REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. 2 OF 2000

BETWEEN

PETER NDUNGU NJENGA.....APPELLANT

AND

SOPHIA WATIRI NDUNGU.....RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Honourable Justice Hayanga) dated 19th November, 1996
in
H.C.C.C NO. 4936 OF 1993)
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JUDGMENT OF THE COURT

The appellant Peter Ndung'u Njenga is the husband of the respondent Sophia Watiri Ndungu. The marriage between the two was celebrated in 1952 in accordance with the ceremonies prescribed by Kikuyu customs. On 23rd August, 1993 the appellant married Mary Wanjiru Njogu at the Registrar's office, Nairobi. When he went through the ceremony of marriage at the Registrar's office he was described as "married under customary law."

It would appear that the appellant's second marriage triggered off the proceedings in the superior court. The respondent sued him claiming the following reliefs:-

> *"(a)A declaration that the defendant (the appellant here) holds the properties comprised in the parcels of land known as NGONG/NGONG/3949 and KAJIADO/NGONG/432 in trust for himself and the plaintiff (the respondent here) as beneficial owners in equal shares;*
>
> *(b)An injunction perpetually restraining the defendant whether by himself, his servant or agents or otherwise howsoever from transferring, alienating, selling or otherwise disposing of the said properties or interfering with the plaintiff's peaceful occupation thereof:*
>
> *(c)Cost of this suit;*
>
> *(d)Any other further relief deemed fit."*

It is common ground that the parties are still married and no divorce is contemplated. It is also common ground that the respondent occupies one of the said parcels of land, namely KAJIADO/NGONG/432 and

that the second wife occupies a parcel of land known as NGONG/NGONG/3949. Parcel No. 432 is about 10 acres whereas parcel No. 3949 is about 5 acres. The claim by the respondent against the appellant was purportedly founded on allegations to the effect that the two parcels of land were acquired with contributions from both the appellant and the respondent.

The cause of action as pleaded in the plaint is one which is available to a wife under section 17 of the Married Women's Property Act of 1882 of England in appropriate circumstances.

But the claim in the prayers by the respondent is based on the concept of an implied or resulting trust.

After hearing the suit the learned Judge ruled in favour of the respondent and ordered as follows:

> "The case ought to have in my view, been brought under the provisions of Married Women's Property Act 1882 and as there was no other Customary Law proved before me to govern this case I must take cognisance of under the Judicature Act Cap 8. That will be the Order of the Court. No order as to costs."

Obviously the learned Judge was referring to the Married Women's Property Act of 1882 of England when he talked of written law. This is clear from his reference to the Judicature Act.

However, earlier on in his judgment the learned Judge made a finding of trust. He said:

> "I agree on the evidence that the plaintiff must have contributed to the purchase of the plots in question directly or indirectly. Accordingly the plaintiff is therefore entitled to a declaration that the Defendant holds the plots in trust for himself and the plaintiff in proportions ONE to TWO in respect of NGONG/KAJIADO/43/2 and in the proportion of two to one in respect of NGONG/NGONG/3949 respectively.
>
> The reason is because the first plot was bought really by plaintiff and PW2 Joseph Muroga Kivitu who says so in his evidence on this matter supporting the evidence of PW1 who said he really paid Kshs.5,000/= plus transfer money while the purchase price was Kshs.450/= per acre so that at the acarage of 10 acres the total amount would be Kshs.450/=.
>
> The plaintiff then paid the entire amount of purchase price and coupled with this is the fact that the plaintiff is living there and according to her testimony her contribution towards the children's education was almost single handed.
>
> I think two to one is a good ratio here particularly when the defendant also admits that he holds those plots for the benefit of his children."

The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied. See Ayoub vs. Standard Bank of S.A [1963] E.A. 619 at pp 622, 623.

However, the judgment of the learned Judge was not appealed against. Instead the appellant opted to obtain a review of that judgment under Order 44 of the Civil Procedure Rules and section 80 of the Civil Procedure Act. That application was filed by another firm of advocates M/s W.G. Wambugu & Co. on 5th June, 1996. The grounds upon which the review of the judgment was sought were put forward in the affidavit in support of the application. These were (1) that there was an error apparent on the face of the record and (2) that the suit was brought under wrong 'legal provisions'. The appellant did not seek the said relief under the general provision in section 80 of the Civil Procedure Act, that is, invoking the power of court to make such order as it thought it.

It is clear however that the learned Judge decided the suit on the basis of the remedy as contemplated

by section 17 of the Married Women's Property Act of 1882 of England. It was clearly an error apparent on the face of the record when the learned Judge proceeded to treat a claim made under an implied or resulting trust as a claim made under section 17.

It was also an error apparent on the face of the record when the learned Judge proceeded to divide the suit lands as if he was dealing with a succession cause when the appellant is still alive. We note that all the respondent's children, by the appellant, are adults and the issue of children's interest apparently was brought in the suit as a red herring. It was also an error apparent on the face of the record when the learned Judge said that although there was no evidence of customary law relating to division of properties amongst spouses (there can be none when the spouses are alive) he was obliged to make a finding based on section 17 aforesaid.

The remedy of review of a judgment or order is available to an applicant if there is a mistake or error apparent on the face of the record and as we have pointed out the learned judge did fall into such manifest errors that it cannot be said that the remedy of review was improperly invoked.

We would therefore allow this appeal, set aside the ruling and order of Hayanga, J and grant the order for review. Under Order 44 rule 6 of the Civil Procedure Rules once an application for review is granted, a note to that effect is to be made in the register and the court is enjoined to re-hear the case or make such order in regard to re-hearing as it thinks fit.

We do not think that it would be worthwhile to remit the suit for a re-hearing. We have powers under section 3(2) of the Appellate Jurisdiction Act, to make such orders as the superior court could have made when we are properly seized of an appeal. In the exercise of those powers we find and hold that the learned Judge had no jurisdiction to alienate suit lands between spouses during their life-time or unbroken coverture and he ought to have dismissed the suit.

The upshot of all this is that this appeal is allowed.

The judgment of the superior court dated 10th May, 1996 is set aside and substituted by an order dismissing H.C.C.C. No. 4936 of 1993. As this is a family dispute we make no orders as to costs.

Dated and delivered at Nairobi this 14th day of July, 2000.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.