



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 10 OF 2017

BEATRICE GACHUGU MBIA.....APPELLANT

VERSUS

SUSAN MUTHONI NYAGA.....1ST RESPONDENT

MWWANGANGI NYAGA.....2ND RESPONDENT

MURIUKI NYAGA.....3RD RESPONDENT

MUCHIRI NYAGA.....4TH RESPONDENT

WANJIRU NYAGA.....5TH RESPONDENT

(Being an appeal against the Judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 11th September 2017 in Embu CMCC Case No. 155 of 2015)

JUDGEMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 11th September 2017 in *Embu CMCC No. 155 of 2015 – Beatrice Gachugu Mbia V Susan Muthoni Nyaga & 4 Others*. By the said judgement the trial court dismissed the Appellant’s suit against the Respondents and allowed the Respondents’ counterclaim as prayed. The Respondents were also awarded costs of the counterclaim and the dismissed suit.

2. The material on record indicates that by a plaint dated 23rd June 2015 the Appellant sought an eviction order against the Respondents from *Title No. Embu/Kithunthiri/548 (the suit property)*. The Appellant pleaded that she was the registered proprietor of the suit property and that the Respondents had illegally and without reasonable cause entered and occupied it thereby occasioning her loss and damage. It was further pleaded that despite being served with notice to quit the Respondents had failed to vacate the suit property hence the suit.

3. The Respondents filed a statement of defence and counterclaim dated 22nd July 2015. The 1st Respondent pleaded that sometime in 1995 she bought a portion of half (½) an acre out of the suit property from the Appellant’s father who was then the registered proprietor for a consideration of Kshs.5,000/- which she paid in full. It was further pleaded that she took possession of that portion of the suit property and settled thereon with her children (the 2nd - 5th Respondents).

4. The Respondents contended that they had extensively developed the portion they occupied and that they had been in open and uninterrupted possession thereof with the knowledge of the Appellant. The Respondents further contended that the Appellant had obtained title to the entire suit property through fraud and concealment of material facts. At least 4 particulars of alleged fraud and concealment of facts were pleaded in paragraph 7 of the defence and counterclaim.

5. By their counterclaim, the Respondents reiterated the contents of their defence and sought a declaration to the effect that the Appellant was holding a portion of the suit property in trust for them. They also sought an order directing the Appellant to excise ½ acre out of the suit property and transfer it to them.

6. The Appellant filed a reply and defence to counterclaim dated 29th July 2015. The Appellant joined issue with the Respondents on their defence. She stated that the suit property was gifted to her by her late father as a wedding gift and that she was lawfully registered as proprietor after obtaining a grant in Siakago Succession Cause No. 19 of 2012 in which no objection proceedings were filed by the Respondents. The Appellant denied the allegations of fraud and maintained that the Respondents were not entitled to any portion of the suit

property.

7. The material on record indicates that upon a full hearing of the suit the trial court found for the Respondents. The trial court believed the evidence of the Respondents and held that the Appellant's late father had actually sold a portion of ½ acre of the suit property to the 1st Respondent for valuable consideration. In the result, the court dismissed the Appellant's suit with costs and entered judgement for the Respondents on their counterclaim.

B. THE GROUNDS OF APPEAL

8. Aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 11th October 2017 raising the following eleven (11) grounds of appeal:

- i. That the learned trial magistrate erred in law and fact by holding that there was overwhelming evidence that the defendants bought land that they occupied.*
- ii. The trial magistrate erred in law and fact by holding that the defendant gave consistent and credible evidence that was corroborated.*
- iii. That the learned trial magistrate erred in law and fact by dismissing the plaintiff's case because she did not call a single witness.*
- iv. The learned trial magistrate failed to capture and analyze or and sufficiently consider the evidence offered by the parties.*
- v. The trial magistrate erred in law and fact by holding that the registration of the plaintiff as the proprietor of the said land was not absolute.*
- vi. The trial magistrate erred in law and fact by holding that the court had jurisdiction to determine customary trust.*
- vii. The trial magistrate erred in law and fact by holding that the plaintiff holds the suit land in trust of the defendants.*
- viii. The trial magistrate erred in law and fact by dismissing the plaintiff's case when she had provided her case as required by the law.*
- ix. The trial magistrate erred in law and fact by ordering the transfer of half an acre to the defendants.*
- x. The trial magistrate erred in law and fact by entering judgement as per the counterclaim when the defendant did not prove her case.*
- xi. The trial of the trial magistrate is bad in law, unjust, unfair and offered no justice in the matter.*

C. DIRECTIONS ON THE HEARING OF THE APPEAL

9. When the appeal came up for directions on 30th June 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 14 days within which to file and serve her written submissions whereas the Respondents were granted 14 days upon the lapse of the Appellant's period to do the needful. The record shows that the Appellant filed her written submission on or about 3rd August 2020 whereas the Respondents filed theirs on or about 11th September 2020.

D. THE ISSUES FOR DETERMINATION

10. The court has perused the grounds set out in the Appellant's memorandum of Appeal as well as the material on record. Although the Appellant raised 11 grounds of appeal the court is of the opinion that resolution of the following issues would effectively determine the appeal:

- a) Whether the trial court erred in holding that the 1st Respondent had purchased the portion of the suit property she was occupying.*
- b) Whether the trial court erred in holding that the Appellant was holding a portion of the suit property in trust for the Respondents.*
- c) Whether the trial court erred in dismissing the Appellant's suit with costs.*
- d) Whether the trial court erred in allowing the Respondent's counterclaim.*
- e) Who shall bear costs of the appeal.*

E. THE APPLICABLE LEGAL PRINCIPLES

11. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

“...Briefly put they are that this 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 that respect. In particular, this 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O’ Connor, P.** rendered the applicable principles as follows:

“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

13. In the same case, **Sir Kenneth O’Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

F. ANALYSIS AND DETERMINATION

a) Whether the trial court erred in finding that the 1st Respondent had purchased a portion of the suit property

14. It was contended by the Appellant that the trial court erred in law and in fact in finding and holding that there was sufficient evidence to demonstrate that the 1st Respondent had purchased a portion of ½ acre out of the suit property. It was further contended that the trial court failed to capture and sufficiently analyze the evidence tendered at the trial.

15. The court has considered the material on record and the submissions of the parties on this issue. It is evident that whereas the 1st Respondent asserted that she bought a portion of the suit property from the Appellant’s father during his lifetime, the Appellant denied the existence of any such sale and asserted that the entire property was her wedding gift. Upon consideration of the conflicting evidence the trial court believed the Respondents and held that there was evidence of such sale. The court is aware that the trial court saw and observed the witnesses who testified at the trial. The trial court also had the advantage of observing their demeanor. There must be good reason for this court should depart from factual findings of the trial court as was held in the case of **Peters V Sunday Post Ltd** (supra) and **Selle & Another V Associated Motor Boat Co. Ltd & Others** (supra).

16. This court’s own evaluation of the evidence reveals that the Respondents settled on a portion of the suit property in 1997 or thereabouts during the lifetime of the Appellant’s father. The Appellant’s father died in 2001 and left them in possession. The material on record also indicates that the Appellant’s own mother was residing with the Respondents on the disputed portion of the suit property. There is also an affidavit sworn by one of the Appellant’s relatives in support of the Respondents’ case. In the result, a fresh evaluation of the material and evidence on record leaves no doubt that the Appellant’s claim was based on quicksand. The Appellant was all along aware of the Respondents’ occupation of a portion of the suit property and the basis of their occupation, otherwise the Respondents could not have been allowed quiet enjoyment for about 20 years. Accordingly, the court finds no fault on the part of the trial court’s holding on the 1st issue.

b) Whether the trial court erred in holding that the Appellant was holding a portion of the suit property in trust for the Respondents

17. The Appellant contended that the trial court erred in law in holding that the Appellant’s registration as proprietor was not absolute but subject to a trust in favour of the Respondents. It was further contended that the trial court had no jurisdiction to determine an issue relating to trust. In her written submissions, however, the Appellant did not pursue the issue of the jurisdiction of the Magistrates’ Court to entertain a claim relating to trust.

18. The court has considered the submissions and evidence on record on this issue. The evidence reveals that the Appellant obtained registration of the suit property through succession proceedings in *Siakago Principal Magistrate's Court Succession Cause No. 19 of 2012 – In the Matter of the Estate of Mbia Kiarirua (deceased)*. The 1st Respondent informed the trial court that she was never informed of the filing of the succession cause to enable lodge her claim therein. The Appellant also conceded during cross-examination at the trial that she did not inform the 1st Respondent of the filing of the succession cause. In the circumstances, the 1st Respondent had no opportunity of staking her claim against the estate of the Appellant's deceased father.

19. The court does not agree with the Appellant's submission that she became the absolute owner of the entire suit property upon her registration as proprietor and that any prior trusts became extinguished. **Section 28 of the Land Registration Act, 2012** stipulates as follows:

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) spousal rights over matrimonial property;

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.”

20. The court is of the opinion that prior to the Appellant's registration as proprietor, her late father was holding a portion of ½ of the suit property in trust for the 1st Respondent. That trust was not extinguished upon the registration of the Appellant as proprietor on 26th August 2013. She simply acquired the suit property subject to the existing trust hence the 1st Respondent's claim of ½ acre of the suit property was not extinguished by the fact of Appellant's registration. The court finds upon evaluation of the material on record that the trial court did not err in its holding on the issue of trust. Accordingly, the 2nd issue is answered in the negative as well.

c) Whether the trial court erred in law in dismissing the Appellant's suit

21. The court has already found that the trial court did not err in finding and holding that the 1st Respondent had purchased a portion of the suit property from the Appellant's late father. The trial court did not also err in law in holding that the Appellant was holding ½ acre out of the suit property in trust for the 1st Respondent. The evidence on record shows that the Appellant did not notify the 1st Respondent when she filed succession proceedings for the estate of her late father. She admitted as much at the trial. There was, therefore, no way the 1st Respondent could have lodged her claim or objection in the succession proceedings to prove her claim against the estate of the deceased.

22. In the case of **Heartbeat Limited V Ng'ambwa Heartbeat Community Children's Home & Rescue Centre [2018] eKLR** the Court of Appeal considered the issue of trust as follows:

“[26] This Court considered the law on trust in detail in *Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*, and outlined the basic tenets as follows:

“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...”

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. ... 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. ...

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 ... 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).” [Emphasis added]

23. In the circumstances, the court is unable to find any fault with the trial court's finding and holding that the Appellant was not the absolute proprietor of the entire suit property and that she was holding a portion of ½ acre in trust for the 1st Respondent. In the circumstances, the trial court was certainly right in declining to grant an order for the eviction of the Respondent from the suit property. The court is of the opinion that the trial court properly rose to the occasion by preventing unjust enrichment on the part of the Appellant.

d) Whether the trial court erred in allowing the Respondents' counterclaim

24. The court has already sufficiently dealt with this issue in the preceding paragraphs. The trial court was satisfied, as this court is, that the existence of a constructive trust had been established by the Respondents. In the premises, the trial court was entitled to give effect to the trust by allowing the Respondents' counterclaim.

25. In the case of **Willy Kimutai Kitilit V Michael Kibet [2018] eKLR** the Court of Appeal considered a case involving the sale of agricultural land whereby the consent of the Land Control Board had not been granted. In the suit before Environment and Land Court, Obaga J had dismissed the Appellant's suit and allowed the Respondent's counterclaim requiring the Appellant to transfer 2 acres out of the suit property to the Respondent. The Appellant had contended that the sale agreement was null and void for want of the Land Control Board consent hence the Respondent had no proprietary interest in the 2 acres he sought in the counterclaim. The Respondent, on the other hand, contended that the Appellant was holding the 2 acres in trust for him.

26. In a unanimous decision dismissing the Appellant's appeal the Court of Appeal held, *inter alia*, that:

“[27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

e) Who shall bear costs of the appeal

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the Respondents shall be awarded costs of the appeal to be borne by the Appellant.

G. SUMMARY OF THE COURT'S FINDINGS

28. In summary, the court makes the following findings on the issues for determination in this appeal:

- a) The trial court did not err in fact or in law in finding that the Appellant was holding a portion of the suit property in trust for the Respondents.
- b) The trial court did not err in law in dismissing the Appellant's suit.

c) The trial court did not err in law or in fact in allowing the Respondents' counterclaim.

d) The Appellant shall bear the costs of the appeal for all the Respondents.

H. CONCLUSION AND DISPOSAL ORDER

29. The upshot of the foregoing is that the court finds no merit whatsoever in the appeal. Accordingly, the same is hereby dismissed in its entirety with costs to the Respondents. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **1ST DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Mogusu for the Appellant and in the absence of Ms. Rose Njeru & Co. for the Respondents.

Y.M. ANGIMA

JUDGE

1.10.2020