



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO. 145 OF 2017**

**TONY JUSTUS ONGALE .....PLAINTIFF**

**= VERSUS =**

**CATHERINE LORNA MARIATI ..... DEFENDANT**

**J U D G M E N T**

1. By a Plaint dated 15<sup>th</sup> August, 2017, the Plaintiff brought this suit against the Defendant for prayers that:

**a) An order of permanent injunction against the Defendant by herself, her servants, workers, agents, 3<sup>rd</sup> parties or any person claiming through her from cultivating, planting crops, fencing off or any manner whatsoever is interfering with the Plaintiff's LR Nos Marachi/Bumala/2042, Marachi/Bumala/2024 and Marachi/Bumala/1982 respectively;**

**b) Costs of this Suit and interests;**

**c) Any other relief this Honourable Court may deem just and fit to grant.**

2. The Plaintiff contends that although he is the absolute owner of parcels of land known as **LR Nos Marachi/Bumala/2042, Marachi/Bumala/2024 and Marachi/Bumala/1982**, the Defendant without the Plaintiff's consent, has been putting the said parcels to use hence denying the plaintiff his rights of ownership and peaceful possession

3. The Defendant filed her Defence on the 21<sup>st</sup> of January, 2019 denying the Plaintiff's claim and in particular contending that;

*a) That the three parcels of land **Marachi/Bumala/2042, Marachi/Bumala/2024 and Marachi/Bumala/1982** were brought with funds from family business as **TONY JUSTUS ONGALE** and **CHARLES ONGALE MARIATI** under the name and style **T.J Ongale & Associates** and that the three parcels were registered in the Plaintiff's name in trust for the whole family;*

*b) That it was only their father, **CHARLES MARIATI ONGALE** who had the right to show the family members where each should settle; and*

*c) That although the Plaintiff holds the legal title in the said parcels of land, he does not have exclusive right of possession as all members of the family under the family have equal right to occupy land.*

4. The hearing commenced on the 3<sup>rd</sup> of November, 2020 with the testimony of **TONY JUSTUS ONGARE** as **PW1**. The Plaintiff testified that his place of abode is Nairobi and the Defendant is his sister. He adopted his witness statement filed on the 21<sup>st</sup> of January, 2017. He continued that L.R No. Bumala/2024, L.R No. Bumala/2042 and Marachi/Bumala/1981 are all his parcels of land and he has the original titles for them He further stated that he bought parcel No. 2042 from Emana Okoth and parcel no. 1981 from Milton Okoth for Kshs.45,000/- for the latter. That he built maisonettes on the land before he was chased away from the house by his father, the Defendant and her children.

5. He added further that he did not give them consent to live on the land and he seeks eviction orders and a permanent injunction against everyone living on the said parcels of land. He stated that the Defendant started living on the Suit Parcel in the year 2014. He also denied the allegations that he was holding the titles in trust for anyone.

6. **PW1** adopted his witness statement filed on the 24<sup>th</sup> of January, 2018 where he stated that:

*a) Neither the Defendant nor any other person claiming through her made any contributions towards the purchase of the two parcels that form the suit parcels herein;*

b) After obtaining the titles, he requested his father, Charles Mariati Ongale, who is a mason to help him put up a house on the three titles;

c) He personally financed the construction of the house that constitutes his home on the three titles and after the death of his mother, he accommodated their father in the said home;

d) The Defendant visited the matrimonial home in December, 2013 during the funeral of their mother. That the Defendant eventually brought her children to his home and are currently living with their father;

e) The two parcels forming the basis of this suit are not family land as they are his personal property bought with his personal earnings and savings;

f) The Defendant has, without his consent, resorted to cutting down trees and selling the Plaintiff's property and livestock.

7. **PW1** also produced the documents his list dated 13<sup>th</sup> February, 2015 to wit; copies of titles for the suit titles; copies of sale agreements; letters dated 23<sup>rd</sup> March 2017 and handwritten will dated 21/5/2017.

8. Upon cross-examination **PW1** stated that he registered T.J. & Associates using a house owned by his father in Huruma as its registered office with the certificate bearing both his and his father's names. That he bought the suit parcels personally despite the fact that the documents were signed by both him and his father. He stated that he buried his mother on parcel 2042 because his father had rejected her.

9. The Defendant called two witnesses. **CHARLES MARIATI ONGALE** testified as **DW1**. He stated that the suit parcels were bought using money from T.J Ongale & Associates. That they sourced funds and put the money into the company's accounts which money was used to purchase the suit parcels. He admitted that the rest of the family members had no idea that the business existed. He stated further that he does not want the suit land only permission to exhume his late wife's body for burial in Butere.

10. Upon cross examination he stated that the T.J & Associates does accounting and auditing and it was the Plaintiff's job to do the accounts. That the title deeds are in the Plaintiff's name because **DW1** did not want the Plaintiff to do succession and he was the reasonable one amongst his children. He continued further that to state that he has registered cautions on the suit titles.

11. **CATHERINE LORNA SANYU** who is the defendant testified as **DW2**. She said that she lives with **DW1** in Bumala and the house in which they live in is the property of T.J & Associates. That she was once employed at the Company before the Plaintiff changed it to his. **DW2** prayed that the Plaintiff as the remaining director should be ordered to pay **DW1** as his co-director.

12. Upon cross-examination, **DW2** stated that the suit parcels were registered in the name of T.J & Associates although she was not sure in whose name the titles currently read. She was shown the titles to the suit land and **DW2** confirmed that the titles were issued in the Plaintiff's name in 2004. She continued further that her father is the one who bought the suit land from Milton Okoth Otuoma even though the agreement is drawn between the Plaintiff and Milton. That she has not filed a suit to complain in court against the registration of the titles in the Plaintiff's name. She took issue with the cheque issued by the company produced by the plaintiff as it does not bear Milton's name; secondly it is dated 2003 yet the land was purchased in 2004. **DW2** reiterated that according to the agreement the seller was Milton, the purchaser was the Plaintiff, the purchase price was Kshs.22,500 and **DW1** was a witness to the agreement. She admitted that **DW1** had donated to her a parcel of land where she has set up a children's home. This marked the close of defendant's case.

13. The Plaintiff filed his submissions on the 17<sup>th</sup> of March, 2021. The Defendant did not file any submissions. The plaintiff submitted that he is the registered owners of the suit parcels and that the Defendant has absolutely no rights or interest in the land. That the averment by the Defendant that the Suit parcels were being held in trust for the entire family are not backed by any evidence and specifically that the suit parcels were bought from the proceeds of the company, T.J Ongale & Associates. That it was the Defendant's duty to prove that the Plaintiff holds a fiduciary position in her favour in respect of the property subject to the claim. He sought to rely on the cases of **NWK vs. JKM (2013) eKLR** and **Harrison Wachira Wanjohi vs. Bethwell Mwangi Githinji & 4 others (2013) eKLR**.

14. I have considered the parties' pleadings, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:

i) Whether the Plaintiff is holding the suit parcels in trust for the Defendant and the rest of the Defendant's family;

ii) Whether the Defendant should be evicted and a permanent injunction issued against her, her agents, employees and family members; and

iii) Who bears the costs of the suit?

15. With regards to the question whether the Plaintiff is holding the suit parcels in trust for the Defendant and the rest of their, the Defendant pleaded at paragraph 3 and 4 of her statement of defence that the Plaintiff holds the suit parcels in trust for his entire family. **DW2** stated in evidence that the Plaintiff bought the suit parcels with the monies from T.J Ongale & Associates which according to her was a family owned business. **DW1** confirmed that he is a partner at T.J Associates which was registered sometime in 1989.

16. **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 48 at paragraph 597** defines a resulting trust as:

***"A resulting trust is a trust arising by operation of law:***

i) Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or

ii) Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or

iii) Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”

17. While discussing the burden of proving trust, the Court of Appeal in the case of Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Center [2018] eKLR stated that:

“Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley – Civil Appeal No. 75 of 2016 (unreported). It was upon the respondent to establish that it was the parties' intention that the appellant would purchase and hold the suit parcels in trust for it. Did it do so?”

18. Section 107 of the Evidence Act Cap 80 of the laws of Kenya provides that: -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” It is therefore the Defendant's burden to prove that the trust she alleges existed. From the Documents produced by the Plaintiff, the agreement for sale for the suit parcels produced as Pex 3 and Pex 4 indicate the Plaintiff as the sole purchaser. The land was not purchased in the name of T.J Ongale & Associates or jointly with the Plaintiff's and their father one Charles Mariati Ongale who was a partner in the business. The DEX 17 also confirms that the Plaintiff was the sole purchaser and DW1 was only a witness to the agreements.

19. The Court of Appeal in the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR, while dealing with the issue of trust stated as follows:-

“Dealing with the first issue, according to the *Black's Law Dictionary, 9th Edition*; a trust is defined as:

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see *Halsbury's Laws of England Vol 16 Butterworths 1976 at para 1452*). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the 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. (see *Black's Law Dictionary*) (Supra). 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 *Halsbury's Laws of England supra at para1453*). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see *Black's Law Dictionary*) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity 29th Edn, Sweet & Maxwell p.175*). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see *Snell's Equity at p.177*) (supra)....”

20. None of the documentation produced by the Defendant in relation to T.J Ongale Associates confirm that the business' money was used to purchase the suit properties, they only prove that a business venture existed. Consequently, I conclude that the Defendant has failed to prove the existence of either a constructive or resulting trust with regards to the suit properties. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR wherein the Court stated that;

“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.”

21. The second issue is whether the Defendant, her agents, employees and family members should be evicted from the suit parcels and a permanent injunction issued. The Plaintiff has produced the titles of the suit parcels and all titles bear his name. The Land Registration Act has made provisions for the rights of a proprietor of land at section 25(1) of the Act which provides that:

*‘The rights of a proprietor whether acquired on first registration or 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 the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.’*

22. Section 26(1) of the Land Registration Act provides that:

*‘The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -*

*a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

23. Since evidence adduced point that all the suit parcels’ titles are registered in the Plaintiff’s name and which titles have not been challenged to have been acquired through fraud or misrepresentation on the part of the Plaintiff, his title remains indefeasible. See Elijah Makeri Nyangw’ra vs. Stephen Mungai Njuguna & Another (2013) eKLR.

24. In light of the foregoing, the Plaintiff’s rights as a proprietor are protected under the law as provided under sections 24 and 25 of the Land Registration Act and no evidence having been proffered by the defence to have those rights stripped from him, I find that he has proved his case for vacant possession of the suit parcels.

25. In conclusion I enter judgement for the Plaintiff and hold that:

a) The Defendant is ordered to surrender vacant possession of the suit parcels No. Land Parcel No. Marachi/Bumala/2042. Marachi/Bumala/2024 and Marachi/Bumala/1982 within ninety (90) days of the delivery of this judgement.

b) In default of (b) above, eviction shall issue.

c) An order of permanent injunction be and is hereby issued against the Defendant, her children, servants, workers, agents, 3<sup>rd</sup> parties or any other person claiming through her from living on, cultivating, planting crops, fencing off or any manner whatsoever interfering with the Plaintiff’s use and occupation of Land Parcel No. Marachi/Bumala/2042. Marachi/Bumala/2024 and Marachi/Bumala/1982 respectively;

d) This being a matter between family members, each party shall meet their legal costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF JULY, 2021.

A. OMOLLO

JUDGE