



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 61 OF 2018

GERMANO M'AMUURI ARAINE- Deceased

(Substituted by **MUGAMBI GERMANO AMURI & DAVID KIMATHI**

(As legal representatives of his estate).....**APPELLANTS**

VERSUS

DANIEL MWITI M'AMURI..... RESPONDENT

(Being an appeal from the Judgment of Hon. H. Ndungu (C.M.) delivered on 6th December, 2018, in

Meru CMCC No. 23 of 2009)

JUDGMENT

1. The appellants appeal against the decision of the trial court on the basis that the court was wrong in holding the respondent to have acquired the suit land as a gift *inter vivos* without evidence/legal basis for that finding and contrary to the uncontroverted evidence that he was given the same in trust and not as an owner; by failing to find under the law the title was subject to impeachment on account of misrepresentation, on the promise to take care of the deceased; by finding the suit land subject to **Cap 300 and Land Registration Act 2012**, yet it was falling on a different registration regime as a commercial plot and lastly failing to consider the appellants evidence and judicial authorities provided.
2. At the lower court, the deceased plaintiff now replaced by the appellants had sued his son, the respondent herein, claiming he had transferred him the plot for no consideration at all but on condition that he would hold it in trust for him, including allowing him to collect rent due from the tenants, he shall not dispose of the land, he shall live, with, maintain, protect and care for the plaintiff during his lifetime and old age and thereafter use the same upon his demise.
3. The deceased averred the respondent had violated the conditions aforementioned, neglected and caused him untold suffering and loss as particularized in the plaint hence sought for the retransfer of the land to him; declaration there was breach of trust and promise leading to unjust enrichment and an order of permanent injunction.
4. The respondent denied the claim vide defence dated 3.2.2009. He admitted to be a son of the deceased, but denied he was ever the owner and developer of the suit land.
5. Regarding the particulars of breach of promise and trust he blamed his step brother for creating a rift between him and the deceased and claimed the deceased was polygamous and that the suit land had been put up through resources from his mother.
6. He alleged the court lacked monetary and statutory mandate to handle the suit land since it fell under the land adjudication and lastly the court could not determine matters of trust.
7. In reply to defence, the deceased stated the suit land fell under Nyambene Municipality Council and was not subject to **Caps 283 and 284 Laws of Kenya**.

TESTIMONY

8. The deceased testified that he educated the respondent and gave him a house but had started selling his farm, cows and trees wherein he (deceased) generated income to sustain his wife and himself. He produced documents indicating the plot initially belonged to him but he transferred it in trust until the respondent takes over upon his demise.

9. Further, the deceased testified the respondent had assaulted and mistreated him. Due to this, all his other children could not take care of him since he allegedly gave out the property to the respondent yet he had ignored, neglected and or abandoned him at the hour of need.
10. In cross examination, the deceased admitted he had 12 sons and many daughters and though he used to be rich, the respondent had squandered everything he had. He told the court he had shared out all his other properties to his children but the respondent and his mother had chased him away from his home and could not live with them anymore.
11. He told the court he acquired the suit land while the respondent was in school, developed it and when his sons got married, he summoned them, shared out his properties but told them he opted to remain under the care and custody of the respondent who was still in college.
12. Further, he told the court the respondent was not in the meeting but after learning of the transfer, he became hostile to him.
13. PW2 told the court the respondent was the last born of the 3rd wife and was given the plot so as to care about the deceased and the rest of the family had no objection to the wish of his father at the time. He told the court the deceased was the one who developed the plot and contributed to undertake any repairs and maintenance works.
14. Further, PW2 testified upon finishing college, the respondent got married, sold all his other portions of land, cows and left Mukinduri for Maua abandoning the deceased contrary to the promise and breach of trust made at the time the suit land was put under his name. He confirmed he was the one taking care of the old man who was aged 90 years over and above the rents he was collecting though the respondent was inciting the tenants not to surrender the rent to their father.
15. Similarly, he told the court his own mother was taking sides in the issue and his intervention for an amicable solution was unsuccessful.
16. PW3 confirmed the deceased was the first person to construct a plot with building stones in 1947 at Mikinduri market, that he tried to amicably settle the dispute between the two at the District officer's office but in vain.
17. PW4 produced the transfer of the plot from the deceased to the respondent, minutes for Town Planning committee for County Council dated 27.6.1987 and the plots register as **P exh 1, 2 and 3** respectively. He confirmed the plot was transferred for no considerations at all.
18. The respondent testified that the suit land was registered under his name after he was given the same by the deceased and his mother as per the full council meeting held on 27.6.1997. He stated he built the structure on the plot in 1997 out of resources supplied by his mother. He insisted the dispute was being fueled out of family differences since his father was polygamous and out of jealousy. He said his step mothers and brothers had their plots and urged the court to dismiss the case.

SUBMISSIONS

19. With leave of court, parties opted to dispose of the appeal through written submissions dated 22.10.2021 and 27.10.2021 respectively.
20. The appellant submits the intention of the deceased granting the gift *intervivos* was conditional and based on a promise and that having failed to meet the conditions and the promise, the respondent should not be allowed to unjustly reap and or enrich himself since the deceased withdrew and denounced the gift during his lifetime and testimony in court. Reliance is placed on **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR, Brite Print (K) Ltd & Another –vs- Barclays Bank of (K) Ltd [2014] eKLR.**
21. Secondly, it is submitted the suit land title could be impeached on account of misrepresentation or fraud, or giving a false promise under **Section 23 (1) of Registration Land Act**, now repealed.
22. On his part, the respondent submitted there was no fraud, misrepresentation or transfership in the process of acquiring the plot which is not family property at all.
23. Secondly, he submitted there was no meeting, agreements, conditions and or promise made by him at the time he was transferred the suit land especially on the responsibilities of taking care of aged parents which in any event was a shared responsibility of all the deceased children.
24. As regards trust, it is submitted none was proved by the appellants but is based on assumption.
25. The issues commending themselves for determination are:
- 1) If the deceased transferred the suit land to the respondent based on a promise, in trust and with conditions.**
 - 2) If the respondent breached the promise, trust and or conditions.**
 - 3) If the deceased was entitled to and under what conditions could he withdraw the transfer.**
 - 4) If the trial court applied the correct law to the facts, pleadings and evidence.**

26. The deceased now represented by the appellants brought the claim alleging breach of trust and promise and or conditions under which he transferred his plot to the respondent. He particularized the breach at paragraph 5 of the plaint. Likewise he pleaded the circumstances under

which he willingly transferred the plot to the respondent which were to be fulfilled during his lifetime after which the plot shall devolve to the respondent.

27. In view of the breach, the deceased sought through the court a sanction of his withdrawal of the gift and a formal cancellation of the same and for the suit property to revert to him. Similarly, he sought for an injunction restraining the respondent from interfering with his suit land.

28. In his testimony, the deceased reiterated he transferred the plot to the name of the respondent without his knowledge, involvement and or concurrence but subject to conditions of trust.

29. He pleaded the trust and testified that though he transferred the plot in the name of the respondent, he had retained some entitlements from the property which were to subsist during his lifetime and survival.

30. In *Re Estate of the late Gideon Manthi Nzioka (Deceased) [2015] eKLR*, Nyamweya J now Judge of the Court of Appeal held gifts of land must be by way of registered transfer or if the land is not registered it must be in writing or by a declaration of trust in writing and for it to be complete, it is not necessary for the donee to express acceptance, which acceptance is presumed until and unless dissent or disclaimer is signified.

31. The deceased stood his ground that the property was his and he gave it out conditionally and specifically to the respondent as the last born since the rest of his sons had gotten married and as expected he wanted to stay and live under the care of the respondent at his old age. He expected the respondent to honour him by giving him not only part of the rental income derived from the suit land, but also to attend to his need including preserving the property.

32. The deceased expressed his misgivings, fears and gave instance where the respondent upon establishing the plot was under his name, incited the tenants and stopped any assistance from the plot reaching the deceased for his needs and comfort at old age.

33. Instead of addressing the averments in the plaint, the respondent allegedly denounced the plot was given to him as a gift by the deceased but instead claimed it came from both his father and mother.

34. In my considered view therefore, that act of denial of the gift and the claim that the respondent single handedly developed the property with effect from 1997 confirmed the respondent did not accept the gift and the conditions attached to it.

35. Once the respondent denounced the gift and the conditions attached to it, the deceased in my view had no option but to institute the process of revoking the transfer out of breach of promise, trust and conditions attached to the same.

36. The respondents came to own the plot by virtue of being one of the twelve sons of the deceased.

37. PW2 stated other than the fact that he was expected to take care of the deceased at his old age, there was no other reason for him to be bequeathed the property. Instead of taking it as a honour, the respondent instead became belligerent and did acts which the deceased took as tantamount to denouncing the gift. Therefore the ownership of the property by the respondent during the lifetime of the deceased was tied to honouring the promise, trust and conditions aforesaid.

38. The respondent could not therefore, in my view, dissociate himself from the bonds between himself and his late father to an extent of chasing him away from his property and making his life, peace and existence untenable yet he was merely asking for rental income from a property he had owned since 1947.

39. The relationship of a father bequeathing a property to his son during his lifetime could in my view be severed out for acts of omission or commission contrary to the intention of the parties. **See BIA –vs- JMA & another [2019] eKLR.**

40. The next issue is under what conditions can a party revoke a gift.

41. The respondents testified he was given the plot by both his mother and the deceased. Similarly, he testified he singlehandedly developed the plot through resources from his mother. He did not however produce any documentary evidence in support of those assertions.

42. Again, he did not plead those facts during the lifetime of his deceased father.

43. The respondent did not counterclaim for the land even after it became apparent his father had initiated the court process for the plot to revert to him. He has not pleaded the loss he is likely to incur if the property were to revert to the estate of the deceased. After all he still would be entitled to claim a stake in it as a beneficiary in the estate of the deceased.

44. As indicated above, the respondent reneged on taking care of his elderly father to an extent that the trust he had in him dissipated leading to him calling for the reversion of the land to himself. The acts of the deceased confirm he did not fully release the plot to the respondent.

45. Similarly, the respondent has not demonstrated he took over vacant possession and perhaps asserted ownership by giving formal notices to the tenants and changing the plot as a new owner.

46. The deceased testified he had been forced to live on the plot after he was chased away by the respondent and his mother.

47. PW2 confirmed these facts. **See David Waweru Mbugua –vs- William Adero Goga & 5 Others [2018] eKLR.** **See Registered Trustee**

48. Coming to the issue of trust, the respondent submits the appellants did not call any evidence to prove trust in line with **Sections 24, 25, 26 and 28 of the Land Registration Act 2012.**

49. In Mumo –vs- Makau [2002] 1 E.A 170, the court held that trust is a question of facts to be proved by evidence. In Twalib Hatayan Twalib Hatayan & Anor –vs- Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, the court held:

“A constructive trust is an equitable trust imposed by the court against one who has acquired property by wrong doing especially where the intention of the parties cannot be ascertained and is aimed at guarding against unjust enrichment. A resulting trust on the other hand is a remedy imposed by equity where the property is transferred under circumstances which suggest that the transfer did not intend to confer a beneficial interest upon the transferee.”

50. This trust may arise either upon the unexpressed but presumed intention of the shelter or upon his informally expressed intention. See Kazungu Fondo Shutu & Another –vs- Japhet Noti Charo & Another [2021] eKLR.

51. In the instant case, the deceased expressed himself of his intention, conditions and the promises the respondent had failed to fulfil hence the reason he was withdrawing from the transfer. The respondent did not deny the existence of those conditions, intentions and or promises. He did not call any evidence to counter the appellants’ evidence, particularly his mother.

52. The deceased accused the respondent of disposing some parcels of land, cows and threatening to dispose of the suit land. The respondent did not counter that evidence at all.

53. In Gitonga Kamiti & Another –vs- Rose M. Simba & Another [2012] eKLR a breach of trust was defined as essentially a broken trust where in a way someone fails to fulfill promises connected to something or someone entrusted to him or her including neglect or deliberate failure to do a job or act as per specific agreement.

54. The respondent has submitted there was no meeting or minutes or particulars of the promise and that the responsibility to take care of the parents is shared.

55. The evidence of PW1, PW2 and PW3 explain the circumstances under which the respondent came to be transferred the suit land. There were no specific questions regarding the particulars of meetings, details of the minutes and or promises made to PW1 and PW2.

56. PW2 was specific that the respondent had gaggged up with his mother to chase away and or deny the deceased any access to and or receipt of income from the suit premises.

57. In my view, there are not doubts therefore that the respondent had breached the trust accorded to him by the deceased plaintiff. **Article 57 of the Constitution** has elevated the rights of older members of our society as Constitutional rights. It bestows them with rights to live in dignity and respect and to be free from abuse and to receive reasonable care and assistance from their family and the state.

58. Therefore, the deceased plaintiff share of income and care from the respondent especially in the circumstances obtaining in this suit could not have been said to be far-fetched and or outside the law.

59. I sum my finding is the appeal has merits, the same is allowed and the lower court decree reversed with an order allowing the appellants claim with costs.

60. The respondents shall execute the transfer within 45 days from the date hereof in default the Deputy Registrar to do so.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2ND DAY OF FEBRUARY, 2022

In presence of:

Apollo holding brief for Otieno C for appellant

Respondent in person

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE