



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 335 OF 2015**

**ABUBAKAR SALIM MACHIRI ..... PLAINTIFF**

**VERSUS**

**MACHIRI Y.S.M MOHAMED .....DEFENDANT**

**J U D G M E N T**

The parties herein are siblings. However, disputes between siblings are not un – common. Those familiar with the Bible know the story of Adam and Cain. The issue is also discussed in great detail in Surat Yusuf Chapter 12 of the Qur'an. Ideally, the first port of call in solving disputes involving family ought to be through arbitration or other fora. Indeed, and to the parties' credit, they first approached their Senior Chief **DAVID S. NAMUTALI (PW 3)** to arbitrate over their dispute but unfortunately, not much was achieved. That recourse was nonetheless commendable because even **Article 45** of the **Constitution** recognizes the family as a fundamental unit of society and a necessary basis of social order and which therefore needs protection. No doubt such protection can be achieved when disputes involving siblings and other family members are resolved in a forum that is not as toxic as the Court. However, now that the parties have ended up in Court, I am obliged to apply the law and resolve their dispute.

By a plaint dated 16<sup>th</sup> December 2013 and filed herein on 17<sup>th</sup> December 2013, **ABUBAKAR SALIM MACHIRI** (the plaintiff herein) sought against his brother **MACHIRI Y.S.M MOHAMMED** (the defendant herein) Judgment as follows: -

**(a) The plaintiff's claim against the defendant is for a declaration that the plaintiff is entitled to 10 acres of land comprised in land parcel NO BUNGOMA/NAITIRI/290 in which the defendant was registered to hold in trust for the plaintiff and order that the defendant be ordered to execute transfer forms to vest title in the names of the plaintiff for 10 acres and in default, the Deputy Registrar be ordered to execute the said forms and/or in the alternative, the defendant be ordered to refund Kshs. 615,000/= being monies paid by the plaintiff towards the purchase of land parcel NO BUNGOMA/NAITIRI/290.**

**(b) Costs of the suit.**

**(c) Interest on (b) at Court rates.**

**(d) Any other suitable and/or alternative relief this Honourable Court may deem fit and just to grant.**

The basis of the plaintiff's claim is that at all material time, the defendant was the registered proprietor of the land parcel **NO BUNGOMA/NAITIRI/290** (hereinafter the suit land) to hold in trust a portion measuring ten (10) acres for the plaintiff. This was pursuant to an agreement in or about 1997 whereby the parties agreed that the plaintiff contributes Kshs. 615,000/= towards the purchase price of Kshs. 1,860,000/= expended in acquiring the suit land after which he would be entitled to 10 acres thereof. Upon purchase of the suit land, the defendant demarcated a portion measuring 10 acres on which the plaintiff erected a semi-permanent house, store, latrine and kitchen. The plaintiff utilized the said portion to grow maize and other crops between the year 2002 to 2005 when, due to financial commitments, he left it fallow. However, when the plaintiff went to plough his portion of 10 acres in 2013 the defendant refused and proceeded to plough it himself and planted maize thereon thus necessitating this suit.

Together with the plaint, the plaintiff filed his statement and those of his witness **MACHIRI JUMA MBULE (PW 2)**, **DAVID S. N. NAMUTALI (PW 3)** and **HARRISON ATONYA (PW 4)**. The plaintiff also filed his list of documents also dated 16<sup>th</sup> December 2013.

In his statement dated 16<sup>th</sup> December 2013, the plaintiff states that in 1997, he and the defendant jointly purchased the suit land at a consideration of Kshs. 1,860,000/= from **FRED W. WAFULA**. However, since the defendant could only be entitled to a maximum loan of Kshs. 1,300,000/= from his employer, the parties agreed that the plaintiff contributes Kshs. 615,000/= which would entitle him to 10 acres

out of the suit land. In 2004, the plaintiff paid the then outstanding balance of Kshs. 200,000/= and the defendant obtained the title to the suit land and allocated the plaintiff 10 acres where he put up a semi-permanent house, store, kitchen and pit latrine. The plaintiff also cultivated his portion for 3 years and following arbitration proceedings conducted by their Chief, the defendant agreed to transfer 10 acres to the plaintiff. However, in 2013, the defendant denied him access to his portion of 10 acres.

**MACHIRI JUMA MBULE (PW 2)** is an elder brother to the parties. In his statement also dated 16<sup>th</sup> December 2013, he says that the plaintiff informed him that the defendant had proposed to him (plaintiff) that the two put their resources together for purposes of purchasing the suit land after which the plaintiff would take 10 acres and the defendant 21 acres. The defendant procured a Bank loan to enable him purchase the 21 acres. The defendant then allocated the plaintiff 10 acres on which the plaintiff erected a semi-permanent house, latrine and store and started utilizing the said portion. However, in 2012 the witness went to visit the defendant and noticed that the structures put up by the plaintiff had been demolished and when he enquired, the defendant informed him that he had demolished the plaintiff's structures because he wanted to plough the entire land. The plaintiff later complained to him that the defendant had stopped him from ploughing the suit land. A meeting was called to resolve the dispute but the parties could not agree since the defendant was claiming exorbitant interest from the plaintiff. The witness added that he was aware that the defendant had allocated 10 acres to the plaintiff.

**DAVID S. N. NAMUTALI (PW 3)** was a Senior Chief in **KIMILILI RURAL LOCATION** in 2002 when the plaintiff requested him to arbitrate over a land dispute with the defendant. The witness states in his witness statement dated 14<sup>th</sup> September 2013 that he summoned the defendant and after deliberations over the matter, the defendant agreed to transfer 10 acres out of the suit land to the plaintiff. The witness subsequently wrote a letter to **STANBIC BANK LTD** on 11<sup>th</sup> January 2002 informing them of the agreement and the defendant demarcated a portion measuring 10 acres on which the plaintiff erected a semi-permanent structure. Later however, the witness was informed that the defendant had refused to transfer the 10 acres to the plaintiff and had demolished the structures thereon.

**HARRISON ATONYA (PW 4)** is a retired banker who previously worked with the defendant as **STANBIC BANK** in Nairobi.

In his statement dated 14<sup>th</sup> September 2013, he narrates how the defendant informed him that he was desirous of purchasing land from one **FREDERICK W. WAFULA** and wanted to secure a loan for the 31.1 acres which the vendor was selling at Kshs. 60,000/= per acre. The witness who was then the Accounts Manager in charge of staff loans advised the defendant to get a third party to purchase the 10 acres since his salary could only enable him to purchase 21 acres. Meanwhile, the Bank approved the defendant's loan for only 21 acres and later, the defendant informed him that his brother the plaintiff would purchase the extra 10 acres. Before the defendant finished repaying the loan, he lost his job and so the repayment became a challenge. When the Bank threatened to sell the securities charged, the defendant paid part of the loan and the plaintiff paid Kshs. 200,000/= after which the title to the suit land was released to the defendant. In 2004, the plaintiff informed him that the land had been demarcated and that he was ploughing his 10 acres on which he had also erected a structure. Later in 2012, the plaintiff informed him that the defendant had demolished the structure and ploughed the whole land. The witness tried to resolve the dispute between the parties amicably but with no success.

By his defence filed herein on 6<sup>th</sup> February 2014, the defendant pleaded that whereas this Court has the requisite jurisdiction to handle land disputes, it has no jurisdiction to handle this suit as the same has not been properly instituted. The defendant denied that there was any agreement between him and the plaintiff to purchase land jointly or that the defendant had agreed to transfer 10 acres thereof to the plaintiff. He denied that he holds the suit land in trust for the plaintiff or had agreed to transfer 10 acres to him. He pleaded further that the plaintiff's claim is not only bad in law but is also time barred and a Preliminary Objection would be raised to have it struck out and that no money was even paid by the plaintiff to off-set the loan and that if any such money was paid into his account, then it was paid without his consent. He pleaded further that the parties jointly purchased a motor vehicle **NO KZK 092** Peugeot at Kshs. 380,500/= of which the defendant raised Kshs. 180,500/= and the plaintiff Kshs. 200,000/= which vehicle was later surrendered to the plaintiff who owes the defendant Kshs. 180,500/=. That the defendant paid a sum of Kshs. 120,000/= as insurance and the plaintiff therefore owes him a sum of Kshs. 300,000/=.

Together with the defence, the defendant also filed a witness statement and list of documents both dated 5<sup>th</sup> February 2014. He also filed a further list of documents dated 23<sup>rd</sup> May 2016.

In his statement, he states that in 1997, he purchased the suit land measuring 31.1 acres from one **FRED WAFULA** at a consideration of Kshs. 1,860,000/= being Kshs. 60,000/= per acre. That he obtained a loan of Kshs. 1,300,000 from **STANBIC BANK** and the balance of Kshs. 560,000/= was paid in instalments and the final payment of Kshs. 120,000/= was paid through a banker's cheque which the vendor acknowledged. He added that the plaintiff never paid Kshs. 560,000/= as alleged but instead went ahead to deposit Kshs. 270,000/= and Kshs. 30,000/= in the defendant's account which the defendant offset by giving him the vehicle registration **NO KZK 092** and the log book which he is still using. He denied that the plaintiff assisted him in purchasing the suit land adding that he serviced the loan by himself until 2004 when the plaintiff paid the out – standing loan of Kshs. 200,000/= without his knowledge. He however denied having agreed to give the plaintiff any portion of the suit land.

In a reply to defence filed on 27<sup>th</sup> March 2014, the plaintiff reiterated the contents of his plaint and joined issues with the defence. He pleaded that the suit was filed with leave of Court and is properly in this Court. He reiterated that the defendant was aware that the suit land was being bought jointly adding that the purchase of the vehicle **NO KZK 092** Peugeot was a totally different transaction not connected with the issues herein.

The hearing commenced before **MUKUNYA J** on 14<sup>th</sup> December 2017 when the plaintiff adopted his witness statement. He added that the defendant approached him with a copy of the title deed to the suit land in the names of **FRED WAFULA** measuring 31 acres and after a long discussion, they agreed to purchase the same but plaintiff said he could only afford 10 acres. Plaintiff applied for a loan of Kshs. 270,000/= on 6<sup>th</sup> February 1997 which he deposited in the defendant's account vide Banker's Cheque No 186090. He further paid Kshs. 30,000/= in defendant's account through a personal cheque. He subsequently made other payments through personal cheques and eventually made the last payment of Kshs. 200,000/= on 30<sup>th</sup> January 2004 through Co-operative Bank Cheque No 048446 after which the defendant's

employer gave him a letter to collect the title. The defendant thereafter gave him 10 acres out of the suit land which he utilized for 3 years and put up semi-permanent structures which the defendant however later demolished in 2013. Between 2013 and 2015, the parties had several discussions to try and settle the dispute but the defendant refused to give him his 10 acres. So the plaintiff first moved to Court seeking leave to file this suit. He told the Court that the transaction relating to the vehicle was a completely different matter and which was completed in 1995. He therefore asked the Court to award him the 10 acres or the contribution he made so that he could buy land elsewhere. He also produced as his documentary evidence the list of documents filed herein.

The plaintiff called as his witness his elder brother **MACHIRI JUMA MBULE (PW 2)**, their Senior Chief **DAVID S. N. NAMUTALI (PW 3)** and **HARRISON ATONYA (PW 4)** a retired banker and colleague of the defendant at **STANBIC BANK** Nairobi. They all adopted as their evidence their respective statements whose contents I have already summarized above.

The defendant was the only witness in support of his case. He too adopted as his evidence the statement filed herein and also produced the list of documents dated 5<sup>th</sup> February 2014 and the further list of documents dated 23<sup>rd</sup> May 2016 as his documentary evidence.

Submissions were thereafter filed both by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff and by **MR ETOLE** instructed by the firm of **ETOLE & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by the parties as well as the submissions by Counsel.

The starting point must be whether this suit is infact statute barred. In paragraphs 8 and 9 of the defence, the defendant has pleaded that the plaintiff's claim is time barred and a Preliminary Objection would be taken to have the suit struck out with costs. The plaintiff's reply was that leave was obtained to file the suit out of time. No Preliminary Objection was raised prior to the commencement of the suit. And although the leave granted to file the suit out of time was among the documents listed as No 8 of the plaintiff's list of documents dated 16<sup>th</sup> December 2013, I could not trace any such order in the file.

That notwithstanding, it is clear from the plaintiff's suit that his case is premised on a trust. This is how he has pleaded in paragraph 10 thereof: -

**10: "The plaintiff's claim against the defendant is for a declaration that the plaintiff is entitled to 10 acres of land comprised in land parcel NO BUNGOMA/NAITIRI/290 in which the defendant was registered to hold in trust for the plaintiff and order that the defendant be ordered to execute transfer forms to vest title in the names of the plaintiff for 10 acres and in default, the Deputy Registrar be ordered to execute the said forms and/or in the alternative, the defendant be ordered to refund Kshs. 615,000/= being monies paid by the plaintiff towards the purchase of land parcel NO BUNGOMA/NAITIRI/290."** Emphasis added.

A claim based on trust is not barred by the provisions of the Limitation of Actions Act. In **STEPHENS & 6 OTHERS .V. STEPHENS & ANOTHER 1987 eKLR**, the Court of Appeal stated as follows: -

**"The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (see section 19(1) of the Limitation Act (1993). The Parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (Cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (Cap 22) provides that: -**

**"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:**

**"to recover from the trustee, trust property or the proceeds thereof in possession of the trustee or previously recovered by the trustee and converted to his use."**

The plaintiff having hinged his claim on trust, it cannot be defeated by a plea of limitation. Therefore, even if any leave was sought and obtained before filing this suit, the same was clearly superfluous. The defendant's assertion that this suit is time barred is not well founded and must be dismissed.

Having resolved the issue of limitation, this Court must now consider whether the plaintiff's claim is merited.

The plaintiff's claim to a portion measuring 10 acres out of the suit land is premised on the assertion that he contributed towards the purchase of the suit land, an allegation which the defendant has flatly dismissed stating that there was no such contribution made by the plaintiff and in any event, there was no agreement to purchase the suit land jointly. The parties, as I have stated above, are siblings and it is clear that whatever arrangements they had between them were verbal. It is common ground that the purchase price for the suit land was Kshs. 1,860,000/=. A copy of the title deed shows that it measures 12.6 Hectares which translates to 31.12 Acres (12.6 x 2.47). The defendant admitted in cross – examination that his employer **STANBIC BANK** could only advance him Kshs. 1,300,000/= and so he had to raise the balance of Kshs. 560,000/=. When he was questioned as to how he managed to raise the balance of Kshs. 560,000/=: he was evasive. In his witness statement dated 5<sup>th</sup> February 2014 he states in paragraph 4 as follows: -

**"The remaining balance of Kshs. 560,000/= was paid vide instalments and that I paid the final Kshs. 120,000/= vide Stanbic**

**Banker's Cheque NO 0195000950402 and the vendor acknowledged the same"**

He then goes on in paragraph 5 of the said statement to claim that the plaintiff paid a sum of Kshs. 270,000/= and Kshs. 30,000/= in his (defendant's) account which was off – set by giving the plaintiff the motor vehicle **NO KZK 092** and log book an assertion that the plaintiff denied and stated that the transaction regarding the said motor vehicle was infact completed way back in 1995 and had nothing to do with the arrangement regarding the suit land. In his oral testimony, the defendant was emphatic that that not only was the plaintiff not entitled to 10 acres out of the suit land but he denied that the plaintiff paid Kshs. 560,000/= towards the purchase price. This is what he said when the was re – examined by his Counsel **MR ETOLE**: -

***“It is not true that the plaintiff paid Kshs. 560,000/= towards the purchase of the land. It is not true that I agreed to give him 10 acres of the land.”***

However, when he was cross – examined by Counsel for the plaintiff **MR MURUNGA**, he said: -

***“So the plaintiff deposited a sum of Kshs. 270,000/= in my account vide cheque dated 4<sup>th</sup> February 1997. I can see the plaintiff's list of documents dated 28<sup>th</sup> June 2017 confirms that the plaintiff deposited Kshs. 300,000/= in my account. That is at page 20 of the plaintiff's list of documents. It is true that the plaintiff also paid Kshs. 200,000 into my account. So I acknowledge that the plaintiff paid me Kshs. 500,000 but again he took it back. I paid him the money back by cheque. It was several cheques. I don't have copies of the cheques.”***

The contradictions in the defendant's testimony is clear proof that he is a dishonest witness with no respect for the truth. It is not possible that the plaintiff would deposit money in his (defendant's) account then reclaim it again. Further, the plaintiff could not be depositing money in the said account unless he had been instructed to do so by the defendant. And the only plausible explanation for that is because the plaintiff was contributing towards the purchase of the suit land. And in the penultimate paragraph of the same statement, the defendant says: -

***“Furthermore, Abubakar Salim Machiri did not help me whatsoever in purchase of the land and I was servicing the loan until the year 2004 whereby he went ahead to pay for me the outstanding balance of the loan in the sum of Kshs. 200,000 without my knowledge.”***

Again, it is inconceivable that the plaintiff, without any prompting, walked to the defendant's account and deposited money without the defendant's knowledge. This Court is persuaded that these payments were being made in furtherance of the parties' discussion when the defendant went to the plaintiff's house and dangled the title deed to the suit land with a proposal that they purchase it jointly whereupon the plaintiff agreed but stated that he could only purchase 10 acres.

Counsel for the defendant has submitted that since the defendant had not authorized the plaintiff to make any payments into his account, both he and his witness **HARRISON ATONYA (PW 4)** were lying. Counsel has made the following submission: -

***“Further, MR ATONYA alleged that the plaintiff paid the sum of Kshs. 200,000/= into the defendant's loan account. It is strange how the plaintiff who was not the Loan Account Holder got the details of the defendant's loan Account as the defendant has denied authorizing him to make that payment. In short, Mr Atonya's evidence cannot be believed and falls short of proving that the plaintiff paid Kshs. 615,000 towards the purchase of the suit property.”***

The truth of the matter is that it cannot be strange that the plaintiff had the details of the defendant's loan account. He had those bank details because they were given to him by the defendant to facilitate the repayment of the loan as part of his contribution towards the purchase of the suit land. This was confirmed by the plaintiff when he gave his oral evidence before **MUKUNYA J** on 14<sup>th</sup> December 2017. The Judge recorded him as saying as follows: -

***“On 6.2.1997, I went and applied for a loan of 270,000. I had Kshs. 30,000 in my account. I took a bankers cheque for 270,000 in his account (cheque no 186090). I deposited it on his account on 5.2.97 (he had given the same to me earlier).”***

Clearly, it is the defendant, rather than the plaintiff and **MR ATONYA**, whose ***“evidence cannot be believed.”*** The plaintiff could only have made payments into the defendant's account with the latter's prompting and for a specific purpose. And as it must now be clear, that purpose was for the plaintiff to have a share in the suit land.

It is also instructive to note that the plaintiff's witnesses including the parties brother **MACHIRI JUMA MBULE (PW 2)** and the defendant's former colleague at **STANBIC BANK DAVID S. N. NAMUTALI (PW 4)** corroborated his testimony that the defendant approached him with the proposal to purchase the suit land and later allocated him 10 acres. It has not been suggested that those two witnesses ganged up to give false evidence against the defendant. They did not strike me as false witnesses. They confirmed that indeed the defendant allowed the plaintiff to put up a semi-permanent house and other structures on the 10 acres before he demolished them and ploughed the whole suit land. The defendant admitted in his oral evidence that indeed the plaintiff ploughed the 10 acres between 2000 to 2001. His explanation for that is that he wanted the plaintiff to raise money to buy his own land. The plaintiff's evidence however was that he ploughed the 10 acres for 3 years from 2002 to 2005 and put up semi-permanent structures but due to other commitments, he stopped using it in 2006. When he returned to the land in 2013, the defendant refused to allow him to utilize the land. It cannot be correct, as the defendant would like this Court to believe, that the defendant magnanimously allowed the plaintiff to plough the 10 acres and put up semi structures between 2000 to 2001 for the sole purpose of raising funds to purchase land elsewhere. The plaintiff could not have raised such a substantial sum of money towards the purchase of the suit land and at the same time, only plough it for one season solely for purposes of raising money to purchase land elsewhere. It can only be that the defendant allocated the plaintiff the 10 acres being his share of the suit land

pursuant to their agreement but later reneged out of their deal for reasons best known to himself.

There is also evidence from **MACHIRI JUMA MBULE (PW 2)** and **DAVID S. N. NAMUTALI (PW 3)** that they arbitrated over the dispute involving the parties. **DAVID S. N. NAMUTALI (PW 3)** that they arbitrated over the dispute involving the parties. **DAVID S. N. NAMUTALI (PW 3)** who was the parties Chief added that following a meeting between the parties, the defendant agreed to transfer 10 acres to the plaintiff. Following that undertaking by the defendant, the witness wrote a letter to the Manager Stanbic Bank on 11<sup>th</sup> January 2002. The said letter is among the documents produced by the plaintiff and due to it's relevance, I shall reproduce it: -

***“OFFICE OF THE CHIEF***

***KIMILILI LOCATION***

***P O BOX 55***

***KIMILILI***

***11<sup>TH</sup> JAN 2002***

***THE MANAGE***

***STANBIC BANK LTD***

***P O BOX 30550***

***NAIROBI***

***Dear Sir***

***DISPUTE CASE BETWEEN ABUBAKARI SALIM MACHIRI .V. MACHIRI \_ Y S M MOHAMED (LAND ARBITRATION).***

***This is to certify that following to the above mentioned case which was brought before me and my panel of elders, I hereby write to confirm that the two named above who are brothers bought land jointly.***

***I further confirm that a Mr Machiri Y S M Mohammed has agreed before me to transfer 10 (ten) acres from the total title deed which he confirmed to be under your custody to the complainant a Mr Abubakar.***

***Kindly accord the bearer get his share under his names to restore peace and the same is appreciated in advance.***

***Thank you.***

***Yours faithfully***

***DAVID S. N. NAMUTALI***

***CHIEF (KIMILILI LOCATION).***

***CC 1. District Officer***

***TONGAREN DIVISION***

***2. Machiri Y S M Mohamed***

***C/O Kimilili Old Market.***

***3. Abukakar S. Machiri***

***C/O Kimilili Old Market.”***

When the contents of that letter were put to the defendant by **MR MURUNGA**, he denied having agreed to transfer 10 acres to the plaintiff. This is what he said in cross – examination by **MR MURUNGA**: -

***“I can see the letter dated 11<sup>th</sup> January 2002 which is at page 21 of the plaintiff’s documents. It is the letter from the Chief saying that I undertook to transfer 10 acres to the plaintiff. That is not true.”***

This letter was not only addressed to the defendant’s employer who was holding the title deed to the suit land, but it was also copied to both him and the plaintiff. The issue being raised therein touched on the suit land which the defendant claims that the plaintiff is not entitled to a share. It is therefore strange that the defendant did not write back to his employer rebutting the contents thereof. It is highly unlikely that **DAVID S. N. NAMUTALI (PW 3)**, and who was the Chief to the parties herein, would have taken upon himself to write such a letter to the defendant’s employer and also copy it to his own boss the District Officer unless the contents thereof were correct. And the fact that the defendant maintained a studious silence in the face of such a profound statement with regard to the suit land can only lead to the inevitable conclusion that he acknowledged the plaintiff’s right to the 10 acres. Nothing would have been easier than writing back to his employer rebutting the contents of that letter or, better still, demanding the witness to withdraw the said letter as being a misrepresentation of the true position. The witness did not strike me as a dishonest person and he remained firm in cross – examination by **MR ETOLE** and said: -

***“I wrote the letter of 11<sup>th</sup> January 2002 at the request of all the parties herein. I could not have written the letter if they had not agreed. I gave a copy of the letter to the District Officer Tongaren who is the Chair of the Land Control Board. Thereafter, the plaintiff came back to complain that the defendant had demolished his house on the land in dispute.”***

I did not hear the defendant cast any aspersions on the integrity of his Chief **DAVID S. N. NAMUTALI (PW 3)**. For my part, I have no reason to doubt that he was an honest witness and the contents of his letter dated 11<sup>th</sup> January 2002 is a true reflection of what transpired when he met the parties herein to arbitrate over their dispute involving the suit land.

I am therefore satisfied from the totality of the evidence herein that the plaintiff contributed towards the purchase of the suit land and is entitled to 10 acres thereof as sought in the plaint.

It is the plaintiff’s claim that the defendant holds the suit land in trust for him and specifically 10 acres thereof. The onus is on the party alleging a trust to lead evidence to prove the existence of such trust. In **PETER NDUNGU NJENGA .V. SOPHIA WATIRI NDUNGU 200 eKLR**, the Court of Appeal held that: -

***“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. 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 a trust must be clearly determined before trust is implied.”***

In this case, the parties are siblings. They did not reduce their agreement in writing. But there is evidence which this Court has already found to be cogent and corroborated showing that not only did the plaintiff contribute towards the acquisition of the land in dispute, but he also utilized part of it for a while before the defendant repossessed it having previously acknowledged that the plaintiff was entitled to a portion measuring 10 acres. That is evidence upon which this Court can make a finding that a constructive trust exists, In **TWALIB HATAYAN TWALIB HATAYAN & ANOTHER .V. SAID SAGGAR AHMED AL HEIDY 2015 eKLR**, the Court of Appeal while considering a constructive trust said: -

***“If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.”***

The moment that the defendant approached the plaintiff with the proposal to jointly purchase the suit land from **FRED WAFULA** and even showed him a copy of the title deed and gave the plaintiff details of his bank account where the plaintiff deposited money towards the acquisition of the suit land, he became a trustee holding the title thereto in trust for the plaintiff. A Court of equity will not allow him to resile from that arrangement and must stop him in his tracks, which I now do, by imposing a constructive trust. Failure to do so would amount to a travesty of justice and allow the defendant to un – justly enrich himself to the detriment of the plaintiff.

The plaintiff has urged this Court to grant either of the following remedies: -

- (a) That the defendant transfers 10 acres out of the suit land to him; or,**
- (b) That the defendant be ordered to refund to him the sum of Kshs. 615,000/= being his contribution.**

When the parties discussed the proposal to have a joint venture in purchasing the suit land, it was with the intention that the plaintiff would get 10 acres out of the 31.1 acres. This is what the plaintiff told the Court when he testified on 14<sup>th</sup> December 2017: -

***“the title deed was in the name of BUNGOMA/NAITIRI/290 in the name of FRED E. WAFULA. The land was 31 acres. I told him I could only purchase 10 acres @ 60,000 per acre”***

Therefore, the deal that the plaintiff was getting himself into was to have a share of the suit land and specifically 10 acres. The deal was not for the defendant to utilize his contribution towards the purchase of the suit land and refund it later. It was not a loan. These transactions took place over 20 years ago and bearing in mind how quickly the value of land appreciates, it is unlikely that the plaintiff can get the same land for Kshs. 615,000/=. The course of justice will best be served if this Court directs that the defendant transfers 10 acres out of the suit land to the plaintiff because that is what the plaintiff bargained for when he joined the venture.

On the issue of costs, they follow the event unless the Court decides otherwise. They are however a discretion of the Court. The parties herein are family being siblings. No doubt the defendant was attempting to steal a march over his brother. Whereas I am tempted to order him to meet the plaintiff's costs as an expression of this Court's displeasure at his conduct and also as a matter of cause, I will nonetheless direct that each party meets their own costs in order not to antagonize them any further.

In so doing, I take cognizance of the fact that following the orders which I am about to make in this Judgment, the parties may very well remain neighbours and therefore need to cultivate love for each other. I will therefore leave them with the gospel of **MATHEWS 22: 37 – 39**:

***“Jesus said unto him, thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, thou shalt love thy neighbor as thyself.”***

The names of the parties suggest that they may be Muslims in which case, I shall remind them of what the Prophet Muhammad said: -

***“None of you has faith until you love for your brother what you love for yourself. None of you has faith until you love for your neighbour what you love for yourself.”***

Ultimately therefore, and having considered all the evidence herein, there shall be Judgment for the plaintiff in the following terms: -

- 1. A declaration that the defendant holds 10 acres out of the land parcel NO BUNGOMA/NAITIRI/290 in trust for the plaintiff.**
- 2. An order that the trust is determined and the defendant shall, within 30 days from the date of this Judgment, execute all the necessary documents to enable the LAND REGISTRAR and SURVEYOR BUNGOMA to demarcate and issue a title document in the names of the plaintiff for 10 acres out of the land parcel NO BUNGOMA/NAITIRI/290.**
- 3. In default, the DEPUTY REGISTRAR of this Court shall execute all such documents on behalf of the defendant.**
- 4. Each party shall bear their own costs.**

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**4<sup>th</sup> February 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 4<sup>th</sup> day of February 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**4<sup>th</sup> February 2021.**