



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 05 OF 2020**

**STEPHEN LAITITI MUTUNGA.....1<sup>ST</sup> APPELLANT**

**CHARITY KIGETU LAITITI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**LENISON KOOME MURIUNGI.....RESPONDENT**

**JUDGMENT**

1. **Stephen Laititi Mutunga** and **Charity Kigetu Laititi** the appellants who were the plaintiffs in the lower court have brought this appeal against the judgment on the ground that they bought and were lawfully transferred **Parcel No. L.R Nyaki/Thuura/3229** for value by the late **James Muriungi Thurania** and hence the trial court erred in law and in fact in dismissing their case and finding the subject property was held in trust by the deceased and hence cancelling the title so as to revert to the deceased estate.

**Pleadings in the lower court.**

2. Through a **plaint** dated **30.6.2014**, the appellants sued the respondent claiming to be registered proprietors of parcel No. **L.R No. Nyaki/Thuura/3229** bought from the respondent's late father **James Muriungi M'Thuranira**. The appellants claimed the respondent had on **23.6.2014** without any colour of right; trespassed into their land, deposited building blocks and other materials with a view of putting up a building hence sought declaratory orders of ownership; that the respondent was a trespasser; permanent injunction restraining any mode of interference; general damages and mesne profits. Contemporaneously the appellants brought an application for temporary orders of injunction in which the trial court granted orders for maintenance of status quo pending hearing.

3. On the other hand the respondent filed a defence and counterclaim claiming to have been a beneficiary of a portion of the said land as a son of the seller; had possessory rights was living thereon with the consent of his father, but had not been formally transferred the land. Further the respondent claimed to have undertaken developments therein but later the property was registered as **L.R No. Nyaki/Thuura/3229**. The respondent further alleged the said sale and transfer was in breach of trust by the late father since he was holding the land in trust, in favour of himself and other siblings, having inherited it from their grandfather. The respondent further claimed the land was secretly sold and transferred which act he termed as insensitive leading to leaving him and his siblings landless and destitute. So he sought the court to declare the land belonged to him, was held in trust by his late father; sought to have it transferred to him and lastly cancel the appellant's title.

4. The respondent through leave of the court took out a third party notice which was allowed against his father now deceased dated **21<sup>st</sup> November 2014** and made allegation against his late father for:-

*(a) Failing to transfer to him the land which he was holding in trust.*

*(b) Secretly selling and transferring the land held in trust.*

*(c) Insensitively leaving the plaintiffs and his children landless and destitute. The same was served and a 3<sup>rd</sup> party defence was entered dated 9<sup>th</sup> December 2014 in which the third party denied any indemnity and on contribution as alleged; denied ever holding any trust over the suit land and averred the defendant had his own land separate and distinct from the suitland hence his claim was malicious, unlawful and without any basis.*

5. By a reply to defence and defence to counterclaim dated 18.10.2014 the appellants claimed to be innocent purchasers for value in good faith; alleged the defendant was a trespasser to their land; his claim was misplaced and untenable in law; the counterclaim was incompetent, defective and bad in law; any development on the land was theirs and denied there was any trust between the respondent and his late father.

6. When the matter came up for hearing on **29<sup>th</sup> August 2018**, **Miss Mbiyiwe** appeared for the third party. The court was told the 3<sup>rd</sup> party was deceased though no death certificate was availed. The 1<sup>st</sup> defendant who had brought in the third party told the trial he did not wish to substitute the third party. The court adjourned the matter for the defence to substitute the third party within 60 days. This was never done at all and the matter proceeded on trial **15<sup>th</sup> April 2019** though no third party directions as required by law, were undertaken.

### The evidence

7. The **1<sup>st</sup> appellant** testified that he bought **Parcel No. Nyaki/Thuura/3229** for **Kshs.300,000/=** and got it transferred to him on 24.5.2018. He produced both the agreement, a search and a copy of the title as P. Exh. 1, 2 and 3 respectively. As a show of developments he also produced a copy of photos as P. exhibit 4. In his testimony the 1<sup>st</sup> appellant told the court the respondent and his other siblings had land elsewhere and the respondent lived adjacent to his land. In his view there was no objection to the sale when parties visited the land control board for consent. In cross examination the 1<sup>st</sup> appellant maintained he paid full purchase price and did a search before the transaction which confirmed the land was in the name of the seller hence there was no collusion to sell any alleged ancestral land.

8. **In re-examination** the 1<sup>st</sup> appellant was categorical the respondent was a trespasser. PW 2 testified that he witnessed the sale agreement and maintained at the time of sale the respondent was not occupying the said land and did not live there other than the building blocks he allegedly deposited there after the sale. He confirmed the purchase price was paid in full.

9. **PW 3** testified he witnessed the agreement of sale and alleged the land sold to the appellants was not inheritance land. He maintained the respondent had not developed the land in issue and was occupying a different parcel of land altogether.

10. **DW 1** the respondent told the court he lived in the suit land since birth and only heard the appellants had bought the land from his father yet he was holding it in trust. He told the court he wanted the suit land to be his since his father had given it to him though not transferred to him. According to him his late father had a big portion of land, had lived there since 1996 and wanted the suit dismissed and his counterclaim allowed. In cross examination DW1 alleged though he had brought a third party notice against his father he had passed on two years before trial.

11. **DW1** confirmed his late father had put up a defence and filed a statement which was on the court record. According to DW1 his father had sold **Parcel No. 3229 out of Parcel No. 694**.

12. **Further DW1** alleged **Parcel No. 694** arose out of inherited land from his grandfather. He confirmed he was aware of the sale and that the appellants possessed a title deed though he was not aware of the transfer. He confirmed his late father had other parcels namely **3224, 3235 and 1515** carved out of Parcel No. **694**. He further admitted he and his siblings had their portions of land. In re-examination he told the court his mother occupied **Parcel No. 1515**.

13. **DW2** testified he knew the respondent occupied the suit land; that the appellants fraudulently wanted to deprive him the land yet he had developed it; the procedures to purchase the land were not followed and that they did not attend the Land Control Board to oppose the sale. DW2 maintained the land was ancestral in nature and that their consent to sell was neither sought or obtained. He confirmed all his other brothers had been allocated land from original **Parcel No. 694**. According to DW2, the balance of 1.5 million was not cleared and that the appellants had not produced any evidence of payment. In his view the appellants could as well get **Parcel No. 3234** which was vacant. He confirmed his parents occupied **Parcel No. 3234** and that his mother also owned **Parcel No. 1515** and that there was a trust in existence.

14. **In cross examination the DW 2 testified** he was aware of the transaction between his late father and the appellants though the land was ancestral.

15. He further told the court his late father had not formally given them title deeds. He confirmed the suit land had become prime land after the construction of a bypass. **DW 3, DW 4 and DW 5** told the court the respondent lived on **Parcel No. 3229** the land was ancestral, he did not have a title deed; had developed the land and that the respondent's mother was also their neighbor.

16. After the close of testimony the appellants submitted that they had proved their case both orally and through documentary evidence. Further they maintained the respondent had not substantiated his allegation on fraud, illegality and existence of a trust.

17. Further the appellants submitted under **Section 26 of the Land Registration Act** they were holding an indefeasible title which could only be impeached on account of fraud, misrepresentation or illegality, none of which the respondent had pleaded or established in evidence.

18. In addition the appellants submitted evidence had shown the deceased had allocated the respondent and his sibling other parcel of land.

19. On the other hand the respondent submitted that the appellants had failed to prove their claim on a balance of probability for lack of evidence of clearance of purchase price; that there was no evidence of appearance at the Land Control Board hence there no Land Control Board consent though mandatory hence the transaction was null and void and that there are alternative parcel of land belonging to the third party which was vacant and the appellants could as well acquire it which is adjacent to the suit land.

20. This being a first appeal this court is obligated to re-assess, review and re-appraise the decision of the lower court bearing in mind it has no advantage of seeing the demeanor of the witness so as to establish if the court below reached the correct factual finding and applied the law applicable under the circumstances.

### Evidence tendered and the findings.

21. It is trite law parties are bound by their pleadings and issues flow from pleadings to which the court has to determine and reach its decision. See – Chalida FCA Ltd vs Odhiambo & 9 others 1987 KLR 182.

22. To start with it is not in dispute that there was a third party defence and that the court was notified that the third party had allegedly passed on. Prior to his demise there was no application for third party directions, and more importantly no issues for determination were drawn by the parties.

23. Further the court gave the respondent 60 days to substitute the third party upon knowing that he was dead. That order was never complied with nor did the respondent state whether he was abandoning his third party claim on account of death. Similarly the trial court did not make a finding on whether the respondent's case against the third party had been abandoned or abated as per **Order 24 Rule 7** from the date of death. It appears the trial court proceeded with the hearing of the matter regardless of whether the claim had been abandoned or fallen by the wayside.

24. The judgment is also silent on what became of the third party notice and defence, the implications of the witness statements forming part of the court records yet parties continued to make reference to the role of the third party to the appellants transaction. In my considered view it was a fatal error on the part of the trial court to fail to make definite findings yet eventually the trial court made far reaching determination and findings relating to the conduct of the third party and the appellants herein.

25. Secondly where a party to any proceedings passes on in the course of trial, the court has to give appropriate directions and orders as to substitution and or amendments of the pleadings. The court made those directions but the respondent did not comply with them on time or at all.

26. In the instant case, the trial court's judgment is silent on the third party notice, the third party defence, the reply to the defence and defence to the counterclaim.

27. Though the parties did not frame any agreed issues for determination the court on its own motion framed eight issues for determination. The law is that issues flow from pleadings. See Galaxy Paints C. Ltd vs Falcon Guards Ltd 2000 C.A 385. In my view the court was right in drawing issues No's 1, 3, 5, 6, 7 & 8 as they derived from the pleadings.

28. As for issue No's 2 & 4 paragraph 9 of the defence and counterclaim states:

***“The defendant shall take out a third party notice against his father who breached trust in respect of L.R Nyaki/Thuura 3229 which he was holding for the defendant”.***

29. Paragraph 12 of the counterclaim states as follows:-

***“That the defendant also claims that the said parcel of land is trust land the defendant's father having inherited the same from their grandfather and holds the same in trust of the defendant and the other siblings”. Particulars of breach of trust against the father:***

- ***Failing to transfer to the land which he was holding in trust.***
- ***Secretly selling and transferring some land he held in trust for the defendant.***
- ***Insensitively leaving the defendant and his children landless and destitute.***

Reasons wherefore the defendant prays for judgment against the plaintiff for:

***(a) Declaration that the parcels NO. Nyaki/Thuura/3229 belongs to the defendant and the same was held in trust by his father.***

***(b) Transfer of the said parcel no. to the defendant and subsequent cancellation of the plaintiff's title”.***

30. The third party notice states:-

***“The defendant claims indemnity and contribution and the following reliefs against James Muriungi M’Thuranira:***

- (i) Failure to transfer to the defendant the land which he was holding in trust.***
- (ii) Secretly selling and transferring the land he held in trust.***
- (iii) Insensitively leaving the plaintiff and his children landless and destitute.***

31. There is nowhere in the third party notice the respondent has claimed specifically for **Parcel No. 3229**. Similarly in the defence and counterclaim, there was no pleading any fraud, illegality, misrepresentation or collusion between the appellants and the third party jointly and or severally. There were no particulars of such claims given by the respondent as required under **Order 2 Rule 4 of the Civil Procedure Rules**.

32. Further the third party notice in its entirety states “.... **And the defendants claim against you and will be bound by any judgment given in the suit**”. The third party defence denied any alleged trust over **Parcel No. 3229**. Indeed it goes on to state that the respondent had his own parcel of land separate and distinct from **Parcel No. Nyaki/Thuura/3229** hence his allegations were malicious, unlawful and without any basis.

33. In my view the third party defence brings on board another issue which the court seems to have overlooked; whether or not the respondent had another parcel of land separate and distinct from the **Parcel No. 3229**.

34. Further the reply to defence and defence to the counterclaim seems to have been overlooked by the trial court yet it brought forth other issues pertinent to the case namely:

*(a) Whether the defendant was a trespasser and when he became a trespasser.*

*(b) If the counterclaim was incompetently fatally defective, bad in law.*

*(c) Who between the plaintiffs and the defendant had his developments on the land and when those developments were made.*

*(d) What nature of trust there was between the defendant and the third party.*

35. Looking at the pleadings herein it therefore very clear that the defendant did not plead and or give any particulars of the nature of trust, its basis and any particulars thereof. Again even if that was so, the same would only have been against the third party yet the respondent failed to substitute him after he was granted an opportunity to do so. Further the court fell into error for allowing the matter to proceed and evidence being led against the third party when it was abundantly clear he had passed on; there was a law firm on record and without taking out any third party directions. The trial court failed to make a definite finding to have the pleadings at the very least amended once it was brought to its attention that the third party had passed on;

36. The defence proceeded when the third party was already dead. The respondent in his evidence together with his siblings appeared to advance a claim for the estate of the deceased third party yet at that point in time they had no legal capacity to advance any such legal claim without letters of administration. The court should not have proceeded with a case involving a deceased party without reflecting on its implications on the entire process.

37. With regard to issues No. 2 & 3 the respondent did not plead any fact to that effect. Nowhere does the defendant mention the origin of the **Parcel No. 3229** which is **Parcel No. 684**. No facts were led as to the history of **Parcel No. 3229**. While the court may have allowed evidence to be led by the defence along that line, as often held by courts, the purpose of pleadings is to narrow down the dispute to give notice to the other party so as to prepare and reply to those allegations.

38. The nature of this evidence unfortunately appears to have been, an afterthought, only being led when the defence knew very well the third party was no more and the dead tell no tales. It was therefore completely wrong for the trial court to allow the said evidence to be given, make determination on its strength and yet fail to juxtapose it with the third party defence and witness statements filed before the demise of the third party.

39. As to **issue No. 4** there was no pleading by the respondent on illegality and or unlawfulness of the sale agreement though there was a prayer for cancellation of the title.

40. Coming to the orders issued by the court the respondent sought for a declaration that **Parcel No. Nyaki/Thuura/3229** belonged to him and the same was held in trust by his late father (third party) while the court gave a completely different prayer namely; a declaration be and is hereby issued that the respondents late father was holding the suit land no. 3229 in trust for his family.

41. The evidence given does not lead to this finding. **Parcel No. 3229** was in the name of the appellants. Secondly the prayer in the counterclaim is in trust for the respondent yet the court substituted that to “for his family.” There were no letters of administration and the respondent was not defending the suit or counterclaiming for and on behalf of the family.

42. The respondents’ own witnesses alleged he was the sole beneficiary of **Parcel No. 3229**. The final prayer given was that the Land Registrar Meru cancels title **No. Nyaki/Thuura/3229** in the name of applicants plaintiff and revert it to the name of the original owner. There was no such a prayer in the counterclaim.

43. Further the respondent did not seek against the third party such prayers. **Section 143 (1) of the Registered Land Act now repealed by Section 80(1) of Land Registration Act 2011** is specific on instances when cancellation of title can be done. Nowhere in the proceedings did the respondent lead evidence to that effect.

44. **Order 2 rule 4 of the Civil Procedure Rules** provides for matters which have to be specifically pleaded. The court cannot make any finding in matters not pleaded or grant any reliefs which are not sought by a party in its pleading as held in **Caltex Oil Kenya Ltd. –vs- Rono Ltd. (2016) eKLR, Anthony Francis Warehan t/a AF Warehan & 2 Others –vs- Kenya Post Office Bank 2004 eKLR.**

45. Secondly a court of law cannot just pick issues literally from the air and purpose to make a determination on them as held in **Chumo Arap Songok –vs- Doash Kibiego Rotich (2006) eKLR.**

46. The record does not show any evidence was led by the parties on illegality, misrepresentation, corruption or fraud and submitted on it so as to suggest the parties left such issues for the court’s determination. The trial court fell into error and *suo moto* decided matters not

pleaded, evidence not led on them and where no submissions to that effect were made by the respondent.

47. Further **order 24 rule 4 (1) and (2) and (3) of the Civil Procedure Rules** is very clear on joinder of a legal representative within one year of a party's demise to the proceedings. As at the time the respondent testified, it was indicated two years had elapsed. So that means in absence of substitution any claim the respondent had over the third party had abated by operation of law.

48. In absence of any action even after the respondent was granted leave, his suit against the third party had abated as per **Order 24 Rule 7 (4) of the Civil Procedure Rules**.

49. The respondents did not amend his defence nor drop the third party proceedings. The court ought to have made a definite finding or inquiry under **Order 24 Rule 5 of the Civil Procedure Rules** before proceeding with the case. In absence of such directives or orders the entire process herein became flawed, the respondent's cause of action against the third party could not lie or continue as against a deceased party.

50. By extension also since the link to the appellants was the deceased, if the said third party had passed on, the suit abated, it goes without saying that the respondent's claim against the appellants herein lost feet on which to stand.

51. In **Suleiman Said Shabhal vs Independent Electoral and boundaries commission and 3 others (2014) eKLR** the court held;

***“Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void but voidable, an act that is voidable is void until it is made or declared void. It ceases to have effect after it is declared void. It is not void abinito. What has been done or accomplished pursuant to that act is not affected by the declaration. On the other hand a nullity is really something that is void, a nothing right from the beginning”.***

52. In line with the above decision, it is evident the trial court conducted proceedings while aware of the death of the third party, and gave an order for substitution which were never complied with. While that order was subsisting the court proceeded to hear the case without giving directions and in complete disregard of the procedure. This was an exercise in futility and hence a nullity. The pleadings ought to have been amended otherwise any claim by the respondent against the third party abated and also its continuation without any amendments against the appellants became untenable.

53. **On the issue of trust, Order 2 rule 10 (1)** provides a party must give particulars of trust. In **Twalib Hatayan and another vs Said Saggah Ahmed Al-herdy and others (2015) eKLR** the court defined the law of trust as follows:

***“According to the Black's Law Dictionary 9<sup>th</sup> Edition a trust is defined as the right, enforceable safely in equity, to have beneficial enjoyment of property to which another holds legal title; a property interest held by one person trustee at the request of another (settler) for the benefit of a third party (beneficiary)”***

54. Under the **Trustee Act cap 167 Laws of Kenya** the expression trust and trustee extend to implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property.

55. In 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 Peter Ndungu Njenga –vs- Sophia Watiri Ndungu (200) eKLR, (Charles K. Kandie –vs- Mary Kimoi Sang (2017) eKLR, Mumo –vs- Makau (2002) 1 E.A 170, Kazungu Fondo Shutu & Another –vs- Japhet Noti Charo & Another (2021) eKLR.**

56. It is common ground that the respondent was aware of the sale of the land and subsequent transfer by the third party to the appellants herein. The respondent has not alleged any illegality, misrepresentation and or fraud on the part of both the appellants and the third party. There was no objection filed at the Land Control Board before and after the land control board consent was issued. Subsequent to the transfer and eventual issuance of title deed in favour of the appellants, no evidence has been tendered by the respondent showing he ever lodged a complaint with the land registrar or any other relevant government agency for commencement of investigations over the manner the appellants acquired the land. The respondent did not enjoin the office of the Land Registrar to this suit on account of any illegality or complicity with both the appellants and the third party.

57. Further the respondent has not particularized the elements of how the trust was exercised and on which parcel of land. Evidence was led on how the respondent and his siblings were issued with alternative pieces of land out of the original Parcel No. 694 by the third party.

58. It cannot therefore be said the third party took advantage of the respondent. On the contrary the evidence of the defence cannot stand in view of the documentary evidence in the court file and further report of scene visit that he benefited from the larger parcel 694 yet he is the one unjustly seeking more than he was given by the third party. The respondent is not the sole beneficiary and lacks authority or capacity to sue on behalf of the estate and by extension his other siblings.

59. In the instant case, the registered owner(s) are the appellants in terms of **Section 28** of Registered Land Act cap 300 now repealed which was the applicable law. The respondent ought to have pleaded how the appellants held the land in trust for him. Instead the respondent pleaded trust against the third party who is now deceased and his claim if any had already abated. It would therefore be farfetched for the trial court to infer and or import any complaint against the third party so as to be answered by the appellants. It would be against public

policy and the law for the court to make such a finding first against a party who is deceased and in which such a cause of action, if it ever existed was not pleaded against both the appellants and the third party either severally or jointly.

60. Evidence led indicates **Parcel No. 3229** was carved out of **Parcel No. 694** allegedly held by the third party. So if that be the mother title and in which other portions have been carved in favour of the respondent and his siblings, it defeats logic for the respondent to purport to seek one portion be cancelled and transferred into his name; yet there are other beneficiaries to the estate..

61. Further if the third party is was dead at the hearing and the respondent did not have letters of administration and has for two years since his demise not taken out any more so after he was given an opportunity by the trial court to join and or substitute with a legal representative, this court can only infer improper motive on the part of the respondent.

62. The actions of the third party in the circumstances of this case and given that his spouse wrote a witness statement but was harassed not to come and testify especially after the death of her husband, in which statement she confirms her consent to the transaction on account of their day to day needs due to old age and medicine, this court is more inclined to make a finding that the appellants and the third party had no intention to unjustly enrich themselves at the expense of the respondent.

Given the foregoing this court finds the appeal with merit, allows the appellant's claim in the lower court and dismisses the respondent's defence and counterclaim. The costs for the appeal and in the lower court are awarded to the appellant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2021 IN PRESENCE OF:**

Omari for the Appellants

Muriuki for Respondent

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**