pointed out that Margaret was not a claimant before Mr. Muchunku. She only gave evidence. Therefore Mr. Muchunku did not have to adjudicate on Margaret's interest in the suit land. The succession battle was between Mukindia and his sister Jennifer Mwari Kimuru. I am not convinced that the proceedings before Mr. Muchunku and his judgment create any trust in favour of Margaret. Mr. Muchunku simply decided that under Meru Customary Law which adopts patrilineal practice of inheritance the brother (Mukindia) of the deceased (Sarah) was entitled to inherit the suit land.

The decision of Mr. Muchunku was in accordance with Meru Customary Law and in my view there was no room for implying a trust in favour of Margaret in regard to the suit land. It is settled law that a court will not imply a trust unless it is absolutely necessary to do so and when Meru Customary Law does not allow an unmarried daughter to inherit whole of the land in dispute no trust in respect of such land can be implied. I will put the matter in this way: when Customary Law does not allow a female to inherit land (except for a limited share for a limited duration) the law cannot presume a trust to the extent that the female would be sole owner of such land as a beneficiary under an implied trust.

The learned Judge (Juma, J) unfortunately made short shrift of the finding as to trust. He set out the evidence called by the parties to the suit quite in ex:enso but without properly evaluating the pros and cons of such evidence he said simply:

***"Having considered the evidence before me I hold that the First Defendant MUKINDIA KIMURU held Sarah's land ABOTIUGUCHI/KATIIRI/1633 in trust for the plaintiff MARGARET KANORIO."***

The learned Judge did not consider whether or not Meru Customary Law would allow creation of an implied trust in favour of an unmarried adopted daughter of a divorced deceased female so as to say that the brother of the divorced deceased female could hold the land in trust for the adopted daughter of the deceased. The learned Judge did not consider the patrilineal aspects of inheritance whilst declaring the trust. This in my view was a serious misdirection which led the learned Judge to err.

The learned Judge set out in extenso the evidence as regards whether or not Sarah made an oral Will bequeathing the suit land to Margaret. Unfortunately he did not decide if such a will was made and if so if it was a valid will. Under Kimeru Customary Law any man or woman who owns property may make a will provided that he/ she is very old, or on his/her death-bed. Such a will would be valid if made in the presence of 'Mwiriga' (clan) elders, close relatives and friends and by declaring who shall be his/her "Mukuru mwene nja" (elder owner of the home) and appointing a "murungamiiri" (administrator).

The statement allegedly made by Sarah to Jennifer Mwari (P.W.2) that the suit land belongs to Margaret, in the presence of Martha Gakii, Silas and Julia Matheka, when she was on death-bed does not amount to a valid Will. Martha Gakii however, stated that Sarah told her that Mukindia was to hold the land on behalf of Margaret. Silas did not admit that Sarah told him (Silas) that her estate was to be inherited by Margaret. Paul Maingi Kimuru, the elder brother of Mukindia stated that Sarah bequeathed the suit land to Margaret. Considering all the evidence that is on record I cannot conclude that Sarah made any valid will. Most of the requirements for making of a valid oral will were not complied with. I hold therefore that Sarah did not make any valid oral will.

Although the appellants had pleaded that Margaret's claim was time-barred under the limitations of Actions Act the learned Judge made no finding thereon. It is the duty of the Judge to decide an issue which falls for determination. The 6th agreed issue was: "is the plaintiff's claim time barred"? Although as becomes clear, in my judgment so far, there is no need to adjudicate on that issue, the learned Judge, in view of the findings he made, was bound to answer that issue. From what I have said so far it is obvious that there being no trust in favour of Margaret and there being no valid will by Sarah, the suit land was rightly granted to Mukindia.

But as limitation was an issue before the learned Judge, I will deal with it. **Section 20 of the Limitation of Action Act Cap.22, Laws of Kenya reads:**

***"20(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-***

***(a) in respect of a fraud or fraudulent breach of trust to which the trustee was party or privy; or***

***(b) to recover from the trustee trust property on the proceeds thereof in possession of the trustee or previously received by the trustee and converted to his use."***

If Margaret had an actionable claim against Mukindia as a beneficiary under the trust then the limitation period would not have applied. For me, therefore, it is only to say that if the learned Judge was right in his findings on trust and validity of an oral will he ought to have said that the limitation period of six years did not apply to Margaret. The reason for this is that the trustee's possession is deemed to be the beneficiary's possession. See Halsbury's Law of England, 4th Edition, volume 28, paragraph 852. Equally, in my view, Silas who allegedly purchased the suit land from Mukindia, could not have successfully pleaded limitation as it cannot be said that he was not aware of what had transpired earlier.

With that, I come to what I said I will deal with later during the course of this judgment; that is an unmarried daughter's right to receive a share of the property. Margaret is unmarried. The suit land belonged to Sarah who had adopted her. The suit land has an approximate area of 0.40 of an hectare. I would award to 'her, in accordance with Kimeru Customary Law one portion of the suit land which portion must not include the house that Silas has built on the suit land. That portion would be one-quarter of the suit land. I would leave it for the parties to agree on what portion, physical, of the suit land should be given to Margaret. If the parties are unable to agree there will be liberty to any of them to apply to the superior court to decide which portion should go to Margaret. Accordingly, I would allow the appellants' appeal only to the extent set out above but make no order as to costs.

**Dated and delivered at Nyeri this 9th day of June, 2000.**

**A.B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**

**JUDGMENT OF GICHERU, J.A.**

I have had the advantage of reading in draft the judgment of Shah, J.A. and I agree that this appeal should be partly allowed in the terms proposed in his judgment. It is so ordered.

**Dated and delivered at Nyeri this 9th day of June, 2000.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**JUDGMENT OF OWUOR, J.A**

I have had the advantage of reading and considering in draft the judgment of His Lordship Shah, J.A. I agree with him and have nothing useful to add.

**Dated and delivered at Nyeri this 9th day of June, 2000.**

**E. OWUOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**