IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 40 OF 2004

BETWEEN

NGUGI TICHA……APPELLANT

AND

KIRITU TICHA …… 1ST RESPONDENT

WAITHIRA TICHA …… 2ND RESPONDENT

WANJIRU TICHA …….. 3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (D. K. S. Aganyanya, J) dated 6th February, 2002

in

H.C.C.C NO. 40 OF 2004)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (D. K. S. Aganyanya, J, as he then was) given on 6th February 2002 dismissing the appellant's suit for: a declaration that he is the absolute and indefeasible proprietor of the properties known as Title Number Kiambaa/Kihara/796 and Kiambaa/Kihara/204 (the suit properties); eviction of the respondents therefrom; mesne profits and general damages for trespass. When dismissing the appellant's suit, the High Court declared that the appellant holds Title Number Kiambaa/Kihara/796 (the property) in trust "*for himself and the defendants as tenants in common in equal shares...*"

2. The appeal is based on the grounds that the finding by the High Court that the appellant holds the property in trust is not supported by evidence; that the learned judge granted relief that was neither pleaded nor sought; that the judgment of the High Court is based on hearsay evidence and that the judge was biased, prejudiced and partial to the respondents.

Background

3. In his plaint, the appellant pleaded that he is registered as proprietor, on a first registration, of the suit properties having been so registered on 10th August 1958 and 2nd April 1959 respectively; that the respondents wrongfully and unlawfully entered, occupied and cultivated portions of the property; planted coffee and dug thereon thereby depriving the appellant of the full use and enjoyment of the property; that despite notice to quit served on them, the respondents refused to vacate the property. On that basis, the appellant prayed for a declaration that he is the absolute and indefeasible proprietor of the suit properties; an order for eviction and ejectment of the respondents and their relatives and those claiming under them; mesne profits; general damages for trespass and loss of profits.

4. In their defence, the respondents pleaded that the appellant was registered as owner of the properties on behalf of and as a trustee for the Ticha family on account of being the eldest son in that polygamous family; that they have occupied and cultivated the property as a matter of right and have done so for over twelve years; that the appellant's suit is barred by the Limitation of Actions Act; and that they "*cannot be evicted from their inheritance which is registered in the name of the Plaintiff in Trust*" and that if the appellant wishes to bring the trust to an end "*then the pieces of land have to be divided into three houses of Ticha*."

5. In his evidence before the trial court, the appellant stated that he is the first-born son of one Ticha Kiritu alias Kimani who died in 1955 in Embu where he had migrated to from a place known as Kihara, Kiambu; that his father had two wives namely; Kiuyungu alias Wambui, (his mother) who was the younger wife, and his stepmother, Wairimu alias Nyangea, who was the older wife and died in 1936 in Embu; that his father then married Waithira (the 2nd respondent) and Wanjiru (the 3rd respondent); that his father sired five or four boys and one girl with Waithira and three daughters with Wanjiru and that they all lived in Embu with their father; that in 1956 they were all repatriated to Kiambu from Embu on suspicion of being sympathetic to the Mau Mau; that on returning to Kiambu, they were welcomed by his uncle (his father's brother) known as Karumbi, with whom they stayed as their late father had no land in Kihara, his grandfather's land having been demarcated and distributed to family members excluding his father.

6. The appellant testified further that they were given two plots by the village elders where they built their houses; that when demarcation started, he registered his name with Kihara Land Committee as landless and so did Kiritu Ticha, the 1st respondent; that the chairman of the

committee told him that he was allocated one acre out of which 0.25 acres was curved out “to the village where I would build” and 0.19 of an acre was curved out as community land and he was left with 0.156 of an acre as his land which was pointed out to him by the chairman, Kihara Land Committee, one Mutungi; and that the land and the plot were then registered in his name and titles namely; Kiambaa/Kihara/796 and Kiambaa/Kihara/T204 issued in his name.

7. The appellant went on to say that the 1st respondent was also registered as owner of a plot measuring 0.25 of an acre; that he did not occupy the property but began cultivating it with his wife and mother; that the 1st respondent authorized him to build his house on his plot, as his was occupied, which he did, where he remained until 1977 when the 1st respondent asked him to vacate; that subsequently the 1st respondent built houses for himself and for his mother Waithira, the 2nd respondent, on the property despite his protests; that in 1974 Wanjiru, the 3rd respondent, demanded to be given a plot or a portion of the property and threatened to take him to court; that the 3rd respondent referred the matter to elders who gave her the plot and asked him to move to the property; that later she said she no longer wanted the plot maintaining that she wanted a portion of the property; that she moved out of the plot into the property in September 1983 and that despite his demand for the respondents to vacate the property they declined to do so prompting him to file suit in the High Court.

8. The appellant went on to say; that in addition to building on the property, the respondents also cultivate the bigger portion of it; that the claims that the property belongs to their father are false; that he was registered as owner of the properties in his own right and not as a trustee as the suit property did not belong to his father and the respondents have no right to inherit it under the pretext that it is family land, and that he is under no obligation to subdivide the property; that although he did not personally buy the property, it was allocated to him by the Kahara Land Committee.

9. The appellant’s mother, Esther Wambui, (PW2), stated in her evidence that her son, the appellant, was given a piece of land by the land committee during demarcation; that neither herself nor the 2nd or 3rd respondents were given land by the committee; that the 2nd and 3rd respondents built on the appellant’s land after the committee had given the land to him; that she was aware that the matter was at some point referred to the elders who decided against the appellant; that since 1959 the 2nd and 3rd respondents, who have no land of their own, have lived and cultivated on the property.

10. The appellant’s wife, Beatrice Wamotho, (PW3), stated that she got married to the appellant in Embu and that they relocated, alongside the respondents, to Kihara due to war; that they stayed as squatters upon return to Kihara until Kihara Land Committee announced that landless people should register; that her husband was given the property and a plot; that she cultivates and lives on the property; that the respondents have no claim over the property and should be ejected; that although

elders decided when the matter was referred to them that the respondents should continue occupying the property, those elders were drawn from one side and were effectively partisan.

11. For the defence, Humphrey Muthondu Mumu, (DW1), a *"mbari ya Kihara"* clan elder to which the Ticha family belongs, testified that land consolidation exercise started in 1957; that Ticha family returned to their rural home in Gachie, Kihara, Kiambu in 1956 after their father died in Embu; that upon their return they were looked after by their uncle, Karumbi Kiritu; that Karumbi Kiritu informed the Kihara Land Committee of the arrival of members of the Ticha family; that the committee asked for the eldest son of the Ticha family and the appellant's name was then forwarded and land allocated to the Ticha family was then registered in his name on behalf of the family although the appellant was not aware that the property was given to him as trustee of his father's family.

12. Wanjiru Ticha, (DW2), who is the third respondent, corroborated the evidence of DW1 in relation to how members of the Ticha family returned to Gachie from Embu after the death of her husband, Ticha. She then stated that she and her co-wife, the 2nd respondent, and their children cultivate and reside on the property; that they have lived on the property since demarcation; that although the property was registered in the name of the appellant, a son of her other co-wife Wambui, it belongs to her late husband Ticha; that the property was registered in the appellant's name in trust for all members of the Ticha family; that although the property is registered in the name of the appellant, it does not belong to him; that on the ground the property is clearly apportioned between the members of the Ticha family.

13. Kiritu Ticha, the 1st respondent (and son of the 2nd respondent and step son to 3rd respondent) who was the 3rd defence witness, stated that he was born in Embu in 1942; that upon moving to Gachie Kihara from Embu in 1956, his late father's brother, one Karumbi Kiritu, who received them and hosted them arranged for the properties to be registered in the name of his step brother, the appellant, who was his father's eldest son from another mother, Wambui; that the only reason the properties were registered in the appellant's name was because he was the eldest son in the family as women were not being registered as owners of land in those days; that his mother and step mother and their children have built their houses on the property and reside there; that in 1975 elders demarcated portions of the property as between the family members and that the 2nd and 3rd respondents have no land other than the property; that if they were to be evicted from the property they would have nowhere else to go; that on his part he also does not have any other property other than plot number T201; that the appellant was registered as proprietor of the property as trustee for the entire Ticha family.

14. Upon evaluating the evidence, the learned trial judge was not satisfied that the appellant was entitled to the reliefs that he sought and went on to hold and declared that the appellant holds the property (Title Number Kiambaa/Kihara/796) in trust for the Ticha family. It is against that background that this appeal has been preferred.

The appeal and submissions by counsel

15. As already mentioned, the appellant's complaints are that the finding by the High Court that the appellant holds the property in trust is not supported by evidence; that the learned judge granted relief that was neither pleaded nor sought; that the judgment of the High Court is based on hearsay evidence

and that the judge was biased, prejudiced and partial to the respondents.

16. The 2nd respondent died on 17th December 2002 and was substituted in this appeal by her daughter, Lucy Wangui Ticha. The 3rd respondent died on 22nd October 2012 during the pendency of this appeal and was substituted in this appeal by her children, George Njoroge Ticha and Margaret Wangari Kimani, the administrators ad litem of her estate.

17. At the hearing of the appeal learned counsel Mr. Evans Thiga Gaturu appeared for the appellant. The 1st respondent addressed the Court on his own behalf and on behalf of the 2nd and 3rd respondents.

18. Mr. Gaturu submitted that the learned trial judge was wrong in his judgment when he held that the appellant held the property in trust; that the finding on trust was not supported by any evidence; that the declaration by the learned judge in favour of the respondents that the appellant holds the property in trust for himself and for the respondents as tenants in common in equal shares and that their names should be entered in the register was not sought by anybody; that in their defence the respondents denied the appellant's claims but did not raise a counterclaim; that the only prayer made by the respondents before the trial court was for the dismissal of the suit with costs.

19. Mr. Gaturu argued that granting orders that were not sought resulted in injustice; that the appellant was not registered as owner of the property in a fiduciary capacity, otherwise it would have been indicated that he held title as trustee in accordance with section 126 of the now repealed Registered Land Act; that the registration of the appellant as proprietor of the property was a first registration under section 143 of that Act which cannot be rectified and there was no basis or material upon which the learned trial judge would have declared a trust; that the respondents do not even qualify as having an overriding interest over the property under section 30 of the Act; and that the registration of the property in the name of the appellant vested in him absolute ownership of the property under section 27 of the Registered Land Act.

20. According to Mr. Gaturu, the learned judge's decision was not based on the pleadings or on evidence; that the judge was biased and partial to the respondents as he ignored evidence favourable to the appellant and relied on incredible heresay evidence; that the evidence that the respondents entered the land after commencement of the suit leading up to this appeal was not challenged, which discredited the respondents' claim to the property; that the judge should have noticed that several injunction applications were presented to the court to restrain the respondents from interfering with the property; and that the judge's findings went against the weight of the evidence; that the judgment is unfair and unjust and the appeal should therefore be allowed with costs.

21. Opposing the appeal, the 1st respondent in his address before us stated that he was born in Embu while the appellant was born in the Rift Valley; that he returned to Gachie Kiambu from Embu in 1956 and he and his larger family were hosted by their father's brother; that the appellant who was the eldest son of Ticha, became registered as owner, on behalf of the Ticha family, of the property; that later

in 1957 the appellant started to demand that the respondents should get out of the property; that elders were then called to intervene and the appellant could not explain how he acquired the property; that the matter was then referred to the area Chief and being dissatisfied with the Chief's verdict the appellant filed suit in the High Court; that the High Court referred the matter to arbitration and an award was rendered declaring the property to belong to the family and that the same should be divided amongst the Ticha family members; that the appellant was again not satisfied; that if women could have been registered as owners of land the appellant would never have been registered as proprietor as Ticha's wives and the appellant's older female siblings would have been the ones who would have been registered as owner; that the appellant, as the first born son, was registered in accordance with Kikuyu customary law; that the property undoubtedly belongs to the Ticha family and the respondents have been in occupation of the land from the onset since 1956.

Determination

22. We have considered the appeal and very deliberately and exhaustively reviewed the evidence alongside the submissions. This is a first appeal. Our duty as the first appellate court is to

"[r]econsider the evidence, evaluate it …and draw …[our] ***own conclusions"*** bearing in mind that we have ***"neither seen nor heard the witnesses"*** and making ***"due allowance in that respect."*** That was held in **Kenya Ports Authority versus Kuston (Kenya) Limited [2009] 2EA 212** where this Court went on to say that ***" the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

23. In **Selle and Another vs. Associated Motor Boat Company Ltd and others [1968] E A 123** this Court held that an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

24. There are three issues for determination in this appeal. The first is whether the learned judge erred in granting relief that was neither pleaded nor sought. The second issue is whether the holding by the learned judge that the appellant holds the property in trust is supported by evidence. The third issue is whether the learned judge was biased.

25. We begin with the question whether the learned judge erred in granting relief that was neither pleaded nor sought. In that regard it is the appellant's position that the declaration given by the trial court to the effect that the appellant holds the property as trustee for himself and for the respondents as tenants in common in equal shares and that the respondents name should be entered in the register was not pleaded or prayed for.

26. In **Galaxy Paints Co Ltd vs. Falcon Guards Ltd [2000] EA 885** it was held that cases must be decided on the pleadings and that a court can only pronounce itself on matters arising from the pleadings and that to do otherwise is to err. The Court stated that:

"The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. **Gandy V Caspair (1956) EACA 139** ***and*** **Fernandes V People Newspapers Ltd (1972) EA 63***."***

27. However, in **Odd Jobs V Mubia [1970] EA 476** the Court held that where parties have canvassed an issue and left it to the court, the court can pronounce judgment on it though it was not pleaded. Law, JA, at page 478 put it in the following words:

"In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision."

28. Based on the pleadings, the appellant's case before the High Court was that he is the registered proprietor of the properties on a first registration, having been so registered on 10th August 1958 and 2nd April 1959 respectively; that on diverse dates after such registration the respondents "*wrongfully, unlawfully and without any claim of right entered, cultivated*…" a portion of the property without his consent thereby depriving him of the use and enjoyment of that portion of the property. In addition to seeking a declaration that he is the absolute and indefeasible proprietor of the properties, the appellant also prayed for an order of eviction and ejectment of the respondents from the property, mesne profits and general damages.

29. In their statement of defence, the respondents pleaded that the appellant was registered as proprietor on account of "*being the elder son by the first wife*…" of Ticha and that he was so registered "*on behalf of the family land as trustee for the family*…" and that the respondents "*cannot be evicted from their inheritance which is registered in the name of the plaintiff in Trust…*" and that if the appellant "*wishes to bring the trust to an end then the pieces of land have to be divided into three houses of Ticha*." In his reply to defence, the appellant denied the respondents defence "*and in particular that any trust existed or can be implied as alleged or at all*."

30. Based on those averments in the pleadings, there can be no doubt that the issue whether the appellant held title as a trustee was raised for determination before the trial court. The evidence adduced, as reviewed above, was geared towards aiding the court to resolve that very issue. Indeed the submissions made by counsel before the learned trial judge focused on the question whether the appellant was registered as proprietor of the property as trustee for the family of Ticha.

31. After reviewing the matter the learned judge pronounced that the appellant was registered as owner of the property "*as the eldest son of the family in accordance with Kikuyu customary law which has a notion of trust in it*." The learned judge went on to say:

"I do not believe the evidence of the plaintiff's side that this land was allocated to the plaintiff as its absolute owner and in my judgment I would make a declaration the plaintiff holds the parcel of land KIAMBAA/KIHARA/796 for himself and the defendants as tenants in common in equal shares and that the defendant's name shall be entered in the register accordingly."

32. We are satisfied that the question whether the appellant held the properties as a trustee was an issue that arose from the pleadings and the learned judge was right to address it. Having found that a trust existed, the learned judge was right to consider the question raised by the respondents in the defence that if the appellant wished "*…. to bring the trust to an end then the pieces of land have to be divided into three houses of Ticha*."

33. As already noted above, the parties' evidence was geared towards proving and disproving the existence of the trust. Having found as a fact that the appellant held the property in trust, it was incumbent upon the court, in our view, to determine the secondary question regarding the parties' respective interests in the property. Indeed the respondents in their pleading expressly required the court to adjudicate that question notwithstanding that a counterclaim was not framed. In effect, the court did what the parties asked it to do. For those reasons we do not consider that there is merit in the complaint that the trial court dealt with matters that did not arise from the pleadings.

34. The next question is whether the holding by the learned judge that the appellant holds the property in trust is supported by evidence. In other words, did the trial judge in this case properly evaluate the evidence and is there a basis for this Court to interfere with the decision of the High Court"

35. The appellant's evidence was that he was the eldest son of Ticha's second wife; that he was born and raised in Dundori in Rift Valley; that his father migrated to Embu where he died in 1955; that he returned to Kiambaa in 1956 and stayed with his uncle (his father's brother) as land demarcation was going on; that he registered himself with Kihara Land Committee as landless and that that the committee informed him that he had been allocated one acre of land out of which 0.25 of an acre was curved out for the plot where he would build; 0.19 of an acre was curved out for the community and he was left with 0.56 of an acre which was then registered in his name and was not for the whole family; that the respondents have no right to inherit that land under the pretext that it belongs to their father Ticha. The appellant's testimony in that regard was supported by the evidence of his mother, PW 2, and that of his wife, PW3, who maintained that the property was given to the appellant in his own right and not on behalf of his family.

36. The defence evidence led by the clan elder, DW 1, the 1st respondent's mother, the 2nd respondent and that of the 1st respondent on the other hand was that the only reason the appellant was registered as owner of the land was on account of having been the eldest son of Ticha; that the land belongs to Ticha and is registered in the name of the appellant in trust for the entire family.

37. The learned trial judge framed the issue for determination in these words:

"Their whole argument is and has been that the title to this land was not registered in the plaintiffs' name as sole and/or absolute proprietor but as "trustee" for the entire Ticha family…"

38. After reviewing the evidence the learned judge then had this to say:

"What do these facts tell about the capacity of the plaintiff in being allocated this land by the committee (clan)"

When the Ticha family came from Embu to Kihara almost all the clan land had been given out and this is why DW2 stated in cross examination that:-

'We were given left over of land which people living at Gachie been given because we were living at Embu, otherwise me could have been given a much bigger land,'

Or that it was Ticha's brother Karumbi who arranged and ensured that some land was availed for the Ticha family.

Whether or not someone is given some property to hold in trust for himself and another person or others is not necessarily pegged on the entry to this effect in the register – (see Mwangi Muguthu vs Maina Muguthu Civil Case No. 377 of 1968 (unreported) and Gatimu Kinguru vs Muya Gathangi [1976] KLR 253 at page 262 – 263.

In the present case its circumstances favour a trust over L.R. No. KIAMBAA/KIHARA/796 whose title was issued to the plaintiff for the Ticha family.

This is why this family came from Embu to look for the Kihara wa Mbari clan and the intention must have been for this family to be given a share of their ancestral land.

Unfortunately this land had all been given out and whatever was available is what was given to the applicant with intent on the part of the clan that the family of Ticha do share it."

(Emphasis added)

39. That finding was clearly based on an evaluation of the evidence tendered. In **Selle and Another vs. Associated Motor Boat Company Ltd and others** (supra) Law, JA at page 129 stated that:

"Where it is apparent that evidence has not been properly evaluated by the trial judge, or that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself and draw its own conclusions."

40. Based on our own evaluation of the evidence, we are unable to reach a different conclusion from the learned judge. It is noteworthy that throughout his testimony before the trial court, the appellant was categorical that the land was allocated to him. In his testimony he made no claim to the land on the basis that he had purchased it. However, in an affidavit that he swore on 6th February 1984 in support of an application to set aside an award that was adverse to him (which he appears to have forgotten when he was testifying before the learned judge) he had deposed that:

"That the defendants wilfully misled and/or otherwise deceived the Arbitration by contending that the land allocated to the plaintiff was family land when infact the same was my own land which infact I bought with my own money to the full knowledge of the defendants." (emphasis added)

41. If indeed the appellant purchased the property with his own money as he deposed in that affidavit, one is at loss how that crucial piece of evidence would have escaped his memory when the matter finally came up for trial. At the trial he made absolutely no reference to entitlement to the property on account of having purchased it. He does not come across as a witness of truth and the learned trial judge was right to prefer the evidence led on behalf of the respondents. There was, in our view, more than sufficient evidence to support the finding reached by the learned judge. There is no merit therefore in the appellant's complaint that the findings by the learned judge were not supported by evidence.

42. The last complaint is the learned trial judge was biased or partial to the respondents. As this Court held recently in

Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR :

"It is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute, and due process of the law requires that the parties be given a hearing before an unbiased and impartial decision maker as part of the resolution process."

43. To sustain a claim that a court is biased or impartial, the person so alleging must demonstrate and lay a basis for such a claim. The claim of bias on the part of the trial judge is that despite the relevant law cited to him, the learned judge was "biased, prejudiced and partial…" and he did not give the appellant "a fair trial." Beyond making that unsubstantiated allegation it was not however demonstrated how the learned trial judge deprived the appellant of a fair trial or in what respect he was biased or partial to the respondents. This complaint has no basis at all.

44. For all those reasons, the appeal has no merit. It is dismissed with costs.

Dated and delivered at Nairobi this 18th day of December, 2014.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/ewm