



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 92 OF 2005**

**(FORMERLY NAIROBI HCC NO. 1045 OF 2002)**

**JUVINALIS ONSANDO OGUMBO.....PLAINTIFF**

**VERSUS**

**CHRISTOPHER ONGAKI NYAGUNIA.....DEFENDANT**

**J U D G M E N T**

**Background and the Pleadings:**

1. The Plaintiff filed suit on 21<sup>st</sup> June 2002 seeking eviction of the Defendant from **L.R. No. West Kitutu/Bogusero/2410 (suit property)** and an injunction restraining the defendant by himself, his agents and or servants from entering, cultivating and/or interfering in any manner with the plaintiff's land.
2. The plaintiff is the registered proprietor of the suit property and claimed that on or about March and April 2001 the Defendant wrongfully and unlawfully trespassed into the suit property, harvested the plaintiff's maize, uprooted his maize seedlings and commenced cultivation. The plaintiff avers that as a consequence he has been deprived of use of the suit property
3. The Defendant on 11<sup>th</sup> December 2013 filed his Amended Defence and Counter-claim. In his defence, the defendant claimed that he was cultivating a distinct and separate parcel of land. He claimed both the plaintiff and himself purchased land from Benedicto Nyakundi Okenyuru (now deceased and herein after referred to as "**Benedicto**") who was the original owner of **West Kitutu/Bogusero/ 1853** out of which the suit property was carved out. It was the defendant's claim that the plaintiff was holding the suit property in trust for the defendant.
4. The defendant in his counterclaim sought an order compelling the plaintiff to surrender a portion of his land measuring 39 m by 100 m by 40 m ("**the portion measuring 0.39 Ha**") which is within the suit property. He claimed he had been in occupation of the portion measuring 0.39 Ha since 1980 and further sought an order that the register be amended accordingly and the plaintiff to sign the necessary documents to facilitate the transfer of the said portion of land to the Defendant.
5. The Defendant averred that in 1980 he entered into a sale agreement with Benedicto, took possession of the portion measuring 0.39 Ha and fenced the same. He claimed that the plaintiff fraudulently obtained the title of the suit property including the portion measuring 0.39 Ha which belonged to the Defendant. The Defendant averred that once the fraud was detected, the Land Registrar requested the Plaintiff to surrender the portion measuring 0.39 Ha which he had obtained illegally but the plaintiff refused to do so.
6. The Plaintiff on 15<sup>th</sup> January 2014 filed his Reply to Defence and Defence to Counterclaim dated 14<sup>th</sup> January 2014. The Plaintiff in his Reply to Defence denied that he held the suit property or any portion thereof in trust for the defendant. The Plaintiff contended that the Defendant was not entitled to any portion of the suit property either on the basis of trust or fraud. The Plaintiff alleged that the defendant entered upon and/or trespassed onto a portion of the suit property which prompted the filing of the instant suit. The Plaintiff further claimed that if there was a purchase between the defendant and Benedicto, then the same could have been in regard to parcel **LR No. West Kitutu/Bogusero/1853** which was still in the name of Benedicto. The Plaintiff averred that the transfer and registration of the suit property to his name was conducted legally with the approval of the vendor, Benedicto.

**Evidence of the Parties:**

7. All the parties filed their respective witness statements and list of documents and the matter proceeded to full hearing. **Juvenalis Onsando Ogumbo (PW1)** testified that he owned the suit property which he purchased from Benedicto for Kshs 2,000/-. He told the court that he visited the site and confirmed that it was in vacant possession before he agreed to purchase the same. He stated that he attended the Land Control Board together with Benedicto, his wife and children. He testified that the Land Control Board accorded consent to the sale transaction and ultimately the suit property was transferred and registered in his name. The Plaintiff stated that after he purchased the suit property he started carrying on subsistence farming thereon. He told the court that the Defendant's father was a brother to Benedicto, and

that the Defendant's father had his own separate land and that during the process of sale no person raised any objection. The Plaintiff further testified that around 2002 while his wife was harvesting maize on the portion of land he had purchased, the Defendant chased her away and started ploughing the portion measuring 0.39 Ha. The Plaintiff stated that the Defendant continued to illegally use the portion measuring 0.39 Ha and that he (Plaintiff) reported to the Chief who advised him to make a report with the police. He told court that the Defendant had no right over the property and should be ordered to vacate. He testified that he had no dealings with the Defendant or his father, and thus does not hold the land in trust for the Defendant. He stated that he had no knowledge that the Defendant had bought any land from Benedicto.

8. **Christopher Ongaki Nyagunia (DW1)** the Defendant herein, testified that the Plaintiff was his neighbour and that they both bought land from Benedicto. He testified that at the time of the sale the land did not have any numbers and Benedicto sold the land to him. He stated that Benedicto sold him the land in 1980 as per a written agreement dated 6<sup>th</sup> July 1980. The agreement did not specify the number of the parcel of land sold. He stated that he fenced his portion and took possession but later learnt that the plaintiff amalgamated the defendant's portion measuring 0.39 Ha with the plaintiff's portion and obtained a title for **L.R. No. West Kitutu/ Bogusero/2410**.

9. **Charles Onyonka Nyakundi (DW2)** testified that both the Plaintiff and Defendant are related to him. He testified that his father sold a portion of his land to the Plaintiff and also sold a portion to the Defendant. He told the court that the Plaintiff took the whole portion including the land belonging to the Defendant. He testified further that his mother tried to reclaim the extra portion from the plaintiff to no avail.

#### **Submissions, Issues, Analysis and Determinations:**

10. At the close of the hearing both parties filed their written submissions. The plaintiff urged the court to consider the mutation form signed by Benedicto and the fact that execution of transfer instrument was not challenged. The Plaintiff submitted that by virtue of ownership of the suit property he is entitled to benefit from the suit property without interference from third parties and made reference to Section 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. He submitted that the Defendant did not lay before the court any basis to warrant entry and/or cultivation of the portion measuring 0.39 Ha. that formed part of the suit property. The Plaintiff submitted that the actions of the Defendant on the suit property amounted to trespass and in support thereof placed reliance on the case of **David Ogutu Onda -vs- Walter Ndede Owino, Kisii HCC ELC No. 295 of 2012 (unreported)**. The Plaintiff further submitted that the Defendant failed to enumerate the particulars of Trust and or circumstances leading to such trust contrary to Order 2 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 and relied on the case of **John Gitiba Buruna & Another -vs- Jackson Rioba Buruma, court of appeal, Civil Appeal No. 89 of 2003 (unreported)**. The Plaintiff contended that the Defendant had not proved fraud as against the Plaintiff to vitiate the Plaintiff's title to the suit property.

11. The Defendant in his submissions contended that the Plaintiff had not proved his case on a balance of probability to warrant the court to declare that the whole of the suit property belonged to the plaintiff. He further submitted that he is entitled to the orders sought in his counterclaim as evidence revealed that the plaintiff did not take possession of the portion measuring 0.39 Ha. which the Defendant was in possession and was utilizing.

12. It is uncontroverted that the property was initially owned by Benedicto and registered as **LR No West Kitutu/Bogusero 1853**. It is not contested that the plaintiff purchased a portion of land from the deceased said land parcel **1853** and that after subdivision, the portion subdivided was given a new number LR No. **West Kitutu/Bogusero/2410**. What is disputed was the size and extent of the land the Plaintiff purchased.

13. Upon perusal of the pleadings, the evidence and the parties written submission the following issues arise for determination:

- 1) **Whether the Plaintiff's title to the suit land was fraudulently obtained?**
- 2) **Whether the Defendant is entitled to the portion measuring 0.39 Ha forming part of the suit property by virtue of trust?**
- 3) **Whether the Plaintiff's claim or the Defendants counterclaim succeeds?**
- 4) **Who should bear the costs of the suit?**

#### **Whether the Plaintiff's title to the suit land was fraudulently obtained?**

14. In order to determine this issue it is necessary to consider the applicable law and in that regard the consideration of Sections 24, 25 and 26 of the Land Registration Act ("**the LRA**") is appropriate. Section 24 of the Land Registration Act provides that subject thereto:-

- a) **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; and**
- b) **the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.**

15. Section 25 of the Land Registration Act states as follows:-

**“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.**

16. Section 26 of the Land Registration Act which provides as follows :-

**26(1) The certificate of title issued by the 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, easements, restrictions and conditions contained or endorsed 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, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

17. The defendant in this case has challenged the plaintiff’s title and alleged that it was fraudulently obtained. It is trite law that fraud has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Black’s Law Dictionary defines fraud thus: -

**“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.**

18. Under Section 26 of the Land Registration Act, a certificate of title is prima facie evidence that the person named therein is the absolute and the indefeasible owner of the land and the certificate of title can only be challenged where it has been acquired fraudulently, unprocedurally or through a corrupt scheme. In the case of **Esther Ndegi Njiru & Another -vs- Leonard Gatei [2014] eKLR** the court held that :

**“...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 a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”**

19. The Defendant in the instant suit although he averred that there was fraud, mistake or concealment on the part of the Plaintiff, he did not plead any particulars which constituted the alleged fraud, mistake and/or concealment to enable the Plaintiff to answer or respond appropriately. The necessity to plead particulars of fraud was emphasized in the case of **Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000]eKLR (Civil Appeal No. 106 of 2000)** where Tunoi JA (as he then was) stated as follows:

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”**

20. On evaluation of the evidence before the Court, I find no evidence that can lead me to hold that the Plaintiff obtained the title to the suit property fraudulently. Indeed, the evidence points to there having been a sale transaction between the Plaintiff and Benedicto who sold a portion of his land to him (and this fact is not in dispute). The mutation form for the subdivision of land parcel **West Kitutu/Bogusero/1853** was prepared and registered on 13<sup>th</sup> January 1983 but the Plaintiff was not registered as owner until 1996 owing to loss of identity card by the seller. The Plaintiff explained that he and the seller together with his son attended before the Land Control Board for consent and that at no time did the issue of he having been awarded excess land arise. The Plaintiff’s position was that he got the same size of land that he had agreed to buy. The Plaintiff testified before me and he struck me as a believable witness.

21. The Defendant for his part only relied on a memorandum of agreement dated 6<sup>th</sup> July 1980 made between him and Benedicto. The memo of agreement was in the following terms:-

**“Benedicto Nyakundi Okenyoru has given Christopher Ongaki Nyagunia a piece of land where there is a grave of Ombogi. Ongaki Nyagunia has paid Kshs 1,100/- the amount meant for renovating house he left his as the heir to grandmother as she said.”**

22. The agreement was witnessed by Okwoyo Karori, Odhiambo Ogutu, Kerubo Nyakundi, Rebecca Moraa, Nyagunia Okenyoru. Though the memorandum of sale may have satisfied the requirement of Section 3(3) of the Law of Contract Act, the question for determination would be whether the above agreement constituted an agreement for sale of land measuring approximately **“39M by 100M by 73M by 40M (0.39 Ha)”** as described by the Defendant in paragraph 6 and 13 of the counterclaim. The land is not described under the agreement between Benedicto and the Defendant and it is unclear what was sold to the Defendant and out of what land. The **Halsbury’s Law of England Volume 42 paragraph 57** states as follows;

**“The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it.”** [Emphasis added]

23. In this case the defendant was given a piece of land where there is a grave of Ombogi, the dimension and/or size of this land was not described by the agreement. Further during the oral evidence by DW1 and DW2 it was not clear whether it was the suit land that had the said grave. In **Nelson Kivuvani -vs- Yuda Komora & Another, Nairobi HCCC No.956 of 1991 (unreported)**, the Court held that:-

**“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.**

**Whether the Defendant is entitled to the portion measuring 0.39 Ha. forming part of the suit property by virtue of trust?**

24. The Plaintiff also submitted that the defendant failed to plead particulars of trust contrary to Order 2 Rule 10(1) of the Civil Procedure Rules. In **Anthony Francis Wareham t/a AF Wareham & 2 others vs. Kenya Post Office Savings Bank [2004] eKLR**:

**“... cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings...”**

25. The question before the court is whether from the facts presented by the defendant, a trust can be construed to have been created. In the case of **Twalib Hatayan & Anor -vs- Said Saggar Ahmed Al-Heidy & Others [2015 eKLR]** the court made an elaborate finding on the different types of trusts. The court observed 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. (see Black’s Law Dictionary) (Supra). 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 (see Black’s Law Dictionary) (supra). 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).**

26. The court of Appeal in **Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri (2014)eKLR** stated as follows:

**“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 in Steadman -vs- Steadman 1976 AC 536 at 540:**

**“ If one party to an agreement stands by and lets the other party incur expenses 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 was not valid....This court is enjoined to dispense substantive justice. What is justice, justice is conscience, not a personal conscience but the conscience of humanity. Would the conscience of humanity allow an individual to receive the purchase price and later plead that the agreement is void? The conscience of humanity dictates that a constructive trust and proprietary estoppel shall apply in such cases”**

27. In the present case, the seller sold only a portion of his land to the Plaintiff and was left with a portion of land **West Kitutu/Bogusero/2409**. **Could the land sold to the Defendant have been on the portion retained by the seller?** That cannot be discounted or ruled out. The Plaintiff stated that the Defendant unlawfully entered onto the portion of land about 2001/2002 and prevented the Plaintiff from utilizing the portion. The evidence shows the Plaintiff complained to the local administration and when the matter could not be resolved he instituted the present suit in 2002.

**Conclusion and Determination:**

28. Although the Defendant has alluded to the existence of a trust in his favour in regard to the portion of land he claims, no evidence was led to establish the existence of a trust. There was no evidence to show that the Plaintiff acquired the portion that he purchased with knowledge that a portion of it belonged to the Defendant. There is no evidence that can support the existence of a trust and besides the Defendant did not plead the existence of any trust. I hold that there was no trust in favour of the Defendant.

29. In the result, it is my holding and finding that the Plaintiff has proved his case on a balance of probabilities and is entitled to judgment. On the other hand, I find and hold that the Defendant’s counterclaim has not been proved and is for dismissal and it is hereby dismissed.

30. I accordingly enter judgment in favour of the Plaintiff and make the following final orders:

- 1. The Defendant is hereby ordered to vacate and deliver vacant possession of the portion of land parcel West/Bogusero/2410 that he has occupied within 60 days from the date of this judgment.**
- 2. In the event of default to comply with (1) above the Plaintiff shall be entitled to an order for the forcible eviction of the Defendant on application.**
- 3. The Plaintiff is awarded the costs of the suit and the counterclaim.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**