



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 345 OF 2017

1. JAMES ARCHER

2. JOANA TRENT.....PLAINTIFFS

VERSUS

1. INGER CHRISTINE ARCHER

2. ANNE LISE ARCHER-CLARK

3. HELEN KAY HARTLEY

4. PETER WALKER

5. BRIAN RICHARD HARTLEY

6. JOHN CHRISTINE CLARK

(as personal representative of the Estate of Christopher John Archer)..... DEFENDANTS

JUDGMENT

1. By an Originating Summons dated 5th June 2012 and filed in court on even date, the Plaintiffs are seeking the following orders:

1. A declaration that the beneficial interests in the properties known as TITLE NUMBERS KWALE/DIANI BEACH BLOCK/806, 807, 808 registered in the names of the 1st, 2nd 3rd defendants are held on trust by the 1st, 2nd and 3rd defendants in the following shares:

1.1 For the 1st, 2nd and 3rd defendants (jointly one undivided share),

1.2 For the 1st plaintiff (one undivided share),

1.3 For the 2nd plaintiff (one undivided share),

1.4 For Robert D. Archer (one undivided share)

All holders of undivided shares to hold as tenants in common, alternatively in such shares as the court shall determine.

2. An order that the 1st, 2nd and 3rd defendants do execute transfer that effect registration of the 1st and 2nd plaintiffs and two nominees of the defendants as joint proprietors of the leasehold interest in Title Numbers: KWALE/DIANI BEACH BLOCK/806,807, 808 and in default of such execution, the registrar of the High Court be authorized to execute such transfers under Section 98 of Civil Procedure Act.

3. Costs of the suit.

2. The summons is premised on the grounds on the face of it and is supported by the affidavit of James H. Archer, the 1st plaintiff sworn on 5th June, 2012, a further affidavit sworn by Joana Trent on 24th October, 2014, a further affidavit sworn by Jean Hartley on 19th November, 2014, a further affidavit sworn by James H. Archer on 19th November, 2014 and the supporting affidavit sworn by Ashwin R. Patel on 19th November 2014.

3. The defendants have opposed the said summons by way of a replying affidavit sworn by Helen Kay Hartley on 23rd October 2012 and a further affidavit also sworn by Helen Kay Hartley on 26th March 2019.

4. By consent dated 27th June, 2012 signed by the advocates for the parties and which was adopted as an order of the court on 19th September, 2017, the plaintiffs suit against the 4th, 5th and 6th Defendants was withdrawn. Further, by consent dated 3rd September 2014 and another consent dated 21st March, 2019 signed by the advocates for the parties and which was adopted as an order of the court on 26th March 2019, the parties agreed to have the suit canvassed by way of affidavit Evidence and respective written submissions. The plaintiffs filed their submissions on 19th June, 2019 and further submissions on 4th July, 2019.

5. The plaintiffs herein claim that a common intention constructive trust exists in relation to the suit properties whereby the plaintiffs claim that the plaintiffs together with their siblings Robert D. Archer and Christopher J. Archer as part of a common intention agreed to pay back loan advanced to their father H. D. Archer for the purchase of the mother title to the suit properties. The suit properties were created by the subdivision of the property known as Land Reference Number 55 (5004/60) measuring a total of 25.2 acres (hereinafter referred to as “the mother title”). It is common ground that as at the time of its subdivision, the suit properties were registered in the name of Christopher John Archer (now deceased) who is the father of the three defendants herein and brother of the plaintiffs. It is also common ground that erected upon suit properties is a residential development known as “Diani House” which was at all material times to this suit operated by the late Christopher John Archer as a short term holiday renting/letting business. It is also common ground that by a will dated 24/7/2007, the late Christopher John Archer bequeathed the suit properties to his three daughters, the defendants herein. The defendants were subsequently registered as the proprietors of their respective portions of the suit property having assumed ownership thereof by transmission.

6. By this suit, the plaintiffs primarily seek a declaration that the defendants hold the three suit properties as a single unit and that they are entitled only to a ¼ undivided share of the whole on their own behalf whilst the remaining ¾ shares of the undivided whole is held in trust by them for the plaintiffs in equal shares. The plaintiffs’ case is that they derived a beneficial interest in the suit properties in question by virtue of contributing money towards the maintenance and improvement of the Diani House. That they also assisted the late Christopher John Archer to create a trust over the suit properties or a common intention between the siblings that the property should be held in trust for all of them which should now be enforced by the court.

7. The plaintiffs’ case is that none of the siblings had sufficient money to fund the purchase of the suit property at that time and so Howard D. Archer paid the purchase price of Kenya Pounds 5000 directly and asked his children to pay back the principal plus interest. They state the loan arrangement was informal and not evidenced in writing. The plaintiffs aver that the suit properties were registered in the name of Christopher John Archer as at that time there was government regulations that only Kenyan citizens could own beach –front property and that Christopher John Archer was the only one out of the siblings who was a Kenyan citizen. The plaintiffs relied on a copy of an accounting document entitled the “Diani House Account” dated 11th September 1967 showing payments as regards the interest owing from the monies lent to Howard D Archer. The plaintiffs also relied on other correspondences to support their contention that a trust existed.

8. The plaintiffs’ counsel file written submissions on behalf of the plaintiffs and gave brief facts of the plaintiffs’ case. Counsel submitted that the issues for determination by the court are:

A. Did Howard D. Archer provide the purchase monies of Kenya Pounds 5000.00 for the purchase of the mother title to Diani House under a loan arrangement under which his four children: James Archer, Joanna Trent Nee Archer, Robert D. Archer and Christopher John Archer would pay the principal plus interest back to him while Christopher John Archer would be registered as proprietor of the mother title?

B. Did the 1st plaintiff and Robert D. Archer as part of a common intention agreed to between the four siblings and Howard D. Archer, pay back to Howard D. Archer certain instalments of principal and interest?

C. Does documentary evidence exist that shows that Christopher John Archer believed that he did not own the entire beneficial interest to Diani House for himself but rather , that he owned Diani House jointly with his siblings?

D. Do the accounts of Diani House, circulated by Christopher John Archer to the siblings portray the siblings as long-term investors in Diani House?

E. Does documentary evidence exist that shows that the 1st, 2nd and 3rd defendants admitted, prior to the death of Christopher John Archer to having knowledge that Howard D. Archer has intentions that the Diani House was to be for the use of his four children and that the plot was left in trust to Christopher John Archer by Howard D. Archer (the father of the 1st, 2nd and 3rd defendants)?

F. Did, prior to the death of Christopher John Archer, the 1st defendant sent an email to the plaintiffs and the 2nd and 3rd defendants wherein the 1st defendant proposed that a trust be established over Diani House which trust would have conditions and terms that Christopher John Archer leave the Diani House to a list in his will and that the trustees (under will) would be responsible for running Diani House?

9. The plaintiffs’ counsel submitted that a constructive trust be fixed on Christopher John Archer because he admitted severally in documents

and verbally that he knew that he held the legal title to the suit property while the equitable title was held by his siblings and himself. That in spite of his approbating and reprobating over the years, the constructive trust is deemed to be affixed to his conscience prior to 1966 due to the accounts circulated by him to his siblings, and that in the last year of his life, he subsequently acknowledged the existence of the trust to the son of the 1st plaintiff in the presence of the defendants. That the defendants, as heirs of the estate of Christopher John Archer have been shown to know about the existence of the constructive trust and acted in breach of the trust by acting as personal representatives of the estate of the deceased and or instructing the personal representative of the estate to transfer the legal title to Diani House to themselves. The plaintiffs therefore submitted that the Defendants should be ordered to effects legal transfers to revert the legal title back to the plaintiffs and the Estate of Robert D. Archer and Christopher John Archer in equal undivided shares holding as tenants in common. The plaintiff's counsel relied on the cases of **Brittle Bank –v- Goodwin (1868) Vol XLVI L.R. Eq. 545; Foxton -v-Manchester & Liverpool District Bankers (1881) Vol xlv L.t. 406; Stainer –v- Evan, Evans –v- Stainer (1887) VOL. XXXIV L.R (C.L) 470; Magnus –v- Queensland National Bank (1888) VOL. XXXVII L.R. 466, C.A; Concha –v- Murieta, De Mora –v- Concha (1889) VOL. XL. L.R. (CH) 543, C.a.; Cowper –v- Stoneham (1893) vol. lxxvii Lt. 18; Wassel –v- Leggart (1896) VOL. 1 L.R. Ch. 554; in Re Jordan, Hayward –v- Hamilton (1904) Vol. 1. L.R. (ch) 260; in Re Frankly –v- Franklyn –v- Frankly (1913) 30 T.C.R 187, C.A.; Nelson and Others –v- Larholt (1947) 2 ALL ER 751; Re Montagu's Settlement Trusts, Duke of Manchester –v-National Westminster Bank Ltd and Others (1992) 4 All E.R. 308; Westdeutsche Landesbank Girozentrate –v- Ishlington London Borough Council (1996) UKHL 12 (22 May 1966); James –v- Williams (CA) (1999) 3 WLR 451; and Death Notice of Robert D. Archer as well as Hulsbury's and Equity & Trusts, Aleister Hudson.**

10. On the their part, it is the defendants case that the plaintiffs and the late Howard D. Archer did not acquire any beneficial interest in the property purchased by the late Christopher John Archer. The defendants argue that the late Christopher John Archer as the purchaser acquired the property in question from one Johannes Theodoras Oberholzer, the vendor. That the late Howard D. Archer as well as the plaintiffs did not participate in the negotiations between the late Christopher John D. Archer and the vendor in respect of the suit property and they were not party to the Agreement for sale of the said property which was executed between the purchaser and the vendor following completion of the negotiations between them. The defendants aver that the late Howard D. Archer made available to the late Christopher John Archer a loan in the sum of 5000 pounds which he applied towards the purchase of the property and that the loan was ultimately repaid by the late Christopher John Archer either in actual cash repayments and by a partial debt write off or discharge by Howard D. Archer. It is the defendants' submission that the late Howard D. Archer did not acquire any beneficial interest in the property by virtue of the loan that he had made available to the late Christopher John Archer. The defendants counsel relied on the text "Underhill's Late Relating to Trusts & Trustees" 12th Edition by R. T. Orton at page 210-211 which states: "Loans: where the purchase money is provided by a third party at the request of and by way of loan to be person to whom the property is conveyed there is no resulting trust in favour of the third party, for the lender did not advance the purchase-money as purchaser but merely as lender." It is the defendants' case that the late Christopher John Archer identified the property in question and thereafter approached his father, the late Howard D. Archer to lend him money for purposes of purchasing the said property and the latter made available the said loan to the former who then purchased the property in question. The defendants counsel further relied on the case or Re Sharpe (1980) 1 WLR 219 and submitted that the late Howard D. Archer did not acquire any or any beneficial interest in the property that was purchased by the late Christopher John Archer. They further submitted that the Plaintiffs are not entitled to any beneficial interest in the property that was purchased by the late Christopher John Archer solely on the basis that the loan funds were made available to him by their father.

11. On whether the plaintiffs themselves acquired any beneficial trust interest in the property purchased by Christopher John Archer by virtue of having paid certain loan repayment instalments to Howard D. Archer and making contributions to the improvement of the Diani House Business, the Defendants argue that none of them entitle the plaintiffs to a business trust interest in the property. The defendants have taken a firm position that Diani House was a running accommodation and catering business operated on the suit properties by their late father. Secondly, that the fact that they were investors as creditors in the said business is critical because it demonstrates the kind of arrangements that existed between the plaintiffs and the late Christopher John Archer. Thirdly, that having agreed that the plaintiffs made certain payments to the Diani House Business, it is important to note that those payments were made for the purposes of the advancement of the said business, not the acquisition of the land itself since the late Christopher John Archer had already purchased the land. The defendants aver that from the Financial Statements which include the Balance Sheets annexed to the plaintiffs supporting affidavit, the plaintiffs are listed therein as Sundry creditors in the said Diani House business run on the suit property and cannot now acquire proprietary rights over the land upon which their debtor's business venture is housed or based, or even the business itself. The defendants counsel relied on Re Sharpe (1980)1 WLR 219. The defendants contend that the plaintiffs claim that they made contributions towards the repayment of the loan made available to the late Christopher John Archer by Howard D Archer by making payments of certain loan instalments themselves do not and could not in themselves give rise to or create a beneficial trust interest in the property acquired by the late Christopher John Archer. That the said contributions at best make them the late Christopher John Archer's Creditors, and therefore their remedy lies as against him or his estate and not against the defendants, especially long after the devolment of his estate. The defendants' counsel relied on the case of **Curley –v- Parkes (2004) EWCA Civ 1515.**

12. On the issue whether the Diani House Financial statement portray the plaintiffs as long term investors, the defendants contention is that the late Christopher John Archer was the sole proprietor of the business whilst the plaintiffs were creditors. The defendants deny that the Financial Statements demonstrate the existence of a partnership or trust relationship over the suit property. The defendants' wondered and stated that the plaintiffs having confirmed that the plaintiffs having confirmed that they used to receive the financial statements, more so when Christopher John Archer was still alive, the plaintiffs never contested their contents including the late Christopher John Archer representing himself as the sole proprietor of the said business. Likewise, that they also never once contested the treatment of their contributions and payments into the said business as part of the business' current liabilities and the treatment of the plaintiffs as creditor of the said business. The defendants added that the conclusions reached by the accountant are not only subjective opinions based on non-verifiable facts, but also in direct contradiction to the financial statements that the accountant was hired to examine and to render an opinion on. The defendants counsel relied on **Universal Education Trust Fund- v- Monica Chopeta (2012)eKLR.** The defendants deny the plaintiffs allegations of trust on the basis of letters written by the late Christopher John Archer to the plaintiffs, arguing that the letters indicating that Christopher John Archer knew that he owns the property in question but in the property was a running business in which the deceased heavily relied on credit to sustain it and wrote the letters to the plaintiffs to cater for their interests as creditors in the said business. The defendants further deny that the letters by Easterbrook & CO. Accountants and Harrison Hamilton & Mathews Advocates as well as the statement of Hugh James Archer are evidence of any existence of trust over the suit property.

13. The defendants aver that the dispute on whether the late Christopher John Archer held the property in trust for the plaintiffs is a long running dispute which commenced as far back as on 8th December 1976 and accuse the plaintiffs for being guilty of laches for waiting until

5th June, 2012 when they filed this originating summons which is even 4 years after the demise of the late Christopher John Archer on 2.4.2008.. Relying on the case of **Juletabi African Adventure Limited & Another –v- Christopher Michael Lockley (2017)eKLR; Pioneer Holdings (Africa) Ltd –v- Francis Thuo & Partners Ltd & 2 Others(2019)eKLR; and Hurry Njubi Ndekei –v- Ruth Wanjiku Kamau(2005) eKLR**, the defendants counsel submitted that the Originating summons should fail. They further submitted that the plaintiffs have not pleaded any fraud in this case and the suit was filed beyond the 6 years limitation period prescribed by the law for filing such suits, adding that the suit is time barred by virtue of the provisions of Section 4(f) of the Limitation of Actions Act.

14. I have analysed the pleadings and the submissions made. The plaintiffs claim to be entitled to a beneficial interest in the suit properties held by the defendants under a proprietary constructive trust. The first issue for determination is whether the late Howard D. Archer acquired any beneficial interest in the property that was purchased by the late Christopher John Archer using a loan of Kenya Pounds 5000 provided by the late Howard D. Archer to the late Christopher John Archer. The Plaintiffs claim that a common intention constructive trust exist in relation to the suit property because the Plaintiffs together with their siblings Robert D. Archer and the late Christopher John Archer as part of a common intention agreed to pay back the loan advanced by their father, the late Howard D. Archer for the purchase of the property. The basis of the plaintiffs claim is that the defendant had prior knowledge of the fact that their father, the late Christopher John Archer held the property in question in trust on behalf of his siblings including the 1st and 2nd plaintiffs. It is common ground that the late Howard D. Archer made available to the late Christopher John Archer a loan of 5000 Kenya pounds which the latter applied towards the purchase of the suit property. According to the plaintiffs, none of the siblings had sufficient money to fund the purchase at the time and so the late Howard D. Archer paid the purchase price directly and then asked his children to pay him back. The plaintiffs admit that the loan arrangement was informal and not evidenced in writing. According to the plaintiffs, there was a verbal agreement whereby the siblings would pay the principal plus interests back to Howard D. Archer in instalments over a period of time. The plaintiffs rely on an affidavit sworn on 1st November 2007 by Robert Dennes Archer attached to the affidavit in support of the summons herein.

15. I have perused the said affidavit of Robert Dennes Archer. What is clear is that the same was sworn about 40 years after the demise of Howard D. Archer who died on 27/8/1967. The said affidavit is also categorical that by that time, the whole of the assets of the Estate of the late Howards D. Archer had been disbursed to the beneficiaries in accordance with the will of Howard Dennes Archer “except for the property known as Diani House at Diani Beach South Coast, Kenya.” The deponent further stated that Diani House was left solely to Christopher John Archer. His explanation is that at that time it was expected that only Kenya citizens would be permitted to own beach side property and that Christopher was and is still the only Kenyan citizen amongst the four Howard Archer children. In paragraph 4 of the said affidavit, it is deposed “although it could not be stated, it is my belief that Diani House was to be “Held in Trust” for the Howard Archer children?”

16. From the contents of the said affidavit of Robert Dennes Archer, what has emerged is that the suit property did not form part of the estate of the late Howard D. Archer. By the time the said affidavit was being sworn, that is on 1st November, 2007, the whole assets of the Estate of Howard D. Archer had been disbursed to the beneficiaries in accordance with his will. It is evident that the suit property did not form part of the assets of the Estate of Howard D. Archer. This is so because the suit property was not included in the will of the late Howard D. Archer.

17. What is also not in dispute is that the late Howard D. Archer loaned the late Christopher John Archer 5000 Kenya pounds towards the purchase of the suit property. It is also evident that the late Christopher D. Archer as the purchaser acquired the suit property from a known vendor, Johannes Theodorus Oberholzer. There is no evidence placed before the court to show that the late Howard D. Archer or the plaintiffs herein participated in the negotiations between the late Christopher John Archer and the vendor in respect of the suit property. Further, neither the late Christopher D. Archer nor the plaintiffs were party to the agreement for sale of the said property which was executed between the late Christophe John Archer as purchaser and the vendor following completion of negotiations between them. The question which arises is whether Howard D. Archer acquired any beneficial interest that was purchased by the late Christopher John Archer by virtue of the loan that he made available to the late Christopher John Archer.

18. From the evidence on record, I am not persuaded that the late Howard D. Archer acquired any beneficial interest in the suit property. I am persuaded by the passage cited by the defendants in ‘Underhill Law relating to Trusts and Trustees’ (supra) in which the legal position regarding loans subsequently applied by the borrower in the purchase of property is documented as follows:

“Loans: where the purchase money is provided by a third party at the request of and by way of loan to the person to whom the property is conveyed there is no resulting trust in favour of the third party, for the lender did not advance the purchase-money as purchaser but merely as lender.”

19. In this case, the evidence that has emerged is that the late Christopher John Archer identified the property in question and thereafter approached his father, the late Howard D. Archer to lend him money for purposes of purchasing the said property, and the late Howard D. Archer then made available the said loan to the late Christopher John Archer who then purchased the property in question. There is no evidence that has been laid before this court to demonstrate that the late Howard D. Archer in making the loan available to one of his sons also intended to acquire an interest in the property his son wanted to purchase rather than an ultimate repayment of the loan. Arising from the clear circumstances obtaining in this case, it is my finding that the late Howard D. Archer did not acquire any beneficial interest in the property that was purchased by the late Christopher John Archer, especially considering that the loan by the late Howard D. Archer was subsequently settled. This being the case, it is also my finding that the plaintiffs are not entitled to any beneficial interest in the suit property that was purchased by the late Christopher John Archer solely on the basis that the loan funds were made available to him by their father.

20. The other issue to consider is whether the plaintiffs acquired any beneficial trust interest in the property purchased by the late Christopher John Archer by virtue of having paid certain loan repayment instalments to the late Howard D. Archer and making contributions to the improvement of the Diani House business. The plaintiffs’ contention is that they repaid the loan to the late Howard D. Archer as purchase price and interest. The plaintiffs also rely on the accounting documents and letters by accountant and advocates to support their contention that they made capital contribution as co-owner but not as siblings. In the bundle of annexures to the supporting affidavit sworn by James H. Archer on 5th June 2012, the Financial statements therein which include balance sheets indicate the payments respectively made by R. D. Archer and the other plaintiffs are clearly treated as current liabilities and the plaintiffs listed therein as sundry creditors. On the other hand, the late Christophe John Archer is represented as the capital account in the balance sheet. On this issue, I am in agreement with the

defendants submission that in ordinary accounting parlance to which the financial statements adduced by the plaintiffs are subject, the term 'capital accounts' refer to a General Ledger Account which is part of the balance sheet classification 'owners' equity' referring to the owner of the business. On the other hand, the term 'sundry creditor' refer to people who are owed by the business entity or owner of that business. In their submissions, the plaintiffs admit that they were long term investors in Diani House business. If that be the case, then the plaintiffs no doubt were creditors in the business run by the late Christopher John Archer at the Diani House. The plaintiffs cannot at the same breath seek to have their position as sundry creditors in the business on the suit property changed so as to acquire a beneficial trust interest in the property itself. In my considered view, the plaintiffs were and possibly still remain creditors in proportion to their respective contributions towards the running of the business and therefore their remedy lies against the late Christopher John Archer or his estate in respect of the said contribution as creditors, not against the defendants especially long after the development of his estate. This also applies to the plaintiffs' claims that they made contributions towards the repayment of the loan made available to the late Christopher John Archer by the late Howard D. Archer by making payment of certain loan instalment themselves. I arrive at this finding because the alleged contributions were made after the property had already been acquired by the late Christopher John Archer. I do not think that such payments would in themselves entitle the plaintiffs to ownership rights over the suit property.

21. As already stated, the accounts allegedly circulated by Christopher John Archer to his siblings as regards accounts of the Diani House portray the siblings as long-term investors. However, from the affidavit of Ashwin R. Patel, the accountant has deponed that the Diani House business was run as a sole proprietorship under the name of Christopher John Archer. There was no evidence laid before this court showing that the plaintiffs ever contested about the late Christopher John Archer representing himself as the sole proprietor of the said business. Likewise, there was no evidence indicating that the plaintiffs contested the treatment of their contributions and payments into the said business as part of the business' current liabilities and the treatment of themselves as creditors of the said business. It is therefore my finding that based on the material on record, it is my finding that the plaintiffs claim of trust based on the fact of certain loan repayment instalments to Howard D. Archer, the Financial statements of Diani House business, the letters by the late Christopher John Archer and the Accountant as well as advocates have not in any way demonstrated that the late Christopher John Archer held the suit property in trust for the plaintiffs. It is my finding that there is no sufficient evidence that has been produced by the plaintiffs to support their claim.

22. It is also not in dispute that the issue on whether the late Christopher John Archer held the suit property in trust for the plaintiffs is a long running dispute which commenced as far back as on 8th December, 1976. There is no good explanation given as to why the plaintiff waited until 5th June 2012 when they filed the summons herein. In this regard, I do agree with the defendants' submission that the plaintiffs are guilty of laches. The plaintiff not only waited until several years after the demise and distribution of the estate of the late Howard D. Archer but also waited until after 4 years after the late Christopher John Archer had died and the assets of his estate, including the suit property, transferred to the defendants by transmission before taking action. There is no explanation whatsoever that has been given by the Plaintiffs for such long delay before any action to secure their alleged interest in the suit property. Further, Section 4 (1)(e) of the Limitation of Actions Act provided that actions, including actions claiming equitable relief, for which no other period of limitation is provided by the Act or by any other written law, may not be brought after the end of 6 years. In this case, the plaintiffs are claiming entitlement to a share in the suit properties under the doctrine of constructive trust and resulting trust. In my view, these are remedies imposed by equity and are within the class of claims under equitable relief as per the provisions of Section 4(1) (e) of the Limitation of Actions Act.

23. For the reasons stated hereinabove, I find that the plaintiffs have not proved their case on the balance of probabilities. Consequently, the plaintiffs' suit is hereby dismissed with costs

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Omondi holding brief for Muthama for 1st, 2nd and 3rd defendants

Adala for Bryant for plaintiffs

Yumna Court Assistant

C.K. YANO

JUDGE