



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 67 OF 2013

JARED MAKINI MICHOMA.....PLAINTIFF

VERSUS

EVANS EDWARD MICHOMA.....1STDEFENDANT

DAMARIS NYOTEYO MICHOMA.....2ND DEFENDANT

JUDGMENT

The Plaintiff and the 1st Defendant are brothers. They are the sons of Stephen Getuno Michoma, deceased (hereinafter referred to as “the deceased”). The 2nd Defendant is the wife of the 1st Defendant. Through amended plaint dated 22nd March 2013, the Plaintiff claimed that the deceased had distributed his properties to his children before his death and that upon his death, grant of letters of administration in respect of his estate was issued and confirmed in Kisii High court Succession Cause No. 85 of 2016 pursuant to which the deceased’s assets were distributed in accordance with his wishes. The Plaintiff averred that it was the deceased’s wish which wish he expressed while he was still alive that L.R No. 13838 (I.R No. 71293) (hereinafter referred to as “the suit property”) be shared equally between the Plaintiff and the 1st Defendant. The Plaintiff averred that in accordance with this wish, the suit property was physically sub-divided on the ground between the Plaintiff and the 1st Defendant. The Plaintiff averred that despite this subdivision the 1st Defendant continued to hold the title of the suit property in trust for the Plaintiff. The Plaintiff averred that his ownership of a half portion of the suit property was well known to all members of Michoma family including the 1st Defendant who acknowledged the same in several correspondences. The Plaintiff averred that the 1st Defendant was given the title of the suit property by the deceased to hold in trust for the Plaintiff because the Plaintiff was still young and was in school. The Plaintiff averred that according to the grant of letters of administration intestate in respect of the estate of the deceased, the suit property was to be divided between the Plaintiff and the 1st Defendant equally. The Plaintiff averred that without the consent of the administrator of the estate of the deceased and other family members, the Defendants fraudulently caused the suit property to be transferred to their names thereby denying the Plaintiff his interest in half portion of the suit property which the 1st Defendant held in trust for him. The Plaintiff denied that the Defendants purchased the suit property from the deceased as they had alleged. The Plaintiff averred that the Defendants had proceeded to take a loan using the suit property as security. The Plaintiff averred that he was desirous of developing his portion of the suit property. The Plaintiff prayed for judgment against the Defendants for:-

(a) A declaration that the transfer of the suit property from the deceased to the Defendants was null and void.

(b) An order for the subdivision of the suit property into two equal portions between the Plaintiff

and the 1st Defendant.

(c) An injunction to restrain the Defendants from charging, mortgaging, selling, transferring or in any other manner using the title of the suit property to secure a loan.

(d) An order that the costs of and incidental to the suit to be met by the Defendants.

The Plaintiff's suit was defended. The Defendants filed a joint statement of Defence on 7th May 2013. In their defence, the Defendants averred that the grant of letters of administration in respect of the estate of the deceased which was issued in Kisii High Court Succession Cause No. 85 of 2006 was obtained fraudulently and through concealment of material facts. The Defendants averred that they were the registered proprietors of the suit property. The Defendants denied that the suit property was held by the 1st Defendant in trust for the Plaintiff. The Defendants denied ever receiving any payments from the Plaintiff on account of rates as alleged in the amended plaint. The Defendants averred that Kisii High Court Succession Cause No. 85 of 2006 on which the Plaintiff had based his claim was still pending.

At the trial, the Plaintiff gave evidence and called three witnesses in proof of his case. The Plaintiff testified as follows. The suit property belonged to the deceased. The deceased acquired the same in the year 1986 when the Plaintiff was in High School and the 1st Defendant was in school in India. The deceased had directed that the suit property be shared between the Plaintiff and the 1st Defendant. The Plaintiff visited the suit property for the first time in the year 2001 when he found out that the 1st Defendant had developed a half portion of thereof. During that visit, he was asked by the deceased to discuss with the 1st Defendant how he could develop his portion of the property. The deceased died in the year 2003 before the suit property was subdivided. The deceased told him that he had given the 1st Defendant the title for the suit property to enable the 1st Defendant obtain a loan to construct a home. He learnt after carrying out a search that the suit property had been transferred to the Defendants in the year 1997. The said transfer was not supposed to be exclusive. The deceased had informed the Plaintiff's siblings in the year 2002 that the suit property would be shared between the Plaintiff and the 1st Defendant. The 1st Defendant did not deny the Plaintiff's interest in the suit property until the year 2012 when the 1st Defendant informed him that he intended to dispose of the suit property. The 1st Defendant refused to co-operate to have the suit property sub-divided. Their mother demarcated the suit property and put a physical boundary between the 1st Defendant's portion and his portion of the suit property. He always paid land rates for his portion of the suit property through Western Union. The suit property was held by the Defendants in trust for him. In cross-examination, the Plaintiff stated that he went to the U.S.A when he was an adult and that at that time, if the deceased wanted to give him the suit property nothing could have stopped him from doing so. He stated further that the property was transferred to the Defendants in the year 1997 while the deceased died in the year 2003. He stated that when the 1st Defendant started constructing a house on the suit property the deceased was alive. He stated that he did not make a formal complaint about the alleged forgery of the deceased signature in the instrument of transfer in favour of the Defendants.

The Plaintiff's first witness was Caren Kemunto (PW 2). PW 2 is a sister to the Plaintiff and the 1st Defendant. PW 2 corroborated the Plaintiff's evidence that the deceased had stated in the year 2002 that the suit property would be shared between the Plaintiff and the 1st Defendant. PW 2 also corroborated the Plaintiff's evidence that the suit property had been divided using a chain link which separated the Plaintiff's portion thereof from that of the 1st Defendant. PW 2 reiterated the Plaintiff's evidence that he used to pay his share of the rates for the suit property. PW 2 stated that she was not aware that the deceased had transferred the suit property to the Defendants in 1997. She confirmed however that the deceased was in good health in 1997.

The third witness for the Plaintiff was Haron Okwoyo Mabeya (PW 3). PW 3 is an uncle to the Plaintiff and the 1st Defendant. PW 3 corroborated the evidence of the Plaintiff and PW 2. The Plaintiff's last witness was Richard Nyambene Michoma (PW 4). PW 4 is a cousin to the Plaintiff and the 1st

Defendant. He also corroborated the evidence of the Plaintiff, PW 2 and PW 3.

On the part of the Defendants, the 1st Defendant gave evidence on his own behalf and on behalf of the 2nd Defendant. In his testimony, the 1st Defendant (DW 1) stated as follows. The deceased visited him and the 2nd Defendant in the year 1990. During the visit, he told them that he had a property in Karen, Nairobi that he wanted to give them to put up a home. The deceased subsequently took them to the suit property and showed them around. The deceased then gave them the allotment letter for the suit property which they used to process the title for the property in the name of the deceased in 1996. They paid all the requisite charges that were required to be made before the title was issued. After they had obtained the title for suit property, the deceased agreed to transfer the property to them. The deceased transferred the suit property to them by an instrument of transfer which was registered on 24th October 1997. They paid the deceased a sum of Kshs.300,000/= as consideration. Once the property was transferred to their names, they charged the same to obtain money to build a home on the property. When they were processing the title for the suit property, the Plaintiff was in the U.S.A. The suit property was transferred to them. It was not given to them to use as a security for a loan. None of his siblings contributed money towards the processing of the title for the suit property and none of them objected to the property being transferred to them. The deceased never told him that he was to hold the suit property in trust for any of his siblings. After obtaining a loan, they started putting up a home on the property which took them five (5) years to complete. By the time the deceased died in the year 2003, the home was almost complete. It is not true that their mother divided the suit property between him and the Plaintiff. He is the one who divided the property using a chain link for his own convenience. The chain link was not used for the purposes of demarcating the suit property for the Plaintiff. The grant of letters of administration in respect of the estate of the deceased which was issued in Kisii High Court Succession Cause No. 85 of 2006 was revoked on 11th July 2013 on his application. The suit property did not feature in any of the family meetings which they used to have. The money which the Plaintiff used to send to him was not for land rates but for the upkeep of their mother and he refunded the same to the Plaintiff when the Plaintiff claimed that the said monies were sent on account of land rates. He denied that he holds the suit property in trust for the Plaintiff. He denied also that he had defrauded the Plaintiff of the property. In cross-examination, he stated that the sum of Kshs. 300,000/= which was paid to the deceased was not for the purchase of the suit property. He admitted that he exchanged some text messages with the Plaintiff. He stated however that the same were merely for buying time and that he did not mean any of the things he stated in the said text messages. He reiterated that the monies that were sent to him by the Plaintiff were for their mother's upkeep.

After the close of evidence, the parties were directed to make closing submissions in writing. Upon perusal of the pleadings, the evidence tendered by the parties and the written submissions, the following in my view are the issues which arise for determination in this suit:-

- (i) Whether the Defendants acquired the suit property fraudulently from the deceased?
- (ii) Whether the Defendants hold half undivided share of the suit property in trust for the Plaintiff?
- (iii) Whether the Plaintiff is entitled to the reliefs sought in the amended plaint?
- (iv) Who should bear the costs of suit?

The first issue:-

The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23(1) of the Registration of Titles Act provided that;

“The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and

the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

On the evidence before the court, it is clear that the Defendants are the registered proprietors of the suit property. The suit property was transferred to the Defendants by the deceased during his lifetime through an instrument of transfer dated 22nd October 1997. The said transfer was registered on 24th October 1997. The burden was upon the Plaintiff to prove that the suit property was registered in the names of the Defendants fraudulently. The Plaintiff did not come out clearly on this issue of fraud in his pleadings and in the evidence he tendered in court which appeared to be conflicting. In the amended plaint, the Plaintiff alleged that the Defendants fraudulently caused the suit property to be transferred to their names. In his testimony, the Plaintiff stated that the suit property was given by the deceased to the 1st Defendant to enable him obtain a loan to construct a home. The Plaintiff stated as follows in his evidence in chief;

“My father informed me that he had given my brother the title to obtain a loan for construction of his home. The transfer was not intended to be exclusive.”

In this statement, the Plaintiff seems to admit that the suit property was indeed transferred by the deceased to the Defendants. If that is the case, I am unable to see the basis of the Plaintiff’s claim that the transfer of the suit property to the Defendants was carried out fraudulently. The Plaintiff had also claimed in the amended plaint that the suit property was transferred to the Defendants contrary to the terms of the grant of letters of administration in respect of the estate of the deceased which was issued in Kisii High Court Succession Cause No. 85 of 2006. As I have stated earlier, the suit property was transferred by the deceased to the Defendants during his life and was in the name of the Defendants as at the date of his death. The suit property could not therefore have formed part of the deceased’s estate. This was the finding of the High Court in a ruling delivered on 11th July 2013 in the said Succession Cause. Through the orders which were made in the said ruling, the grant of letters of administration which was issued in Kisii High court Succession Cause No. 85 of 2006 on which the Plaintiff based his claim herein was revoked.

In the case of Mutsonga vs. Nyati (1984) KLR 425 it was held that:

“Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required which is something more than a balance of probabilities, and it is a question for the trial judge to answer.”

From my analysis of the Plaintiff’s case as pleaded and the evidence tendered in support thereof, I am not satisfied that the Plaintiff discharged the burden of proof of fraud he alleged against the Defendants. For that reason, my answer to the first issue is in the negative.

The second issue:

In the case of John GitibaBurunavs. Jackson RiobaBuruna (2007) eKLR, the court stated that;

“Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.”

In the case of MwangiMbothu& 9 others vs. GachiraWaitimu& 9 Others (1986) eKLR, the court stated that;

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

The law is now settled that the existence of a trust must be pleaded and proved. The Plaintiff pleaded in

his amended plaint that the Defendants hold a half portion of the suit property in trust for him. The onus was upon the Plaintiff to prove trust. I am not satisfied from the evidence on record that the Defendants hold a half portion of the suit property in trust for the Plaintiff. The evidence on record shows that the deceased transferred the suit property to the Defendants in the year 1997 when he was of sound mind and in good health. When the deceased transferred the suit property to the Defendants, the Plaintiff was an adult and was not incapacitated in any manner. I am in agreement with the contention by the Defendants that if it was the intention of the deceased that the suit property be shared between the 1st Defendant and the Plaintiff equally, the deceased could have carried out that intention during his life time. The Plaintiff led evidence that he was young and had travelled to the U.S.A to pursue further education and that this explains why the suit property was not transferred to him and the 1st Defendant as joint owners by the deceased. In his evidence in chief, the Plaintiff stated that he came back from the U.S.A in the year 2001 and visited the suit property for the first time. At this time, the deceased was still alive. I am of the view that if at all it was the intention of the deceased to share the suit property between the Plaintiff and the 1st Defendant, the presence of the Plaintiff in Kenya presented a good opportunity for him to do so. Since the suit property was in the name of the Defendants as at this time, the deceased could have asked them to transfer a half portion of the said property to the Plaintiff if he had transferred the property to the Defendants on the understanding that they would hold a half portion thereof in trust for the Plaintiff. There is no evidence that the deceased asked the Defendants to transfer a half portion of the suit property to the Plaintiff or that the Plaintiff asked for the said portion of the suit property to be registered in his name. The Plaintiff told the court that the deceased instead asked him to discuss with the 1st Defendant who had already developed a portion of the suit property how he (the Plaintiff) could develop his share of the suit property. I wonder why the Plaintiff who claimed to own a half portion of the suit property which was held in trust for him by the 1st Defendant had to hold a discussion with the 1st Defendant before developing his share of the suit property. The evidence of PW 2, PW 3 and PW 4 did not contain anything new. The common thread running through the evidence of PW 2, PW 3 and PW 4 is that it was the intention of the deceased that the 1st Defendant shares the suit property with the Plaintiff. PW 2, PW 3 and PW 4 did not however tell the court why the deceased did not carry out this intention when he was alive. Like the Plaintiff, PW 2, PW 3 and PW 4 did not place any material before the court on the basis of which the court could imply a trust relationship between the Defendants and the Plaintiff. It is my finding that the Plaintiff failed to establish that the 1st and 2nd Defendants hold a half portion of the suit property in trust for him. My answer to the second issue is also in the negative.

The third issue:

Having already held that the Defendants did not acquire the suit property fraudulently and that they do not hold a portion thereof in trust for the Plaintiff, this issue must similarly be answered in the negative. In view of those earlier findings, there is no basis upon which this court can grant any of the reliefs sought by the Plaintiff in the amended plaint.

The fourth issue:

Costs normally follow the event. The court however has discretion in special cases to depart from that settled rule. In this case, I am of the view that each party should bear its own costs due to the relationship existing between the parties. The Plaintiff and the 1st Defendant are brothers. The 2nd Defendant is the Plaintiff's sister in law. This dispute between them has been raging for the last 5 years. It is not necessary to escalate it any further by imposing a penalty on any of them.

In conclusion, it is my finding that the Plaintiff has not proved his claim against the Defendants to the required standard. The Plaintiff's suit is dismissed accordingly. Each party shall bear its own costs.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Read in open court in the Presence of:

Present in person for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Kajuju Court Assistant