REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 39 OF 2019

NAHASHON MUTUKU NDUNGU...............................APPELLANT

VERSUS

ANTHONY KUSU WAMBUA......................................RESPONDENT

(Being an Appeal from the Judgment of Senior Resident Magistrate's Court

at Kithimani in Civil Case No. 208 of 2014 delivered on 31st July, 2019 by

Hon. Gilbert Shikwe -Snr. Resident Magistrate)

JUDGMENT

Introduction

1. This Appeal is in respect to the Judgment delivered on 31st July, 2019 by the learned Magistrate. In his Judgment, the learned Magistrate found that the Appellant, although registered as the owner of the suit land, held the same in trust for his brother who sold the land to the Respondent. The lower court allowed the Respondent's claim in its entirety.

2. The Appellant being dissatisfied with the decision filed this Appeal. In the Memorandum of Appeal, the Appellant has challenged the decision of the learned Magistrate on the following grounds:

> ***a) The learned trial Magistrate erred in fact and law in ordering the Appellant to transfer the whole parcel of land known as Mbiuni/Katitu/371 to the Respondent despite having come to a conclusion that the same was held by the Appellant in trust for himself and his brother Laban Kimau Ndungu.***
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> ***b) The learned trial Magistrate erred in fact and in law in failing to appreciate the contract for sale between the Respondent and Appellant's brother had not been completed hence not enforceable.***
>
> ***c) The learned trial Magistrate erred in fact and in law in ignoring in totality the Appellant's Defence, express testimony and his Counter-claim.***
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> ***d) The learned trial Magistrate erred in fact and in law in ignoring the Appellant's testimony that he has been in continuous actual possession of the suit property since 1948 uninterrupted by Laban Kimau Ndungu.***
>
> ***e) The learned trial Magistrate erred in fact and in law in failing to appreciate the mandatory provisions of the Land Control Act.***
>
> ***f) The learned trial Magistrate erred in fact and in law in inferring a customary trust despite lack of evidence to show that the same was ancestral land.***
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> ***g) The learned trial Magistrate erred in fact and in law in relying on conjecture, supposition and on extraneous matters.***

Submissions:

3. The Appeal proceeded by way of written submissions. Counsel for the Appellant submitted that the Appellant is the registered proprietor of a parcel of land known as Mbiuni/Katitu/371 *(the suit property)* and that the evidence adduced in court did not show that the suit property was registered in the name of the Appellant to be held on his behalf and on behalf of his brother.

4. Counsel submitted that the Respondent did not adduce any evidence to show that the suit land was indeed held in trust for the Appellant's brother; that the Respondent's witnesses on cross-examination confirmed that at the time of adjudication, they were not present and that the brother to the Appellant was of full age at the time of adjudication.

5. Counsel submitted that the trial court entirely relied on the Respondent's witnesses' testimony without any legal backing to determine the question of trust and ownership of the suit land; that the Appellant was the registered owner of the suit property; that the Respondent never established a permanent home on the suit property and that the finding that the Respondent had been on the suit property had no factual basis.

6. Counsel for the Appellant relied on the case of ***Esther Ndegi Njiru & Another vs. Leonard Gatei [2014] eKLR*** where the court held that;-

> *"The law is extremely protective of title and provides only two instances for challenging of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."*

7. On whether there was customary trust over the suit land, counsel for the Appellant submitted that notwithstanding the provisions of Section 28 of the Land Registration Act which provides that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interests without their being noted on the register, including customary trust, the Respondent did not entirely proof how customary trust was created over the suit property.

8. Counsel submitted that the legal burden of proving the existence of the trust rested with the one who was asserting a right under customary trust and that to discharge this burden, the person had to proof that the suit property was ancestral clan land and that the registered person was the designated family member who was registered to hold the parcel of land in question on behalf of the family.

9. Counsel relied on the case of ***Njenga Chogera vs. Maria Wanjira Kimani & 2 Others [2005] eKLR*** which quoted with approval the holding in the case of ***Muthuita vs. Muthuita [1982-88] 1KLR 42***, in which the Court of Appeal held that customary law trust is proved by leading evidence. It was submitted that trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

10. Counsel relied on the case of ***Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR*** where the court held 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."*

11. The Appellant's counsel submitted that the suit land was never clan or communal land before registration and that the trial court erred in shifting the burden of proving that the Appellant had a good title which was contrary to the doctrine of sanctity of title under the Torrens system.

12. According to counsel, the only land that was owned by the family was Mbiuni/Katitu/438 which was registered in the name of their mother; that the said property had a dispute which was resolved by the Land Disputes Tribunal and that the suit property does not belong to the entire family as alleged.

13. On whether the contract for sale between the Respondent and the Appellant's brother was unenforceable, Counsel submitted that there was no privity of contract between the Appellant and the Respondent because the Appellant was not a party to the land transaction; that the Appellant was not the administrator of the deceased's Estate and that the Respondent could not seek specific performance against the Appellant herein.

14. Counsel submitted that the Appellant's brother died before the contract was fully performed by the purchaser by paying the balance of the purchase price; that the contract became frustrated by the death of the seller and that the suit herein being agricultural land was subject to the consent of the Land Control Board pursuant to the Land Control Act. It was submitted that the invocation of the equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act had no legal foundation.

15. Counsel relied on the case of ***Wamukota vs. Donati (1987) KLR 280 at page 291*** where Apollo JA found the public policy considerations behind the Land Control Act unquestionable in the following terms;

> *"I believe that sound reasons of public policy motivated the Parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes, Strong words indeed."*

16. On whether the trial magistrate erred in ignoring the fact that the Appellant has been in possession of the property since 1948 uninterrupted, Counsel submitted that the Appellant's brother had not challenged the title of the suit property which was registered in his name since 1976 and that the Respondent's claim was time barred by virtue of the Limitation of Actions Act.

17. Counsel for the Respondents submitted that the Appellant failed and/or omitted to extract and attach a certified copy of the decree to the Record of Appeal making the said Appeal incompetent. Counsel relied on the case of ***Mukasa vs. Ocholi (1968) EA.89*** where the court observed as follows:

> *"…There is ample authority for saying that the court has no jurisdiction to entertain an appeal where a decree embodying the*

terms of judgement has not been drawn up…without a decree is an appeal is incompetent and premature…"

18. Counsel submitted that that the Appellant did not adduce any evidence to show that he bought the suit property from Kalamba Kithakwi in 1936 and that at the material time the Appellant was 8 years old having been born in 1928.

19. It was submitted by the Respondent's counsel that the Law of Contract section 3 provides that:

> *"No suit shall be brought upon a contract for the disposition of an interest in land unless-*
>
> *(a) the contract on which the suit is founded –*
>
> *(i) is in writing;*
>
> *(ii) is signed by all parties thereto; and*
>
> *(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.*
>
> *Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust."*

20. Counsel submitted that all land contracts should be in writing and duly signed by the parties and that it was evident that the Appellant did not avail any Sale Agreement to show that he bought the suit land in 1936. It was submitted that the Appellant's witnesses were not witnesses to the said agreement.

21. Counsel submitted that the Respondent bought a portion of the suit property from the deceased and that the Appellant held a portion of the suit property in trust for his late brother. Counsel relied on the case of ***Kanyi vs. Muthiora (1984) KLR 712*** where the court held that:

> *"The registration of land in the name of a proprietor under the Registered Land Act did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as trustee as outlined in section 28 of the Act."*

22. Counsel also pointed to the court the case of ***Isaac M'inanga Kiebia vs. Isaaya Theuri M'lintari & Another (2018) eKLR*** where the Supreme Court held that:

> *"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie vs. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group."*

23. Counsel submitted that the it is evident that the subject land was held in trust and the Appellant was aware of the same; that the Appellant did not object to his deceased's brother selling the land as he did not own the entire land parcel and that the Appeal should be dismissed with costs to the Respondent.

Analysis and findings:

24. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the lower court. It was held in the case of ***Selle vs. Associated Motor Boat Co. [1968] EA 123*** as follows:

> *"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

25. The first issue I will deal with is whether the Record of Appeal should be struck out on the ground that a copy of the challenged Decree is not in the Record of Appeal. This issue was addressed by Njoki Mwangi J. in the case of ***Elizanya Investments Limited vs. Lean Energy Solutions [2021] eKLR*** as follows:

> *"Order 42 Rule 13(4) (f) of the Civil Procedure Rules, 2010 is specific that what is required at the appellate stage is the Judgment, order* ***<u>or</u>*** *decree appealed from. In the present case, the appellant attached a copy of the lower court Judgment in compliance with*

the said provisions. It is discernible from a reading of the above provisions that it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court.

In the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others** *[2020] eKLR, when addressing the issue of failure by an appellant to file a decree, the court stated thus-*

> *"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from and does not* **make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."**

I am of the view that the use of the conjunction ***"or"*** *means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the Judgment appealed from.*

26. I am in agreement with the above holding. The provision of Order 42 Rule 13 (f) of the Civil Procedures Rules does not make it mandatory for a party to include a Decree in the Record of Appeal. The law allows the Appellant to file a Decree or a Judgment.

27. However, considering that the appellate court can only arrive at a fair decision in respect to an impugned Judgment, it is mandatory for the Judgment of the lower court to be exhibited in the Record of Appeal. In the absence of a Judgment, the appellate court can do no better than strike out the Record of Appeal. That is not the position in this matter.

28. The issue that was before the lower court was whether the Appellant, who was a Defendant in the lower court, holds parcel of land number Mbiuni/Katitu/371 *(the suit property)* in trust for his late brother, Laban Kimau, and if so, if the said Laban Kimau validly sold the suit property to the Respondent herein.

29. In the Plaint that was filed in the lower court, the Respondent averred that the suit property was registered in the name of the Appellant on behalf of the late Laban; that on 23rd August, 2012, he bought the suit property from the late Laban for Kshs. 200,0000 and that it was agreed that the Appellant would transfer the land to him.

30. In his Defence and Counter-claim, the Appellant averred that the suit property is his personal property having purchased the same from Kalamba Kithatui; that his children have settled on the suit property and that the Respondent has no cause of action as against him.

31. After hearing the evidence, the learned Magistrate allowed the Respondent's Plaint as follows:

> *"In this case, the Defendant has pleaded customary trust in the suit land. The Plaintiff's case is that he is the absolute registered owner of the suit land pursuant to a grant of administration. The provisions of the law above are to the effect that the overriding interest such as a customary trust need not be noted on the register of the suit land.*
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> *It therefore follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land. It is therefore my finding after analyzing the evidence presented before me that the fact that the defendant was registered as the owner of the suit land, he was not precluded from holding the suit land in trust for his brother who was actually given his fair share and which he sold to the Plaintiff. In the premises, I allow the Plaintiff's claim in its entirety and grant all the four Orders in favour of the Plaintiff."*

32. The doctrine of customary trust is recognized in this country. The legal status of the said doctrine was confirmed by the Supreme Court in the case of ***Isaac M'inanga Kiebia vs. Isaaya Theuri M'lintari & Another (2018) eKLR*** where the court held as follows:

> *"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in* ***Kiarie vs. Kinuthia****, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group."*

33. Customary law trust is proved by leading evidence. Customary trust is a question of fact which must be proved by whoever is claiming a right under it. The Respondent was under an obligation to proof that the land in question was family or clan land, and that the Appellant was holding the same in trust for his late brother.

34. The Respondent informed the trial court that on 23rd August, 2012, he purchased the suit property from Laban Kimau Ndungu *(deceased);* that at the time of the purchase, the land was already registered in the name of the Appellant and that Laban died before ensuring that the Appellant transfers the land to him.

35. In cross-examination, the Respondent informed the court that the suit land was registered in favour of the Appellant in 1976; that parcel of land number 438 was registered in favour of the Appellant's mother; that he did not pay the entire purchase price and that he never obtained the consent of the Land Control Board.

36. The clan elder of Atangwa clan informed the trial court that the Appellant and the late Laban inherited the suit property from their late mother; that he was called by the two brothers to resolve the dispute in respect to the suit land and that there exists a splinter group of the clan.

37. The Appellant's uncle stated that the suit property belonged to the Appellant's father, Ndungu Kimau, and that upon the demise of their mother, the two brothers shared the said land. The Appellant's step brother (PW4) informed the court that his mother was the 2nd wife while the Appellant's mother was the 1st wife to their late father and that the suit land initially belonged to their father.

38. According to the evidence of PW4, the late Laban was young when their mother died and that is why the suit land was registered in favour of the Appellant. According to PW4, the late Laban build his house on his portion of land which is the portion that was sold to the Respondent.

39. On his part, the Appellant informed the court that he was 91 years old; that the land that was registered in favour of their late mother was parcels number 219 and 438; that he bought the suit property in 1936 and that the land was surveyed in 1972.

40. The Appellant's neighbour informed the court that the Appellant owns the suit property; that suit property was surveyed in 1976 and that the late Laban was over 35 years old by then. According to the Appellant's son, he has been residing on the land since 1993; that his uncle Laban died in 2014 and that his signature was forged during the sale of the land.

41. Although the Respondent's claim over the suit property is premised on the sale agreement date 23rd August, 2012, he has admitted that the land was registered in the name of the Appellant as at the time of the purchase. In the said agreement, the late Laban stated that he had sold land bordering the land of the Appellant and that he had been paid Kshs. 132,100, leaving a balance of Kshs. 67,900.

42. Going by the text of the Agreement between the Respondent and Laban, it is not clear whether the Respondent purchased a portion a portion of Mbiuni/Katitu/371 *(the suit property)* or the entire suit property. Indeed, in view of the fact that no evidence was produced to show that the Appellant owned another piece of land neighbouring the suit property, the Respondent could only have purchased a portion of the suit property and not the entire land.

43. If the Respondent was purchasing a portion of the suit property, the question that arises is what acreage was he was purchasing? And if he was purchasing half of the suit land, then, why would he claim the entire suit property in the Plaint? In so far as the Respondent's claim as pleaded in the Plaint was not in accord with the sale agreement of 23rd August, 2012, his claim should have failed on that ground alone.

44. Further, the Respondent admitted in evidence, and in his statement of Defence that he neither completed paying the purchase price nor obtained the consent of the Land Control Board contrary to the provisions of the Land Control Act. Having not paid the full purchase price and obtained the consent of the Land Control Board, the agreement of 23rd August, 2012 is not enforceable in respect to the suit land.

45. On the issue of whether or not the Appellant is holding the suit property in trust for his brother, it is my finding that the issue could only be raised by the legal administrators of the Estate of the late Laban Kimau Ndungu. Indeed, the Respondent should have sought to enjoin the Legal Representative of the estate of Laban in this suit.

46. I say so because it is only the late Laban, or his Estate, that could validly raise the issue of the Appellant being a trustee in respect of the suit land. Furthermore, even if it is true that the Appellant was holding the title to the suit property in trust for his brother, it was imperative that the issue of trusteeship be resolved first before the Respondent could enter into a valid Sale Agreement with the late Laban, or obtain a written consent of the purported trustee.

47. The above notwithstanding, the Respondent and his witnesses did not adduce evidence to show that the suit property was registered in the name of the Appellant as a trustee for his late brother. Indeed, the evidence that was adduced shows that the Appellant's father had two wives, and each wife was registered as the proprietor of specific parcels of land on behalf of their children. The suit property was not amongst them.

48. In conclusion, it is my finding that the Respondent did not establish at trial that the suit property was ancestral land and that during adjudication, the Appellant was designated to hold the same on behalf of the family. The Respondent did not also prove that he completed the sale agreement of 23rd August, 2012 so as to be entitled to an order of specific performance.

49. Furthermore, the Respondent cannot succeed in seeking for a refund of the purchase price from the Appellant considering that there was no privity of contract between him and the Appellant. The Respondent's claim for a refund of the purchase price can only be as against the late Laban's Estate.

50. For those reasons, I allow the Appeal and set aside the Judgment of the lower court in Kithimani PMCC No. 208 of 2014 and substitute the said Judgment as follows:

a) ***The Plaint dated 5th November, 2014 in Kithimani PMCC No. 208 of 2014 is dismissed with costs.***

b) ***The Defendant's Counter-claim in Kithimani PMCC No. 208 of 2014 is allowed as prayed.***

c) The Respondent to pay the costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O.A. ANGOTE

JUDGE