IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWILU & GATEMBU, JJ.A)

CIVIL APPEAL NO. 197 OF 2011

BETWEEN

RACHEL WAIRIMU MUKOMA ……..…… APPELLANT

AND

HANNAH WAMBUI GITHERE …… 1ST RESPONDENT

WANJIKU GITHERE …… 2ND RESPONDENT

HARUN THIONGO NJIRI ……..…..... 3RD RESPONDENT

KAGUONGO NJIRI …… 4TH RESPONDENT

JOSEPH NJIRU GITHERE …… 5TH RESPONDENT

NJIRIRI GITHERE …….. 6TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (M. Ang'awa, J) delivered on 13th March, 2007

in

HIGH COURT CIVIL CASE NO. 188 OF 1988)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court delivered on 13th March 2007 allowing the respondents' suit against the appellant for a declaration that the properties known as githunguri/gathangari/1057 and Githunguri/Gathangari/106 and Githunguri/Gathangari/105 are held by Mukoma Njiri in trust for himself and for Hannah Wambui Githere, Wanjiku Githere, Harun Thiongo Njiri, Kaguongo Njiri, Joseph Njiri Githere and Njiriri Githere and apportioning the same as among them.

Background

2. In January 1988, the respondents Hannah Wambui Githere, Wanjiku Githere, Harun Thiongo Njiri, Kaguongo Njiri, Joseph Njiri Githere and Njiriri Githere as the 1st to 6th plaintiffs respectively commenced a suit, by way of Originating Summons against the appellant's late husband, Mukoma Njiri. In that suit, the respondents sought a declaration that Mukoma Njiri (hereafter referred to as "Mukoma") holds the properties known as Githunguri/Gathangari/1057 (parcel 1057) and Githunguri/Gathangari/T.105 (parcel T105) in trust for himself and for the respondents; alternatively a declaration that the 1st respondent is entitled, under section 38 of the Limitation of Actions Act, to be registered as proprietor of 1.5 acres or thereabouts of parcel number 1057; alternatively that the 5th and 6th respondents who are in joint exclusive possession and occupation of parcel T.105 have jointly acquired the same by adverse possession.

3. The Originating Summons was supported by an affidavit sworn by the 1st respondent. In that affidavit, the 1st respondent deposed that she, and the 2nd respondent were the wives of Githere Njiri, deceased, who died in April 1954 and who was an elder brother to Mukoma, Harun Thiongo Njiri (the 3rd respondent) and Kaguongo Njiri (the 4th respondent); that Joseph Njiri Githere (the 5th respondent) is her son while Njiriri Githere (the 6th respondent) is the son of her co-wife the 2nd respondent; that her late husband, Mukoma, the 3rd and 4th respondent, are descendants of Njiri Githere, deceased; that the properties known as title numbers Githunguri/Gathangari/1057, T.105 and T.106 (the suit properties) belonged to Njiri Githere but that during the land adjudication, demarcation and consolidation exercise the same were registered in the name of Mukoma, being the eldest surviving son of Njiri Githere, in trust for the family; and that the 1st to 4th respondents are entitled to inherit those properties.

4. The 1st respondent further deposed that in an agreement dated 27th April 1986 Mukoma acknowledged that she, the 1st respondent, is entitled to a portion of one acre of parcel number 1057; that in acknowledgement of the trust Mukoma transferred parcel T106 to the 4th respondent in 1975 despite which Mukoma refused to acknowledge that he holds the suit properties in trust for the family and refused to share the same with the respondents; that for a period in excess of 12 years she has been in control, occupation and use of a portion of one and half acres of parcel number 1057 on which she has built her house and is undertaking subsistence farming; that the 5th and 6th respondents, (the children of the 1st and 2nd respondents respectively) have been in control, use and occupation of parcel T105 on which they have built their residential houses.

5. In answer to the respondents' claims, Mukoma filed a replying affidavit sworn on 2nd March 1988 in which he denied holding the suit properties as a trustee and contended that he is the absolute owner of the properties in respect of which he holds indefeasible titles under section 143 of the Registered Land Act; that the only portion of land he inherited from his father Njiri Githere measures 4 acres; that his brothers, the 3rd and 4th respondents, sold their inheritance rights in that 4 acre property to him; that he bought the remainder of the 8 acres of land that make up parcel number1057 after the death of his father; that the 1st respondent's late husband, Githere Njiri, who died in 1952 was not entitled to any share in the 4 acres left by their father; that out of pity for the 1st respondent, he gave her one acre of land to enable her look after her children; that he gave parcel T106 to his younger brother, the 4th respondent, as a gift as the 4th respondent had also sold his inheritance rights in the 4 acre inherited land to him; that the 5th and 6th respondents have been occupying parcel T105 with his consent and their occupation is therefore not adverse; that the 1st respondent's occupation of a portion of parcel number 1057 is also with his consent and therefore not adverse.

6. In his further affidavit sworn on 28th June 1988 Mukoma reiterated that the only land that belonged to his father was 4 acres; that the same was shared between the 4 brothers namely Githere Njiri, the 3rd and 4th respondents and himself with each brother taking one acre; that out of that one acre, each person contributed 0.10 of an acre for their mother Wairimu Njiri referred to as Wamando, and a portion of 0.10 was contributed by each person for common land with the result that each brother was left with only 0.80 of an acre.

7. In that further affidavit, Mukoma went on to state that an additional 0.12 of an acre was also excised from the portion due to the 1st respondent to form part of parcel T.106 which she was to hold together with the 4th respondent, that as a consequence, the 1st respondent's entitlement to inherited of the 4 acre was further reduced to 0.68 of an acre; that an additional 0.13 of an acre was also excised from the portion due to the 4th respondent, Kaguongo Njiri, to form part of parcel T106, which he was to hold together with the 1st respondent; that the result of that was that out of the inherited land of 4 acres, the 4th respondent would be entitled to 0.67 of an acre, which he then sold to Mukoma for Kshs. 804/= on 21st March 1968. In effect parcel T.106 was made up of the 1st respondent's 0.12 of an acre hived off parcel number 1057 and the 4th respondent's 0.13 of an acre hived off parcel number 1057.

8. According to Mukoma, the 3rd respondent, Thiongo Njiri also sold his 0.80 of an acre entitlement from the inherited land to him for Kshs. 800/= on 15th March 1967 and migrated to the Rift Valley; that the total of 0.40 of an acre hived off the inherited land for the mother was registered in his name as parcel number 1057 as resolved by the family and the clan as he is the one who was looking after the mother.

The evidence

9. The suit was heard by four judges over a period spanning 13 years. A. B. Shah J, (as he then was) took the evidence of PW1, Grace Wangui Njiri, on 24th August 1994. PW1 was one of the wives of the deceased patriarch Njiri Githere and a co-wife to Wairimu Ngionu. In her testimony, PW1 stated that her husband Njiri Githere died before the declaration of emergency in Kenya in 1952; that his land was divided between his two houses; that the land for the second house represented by her co-wife Wairimu Ngionu was registered in the name of Mukoma who was her co-wife's son; that the 1st and 2nd respondents had been staying on the land for a long time since the emergency and prior to the registration of that land; that Mukoma was supposed to hold the land in trust for the 4 sons of Njiri Githere with Wairimu Ngionu, namely the 1st and 2nd respondents representing the first son, Mukoma, the 3rd respondent and the 4th respondent despite being the registered owner; that the land was ancestral land having been inherited from earlier generations; that the land measured 6.20 acres in addition to two plots that were registered in Mukoma's name and that the same should have been divided amongst the four sons.

10. Kaguongo Njiri, the 4th respondent (Pw 2) testified before Mitey J and stated that parcel number 1057 is his fathers land that was registered in Mukoma's name in 1963; that parcels T105 and T106 were registered jointly in his and Mukoma's names; that parcel number T105 also belonged to his father; that parcel 1057 which was inherited by his father from his grandfather measures 6.20 acres; that his father died during the emergency by which time he had sub divided that land; that based on the green card relating to parcel number 1057, that property measures 11.16 acres; that the 11.16 acres includes one acre as well as "another portion" purchased by Mukoma, and 4 acres purchased by Githere Njiri's wives; that parcel number 1057 should be subdivided into four portions of 1.55 acres each and allocated to the 1st and 2nd

respondents of the first part, the 3rd respondent on the second part; the 4th respondent of the third part and Mukoma of the fourth part; that the balance of 4 acres should go to the 1st and 2nd respondents and about 1 acre to Mukoma.

11. PW2 further testified that parcel T.105 belongs to the 3rd respondent “and Githere” while parcel T106 on which he resides, belongs to him and Mukoma; that the 5th and 6th respondents have built their houses on parcel T.105; that the 2nd respondent also resides on parcel T105; that Mukoma transferred parcel T.106 to him in 1967; that the 1st respondent and Mukoma live on parcel number 1057 though he did not know the size of parcel number 1057 that is occupied by the 1st respondent. PW 2 denied having sold his share of parcel number 1057 to Mukoma but stated that 0.12 of an acre of his share of parcel number 1057 was to be removed once the land is subdivided and given to Mukoma in exchange of Mukoma’s interest in parcel T.106.

12. Under cross examination PW2 stated that he has lived on parcel T106 for 30 years but was living on parcel number 1057 before that during the emergency period; that parcel number 1057 measures 6.2 acres; that when his father died the acreage of the family land was not known; that he began demanding his share of parcel number 1057 from Mukoma soon after independence but Mukoma declined to accede to the demand; that he complained to the administration and the district officer ordered the sub division of the family land but Mukoma refused to comply; that he accompanied Mukoma to the lands office to transfer parcel T.106 into his name. PW2 maintained that his entitlement in parcel number 1057 is 1.55 acres; and that the 1st and 2nd respondents should also get 1.55 acres out of parcel number 1057 in addition to 4 acres that they purchased that is part of parcel number 1057.

13. Hannah Wambui Githere, the 1st respondent (PW3) testified before Mitey J on 19th May 1999 and stated that she is the wife of Githere Njiri, deceased who was the eldest son of patriarch Njiri Githere; that her late husband was left in charge of his father’s land on which she has lived since marriage; that her husband was killed at the beginning of the emergency after which his younger brother, Mukoma, took charge of the land; that she purchased 4 acres of land through Mukoma for which she gave cows and money to enable Mukoma purchase the land; that her father in law’s land should be divided into 4 portions; that she is entitled to about 1.5 acres of the family land in addition to the 4 acres that she purchased and that her claim is therefore for 5.5 acres; and that Mukoma also purchased one acre of land which is part of parcel number 1057.

14. Under cross-examination PW3 stated that Mukoma took the title for the whole land that measures 11 acres including the 4 acres belonging to her and her co-wife the 2nd respondent which Mukoma purchased on their behalf and for her for which she paid Kshs. 4,000.00 in cash and 1 bull.

15. Thiongo Njiri, the 3rd respondent (PW4) testified before Mitey J on 6th March 2000 and stated that Mukoma and the 4th respondent are his brothers; that the 1st and 2nd respondents are his in laws having been married by his late elder brother; that his father had two shambas in places known as Kanyore and Githunguri; that parcel number 1057 measures 6.70 acres while the other shamba measuring 3.3 acres was sold by Mukoma; that the parcel measuring 6.20 acres was registered in Mukoma’s name and it should be divided between the sons of the late Njiri Gichere; that he was not aware why the land was registered in Mukoma’s name; that 4 acres of land purchased from one Wakanyi is part of the family land; that one acre of the land purchased by Mukoma was also incorporated into the family land; that parcels T.105 and T.106 are also family properties; that the 4th respondent lives on parcel T.106 while the 5th and 6th respondents reside on parcel T105. PW4 was categorical that he did not sell his share of parcel number 1057 to

Mukoma as claimed.

16. Under cross examination, the 3rd respondent stated parcel number 1057 measures 6.7 acres; that the 1st and 2nd respondents purchased 4 acres from one Wakanyi Ndirangu that is also part of number 1057 which measures 11 acres; that he did not at anytime sell his interest in number 1057 to Mukoma; that his claim on the family land is for 3 acres; that Mukoma purchased 4 acres of land on behalf of the 1st and 2nd respondents; that Mukoma also purchased one acre of land for himself for Kshs.1, 000.00. On further questioning the 3rd respondent stated that he claims 1.55 acres of the family land and that the two plots should be shared.

17. Wanjiku wa Githere, the 2nd respondent (PW5) testified before Mitey J on 10th April 2000 and stated that she is the wife of Githere Njiri and a co-wife to the 1st respondent; that she was detained by the colonial authorities alongside her co-wife, the 1st respondent, during the emergency period in Kenya; that her husband was killed during that period; that together with the 1st respondent they gave money to Mukoma to purchase land for them; that 4 acres of land were purchased for them by Mukoma for Kshs.1,300.00 and was amalgamated during demarcation with her father in law's land; that her father in law's land was the 6.20 acres plus 2 plots which should be sub divided between the 4 sons while the balance of 4 acres belongs to her and the 1st respondent; that Mukoma holds the whole land in trust for family members.

18. Under cross examination the 2nd respondent stated that she and the 1st respondent used to deal in charcoal and the proceeds of sale were given to Mukoma for purposes of purchasing land; that Mukoma purchased 4 acres of land from Wakanyi on their behalf for which he paid Kshs. 1,300.00; that her claim is for a portion of her father in law's land, the land they purchased and a share of the plots; that the plot occupied by Kanyore (Kaguongo") be sub divided between him and Mukoma while the other plot between the family of Githere and Thiongo.

19. Joseph Njiri Githere, the 5th respondent (PW6) and son of the 1st respondent testified before Ransley J on 8th November 2004 and stated that he resides on parcel T.105 alongside the 6th respondent but that he cultivates parcel number 1057 where he was born in 1957; that his father, Githere Njiri, died in 1953; that some land was purchased and consolidated into parcel number 1057; that parcel number 1057 measuring about 12 acres and parcel T.105 should be divided amongst the four sons of his grandfather; that Mukoma in whose name the property is registered refused to subdivide it; that he alongside his mother the 1st respondent and his step mother the 2nd respondent are claiming a portion of the land that should have been given to his father.

20. Gitau Njuguna Kamau (PW7) aged 83 years at the time of the hearing before Ransley J on 1st March 2005 stated that he hails from Githunguri location; that in the early years prior to 1957 oral agreements relating to land were the norm and that boundaries were determined by paces and payment was made in kind by delivery of goats.

21. Jeremiah Nduati Githere (PW8) testified before Ransley J on 1st March 2005. He stated that he is the son of the 1st respondent and was born in 1944; that his father who was a landowner was killed in 1953; that his mother bought an additional piece of property of 4 acres parcel No. 528 through Mukoma which was consolidated with the family parcel of 6.2 acres; that Mukoma also bought a one acre parcel 1035(1055") which was also consolidated with the family land; that the family land belongs to the 4 brothers and each should get 1.5 acres; that his mother the 1st respondent owns the 4 acres that Mukoma became registered as the owner of on the basis of being the eldest surviving son; that in 1986 Mukoma wanted to give his mother one acre and wrote a letter to that effect and that the land should be distributed amongst the four brothers with

each getting 1.5 acres. With that, the respondents' case before the High Court was closed.

22. The defence case commenced before Ransley J on 9th March 2006 with the evidence of Githere Njiri (DW1) (son of Njiri Githere and PW 1) a stepbrother to Mukoma and the 3rd, 4th respondents. He stated that he was born in 1924; that his father who died in 1951 owned the suit land which was divided between two houses namely his mother's house and the house of Wairimu Njiri (the mother of Mukoma and the 3rd and 4th respondents); that the portion of land due to the house of Wairimu Njiri, measuring 4 acres, was registered in the name of Mukoma; that from the 4 acres a road was curved out leaving 3.20 acres to be divided between the 4 sons of Njiri Githere namely Mukoma, the 3rd and 4th respondents and the 1st respondent representing her late husband Githere Njiri, deceased, with each getting 0.8 of an acre. The witness further stated that the 4 acres is part of parcel number 1057 and that Mukoma purchased the 3rd and 4th respondent's shares of the 4 acres; that he witnessed the sale of the 4th respondent's interest for which Mukoma paid Kshs.804.00 and an agreement which he witnessed was entered into; that he was also involved in the sale by the 3rd respondent of his interest of 0.8 to Mukoma and that he is the one who delivered the purchase price to the 3rd respondent; that the 1st respondent is only entitled to her husband's share of the property and that Mukoma bought the rest of the property in parcel number 1057 from Wakanyi Ndirangu; and that the 1st respondent was given T.105 by Mukoma.

23. Following the retirement of Ransley J, Angawa J took over the conduct of the hearing and on 5th March 2007 Githere Njiri (DW1) continued with his testimony. He maintained that two of Mukoma's brothers sold their interest in the family land to Mukoma in 1967; that prior to land consolidation, the size of the family land was not known in terms of acres; that Mukoma bought an acre of land which was added to the family land.

24. The second defence witness was James Kanyora (DW2), son of Mukoma and a farmer in Githunguri. He stated that he was born in 1952; that his father is the registered owner of parcels T105 and T106; that in 1958 his father was the owner of plot 558 and later bought plot number 1055; that plot 558 and plot 1055 were combined into plot number 1057; that the size of T106 is a quarter of an acre while plot number 1057 is 11.3 acres.

25. After the close of the defence case and after closing submissions had been made, on 6th March 2007 the court directed the parties to "come up with a schedule of the proposed approval of land". A defence witness was then recalled and produced a schedule that represented Mukoma's claim. He also produced a schedule representing the respondents' proposals on the division of the property.

26. In a judgment delivered on 13th March 2007 Angawa J. found as a fact that Mukoma was registered as proprietor of number 1057 (measuring 11.6 acres); T.105 and T.106 in trust for the family and that the 5th and 6th respondents had acquired title to T.105 by adverse possession. The judge proceeded to apportion the interest in parcel 1057 as follows:

    a. 5.13 acres of the property to Hannah Wambui Githere and Wanjiku Githere.
    b. 1.10 acres of property to Kaguongo Njiri.
    c. 1.10 acres of the property to Harun Thiongo Njiri.
    d. 3.87 acres of the property to Mukoma Njiri.

27. The court granted parcel T105 to the 5th and 6th respondents in equal shares having acquired the title to it by way of adverse possession; the 4th respondent was ordered to compensate the 1st

respondent for 0.13 of an acre in respect of parcel T106 which was awarded as follows:

a. 0.125 acres to Kaguongo Njiri, and
b. 0.125 acres to Hannah Wambui Githere and Wanjiku Githere.

28. The costs of the suit were awarded to the respondents. It is that judgment that has given rise to the present appeal.

The appeal

29. In her memorandum of appeal, the appellant (Mukoma's widow) complains that in making that award, the High Court failed to determine issues that required determination; that the High Court granted reliefs that were not sought; that there was no evidence before the court to support the declaration of trust over parcel number 1057; that the finding of adverse possession over parcel 105 was erroneous as it was established in evidence that the 5th and 6th respondents were in possession of that property with Mukoma's permission; that the learned judge wrongly approached the matter before her as a succession cause; that the learned judge failed to have regard to the fact that Mukoma was the registered proprietor of parcel number 1057; and that the learned judge should have found that the 3rd and 4th respondents had sold their share of inheritance of the family land to Mukoma and finally that the learned judge erred in admitting further evidence on the proposed subdivision after the close of the hearing.

Submissions by counsel

30. During the hearing of the appeal, the parties were represented by learned counsel. Mr. P. G. Nganga appeared for the appellant while Mr. B. G. Njugi appeared for the respondents. Counsel highlighted the written submissions filed on behalf of the parties.

31. For the appellant Mr. Nganga submitted that for all practical purposes the dispute between the 1st, 2nd 3rd, 4th respondents and Mukoma is a dispute between 4 brothers over land while the claim by the 5th and 6th respondents, the children of the 1st and 2nd respondents, is a claim over land based on adverse possession; that the husband of the 1st and 2nd respondents was a Mau Mau who was killed during the colonial time while Mukoma, the appellant's deceased husband, was a loyalist; that the respondents blamed Mukoma for the death of the 1st and 2nd respondents' husband and there has been bad blood as a result; that the dispute is over three parcels of land, parcels number 1057, T.105 and T106 made up of family land inherited from the father of the 4 brothers and amalgamated with land subsequently acquired and which together formed parcel number 1057 during the land adjudication and consolidation exercise; that the issues that required determination based on the pleadings before the High Court were whether Mukoma held parcels number 1057 and T.105 in trust for the respondents and whether the 5th and 6th respondents were in adverse possession of parcel T.105; that instead of confining her determination to those issues, the learned trial judge waded into matters that were not pleaded by purporting to apportion the land and by undertaking an enquiry into matters of alleged purchase of 4 acres of the land by the 1st and 2nd respondents. In that regard counsel for the appellant cited the case of **Galaxy Paints Co Ltd vs. Falcon Guards Ltd [2002] EA 385** for the proposition 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, as the trial judge did in this case, is to err.

32. Mr. Nganga's next complaint was that the learned judge failed to determine the issues that were

properly before her, namely whether Mukoma held parcels number 1057 and T.105 in trust for the respondents and whether the 5th and 6th respondents were in adverse possession of parcel T.105; that instead of making findings on those issues the judge wrongly proceeded on the basis that she was dealing with a succession cause and ignored that Mukoma is the registered owner of parcel number 1057; that the trial judge erred in failing to appreciate that the onus lay on the respondents to prove the existence of the alleged trust; and that the learned trial judge erred in admitting evidence after the close of the hearing. Counsel went on to say that the errors made by the trial judge are grave and that taking into account the fact that the proceedings are not clear especially with regard to the evidence of the 2nd defence witness, Mukoma was highly prejudiced and the matter should therefore be referred back to the High Court for retrial.

33. Mr. Nganga further argued that even if the learned trial judge could, as a matter of law, deal with the matters that she did though not arising from the pleadings, based on the evidence, the judge reached the wrong findings. In effect, it is the appellant's contention that the evidence did not support the findings made by the trial judge. In that regard the appellant complains that the evidence does not support the manner in which the trial judge apportioned parcel number 1057. The first issue of fact that required determination according to the appellant is how much of the 11.12 acres making up parcel number 1057 is family land. While the respondents contended that 6.2 acres of that land was family land, Mukoma contended it is 4 acres. Mr. Nganga submitted that the defence evidence in that regard was more reliable; that the evidence presented by the respondents was contradictory; that the trial judge was therefore right in accepting the defence version of facts that the family land was 4 acres.

34. Counsel submitted that out of the 4 acres of family land in parcel number 1057, only 0.68 acres is held in trust for the 1st and 2nd respondents by reason that 0.4 acres was hived off before consolidation was done and before the title was issued for purposes of the road; that 0.4 of an acre was deducted for the mother leaving 3.2 acres available for subdivision between the 4 sons of the deceased with the result that each son would get 0.8 of an acre. That from the 0.8 of an acre due to the 1st and 2nd respondents, 0.12 of an acre was to go towards the make up of parcel T106 with the result that what remained of parcel number 1057 available to the 1st and 2nd respondents is 0.68 of an acre which is therefore what Mukoma held in trust for the 1st and 2nd respondents. According to counsel evidence was led to show that it was agreed that 0.4 of an acre that was deducted from parcel number 1057 for the mother would go to Mukoma.

35. Counsel for the appellant further submitted that accepting that parcel number 1057 measures 11.12 acres and that 3.2 acres is the family land, the next question is who is entitled to the balance of the land. In other words, as between Mukoma and the 1st and 2nd respondents who should have been left with the balance of 6.92 acres" In that regard, counsel for the appellant submitted that the trial Judge erred in finding that the 1st and 2nd respondents purchased 4 acres of that land; that based on the evidence, Mukoma's one acre parcel previously known as 1055 was combined with 528 to make up parcel number 1057; that the respondents did not lead any credible evidence of having purchased any part of that land and that the assertion by the 1st and 2nd respondents that they purchased 4 acres should be rejected with the result that there cannot be a trust in respect of the reminder of the land.

36. Regarding the respondent's alternative plea that they are entitled to parcel number 1057 by reason of adverse possession, counsel for the appellant submitted that adverse possession does not apply as they occupied the land with Mukoma's consent; and that for the same reason the occupation by the 5th and 6th respondents of parcel T.105 cannot be adverse as their occupation was also with Mukoma's.

37. As regards parcel T.106, counsel for the appellant submitted that the finding of the trial judge was well founded and should be upheld by this Court.

38. Counsel for the appellant concluded his submissions by urging us to allow the appeal and prayed that the matter be referred back to the High Court for re-trial or alternatively this Court do re-evaluate the evidence and draw its own conclusions and findings in which event the 1st and 2nd respondents are only entitled to 0.68 of an acre in parcel number 1057.

39. On his part, Mr. Njugi for the respondents commenced his address by stating that in the event that the appeal succeeds, we should do the best we can to re-evaluate the evidence on record and draw our own conclusions rather than refer the matter back for retrial as most witnesses have passed on and the 1st respondent is at the advanced age of 103 years.

40. In opposition to the appeal, counsel for the respondents submitted that the trial judge correctly decided the matter based on the pleadings and the evidence tendered and properly apportioned the suit properties; that evidence was led, supported by the green cards produced, to show that the family land is 6.2 acres to which 4 acres, purchased by the 1st and 2nd respondents were added and a further 1 acre purchased by Mukoma was added making the total of 11.2 acres; that evidence was also led to show that Mukoma received money and a cow from the 1st and 2nd respondent for the purchase of the 4 acres; that the respondents' evidence established that Mukoma was registered as owner and holds parcel number 1057 in trust for the family members; that the assertion by Mukoma that the 3rd and 4th respondents sold their share of the family land to him is not supported by evidence and is incredible as the 3rd and 4th respondents did not at any time take possession of their respective portions of the family land and did not therefore have anything they could sell; that despite the inconsistency in the testimony of the respondents' witnesses regarding the amount paid for the 4 acres purchased by the 1st and 2nd respondents, there can be no doubt that they did in fact purchase the 4 acres.

41. Regarding the trial judge's holding in respect of parcel T106, counsel for the respondents agreed with counsel for the appellant that the same should be upheld.

42. Turning to the trial judge's finding on parcel T105, counsel for the respondents submitted that the holding that the 5th and 6th respondents acquired the same by adverse possession is correct and should be upheld by this Court.

43. With that counsel for the respondents urged us to dismiss the appeal.

Determination

44. We have reviewed the record of appeal, considered the grounds of appeal and the submissions by both learned counsel for the parties. This is a first appeal. Our duty as the first appellate court as summed up by this Court in **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** 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."*** In the same case this Court went on to say ***" 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."***

45. In order for this Court to effectively discharge that duty as the first appellate court, the record of proceedings and evidence from the lower court must be intelligible. In certain respects, that is not

the case here. We have had great difficulty in following some of the evidence as recorded in this case. As we have already observed, the hearing of the suit spanned between 1994 and 2007 and was handled by four judges over that period. Angawa J was the last judge in the court below to hear the matter and on whose shoulders the task of concluding the trial and writing the judgment fell. She took over the conduct of the hearing on 5th March 2007 when Githere Njiri (DW1) continued with his testimony. The second defence witness who testified before Angawa J was James Kanyora (DW2). As counsel for the appellant correctly observed, the record of the evidence of DW2 is totally incomprehensible.

46. Angawa J, must have encountered the same difficulties we have encountered in trying to make sense of the record of evidence because after the close of the defence case and after closing submissions on 6th March 2007 the judge took a rather unusual step and directed the parties to "come up with a schedule" of what we believe is the manner the parties proposed the suit land should be distributed. A defence witness was then recalled and the schedules setting out the parties' respective proposals for sub division of the suit properties were produced before the court. The unusual course taken by the trial judge in admitting evidence after the close of the case has attracted a complaint by the appellant and is the subject of one of the grounds of appeal.

47. Quite apart from the injustice visited upon the parties by the failure to expeditiously hear and determine cases, as is clearly manifest here, this case is testimony to the fact that judges and magistrates must as a matter of great urgency be rid of the burden of recording evidence. There is a critical and impelling need for provision of stenographers or the use of other efficient reliable and accurate means of recording evidence. Absent that, the duty of an appellate court is made extremely difficult and can exacerbate further injustice to litigants.

48. Having said that and doing the best we can with the material before us, the first issue for our consideration is whether the trial court waded into matters that were not pleaded by engaging in an enquiry as to the composition of the suit property and purporting to apportion the same instead of confining itself to issues that arose from the pleadings. We accept, as submitted by counsel that disputes before the courts should be determined based on the pleadings. The case of **Galaxy Paints Co Ltd vs. Falcon Guards Ltd** to which we were referred supports that proposition. There are many other decisions on the point including **North Kisii Central Farmers Ltd v Jeremiah Mayaka Ombui and 4 others [2014] eKLR** and **Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others (Kisumu) Civil Appeal No. 20 of 2011**.

49. Counsel for both parties are in agreement that based on the Originating Summons presented to the lower court two issues arose for the determination. The first is whether Mukoma who admittedly was registered as the owner of the suit properties held the same in trust for himself and the respondents. The second issue is whether the respondents or some of them acquired title over the suit properties or portions thereof by adverse possession and if so, whether they should be registered as proprietors on that basis.

50. It is clear from the judgment of the High court (or court below) that the learned trial judge was alive to the fact that those were the issues that called for determination. The trial judge framed the question as follows: "*The issue before this court is whether the defendant holds land in trust of (sic) his family or in the alternative are they entitled in adverse possession*."

51. In a bid to present their respective positions on those questions, the parties' evidence was

geared towards proving the existence of the trust on account of their respective entitlements and contributions towards the make up of the suit properties. Having found as a fact that Mukoma held part of the suit land in trust for the respondents, it was incumbent upon the court, in our view, to determine which parts of the suit properties were so held. Indeed the parties themselves required the court to adjudicate that question. The course taken by the court below in pronouncing itself on the apportionment is consistent with the view held by this Court in **Odd *Jobs v Mubia, [1970] EA 476***, where it was held that:

"A court may base its decision on unpleaded issue if it appears from the course followed at the trial court that the issue has been left to the court for decision."

52. In our view, the parties clearly called upon the court to decide whether Mukoma held the suit property in trust. Having answered that question in the affirmative it was necessary for the court to consider the secondary question of apportionment of the suit properties between the parties. Indeed, in grounds 3 and 4 of the memorandum of appeal where the appellant complains that the learned judge erred in declaring trust over parcel number 1057 and finding adverse possession over parcel T105, the appellant implicitly concedes that what the court below did in its judgment was what it was required by the parties 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.

53. The next issue for our consideration is whether the findings made by the learned judge on the apportionment of the suit property are well founded and supported by evidence. It is in this regard that we have had great difficulty in comprehending the record of the evidence. Based on the copy of the title produced before the lower court, parcel number 1057 measures 4.52 hactare (approximately 11.16 acres). All parties agree that parcel number 1057 resulted from consolidation of several parcels of land. The parcels consolidated into parcel number 1057 include the parcel inherited from Njiri Githere, which has been referred to as the family or ancestral land; a parcel purchased by Mukoma; and a parcel purchased by the 1st and 2nd respondents. The appellant does not, however, accept that the1st and 2nd respondents purchased any land. Part of the controversy is whether out of the 11.16 acres making up parcel number 1057, family land is 4 acres, as contended by Mukoma, or 6.2 acres as contended by the respondents.

54. All the respondents' witnesses testified that the land inherited from Njiri Githere is approximately 6.20 acres. PW 2,3,4 & 5 were in agreement that the 1st and 2nd respondents' 4 acre parcel that they purchased is also part of parcel 1057 and that a parcel measuring one acre that was purchased by Mukoma is also part of parcel number 1057.

55. The evidence of DW1, Githere Njiri, a stepson to the respondents accorded with Mukoma's further affidavit sworn on 28th June 1988 in opposition to the Originating Summons where Mukoma deposed that the inherited or family land measures 4 acres; that that land was to be divided into 4 and out of each of the 4 portions was to be excised 0.10 of an acre for their mother, 0.10 of an acre for public land; 0.12 of an acre was to be removed from the 1st respondent's portion to form part of parcel T106 leaving the 1st respondent with 0.68 of an acre; that out of Kaguongo Njiri's portion, an additional 0.13 of an acre was removed to form part of parcel T106 leaving the 4th respondent with 0.67 of an acre which he sold to Mukoma.

56. The record of the evidence of DW2 is totally incomprehensible and does not assist the Court.

57. In the judgment of the court below, the trial judge found as a fact, correctly in our view, that

parcel 1057 "**was a** *(sic)* **combined land**." The judge went further and held that "**only 4 acres and not 6.5 acres belongs to the family from the fathers** *(sic)* **share**." The basis on which the learned trial judge arrived at that conclusion would appear to be the further affidavit sworn by Mukoma on 28th June 1988 to which we have referred whose contents DW1 echoed at the hearing. Mukoma died sometimes during the pendency of the suit in the High Court. An opportunity to cross-examine him on his affidavit did not therefore present itself. The further affidavit sworn by Mukoma on 28th June 1988 on which the judge relied purported to correct the contents of an earlier affidavit sworn on 25th August 1987. In that earlier affidavit the position taken by Mukoma was that the 1st and 2nd respondents were not entitled to any part of parcel number 1057; that family land or inherited land was only 4 acres and that he purchased the 8 acres of land that made up the remainder of parcel number 1057. In that affidavit Mukoma did not address himself at length on the merits of the claims by the respondents that he held the property in trust. Rather, Mukoma attacked or challenged the respondents' claims on the basis that an award that had been rendered directing the subdivision of the property had been made without jurisdiction.

58. The contents of the further affidavit sworn on 28th June 1988 on which the trial judge relied contradicted in material respects the contents of his earlier affidavit. Mukoma shifted from a position where he categorically denied that the 1st and 2nd respondent were entitled to a portion of the family land to a position that they were entitled to some portion of 0.68 of an acre out of parcel number 1057. These are in our view, matters that affected his credibility and his claims on the suit properties that were never tested in cross examination.

59. The plaintiffs' witnesses were all subjected to cross-examination. Apart from some inconsistencies in the actual area or size of the family land and minor contradictions in their evidence regarding the "price" paid by the 1st and 2nd respondents towards acquisition of the 4 acres, their evidence that the family land is 6.2 acres or thereabouts was consistent. PW1's evidence was that family land measured 6.20 acres. She denied any knowledge of Mukoma having purchased 8 acres of land prior to consolidation. The 4th respondent who was PW2 stated that the inherited land that forms part of parcel number 1057 is 6.20 acres and that the same should be divided into 4 units. He also accepted that Mukoma purchased a one acre piece of land which forms part of parcel number 1057 and that 4 acres were purchased by the 1st and 2nd respondents. The evidence of Hannah Wambui Githere, the 1st respondent who was PW3, the evidence of Thiongo Njiri, the 3rd respondent who was PW4, the evidence of Wanjiku Githere, the 2nd respondent who was PW5, and the evidence of Jeremiah Nduati Githere who was PW 8 was to the same effect. Joseph Njiri Githere the 5th respondent who was PW6 generally agreed with the other respondents' witnesses though he was not sure whether parcel number 1057 measures 12 or 10 acres.

60. Based on our own re-evaluation of the evidence, despite the fact that the same is a sorry state, we take the view that the evidence presented by the respondents was consistent and more reliable relative to the defence evidence. We are satisfied and hold that the family land making up part of parcel 1057 is 6.2 acres. We are also satisfied and hold that the 1st and 2nd respondents acquired a 4-acre parcel that is also part of parcel number 1057 and that Mukoma acquired a 1-acre parcel that is also part of parcel number 1057. Parcel number 1057 is therefore made up of 6.2 acres of family or inherited or ancestral land; 4 acres acquired by the 1st and 2nd respondents and 1 acre acquired by Mukoma. The 1st and 2nd respondents as one unit, the 3rd respondent, the 4th respondent and Mukoma (represented by the appellant) are entitled to 1.5 acres each of the 6.2 acres of the family land.

61. Consequently we apportion parcel number 1057 between the parties as follows:

1st and 2nd respondents jointly 1.5 acres + 4 acres = 5.5 acres approximately

Appellant 1.5 acres + 1 acre = 2.5 acres approximately

3rd respondent 1.5 acres approximately

4th respondent 1.5 acres approximately

62. As regards parcel T106, the learned trial judge apportioned the same as follows:

Kaguongo Njiri 0.125 acres

Hannah Wambui Githere

and Wanjiku Githere 0.125 acres.

63. Both parties have urged us not to interfere with that apportionment and the same is upheld.

64. Regarding parcel T.105 the learned trial judge apportioned the same between the 5th and 6th respondents in equal shares having found the same to have been acquired by having regard to the evidence that was before the trial Court. We do not see that the appellant has made out a case for us to interfere with that decision.

65. Despite the sorry state of the record, counsel implored us to do the best we can with the material before us to avoid a retrial considering that most of the original cast is deceased and the remaining actors who may be alive are very advanced in age. We have endeavored to do that.

66. The effect of the foregoing is that the appellant's appeal partially succeeds to the extent, and to the extent only that we set aside the judgment of the High Court given on 13th March 2007 in relation to apportionment of parcel number 1057 and substitute the same with an order that parcel number Githunguri/Gathangari/1057 is apportioned as follows:

1st and 2nd respondents1.5 acres + 4 acres = 5.5 acres approximately

Appellant 1.5 acres + 1 acre=2.5 acres approximately

3rd respondent 1.5 acres approximately

4th respondent 1.5 acres approximately

67. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 25th day of July, 2014.

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

……..

JUDGE OF APPEAL

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

REGISTRAR

/ewm