



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 9 OF 2020**

**MICHAEL EDDY WETABA.....APPELLANT**

**VERSUS**

**ALEX OSUNDWA TUKWA..... RESPONDENT**

**JUDGEMENT**

The appellant herein being aggrieved by the aforesaid decision prefers the following grounds of appeal:-

1. That the learned trial magistrate grossly erred in law by failing to appreciate the effect of registration of land and section 26 of the Land Registration Act that provides:-

*“The certificate of title issued by registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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 subject to the encumbrances, restrictions and conditions contained in the certificate 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, procedurally or through a corrupt scheme.”*

2. That the learned trial magistrate grossly erred in asserting that the father of the respondent had a legal obligation to give land to the respondent hence reaching untenable determination.

3. That the learned trial magistrate grossly misdirected himself by considering that a licensee's right over land override the right of the absolute proprietor thereof.

4. That the learned trial magistrate grossly erred in concluding that the respondent had a legitimate expectation of living in the said land.

5. That the learned trial magistrate grossly erred in law and fact by finding in favour of the respondent who had not raised any counter-claim to the plaintiff's suit or challenge the registration of the plaintiff in any manner.

6. That the learned trial magistrate grossly erred in law by arriving at a decision to the effect that “a fact of legal ownership only cannot entitle the plaintiff to an order of eviction.”

7. That the learned trial magistrate introduced completely alien principals in Land Law.

8. That the learned trial magistrate completely ignored crucial evidence tendered on behalf of the appellant especially an agreement where the respondent voluntarily agreed to relocate from the suit property.

9. That the learned trial magistrate's evaluation of the evidence before him was wanting.

10. That the learned trial magistrate exhibited actual bias against the appellant.

11. That the learned trial magistrate erred in awarding costs to the respondent.

The appellant prays that;

1. That the entire judgment be set aside.
2. That the appellant be granted orders of eviction against the respondent from land parcel East Wanga/Lubini/4862.
3. That the respondent be condemned to pay costs of both the lower court and this appeal.

It is the appellant's submissions that the appellant and the respondent herein are step brothers. They are both sons of one Were Wetaba who was the proprietor of land parcel East/Wanga/Lubini/4862 that was given to the appellant as a gift. The appellant is now the absolute registered proprietor of the same but the respondent has refused to move out claiming inter-alia that he was given the land by his grandfather and is in possession of part of the same. Both parties hereto testified in court without calling any other witnesses. The thrust of the appellant's case was that as the registered proprietor he is entitled to the absolute and exclusive use of the same. The respondent on the other hand argues that the suit property is ancestral and that just like his step-brothers he is entitled to get a piece of the land. The court in its judgment found that the appellant was indeed the registered proprietor of the land but for the fact that the father had not given him an alternative land as alleged (North/Wanga/Mayoni/2446) the respondent had a legitimate expectation of living in the said land and that legal ownership only cannot entitle the appellant for an order of eviction. The appellant herein being aggrieved by the said decision appealed and relied in the case of *Elijah Makeri Nyang'wara vs. Stephen Mungai Njuguna & Another* (2013) eKLR.

On ground 2 of the memorandum of appeal, the appellant submitted that the father of the defendant herein had gifted the defendant a piece of land designated N/Wanga/Manyoni/2446 which was registered in his name. The defendant refused to move there claiming that the land had to be in his name. The court erroneously agreed with the defendant that the said piece of land had not been shown satisfactorily to be in the defendant's name as the title and its search were not shown. They relied on the cases of *Raurenjia Nguru Nujiri & Another vs. Jane Terry Wanjiru Mbogo Embu ELC No. 51 of 2017 eKLR* and *Esiroyo vs. Esiroyo & Another* [1973] EA 288. That therefore the respondent's entitlement to a piece of land from his father is legally misplaced. That the occupation of land by the respondent was a mere license and can therefore not override the appellant's legal right over the same. That, the defendant agreed to relocate to land parcel N. Wanga/Mayoni/2446 which apparently is bigger than the suit property. He confirmed agreeing to relocate before the Chief. The trial magistrate did not give any weight to this evidence but disregarded it altogether in his judgment.

The respondent submitted that the duty of the court as the first appeal is to re evaluate and revisit all the evidence availed and to reach its own conclusion on the matter. They relied on the cases of *Oluoch Eric Gogo vs Universal Corporation Ltd* (2015) eKLR and *Mwanasokoni vs Kenya Bus Service Limited* (1982 – 88) 1 KAR 278. That the onus of proof is on he who alleges.

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 appellant is the registered proprietor of Land parcel No East/Wanga/Lubini/4862. The appellant testified that the respondent is his step brother. They are both sons of one Were Wetaba who was the proprietor of land parcel East/Wanga/Lubini/4862 that was given to the appellant as a gift. The appellant is now the absolute registered proprietor of the same but the respondent has refused to move out. The respondent testified that he was given the land by his grandfather and has been in occupation of the same since 2000 with his family. That he has not been given any alternative land and he buried his two deceased children there. This is not controverted by the appellant. 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, 9<sup>th</sup> 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 29<sup>th</sup> 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).” Emphasis added*

In applying the principles to the case before us, all indications are that a trust arose as between the respondent and the appellant. The respondent and the appellant are step brothers. The respondent came into possession of the suit land in 2000 and has established a homestead there. 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 respondent was put into possession of the suit property before the appellant transferred it into his name and as such, a constructive trust had been created and the appellant could not renege in 2019 by demanding that the respondent be evicted. 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. I see no reason to interfere with the decision of the Trial Magistrate. This court 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 9<sup>TH</sup> DECEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**