



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 294 OF 2016

NISHIT BHIKHUBHAI SHAH..... PLAINTIFF

VERSUS

KIRIT BABULAL BAKRANIA..... DEFENDANT

CHAMPUBEN W/O GOVINDJI

MULJI DODHIA.....3RD PARTY

JUDGEMENT

The dispute before the court concerns the ownership of all that parcel of land known as L.R No. 209/103/7 situated on Ndovu Ahmed Lane, Parklands, Nairobi (hereinafter referred to as “the suit property”). The plaintiff brought this suit against the defendant by way of a plaint dated 18th July, 2001 which was subsequently amended on 12th September, 2001. In his amended plaint dated 12th September, 2001, the plaintiff sought the following reliefs against the defendant;

- a) Vacant possession of the suit property.
- b) Damages for trespass at the rate of Kshs. 1,800/- from 8th December, 1995 until possession is delivered up.
- c) Costs of the suit.
- d) Interest on (b) and (c) above at court rate.
- e) Any other or further relief that the court may deem fit to grant.

The plaintiff averred that he was at all material times a joint co-owner of the suit property having purchased the same together with his father one, BHIKHUBHAI HIRJI SHAH (hereinafter referred to only as “BHIKHUBHAI”) from the 3rd party at a consideration of Kshs. 2,000,000/- on or around 5th December 1995. The plaintiff averred that prior to the sale of the suit property to them, the 3rd party had permitted the defendant’s father one, BABULAL TRIKAM BAKRANIA (hereinafter referred to only as “BABUBAL”) to occupy the suit property as a licensee. The plaintiff averred that following the purchase of the suit property, the plaintiff wrote to the defendant through his advocates on or around 8th December, 1995 demanding vacant possession. The plaintiff averred that the defendant refused, failed and/or neglected to deliver vacant possession even after being served with a notice to sue.

The plaintiff averred that by reason of the foregoing, the plaintiff had been deprived of the use and enjoyment of the suit property and had thereby suffered loss and damage. The plaintiff averred that the fair letting value of the suit property was Kshs. 1,800/- per day. The plaintiff averred that the defendant had sued the 3rd party in Nairobi HC.Misc.Civil Suit No. 1425 of 1996(O.S) claiming the suit property by adverse possession but the suit was dismissed.

The defendant filed a defence and counter-claim on 5th September, 2001 which was amended on 26th October, 2016. In his amended defence, the defendant denied the plaintiff’s claim in its entirety. The defendant denied that his father BABULAL occupied the suit property as a licensee. The defendant averred that the plaintiff was not entitled to possession of the suit property. In his counter-claim, the defendant averred that the suit property was purchased on behalf of and for the use of BABULAL, deceased by the 3rd party’s husband, GOVINDJI MULJI DODHIA, (hereinafter referred to only as “DODHIA”) in or around 1967. The defendant averred that DODHIA and BABULAL had an understanding when the property was purchased that the same would be held for and on behalf of BABULAL who would pay for the same through his services to DODHIA. The defendant averred that BABULAL and DODHIA were in an employee and employer relationship and that the scope and particulars of their understanding in relation to the suit property was within the knowledge of the plaintiff and the 3rd party.

The defendant averred that the arrangement between BABULAL and DODHIA was that the suit property would be purchased by DODHIA and held in the name of DODHIA's wife, CHAMPUBEN, the 3rd party herein until BABULAL had reimbursed the purchase price to DODHIA through the services that he was rendering to DODHIA the cost of which was either retained or deducted by DODHIA to recover the said purchase price. The defendant averred that it was agreed between BABULAL and DODHIA that after DODHIA had received the full purchase price that he used to acquire the suit property for and on behalf of BABULAL in the manner aforesaid, DODHIA would cause the suit property to be transferred by the 3rd party to BABULAL's son, the defendant. The defendant averred that BABULAL and his family occupied the suit property on the foregoing understanding and not as the 3rd party's licensees as claimed by the plaintiff.

The defendant averred that BABULAL used the suit property as a workshop when he took possession thereof in 1968 until 1973 when he started residing thereon. The defendant averred that the plaintiff's father and alleged co-proprietor of the suit property, BHIKHUBHAI who was also an employee of DODHIA was allowed to occupy a portion of the suit property around 1972. The defendant averred that the plaintiff moved into the suit property with his father and that at all material times, the plaintiff's family was residing on the upper floor of the one storey building on the suit property while the defendant and his family were staying on the ground floor.

The defendant averred that overtime, BABULAL reimbursed to DODHIA the full purchase price of the suit property in cash and through services that he rendered thereby becoming entitled to have the suit property transferred to him or to his order. The defendant averred that DODHIA died in June, 1993 before causing the suit property to be transferred to the defendant as had been agreed between him and BABULAL. The defendant averred that the agreement between BABULAL and DODHIA was known to and accepted by the 3rd party in whose name the property was registered. The defendant averred that the 3rd party did not give any consideration for the suit property.

The defendant averred that in or around 1995 after the death of DODHIA, the 3rd party with the full knowledge of the agreement between BABULAL and DODHIA wrongfully and fraudulently transferred the suit property to the plaintiff and his father, BHIKHUBHAI. The defendant averred that the said transfer was fraudulent and was designed to defeat the defendant's interest in the suit property. The defendant averred that the plaintiff and BHIKHUBHAI purchased the suit property with the full knowledge of the defendant's interest in the suit property in furtherance of a conspiracy with the 3rd party to deprive the defendant and other heirs of BABULAL of their rights and interest in the suit property.

The defendant sought judgment against the plaintiff by way of a counter-claim for;

- a) A declaration that the suit property is held by the plaintiff and BHIKHUBHAI as trustees for the defendant.
- b) An order for the transfer and registration of the suit property in the name of the defendant.
- c) An order for account to be taken of receipts and income derived from the suit property from the time the same was transferred to the plaintiff and BHIKHUBHAI up to the time of re-transfer and delivery of possession to the defendant; and any amounts found to be due, be paid to the defendant by the plaintiff and the 3rd party jointly and severally.
- d) Costs of the counter-claim to be paid by the plaintiff and the 3rd party jointly and severally.
- e) Any other relief the court deems fit and just to grant.

On 26th April, 2005, the defendant obtained leave to serve a third party notice upon the 3rd party. The defendant filed the third party notice on 5th May, 2005 and served the same upon the 3rd party on 8th December, 2005. In the third party notice, the defendant claimed full indemnity from the 3rd party against the plaintiff's claim. The indemnity was sought on the grounds that; the 3rd party held the suit property on the basis of an agreement and trust arrangement between BABULAL and DODHIA in favour of the defendant and that the 3rd party in breach of the said agreement and trust arrangement caused the suit property that was held in her name to be wrongfully transferred to the plaintiff and BHIKHUBHAI on or around 5th December, 1995.

The defendant averred in the alternative that in furtherance of a conspiracy with the plaintiff to deprive the defendant of his rights and interest over the suit property, the 3rd party fraudulently transferred the property to the plaintiff and BHIKHUBHAI on or around 5th December, 1995. The 3rd party did not enter appearance.

At the trial, the plaintiff gave evidence in support of his case and did not call any witness. The plaintiff adopted his witness statement dated 24th February, 2012 as part of his evidence in chief and produced as a bundle the documents that were attached to his list of documents dated 29th May, 2006 as PExh.1. In his brief oral testimony, the plaintiff told the court that he purchased the suit property together with his father on 5th December, 1995. He told the court that the suit property was registered in his name and the name of his father, BHIKHUBHAI. The plaintiff stated that the defendant's adverse possession claim over the suit property was dismissed by the High Court. The plaintiff urged the court to grant the reliefs sought in the amended plaint.

In cross examination, the plaintiff stated that he was born in 1965 and as such he was nine years old in 1974. He stated further that they bought the suit property at Kshs. 2,000,000/- from the 3rd party in 1995 and that the last communication he had with the 3rd party was in 1997. He stated that he did not know her whereabouts or whether she was still alive. He stated that they did not enter in a written agreement. He stated that they purchased the suit property on a willing buyer willing seller basis.

He admitted that his family moved into the suit property in 1972 and that his family was occupying the upper floor while the defendant's family was occupying the ground floor. He stated that as at the time when they purchased the suit property, his family and that of the defendant were in occupation of the suit property. The plaintiff told the court that he was not familiar with the agreements on the basis of

which the defendant was laying a claim to the suit property. The plaintiff stated that they had a title to the suit property and that they were paying land rent and rates for the property. He stated that the lease in respect of the suit property was to expire in 2003 and that they had renewed the same. On examination by the court, he stated that his father who was a co-proprietor of the suit property was staying with him after they moved from the suit property in 1999. He stated that as a co-proprietor of the suit property he could maintain a suit against the defendant alone.

The defendant gave evidence and called two witnesses. The defendant's first witness was SURESH BABULAL BAKRANIA(DW1). DW1 was a brother to the defendant. He adopted his witness statement filed on 4th May, 2018 as part of his evidence in chief. In his witness statement, DW1 stated as follows: DODHIA was having problems with a bank. For that reason, from around 1967, he started registering his properties in his wife's name. His father, BABULAL used to do building and repair maintenance works for DODHIA. In 1965, BABULAL and DODHIA agreed that DODHIA would purchase the suit property at Kshs. 90,000/- on behalf of BABULAL on the understanding that the suit property would be held in trust for his brother KIRIT BABULAL BAKRANIA (the defendant) by CHAMPUBEN wife of DODHIA, the 3rd party until the defendant turned eighteen years old.

He stated that it was on the basis of that agreement that he and his family moved into the suit property in 1973 and had continued to live there up to the time he was giving evidence.

He stated that on 1st July 1974, an agreement was entered into between BABULAL, DODHIA and his wife CHAMPUBEN, the 3rd party in which the amount due to BABULAL for building maintenance work done on DODHIA's various properties between 1965 and 1974 was agreed at Kshs. 147,000/-. He stated that it was agreed that from the said amount, a sum of Kshs. 90,000/- would be deducted by DODHIA on account of the purchase price for the suit property and Kshs. 13,000/- on account of a motor vehicle, Mazda pickup registration number KNH 269 that BABULAL had purchased from DODHIA. DW1 reiterated the contents of the defendant's defence as to when BABULAL took possession of the suit property, the relationship between BHIKHUBHAI and DODHIA and how the 3rd party purported to sell the suit property to the plaintiff and BHIKHUBHAI at a gross undervalue. He stated that according to a valuation carried out on behalf of the defendant by Lloyd Masika, the value of the suit property at the time of the transfer of the same to the plaintiff and BHIKHUBHAI was Kshs. 20,000,000/-

In his oral testimony, DW1 stated among others that, further to the agreement of 1st July, 1974, DODHIA entered into another agreement with the defendant on 19th March, 1993 in which he was a witness. He stated that the suit property was registered in the name of the 3rd party because DODHIA had problems with banks over loans and as such he was registering properties in the name of his wife. He stated that although the 3rd party was not a party to the agreement of 1993 she was aware of the same. He stated that when the 3rd party purported to sell the suit property to the plaintiff and BHIKHUBHAI, the property had been sold to BABULAL. He stated that BHIKHUBHAI was working for the 3rd party in her shop and that the employer-employee relationship between BHIKHUBHAI and the 3rd party made the fraudulent transfer of the suit property between the two easier. In cross-examination, DW1 stated that the first agreement between BABULAL and DODHIA was made in 1967 and not in 1965 as he had stated in his evidence in chief. He stated further that BABULAL died in 1981.

The defendant's second witness was RAMESH MAVJI VIRJI(DW2). He adopted his witness statement filed on 4th May, 2018 as his evidence in chief. In the statement, DW2 stated as follows: He knew DODHIA who was his neighbour on 2nd Parklands Avenue. He also knew BABULAL who was his good friend as well as BABULAL's sons, KIRIT, SURESH and the late BHAGWANJI. On 1st July, 1974, he visited BABULAL. He found BABULAL in a meeting with DODHIA. They were later joined by CHAMPUBEN, wife of DODHIA, the 3rd party herein. At the meeting, they were discussing the contract works that BABULAL had been doing for DODHIA. They agreed at that meeting that BABULAL would be given the suit property and a Mazda motor vehicle would be purchased in exchange for the work done. He saw BABULAL, DODHIA, CHAMPUBEN and the defendant signing the agreement. In cross-examination, he stated that he had known the defendant for more than fifty years. He however did not know the plaintiff but knew the plaintiff's father, BHIKHUBHAI.

The defendant KIRIT BABULAL TRIKAM BAKRANIA(DW3) was the last to give evidence. He adopted his witness statement that was filed in court on 4th May, 2018 as part of his evidence in chief. The defendant produced the documents attached to his list of documents and supplementary list of documents filed on 6th June, 2006 and 14th November, 2017 as DEXh. 1 and DEXh. 2 respectively. In his witness statement, he corroborated the evidence of DW1 that I have highlighted above. In his oral testimony, he told the court that he signed the 1974 agreement alongside BABULAL, DODHIA and CHAMPUBEN wife of DODHIA, the 3rd party. He was 15 years then. He stated that he also signed the 1993 agreement that was between him and DODHIA.

In cross-examination, he stated that the 3rd party was the previous owner of the suit property and that BHIKHUBHAI knew about the trust arrangement between BABULAL, DODHIA and CHAMPUBEN. He stated that he had lived on the suit property for forty-six years. In re-examination, he stated that in his 1993 letter, he wanted the suit property transferred to him by DODHIA and that the letter was dictated by him to someone who worked at Old Mutual who typed the same. He asserted that he was the rightful owner of the suit property and that the suit property should be transferred to him based on the 1974 and 1993 agreements.

The submissions:

The plaintiff filed his submissions dated 23rd August, 2019 on 26th August, 2019 while the defendant filed his submissions dated 29th October, 2020 on 30th October, 2020. The plaintiff submitted that the suit property was lawfully transferred and registered in the plaintiff's name. The plaintiff submitted that the 3rd party did not deny selling the suit property to the plaintiff and that fraud in the sale and transfer of the suit property alleged by the defendant was not proved to the required standard. In support of his submission on proof of fraud, the plaintiff cited Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR and Kirugi & Another v Kabiya & 3 others [1987] eKLR.

On whether the suit property was subject to a trust in favour of the defendant, the plaintiff submitted that the evidence adduced by the defendant in proof of the alleged trust was contradictory and left a question whether the alleged trust was in favour of the defendant or his

father, BABULAL. The plaintiff submitted that whatever the case, DODHIA who was alleged to have created the trust was not the registered owner of the suit property. The plaintiff submitted further that there was no evidence that the parties had intended to create a trust in respect of the suit property in favour of the defendant. The plaintiff submitted that in the absence of such intention, the court could not imply a trust relation. In support of this submission, the plaintiff cited Peter Ndungu Njenga v Sophia Watiri Ndungu[2000]eKLR and Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Centre[2018]eKLR. The plaintiff submitted that the defendant had failed to prove that the suit property was transferred to the 3rd party to hold as a trustee for the defendant.

The plaintiff submitted further that the defendant occupied the suit property as a licensee and not on the basis of the alleged trust. The plaintiff submitted that this is clear from the affidavit that was filed by the 3rd party in the suit that the defendant had brought in the High Court seeking to be registered as the owner of the suit property by adverse possession. The plaintiff submitted that in the said affidavit, the 3rd party had stated that she had authorised the defendant to reside on the suit property.

The plaintiff submitted that the defendant was a trespasser on the suit property and that his acts of trespass commenced on 8th December, 1995 when the plaintiff acquired the suit property. The plaintiff submitted that he had suffered loss and damage as a result of the defendant's said act of trespass. The plaintiff submitted that he was unable to rent out the portion of the suit property occupied by the defendant and as such he had lost rental income. The plaintiff urged the court to grant him the reliefs sought in his plaint and for the defendant's counter-claim to be dismissed.

In his submissions in reply, the defendant submitted that the plaintiff's suit was a non-starter in that the plaintiff's alleged proprietary interest in the suit property was a leasehold of 49 years with effect from 1st November, 1954 which lease expired in 2003 and was never renewed. The defendant submitted that although the plaintiff claimed that he had applied for the extension of the said lease, he placed no evidence before the court in proof of that fact. The defendant submitted that the evidence before the court left no doubt that the lease had expired. The defendant submitted that upon the expiry of the said lease, the suit property reverted to the Government of Kenya as the owner thereof and that the plaintiff had no interest in the same that could be enforced through this suit. The defendant cited a High Court decision in support of this submission.

The defendant submitted further that since the 3rd party did not enter appearance in response to the third party notice, she was deemed to have admitted the allegations of fraud and breach of trust that were made against her by the defendant in the said notice. The defendant submitted that the defendant and his witnesses adduced sufficient evidence from which a trust relationship could be implied between the defendant and the 3rd party in relation to the suit property.

The defendant submitted further that the plaintiff did not acquire a valid title in respect of the suit property. The defendant submitted that when the 3rd party purported to sell and transfer the suit property to the plaintiff and his father, the 3rd party was aware that she was holding the suit property in trust for the defendant. The defendant cited sections 25(2) and 28(b) of the Land Registration Act, 2012 and submitted that the registration of the 3rd party as the owner of the suit property did not relieve her of her obligation as a trustee in respect thereof.

In conclusion, the defendant submitted that the plaintiff had failed to prove his claim against the defendant on a balance of probabilities and that the defendant had proved his counter-claim against the plaintiff. The defendant urged the court to dismiss the plaintiff's suit and to enter judgment for the defendant as prayed in the counter-claim.

Analysis and determination of the issues arising:

The parties did not agree on the issues for determination by the court. From the pleadings the following in my view are the issues arising for determination in this suit and counter-claim;

1. Whether the defendant is a trespasser on the suit property.
2. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
3. Whether the defendant is entitled to the reliefs sought in the amended counter-claim.
4. Who is liable for the costs of the suit and the counter-claim?

Whether the defendant is a trespasser on the suit property.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. This means that even if one does not have actual possession of land so long as he has a title to land, that is deemed as possession for the purposes of trespass. It is common ground that the suit property is registered in the name of the plaintiff and his father, BHIKHUBHAI. It is also common ground that the defendant is in occupation of a portion of the suit property and that the plaintiff had demanded possession of the said portion of the suit property from the defendant and the defendant refused to deliver the same.

I am of the view that the plaintiff having proved that he and his father are the registered owners of the suit property and that they had demanded possession of the portion thereof occupied by the defendant and the defendant had refused to yield the same, the burden shifted to the defendant to prove that he has a justifiable cause for continuing in occupation of the suit property. The defendant has contended that he is in occupation of the suit property as of right. The defendant has contended that he is a beneficiary of a trust in respect of the suit property that was created in his favour in a transaction that involved his father, BABULAL, DODHIA and the 3rd party. The defendant has contended that

pursuant to that trust, the suit property was supposed to be registered in his name as the proprietor thereof. The defendant has contended that the suit property was transferred to the plaintiff and his father fraudulently in breach of that trust in his favour. The defendant has contended that he is entitled to remain in possession of the suit property and to have the property registered in his name in discharge of that trust.

In order to determine whether the defendant has a justifiable cause for being in possession of the suit property, it is necessary to interrogate the validity of his claim over the property based on the alleged trust. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, the Court of Appeal stated as follows on trusts:

“27. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others. [2015] eKLR, this Court examined and stated the law on trusts as follows:

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. 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 (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).” Emphasis added

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR.”

In Peter Ndungu Njenga v Sophia Watiri Ndungu (supra), the Court stated as follows:

“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 courts 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 a trust is implied.”

In Mwangi Mbothu & 9 others v Gachira Waitimu & 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.”

In Mumo v Makau[2004] 1 KLR 13, it was held that:

“1. Trust is a question of fact and has to be proved by evidence. Section 28 of the Registered Land Act Contemplates the holding of land in trust.

2. There is nothing in the Registered Land Act which precludes the declaration of trust in respect of registered land, even if it is a first registration.”

In Muiruri v Kimemia[2002] 2KLR 677 it was held that:

“A party relying on the existence of trust must prove through evidence the existence of such trust.”

I am satisfied that the defendant has proved that a trust relationship existed between him and the 3rd party in relation to the suit property. The defendant has placed overwhelming evidence before the court in proof of that relationship. That evidence was not controverted. The defendant has demonstrated the following: His father, BABULAL was a contractor who used to do construction, maintenance and repair works. DODHIA was in real estate business and had a company known as Nairobi Housing Development Limited which he used in buying and selling houses. DODHIA engaged BABULAL from time to time to do construction and repair works in his houses. In 1967, BABULAL and DODHIA agreed that DODHIA would purchase the suit property on behalf of BABULAL and that the suit property was to be held in the name of the 3rd party in trust for the defendant who was a minor by then. The suit property that was to be purchased at Kshs. 90,000/- was to be transferred by the 3rd party to the defendant when he attained the age of 18 years. BABULAL moved to the suit property in 1973 pursuant to that agreement. BABULAL was to reimburse DODHIA the said sum of Kshs. 90,000/- through the payments that were due to him from the construction, repair and maintenance works that he was doing for DODHIA. The said sum of Kshs. 90,000/- was reimbursed in full and the suit property was due to be transferred to the defendant.

The suit property was registered in the name of the 3rd party because DODHIA was in debts and was being chased by creditors and as such he was registering his properties at that time in the name of his wife. The defendant produced in evidence copies of letters dated 5th May, 1967 and 27th May, 1967 that captured the agreement between BABULAL and DODHIA concerning the purchase of the suit property. In the letter dated 5th May, 1967, BABULAL requested DODHIA for whom he was doing some work to purchase the suit property for him. The letter dated 27th May, 1967 was a follow up to the letter of 5th May, 1967 and a discussion that the two had had in between. This latter letter was signed by DODHIA in acknowledgment of what he had agreed on with BABULAL. The letter states expressly that the property was to be transferred to the defendant upon attaining the age of 18 years. These letters were not disputed at the trial.

The defendant also produced evidence of payment of Kshs. 90,000/- to DODHIA by BABULAL for the suit property. This was contained in the agreement dated 1st July, 1974. The agreement was signed by BABULAL, DODHIA, the 3rd party and the defendant. The agreement is clear in its terms. It reiterated the agreement that BABULAL had with DODHIA over the suit property and more importantly, DODHIA acknowledged in it that he had been paid for the property in full. Although the plaintiff had claimed that the 3rd party had denied signing this agreement, no credible evidence of such denial was placed before the court. In any event, the 3rd party did not enter appearance to the third party notice and as such she is taken to have admitted the defendant's claim against her. DW1 testified that he was present on the day that agreement was being signed and that the 3rd party was present and he witnessed her signing the document. That evidence was not controverted.

The agreement of 1st July, 1974 was not limited to the suit property. It included also another transaction between DODHIA and BABULAL relating to a motor vehicle that DODHIA had purchased for BABULAL in 1972 that was also registered in the name of the defendant. In that agreement, DODHIA acknowledged receipt of payment from BABULAL for that vehicle. The defendant produced evidence showing that the vehicle was paid for by DODHIA and that it was registered in the name of the defendant. This shows that the agreement of 1st July, 1974 which is very detailed in its terms was not just a creature of the defendant as the plaintiff wants the court to believe. It is my finding that the agreement was executed by the parties mentioned therein.

The last in a series of those agreements that the defendant produced in support of his claim over the suit property was the agreement dated 19th March, 1993. This agreement was between the defendant and DODHIA. This was a commitment by DODHIA that he will honour the 1974 agreement. Before the parties entered into this agreement, the defendant had written to DODHIA on 5th March, 1993 demanding that the suit property be transferred to him failure to which he would hand over the matter to his advocates. The letter was also produced in evidence. Again, this agreement was not challenged at the trial.

From the totality of the evidence before the court, it is my finding that the suit property was purchased by DODHIA for BABULAL who acquired the same for his son, the defendant and that the same was registered in the name of the 3rd party to hold merely as a trustee for the defendant. No evidence was placed before the court showing that the 3rd party paid for the suit property or that she had any other interest in the property apart from the fact that the property was registered in her name. It is my finding that the 3rd party held the suit property in trust for the defendant and that she was aware of the trust.

It follows from the foregoing that the sale and transfer of the suit property by the 3rd party to the plaintiff and his father was carried out in breach of the said trust. In N W K v J K M & another [2013] eKLR, the court stated as follows on liability of strangers to a trust:

“The liability of strangers to a trust for breach of trust is determined by two principles, known as the “dishonest assistance” and “knowing receipt” principles. These principles are explained in the text by Alistair Hudson on Equity and Trusts, 4th Edition, at page 732 as follows:

“First, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she dishonestly assists the commission of a breach of trust, without receiving any proprietary right in that trust property herself. This liability is referred to as ‘dishonest assistance’. The test for ‘dishonesty’ in this context is a test which asks whether or not the defendant acted as an honest person would have acted. This notion of dishonesty extends beyond straightforward deceit and fraud potentially into reckless risk-taking with trust property.

Secondly, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she receives trust property with knowledge that the property has been passed to her in breach of trust. This form of liability is referred to as ‘knowing receipt’. ‘knowledge’ in this context includes actual knowledge, wilfully closing one’s eyes to the breach of trust, or failing to make the inquiries which a reasonable person would

have made in these circumstances.

In either case, there must have been loss suffered by the beneficiaries as a result of some breach of trust: the liability of the strangers is then to account to the beneficiaries for that loss, providing that the knowing receipt or dishonest assistance has been demonstrated. Therefore, there must have been a breach of trust of trust before either of these claims could arise.”

From the evidence on record, I am satisfied that the plaintiff and his father were aware that the 3rd party held the suit property in trust for the defendant. The plaintiff did not deny that his father and he were staying on the suit property together with the defendant until 1999 when they left and that they had lived on the suit property from 1972. The plaintiff did not deny that his father was working for DODHIA and the 3rd party in the shop that they had in Ngara, Nairobi. Due to their relationship with DODHIA and the 3rd party and the fact that they lived together with the defendant on the suit property for over 20 years as at the time the property was transferred to them, they must have known on what basis the defendant was occupying the suit property. Even if they were not aware, they had a duty to inquire from the defendant on what basis he had occupied the suit property for that long. As stated above, knowledge need not be actual. It is my finding that the plaintiff and his father knowingly acquired the suit property from the 3rd party in breach of the trust under which the 3rd party held the suit property. As a result of that breach, the defendant has been deprived of the suit property. The plaintiff and his father are liable to account to the defendant for the suit property. The title that they acquired was subject to the defendant's beneficial interest in the suit property.

From the evidence before the court, the defendant's contention that the suit property was fraudulently sold by the 3rd party to defeat his beneficial interest cannot also be ruled out. The property was sold by the 3rd party to the plaintiff and his father soon after the death of DODHIA in 1993. The property was allegedly sold at Kshs. 2,000,000/- on 5th December, 1995. A valuation done by the defendant on 30th May, 1996 six months from the date of sale showed that the market value of the property was Kshs. 20,000,000/-. The plaintiff produced a valuation report dated 6th June, 1996 that showed that the market value of the suit property was Kshs. 12,000,000/-. The two reports leave no doubt that the suit property was transferred to the plaintiff and his father at a gross under value. No explanation was given as to why the 3rd party would forego over Kshs. 10,000,000/- in 1995 in the transaction. The substantive law that regulated dealings with the suit property was the Transfer of Property Act, 1882(now repealed). Section 53 of the Transfer of Property Act, 1882 provides as follows:

Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

It is my finding that the purported sale and transfer of the suit property to the plaintiff and his father is null and void for breach of trust under which the property was held by the 3rd party and also on account of fraudulent disposition by the 3rd party to defeat the defendant's beneficial interest in the property. The plaintiff and his father did not therefore acquire a valid interest in the suit property.

Since the title held by the plaintiff and his father in respect of the suit property is void, the defendant who has a beneficial interest in the property has a right to occupy the property. It follows therefore that the defendant has a justifiable cause for being on the suit property. The defendant is therefore not a trespasser on the property.

Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

From my findings above, the plaintiff has not proved his case against the defendant to the required standard. Having failed to prove that the defendant is a trespasser on the suit property, the plaintiff is not entitled to any of the reliefs sought.

Whether the defendant is entitled to the reliefs sought in the counter-claim:

The defendant has established that the 3rd party held the suit property in trust for him and that the transfer of the suit property to the plaintiff and his father was fraudulent and in breach of that trust. Since the plaintiff and his father are holding the suit property that belongs to the defendant pursuant to a void transaction between the plaintiff and his father and the 3rd party, the defendant is entitled to a declaration that they are holding the property in trust for the defendant. As for the order that the property be registered in the name of the defendant, I am unable to make the order since the status of the property is unclear from the evidence on record. It is common ground that the lease for the suit property expired in 2003. As at the time of the hearing of the suit, there was no evidence that the lease had been renewed and if so the terms of such renewal. The last official search on record dated 6th February, 2019 shows that the lease for the suit property was for a term of 49 years from 1st November, 1954 and that the same had expired. The court cannot make an order for an expired lease to be transferred to the defendant as there will be no interest to transfer. With regard to the claim for accounts, the plaintiff is obliged to account to the defendant for the income derived from the suit property from the time he and his father acquired the same in breach of trust. It is however common ground that the plaintiff and his family used to occupy only a portion of the suit property with the rest being occupied by the defendant. It is also common ground that the plaintiff and his family vacated the said portion of the suit property. No evidence was led by the defendant showing that the plaintiff was deriving income from the said portion of the suit property that they used to occupy and subsequently vacated. This coupled with the fact that the lease for the suit property expired in 2003 renders the order for accounts untenable.

Conclusion:

In conclusion the plaintiff's suit fails wholly while the defendant's counter-claim succeeds in part. Consequently, I hereby make the following orders;

1. The plaintiff's suit is dismissed.
2. I declare that the plaintiff NISHIT BHIKHUBHAI SHAH and his father BHIKHUBHAI HIRJI SHAH hold whatever interest that they have in L.R No. 209/103/7, Nairobi in trust for the defendant.
3. Each party shall bear its own costs of the suit and the counter-claim.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF APRIL 2021

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Rabut h/b for Mr. Mbaluto for the Plaintiff

Ms. Nyaguthie for the Defendant

Ms. C.Nyokabi-Court Assistant