REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 481 OF 1999

B. NGIGI GIKONYO …………………………………… APPELLANT

VERSUS

KABUKU GIKONYO ………………………………….. RESPONDENT

(Appeal from the Judgment of the learned Resident Magistrate Thika Mrs T.W.C. Wamae delivered on the 27th Day of October 1999 in the Resident Magistrate's Court at Thika being Civil Case No,. 445 of 1990)

JUDGMENT

This is an appeal from the judgment of Wanjiku Wamae, then Resident Magistrate, dated 27th October 1999 in the Senior Principal Magistrate's court at Thika Civil Case No. 445 of 1990.

The Respondent, then Plaintiff, sued the Appellant, then Defendant, claiming for orders that

" (a) there be a declaration that defendant holds land parcel Ngenda/Karuri/121 in trust for himself, t he plaintiff and her children;

(b) an order do issue directing the defendant to transfer 0.4 ha out of land parcel Ngenda/Karuri/121 to the Plaintiff;

© costs of the suit."

Briefly, the Appellant is a step son of the Respondent who was the second wife of the father of the Appellant. The Appellant's mother was the first wife of the Appellant's father - who died in 1968.

It could appear that, or the parties are conducting this case as if, the only asset the father of the Appellant had in his estate was the suit parcel of land in this matter. However evidence is to the effect that before he died, the Appellant's father, as the registered owner of the suit parcel of land, had sub-divided the land between his two wives equally. That had been done on the ground, but the sub division had not been effected at the Land Registry.

On 18th April 1966 Gikonyo Itemo, the said father of the Appellant, transferred the whole suit parcel of land, NGENDA/KARURI/121, to the Appellant and a close look at the evidence reveals that that transfer was made before the existence of the sale transaction the appellant is relying upon to defeat the claim of the Respondent. This is because from that evidence of sale transaction as adduced in support

of the Appellant's defence, it was after the transfer that the father of the Appellant was discussing his alleged intention to sell the portion of the suit parcel of land he had given to the Respondent. From that evidence, the Appellant's father indented to sell that portion to get the money to buy another piece of land for the Respondent. The family prevailed upon him not to sell the land to an outsider and as a result he sold the 0.4 hectare portion to the Appellant for Kshs 1000/=.

There is inconsistency which should be noted in that while the Appellant's own evidence was that it was his father who sold him that portion, evidence from his witnesses, particularly his mother, was that it was the Respondent herself who sold that portion to the Appellant.

Although the Appellant produced some documents he claimed to be the agreement of sale between him and his father, the Respondent's case is that there was no sale of any kind and the Respondent maintains that she was not aware of any such a sale.

No documentary evidence showing a sale agreement between the Appellant and the Respondent was exhibited. What was exhibited are documents claimed to relate to the sale agreement between the Appellant and his father. But as the learned trial magistrate found, the documents did not bear signatures of the seller and the buyer and I add that any signature that the Appellant may have relied upon is a doubtful signature.

Furthermore, while the evidence in support of the Appellant's evidence was that he bought the portion for Kshs 1000/=, that sum of money is not reflected in the relevant land register as exhibited in the abstract of title which has a figure of Kshs 2000/=. That suggests that what the Appellant is saying about the sale is not correct as the purchase price should have been the same figure everywhere. That suggestion becomes stronger when it is noted that in the land register, compiled under the Registered Land Act, Cap. 300 Laws of Kenya, the word "Gift" is inserted alongside the sum of money Kshs 2000/=. Are the two not connected" What the two so written side by side means is that the Appellant's father transferred the whole of parcel of land No. NGENDA/KARURI/121 measuring 0.8 hectare, to the Appellant as a gift valued at Kshs 2000/=. If 0.8 hectare is Kshs 2000/-. 0.4 hectare which the Respondent claims comes to Kshs 1000/=. That is why the Appellant is talking of having paid a purchase price of Kshs 1000/=.

It means therefore that the purchase the Appellant is claiming is in respect of the 0.4 hectare portion claimed by the Respondent, and not in respect of the whole of parcel No. NGENDA/KARURI/121. It is therefore misleading for the Appellant to give the impression he has tried to give in this appeal, as can be seen from the grounds of appeal and the Appellant's submissions in support, that the Appellant had bought the whole of NGENDA/KARURI/121from his father and that for the Respondent to establish a trust against the Appellant, the Appellant's father must have held that trust in favour of the Respondent before the land transfer.

The Appellant should not close his eyes to the fact that part of the evidence supporting his case is that although he was younger to his elder brother, his father decided to transfer parcel of land NGENDA/KARURI/121to him (the Appellant) to hold the portion of 0.4 hectare, given to his mother, on behalf of himself, his brother and his mother. If that was so, why should it not be a similar situation with regard to the other portion of 0.4 hectare his father had given to the Appellant's step mother the Respondent in this appeal"

From what I have been saying above therefore, the position in summary is that while it is true that the Appellant's father transferred land parcel No. NGENDA/KARURI/121 to the Appellant, that transfer was by way of gift valued, for the purpose of paying Government fees, at Kshs 2000/=. The

Appellant had not therefore bought that land or any part of it from his father, and the transfer was made so that the Appellant holds the 0.4 hectare divided share on the ground in that land on behalf of himself, his bother and his mother while the Appellant was holding the other 0.4 hectare divided share on the ground in that land on behalf of the Respondent and her children,. That was a trust under Kikuyu customary Law and as section 126 of the Registered Land Act does not make it mandatory that every trust must be noted in the relevant land register with the words 'as trustee', the trust the Appellant had is a trust the court should and does recognize. There must have been reasons, not revealed to the court, why Gikonyo Itemo, the father of the Appellant, decided to handle his estate that way before he died two years after. It is unfortunate there seems to have been no succession proceedings in respect of the estate of Gikonyo Itemo and these proceedings therefore come in as a substitute in the circumstances. By then section 120 (now repealed) of the Registered Land Act was the one governing succession proceedings. The Law of Succession Act; Cap 160 Laws of Kenya, had not been passed.

I feel I have said enough to decide this appeal. Other issues in the matter were properly covered by the learned trial magistrate in her judgment appealed from. As I do not find a good reason to interfere with that judgment, the same judgment is hereby upheld and this appeal dismissed with costs to the Respondent.

Dated this 25th day of June 2003.

J.M. KHAMONI

JUDGE

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