



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 84 OF 2017

CHARLES MAKHETI..... PLAINTIFF

VERSUS

FLORENCE MUKANDA BARASA.....DEFENDANT

JUDGEMENT

By a plaint dated 3rd March 2017 the plaintiff avers that at all material times he has been and is still the proprietor of all of the land parcel number Kakamega/Lumakanda/6348. On diverse dates the defendant encroached, entered and started ploughing on the said land. Such encroachment and ploughing by the defendant on the said land is without the consent of the plaintiff. Despite demand and notice of intention to sue being issued by the plaintiff to the defendant to desist from dealing in any manner whatsoever with the said parcel of land, the defendant has neglected, ignored, refused and/or otherwise failed to honour such demands at all thereby rendering this suit necessary. The plaintiff prays for judgment against the defendant for:-

1. An order for immediate eviction of the defendant whether by herself and or her family members and or agents from land parcel No. Kakamega/Lumakanda/6348.
2. An order for demolition of all structures illegally erected or standing on the aforesaid parcel.
3. An order of permanent injunction barring the defendant from dealing with the said parcel of land in any manner either by herself, agents, representatives or any person claiming through her.
4. Costs of this suit be provided for.
5. Interest on (b) above at court rates.

The defendant denies that the plaintiff is the lawful owner of title number Kakamega/Lumakanda/6348. The defendant denies encroaching on the plaintiff's parcel as alleged. The defendant testified that she has been in occupation of the suit properly since 1995 and has lived on the said land peacefully, openly and continuously by virtue of her marriage to one Francis Barasa Wanyama (Deceased). The suit parcel herein arose from a sub-division of original parcel number L.R. Kakamega/Lumakanda/561 measuring 13.6 Hectares (34 acres) and which was allotted to Rebecca Namaemba Nyongesa (mother to the plaintiff herein) by the Settlement Fund Trustees. The plaintiff's mother obtained the said parcel of land through a loan scheme. In 1995 one Sarah Wanjiku sued the said Rebecca Namaemba Nyongesa over the said parcel of land in Kakamega HCC No. 173 of 1995 and the Rebecca did approach Francis Barasa Wanyama (Deceased) to assist in financing the case as well as registering the suit land in her name which request the deceased acceded to. In the same vein, the said Rebecca Namaemba was unable to pay off the settlement loan and the Trustees threatened to re-possess the land, which prompted the said Rebecca to seek the intervention of the defendant's deceased husband who paid the entire loan balance resulting in issuance of discharge and subsequent registration of title. In consideration of the foregoing the said Rebecca Namaemba Nyongesa gave possession of half of her whole title to the said deceased and the defendant herein who took possession thereof in 1995 and has since occupied, utilized and developed the same to date. The deceased died on 17th August, 1998 before the process of sub-division and transfer was complete, and upon his demise the deceased was given a decent burial which burial was attended by the plaintiff, his mother and the entire family. On 17th August, 1995 or thereabouts, the said Rebecca Namaemba willingly and voluntarily, vide a written agreement, agreed to sub-division into 2 equal portions and transfer half of the land to the deceased and the other half to her son David Wangwe Nyongesa. Upon clearance of the loan the said Rebecca Namaemba secretly and without due notice to the deceased applied for the documents of title which culminated in the registration of her name as owner plot number L.R. Kakamega/Lumakanda/561. During the pendency of proceedings in Kakamega ELC Case No. 352 of 2014 the plaintiff colluded with his mother and brother to subdivide the said parcel and transfer to their respective names. The defendant avers that the sub-division of original title number Kakamega/Lumakanda/561 measuring 13.6 Hectares (34 Acres) into two portions namely Kakamega/Lumakanda/6349 in the name of David Wangwe Nyongesa measuring 4.1 Hectares (10 Acres) and Kakamega/Lumakanda/6348 in the name of the plaintiff herein measuring 8.4 hectares (24 acres) with the knowledge that the deceased was entitled to half thereof and which portion has been from time immemorial been in occupation of the defendant is fraudulent and unlawful and the defendant shall seek for a declaration that the plaintiff and David Wangwe Nyongesa hold the said to titles in trust for the deceased.

The defendant's claim against the plaintiff is for a declaration that a constructive trust exists in favour of the deceased and that the plaintiff holds part of LR Kakamega/Lumakanda/6348 measuring 17 acres in trust for the deceased and the same be transferred to and registered in the name of the defendant. The defendant further prays for a permanent injunction restraining the plaintiff by himself, his servants, agents, employees or any other person claiming through him from evicting the defendant, trespassing onto, laying claim thereto or in any other manner dealing with the said share. The defendant prays that plaintiff's suit be dismissed with costs and judgment be entered in respect of the counterclaim as hereunder:

1. A declaration that the plaintiff hold title number LR Kakamega/Lumakanda/6348 in trust for the Estate of deceased and the plaintiff be directed to transfer the suit land to the defendant and in default the Deputy Registrar of this court be mandated to sign a transfer on behalf of the plaintiff.
2. Costs.
3. Interest.

This court has carefully considered the evidence 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.”

It is a finding of fact that the plaintiff is the registered proprietor of the suit land kwon as land parcel No. Kakamega/Lumakanda/6348. The defendant testified that her deceased husband was given a promise on which he acted upon and assisted in settling court fees/legal fees in respect of court proceedings in Kakamega HCC No. 187 of 1995 between Sarah Wanjiku Kimani vs. Rebecca Namaemba Nyongesa. It is a finding of fact that the defendant's husband was put in possession of the suit land in 1995. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Sagar 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 plaintiff and the defendant. 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 defendant testified that she has been in occupation of the suit property since 1995 and has lived on the said land peacefully, openly and continuously by virtue of marriage to one Francis Barasa Wanyama (Deceased). The deceased died on 17th August, 1998 before the process of sub-division and transfer was complete, and upon his demise the deceased was given a decent burial which burial was attended by the plaintiff, his mother and the entire family. On 17th August, 1995 or thereabouts, the said Rebecca Namaemba willingly and voluntarily, vide a written agreement, agreed to sub-division into 2 equal portions and transfer half of the land to the deceased and the other half to her son David Wangwe Nyongesa. She stated that Rebecca Namaemba agreed to transfer to her 10 acres. DW3 the said David Wangwe Nyongesa corroborated the defendant's evidence and confirms that the defendant was entitled to 10 acres which the plaintiff has refused to transfer. He confirms that the said Francis paid legal fees for his mother's court case and they entered into the said agreement DEX5. That he and Francis had the power of attorney to act on behalf of his mother DEX3. From the said 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. The defendant in the instant case is the beneficiary of the estate of Rebecca Namaemba. 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 the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with no orders as to costs. For these reasons I find that the defendant has proved her counter claim on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff holds a portion of land in title number LR Kakamega/Lumakanda/6348 in trust for the Estate of deceased
2. The plaintiff is ordered to transfer 10 acres of the suit land in which the defendant occupies to the defendant within the next 60 (sixty) days from today's date and in default the Deputy Registrar of this court be mandated to sign the transfer on behalf of the plaintiff.
3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 9TH DECEMBER 2020.

N.A. MATHEKA

JUDGE