



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 121 OF 2019

JEREMIAH IMBUSI PLAINTIFF

VERSUS

ASITIBA IMBUSI

HERBERT ASITIBA IMBUSI

ALEXANDER ASITUHA ASITIBA

CHASA OKWOMI ASITIBA..... DEFENDANTS

JUDGEMENT

The plaintiff avers that at all material times to this suit, parcel of land known as West Bunyore/Ebusiekwe/1867 originally belonged to the plaintiff and 1st defendant's father one Imbusi Esivere who unfortunately passed away before land adjudication process was completed. Prior to the death of Imbusi Esivere, he allocated the said parcel of land to the plaintiff and the 1st defendant in equal shares and expressed his wish to the entire family. The plaintiff avers that at the time he was still a minor. The plaintiff further avers that when registration exercise was being carried out, the 1st defendant registered himself as the owner of the entire parcel of land. The plaintiff avers that when he attained the age of majority, he requested the 1st defendant to commence sub-division and transfer his part of the suit parcel of land however the 1st defendant failed and/or refused to heed to the plaintiff's request. The plaintiff avers that he continued residing on his share of the suit parcel of land and has been residing therein for over 60 years. The plaintiff avers that he put up houses, planted trees and subsistence crops and also settled his sons on his portion of land and has been living peacefully with the 1st defendant. The plaintiff avers that sometime in the year 2012, he was surprised to discover that the 1st defendant had secretly sub-divided the original parcel of land known as West Bunyore/Ebusiekwe/1867 into 4 portions and transferred them to his 3 sons. Land parcel No. West Bunyore/Ebusiekwe/2048 to the 2nd defendant; Land parcel No. West Bunyore/Ebusiekwe/2049 to the 1st and 3rd defendants; Land parcel No. West Bunyore/Ebusiekwe/2050 to the 1st and 4th defendants; Land parcel No. West Bunyore/Ebusiekwe/2051 to the 1st defendant

The plaintiff avers that the 1st defendant had full knowledge that he held half of the original land parcel No. West Ebusiekwe/1867 in trust for him. The plaintiff further avers that the defendants' actions are aimed at frustrating him and denying him peaceful occupation of the suit parcel of land. The plaintiff now avers that the defendants' action of sub-dividing the original parcel of land known as West Bunyore/Ebusiekwe/1867 and the subsequent transfer of the sub-divided portions was illegal, null and void. The plaintiff's claim against the defendants is therefore for a declaration that half (1/2) of original land parcel No. West Bunyore/Ebusiekwe/1867 is held in constructive trust for the plaintiff by the 1st defendant, an order that the sub-division of land parcel No. West Bunyore/Ebusiekwe/1867 into land parcel No. West Bunyore/Ebusiekwe/2048, 2049, 2050 and 2051 and their subsequent transfers to the defendants be cancelled and the same to revert back to West Bunyore/Ebusiekwe/1867, an order that land parcel No. West Bunyore/Ebusiekwe/1867 be sub-divided into 2 equal portions and a half share transferred to the plaintiff, costs and interest at court rates. the plaintiff prays for judgment against the defendants jointly and severally for:-

1. A declaration that half (1/2) of original land parcel No. West Bunyore/Ebusiekwe/1867 is held in constructive trust for the plaintiff by the 1st defendant.
2. An order that the sub-division of land parcel No. West Bunyore/Ebusiekwe/1867 into land parcel No. West Bunyore/Ebusiekwe/2048, 2049, 2050 and 2051 and their subsequent transfers to the defendants be cancelled and the same to revert back to West Bunyore/Ebusiekwe/1867.
3. An order that land parcel No. West Bunyore/Ebusiekwe/1867 be sub-divided into 2 equal portions and a half share transferred to the plaintiff.

4. Costs of and incidental to this suit plus interest.
5. Any such other or further relief as this honourable court may deem appropriate.

PW1 testified that parcel of land known as West Bunyore/Ebusiekwe/1867 originally belonged to the plaintiff and 1st defendant's father one Imbusi Esivere who unfortunately passed away before land adjudication process was completed. Prior to the death of Imbusi Esivere, he allocated the said parcel of land to the plaintiff and the 1st defendant in equal shares and expressed his wish to the entire family. That sometime in the year 2012, he was surprised to discover that the 1st defendant had secretly sub-divided the original parcel of land known as West Bunyore/Ebusiekwe/1867 into 4 portions and transferred them to his 3 sons. He produced the green cards as PEx1 to 5.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court or file any defence. 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 defendants are the registered proprietors of the suit land. The plaintiff testified that the 1st defendant had full knowledge that he held half of the original land parcel No. West Ebusiekwe/1867 in trust for him as he was still a minor during the land adjudication and the land belonged to their deceased father. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Saggah 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 1st 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 plaintiff testified that he continued residing on his share of the suit parcel of land and has been residing therein for over 60 years. The plaintiff avers that he put up houses, planted trees and subsistence crops and also settled his sons on his portion of land and has been living peacefully with the 1st defendant until 2012 when he discovered it had been subdivided into 4 portions. His evidence was not opposed. 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 plaintiff in the instant case is the beneficiary of the estate of Imbusi Esivere. 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".

For these reasons I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that half (1/2) of original land parcel No. West Bunyore/Ebusiekwe/1867 is held in constructive trust for the plaintiff by the 1st defendant.
2. An order that the sub-division of land parcel No. West Bunyore/Ebusiekwe/1867 into land parcel No. West Bunyore/Ebusiekwe/2048, 2049, 2050 and 2051 and their subsequent transfers to the defendants be cancelled and the same to revert back to West Bunyore/Ebusiekwe/1867.
3. An order that land parcel No. West Bunyore/Ebusiekwe/1867 be sub-divided into 2 equal portions and a half share transferred to the plaintiff.
4. No orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE