



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE No. 12 OF 2015**

**JAMES NJENGA BURUGU.....PLAINTIFF**

**VERSUS**

**CHRISTOPHER KAMAU BURUGU.....DEFENDANT**

**JUDGMENT**

1. Litigation in this matter pits one brother against the other: the plaintiff is a younger brother of the defendant. By plaint filed on 20<sup>th</sup> January 2015, the plaintiff averred that the defendant who is the registered proprietor of the parcel of land known as **Dundori/Miroreni Block 1/52(Cura)** (hereinafter “the suit property”) obtained a loan from Agricultural Finance Corporation (AFC) and used the suit property as security. He also had another loan from Barclays Bank Ltd. Sometime in the year 1993, the defendant who was unable to finance the said loans requested the plaintiff to service the loans and in return the defendant would surrender to the plaintiff his legal right over the suit property and that on obtaining a discharge from AFC, the defendant would transfer the suit property to the plaintiff. The plaintiff serviced and cleared the loan but contrary to the agreement, the defendant refused to sign transfer in favour of the plaintiff and also refused to hand over the title deed to the plaintiff.

2. The plaintiff therefore contends that the defendant holds the suit property on his behalf and is seeking judgment against the defendant for:

*a. A declaration that the plaintiff is the rightful owner of parcel title number **Dundori/Miroreni Block 1/52(Cura)** and that the defendant holds the same on behalf of the plaintiff.*

*b. An order compelling the defendant to transfer parcel title number **Dundori/Miroreni Block 1/52(Cura)** to the plaintiff.*

*c. Costs of this suit.*

3. In his statement of defence, the defendant admitted being the registered owner of the suit property but denied that the loan was repaid by the plaintiff or that there was an agreement that any payment would be in exchange for the plaintiff acquiring the suit property. He therefore urged the court to dismiss the case with costs.

4. At the hearing only the plaintiff and the defendant testified. He largely adopted his witness statement as his evidence in chief. He stated that sometime in the year 1990, the defendant told him that he had bought the suit property at a purchase price of KShs 390,000 which amount he financed through a loan of KShs 200,000 from his employer Barclays Bank and a loan of KShs 200,000 from AFC. The loan from AFC was secured using the title of the suit property. He added that the defendant told him that the intention of purchasing the property was to settle their parents. Since he was experiencing difficulties servicing his employer’s advance and the AFC loan, the defendant offered to sell the suit property to the plaintiff at a consideration of KShs 400,000. The plaintiff who was then working for Bayer East Africa Ltd was unable to raise the KShs 400,000 at a go. They then agreed that the plaintiff takes over the repayments. The plaintiff borrowed KShs 100,000 from his employer in October 1993 and KShs 100,000 from Barclays Bank on 24<sup>th</sup> October 1993 so as to be able to pay KShs 200,000 to the defendant. He therefore gave KShs 100,000 to the defendant in October 1993 and another KShs 100,000 on 25<sup>th</sup> January 1994. According to the plaintiff, he made the following payments to AFC: a total of KShs 47,000 in the year 1993, KShs 33,594.70 in 1994, KShs 58,000 in 1996, KShs 7,000 on 23<sup>rd</sup> September 1999, KShs 95,000 on 25<sup>th</sup> October 1999 and KShs 60,000 on 25<sup>th</sup> October 1999.

5. The plaintiff further stated that since he had not serviced the AFC loan for 3 consecutive years from 1996 to 1999, AFC issued a foreclosure notice dated 5<sup>th</sup> October 1999 to the defendant demanding a total of KShs 154,640.30. Upon making the payments above, the plaintiff wrote to AFC on 25<sup>th</sup> October 1999 and on 6<sup>th</sup> January 2000 seeking release of the title deed. AFC responded to the defendant on 20<sup>th</sup> March 2000 stating that there was a balance of KShs 4,600 which needed to be cleared before the title could be released. On 17<sup>th</sup> April 2000, the plaintiff gave the defendant the sum of KShs 4,600 and by the time the defendant went to pay AFC on 21<sup>st</sup> September 2000 the amount had gone up to KShs 6,890. The plaintiff therefore had to top up the difference thus paying KShs 6,890 on 21<sup>st</sup> September 2000. According to his own calculations, the plaintiff paid a total of KShs 307,484.70 to AFC and KShs 200,000 to the defendant.

6. The plaintiff added that upon completing the payments, he requested the defendant to retrieve the title deed from AFC so that transfer could be effected in favour of the plaintiff but the defendant told him that AFC had misplaced it. The plaintiff went to AFC and was given the title. Three days later, around 29<sup>th</sup> March 2009, he took the title to the defendant so that the defendant could effect transfer but the defendant did not do so thus forcing the plaintiff to file this suit. He added that the last time he set foot on the suit property was on 25<sup>th</sup> July 2012 during the burial of their father and that any time he tries to access the suit property, his other brother Joseph Mwithukia Burugu who the defendant has placed in the suit property as an agent threatens to slash him to pieces. He produced, among others, copies of the following documents as exhibits: title deed for the suit property, payments receipts issued by AFC, letter from AFC to the defendant dated 5<sup>th</sup> October 1999, letter from the defendant to AFC dated 25<sup>th</sup> October 1999, letter from the defendant to AFC dated 6<sup>th</sup> January 2000, letter from AFC to the defendant dated 20<sup>th</sup> March 2000, note from the defendant dated 12<sup>th</sup> April 2000 and demand letter dated 21<sup>st</sup> December 2011.

7. Under cross examination, the plaintiff stated their mother passed away in 2010 and their father passed away in 2012. They were staying on the suit property. He added that the agreement that the defendant sells the land to him was oral and was made in the presence of their mother and the plaintiff's wife around 30<sup>th</sup> May 1993. Regarding the payments to AFC, he stated that all the receipts were made either by the defendant or on the defendant's account. Similarly, all notices from AFC were issued to the defendant. He further testified that the suit property is agricultural land and that he never appeared before Land Control Board to obtain consent for transfer of the land from the defendant to him. No consent of the Land Control Board was issued and no consent was issued by AFC to transfer the suit property to him. Regarding the amounts that he had paid, he stated that he never asked for it back from the defendant. Instead, he wants the whole of the suit property since he paid for it. He further stated that the last payment in the transaction was in the year 2000, that he filed this case some 23 years from the time he bought the land and that the first demand letter through a lawyer was written on 21<sup>st</sup> December 2011, some 19 years after he bought the land.

8. The plaintiff's case was then closed.

9. In his testimony the defendant stated that the plaintiff is his younger brother and that he (the defendant) is the registered owner of the suit property. He added that he bought the suit property pursuant to sale agreement dated 29<sup>th</sup> October 1990. The purchase price was KShs 390,000 which sum he financed partly through a loan of KShs 100,000 from his employer Barclays Bank, another loan of KShs 100,000 from his co-operative known as Kenya Bankers Sacco and the balance through a loan from AFC. He further stated that he became sick in 1990 and underwent surgery. He got into financial difficulties. Representatives of AFC went to the plot and told his parents who were living on the plot that the defendant had not paid for several months. His father then suggested that he (his father) talks to the plaintiff to see if the plaintiff could help. His father later told him that the plaintiff who was employed and therefore financially stable had agreed to pay. The plaintiff paid some money. The loan was later cleared and the charge was discharged pursuant to discharge dated 9<sup>th</sup> March 2009.

10. The defendant further stated that he never agreed to sell the suit property to the plaintiff and that they never agreed on any purchase price. The payments made by the plaintiff were voluntary payments which the defendant was to refund. He added that the suit property is an agricultural land and that they never applied for consent of land control board since he was not selling the land to the plaintiff. However, when he bought the land he obtained consent dated 30<sup>th</sup> October 1990. Regarding the money paid on his behalf by the plaintiff, he stated that he refunded it to the plaintiff. He got his pension in the year 2004 and paid the plaintiff KShs 150, 000 then later he paid him KShs 157, 000. Both payments were in cash. The plaintiff has never demanded his money back from him (the defendant). He stated that as at the date of his testimony, he had a caretaker on the suit property who was farming the land. He urged the court to dismiss the plaintiff's case.

11. Under cross examination, he stated that the plaintiff paid to AFC a total of KShs 307,000 on his behalf. He added that he and the plaintiff had a shop at Umoja and that on 26<sup>th</sup> January 1994 he received KShs 200,000 from the plaintiff being a refund in respect of the shop business. He denied that he ever received any money from the plaintiff for the suit property. He confirmed that he wrote a letter dated 12<sup>th</sup> April 2000 to the plaintiff and added that the money referred to in the letter was not part of any purchase price. Instead, he was asking plaintiff to continue helping by paying AFC. He further stated that he introduced the plaintiff to AFC on 7<sup>th</sup> June 1993 so that AFC could know that money would be coming from plaintiff's account. The introduction was not for purpose of transferring the land to the plaintiff. He produced copies of the following documents, among others, as exhibits: AFC loan application letter dated 8<sup>th</sup> November 1991, letter from AFC dated 9<sup>th</sup> April 1992, notification of discharge dated 9<sup>th</sup> March 2009 and letter of consent dated 30<sup>th</sup> October 1990.

12. The defence case was thus closed.

13. Parties filed and exchanged written submissions. For the plaintiff it was submitted that there was an arrangement for the sale of the suit property to the plaintiff, that the plaintiff has established both constructive and resultant trust owing to the fact that he made payments to AFC which led to the suit property being discharged and the title deed being released to the plaintiff, that consent of the land control board under **section 6(1)** of the **Land Control Act** is inoperative since the defendant created an implied or constructive trust in favour of the plaintiff and that the defendant should therefore be compelled to transfer the suit property to the plaintiff.

14. For the defendant, it was submitted that he is the registered proprietor of the suit property with all the rights and privileges arising therefrom, that there was no arrangement that the plaintiff would acquire the suit property on account of the payments that he made, that this suit is not sustainable in view of the provisions of **section 3 (3)** of the **Law of Contract Act**, that specific performance cannot issue since there is no valid and enforceable contract between the parties.

15. I have considered the pleadings, the evidence, the submissions and the authorities cited by the parties. As previously noted, the parties herein are closely related. The plaintiff is a younger brother of the defendant. One wishes that such siblings do not disagree and that if they do, they quickly resolve the dispute without having to resort to litigation. Yet here we are. The court must rise to its calling to do justice as between the parties. Hopefully, when all is said and done, the parties herein will find reconciliation and live harmoniously with one another. While the court can render justice, brotherly coexistence will require the parties' personal endeavour.

16. There is no dispute that the defendant is the registered proprietor of the suit property and that he was proprietor even before the

transaction that led to the dispute herein was entered into, that the parties' parents were living on the suit property at the time the transaction was entered into, that the plaintiff has never been in possession of the suit property, that the suit property was charged in favour of AFC to secure a loan advanced to the defendant by AFC and that the plaintiff serviced part of the loan by way of paying to AFC instalments amounting to KShs 307,000 on behalf of the defendant. Those are the facts on which the parties are in agreement.

17. Regarding the disputed matters, I have distilled the following issues for determination: Firstly, whether there was an agreement for the sale of the suit property to the plaintiff; secondly, whether the defendant holds the suit property in trust for the plaintiff and finally, whether the reliefs sought should issue.

18. The first issue as to whether there was an agreement for the sale of the suit property to the plaintiff ultimately boils down to whether or not a contract exists between the parties. To answer that question, we need to see if the essential elements of a valid contract exist in whatever transpired between the parties. Both parties agree that there was no written contract. The defendant has argued that this suit is not sustainable in view of the provisions of **section 3 (3)** of the **Law of Contract Act**. The section provides:

***(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.***

....

***(7) The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.*** [Emphasis supplied]

19. The plaintiff's version is that the offer to sell the suit property to him was made around 1990. Pursuant to the provisions of subsection (7) as captured above, the provisions of subsection (3) do not apply to any agreement or contract made or entered into before the commencement of that subsection (3). **Section 3(3)** of the **Law of Contract Act**, came into effect on 1<sup>st</sup> June, 2003. The alleged contract between the plaintiff and the defendant if at all it exists would predate **Section 3(3)** of the **Law of Contract Act** and would therefore not be affected by the said section.

20. The Court of Appeal gave a historical background to **Section 3(3)** of the **Law of Contract Act** and its effective date in **Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR** as follows:

***24. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1<sup>st</sup> June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:***

***(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;***

***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-***

***(1) Has in part performance of the contract taken possession of the property or any part thereof; or***

***(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '***

***25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find***

**that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act. [Emphasis supplied]**

21. Provisions similar to **Section 3(3) of the Law of Contract Act** are found at **Section 38** of the **Land Act, 2012**. Similarly, **Section 38(2)** of the **Land Act, 2012** excludes from the requirement of writing, any agreement or contract made or entered into before 2<sup>nd</sup> May, 2012 which was the commencement of the Act. Again, if any oral contract for the sale of the suit property existed between the parties herein, it would not be affected by **Section 38** of the **Land Act, 2012**.

22. The question therefore still remains. Was there an agreement for the sale of the suit property to the plaintiff? Was there a contract? In **Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR** the Court of Appeal observed:

***It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration.***

23. Was there an offer? In the context of this case, the offer would be that the defendant expresses readiness to sell the suit property to the defendant at a certain purchase price. According to the plaintiff, since the defendant was experiencing difficulties servicing his employer's advance and the AFC loan, the defendant offered to sell the suit property to the plaintiff at a consideration of KShs 400,000. Although the defendant admits that he had financial difficulties, he denies that there was any offer to sell the suit property to the plaintiff. His explanation is that since their parents were staying on the suit property, when their father realized that the defendant was having financial difficulties and that AFC was on the verge of foreclosing, their father suggested that the plaintiff assists with the repayments. I note that the plaintiff confirmed in his testimony that the defendant told him that the intention of purchasing the suit property was to settle their parents. The parents were indeed settled on it and are buried on it. If there was an agreement way back around 1990 that the plaintiff acquires the suit property where the parents were residing until the mother passed away in the year 2010 and the father in the year 2012, such an agreement would have been a family matter of open notoriety. I find it rather strange that no family member testified to support the plaintiff's claims.

24. I also note that although the plaintiff claims that the purchase price was agreed at KShs 400,000 he stated in his testimony that he paid KShs 307,484.70 to AFC and KShs 200,000 to the defendant thus making a total of KShs 507,484.70 which is way beyond both the purchase price and the amount of KShs 307,484.70 that was needed to obtain a discharge of the suit property from AFC. While the payment of the KShs 307,484.70 is well documented, that is not the case in respect of the KShs 200,000 which the plaintiff claims to have paid in cash and receipt whereof the defendant has denied. In view of these inconsistencies, I find the explanation offered by the defendant that the plaintiff only assisted with the repayments at the request of their father to be more probable. I do not see any common intention to enter into a sale agreement between the parties in relation to the suit property. Consequently, I find that there was no offer to sell the suit property to the plaintiff. It follows therefore that there could be no acceptance and payment of consideration for a non-existent offer. The answer to issue number one is that there was no agreement for the sale of the suit property to the plaintiff.

25. The second issue for determination is whether the defendant holds the suit property in trust for the plaintiff. The Court of Appeal discussed the essentials of a trust in **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidi & Others [2015] eKLR** 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).”***

26. A party who alleges existence of trust must prove it. In **Dorcas Indombi Wasike v Benson Wamalwa Khisa & another [2010] eKLR** the Court of Appeal stated:

***The appellant’s counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one***

*thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171, are clear that: -*

*“The law never implies, the Court never presumes a trust, but in case of absolute necessity. 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 will be implied.”*

27. The answer to issue number one generally resolves issue number two. The plaintiff has urged the court to find that there is a resulting trust. In view of my finding that there was no agreement for the sale of the suit property to the plaintiff, I see no room to presume or infer such a trust since there is no necessity to do so and there is no injustice to remedy through the equitable instrument of a trust. The plaintiff has not demonstrated any common intention to enter into a sale agreement between himself and the defendant in relation to the suit property. He is not and has never been in possession of the suit property. Although he paid a sum of KShs 307,484.70 to AFC on behalf of the defendant, there was no agreement that that amount would be purchase price for the suit property. He has not claimed any of the sums he says he paid to AFC or to the defendant in his plaint. I am therefore not called upon to decide if a refund is due. The answer to issue number two is that the defendant does not hold the suit property in trust for the plaintiff.

28. The final issue for determination is whether the reliefs sought should issue. The plaintiff has sought a declaration that he is the rightful owner of parcel title number **Dundori/Miroreni Block 1/52(Cura)** and that the defendant holds the same on his behalf and an order compelling the defendant to transfer parcel title number **Dundori/Miroreni Block 1/52(Cura)** to him. The plaintiff has not proven his case and these remedies are therefore not available. His case is for dismissal.

29. In the end, the plaintiff's case is dismissed. So as not to occasion any new conflict between the siblings, I order that each party bears own costs.

30. Judgment herein was to be delivered on 27<sup>th</sup> February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of July 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mrs Oliech holding brief for Ms Njeri Njagua for plaintiff

No appearance for defendant

Court Assistants: Beatrice & Lotkomoi