



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 2 OF 2018

NGULUNGU KITHEKA NGAO.....APPELLANT

VERSUS

ALEXANDER MATUVI KITHEKA....RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate's Court at

Kitui in Civil Case No. 311 of 2004 delivered on

1st December, 2011 by Hon. B.M. Kimemia– PM)

JUDGMENT

1. This is an Appeal against the Judgment of the Principal Magistrate in Kitui PMCC No. 311 of 2004. In the said Judgment, the learned Magistrate found that the Defendant/Respondent had proved his Counter-claim on a balance of probabilities.
2. In the Supplementary Memorandum of Appeal, the Appellant averred that the learned Magistrate erred when she held that he had failed to prove his claim; that he erred when he failed to appreciate that he was the registered proprietor of the suit land and therefore entitled to the land and that there was no basis for the learned Magistrate to have inferred a trust in favour of the Respondent.
3. The Appellant finally averred in the Memorandum of Appeal that the learned Magistrate failed to make a finding that the Agreement that the Magistrate produced was a forgery; that there was no evidence to show that the suit land was jointly purchased by the two of them and that the Appeal should be allowed.
4. In the Amended Plaintiff that was filed by the Plaintiff in the lower court, the Appellant averred that he was the registered proprietor of land known as Matinyani/Mutulu/475 which he bought in 1975; that in January, 1998, the Respondent unlawfully trespassed on the said land and that the Defendant should be evicted from the land.
5. In his Amended Defence and Counter-claim, the Respondent stated that he is the one in possession of the suit land; that in 1974, he purchased parcels number 475 and 476 jointly with the Plaintiff and that he allowed the Plaintiff, who is his elder brother, to have the two parcels of land registered in his name thus creating a resulting trust in favour of the Respondent.
6. The Respondent's claim in the lower court was for a declaration that the Appellant holds parcels number Matinyani/Matulu/475 and 476 in trust for him and that he should transfer parcel number 475 to him.
7. This being a first Appeal, this court is required to evaluate the evidence that was placed before the Magistrate and arrive at its own conclusion. The Appellant informed the trial court that he purchased parcels of land numbers 475 and 476 from a Mwangale Kunde in 1975; that the land was surveyed and that the same was registered in his favour.
8. It was the evidence of the Appellant that he used a Title Deed for parcel number 475 to secure a loan from Agricultural Finance Corporation which he completed repaying in 1991 and that when his mother sued him in Civil Case No. 320 of 1995, the court decided the matter in his favour.
9. The Appellant denied that he bought the two suit properties jointly with the Respondent; that he bought parcel number 476 from Ubia Kithuku in 1984 and that the Respondent was his witness in that transaction. According to the Appellant, the Respondent bought a parcel of land number 421.
10. It was the evidence of the Appellant that his mother owns parcel number 408 which borders parcel number 475 and that he has been utilizing both parcel numbers 475 and 476. The Appellant admitted that the Respondent has built his house on portion number 475 and has

been cultivating it since 1998.

11. On his part, the Respondent informed the court that the Appellant is his only brother; that he is the one who has been using parcel number 475 since 1975 and that he has built a permanent house, which is his home, on the land. According to the Respondent, he purchased the land jointly with the Appellant from a Mr. Selule; that they purchased the land and had it sub-divided into two and that the Appellant is on parcel of land number 476 while him is on parcel number 475.

12. To prove that they bought the two parcels jointly, the Respondent produced in evidence an Agreement purportedly drafted by himself in which the two agreed on how they will share the land equally. On cross-examination, the Respondent stated that he represented his mother in Civil Case No 320 of 1998 in which the Appellant was accused of having hived off a piece of land from parcel number 408 and added on parcel number 475.

13. The evidence that was produced before the lower court shows that the register in respect of parcel of land known as Matinyani/Matulu/475 was opened on 5th September, 1979. The Title Deed was then registered in favour of the Appellant on 23rd August, 1980. The adjudication record shows that the said land initially belonged to a Mr. Mwanga Syelunde before the records were changed to reflect the Appellant's name on 21st January, 1975.

14. Although the Appellant produced a handwritten Agreement showing that he purchased parcel of land 476 vide an Agreement dated 5th August, 1984, the said Agreement was never translated in the language of the lower court, which is English and Kiswahili. In the circumstances, this court cannot rely on the said document. However, the Application for the consent of the Land Control Board shows that parcel of land number 476 was transferred from a Mr. Charles Yumbia Kithuku to the Appellant in 1984 for a consideration of Kshs. 10,000. The Board then gave its consent to the Appellant on 19th October, 1984.

15. The fact that the Appellant applied for the consent of the Board for the transfer of parcel of land number 460 from Charles Yumbia in 1984 is consistent with his testimony that he bought the said land in 1984, and was issued with a Title Deed the same year.

16. The fact that indeed the Appellant bought parcel number 476 in 1984, is inconsistent with the Respondent's assertion that parcel numbers 476 and 475 were one parcel of land which was sub-divided into two as at the time of buying it. Indeed, the purported handwritten Agreement between the Appellant and the Respondent dated 29th August, 1974 in which they purportedly agreed to share parcels of land numbers 475 and 476 "in future" is a forgery.

17. I say so because by 1974, parcel of land number 476 was still in the name of Charles Yumbia. It was not until 1984 that the Appellant purchased it. The purported Agreement of 1974 could not have therefore captured parcel number 476 as a jointly owned property. Indeed, in the same year, parcel of land number 475 was still in the name of Mwanga Syelunde. It was not until 16th June, 1975 that the Land Adjudication Officer allowed the said Mwanga Syelunde to transfer the land to the Appellant.

18. The evidence that was produced before the lower court therefore shows that the Respondent did not contribute or participate in the purchase of the two properties. However, the Appellant allowed him to occupy and live on parcel number 475 since 1975. The question that arises is therefore this: does the concept of trust arise in favour of the Respondent?

19. The two suit properties were registered under the repealed Registered Land Act. That is the law applicable in this particular matter. Section 159 of the Registered Land Act (*repealed*) granted to the Magistrate's jurisdiction to determine disputes relating to title to or the possession of land registered under the Act where the value of the subject matter did not exceed Kshs. 500,000.

20. Consequently, the lower court had the requisite jurisdiction to determine the rights of a proprietor of land registered under the Act, which rights are subject to his obligation as a trustee (*See Section 28 of the Registered Land Act*).

21. The Black's Law Dictionary, 8th Edition has defined the term "trust" as follows:

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal titles; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."

22. There are many kind of trusts recognized in law, with the most common in land being customary trusts and constructive trust. The customary trust does not arise in this case because the suit property is not ancestral land. Indeed, the two properties were purchased by the Appellant. However, the Appellant allowed the Respondent to occupy one of his parcel of land since 1975 to date.

23. The doctrine of constructive trust was defined by the Court of Appeal in the case of *Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri (2014) eKLR* as follows:

"A constructive trust is based on common intention which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted upon by the claimant."

24. The Appellant in this case allowed his brother to live on parcel number 475 since 1975. The Respondent has been living on the said land without any interference from the registered proprietor, the Appellant. Obviously, if someone has been living on your land for more than forty (40) years, the court is entitled to import the concept of constructive trust to protect such an individual from eviction. Furthermore, Section 30(g) of the Registered Land Act (*repealed*) provided that the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession is an overriding interest on registered land.

25. The facts of this case shows that there was a common intention between the Appellant and the Respondent, which intention the Respondent relied upon, to live and utilize parcel number 475. That intention created a trust, which is recognized by the Registered Land Act. Indeed, it has been recognized that a 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 a common intention.

26. Having allowed the Respondent to occupy his land since 1975 to date, the Appellant would be defeating a common intention which he had with his brother since 1975, which is unconscionable and not acceptable. Consequently, I find that the learned Magistrate was right when he held that the Respondent had established the existence of a trust.

27. For those reasons, I dismiss the Appeal and uphold the decision of the lower court. However, this being a family dispute, I direct that each party should cater for his costs, both in this Appeal and in the lower court.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE