



**Shah & another v Shah & another (Environmental and Land Originating
Summons E006 of 2023) [2024] KEELC 1754 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023
LN MBUGUA, J
APRIL 9, 2024**

BETWEEN

DINESH KHETSHI SHAH 1ST APPLICANT

MINAKUMARI DINESH SHAH 2ND APPLICANT

AND

SAILESH KHETSHI SHAH 1ST RESPONDENT

VANITA SAILESH SHAH 2ND RESPONDENT

JUDGMENT

1. This suit was filed by way of an Originating summons dated 19.4.2023, where the applicants seek the following orders;
 - a. That the registration of the Respondents as joint tenants of all that property known as LR No. 209/8907 as trustees of the Applicants be terminated.
 - b. That the Respondents be ordered to execute transfer of documents of the title to the said Land Reference No. 209/8907 in favour of the Applicants in consideration of love and affection within 30 days of this order failing which the Deputy Registrar of the Court do execute the said transfer documents.
 - c. That costs of the application be borne by the Respondents.
2. The respondents were served by way of substituted service but no response was filed.
3. The matter was heard through affidavit evidence. The 1st Applicant swore a supporting affidavit dated 20.4.2023 where he introduces the 2nd applicant as his wife, while the respondents are his brother and his wife respectively.



4. That sometime in year 1978, he purchased a 4 bedroom flat on Ndovu Ahmed Lane off 1st Parklands Avenue from Classic Houses Development Limited being LR No. 209/8907 for the sum of ksh.750,000/=. However, since he was residing in the United Kingdom together with his family, he nominated his brother and his wife as trustees for the purposes of holding the title to the suit parcel which title was duly issued in their names in 1982.
5. That in March 1982, he came back to Kenya and took possession of the said property where he resides with his family, and has been paying rent and rates.
6. That in April 1982, the Respondents relocated from Kenya to United Kingdom to date and they have been completely unresponsive of his request to transfer the suit property to him, that is why the applicants seek to terminate the trust and have the property registered in their names.
7. The question falling for determination is whether the respondents hold the suit parcel LR No. 209/8907 in trust for the applicants, and whether the said trust should be terminated so as to have the land registered in the names of the applicants.
8. It is trite law that in civil cases, he who alleges bears the burden of proof as stipulated under Section 107-112 of the Evidence Act. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
9. It therefore behooves the applicants to prove that indeed the respondents held the suit land in trust for the said applicants.
10. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, it was held that:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:- “The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
11. The 1st Applicant claimed that he purchased the suit parcel in 1978 and paid the purchase price. There is however no evidence indicating that indeed the 1st applicant purchased the said land. There is no evidence of payments, nor particulars of the vendor, and the purchase agreement thereof.
12. Further, the Applicants did not demonstrate how the alleged trust was conveyed to the Respondents. There was no Power of Attorney. There was no indication that the alleged trust granted in 1978 would operate until 1982 when the Applicants allegedly returned to Kenya and there is no evidence as to why the Applicants seek to terminate this trust 40 years after allegedly granting the said trust upon the respondents.
13. The title document does not in any way indicate that a trust thereof was registered in any of the entries in the title in favour of the applicants.



14. Assuming that the 1st applicant and 1st respondent were brothers who held each other in trust, love and affection, the Applicant does not even have his brother's contact, nor does he indicate how the two families who trusted each other changed residence from United Kingdom to Kenya and vice versa within a span of one month in 1982.
15. The most glaring contradiction is the evidence that even after the Applicants allegedly returned to Kenya in 1982, the Respondents continued to be in control of the suit property. The copy of title indicates that there were several transactions on the title after the year 1982 where the property was charged to Pan Africa Bank Limited and further charged to Akiba bank with final discharge taking place after year 2013! The applicants are mute in relation to these numerous transactions in the title. The aforementioned transactions are certainly not in tandem with the applicatin's claim that they took over the suit property in March 1982.
16. In the end, I find that Applicants failed to demonstrate the existence of a trust between them and the Respondents. As such, their claim fails and the suit is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Munene holding brief for Koech for Plaintiff

Court assistant: Eddel

