



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 54 OF 2018**

**MARGARET WAMBOGO NYAGA.....APPELLANT**

**VERSUS**

**JOHNSON MUCAMURA GITONGA.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of the Ruling/Order of Hon. B. M. Kimemia (SPM) Runyenjes delivered on 25<sup>th</sup> September, 2018 in Succession Cause No.83 of 2016; the appellant sued the respondent in his capacity as the administrator of the Estate of the late Antony Gitonga Mwaniki whom the appellant contends held Land Parcel No. Kagaari/Kanja/3757 (the subject property) in trust for the Njathika family; the appellants claim of the existence of a constructive trust over half an acre of the subject property was dismissed by the succession court;

2. The appellant being dissatisfied with the trial court's decision filed this appeal and listed nine (9) grounds of appeal which are as summarized hereunder;

(i) The trial court erred in finding that the protestor had not proved her case on a balance of probabilities; and erred in arriving at findings that were against the weight of the evidence;

(ii) The trial court erred in not finding the protestor on behalf of the Estate of Japhet Nyaga Njathika was not entitled to half of an acre out of the subject property; which the late Japhet Nyaga Njathika had redeemed from an unlawful sale by the respondent's father; and erred in not finding the existence of a constructive trust over the half acre;

(iii) The trial court erred in finding that the lack of Consent to Transfer from the Land Control Board to transfer the half acre invalidated the claim by the claim of the late Japhet Nyaga Njathika or his estate; that the claim did not fall strictly under a controlled transaction but was that of a family member who was entitled to half an acre in the subject property; the half acre ought to have been transferred by transmission which required no consent from the Land Control Board;

3. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of their respective case;

**APPELLANT'S CASE**

4. The appellant submitted that there was a sale of half an acre of land of the subject property to by the respondents late father to one Mr. Karanja; the land was redeemed from Mr. Karanja and it was agreed that it be transferred to the late Japhet Nyaga Njathika who refunded the purchase price and took possession of the subject property and thereon planted coffee and macadamia trees; during his cross-examination the respondent confirmed these facts and also confirmed the appellants continued exclusive occupation of the disputed portion;

5. The appellant contends that the transfer of the half portion from the deceased to Japhet Nyaga Njathika was not a controlled transaction under the Land Control Act but a transaction based on the fact that the two were beneficiaries to the estate of Alexander Njathika who had been registered as the proprietor of the subject property to hold in trust for all the beneficiaries and that the deceased was not entitled to the whole parcel of land;

6. Alternatively, even in the absence of the required consent the fact remained that payment was made in order reclaim the portion and the appellants husband had taken possession and extensively developed the land; case law relied on is the case of **Macharia Mwangi Maina & 7 Others vs Davidson Mwangi Kagiri [2014] eKLR** where it was held that the trial court erred in failing to note that consent of the Land Control Board was not required where a trust was created over agricultural land;

7. That a constructive trust can also arise from the conduct of the parties and the court can infer a common intention therefrom; the intentions of the parties in this instance was clear and the same was demonstrated from the evidence; to support her submissions on the existence of a constructive trust in favour of her husband the appellant relied on the following authorities **Willy Kimutai Kitlit vs Michael Kibet [2018] eKLR** and the case of **Constatine Martin Kithinji Gitobu vs Harriet Nkuene Kirimanja & 9 Others (2020) eKLR**;

8. In conclusion the appellant submitted that upon the demise of her husband his legal representative was entitled and had a legitimate and beneficial interest in half the portion of the subject property; and that the trial court erred in not finding that the Protest was well founded; and urged the court to allow the appeal; set aside the trial courts' ruling and substitute it with an Order allowing the Protest.

#### **RESPONDENT'S CASE**

9. In response the respondent opposed the appeal by contending that the appellant failed to prove her case on a balance of probabilities in that she never adduced evidence to prove how much money her husband contributed towards the refund; and submitted that the subject property was gifted to his father by his grandfather; that if it had been held in trust the three sons of the late Japhet Nyaga Njathika would have claimed it during their lifetimes; the purchase alluded to was stopped by his grandfather to prevent his father from disposing the only inheritance for his children; the late Japhet Nyaga Njathika died in the year 2000 and the respondents grandfather died in 2010 at no time did the late Japhet Nyaga Njathika or his adult sons ever lay claim to the impugned half portion during his or their lifetime;

10. Trouble started in 2014 when the respondent decided to occupy his late fathers' property; at the material time the land was then occupied by the respondents' fathers mother Judith Wanjuki Mwaniki, the respondents fathers sister Lucy Ruguru and the appellant who was the only one who refused to vacate the subject property;

11. The respondent contends that a claim for a declaration of trust ought to have been instituted in the Environment and Land Court before the claim was made in the succession court; case law relied on **Re Estate of Solomon Mwangi Waweru (Deceased)(2018)eKLR**; quoted with authority in **Re Estate of Samuel Kathieri (Deceased) [2019] eKLR**; **In the Matter of the Estate of Peter Igamba Njoroge Succession Cause No.432 of 2009 (unreported)**; this case outlines that the mandate of the succession court under the Law of Succession Act is limited; and that it does not extend to determining issues of ownership of property and declaration of trusts;

12. The respondent reiterated that there exists no trust in favour of the appellant over the subject property; and beseeched the court to dismiss the appeal in its entirety with costs to the respondent.

#### **ISSUES FOR DETERMINATION**

13. From the grounds of appeal and the respective submissions filed by the parties, this court has framed the following issues for determination which are as follows:-

(i) Whether the learned Magistrate erred in dismissing the suit.

(ii) Whether the trial court had jurisdiction to hear and determine issues pertaining to trusts;

#### **ANALYSIS**

14. In considering these issues, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123** therein the court held that the duty of an appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent conclusion; in addition, this court as an appellate court, will not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law;

#### **Whether the learned Magistrate erred in dismissing the appellants suit.**

15. The appellant filed a Protest as the legal representative of the Estate of the Late Nyaga Njathika in which she claims half an acre out of the subject property Land Parcel No. Kagaari/Kanja/3757; her contention was that the land was family land and when her late husband learnt that it had been sold he paid off the purchaser and redeemed the property; after paying off the purchaser her late husband never got the property transferred to himself but nonetheless took possession of the half acre and developed the same and planted coffee and macadamia trees;

16. Interest in the subject property and that the respondent could only inherit the portion belonging to his father;

17. The trial court in its ruling stated that '**.....It was trite law that he who alleges must prove.**' ; thus the trial court invoked the provisions of Section 107 of the Evidence Act which places the burden of proof on the party who wants the court to rely on the existence of facts for it to make a finding in the party's favour, to prove those facts;

18. The evidence on record reflects that the appellant called two (2) witnesses to support her claim for the refund; her evidence was that Japhet Nyaga offered to refund to Joshua Kang'ara Nyaga the amount he had paid plus 30% of the consideration as damages for breach of the Agreement; that Japhet Nyaga paid the monies and the Agreement for the Sale of the land was revoked; a copy of the Agreement for Sale dated 4/07/1994 between Antony Gitonga Mwaniki and Joshua Kangara Karanja was annexed to the Appellants List of Documents; and appellant and her witnesses confirmed the said sale of the property;

19. When re-evaluating the evidence on the refund of the purchase price to Joshua Kangara Karanja this court notes that the appellant's evidence was that the amount refunded was in the sum of Kshs.24,000/-; the witness **PW2** did not specify the amount that was refunded;

whereas **PW3** also never gave a figure of the amount and added a twist to the evidence by stating as follows;

**‘...John Mwaniki stopped the sale for me and my sister and they rescued the land. They contributed the money equally, Japheth and John.....’**

20. The trial court made the following observation;

**‘There was no evidence presented to demonstrate that the transaction between the deceased and his brother Japheth or even between Japheth and Joshua for the refund of the alleged money.....’**

21. It is evident that the appellants evidence and her witnesses adduced no cogent or corroborated evidence on the amount refunded nor did they produce any documentary evidence either in the form of receipts or an agreement to support and prove this fact;

22. The appellant’s claim is also based on a trust and the same section of the Evidence Act places the onus on the appellant to prove the existence of such a trust; reference is made to the case of **Patrick Mathenge Gachie & 3 Others vs Karuni Wambugu & Another [2010] eKLR** where Makhandia J as he then was held;

**“The burden of proving trusts rests on the protestors. In my view they failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The fact that the protestors are in occupation of the suit premises is no proof of trust.....”**

**It is instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1<sup>st</sup> protestor’s father and the 2<sup>nd</sup> protestor were all adults. One wonders then, why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves.”**

23. The trial court made a similar observation and wondered why the appellants husband during his lifetime and or his siblings one being **PW2** were all **‘...aware of the alleged trust and to date never moved to court to have it declare that the land had indeed been held in trust of her mother and other siblings. Once such an interest was established before a competent court, the objector would have had a locus to claim from the estate of the deceased...’**

24. It is apparent that the late Japheth and his siblings who were the sons of Njathika were all alive and were adults when the suit property was registered; and the trial court correctly noted that **‘...Such a matter ought to have been litigated elsewhere and presented to the family court as a declared or as an established right.’**

25. The only explanation that can be attributed to the state of affairs is indolence and equity does not aid the indolent;

26. This court finds that there was no evidence upon which the trial court could have made a finding that the subject property was held in trust as alleged by the appellant; occupation of the subject property was in itself not proof of the trust there was no explanation as to why the siblings during the lifetime of the deceased never claimed their portion of the subject land if indeed they were clear in their minds that the deceased held the land in trust for himself and themselves;

27. This court finds no good reason to interfere with the trial courts finding that the appellant had not proved her claim and thereby dismissed it.

28. This ground of appeal is found lacking in merit and it is hereby disallowed.

#### **Whether the trial court had jurisdiction to hear and determine the suit.**

29. The appellants claim herein is based on a trust; there are a plethora of authorities on the mandate and jurisdiction of a probate courts’ on the issue of trusts; case law relied on is **Re; Estate of the Late Jonathan Kinyua Waititu (Deceased) [2017] eKLR; Re Estate of Samuel Kathieri (Deceased) [2019] eKLR; In the Matter of the Estate of Peter Igamba Njoroge Succession Cause No.432 of 2009 (unreported);**

30. The position is that succession proceedings are not the appropriate methods of challenging the title of the deceased to the subject property; the claim by the appellant of a trust ought to have been instituted in a separate suit filed in the Environment and Land Court so as to resolve the issue on the existence of a trust and obtain the requisite declaratory orders;

31. As correctly pointed out by the trial court this is not the function of the succession court and that **‘...Such a matter ought to have been litigated elsewhere and presented to the family court as a declared or as an established right.’**

32. This court finds that the mandate of trial court as a succession court was limited and it had no jurisdiction to hear and determine matters pertaining to trusts; but all is not lost the appellants can still vindicate her claim in the Environment and Land Court and thereafter apply for revocation of the Grant;

#### **FINDINGS AND DETERMINATION**

33. For the forgoing reasons this court makes the following findings and determinations;

(i) The appeal is found lacking in merit and it is hereby dismissed.

(ii) Being a family matter there shall be no order as to costs.

It is so Ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 25TH DAY OF MARCH, 2021.**

**HON.A.MSHILA**

**JUDGE**