



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 14 OF 2020

CHARLES KANGAYIA.....APPELLANT

VERSUS

ALFRED MUSAVI

SIMON SENYENJE..... RESPONDENTS

JUDGEMENT

The appellant being aggrieved by the judgment/order/decree dated 14th May, 2020 delivered by B. Ochieng CM In the Kakamega CMC ELC Case No. 115 of 2019 hereby appeals against the whole judgment/decision made therein upon the following principal grounds:-

1. The trial magistrate erred in law and in fact when after correctly finding as a fact that the period of adverse possession over the suit parcel begun running in 2009 erred in law and fact by holding that the adverse period of 12 years had lapsed as to entitle the respondents to the prayers sought in the counterclaim.
2. The trial magistrate erred in law and fact in holding that the plaintiff had failed to prove his case on a balance of probabilities.
3. The trial magistrate erred in law and in fact by failing to make a finding that only 10 years had expired at the time when the appellant instituted suit against the respondents and as such the doctrine of adverse possession had not been satisfied.
4. The trial magistrate erred in law and fact in his analysis in particular by treating the appellant's suit as if it was a claim for refund of sale of land purchase price.
5. The trial magistrate erred in law and fact in basing his determination of the appellant's suit solely on his finding that the appellant's demand of refund of the balance of purchase price of the suit property in 2009 was time barred.
6. The trial magistrate erred in law and in fact in failing to find that the respondents lacked locus standi to claim trust of the suit land on behalf of the estate of his deceased father.

The appellant prays that the appeal be allowed with costs and the judgment of the lower court be set aside and be substituted with a judgment in favour of the appellant in accordance with the amended plaint.

The appellant in his submission stated that the relevant sections are sections 7, 17, 37 & 38 (1) of the Limitations of Actions Act. That the finding by this trial court was in error in that in the instant case the time began to run on 4th February, 2009 and hence at the time the suit was filed on 30th July, 2019, 12 years had not lapsed for the defendants to claim by way of adverse possession. Having found that the purchase price had not been paid in full then time for purposes of adverse possession could not run. Therefore, the defendants or their father could not and cannot benefit from section 28 (h) of the Registration of Land Act. They submit that no trust could equally be created from the relationship between the father of the defendants/respondents and the father of the plaintiff/appellant as the defendant's father was in breach of the sale of land agreement between them. That the defendant's father failed to pay the full purchase price and he was thus in breach of the sale agreement hence at the time the defendants approached court their hands were unclean and equity cannot come to their aid. Further that the, the trial court was right in holding that no further payment could be made due to effluxion of time but failed to add that it was equally criminal under section 22 of the Land Control Act for any party of the agreement to pay or receive the payment.

That this also applied to the defendants stay on the suit land. He denied himself the assistance of the law more specifically Section 28 (h) of the Registration of Land Act and the only remedy is for him to be evicted from the suit land as there continued stay is in contravention of section 22 of the Land Control Act. They urge the court to allow the appeal set aside the lower courts decree and in its place make a finding

that there is no evidence on record that can lead to the interference with the plaintiff's ownership of the suit land which is protected by virtue of section 25 and order that the defendants be evicted from the suit land.

The respondent submitted that the holding that the demand of further payment of the purchase price was time barred was legit and factually sound. That asking for the balance of a transaction which took place in 1975, in 2009 is totally absurd and against the law of Limitations of Actions Act. This was a period of 34 years.

They submit that the defendants proved that they have been on the property as the family of the late Amukumbi and in their representative capacity. They proved that they are entitled to the land because the late Amukumbi was their father. Individually they had held the land adversely and as of their own right they can sustain a claim on adverse possession. That adverse possession though individually was jointly and severally with other members of their family. That there was a constructive trust created because of the special facts of the case. The court was right to allow them to be treated as a trust of all members of their late father. That in giving of this land as a trust land for the family, the court took into account that other members of the late Amukumbi shall inherit their shares when the trust is dissolved. That the testimony proves the defendants' individual interest which qualifies them to a share of the land. That land parcel number Kakamega/Savane/247 is for the family of the late Amukumbi. That a trust does not need locus standi to be effected in law. They relied on the case of Felex Kipchoge Limo vs. Robinson Kiplagat Tuwei, 2018 eKLR.

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 records of the lower court and it is a finding of fact that Kangayia Shichei is the registered proprietor of Land parcel No Kakamega/Savane/247. The appellant testified that the suit land belonged to his late father Kangayia Shichei and he was the administrator of his estate. That the defendants' father Timona Mulama Amukumbi purchased the suit land but failed to pay the full purchase price. That at the time his father died in 2009 and the defendants' father was to pay the balance at market value. That the defendants' father died in 2019 before doing so.

The respondents testified and submitted that the demand for further payment of the purchase price was time barred. That asking for the balance of a transaction which took place in 1975, in 2009 is totally absurd and against the law of Limitations of Actions Act. This was a period of 34 years. They submit that the defendants proved that they have been on the property as the family of the late Amukumbi and in their representative capacity. They proved that they are entitled to the land because the late Amukumbi was their father. Individually they had held the land adversely and as of their own right they can sustain a claim on adverse possession. That adverse possession though individually was jointly and severally with other members of their family. That there was a constructive trust created because of the special facts of the case.

It is not in dispute that the respondents' father and his family took possession of the suit land in 1975 to date after entering into a sale agreement and making part payment. Indeed I concur with the Trial Magistrate that a claim for payment of the outstanding balance would not stand in 2009 as the same would have been time barred by virtue of section 4 of the Limitation of Actions Act. The respondents' counterclaim is based on trust and adverse possession. I concur with the finding of the Trial Magistrate that the claim on adverse possession cannot lie as the respondents have only been on the suit land for a period of 10 years from 2009 when the time started running. In the case of *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggat Ahmed Al-Heidy & Others (2015) eKLR*, this 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 respondents’ father and the appellant’s father. As stated in the authority above, a trust will automatically arise in favour of the person who advances the purchase money. It is a finding of fact that the purchase money for the suit parcel was advanced by the respondents’ father and he was put in possession of the land in 1975. *In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR* wherein 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 appellant’s father had put the respondents’ father into possession of the suit property with the intention that he was to transfer the property purchased to them and as such, a constructive trust had been created and the appellant could not renege in 2009 by demanding the balance at market value. 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. The respondents in the instant case are beneficiaries of the estate of the buyer the late Timona Amukubi. The appellant’s father all along acted on the basis and represented that the respondents were to obtain proprietary interest in the suit property. 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 find that the Trial Magistrate did consider the counter claim and reached a finding hence allowing the same. In the case of *Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870,* it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. 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 9TH DECEMBER 2020.

N.A. MATHEKA

JUDGE