



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 466 OF 2017

SAMSON NGUGI PHILIP KANGORI.....PLAINTIFF

VS

PETER NJUGUNA SAMSON ALIAS SIMON PETER NJUGUNA...DEFENDANT

JUDGMENT

1. The Plaintiff is the father of the Defendant. The Defendant is the registered proprietor of Loc. 18/Kirere/67 (suit land) having been so registered on 4/3/64. The Defendant is the 5th born child and the 1st male child/son of the Plaintiff having been born on the 26/2/1962. The suit land measures 6.4 acres. The Plaintiff has pleaded that during the land consolidation and adjudication and registration in Murang'a he caused the suit land to be registered in the name of the Defendant as trustee for the parties herein together with his 10 children and wife, the Defendant included. Between the years 2013-2014 he approached the Defendant to dissolve the trust and share the land amongst himself and his children but the Defendant rejected his plans. He avers that he initially agreed but changed his mind when the forms for application for land sub division were availed to him.

2. The Plaintiff in his plaint filed on the 5/6/2015 seeks the following orders;

- a. A declaration that Land Loc 18/Kirere/67 belongs to the Plaintiff and the Defendant was only registered as a Trustee to it for the beneficial ownership of the Plaintiff and all his children who includes the Defendant.
- b. That the said Trust be declared dissolved and the whole land revert to the Plaintiff to enable the Plaintiff share it out amongst himself and all the children as he desires.
- c. The Defendant to meet the costs of the suit.

3. In his statement the Defendant denied the Plaintiffs claim and averred that it is his grandfather namely Philip Kangori Ndune, (named after him) that caused the suit land to be registered in his name and not the Plaintiff. He pleaded that the Plaintiff inherited land from his father in Gathera and Kandara locations, some of which he (Plaintiff) sold to his brother Kinyua. He vehemently denied existence of trust on the suit land and called for strict proof. Except for one of his married sisters with intent to sell the land upon subdivision, he refuted the Plaintiff's claim that the family members want to dissolve the alleged trust and subdivide the land.

4. The Plaintiff testified that he is a retired Agricultural officer with the Ministry of Agriculture having retired in 1981. He informed the Court that he bought 16 plots from various persons, some of whom are deceased and consolidated and registered them in the name of the Defendant to hold in trust for him. The Defendant was about a year old then. He has made developments on the land and he lives thereon. He used the land to secure loans as shown on the copy of the green card he produced in Court marked PEX No 10. He refuted claims that the land belonged to his father. Further he denied the Defendant's assertion that he was given the suit land by his grandfather.

5. He stated that his father Philip Kangori Ndune owned 3 parcels of lands at Gathera Sub location Loc. 7 (Nginda) which upon his death in 1970 devolved to the Plaintiff's brothers and step brothers Cosmas Mwaniki Philip, Maina Philip and John Njoroge Philip. This was his father's ancestral land where he was born and grew up. The second parcel of land was 15 acres at a village called Ngurue-ini in Kangari (Loc. 2 Kinyona) which was given to his brothers and step brothers as follows; Philip Maina (2.5) acres, John Njoroge Philip (2.5) acres and Jasan Kinyua (deceased) (10) acres. The third parcel of land was at Gathera (Loc 7 Nginda) Location measuring 0.7 acres which he inherited upon completion of succession of the estate of his father. He informed the Court that this is the only land that he inherited from his father as he had bought other parcels of land for himself from his savings he having been a civil servant.

6. He informed the Court that he registered the suit land in the name of the Defendant because he was working as a civil servant and wanted to avoid raising any alarm as he had bought many other parcels of land which had been registered in his own name. In 1966 he applied to be

appointed as a guardian and manager of the suit land then registered in the name of a minor by the Kigumo African Court – Civil Case No 531 of 1966 to enable him charge the suit land. He produced the appointment of guardianship marked as PEX1 dated 19/4/1967. To demonstrate that he had proprietary rights to the suit land, he stated that he charged the suit land in or around 1981 with Murang'a Farmers Cooperative Society. He produced a copy of the green card to show the various loans taken from Agricultural Finance Cooperation, Kenya Commercial Bank Limited, Murang'a Farmers Cooperative Union and Irati Farmers' Co-operative Society between 1968 and 1982. The Defendant was 22 years in 1982 and he did not raise any objection. He informed the Court that he repaid all the loans without any external assistance from anyone and the land was discharged in 2012 and he has the title in his custody.

7. The Plaintiff stated that his brothers and step brothers have sons named after his father and none was given land by his father. He argued that he could not recall anything special about the Defendant that could have made him be given land by his father. He was only 6 years when his grandfather died.

8. He stated that he resides on the suit land with the Defendant and the family of his deceased son. In 1960 he built a 3 bedroomed permanent house where he brought up all his children including the Defendant. That he gave his two sons coffee trees on the suit land which is part of the 4 acres under coffee which he planted in 1959.

9. He informed the Court that in 2013-14 he held a meeting with all his children, the Defendant included and agreed to dissolve the trust and distribute the suit land to them. The Defendant was present and agreed as well. In pursuance to this the process of obtaining consent to subdivided and transfer followed but later the Defendant refused forcing him to file suit.

10. In cross examination he stated that it is not a custom under Kikuyu Customary law for a grandfather to give sons named after him land. He clarified that the 16 parcels of land were bought at various times from 1957 from several people. He informed the Court that he does not have any agreements for sale and the witnesses who witnessed the purchases are dead. That he consolidated the land in 1960 and again in 1964. He stated that his father did not have land at Kirere. He stated that he was unaware of his other children opposing his desire to assert title for his land.

11. In defence, the Defendant testified that he is the 1st born son and 5th child of the Plaintiff. That they are all 11 children but 7 are surviving. That he was born on 26/2/62 and got registered as owner of the suit land on 4/3/64 at 2 years of age. That the suit land belonged to his grandfather who caused it to be registered in his name as a gift because he was named after him. He testified that his grandfather had 2 wives and his father was the 1st born in one of the houses. That the other grandsons (except one) were born after his grandfather had passed on. He denied the Plaintiff's claim that he acquired the suit land through purchase. He argued that if the suit land belonged to his father he could have registered it in his name and not his. He confirmed that the Plaintiff lived on the land before he was born. That the Plaintiff charged the suit land and obtained loans without his consent. That he failed to pay the loans and the suit land would have been sold if his sister had not repaid the loans.

12. In his testimony, he stated that the suit land is occupied by himself (2 acres), his deceased brother's family (2 acres) and the remainder by the Plaintiff. That his father has built a permanent house and grows coffee thereon. That he also planted coffee in 1972 on half an acre of the land. He added that all the coffee on the land belong to him and his late brother. He testified that he has not evicted the Plaintiff from the land because of the respect he has for him.

13. In his further testimony he confirmed that they went to the District Officer's office at Kigumo to discuss the subdivision of the suit land but he disagreed with the Plaintiff. He stated that he does not want the land reverted to his father because it will be shared amongst his siblings. That when his father charged the property in 1982 he was an adult but did not object. That he did not repay any of the loans on the suit land.

14. Parties filed written submissions which I have read and considered together with the evidence on record. The issues for determination are;

A. Whether the Plaintiff has proved trust?

B. Who meets the costs of the suit?

15. Section 28 of the Registration of Land Act, cap 300 (now repealed) provides as follows;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. (emphasis is mine).

The current Registration of Land Act of 2012 has a similar proviso under section 25.

16. According to Black's Law dictionary trust is the right enforceable only in equity to the beneficial enjoyment of property to which another person holds the legal title. Similarly, the Concise Law Dictionary by P G Osborn, trust is:

“A relation or association between one person (or persons) on the one hand and another person (or persons) on the other, based on confidence, by which property is vested in or held by the one person, on behalf of and for the benefit of another. The holder of the

property is the trustee, and the beneficial owner is the cestui que trust. The trustee has a right in rem in the property, the cestui que trust has a right in personum against the trustee or those who take from the trustee with notice of the trust....”

17. Trusts in land are either express or implied. Express trusts arise from instruments of trust which are registered on the title and the registered proprietor denoted on the register as a trustee. In implied trust there is no instrument registered on the land but it is implied from the intention of the parties. It includes resulting and constructive trusts.

18. A resulting trust is defined as an implied trust where the beneficial interest in property comes back, or results, to the person (or his representative) who transferred the property to the trustee or provided the means of obtaining it. It is a remedy imposed by equity when the property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. The main distinction between an express trust and a resulting trust is that in an express trust, an intention to create a trust is always expressed or declared. In a resulting trust the intention is not expressed, but inferred by operation of law from the terms of the conveyance or will or from the accompanying facts and circumstances.

19. A constructive trust is a trust which is not created by words or circumstances importing an intention to create trust. It is imposed by Courts of equity in order to prevent the inequitable acquisition of another’s property. It arises in case of advantage gained by a fiduciary or a person through undue influence or conduct which is otherwise unconscionable. It is a trust which is raised by construction of equity in order to satisfy the demands of justice without reference to any presumable intention of the parties, either express or implied. Further, it is an equitable remedy by which a Court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud or theft and or where the wrong doer gain title to the property. In such a case, the legal holder of title is holding the property wrongly and has no right of enjoyment of it.

20. In the case of **Gissing Vs Gissing (1971) AC 886** a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that results back to the person who provided the money.

21. The general law on resulting trusts, as enunciated in **Snell’s The Principles of Equity, 27th Edition at page 177**, is that when a father buys a property and puts it in the name of his son or daughter, prima facie, it is a gift to the child. There is therefore a presumption that when property is registered in the name of a child by his parent, the property is not held in trust but is property that is meant to be owned by that child.

22. It is trite law that presumptions are merely that presumptions. They can be rebutted by even slight evidence of a party’s actual intentions that are inconsistent with the presumption. In the case of **Mackowick Vs Kansas City (1906) US**, Justice Lamm, in a prosaic manner, had this to say;

“as the equitable presumptions of resulting trusts may be viewed as the bats of the law- flitting in the twilight but disappearing in the sunshine of actual facts”.

23. The Defendant has pleaded and testified that the suit land was gifted to him in 1962 by his paternal grandfather whom he was named after in accordance Kikuyu customary law as he was the 1st born male grandchild of his grandfather. In evidence he stated except for one grandson, the others were born after the demise of his grandfather. He conceded that at the time of the registration he was only two years old. The Defendant was an infant and there is no way he would have known the fact of the gifting of the land. He did not give evidence to support the alleged gift as well as the ownership of the land by his grandfather nor the kikuyu customary traditions. He did not explain what special circumstances could have led his grandfather to give him land and exclude his own children and the other grandson that had been born in the lifetime of the grandfather.

24. According to the evidence of the Plaintiff, since 1957 he started purchasing fragments from other parties which he consolidated in 1960 and caused the land to be registered in the name of the Defendant in 1964 to hold in trust for him. He testified that he was employed as an agricultural officer in the Ministry of Agriculture and used his salary to purchase the suit land. He explained that the reason he registered the land under the name of the Defendant was because he was a civil servant and did not want to raise eye brows in Government as he had bought other lands and registered under his name.

25. It is not in dispute that the Plaintiff took possession of the land and built a permanent house which he raised his 11 children, the Defendant included. He has also planted coffee on 4 acres of the land. The Defendant admitted in evidence that the Plaintiff, Defendant and the family of his late brother live on the land. The conclusion that this Court reaches is that the land belonged to the Plaintiff having acquired it through his salary he proceeded to utilise his land as any owner would. The Defendant was asked why he has not evicted his father if indeed the land belongs to him and his answer was he respects his father. The reason is because he cannot demonstrate how he acquired the suit land.

26. It is further demonstrated in evidence that the Plaintiff sought guardianship over the suit land in 1966 and charged it to secure loan facilities from various institutions at different times. This is a procedure allowed under section 57 of the Trusteeship Act Cap 167 which provides as follows;

“An order under this Act for the appointment of a new trustee, or concerning any interest in land, stock or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any interest in land, stock or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage”

The Plaintiff applied for guardianship over the property as he had beneficial interest in the land. He did not require the consent of the Defendant as he was exercising a beneficial right. In any event the Defendant was a child. It is on record that the Plaintiff took the last loan in 1982 when the Defendant was 20 years old and he, the Defendant did not raise any objection. There is no evidence that has been presented by the Defendant to support fraud or any acts of advantage over the Defendant by the Plaintiff.

27. The Plaintiff led evidence to disapprove the Defendant's claim that the suit land belonged to his grandfather. He stated that his father owned 3 parcels of land at Githera (2 parcels) and at Kinyona which were distributed to his sons in various portions including the Plaintiff. The Plaintiff stated that the suit land situate in Kurere was not one of them. The Defendant did not produce any evidence to disabuse this position. The Plaintiff's evidence put on a balance of probability is both credible and believable.

28. The Plaintiff has given reasons to show that despite the Defendant being his son and the suit property having been registered in his name at the tender age of 2 years, he nevertheless had intended to create a resulting trust. It is on record that the Plaintiff's intention in registering the land in the name of his son was for self-serving reasons – wealth accumulation. It was not illegal for civil servants to acquire land so much so that the Plaintiff cannot be said to have come to equity with unclean hands.

29. In the instant case the Plaintiff has explained that he paid for the land using his salary as a civil servant. No evidence was tendered to contradict this position. The Plaintiff's intention as explained in evidence was that title would result back to him at the right time. There is no evidence to show that it was a gift.

30. Costs follow the event. It is on record that the Plaintiff sought the cooperation of the Defendant to have the land subdivided for distribution to the Plaintiff's children the Defendant included but he declined to cooperate. It is for this reason that the Defendant is condemned to meet the costs of the suit.

31. The Court makes the orders as follows;

- a. It is hereby declared that the parcel of land Loc 18/Kirere/67 belongs to the Plaintiff.
- b. It is ordered that the said trust be and is hereby dissolved and the whole land reverts to the Plaintiff.
- c. Costs are payable by the Defendant.

Ordered accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4TH DAY OF OCTOBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwangi HB Ngugi for the Plaintiff

Defendant – Absent

Kuiyaki and Njeri, Court Assistants