REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE NAIROBI

LAND ACQUISITION ACT APPEAL NO 1 OF 1974

NATVARNHAI PRABHUDAS PATEL .....APPELLANT

VERSUS

COMMISSIONER OF LANDS .....RESPONDENT

DR KIANO.....INTERESTED PARTY

JUDGMENT

The substantial facts of this appeal are not in dispute. Dr Kiano and his ex-wife Mrs Ernestine H Kiano were registered as owners in equal shares of a piece or parcel of land measuring about 176 acres situate about eight miles from the city of Nairobi in the Kabete area, being land reference No 190. In February 1967, Dr Kiano sold the whole of that land to the appellant, who paid to Dr Kiano the full purchase price and who went into possession and occupation of the land on 1st February 1967.

The land would appear to have been meant for agricultural use, and after some delay, on 8th November 1967, the Kiambu divisional land control board approved its sale from Dr Kiano to the appellant. This decision was communicated to the appellant by the district commissioner, Kiambu, by a letter dated 22nd December 1967. One of the conditions of the approval minutes was that Dr Kiano would obtain a new LCR number from the Commissioner of Lands, Nairobi. It is to be observed that no mention of Mrs Kiano was made either in the minutes of the Kiambu divisional land control board dealing with the application or in the letter of the district commissioner, Kiambu.

It would further appear that, before the transfer of the land in favour of the appellant could be effected, the Government decided to acquire the land under the Land Acquisition Act; and, by an award made on 19th December 1973, the Commissioner of Lands awarded compensation totalling Shs 626,175 in respect of the land apportioned as follows: (i) Shs 154,541/15 to the Agricultural Finance Corporation in respect of a charge in its favour on the land; (ii) Shs 235,817 in respect of Dr Kiano's share to be paid to the appellant on the authority of Dr Kiano; and (iii) Shs 235,817 in respect of Mrs Kiano's share to be paid into Court under section 13 (2) of the Land Acquisition Act until such time as the rightful person to receive it has been determined.

It is again pertinent to observe that, on 30th November 1972, Dr Kiano had written a letter to the Minister for Lands and Settlement in which he had stated *inter alia*:

> Thus I have no claim or any right over the above farm and any compensation that may be payable by virtue of compulsory acquisition should be paid to Mr Navtarnhai Prabhudas Patel [the appellant.]

> Although in the title the name of ex Mrs Ernestine H Kiano appears, on the title, she has no claim or right whatsoever over the said farm or its proceeds as the purchase price was paid by me and her name was just "benami". If any claim is made by her, I take full responsibility and liability for such claim, but I assure you that she has no right whatsoever over the property.

Under section 28(1) of the Land Acquisition Act of 1968, the Commissioner of Lands could have of his own accord referred the questions, *inter alia*, of the persons who were interested in the land concerned, or the persons to whom compensation is payable or the shares in which compensation is to be paid to tenants in common, to this Court for its determination. He chose not to do so; instead in his award he directed that the share payable to Mrs Kiano be deposited in Court until such time as the rightful person to receive the same has been determined. Of course, he was entitled to do so under section 13 of the Land Acquisition Act if there is, *inter alia*, a dispute as to the right of the persons entitled to receive the compensation as in the present case.

Again, I think it is very pertinent to note that a copy of the award dated 19th December 1973 was sent by registered post, *inter alia*, to Mrs EH Kiano, c/o P Le Pelley Esq, Messrs Hamilton Harrison & Mathews, PO Box 30333, Nairobi."

The appellant had a right of appeal under section 29(1) of the Land Acquisition Act in respect, *inter alia*, of the determination of his interest or right in or over the land on 21st January 1974, he duly presented his memorandum of appeal to this Court stating that:

> The question for the determination of the court is as to whether or not the appellant has an interest or right in and over the whole of the said land and consequential question of payment of the amount of compensation in the sum of Shs 235,817 deposited or to be deposited by the respondent in Court in terms of his award.

The appellant had received a copy of the award under registered cover on 28th December 1973. The memorandum of appeal was served upon the Commissioner of Lands on 5th March 1974, he being the respondent; but the appellant also caused a notice dated 18th February 1974 to be issued by the senior deputy registrar of this Court upon Dr Kiano and Mrs EH Kiano (the latter c/o Messrs Hamilton Harrison & Mathews, Advocates, Esso House, PO Box 30333, Nairobi) informing them of the filing of this appeal and notifying them that they were required within ten days from the date thereof to intimate to the senior deputy registrar whether or not they desired to appear and be heard at the hearing of this appeal. Dr Kiano replied on 28th February 1974 informing the senior deputy registrar that Mr M M Chandhari, advocate, would act on his behalf; but I am unable to find any such notification by Mrs EH Kiano. However, I note from the record that on 20th May 1977 Mr Kwach, presumably of the firm of Messrs Hamilton, Harrison & Mathews, appeared for Mrs EH Kiano (interested party) when the matter was stood over generally. However, again there is nothing on the record to indicate that Messrs Hamilton, Harrison & Mathews ever withdrew from acting on behalf of Mrs EH Kiano.

On 6th May 1978, the senior deputy registrar of this Court issued a notice to all the interested parties stating that the appeal would be mentioned before him on 2nd June 1978 at 2.15 pm, with a view to fixing a mutually convenient date of hearing. A copy of that notice was served upon, *inter alia*, Mrs EH Kiano, c/o Messrs Hamilton, Harrison & Mathews, on 12th May 1978. When the appeal was duly mentioned by the senior deputy registrar on 2nd June 1978 there were appearances for both the appellant and the respondent, but for neither of the interested parties; and the appeal was listed, by consent, for hearing on 25th and 26th January 1979, with directions that "Registry to notify forthwith the other parties who have not appeared before me this afternoon of the hearing date". I again note from the record that the hearing notice for 25th and 26th January 1979 was served upon Messrs Hamilton, Harrison & Mathews for Mrs EH Kiano as far back as 9th June 1978. However, when the appeal finally came up for hearing before me on 25th January 1979, all parties were represented except for Mrs EH Kiano. I was informed from the bar that she had left this country some years ago, but nobody could give me the exact date.

From the history of this matter, which I have set out at some length, one salient fact has clearly emerged: and that is that in all the proceedings in respect of the land, going back to over ten years, at no stage has

Mrs Kiano shown any interest in it or lodged any claim in respect of the moneys deposited by the Commissioner of Lands in Court "until such time as the rightful person to receive the compensation in respect of this share has been determined".

Mr Bhailal Patel, who has ably argued this appeal on behalf of the appellant, has stressed this point and, if I may say so with respect, quite properly so; and he has on this basis distinguished other cases involving disputes over joint ownership of property by spouses, all of which had been strenuously contested by the parties. Mr Patel argued that it was clear from all the dealings between the parties that Dr Kiano was the *de facto* owner of the land and, in view of the contents of Dr Kiano's letter of 30th November 1972 from which I have quoted earlier, he could also be treated as the *de jure* owner of the land since he had paid the original purchase price of the property from his own funds and Mrs Kiano's name was "*benami*" or that, in any event, Mrs Kiano had held her share in a resulting or implied trust on behalf of Dr Kiano.

Mr Chandhari on behalf of Dr Kiano confirmed that his client had been fully paid by the appellant before the land was acquired by the Government under the Land Acquisition Act, and that his client had no interest whatsoever in the dispute.

Mr Ole Kieuwa, State counsel for the Commissioner of Lands, stated that the commissioner's interest was limited to his desire to see that the money deposited in Court was paid to the person legally entitled to it in order to safeguard the commissioner from any future claim by Mrs Kiano. He submitted that the "*benami*" doctrine is limited to Hindus and Muslims only; and he could not assist the Court in determining the rightful owner of the money deposited in Court. He felt that the doctine of "advancement" could be argued to apply, but was rebuttable; and his only reservation about the "implied" trust was that its existence was claimed by only Dr Kiano, who was an interested party.

The nature of "*benami*" transactions and the principles of law applicable to them have been dealt with in two local cases: (1) *Bishen Singh Chadha v Mohinder Singh* (1956) 29 KLR 20, and (2) *Shallo v Maryam* [1967] EA 409 in which various Indian authorities and the rulings of the Privy Council were considered. I need not re-iterate what has been said in those cases. The first involved Sikh parties who are governed by the Hindu law. The second involved Muslims. Whilst I am not so certain that the doctrine of "*benami*" applies only to Hindus and Muslims (as asserted by Mr Ole Kieuwa) I am of the view, with respect to Mr Bhailal Patel, that it does not apply to Africans in Kenya and was never intended to. If there is any similar doctrine under the African customary law, at least I am not aware of it, and no evidence in support of such a doctrine has been led before me.

As to the English law relating to joint holding of property by spouses, it is stated at pages 447 and 448 *Bromley's Family Law* (5th Edn):

> If the wife alone provides the purchase money, there is a resulting trust in her favour and the husband (or the spouses jointly if the legal estate is vested in both) is presumed to hold the property in trust for her absolutely.
>
> On the other hand, if the husband provides the purchase money and has the property put into his wife's name or into joint names, he is presumed to intend a gift to his wife, and the presumption of advancement operates to give her *prima facie* the sale or a joint beneficial interest. ... These presumptions have always been rebuttable by evidence that the wife intended a gift in the first case or that the husband intended to keep the beneficial interest in the record. But as the members of the House of Lords agreed in *Pettitt v Pettitt* [1969] 2 All ER 385, they are much less strong today because some explanation of the parties' conduct will usually be available unless they are both dead. Lord Diplock went so far as to question whether they were still valid at all. As he observed, they are no more than a judicial inference of what the spouses' intention most probably was, drawn in cases relating to the propertied classes of the nineteenth and early twentieth century among whom marriage settlements were common and where the wife rarely contributed to the family income by her earnings ....

Again, it is somewhat succinctly stated in Halsbury & Maudslay: *Modern Equity* (10th Edn) page 269 :

> As in the case of voluntary conveyances, a 'purchase in the name of wife or child or other person to whom the purchaser stands in *loco parentis* raises a contrary presumption as the purchase is presumed in these cases to be an advancement. The presumption is weak in the case of husband and wife ....

The English authorities as the subject have been exhaustively considered by the House of Lords in *Pettitt v Pettitt* [1969] All ER 385 where grave doubts about the application of the doctrine of advancement between husband and wife have been expressed. However, as stated by the Privy Council in *Guram Ditta v Ram Ditta* (1928) 55 LR Ind App 235, 240, there was no reason for importing the English presumption of advancement in favour of wife to India since different customs, different conditions of family life and, different social relationships obtain there than in England. In my view the same holds true for at least the indigenous and non-English inhabitants of this country, and I hold that there is no presumption of advancement in favour of the wife.

I have then to fall back upon the facts of the case and must decide on them whether there was an implied or resulting trust in favour of Dr Kiano, as claimed by him. I hold on the facts before me that that is so. In this regard, I have borne in mind the observations of Newbold J A passage from *Cook v Fountain* (1676) 36 ER 984, 987:

> So the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception and that is this: the law never implies, the Court never presumes a trust, but in case of absolute necessity.

Again it is stated in *Ayoub v Standard Bank of South Africa Ltd* [1963] EA 619, 623:

> The Courts will not imply a trust 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 will be implied.

These observations were approved by the old Court of Appeal in *Kamau Kamere v Ndungu Kiiru* (unreported). It is not strictly correct, as claimed by Mr Ole Kieuwa, that I have only the assertion of Dr Kiano before me that the land belonged to him solely. In my view the conduct of Mrs E H Kiano speaks volumes, as I have indicated before. At no stage during the past ten years or more has Mrs Kiano ever made any claim to a share in the land or done anything to indicate her interest in the sale of the land, or its proceeds, or in the compensation awarded under the Land Acquisition Act. In the circumstances I see no reason to doubt Dr Kiano's claim and I accept it. I am satisfied that the purchase price for the original purchase of the land was paid by Dr Kiano alone and that, although the transfer was in his and Mrs EH Kiano's joint names, he was the real beneficial owner of all the land and that it was so intended by the spouses when the said land was purchased.

It, therefore, follows that this appeal is allowed and it is held that the appellant is also entitled to be paid the share in the name of Mrs EH Kiano deposited in Court; and I direct that the same be paid out to the appellant. If at some later date Mrs EH Kiano chooses to lodge any claim for that sum of money, she should do so against Dr Kiano; but if she chooses to claim against the appellant also, the appellant would, I assume, be entitled to be indemnified by Dr Kiano in view of his written undertaking, referred to earlier, to that effect.

Normally in civil matters the costs follow the event, and a successful appellant should have the costs of his appeal. However, the circumstances of this case have not been normal and the propriety of the action of the Commissioner of Lands in depositing the disputed sum in Court cannot be doubted. I consider that the most just order would be for each party to bear its own costs and I so order.

Appeal allowed.

Dated and delivered at Nairobi this 8th day of February 1979.

S.K SACHDEVA

JUDGE