



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO. 15 OF 2019

JUVENALIS ONSARIGO OTOTO.....APPELLANT

VERSUS

JOACHIM ANUNDA.....1ST RESPONDENT

JOSEPH KIROCHI.....2ND RESPONDENT

ERNEST OGEGA.....3RD RESPONDENT

(Appeal from the judgment of Hon. S.K Onjoro SRM dated 3.5.2019 in Kisii CMELC Case No. 125 of 2018)

JUDGMENT

INTRODUCTION

1. This appeal arises from the judgment and decree of Honourable S.K.Onjoro, Senior Resident Magistrate delivered on 3rd May 2019 in Kisii CMELC No. 125 of 2018.

2.The Appellant filed an Amended Plaintiff in the lower court in which he stated that he purchased land parcel No. BOGETAORIO 11/1943 in 1998 through his late father Ototo Onsarigo. The father had the suit property registered in his own name in trust for the Appellant. The Appellant settled on the suit property and carried out some developments. He further stated that sometime in August 2012 the Defendants encroached onto his land and started cutting down trees. To his surprise, he discovered that the Respondents who are his brothers had fraudulently transferred the suit property to their names. He prayed that that the Respondents' title be cancelled and for a declaration that the Respondents were holding the title to the suit property in trust for him.

3. The Respondent denied that Appellant's claim and stated that the suit land was passed onto them by their late father as a gift and they were the registered owners thereof.

4. As this is a first appeal, I must bear in mind that the primary role of the first appellate court is to re-evaluate the evidence before the trial court then determine whether the conclusion arrived at by the trial court should stand or not. However, I must caution myself that I neither heard nor saw the witnesses testify. See **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 E.A 212**. In order to do so, it will necessary to restate the evidence presented in the lower court.

5. The Appellant who testified as PW1 adopted his witness statement in which he stated that he bought land parcel No. Bogetaorio 11/ 1943 from one Samwel Onduso in 1968 through his late father Ototo Onsarigo (deceased). Since he was working away from home at Vihiga Police Station, he had the land registered in his father's name. He produced a copy of the green card and sale agreement dated 1.11.1998 as Plaintiff's exhibits 1, 2 and 3. He stated that he has been staying on the suit land since he bought it. Upon cross-examination, he stated that his late father held the land in trust for him. He told the court that he later discovered that the Defendants who are his brothers had registered the land in their names. He told the court that the defendants started cultivating his land in 2012.

6. Joachim Anunda, the 1st Respondent testified DW1. He stated that the suit property initially belonged to their late father and he gave it to them as a gift. He said he did not know how his father had acquired the land. He told the court that his late father had another parcel of land which he inherited from his father.

7. Joseph Kirochi, the 2nd Respondent who testified as DW2 corroborated DW1's evidence that they were given the suit property by their late father. In addition to the suit property, he said he also inherited land parcel No. BASSI/ BOGETAORIO11/186 measuring 1.1 hectares and BASSI/BOGETAORIO 11/22.

8. After hearing both parties, the court came to the conclusion that the Appellant had failed to prove his case and dismissed his case with costs to the Respondent.

9. Being dissatisfied with the said judgment and decree dated 3rd May 2019 the Appellant filed this appeal citing the following grounds:

- i. That the learned Trial Magistrate erred in law and fact in failing to find that the Appellant had proved his case.
- ii. That the learned Trial magistrate erred in law and in fact in failing to find that the Respondent's evidence was not in tandem with their pleadings.
- iii. That the learned Trial magistrate erred in law and in fact by failing to properly analyze the evidence before him and thus reached a wrong conclusion.
- iv. The learned Trial Magistrate decided the case without giving full consideration to the submissions by the Appellant's counsel
- v. That the learned Trial Magistrate erred in law and fact in failing to find that the Plaintiff had proved the existence of a trust.

10. The appeal was prosecuted by the way of written submissions and the Appellant filed his submissions on 5th December 2019 while the Respondents filed theirs on 13th January 2020.

APPELLANT'S SUBMISSIONS.

11. In her submissions learned counsel for the Appellant argued that the Appellant had proved his case by establishing that there was a resulting trust in his favour, since he had paid the purchase price and he had lived on the suit property peacefully for 43 years until his father died in 2010, when the Defendants invaded the suit land and began farming thereon. She submitted that in their defence the Respondents did not raise the fact that the suit property had been gifted to them by their father and their evidence to this effect ought to have been disregarded. She further submitted that contrary to the finding of the court that the agreement produced by the appellant did not indicate the parcel number of the land sold to his father, the agreement dated 18.5.2002 indicates the parcel number as plot No. BOGETAORIO11/1943.

RESPONDENTS' SUBMISSIONS

12. In his brief submissions, learned counsel for the Respondents submitted that the Appellant failed to prove the existence of a trust as he did not call any witness to prove a trust and the agreement does not indicate that the land was to be held in trust for the Appellant. He also submitted that the Appellant did not prove fraud to the required standard. He argued that the suit property was transferred to the Respondents during their father's lifetime in the year 2000, yet the Appellant only filed suit against them in 2012.

ISSUES FOR DETERMINATION

13. Having considered the grounds of Appeal, the record of appeal and rival submissions, the issues that fall for determination are;

- i. Whether the Appellant proved that the existence of a trust in relation to the suit property.
- ii. Whether the appeal should be allowed.

ANALYSIS AND DETERMINATION

14. The Appellant's case is founded on trust. He was therefore required to prove first, that his late father who was also the Defendants' father held the suit property in trust for him and therefore any transfer of the suit property to the Respondents was subject to the said trust.

15. The Appellant testified that he bought land from one Samwel Onduso Magembe in 1968. The said parcel of land was subsequently registered as parcel no. BOGETAORIO 11/1943. The same was registered in the name of his late father Ototo Onsarigo as the Appellant was working away from home. He produced two sale agreements. The first one dated 1.11.98 which does not bear the parcel number and the second one dated 18.5.2002 which refers to plot no. BOGETAORIO 11/1943. While the second agreement makes reference to a parcel of land purchased by Onsarigo Ototo from Onduso Sitara in 1968, the agreement dated 1.11.98 makes no reference to the land bought in 1968.

16. It is trite law that he who alleges must prove. It was incumbent upon the Appellant to establish the existence of a trust by adducing evidence that would link the land purchased by his father on his behalf in 1968 to the one referred to in the two agreements dated 1.11.98 and 18.5.2002 so as to demonstrate the intention of the parties. I have evaluated the evidence adduced by the Appellant and I find that there are gaps in the evidence tendered in the lower court. I do not agree with the Appellant that the Respondents' evidence was at variance with their pleadings.

17. As was held in the case of **Gichuki v Gichuki (1982) KLR 285** and **Mbothu & 8 Others v Waitumu & 11 Others (1986) KLR 171** both cited in **Charles K. Kandie v Mary Kimoi Sang (2017) eKLR**

“The law never implies and the court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

18. In the circumstances, I cannot fault the learned Trial Magistrate for having arrived at the conclusion that the Appellant had not proved his case.

In view of the foregoing, I find no merit in the appeal and I dismiss it with costs to the Respondents.

Dated, signed and delivered electronically via Zoom this 23rd day of April, 2020.

J.M ONYANGO

JUDGE