



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 13 OF 2018

SAMUEL KADIVANE KISAGOAPPELLANT

VERSUS

PATRICK MUSUNGURESPONDENT

JUDGEMENT

Samuel Kadivane Kisago the above named appellant appealed to the Environment and Land Court at Kakamega against the decision of Hon. M. L. Nabibya (SRM) where the learned magistrate erred in fact and law on the following grounds:-

1. Dismissing the appellants suit entirely.
2. By dismissing the defence and counterclaim thus rendering both parties in limbo and without direction.
3. By failing to recognize the plaintiffs right as the absolute registered proprietor of land parcel registration No. Tiriki/Kapsotik/1186.
4. By failing to consider the evidence on record the documents adduced by the parties in the case and importing her own words and diverting entirely from the whole issue raised in the case.
5. By holding the plaintiffs title to be the estate of the plaintiffs deceased father who died with no ownership of any estate.
6. By holding that the plaintiff holds the title in trust for the defendant yet there existed no registration of any resulting trust.
7. By importing her own words and views which were never pleaded as regards an oral will in the respect of a non-existent estate.
8. Even after importing her own words she entirely failed to back her allegations with any authority or law at all thus rendering such decision below per.
9. By failing to consider the parties to the suit legitimate expectations thus leaving them in dilemma not to know what to do with the title or ownership.
10. The learned trial magistrate relied on strenuous issues depicting open bias and unfairness against the appellant herein and more particularly the direction that:-
 - a. The title which is registered in the appellant's name be and or revert back to the late Peter Kisago estate even contradicting her holding that she is not a succession court.
 - b. By directing that the title should not be used in anyway such as transfer.

The appellant seeks the following orders that:-

1. This appeal be allowed with costs.
2. That the judgment of the Honourable Magistrate M.L. Nabibya (SRM) Hamisi Law Courts delivered on the 18th day of October,

2019 be set aside with costs to the appellant.

3. That this Honourable Court be pleased to issue orders evicting and permanent injunction against the respondent from land parcel registration No. Tiriki/Kapsotik/1186 which is absolutely registered in plaintiff's name.

4. Any other order that this court may deem fit.

The appellant submitted that the Learned Magistrate in Hamisi ELC Case No. 38 of 2018 dismissed the plaintiff's case by holding that the suit land in trust of the estate of the late Peter Kisago together with the defendant's counterclaim where the plaintiff claimed for permanent injunction from entry and demolition of structures on plaintiff's land Registration No. Tiriki/Kapsotik/1186, an award of damages and costs. That from the evidence on record, the Learned Magistrate failed to recognize the plaintiff's right as the absolute registered proprietor of land Registration No. Tiriki/Kapsotik/1186 and held that the land was being held in trust when there was no registration of any resulting trust. The decision was not backed by any legal authority leaving parties in limbo on what to do with the title document or ownership. That the law on protection of indefeasibility of title is covered under section 24, 25 and 26 of the Land Registration Act No. 3 of 2012. It provides that a certificate of title is conclusive evidence that the person named therein as proprietor of land is absolute and indefeasible owner and ownership can only be challenged on grounds of fraud or misrepresentation in which the proprietor named therein is a party. Fraud mentioned under section 23 of the Registered Land Act must be proved on balance of probabilities. Absolute and indefeasible title supersedes all equitable rights. That the erred decree by the lower court tends to place the purpose of registration of property into jeopardy since non recognition and protection of absolutism of title will have no meaning.

That the court relied on strenuous matters by relied on strenuous matters in dismissing the plaintiff's case. The parties have been left in limbo and at loggerheads as to how the suit land shall revert back to the estate of the late Peter Kisago Estate which contradicted his holding of not being a succession court and going further to state that the title document should not be used in any way such as transfer.

The respondent submitted that the Trial Magistrate court sitting as an environment and court derived her powers from Gazette Notice No. 5178; Practice Directions on Proceedings Relating to the Environment and the use and Occupation and title to land proceedings in other courts. In supplement Section 9 of the Magistrate Court Act No. 26 of 2015 gives powers to Magistrate's Courts to hear and determine environment cases and give orders as they deem fit to enable them expedite, proportionate and attain justice as envisaged by Section 3A Civil Procedure Act. They thus submit that the trial magistrate was right to find that the title which is registered in the appellant's name be and or revert back to the late Peter Kisago estate.

That the said findings were based on the substantial evidence from both sides that both the appellant and respondent are brothers who share the same father. That the land in question Tiriki/Kapsotik/1186 was purchased by Peter Kisago (deceased father to both the appellant and respondent) as evidenced by (DE1). The said land was formerly Plot 810 subdivided into Nyangori/Kapsotik/979 and later portioned to read the current Tiriki/Kapsotik/1186. He submits that the Trial Magistrate did not err in law in finding that a trust had been established as the defendant's counter claim was directly against the plaintiff who was the registered proprietor of the land and also his brother as they both share the same father but different mothers.

He relied on the case of Alice Wairimu Macaharia vs. Kirigo Philip Macaharia 2019 eKLR using the case of Kiarie vs. Kinuthia that enunciated the elements of a trust. Furthermore, in the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR as was quoted in the case of Alice Wairimu Macaharia vs. Kirigo Philip Macaharia (2019) eKLR the court has powers to presume a trust in out of absolute necessity as was the necessity in the instant case herein.

This court has carefully considered the appeal and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

I have perused the lower court records and it is a finding of fact that the plaintiff/appellant is the registered proprietor of land parcel No. Tiriki/Kapsotik/1186. In evidence the plaintiff stated that he was allocated the suit land in Succession Cause No. 24 of 2017 from the estate of the late Jesoi Kibor. The deceased had sold it to his father who then allocated the same to the plaintiff. DW1 testified that the plaintiff is his brother and he in 2018 he had stayed on the land for 18years. His wife died and was buried there. The plaintiff went for succession secretly and registered himself as the proprietor. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & Others (2015) eKLR, the Court expounded on 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).”

In applying the principles to the case before us, all indications are that a constructive trust arose as between the plaintiff and the defendant. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR the Court stated that;

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

The defendant testified that he continues residing on his share of the suit parcel of land to date. The land belonged to their father and it should be shared among the siblings. The plaintiff is his brother and their father was Peter Kisago. The plaintiff now wants to evict him. I find that the land was bought by their father and the defendant is a beneficiary. The mere fact that he resides on the suit land and has done so with his family for over 18 years is clear evidence that he is entitled to the same together with his other siblings. From this evidence I come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman – vs- Steadman (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

I therefore find that the appellant failed to prove his case on a balance of probabilities. I see no reason to interfere with the decision of the Trial Magistrate. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE