



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 471 OF 2017

MARY ANNE OBONDO.....PLAINTIFF

=VERSUS=

MOSES NAMUSASI CHIKATI.....DEFENDANT

JUDGMENT

Background

1. This suit was initially heard *ex-parte* and an *ex-parte* judgment dated 27/11/2018 was read on 29/11/2018. The said *ex-parte* proceedings and judgment were subsequently set aside through a ruling rendered on 18/6/2019. Subsequently, the suit was heard *interpartes* and it now falls for determination.

2. Parties to this suit are siblings. The plaintiff is an elder sister of the defendant. The dispute in the suit relates to Land Title Number **Dagoretti/Riruta/2533**. By a plaint dated 13/7/2017 and filed in court on the same day, the plaintiff seeks the following orders against the defendant:

- a) A declaration that the defendant is holding Parcel Number DAGORETTI/RIRUTA/2533 in trust for the plaintiff*
- b) An order that the defendant do transfer Land Parcel Number DAGORETTI/RIRUTA/2533 to the plaintiff*
- c) The defendant do execute transfer documents to effect order 2 above or in the alternative, the Deputy Registrar do execute the transfer documents (sic)*
- d) An order that the defendant pays mesne profits for the period stayed in the house*
- e) Costs of this suit*

3. The plaintiff's case is that she bought the suit property from John Kibagendi Moriasi and his wife Gladys Magoma Moriasi in 2003 at Kshs 2,000,000. Because she was out of the Country most of the time, she requested the sellers and the defendant herein to process the contract documents, conveyance instruments and the resultant title in the name of the defendant, her younger brother whom she trusted. The defendant was to hold the title in trust for her. The title was indeed processed in the name of the defendant but the defendant has since declined to convey the title to her. She contends that the defendant holds the suit property in trust for her.

4. On 12/10/2017, the defendant filed a statement of defence dated 5/10/2017. He denies that he holds the suit property in trust for the plaintiff. His case is that he was introduced to the seller by the plaintiff in 2003 and the seller sold to him the suit property at Kshs 2,000,000. Prior to 2003, he worked for the plaintiff as a houseboy for 8 years without a salary and the plaintiff promised to assist him acquire a home of his own. He paid the sellers Kshs 100,000 and the plaintiff paid for him Kshs 1,900,000. The Kshs 1,900,000 paid by the plaintiff was treated as a loan which he fully repaid to the plaintiff in small instalments over five years running from 2003 to 2008. He adds that the plaintiff endorsed the sale agreement hence the contention that he was out of the country most of the time is a lie.

Plaintiff's Evidence

5. *Interpartes* hearing of the suit took place on 9/10/2019. The plaintiff testified as PW1 and called John Kibagendi Moriasi who testified as PW2. The plaintiff adopted her witness statement dated 13/7/2017 as her sworn evidence in chief. She produced the following exhibits (i) Sale Agreement dated 15/5/2008; (ii) Certificate of Lease dated 4/2/2000; (iii) Undated Transfer of Lease; (iv) Acknowledgment of Certificate of Lease (v) Bio Data page of her Passport issued on 22/7/2010; (vi) Debit Advice of Kshs 1,900,000 dated 23/7/2003 and (viii)

Receipts.

6. In summary, the plaintiff's evidence was that she bought the suit property in 2003 from her workmate, John Kibagendi Moriasi and his wife, Gladys Magoma Moriasi at Kshs 2,000,000. She paid purchase price through direct transfer of Kshs 1,900,000 and cash payment of Kshs 100,000. After paying the full purchase price, her employer, USAID, assigned her duties in various foreign missions in Iraq, Cypress, Germany and USA. Due to her overseas tour of duty, she caused the agreement and the transfer to be drawn in the name of her brother, the defendant herein, to hold it in trust for her because her brother was available to execute relevant documents. In 2004, the defendant proposed to her to sell to him the suit property. She initially accepted the idea and in fact directed the vendors who were still holding the title to present the title to the defendant. However, it became apparent that the defendant could not raise the funds and she instructed the vendors to retrieve the title from the defendant. The vendors repossessed the title at her request. After the title had been repossessed by the vendors, she approached the defendant to enquire whether it was possible to have the title transferred to him to hold it in trust for her since she was not available to execute the conveyance documents yet she wanted the property to be transferred from the vendors immediately. The defendant agreed and the title was transferred into the name of the defendant. When she subsequently requested the defendant to convey the title to her, he declined. Consequently she brought this suit.

7. In cross examination, she stated that she requested the seller to give the title to the defendant because she was in Iraq then. Moses had shown interest in the property, but he was not paying rent. The sale agreement showed that she was paying the purchase price on behalf of the purchaser. The title did not show that the defendant was holding the property in trust. She did not have any documents to show that she had raised the issue of trustship between 2008 and 2017 when she instituted the suit.

8. PW2 testified that he was a pastor. Prior to becoming a pastor, he worked as a banker. He also worked at the USAID where the plaintiff was his workmate. In 2003, together with his wife, they sold the suit property to the plaintiff and the plaintiff paid them purchase price in full. They were not able to execute a sale agreement in 2003 because the plaintiff was out of the country most of the time. Ojiambo & Company Advocates acted for both parties to the agreement. The agreement and the transfer were signed in the offices of Ojiambo & Company Advocates.

Defendant's Evidence

9. The defendant testified as DW1. He produced seven documents, namely (i) Certificate of Lease; (ii) Sale Agreement dated 15/5/2008; (iii) Letter of Appointment dated 24/7/2001; (iv) Balozi Sacco Statement of Account for the period 2005-2008; (v) Email from the plaintiff to the defendant dated 2/2/2008 (vi) Copy of Cheque dated 2/5/2008; and (vii) Copy of Cheque dated 15/5/2008.

10. His evidence was that he bought the suit property from John Kibagedi Moriasi and Gladys Magoma Moriasi vide a sale agreement dated 15/5/2008. He worked for the plaintiff as a houseboy in Nairobi's South B and South C Estates from 1989 to 1997 without any pay. The plaintiff accumulated her benefits for payment at the end of his service. In 1997, he secured a job at USAID, Gigiri, as a cleaner. The plaintiff who is his sister worked in the same organization. He gave part of his salary to the plaintiff for safe custody with the sole intent of accumulating money to enable him build a house on the plot which the plaintiff had promised to buy for him. He continued to save money even after he moved from USAID to the US Embassy. In 2003, he learnt from Mr John Moriasi (PW2) who also worked at USID that they were selling the suit property at Ksh 2,000,000. The plaintiff strongly recommended to him to buy the house. She asked him to pay the sellers Kshs 100,000 and she was to pay the balance, Kshs 1,900,000. The initial sale agreement was entered into between the sellers and the plaintiff on his behalf but the records are held by the plaintiff. The plaintiff allowed him to take possession of the suit property but prevailed upon Mr Moriasi not to transfer the suit property until he repaid her the sum of Kshs 1,900,000 which she had paid. The original title was deposited with him. She repaid the plaintiff on diverse dates and the plaintiff recorded the payments in a book she kept. At one point when he defaulted, the plaintiff sent Mr Moriasi to repossess the title. The plaintiff only allowed Mr Moriasi to transfer the property to him after he had repaid her in full. He personally paid stamp duty, transfer fees, and legal costs relating to the transfer.

11. The defendant contested the plaintiff's contention that she was abroad in 2008 when the sale agreement and transfer were executed and stated that she was present and personally endorsed her consent to the sale agreement. He dared the plaintiff to place before the court her passports to demonstrate that she was prevented from signing the sale agreement and transfer by her overseas engagements. He urged the court to dismiss the plaintiff's suit.

Plaintiff's Submissions

12. The plaintiff's advocate, Mr Oboge framed the following as the key issues falling for determination in the suit: (i) Whether the defendant is a trustee of the plaintiff; (ii) Who purchased the land and who ought to be declared the owner of the suit land; (iii) Whether the firm of Ojiambo and Company Advocates is conflicted in the matter; and (iv) Who should bear the costs of the suit.

13. Counsel submitted that a resulting trust obtains between the plaintiff and the defendant; firstly because the two parties are siblings; secondly because it is clear who purchased the suit property; and thirdly because of the clear intention of the plaintiff when she authorized the transfer of the suit property to the defendant. He added that the resulting trust is an implied trust where the beneficial interest in the property comes back, or results to the person who transferred the property to the trustee or provided the means of obtaining the property. Counsel argued that there was no need to reduce the trust relationship into writing because the parties to this suit are siblings who had a very close bond. It was further submitted that the material transaction was exempted from the requirements of Section 3 of the Law of Contract Act because it involved a trust. Reliance was placed on **Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi [2014]eKLR**. Counsel further submitted that the indefeasibility of title under Section 25 of the Land Registration Act is subject to trust relationships.

14. Counsel for the plaintiff further argued that the defendant had confirmed during cross-examination that he did not purchase the property and that there was no evidence that he gave the plaintiff any money as contended by him. He added that the defendant had confirmed that he worked for three different institutions during the period he alleges to have worked for the plaintiff as a houseboy.

15. Counsel added that the plaintiff had demonstrated that she is the one who purchased the land and her evidence had been corroborated by

PW2. He argued that the firm of Ojiambo & Company Advocates was conflicted and had violated the requirements of Rule 9 of the Advocates (Practice) Rules. He added that the Firm of Ojiambo & Company Advocates had unfairly used their position as her advocates to build and advance the defendant's case. Counsel urged the court to grant the prayers sought in the plaint.

Defendant's submissions

16. In response, counsel for the defendant submitted that to succeed on a claim of resulting trust, the plaintiff was under duty to prove that she paid the purchase price in the capacity of a purchaser and that it was the parties' clear intention that the defendant would hold the suit property on her behalf. Counsel added that clause 1 of the sale agreement was clear that the plaintiff did not pay purchase price in her own right as a purchaser but paid it on behalf of the defendant. Counsel added that the defendant had demonstrated that he repaid the plaintiff the purchase price which the plaintiff had paid on his behalf. He contended that the plaintiff did not trust the defendant and it was only after the defendant had repaid her purchase price in full that the plaintiff allowed the vendors to transfer the suit property to the defendant. The defendant argued that the claim of resulting trust was an afterthought.

17. On the question as to whether or not the firm of Ojiambo & Company Advocates was conflicted, the defendant submitted that the issue did not arise from the pleadings and evidence before court and did not fall for determination in the suit. He added that in any event, the said firm was not conflicted because they acted for the defendant, not the plaintiff, in the sale and transfer of the suit property. He urged the court to refer to Clause 5 of the sale agreement. He added that the firm of Ojiambo & Company Advocates had never acted for the plaintiff at all. Her argued that no application was filed by the plaintiff for an order of disqualification of the said Firm.

18. Counsel submitted that PW2 was not a credible witness because he was evasive and dishonest to the extent that he lied to the court, despite the clear wordings of the agreement, when he attempted to contradict the written agreement in terms of the identity of the purchaser and the legal representation of the parties. He argued that the plaintiff and PW2 had a common plan to mislead the court on the terms of the agreement and the intention of the parties.

Analysis & Determination

19. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework, common law principles, and existing jurisprudence on the key issue in this suit. The key issue falling for determination in this suit is whether the defendant acquired and holds the suit property as a trustee of the plaintiff.

20. Parties to the suit are sister and brother. The suit property was registered in the name of the defendant in November 2008. The plaintiff contends that the defendant holds the suit property in trust for her because she is the one who paid the purchase price to the vendors and that trustship should be inferred from the blood relationship which exists between her and the defendant. On his part, the defendant contends that he holds the suit property as the absolute and lawful owner. He contends that the purchase price which was paid by the plaintiff was paid on his behalf and he fully repaid the purchase price to the plaintiff between 2003 and 2008 before the suit property was conveyed to him. Before I analyze the evidence and make pronouncements on the key question in this dispute, I will briefly outline the law relating to trusts in so far as it is relevant to the dispute in this suit.

21. **Retired Honourable Sir Robbert Megarry and Sir William Wade** in their work "**The Law of Real Property**", Eighth Edition, Pages 412 to 414, identify three categories of trusts: (i) trust imposed by statute (ii) express trust – trust expressly declared by a settlor; and (iii) implied or resulting trust – said to arise by operation of equity and is presumed from the intention of the settlor or the common intention of the parties.

22. **Alistair Hudson** in his work "**Equity & Trusts**" Page 379, outlines the following circumstances under which resulting trusts arise:

"Resulting trusts arise in two quite different contexts: either to restore the equitable interest in property to its original beneficial owner in circumstances in which a transfer of that property has failed; or to recognize the equitable proprietary rights of someone who has contributed to the purchase price of property with an intention that she take some property rights in that property"

23. One essential feature in resulting trusts is the feature of common intention. This feature is aptly explained by **Alistair Hudson** at page 383 of his work as follows:

"The reference of "common intention" in the creation of a resulting trust is a commonly used one. Its meaning is that a resulting trust is a mixture of the intention of the settlor and the trustees own knowledge that she is not intended to take the property beneficially".

24. Having outlined the circumstances under which a resulting trust arises, I now turn to the facts and evidence in this dispute.

25. There is common ground that the purchase price was paid to the vendors by the plaintiff way back in 2003. There is no evidence of any formal agreement executed by the vendors and the plaintiff between 2003 and 2008. Both parties contend that upon paying purchase price, the plaintiff authorized the vendor to hand over vacant possession of the property together with the original title to the defendant. The defendant has since then occupied the property without any demand for or payment of rent. The defendant contends that the purchase price paid in 2003 by the plaintiff was paid on behalf of the defendant and that the defendant was the purchaser of the suit property. The plaintiff disputes this. What was the common intention of the parties then?

26. One key piece of evidence in determining the common intention of the parties is the plaintiff's email to PW2 dated 2nd February 2008 which reads as follows at paragraph 2:

“ I hope this makes it clear. Please read my letter of Jan 28, 2008 again. You will remember that I did not send you to the lawyer to collect the Kshs. 2 million cheque which I paid you in 2003. I gave you the cheque (check) personally as a friend. I hope you can also give me the title deed the same way you received the check from me. Remember you had already given me this title deed which I instructed you to give to Moses then later on requested you to repossess it in 2005 when I realised Moses was not honouring his pledge to remit payments. We have already wasted one week since my last letter of Jan 2008. For the short while I am here in Kenya, I want to have this matter resolved before I leave the country as it may take me very long again for me to be here for this length of time. Where can I meet you on Monday Feb 4, 2008 to collect the title Deed? I am free to come to Daystar University to wait for you when you arrive, signing of receipt of the TD should take not less than one minute. I will sign a document confirming that I have received the Title Deed from you. Please see the sample draft below which you can copy and paste on 2 separate fullscaps. Both you and me will sign on both letters. You keep one and I will keep one as proof that I received the Title Deed. In case you are busy, please write out what you want and let Dorothy my cousin help you in typing and printing the 2 pages for you to come with for our signatures when I receive the title deed. See sample (please revise as you deem fit).

27. What emerges from the above email is that between 2003 (the year the plaintiff paid the vendors the purchase price for the suit property) and 2005 (the year the title was retrieved from the defendant), the plaintiff entered into an arrangement with the defendant pursuant to which they agreed that the defendant would pay the plaintiff money and the plaintiff would cede to the defendant her position of purchaser of the suit property. When the defendant defaulted, the plaintiff instructed PW2 to repossess the title and PW2 proceeded to do so. From this piece of evidence, it is clear that the contention that purchase price paid by the plaintiff was done by the plaintiff on behalf of the defendant is not far-fetched. It is clear that the plaintiff indeed intended to cede to the defendant the position of purchaser.

28. Secondly, the subsequent and only formal agreement relating to the suit property was executed in 2008, about three years after the plaintiff had caused the vendors to repossess the title from the defendant on the ground that the defendant had defaulted to make payments to her as mutually agreed. The said agreement made express reference to the purchase price which the plaintiff had paid to the vendors in 2003. The sale agreement was categorical that the purchase price paid by the plaintiff in 2003 was paid by the plaintiff on behalf of the defendant. The agreement was similarly categorical that the purchaser in the transaction was the defendant, not the plaintiff. To confirm the clear terms of the agreement, the plaintiff appended her signature to the following text which forms part of the agreement.

“Consent to the within written Agreement.

Signed

MARYANN OBONDO GALLO”

In the presence of

Signed

Advocate”

29. In my view, the common intention of the parties should first be discerned from the written agreement or memoranda by the parties. It is only when the common intention of the parties is unclear in the written agreement or memoranda that a court of law would be at liberty to rely on parole evidence.

30. If the plaintiff had a different intention, she had the opportunity to express that intention in the agreement to which she appended her signature. She instead clearly consented to the agreement which provided that the purchase price which she had paid was paid on behalf of the defendant. She had a similar opportunity to express her intention in the instrument of transfer by capturing therein the feature of trustship. She did not. She is the one who received the title deed from PW2. Having caused the title deed to be retrieved from the defendant in 2005 on the ground that the defendant had failed to honour the agreed payment arrangements, she in 2008 consented to the agreement and conveyance in their form. In my view, it cannot in the circumstances be said that the parties had an intention different from what was expressed in the agreement dated 1/7/2008.

31. It is therefore my finding that the plaintiff has failed to prove that the defendant holds Title Number Dagorretti/Riruta/2533 in trust for her. Her claim therefore fails in its entirety.

32. The plaintiff urged the court to be guided by the finding in the case of **Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi 2014)eKLR**. In my view, the facts of the above case were different. The plaintiff in that case wanted to bid for property in a public auction. She was out of the country. She decided to bid for the property through the defendant. She provided the money. There was no evidence of any written agreement expressing the common intention of the parties like in this suit where the plaintiff made payment in 2003 and in 2008, she appended her signature to an agreement stating that the payment made in 2003 was made on behalf of the defendant. While I concur with the findings of my brother Munyao J, I do not think the facts in that case were the same as the facts in the present suit.

33. The plaintiff raised the matter of representation of the defendant by the firm of Ojiambo & Company Advocates as one of the issues falling for determination in this suit. I do not agree with that view. Firstly, this is not one of the issues arising from the parties' pleadings. Secondly, the plaintiff never objected to the position of M/s Ojiambo & Company Advocates as advocates for the defendant. The plaintiff only raised the issue in her written submissions. The matters alluded to in the written submissions were not supported by any evidence. In the circumstances, I decline to admit that issue for determination at this stage of the suit.

34. The net result is that the plaintiff's suit fails and it is accordingly dismissed. The plaintiff shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Rotuk holding brief for Mr Ojiambo for the defendant

Mr Obooge for the plaintiff

Court Clerk - June Nafula