



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CIVIL APPEAL NO. 52 OF 2018

CONSTATINE MARTIN KITHINJI GITOBU.....APPELLANT

VERSUS

HARRIET NKUENE KIRIMANIA.....1ST RESPONDENT

ESTHER KATHURE KIRIMANIA.....2ND RESPONDENT

ERASTUS MWITI KIRIMANIA.....3RD RESPONDENT

GITONGA KIRIMANIA.....4TH RESPONDENT

JULIET GATWIRI KIRIMANIA.....5TH RESPONDENT

MBAYA KIRIMANIA.....6TH RESPONDENT

KENNETH MURIUNGI KIRIMANIA.....7TH RESPONDENT

ASHFORD KIOGORA KIRIMANIA.....8TH RESPONDENT

FAITH KIENDE KIRIMANIA.....9TH RESPONDENT

LUCY KAROKI KIRIMANIA.....10TH RESPONDENT

(Being an appeal from the judgment of the Hon. J. Irura – SRM

delivered on 31.10.2018 at Nkubu P.M.C.C case no. 134 of 2014)

JUDGMENT

1. This dispute involves family members whereby in the suit before the lower court, the appellant herein was the 1st defendant while the respondents were the plaintiffs. The 1st plaintiff is the mother of the other plaintiffs, she is also a wife to the 2nd defendant and is an Aunt to the 1st defendant who in turn is a cousin to the rest of the plaintiffs. At the heart of the dispute is a built up property in Nkubu town plot no 11A KITHIRUNE MARKET (hereinafter, the suit plot) registered in the name of the 2nd defendant which land was allegedly sold to the 1st defendant by the 2nd defendant.

2. The initial plaint was filed on 3. 1 .2013 against the Constantine Martin Kithinji Gitobu, the current appellant (1st defendant), but was amended few days later on 18.1.2013 to bring on board the 2nd defendant, one M’Kirimania M’ikiugu in the Principle Magistrate Court at Nkubu, Civil Suit No. 134 of 2014. The plaintiffs were seeking a permanent injunction restraining the defendants from interfering with their peaceful occupation of Plot No. 11A Kithirune market by the plaintiff, a declaration that the 2nd defendant is the registered owner over the suit land, to hold in trust for the plaintiffs and himself as a family property and costs of the suit. It was the plaintiffs’ case that they are beneficial owners of Plot No. 11A situated in Kithirune Market which is registered in the name of M’Kirimania M’ikiugu who is the husband of the 1st Plaintiff and father to the 2nd to 10th Plaintiffs.

3. The suit was opposed vide the amended defence and counterclaim filed on 27/2/2013 where the 1st defendant stated that he purchased the suit land from M'Kirimania M'Ikiugu on 28/6/2012 and went ahead to seek restraining orders and damages for the damages caused totaling to Kshs. 35,000.

4. During the hearing of the suit in the lower court, Esther Kathure testified for and on behalf of the other plaintiffs and told the court that she operates a shop on the suit land and together with her co-plaintiffs, they bought the suit land and gave it to their father to hold in trust for their family. On the other hand, the appellant (1st defendant) herein testified that when M'Kirimania M'Ikiugu was discharged from Chogoria Hospital after being sick, he approached him and sold the suit land to him. However, the transfer was not completed because it had a caution on it so the title is still in the name of M'Kirimania M'Ikiugu.

5. On 31/10/2018 the learned Senior Resident Magistrate Hon. J. M. Irura entered judgement for the respondents herein where she found that there exists constructive trust between the plaintiffs and the 2nd defendant and went on to order a permanent injunction against the appellant and costs of the suit.

6. Aggrieved by the said decision of the Senior Resident magistrate, the appellant has appealed to this court on eleven grounds, which I deem it fit to collapse into 3 as follows;

a. The learned Senior Resident Magistrate erred in law and in fact in finding that the 2nd defendant held the suit property in trust for the plaintiffs.

b. The Learned Senior Resident Magistrate erred in law and fact in invalidating the agreement of sale between the two defendants.

c. The Magistrate was biased.

7. This being a first appeal, it is the duty of this court to re-evaluate the evidence, asses it and make its own conclusions but remembering that it neither saw, nor heard the witnesses and making allowance for that –See **Selle vs. Associated motor Boat Company Ltd (1968) EA. 123.**

8. In determining the issues herein, this court has carefully perused through the record as well as the submissions of the parties, hence the court has to determine **whether to allow this appeal, set aside the judgement delivered on 31/10/2018, issue eviction orders against the respondents and award general and special damages amounting to Ksh. 100,000? or whether to uphold the decision of the trial court.**

Trust

9. The appellant contends that the lower court erred in law and in fact in finding that the 2nd defendant held the suit land in trust for the plaintiffs without any tangible proof whatsoever, and therefore it was wrong to grant the orders to the plaintiffs under the purported doctrine of constructive trust, when this claim was not anchored in the pleadings.

10. In **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR** the Court held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

11. It was the respondents' case in the lower court that their father held the suit property for them in trust. PW1, Esther Kathure had adopted her statement of 3.1.2013 as her evidence. Therein she has given minute details of how the suit land came to be registered in the name of their father. It was through the combined effort of the whole family that they purchased the suit plot from one Justus Ikiara. They all assisted in the purchase of the property and there after decided that the said land should be registered in the name of the 2nd defendant, who is their father to hold in trust for them. Pw1 had also produced as their exhibits the 8 documents in their list dated 23.1.2013. Therein is the sale agreement and payment of the requisite land rates. The averments that the plaintiffs assisted in the purchase of the property was never disputed by the 2nd defendant.

12. I find that the trial Magistrate correctly re-stated the requirements for a constructive trust when she cited **Halsbury's Laws of England, 4th Edition**, Volume 48 at paragraph 690 where it is stated that;

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be

shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

13. The issue of trust is aptly captured in paragraph 10 and 15 of the amended plaint and it was not necessary for the respondents to expound on the nature of trust. Thus it cannot be true that the trial court was considering a doctrine which was not raised in the pleadings.

14. The trial magistrate has clearly analyzed the basis upon which she concluded that a constructive trust existed as between the plaintiffs and the 2nd defendant. The plaintiffs contributed money, bought the plot, built a permanent building, and started to pay rates to the council which evidence was not challenged by the appellant. In addition, the appellant had admitted during cross examination that pw1 was staying in that plot. It has emerged that she was not a tenant. She was lawfully carrying on her business in the premises which belonged to the family.

15. It emerged that the appellant had embarked on a process of buying the suit plot from his uncle, but he was doing so clandestinely knowing very well that his cousin was even utilizing the suit plot. This is an indication that the appellant was aware that the plaintiffs had an interests in that land.

16. I therefore conclude that the trial magistrate did not deviate from the pleadings of the parties as alleged by the appellant. Further, I find that the trial court arrived at a proper and just conclusion in making a finding that constructive trust can arise from the conduct of the parties and that the court can infer a common intention there from.

The agreement of sale between the two defendants.

17. The appellant has submitted that due process was followed when he was purchasing the suit land, and that it is the 2nd defendant who ought to have been disputing the sale and not the plaintiffs. He avers that the 2nd defendant was part and parcel of the proceedings before the lower court and he never denied that he was not paid the purchase price.

18. I find that this 2nd defendant did not testify before the lower court, hence his pleadings were not subjected to any prove, -see case of **Robert Ghonzi Kimani vs. David Bwire Khisa & Another** where it was stated that:

“The pleadings have been held not to be evidence but mere averments. The late Justice Madan said in the case of CMC Aviation limited vs Cruisair Limited (No. 1) 1978 KLR 103 and 104 that:- the pleadings contain the averments of the parties concerned and until they are proved disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. The pleading in this suit are not normally evidence. They may become evidence if they are expressly or implied admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents”.

19. I am therefore in agreement with the submissions of the respondent that the pleadings of the 2nd defendant have no evidential value.

20. I find that the trial Magistrate dwelt at length on whether any consideration passed from the appellant to the 2nd defendant in the purported purchase of the suit land where she found that the sale agreement did not meet the criteria set out in the law of Contract Act section 3. She also found no evidence of payment of the purchase price. Indeed, none of the documents relied on by the appellant capture the payment of the Kshs. 900,000 and nor was there any acknowledgement receipt. I am therefore inclined to find that the trial magistrate arrived at a proper finding when she concluded that the 1st defendant could not succeed to have the suit plot on the basis of having purchased the same from 2nd defendant as there was no sufficient proof of purchase. The counterclaim was therefore dismissed on sound principles of laws and facts. I must add that even if the plaintiffs did not have the actual details of how they bought the land, it must be kept in mind that their claim is based on trust, that 2nd defendant held the suit land in trust for them.

Bias

21. The appellant has claimed that the trial Magistrate was biased against him as the court had entered into the arena of litigation and that the appellant feels prejudiced by the conduct of the Magistrate. This is a very serious allegation considering that Judicial Officers are supposed to be impartial while dispensing justice. The question is, did the appellant raise this issue before the trial court? If so, was it addressed? There is nothing in the entire proceedings before the trial magistrate to indicate that there was bias, of which the issue was never raised before that court, hence the claim of bias is unfounded.

22. I conclude that the trial magistrate, having established there existed a constructive trust between the 2nd defendant and the plaintiffs and having dismissed the appellant’s counterclaim arrived at a correct decision in the judgment and this court finds no reason at all to interfere with the said judgment. **Consequently, I find that the appeal is not merited and is subsequently dismissed with costs to the respondents.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kimaita for appellant

Thangicia holding brief for C.P Mbaabu for respondent

HON. LUCY. N. MBUGUA

ELC JUDGE