



REPUBLIC OF KENYA



KENYA LAW
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**Ondieki v Ndusi (Environment and Land Appeal E024 of 2021)
[2022] KEELC 12778 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 12778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E024 OF 2021**

DO OHUNGO, J

OCTOBER 4, 2022

BETWEEN

HEBISIBA MORAA ONDIEKI APPELLANT

AND

ELPHAS ABASI NDUSI RESPONDENT

((Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hazel Wandere, Senior Principal Magistrate) delivered on 15th June 2021 in Kakamega MCELC No 209 of 2018 Hebisiba Moraa Ondieki v Elphas Abasi Ndusi))

JUDGMENT

1. Through plaint dated March 12, 2014, initially filed in this court but later transferred to the subordinate court, the appellant herein averred that her late husband Manoah Kisame Aradi registered the parcel of land known as Isukha/Lubao/1024 (the suit property) in the name of the respondent to hold it in trust for her benefit as well as the benefit of her two sons. She prayed for an order directing the respondent to transfer the suit property to her and her two son and in default the Deputy Registrar to sign the necessary documents on his behalf. Upon hearing the case, the subordinate court (Hazel Wandere, Senior Principal Magistrate) dismissed it with costs.
2. Aggrieved, the appellant filed this appeal, listing the following grounds of appeal in the memorandum of appeal dated July 1, 2021:
 1. The learned trial magistrate erred in fact and in law in misconstruing the meaning application and import of a legal trust.
 2. The learned trial magistrate erred in fact and in law by failing to consider the evidence of fraud and misrepresentation as adduced by the appellant in support of her case.



3. The learned trial magistrate erred in fact and in law in reaching a finding that the appellant lacked the requisite locus standi to institute the suit against the respondent in spite of the evidence adduced to the contrary.
 4. The learned trial magistrate erred in fact and in law in dismissing the appellant's case without considering its merits.
3. The appeal was canvassed through written submissions. The appellant argued that the learned magistrate did not address the issue of trust yet there was evidence before her that the suit property was given to the appellant and her children during a commemoration ceremony of her deceased husband. That the learned magistrate did not consider evidence of fraud and misrepresentation which she adduced, which evidence the respondent denied. Reliance was placed on Section 25 of the Land Registration Act as well as the cases of Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others [2015] eKLR and Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi [2014] eKLR. Finally, the appellant argued that the learned magistrate erred in concluding that she lacked locus standi, yet the amended plaint had all co-administrators as plaintiffs before they later withdrew leaving her as the sole plaintiff. She therefore urged the court to allow the appeal.
 4. On his part, the respondent argued that since the appellant is co-administrator of her late husband's estate together with three others, the learned magistrate correctly held that she did not have locus standi to institute the suit. He relied on the cases of Republic v Nairobi City Council & 3 others Ex parte Christine Wangari Gachege Suing on Behalf of the Estate of Rahab Wanjiru Evans [2014] eKLR and Hassan Iddi Malambu suing as the administrator of the estate of Amina Naanyu Malambu v Bestel Agencies Company Ltd & another [2015] eKLR.
 5. This is a first appeal. My mandate is therefore to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.
 6. I have carefully considered the grounds of appeal, the entire record, and the parties' submissions. The issues that arise are whether the appellant had *locus standi* to institute and prosecute the suit, whether trust was established and whether the reliefs sought by the appellant ought to issue.
 7. The record shows that the appellant commenced proceedings through plaint filed on March 13, 2014 and in which she was the sole plaintiff. She averred therein that she is the administratrix of the estate of her late husband Manoah Kisame Aradi and the beneficial owner of the suit property. Pursuant to leave granted by the court on November 18, 2014, the appellant filed an amended plaint on November 26, 2014, through which her co-administrators Steve Biko Aradi, Charles Chahya Aradi and Mary Irene were joined to the suit as second to fourth plaintiffs respectively. A reading of paragraph 3A of the amended plaint makes it clear that the plaintiffs brought the suit in their capacity as administrators of the estate of Manoah Kisame Aradi (deceased).
 8. The general rule, pursuant to the principle of relation back in amended pleadings, is that once pleadings are amended, what stood before the amendment is no longer material before the court. See Mohan Meakin (K) Limited v Attorney General [2014] eKLR. It follows therefore that the amended plaint effectively and completely replaced the initial plaint, such that the suit was deemed to have been commenced by all the administrators jointly, as is indeed contemplated by Sections 79 and 82 of



the *Law of Succession Act*. See, also, the cases of *Republic v Nairobi City Council & 3 others Ex parte Christine Wangari Gachege Suing on Behalf of the Estate of Rahab Wanjiru Evans* (supra) and Hassan Iddi Malambu suing as the administrator of the estate of Amina Naanyu Malambu v Bestel Agencies Company Ltd & another (supra).

9. The identity of the plaintiffs in the matter did not rest with the filing of the amended plaint on November 26, 2014. The record shows, and the appellant confirmed as much in her submissions in this appeal, that the second to fourth plaintiffs filed notices of discontinuation of the suit before hearing and delivery of judgment. Strictly speaking, upon the second to fourth plaintiffs withdrawing their claims, the plaint ought to have been further amended to reflect the new parties as the appellant and the respondent only. Even though there was no amendment, the effect really was that the second to fourth plaintiffs were no longer parties and that situation related back to the commencement of the suit. The suit, post withdrawal of the second to fourth plaintiffs, offended Sections 79 and 82 of the *Law of Succession Act* to the extent that the appellant was attempting litigate the interests of the deceased's estate in the absence of her co-administrators. I agree with the learned magistrate that the appellant lacked the capacity to do so and that her suit was fatally defective to that extent.
10. Even if the appellant's suit did not fail on account of lack of capacity to sue, it would have still failed on account of failure to prove trust. The appellant claimed that her late husband registered the suit property in the name of the respondent to hold it in trust for her benefit as well as that of her two sons.
11. A party who alleges existence of trust must prove it. See *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR. In *Dorcas Indombi Wasike v Benson Wamalwa Khisa & another* [2010] eKLR the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular *Mbothu & 8 others vs Waitimu & 11 others* [1986] KLR 171, are clear that: -

“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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

12. A perusal of the copy of the register in respect of the suit property reveals that the deceased was registered as proprietor on June 20, 1990. Between August 29, 1991 and November 15, 2000, he charged it severally in favour of different banks to secure loans. On March 9, 2004, a caution was registered in favour of the respondent, claiming a purchaser's interest. The respondent later withdrew the caution on January 10, 2006. On November 28, 2012, the appellant jointly with Charles C. Aradi and Mary Atieno Aradi were registered as proprietor as administrators of the deceased's estate and later that same day the respondent was registered as proprietor and title deed issued to him.
13. As is manifest from the above account, the property was transferred to the respondent from the appellant and her co-administrators and not from the deceased as the appellant claimed and testified. The appellant's case is built on the allegation that the deceased owned the suit property and that he transferred it to the respondent with the intention of creating a trust in her favour and her sons' favour. She has neither demonstrated ownership by the deceased as at the date of transfer nor an intention to create the alleged trust. In those circumstances, I find that the appellant did not establish trust.
14. The appellant attacked the respondent's title solely on account of trust. No illegality, fraud, misrepresentation, or the like were alleged regarding the circumstances in which the respondent



acquired title from the appellant and her co-administrators. In the absence of proof of the alleged trust, the respondent's rights as registered proprietor must be upheld.

15. In view of the foregoing discourse, I find no merit in this appeal and I therefore dismiss it. In view of the close family relationship between the parties, I order that each party shall bear own costs of the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Magina holding brief for Ms Arunga for the appellant

No appearance for the respondent

Court Assistant: E. Juma

