



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 515 OF 2013

JULIA ADHIAMBO OGUYA.....PLAINTIFF

=VERSUS=

ANDREW HORACE O. OMONDI.....DEFENDANT

JUDGEMENT

The plaintiff's case.

The plaintiff brought this suit by way of a plaint dated 14th June, 2012 filed in court on 15th June, 2012. The plaintiff averred that in 1984 she took possession of Flat No. MF 41/G Madaraka estate, Nairobi (hereinafter referred to only as "the suit property") which was then leased by the City Council of Nairobi (hereinafter referred to only as "the council") to one, William Olotch(PW2) who was a friend to her brother in law, Arthur Omondi(DW1). The plaintiff averred that to enable her get "owner occupied" house allowance from her employer, PW2 agreed to surrender the tenancy of the suit property to her and to arrange with the council to have her name entered into the council records as the tenant in respect of the property. The plaintiff averred that PW2 did not succeed in transferring the tenancy in respect of the suit property to her. The plaintiff averred that her sister one, Susan Omondi and her husband Arthur Omondi (DW1) maliciously and fraudulently colluded with one, Waweru and changed the tenancy in respect of the suit property to the name of their son, Andrew Horace O. Omondi, the defendant herein who was then studying in India. The plaintiff averred that the said Susan Omondi and her husband, Arthur Omondi (DW1) thereafter mischievously assured her of peaceful unlimited stay in the suit property.

The plaintiff averred that in 1998, the ownership of the suit property changed from the council to National Housing Corporation (hereinafter referred to only as "NHC") which then offered to sell the same through a tenant purchase scheme with the sitting tenant being given the first option to purchase the property. The plaintiff averred that although the defendant was the legally recognised tenant in the suit property, the plaintiff was the one in occupation of the property and was the one paying all the rent and other charges that were payable under the tenancy agreement.

The plaintiff averred that when NHC offered to sell the suit property as aforesaid, she approached her sister, Susan Omondi, her husband, Arthur Omondi (DW1) who were then living in the USA and the defendant and inquired from them whether they were interested in purchasing the property. The plaintiff averred that her three relatives told her that they had no interest in the suit property and that she could go ahead and purchase the same from NHC. The plaintiff averred that she applied to purchase the suit property from NHC in the name of the defendant on the understanding that the same will ultimately be registered in her name. The plaintiff averred that the defendant was a co-applicant for the property. The plaintiff averred that the defendant agreed to have the name of the tenant in the NHC records changed from his name to that of the plaintiff but he failed to execute the necessary documents to facilitate the same. The plaintiff averred that she went ahead and made all the necessary payments that were required towards the purchase of the suit property. The plaintiff averred that she paid the full purchase price for the property after she obtained a loan in June, 2009.

The plaintiff averred that after she had paid for the suit property as aforesaid, the defendant sent to her a letter claiming that she had been his tenant and offering to refund to her part of the payment that she had made to NHC for the suit property. The plaintiff averred that it was after she had paid for the suit property in full that the defendant came forth to claim the property. The plaintiff averred that she had occupied the suit property since 1984 and that the defendant had never lived on the suit property. The plaintiff averred that she had been the actual tenant on the suit property and that with the cooperation and consent of the defendant, she paid the full purchase price for the suit property that she had occupied for 27 years.

The plaintiff averred that on 28th March, 2012, the defendant instructed an auctioneer to levy distress against her to recover alleged rent arrears of Kshs. 480,000/-. The plaintiff averred that she had never been a tenant of the defendant on the suit property. The plaintiff averred that since she paid for the suit property which was in the name of the defendant there was a resulting trust in her favour and that the defendant was holding the suit property in trust for her. The plaintiff sought judgment against the defendant for;

- a) A declaration that the plaintiff is the rightful owner of the suit property.

- b) An order of injunction restraining the defendant by himself or through his agents, servants or employees from levying distress against the plaintiff pending hearing and determination of this suit.
- c) A permanent injunction restraining the defendant by himself or through his agents, servants or employees from levying distress against the plaintiff pending the hearing and determination of this suit.
- d) A declaration that the intended transfer of the suit property to the defendant is illegal, null and void.
- e) Re-conveyance of the suit property to the plaintiff and in the alternative, payment to the plaintiff of the current market value of the property.
- f) A permanent injunction restraining the defendant, his servants and/or agents or otherwise howsoever from leasing, charging, mortgaging, renting, evicting tenants, interfering with the plaintiff's ownership, occupation, possession control of the suit property.
- g) The status quo be maintained by all the parties until amicable conclusion of the matter.
- h) Costs of the suit.
- i) Any other relief this honourable court deems fit and just to grant.

The defendant's case.

The defendant filed his defence and counterclaim dated 26th November, 2012 on 29th November, 2012. The defendant admitted that the suit property was owned by NHC which offered to sell it under tenant purchase scheme. The defendant denied that the plaintiff was a tenant in the suit property and that he was holding the suit property in trust for the plaintiff. The defendant denied that the plaintiff paid the purchase price for the suit property. The defendant averred that if the plaintiff made any payment towards the purchase of the suit property, such payment was made parallel to the payment that was made by the defendant for the same property and that that fact was communicated to the plaintiff by NHC. The defendant admitted that he had requested the plaintiff to accept a refund of the payments that she had made to NHC towards the purchase price for the suit property. The defendant averred that the offer to refund to the plaintiff the payments she had made to NHC was made on humanitarian grounds since the plaintiff was his close relative.

The defendant averred that since he was the registered owner of the suit property, the plaintiff who was occupying the same was his tenant and as such liable to pay rent. The defendant admitted instructing an auctioneer to levy distress against the plaintiff for the recovery of rent but denied that such instructions were given fraudulently or deceitfully.

In his counterclaim, the defendant reiterated the averments in his defence. The defendant averred that the suit property was transferred to him by his father(DW2) in 1996. The defendant averred that pursuant to an invitation that he received from NHC as the tenant on the suit property to purchase the same, he paid for the property and had the same registered in his name. The defendant averred that the plaintiff had not paid rent to him since 2009 and that the rent that was due from the plaintiff as at March, 2012 was Kshs. 480,000/- which amount the plaintiff had refused to pay despite demand and notice of intention to sue having been served upon her. The defendant sought judgment against the plaintiff by way of a counter-claim for;

- a) Kshs 480,000.
- b) Interest on (a) above at the prevailing commercial rates.
- c) In the alternative, vacant possession of the suit property together with mesne profit from the year 2009 when the defendant was registered as the legal owner of the suit property.
- d) A declaration that the defendant is the rightful and registered owner of the suit property and as such entitled to exclusive and unimpeded right of possession and occupation of the suit property.
- e) A permanent injunction restraining the plaintiff, whether by herself or her servants or agents or otherwise howsoever, from accessing, developing, remaining on, having possession of or in any other way dealing with the suit property.
- f) General damages for trespass.
- g) Cost of the suit together with interest thereon.
- h) Any other and further relief that this honourable court would be pleased to award.

At trial the plaintiff adopted her witness statement filed in court on 15th June, 2012 as her evidence in chief and produced her supplementary bundle of documents dated 27th February, 2015 as P-Exh 1. The plaintiff narrated to the court how she came to occupy the suit property, the offer that was made by NHC to the tenants occupying houses in Makadara Estate formerly owned by the council to purchase the houses that they were occupying, how she applied for the suit property with the blessings of the defendant and his parents and paid the full purchase price for the same. The plaintiff also told the court how the defendant changed his mind over the suit property after she had paid for the same and demanded rent from her claiming that she was his tenant and purported to levy distress for the recovery of the alleged rent. She testified that she had lived on the suit property from 1984/85 when she was 25 years old and that she had over the years paid for all the expenses for

the house and maintained the same. She told the court that attempts by the former tenant in the house, William Olotch (PW2) to change the tenancy of the house to her name did not succeed and that in 1996 her brother in-law, Arthur Omondi (DW1) changed the tenancy of the house to the name of the defendant from the name of William Olotch (PW2). She stated that she did not know how Arthur Omondi (DW2) came to the picture because, William Olotch (PW2) was the tenant in the suit property. The plaintiff stated that she paid for the suit property in the name of the defendant since he was the one officially recognised as the tenant occupying the house. She stated that the offer by NHC to sell the suit property was initially made to the defendant alone and that her name was added to the offer letter later when NHC realised that she was the tenant living in the house. She stated that she paid the full purchase price for the suit property in the sum of Kshs. 2,100,000/- to NHC. She stated that it was until 2009 that the defendant through his mother purported to make payment to NHC for the suit property by which time she had paid the full purchase price. The plaintiff told the court that she made the last payment of the purchase price for the suit property on 7th August, 2009 in the sum of Kshs 360,000/-. She stated that after the defendant purported to pay for the suit property, the defendant and she were summoned to NHC's office where the defendant was told to present an affidavit authorising change of name of the tenant from the defendant to the plaintiff. The plaintiff stated that the defendant went underground and appeared after about 7 months claiming that he was the owner of the suit property and that he was owed rent. The plaintiff stated that it was at the same time that the defendant offered to refund to her the payments that she had made to NHC for the suit property which the defendant claimed to be Kshs. 1,600,000/-.

The plaintiff called William Olotch (PW2) as her witness. PW2 told the court that he had a long relationship with Arthur Omondi (DW1) going back to their school days. He told the court that the suit property was leased to him by the council after the council had forced him to vacate a house at Jamhuri Estate that he was occupying courtesy of DW1 who was the council's tenant in respect thereof. PW2 told the court that he had agreed with DW1 that he would hand over the Jamhuri Estate house to the defendant on his return from India where he was studying. PW2 testified that after moving to the suit property and occupying it for some time, he purchased a house which he moved to. He told the court that when he was moving out of the suit property, he contacted DW1 and told him that it was his wish to leave the suit property to the defendant as they had agreed with regard to the Jamhuri Estate house that was taken by the council. He told the court that he moved out of the suit property in 1983/1984 to his personal house after which he left the country. He stated that after vacating the house, the same was occupied by a Mr. Otieno and that the plaintiff occupied the house after Mr. Otieno vacated the same. He stated that Mr. Otieno and the plaintiff were both relatives of DW1 to whom he handed over the suit property when he vacated the same.

After the close of the plaintiff's case, Arthur John Omondi (DW1) gave evidence as the defendant's first witness. He told the court that the defendant was his son while the plaintiff was his sister in-law. He told the court that the suit property was a council house which he used to occupy. He stated that he gave the suit property to his friend William Olotch (PW2) with whom they had been friends since their school days. He stated that he gave PW2 the suit property on the understanding that after he got a better house he would surrender the property back to him. He stated that the suit property was never returned to him because as at the time PW2 vacated the same, he had another house and no longer required a council house. He told the court that he gave the house to a Mr. Otieno whose wife went to school with his wife. DW1 stated that after the plaintiff finished school, she got married and she did not have a job while her husband was working with KWS. He told the court that he got a job for the plaintiff but the plaintiff had nowhere to stay. He stated that he asked Mr. Otieno to vacate the suit property so that he could give it to the plaintiff. He stated that he did not surrender the suit property to the plaintiff. He stated that at the time, the defendant was studying in India while he had left the country for the USA on a Green Card. DW1 stated that he made a decision to leave the suit property to the defendant and that when he came back to the country for a holiday, he changed the tenancy of the suit property to the name of the defendant and left the rent card with the plaintiff so that she could continue paying rent for the property.

DW1 stated that after he had left for the USA, the plaintiff sent him an email to the effect that the suit property was being sold by the council to pay its debts. He stated that he asked the plaintiff to discuss the issue of the suit property with the defendant to whom he had transferred the tenancy in respect of the property. He stated that the plaintiff knew that the suit property did not belong to her and that explained why she informed him when it was put up for sale. He stated that the plaintiff knew all along that the tenancy of the suit property had been changed to the name of the defendant because the rent card was in the name of the defendant. DW1 stated that he allowed the plaintiff to occupy the suit property on compassionate grounds. He stated that the plaintiff had no interest whatsoever in the suit property.

The defendant was the last to give evidence. The defendant adopted his witness statement dated 29th November, 2012 as his evidence in chief and produced the documents attached to his bundle of documents dated 8th May, 2014 as D-Exh 1. He told the court that the plaintiff was her maternal aunt and he did not know why she had sued her. The defendant stated when he was studying in India, he came back to the country for holiday in 1996 and his father (DW1) transferred the suit property to him. He stated that in 2006, NHC offered the suit property to him for sale. He stated that the property was not offered to the plaintiff and that the plaintiff's name was added to the letter of offer. He stated that the original letter of offer did not have the plaintiff's name. He told the court that after he received the offer, he made the necessary payments and that at some point, NHC asked why the house was being over paid. He stated that he was invited together with the plaintiff to the NHC's office and the plaintiff was asked to stop making payments for the suit property. The defendant stated that he offered to refund to the plaintiff the payments that she had made for the suit property because the payments were made on his account. The defendant stated that after he paid for the suit property, he executed an agreement of sale and a lease was subsequently issued in his name. He stated that he was thereafter issued with a title for the property. The defendant stated that the plaintiff was supposed to pay rent and that he had levied distress against the plaintiff to recover outstanding rent. The defendant urged the court to grant him possession and to dismiss the plaintiff's suit.

The plaintiff's submissions.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed her submission on 9th December 2019 while the defendant filed his submissions in reply on 16th June, 2020. The plaintiff submitted that as at the time the suit property was being sold by NHC, she was the tenant in occupation and as such she was entitled to be given priority to purchase the suit property. The plaintiff submitted that in 1996, the defendant was a student in India and as such the suit property could not have been given to him as a gift. The plaintiff submitted further that in any event the plaintiff had never paid rent for the suit property and as such could not claim to be a tenant in the suit property that the plaintiff had occupied since 1984.

On the payment of the purchase price, the plaintiff submitted that she was the one who paid the full purchase price. The plaintiff submitted that the defendant did not produce any evidence showing that he paid a deposit of Kshs. 200,000/- for the suit property as he had claimed and

that in any event the deposit payable was Kshs. 210,000/-. The plaintiff submitted that the only payment that was made by the defendant was a sum of Kshs. 1,600,000/- that was paid on 30th April, 2009 after the plaintiff had completed the payment of the purchase price and two years after the plaintiff had paid a deposit for the house. The plaintiff submitted that if she had not paid the deposit and continued paying for the suit property, the agreement for the sale of the suit property would have been rescinded by NHC. The plaintiff submitted that since it was her who paid for the suit property and her payment had not been refunded to her as at the time the property was transferred to the defendant by NHC, the defendant had unjustly benefited at her expense. The plaintiff submitted further that having regard to the relationship between the parties and their conduct, a resulting trust was created in favour of the plaintiff in respect of the suit property which should be actualised by the grant of the reliefs sought by the plaintiff in the plaint.

In his submission in reply, the defendant submitted that the offer that was made by NHC which was selling the suit property was made to the defendant and was accepted by the defendant. The defendant submitted that under the doctrine of privity of contract, no rights or obligations were conferred upon the plaintiff under the contract that the defendant entered into with NHC. The defendant submitted that as the registered owner of the suit property, he was entitled to enjoy his proprietary rights over the suit property which rights could not be challenged by the plaintiff who was not a party to the agreement between him and NHC. The defendant submitted that if the plaintiff had an issue with NHC, she should have joined it as a party to the suit. On the issue of trust, the defendant submitted that no trust was created between the parties express or implied. The defendant submitted that there was no evidence that the plaintiff paid the purchase price for the suit property with the consent of the defendant. The defendant submitted that having established that he was the owner of the suit property, it follows that the plaintiff's occupation of the property was illegal and that the defendant was entitled to recover rent from the plaintiff from the time he was registered as the proprietor of the suit property. The defendant submitted that he was also entitled to damages against the plaintiff for trespass.

Analysis of the issues arising and determination thereof.

I have considered the pleadings and the evidence tendered by the parties in support of their respective cases. The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own issues that it submitted on. From the pleadings and the issues framed by the parties in their submissions, I will summarise the issues arising for determination in this suit as follows:

1. Whether the plaintiff is the lawful owner of the suit property.
2. Whether the defendant holds the suit property in trust for the plaintiff.
3. Whether the plaintiff is entitled to the prayers sought in the plaint.
4. Whether the defendant is entitled to the prayers sought in the counter-claim.
5. Who should bear costs of the suit?

Whether the plaintiff is the lawful owner of the suit property.

From the evidence on record, it is not disputed that the suit property was at all material times owned by the council and that the council handed over the management of the property to NHC when it was unable to pay some debts that it owed to NHC. It is also not disputed that NHC later on put up the suit property for sale to the public with priority being given to the sitting tenants. For the purposes of the dispute before the court, the original tenant to whom the suit property was let by the council was PW2. I am persuaded from the evidence on record that PW2 and DW1 had some agreement or arrangement in relation to the suit property under which PW2 handed over control of the suit property to DW1 when he vacated the same. I am also persuaded that the plaintiff was put into possession of the suit property by DW1 under some form of family arrangement the terms of which did not come out clearly at the trial. I am further persuaded from the evidence on record that the plaintiff all along recognised DW1's interest in the suit property. This is clear from the e-mails that were exchanged between the plaintiff and DW1 when NHC offered to sell the suit property to the sitting tenant. It is also clear from the evidence on record that the plaintiff was aware before the suit property was offered for sale by NHC that the tenancy in respect of the suit property had been changed from the name of William Olotch (PW2) to that of the defendant. The plaintiff produced as part of PExh. 1 copies of receipts for the transfer fees that was paid to the council on 24th September, 1996 by PW2 when he was transferring the suit property to the defendant. The plaintiff also produced receipts dated 24th September, 1996 for rent that was paid to the council for the suit property for the months of September, 1996 and October, 1996 which show that rent for the suit property was paid in the name of PW2 for the last time in September, 1996 and that from October, 1996 rent was being paid in the name of the defendant. The plaintiff also produced a rent card issued in the name of the defendant on 24th September, 1996. See the documents at pages 9, 10 and 11 of PExh1. It is also not in dispute that the plaintiff was the *de facto* tenant and occupant of the suit property from 1984/1985 when she was put into possession by DW2 up to the time the property was put up for sale by NHC. It was not disputed that the defendant had never lived on the suit property as a tenant and that he only occupied the suit property for a short duration when he stayed with the plaintiff between 1999 and 2001. The question that I need to answer is, as between the plaintiff and the defendant who purchased the suit property from NHC? From the evidence before the court, I am convinced that the offer for the sale of the suit property that was made by NHC was made to the defendant. The property was being sold to the sitting tenant and from the records that were held by the council and NHC, the tenant on the suit property was the defendant. In her affidavit sworn on 14th June, 2012 filed herein in support of an application for interlocutory injunction, the plaintiff admitted in paragraph 7 thereof that the offer was made to the defendant. The plaintiff also went ahead and annexed to the said affidavit a copy of the letter of offer dated 4th May, 2007 that was in the sole name of the defendant. I am in agreement with the defendant that the letter of offer dated 4th May, 2007 at page 33 of PExh. 1 is not genuine. It is apparent on the face of the letter that the name of the plaintiff was inserted in the letter after it was issued.

From the evidence on record, I am satisfied that it is the plaintiff who accepted the offer although the same was issued to the defendant. It is also clear from the record that as at the time the offer was made formally, the plaintiff had paid a deposit of the purchase price in the sum of Kshs. 210,000/- on 17th April, 2007; again in the name of the defendant. This payment is acknowledged in the letter of offer. Although the defendant claimed that he had also paid a deposit of Kshs. 200,000/-, no evidence of such payment was placed before the court. In any event,

as correctly submitted by the plaintiff, the deposit payable was Kshs. 210,000/- and not Kshs. 200,000/-. I am also persuaded from the evidence tendered by the plaintiff that she paid the full purchase price for the suit property. The summary of payments, receipts and bank statements that were tendered in evidence by the plaintiff in proof of the payments that she made to NHC on account of the purchase price for the suit property were not disputed by the defendant. From the summary of payments at pages 74 and 75 of PExh.1, the plaintiff paid a total of Kshs. 2,738,500/- for the property. From the evidence on record, the only payment that was made by the defendant to NHC for the suit property was a sum of Kshs. 1,600,000/- that was paid by the defendant's mother on 22nd April, 2009 through Barclays Bank of Kenya Limited.

From the evidence that was tendered by the plaintiff, the period for the payment of the deposit for the suit property was extended to 11th May, 2007 and the period for the payment of the balance of the purchase price to 26th July, 2007. This means that as at the time that the defendant purported to pay for the suit property, the time for the payment of the deposit and the balance of the purchase price had already expired. I am in agreement with the plaintiff that the defendant's attempt to purchase the suit property was an afterthought. From the evidence on record, as at the time, the defendant paid the said sum of Kshs. 1,600,000/- that was not even enough to cover the full purchase price, the plaintiff had already paid the full purchase price for the suit property in the sum of Kshs. 2,100,000/- in the name of the defendant.

From the totality of the evidence on record, I am in agreement with the plaintiff that the defendant had no objection to the plaintiff purchasing the suit property. The defendant was aware of the offer by NHC to sell the suit property, the need for an application to be made for the property and the requirement that a deposit be paid in advance. The defendant was also aware of the formal offer for sale that was made by NHC and the terms thereof. For a period of 2 years from the time the sale process started, the defendant showed no interest and took no action. The defendant who was aware that the plaintiff was the one occupying the suit property left the plaintiff to apply for the property, pay the deposit, accept the formal offer and pay the entire purchase price before coming to claim the property merely because his name was on the record of NHC as the tenant occupying the house. As I have stated earlier, this move was an afterthought. I am shocked that even with the knowledge that it was the plaintiff who had paid the deposit for the suit property and the balance of the purchase price for the property over a period of 2 years, NHC still went ahead to transfer the suit property to the defendant who had only paid Kshs. 1,600,000/- against a purchase price of Kshs. 2,100,000/-. The defendant having stood by and watched the plaintiff paying for the suit property thereby protecting it from being sold to the public is estopped from denying that the property belongs to the plaintiff. There is no doubt that if the plaintiff had not applied for the suit property, paid the deposit and continued paying the balance of the purchase price, the suit property would have been sold to someone else. It is my finding that the defendant having allowed the plaintiff to occupy the suit property; an offer having been made to the sitting tenant to purchase the property; the defendant having not shown interest in purchasing the property and the plaintiff having accepted the offer and paid for the property albeit in the name of the defendant, the plaintiff is the beneficial owner of the suit property. I find no merit in the privity of contract argument that was put forward by the defendant. The agreement of sale relied on by the defendant was executed after the plaintiff had paid the full purchase price and the defendant never complied with the terms thereof.

Whether the defendant holds the suit property in trust for the plaintiff.

The plaintiff has contended that since she was the one who paid for the suit property, the same was transferred to the defendant wrongfully. The plaintiff has averred that her relationship with the defendant and the conduct of the parties in relation to the suit property created a resulting trust in her favour which should be actualised by transferring the property to her. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, that was cited by the plaintiff in her submissions, the Court of Appeal stated as follows on trusts:

“ 27. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, this Court examined and stated the law on trusts 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 para 1453). 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

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, 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. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also *Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR.*”

I am satisfied that the plaintiff has proved the existence of a trust relationship between her and the defendant in relation to the suit property. In *Njenga Chogera v Maria Wanjira Kimani & 2 Others [2005] eKLR*, the Court of Appeal stated as follows on the nature and proof of trust:

“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”

From the history of the suit property and the conduct of the parties during the purchase of the suit property, I am satisfied that the plaintiff has established the existence of a trust in her favour which should be actualised by the transfer of the suit property to her.

Whether the plaintiff is entitled to the prayers sought in the plaint.

The plaintiff sought several reliefs in the plaint some of which have been overtaken by events. Prayers (b), (c), (d) and (g) in the plaint have been overtaken by events. I am satisfied that the plaintiff is entitled to prayer (a) of the plaint. As concerns prayer (e), the plaintiff has established that the defendant holds the suit property in trust for her. The plaintiff is therefore entitled to have the suit property transferred to her by the defendant. The plaintiff has also proved that she is entitled to prayer (f) of the plaint. On the issue of costs, the same is at the discretion of the court. Costs normally follow the event. In this case, the parties are very close relatives and their relationship is already strained. I do not intend to worsen it. Each party shall bear its own costs of the suit.

Whether the defendant is entitled to the prayers sought in the counter-claim.

For the reasons that I have given above, I find no merit in the defendant’s counter-claim. The plaintiff was not the defendant’s tenant in the suit property. The defendant was not entitled in the circumstances to receive any rent from her. The purported demand for rent that was followed by distress for rent was illegal. The defendant is in the circumstances not entitled to the sum of Kshs. 480,000/- that he has claimed on account of rent arrears. With regard to prayers (c), (d), (e) and (f) in the counter-claim, having held that the plaintiff is the beneficial owner of the suit property, the defendant is not entitled to the same. The defendant is also not entitled to the costs of the counter-claim since the same has not been proved.

Conclusion.

In conclusion I hereby make the following orders;

1. Judgement is entered for the plaintiff against the defendant on the following terms;
 - a. It is declared that that the plaintiff is the rightful owner of all that property known as Flat No. MF 41/G, Makadara Estate.
 - b. The defendant shall transfer to the plaintiff within 30 days from the date hereof his leasehold interest in the said Flat No. MF 41/G, Makadara Estate that has been registered as I.R No. 127953/1.
 - c. The plaintiff shall pay all the statutory charges and fees associated with the transfer.
 - d. A permanent injunction is issued restraining the defendant by himself, his servants and/or agents or otherwise howsoever from leasing, charging, mortgaging, renting, evicting tenants, interfering with the plaintiff’s ownership, occupation, possession or control of Flat No. MF 41/G, Makadara Estate.
 - e. Each party shall bear its own costs of the suit.
2. The defendant’s counter-claim is dismissed with each party bearing its own costs.

Delivered and Dated at Nairobi this 17th Day of December 2020

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Mr. Kamau for the Defendant

Ms. C.Nyokabi-Court Assistant