



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 13 of 2007

NJUE NJERU.....APPELLANT

VERSUS

EUGENIO NTHIGA NJERU.....RESPONDENT

J U D G M E N T

The Appellant and the Respondent herein are blood brothers. In **Civil Suit No. EMBU SPM CC. 118/2004** they were plaintiff and defendant respectively. The only other witness to testify in the subordinate court was their sister Angela Gaceke.

After filing the original plaint on 14/5/2004, the Plaintiff/Appellant amended it twice and the further amended plaint dated 28/11/2005 must be the one the court proceeded with during the hearing. The plaint had 2 prayers:-

1. ***Declaration that the defendant holds half portion of land parcel No. Gaturi/Nembure/1059 in trust (sic) of the plaintiff and an order for him to transfer that portion to the plaintiff.***
2. ***That the defendant do transfer parcel of land Gaturi/Nembure/1059 to the plaintiff.***

The 2nd prayer was replicating the second part of prayer one and it ought not to have been made. The defendant in his amended defence denied the contents of the plaint. He also gave notice that he would raise a preliminary objection on the issue of jurisdiction but he did not do so. The issue of jurisdiction has not been raised in the appeal and I will therefore leave it at that.

After the hearing where both parties sister supported the plaintiff, the learned trial magistrate found as a fact that the plaintiff and the defendant had bought the plot in question together as evidenced by the sale agreement. She also believed PW2's evidence. She also found that the plaintiff had all along been keeping the Title Deed to the plot in question. She also found as a fact that consent to sub-divide had been granted by the Land Control Board way back in 1986 but the land was not transferred to the plaintiff then. The consent was granted but the defendant declined to apply for the transfer thereafter saying that it was too expensive.

They nonetheless continued living together but the plaintiff decided to come to court - so he filed this matter.

PW2 his sister confirmed that the 2 parties had bought the land jointly and they are still living thereon each on his portion. The only thing the plaintiff doesn't have is the Title Deed to the portion

According to the defendant however, the land was his alone and he had only allowed the plaintiff's wife to cultivate there so that she could fend for her children. He therefore denied holding the land as a trustee for the plaintiff.

The learned trial magistrate found that the plaintiff had proved on a balance of probabilities that the 2 had bought the land together and that he was entitled to half the portion. Being dissatisfied with that Judgment and subsequent decree, the defendant filed this appeal through P.N. Mugo & Co. Advocates. He proffered 11 grounds of appeal which were all argued together. I do not find it necessary to replicate the same for purposes of this Judgment. The gravaman of the appeal is that there was no contract of sale between the 2 and if there was, then the same could not be enforced because it was time barred.

He also stated that the transaction was null and void for lack of the Land Control Board Consent; and further that the plaintiff's interest was not entered in the register of Title which shows the appellant to be the absolute proprietor of the same. He therefore urged the court to dismiss this appeal. His counsel expounded on the said grounds.

On her part, counsel for the respondent submitted that the claim was based on trust and the limitation of time does not therefore apply. She relied on section 20 (1) of Limitation of Actions Act which provides:-

“ None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action.

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

She submitted that they had only produced the agreement and consent in support of their claim under trust. She asked that this appeal be dismissed as the same lacks merit.

I have carefully considered the evidence before the subordinate court as revisited above. My finding is that indeed the 2 brothers had purchased the land together. The plaintiffs evidence had been corroborated by the evidence of their sister PW2 who did not favour either side. The plaintiff even applied for and obtained the consent to subdivide the land 10 years later. It was not clear why he appeared to have changed his mind later. The plaintiff was not therefore living in that land for the last about 34 years as a trespasser or a licensee. Indeed he was living there as a beneficiary of the trust between himself and the defendant. He had waited for the defendant to realize the trust and give him his entitlement but he refused to do so. I have no reason whatsoever to doubt that the defendant was registered as proprietor of the plot in order to later on give his brother half the share and that is why he voluntarily went to the Land Control Board in 1986 and had the land subdivided into 2 equal portions. If he had wanted to sell the other half to another party as he claimed, then he

would have given the plaintiff notice to vacate the land which he did not.

It is also instructive that the Plaintiff/Respondent was the one who had the custody of the Title Deed and the Land Control Board Consent. He had been entrusted to keep the same because he had an interest in the land and was not just a mere trespasser or licensee. It is indeed inhuman and unconscionable for the Appellant to disown the Trust and seek to divest his brother of his right which he and his family have known as their home for the last 34 years.

I find that the learned trial magistrate did not err at all either in law or in fact in finding that there was a trust in favour of the Plaintiff/Respondent over the plot in question. I make the same finding and uphold her Judgment.

Consequently, I find this appeal devoid of merit and dismiss it with costs to the Respondent.

Delivered, dated and signed at Embu this 13th day of May 2010.

W. KARANJA

JUDGE.