IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, APALOO JJA & MASIME AG JA)

CIVIL APPEAL NO. 18 OF 1987

STEPHENS & 6 OTHERS …….. APPELLANTS

VERSUS

STEPHENS & ANOTHER……..….....RESPONDENT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

The late Harry Claphans Stephens (hereinafter called the deceased) died intestate on January 14, 1958. The evidence is such that it is not possible to paint an accurate picture of his personal circumstances. But he seems to be a man of small means. The only known assets he died possessed of, were a plot of land 5.52 acres in area at Kisauni, Mombasa, a piece of unregistered land at Taveta, a motor vehicle and some unspecified personal effects. The Kisauni plot was his home and that of his family. It is the plot in dispute in the suit which culminated in this appeal. The late HC Stephens was survived by a wife, three sons and three daughters. These were his own off-spring. They are the appellants in this case. The deceased also stood *in loco parentis* to his nephew Joseph Stephens, his sister's son and he adopted Jaldoon Ramadhan – both males. They are the respondents in this appeal. It is common ground that all the parties together were the lawful heirs and successors to the deceased and were all jointly beneficiaries of his estate.

At the date of Stephen's death, the only substantial property he had, was the Kisauni plot but this was encumbered. The deceased had granted a mortgage of it to secure a loan. This loan was not repaid at the time of his death. Principal and interest then stood at something in the order of Kshs 26,000. There were no funds to pay off the loan. The creditor is said to have threatened to exercise his power of sale and realise the security. The family were anxious to stave off the sale and preserve the property. The five male members of the family, that is the three male appellants and the two respondents met together and decided to raise money by granting a second mortgage on the self-same plot.

Meantime, they persuaded the first mortgagee to stay his hand. In order to grant a valid mortgage, title to the plot should be vested in the proposed mortgagor. The individual the "brothers" chose to deal with the property and execute a second mortgage, was the 1st respondent. He was the eldest male member of the family, received reasonably good education and was a person in whom the rest of the beneficiaries reposed confidence. For this reason, with the concurrence of the other adult members of the family, he obtained grant of letters of administration in respect of the deceased's estate in April 1959. In that capacity, he got the Kisauni property vested in himself as personal representative of the late H C Stephens. He then proceeded to grant a second mortgage to a businessman called R R Shah. He raised a

loan of Kshs 30,000 from this mortgage. From this, he paid off the first mortgagor and as he himself said, saved the property for the family.

With the threat of the alienation of the family land removed, the other beneficiaries appeared to have given the 1st respondent their trusted administrator, a free hand. The widow hardly participated in discussions about the estate. The daughters were apparently not *sui juris*, they were all in school and were content to leave the administration of their father's small estate to their elder brother. The loan was repaid in 1974 and presumably, the property was reconveyed to the 1st respondent, freed and discharged from the mortgage. Although the legal title was vested in the 1st respondent alone, all the parties, were beneficial owners. The resultant legal position was, that the 1st respondent held the legal estate in trust for himself and all his brothers and sisters as well as the widow.

So as a trustee, the 1st respondent incurred the responsibility of honest, efficient and high-minded dealing with regard to the trust estate which a court of equity demands of all trustees. He also incurred an obligation to account to the beneficiaries of his dealings with the property. Indeed, the duty to account is the main vehicle by which a court of equity enforces the trustee's fiduciary duty.

The 1st respondent's duty can really be stated on first principles. As the personal representative of the deceased, he owed a duty to pay all the debts of the intestate and thereafter, distribute the rest of the estate to his co-beneficiaries. It is common ground that the 1st respondent did not render an account of his administration to the widow or his brothers and sisters. What he did instead, was to convey the plot in dispute which he owned jointly with the widow and seven other beneficiaries, to himself and the second respondent, the deceased's adopted son. He paid off the mortgage in 1974. Five years afterwards, that is in 1979, he made the joint conveyance to himself and the second respondent. The curious result of this, was that the widow and the natural children of the deceased were deprived of their only patrimony. According to the evidence, they learnt of their fiduciary's action in 1981. Their reaction was perfectly understandable. They proceeded to lodge a caveat against the respondent's registered title and followed this soon afterwards with the present plaint. On his own admission, the 1st respondent did not inform the widow or his other brothers and sisters when he changed the 'group' character of the property into his and the 2nd respondent's individual ownership.

So in the plaint, the appellants ask the court to order the 1st respondent to account, distribute the rest of the assets to the beneficiaries and most importantly, declare them the beneficial owners of the suit plot and direct a rectification of the register of titles to reflect this position. The facts as

I have narrated them were not controverted. Indeed, subject to certain immaterial averments which I will mention presently, the 1st respondent admits them. That being so, it is plain to me that the 1st respondent in converting the trust property into his own and that of the 2nd respondent, he was guilty of a breach of trust. That equitable "wrong" is a mixed bag

of many deviations form the duty of fair, efficient and honest dealing by a fiduciary and which consists of both commissions and omissions. At page 662 of *Nathan & Marshall Cases and Commentary on the Law of Trusts*, it is said:-

"A trustee is liable for a breach of trust if he fails to do what his duty as a trustee requires or if he does what as trustee he is not entitled to do."

On the facts, the 1st respondent did not only fail to do his duty of accounting to the beneficiaries and yielding up to them such part of the estate as they may be beneficially entitled to, but he wrongly converted the only substantial property in the estate to his own name and that of a confederate. In these circumstances, I should have thought that judgment in favour of the appellants for the relief they prayed for was a matter of course. They were entitled *ex debito justitiae* to the reliefs they sought on the plaint.

But strange as it seems, they failed *in toto*. That brings me to the basis on which they resisted the appellant's claim. They say two things, namely, (1) that the appellants lost interest in the plot and (2) their claim was time-barred. The judge found in their favour on both counts. The appellants invite us to say the

judge was in error on both grounds. The facts, per se, do not reflect creditably on the respondents, so the main plank on which they rested their defence was the Statute of Limitation (cap 11, Laws of Kenya, 1948 since repealed). They say, the appellants' "right to receive or have a share in their father's estate" accrued at the date of his death, and the suit to recover the same was barred after 12 years, namely, in January 1970 and that the present suit brought in 1981 was time-bared. They took their stand on section 3 of the Limitation Ordinance, cap 11, Laws of Kenya 1948. The learned judge agreed.

Is this a proper appreciation of the appellant's complaint? At no time was any issue raised on the appellants' entitlement to the inheritance of the suit plot. By common consent, both the appellants and respondents were the successors and beneficial owners of the plot. In order to raise funds to pay off an encumbrance on the property, they authorized the 1st respondent to obtain grant of letters of administration and vest legal title in himself to enable him do this. In this capacity, the plot was vested in him. He kept faith with his co-beneficiaries and raised funds with which the encumbrance was discharged. Five years after this, he broke faith with them and converted the property to himself and a confederate. He withheld this action from the co-beneficiaries. When they became cognizant of it in 1981, they immediately brought plaint. The object of the Limitation Act is to prevent the agitation of stale claims which by reason of the lapse of time, would be hard or inequitable to defend. The breach of fiduciary duty about which the appellants complained was committed in 1979. By what process of reasoning can it be said that their cause of action accrued in 1958?

The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939). The parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (cap 22) provides that:

"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:

"to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

That was precisely the reliefs which the appellants sought in regard to the suit plot. In my opinion, no period of limitation applies in this case and I am in respectful disagreement with the learned judge's contrary holding on this point. If this is the right view to take, the same must hold good for the consequential relief of account.

As I said, the second ground which the respondents profer for their action, is that the appellants ceased to be interested in the property. The apparent reason for this, is that they did not contribute one cent towards the liquidation of the mortgage debt. I do not see how that fact per se, can result in extinguishing their joint ownership of the property. They did not execute any release of their beneficial ownership in the property to the respondents and were indeed not asked to do so. It is impossible to accept that this unilateral and furtive action of the 1st respondent can have the legal effect of determining their interest. Had the 1st respondent performed his duty and rendered accounts to the beneficiaries and satisfied them of their indebtedness to him, they would, in all probability, have paid their just dues. At least, even on the 1st respondent's own showing, neither the widow nor the female beneficiaries were expected to contribute to the repayment of the mortgage debt. Yet in one fell swoop, he purported to extinguish their interest by the conveyance impugned in this suit. In my judgment, he has failed to achieve that result and his action amounts to nought.

Yet, the learned trial judge felt able to conclude that:

"The court accepts Mr Anjarwalla's submission and holds that the transfer of the plot to himself and second defendant was not in breach of any law."

I profoundly disagree. Such transfer of the plot without the knowledge of the appellants was in breach of the 1st respondent's fiduciary duty to them and was a flagrant breach of trust. It follows that the appellants are entitled to a declaration that they, jointly with the respondents, are entitled to the beneficial ownership of the suit plot and that the registrar of titles will rectify the register to reflect this holding. Accordingly, I would allow the appeal and set aside the judgment appealed from. In lieu of it, I would enter judgment for the appellants and make the declarations and orders sought in the plaint save that the declaration numbered (iii) will be in terms set out *supra*. I would also set aside the order awarding costs in the respondent's favour. Instead, I would award the appellant's costs and interest both in the court below and in this court. In view of the nature and complexity of this appeal, I would grant a certificate for costs for two counsel.

Nyarangi JA. I agree that this appeal should be allowed.

In my judgment this appeal turns upon the answer to the question: Could the first respondent as administrator of the estate of the deceased transfer the plot number 113 of section 1 MN Kisauni comprising of 5.52 acres to himself and to the respondent?

It is plain that the cause of action as against the respondents arose on June 22, 1979 on which date the first respondent made the mistake of extinguishing the shares of the appellants each of whom was beneficially entitled to a share in the deceased's property. There is no evidence that the appellants delayed and delayed and delayed beyond all measure with regard to making their individual contributions towards repayment of the loan. The first respondent adduced no evidence that any demands for contributions were made.

Clearly the claims of the appellants were not stale. In the circumstances, there was no acquiescence on the part of the appellants, the first respondent was at all material time the administrator of the deceased's estate and there is no evidence of conduct on the part of the appellants which would suggest that they had waived their beneficial interest.

There is no question of laches here. As Apaloo, JA also agrees, the order of the court is that the appeal is allowed and the judgment and order of the High Court set aside. I agree with the order proposed by Apaloo JA on costs.

Masime Ag JA. I have had the advantage of reading in draft the judgment of Nyarangi and Apaloo, JJA in this appeal. I respectfully agree with both of them that this appeal should be allowed with costs for two counsel. An administrator of the estate of a deceased pursuant to a grant of letters of administration issued by the High Court is a trustee and stands in a fiduciary relationship to all those who are beneficially interested in the estate. His duties as such trustee continue until he distributes the estate when his undertakings to the court are discharged. In the circumstances it cannot be urged, as the learned counsel for the respondents has tried to do, that time runs out against the beneficiaries commencing with the death of the deceased. See section 20(1)(b) of the Limitation of Actions Act, cap 22, Laws of Kenya. On the facts of this case, I respectfully hold that the cause of action arose for the appellants against the respondents when in 1979 he as administrator of the estate of the deceased committed a breach of his trustee position by secretly conveying the trust property to himself and the second respondent to the exclusion of the appellants who were also beneficially interested. There was no acquiescence by the appellants in that breach and no laches can be alleged as they took steps to lodge a caveat against the title as soon as they learnt of the breach.

In the result I concur that the judgment of the learned trial judge ought to be set aside and instead judgment be entered for the appellants against the respondents with orders as proposed by Apaloo JA, and an order that the costs of the suit both in the High Court and in this court be awarded to the appellants against the respondents for two counsel.

Dated and Delivered at Mombasa this 24th Day of July, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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Ag JUDGE OF APPEAL