



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 21 OF 1981

GICHUKI

VERSUS

GICHUKI

JUDGMENT

The appellant, who claims to be 103 years of age, sued the respondents (who are the registered proprietors of the land comprised in title Limuru/ Bibirioni/898) for a declaration that by reason of a trust in his favour, he was entitled to a one-third share of the land and to a consequential rectification of the register.

The learned judge (Harris J) dismissed the suit on two grounds:

- a) that there was no evidence of the existence or creation of a trust in the appellant's favour, and
- b) that the dispute was res judicata, the first respondent having sued the second respondent and the present appellant claiming that the suit land should be divided into three parts, in the Court of the Resident Magistrate at Kiambu, in Civil Case No 97/73.

The Resident Magistrate decided that the present respondents were the proprietors, in accordance with the Land Certificate, a decision which the learned judge described as "clearly right" and with which he concurred. On this appeal, we are faced not only with a memorandum of appeal challenging the decision to be set aside, but also with an application that the dispute be referred to arbitration by elders.

As regards the appeal itself, there can be no doubt that the judgment of Harris J was correct; no trust was proved to have been created or to have existed in favour of the appellant, and the dispute between the same parties involving the same cause of action had previously been adjudicated by a court of competent jurisdiction, and no appeal was brought against that decision so that res judicata applied.

As regards the application to set aside the decision of Harris J and to refer check for more decisions at : the dispute to the arbitration of elders, this court has no power to make any such order, because by Order XLV of the Civil Procedure Rules, a reference to arbitration by order of the court can only be made

if all the parties to the suit agree (and the second respondent does not agree) and an order of reference can only be made before judgment in the suit is delivered.

It follows that in our opinion, this appeal and the application for reference to arbitration both fail, and we order that the appeal be dismissed with costs. We make no order for costs on the application for reference to arbitration.

Dated and delivered at Nairobi this 23rd day of January , 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

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

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