



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 300'B' OF 2012

JORAM KAINGWA NGETHE (Suing as the personal representative

Of the Estate of the late Naomi Njeri Ngethe.....PLAINTIFF

VERSUS

MONICA WANJIKU NGETHE.....DEFENDANT

J U D G M E N T

By plaint amended on 21.03.2013 and filed on 4.4.2013 pursuant to the leave granted by the court on 19.3.2013, the plaintiff states that he is the legal representative to the estate of the later Naomi Njeri Ngethe and agitates this suit for and on behalf of the deceased's estate. His address of service for this suit's purposes is care of Anassi Momanyi and Company Advocates, National Bank Building, 1st floor, Oloo Street, P. O. Box 7946-30100 Eldoret. The defendant is an adult female of sound mind residing within Eldoret. The plaintiff is a brother of the defendant who was the daughter of the late Naomi Njeri Ngethe and the plaintiff jointly with the defendant are legal representatives of the estate of the deceased Naomi Njeri Ngethe. It is claimed by the plaintiff that on or about 5.4.1986 the late Naomi Njeri Ngethe bought one (1) acre out of land reference no 124/569 B Kimumu Estate Eldoret. The said acre of land was bought in the names of the defendant as a trustee for the deceased Naomi Njeri Ngethe.

On or about 17th December, 1996 it was agreed amongst the deceased Naomi Njeri Ngethe, the defendant and one Samson Njuguna Ngethe (a son of the deceased Naomi Njeri Ngethe and a brother to the defendant) that the said one (1) acre then delineated as land reference number Uasin Gishu/Kimumu/642 be registered in the joint names of the defendant and Samson Njuguna Ngethe as trustees of the deceased Naomi Njeri Ngethe and a title deed was issued in their joint names.

On or about the year 2002 without the deceased's knowledge and consent land reference number Uasin Gishu/Kimumu/642 was subdivided into parcels number Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu 1948 and Uasin Gishu/Kimumu 1949. On or about 10.5.2002 land reference number Uasin Gishu/Kimuku/1946. Uasin Gishu/Kimumu 1947 and Uasin Gishu/Kimumu 1949 were registered in the names of the defendant as a trustee of the deceased Naomi Njeri Ngethe.

The deceased Naomi Njeri Ngethe had continued to enjoy the said parcel of land without any interference from the defendant and the deceased had even put up permanent structures thereon.

On or about October, 2003 the defendant filed *Eldoret CMCC.No.1325 of 2003* and the plaint as amended sought a permanent injunction to restrain the Naomi Njeri Ngethe *now the deceased, her*

servants and or agents from erecting structures or in any other way dealing with the suit land. She further prayed for an order of eviction and demolition of the said premises and costs of the suit. The suit in Eldoret CMCC No. 1325 of 2003 was struck out with costs for want of jurisdiction.

The plaintiff claims that the defendant has always been and she still is a trustee for the deceased Naomi Njeri Ngethe, or her estate despite being the registered owner of land reference number Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu 1947 and Uasin Gishu/Kimumu 1949.

The deceased Naomi Njeri Ngethe, or her estate is the beneficial owner of land reference number Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu 1947 and Uasin Gishu/Kimumu 1949. The estate of the deceased Naomi Njeri Ngethe seeks a declaration that the defendant though registered as the owner of land reference number Uasin Gishu/Kimumu/1946. Uasin Gishu/Kimumu 1947 and Uasin Gishu/Kimumu 1949 is so registered as a trustee of the deceased Naomi Njeri Ngethe or who was the beneficial owner or her estate and dependents. The plaintiff seeks to have the trust brought to an end. The plaintiff claims that the demand and notice to sue have been issued to no avail. The plaintiff prays for an inhibition order to stop the defendant from dealing with the land pending the hearing and determination of the suit. The plaintiff precisely prays for Judgment in the following terms:

i. A declaration that the defendant is a trustee of the deceased Naomi Njeri Ngethe over land reference number Uasin Gishu/Kimumu/1946. 1947 and 1949 and a further declaration that the deceased Naomi Njeri Ngethe or her estate was the beneficial owner of the suit land parcels.

ii. An inhibition order stopping the defendant her agents and or servants from dealing with the suit parcels of land references number Uasin Gishu/Kimumu/1946, 1947 and 1949 in anyway that will be detrimental to the deceased Naomi Njeri Ngethe's estate.

iii. An order to have the suit parcels of land reference Uasin Gishu/Kimumu/1946. 1947 and 1949 transferred to the plaintiff for and on behalf of the estate and beneficiaries of the deceased Naomi Njeri Ngethe's estate.

iv. Costs of the suit.

The defendant filed amended defence and amended counter-claim on 19.4.2013 averring that she is the sole registered owner of parcels of land number Uasin Gishu/Kimumu 1946, 1947, 1949 having solely purchased the same on the 5.4.1986. The defendants pray that the plaintiff's suit should be dismissed with costs to the defendant.

In the counter-claim, the defendant avers that she solely purchased one (1) acre of land out of land reference number **Plot.124/569 'B'** on 5th April, 1986 and that that after she purchased the said parcel of land, she subsequently moved, took possession and occupied the land and she started developing the same. Defendant has been in quiet and uninterrupted possession of the land.

The Defendant further avers that on or about 17th December, 1996 the said one (1) acre parcel of land then delineated as parcel No. Uasin Gishu/Kimumu/642 was registered in her names and that of his brother one Samson Njuguna Ngethe.

The defendant further avers that on or about the year 2002 the land reference Number UASIN GISHU/642 was sub divided into parcels of land number 1946, 1947, 1948 and 1949. On or about the year 2002 the parcel of land reference No. Uasin Gishu/Kimumu/1946, 1947 and 1949 was registered in the Defendant's name and parcel of land number Uasin Gishu/Kimumu/1948 was registered in the name of Samson Njuguna Ngethe.

The Defendant avers that the plaintiff has illegally and without any colour of right laid claim on his said parcels of land and he has been erecting structures on the same. The Defendant avers that she allocated the parcel of land No. Uasin Gishu/Kimumu/1948 to Samson Njuguna Ngethe because he assisted her to

clear the balance of the purchase price of the land.

The defendant avers that the plaintiff never contributed anything in the purchase of the said parcel of land and at no time did she ever agree with the plaintiff or anybody that the said parcel of land be registered her name as trustee for the plaintiff.

The defendant avers that the Plaintiff who is her brother chased her from home and that the deceased mother disowned her after some misunderstanding and as a result the defendant through hard work purchased the said land from her own savings.

The Defendant further states that the Plaintiff has several parcels of land including the deceased property which he is currently residing on and which land are registered in the name of the deceased. The defendant avers that the Plaintiff claim is illegal, malicious and has caused her unnecessary costs, loss and embarrassed her.

The Defendant further claim against the plaintiff is for an order of permanent injunction barring the plaintiff, its agents, servants or anybody claiming through her from erecting structures, alienating, interfering or in any manner dealing with the said parcel of land. Demand and Notice of intention to sue has been issued in vain. The Defendant aver that there is no suit pending in any other court between the Plaintiff and the Defendant over the same subject matter. Save for Eldoret CMCC No.1325 of 2003 which was truck out.

Reasons wherefore, the Defendant prays precisely for a declaration that the entire parcels of land UASIN GISHU/KIMUMU/1946, 1947 and 1949 is the property of the Defendant and the Plaintiff, its agents, servants or anybody claiming through the estate of Naomi Njeri Ngethe should be barred from claiming the same and an order of permanent injunction against the Plaintiff, its servants or anybody claiming through the deceased estate from erecting structures, alienating, interfering or in any matter dealing with the said parcels of land. She prays for an order of eviction and demolition of the said structures and costs of the suit plus interest. In reply to defence and defence to counter-claim the plaintiff states that the said acre of land was bought in the name of the defendant as a trustee for the deceased. That the defendant and Samson Njuguna Ngethe were registered as trustees and not as owners of the said parcel of land. The parcel of land was subdivided with the knowledge and consent of the deceased.

When the matter came for hearing ***PW1, Joram Kainywa Ngethe*** testified that the Land reference Uasin Gishu/Kimumu/642 belonged to his late mother Naomi Njeri Ngethe but it was registered in the names of Monica Wanjiku Ngethe as trustees for their mother. Monicah Wanjiku and Samson Njuguna were his sister and brother respectively and daughter and son of the later Naomi Njeri Ngethe.

On or about the year 2002, land reference number Uasin Gishu/Kimumu.642 was subdivided into four parcels namely Uasin Gishu /Kimumu1946, 1947, 1948 and 1949 without consent and knowledge of the deceased. After the subdivision, land reference Uasin Gishu/Kimuku/1946, 1947 and 1949 was then registered in the names of the defendant while parcel no. 1948 was registered in the name of Samson Njuguna Ngethe their brother. Parcels number 1946, 1947, 1948 and 1949 belonged to their late mother and their brother Samson Njuguna Ngethe and the defendant were just trustees of their late mother over the land parcels.

PW2, Lumulie Lokibub testified that he was the owner of land reference Uasin Gishu/Kimumu/124 which was subdivided into numbers Uasin Gishu/Kimumu/641 and 642. He sold parcel number 642 to Naomi Njeri Ngethe who requested him to have the parcel transferred to Monica Wanjiku Ngethe and Samson Njuguna Ngethe his daughter and Son respectively. After he transferred the said plot to Monica Wanjiku Ngethe and Samson Njuguna Ngethe his business ended and later he heard that the daughter and son secretly subdivided and transferred the resultant parcels into themselves. According to PW2, the owner of parcel number Uasin Gishu/Kimumu/642 was Naomi Njeri Ngethe although she allowed her children to hold it on her behalf. Monicah Wanjiku Ngethe and Samson Njuguna Ngethe never bought any land from him.

PW3 Paul Mburu Ngethe testified that the land belonged to their deceased mother and that the defendant and Samson Njuguna Ngethe were registered as trustees for their mother. He testified further that he paid for the land using a cheque from his bank account on behalf of his late mother after she gave him money. That his late mother instructed her to have the name of Monica Wanjiru Ngethe used in the purchase of land. On cross examination by Mr. Omusundi he states that he did not have a copy of the bank cheque but insists that the defendant did not pay the money and that the transactions were carried out in the names of the defendant and Samson Ngethe as trustees.

PW4 Samson Njuguna Ngethe testified that he is a businessman currently based in Eldoret. The plaintiff Joram Kaingwa Ngethe is his elder brother while Monica Wanjiku Ngethe the defendant was his sister. The deceased Naomi Njeri Ngethe was his mother and the mother of the plaintiff and the defendant. Land reference Uasin Gishu/Kimumu/642 belonged to his late mother who had him and his sister the defendant registered as her trustees. Sometimes later they agreed between him and the sister to have the land Uasin Gishu/Kimumu/642 subdivided into four (4) plots. The resultant plots were UG/Kimumu/1946, 1947, 1948 and 1949. When the subdivision was done they did not involve their mother. After the subdivision parcel No. 1948 was transferred to him while the rest went to his sister the defendant. The parcel number 1946, 1947, 1948 and 1949 belonged to their late mother and they were just her trustees. The plot belonged to and is part of their late mother's estate and that their mother utilized the land until she died

DW1, Moniah Wanjiku Ngethe testified that she is a resident of Kamkunji and was sickly. She knew Naomi Njeri Ngethe who was her mother. That her parcels of land are 1946, 1947 and 1949 as the same are registered in her name. That she bought the lands from Mr. Julia Cheptarus Kandie. They agreed on 5.4.1986 and bought the land for Kshs. 20,000/= . When she bought the land, Julia Kandie had not transferred the land from Lumule Lokibor. He gave her the agreement between Lumule Lokibor and Julia Kandie on 5.6.1985. After buying the land her mother said that Njuguna should stay on the land. She states that her mother had her money and that she had Kshs. 15,000/= only that she used to buy the land from Julia but Julia did not want her to buy less than one acre. Her mother added Kshs. 4,000/= to enable her purchase one acre. The money her mother added was to take care of Njuguna's share.

At the close of the defendant's case the plaintiff and defendant filed written submissions in compliance with the directions of the court. The plaintiff filed submissions on 2nd August 2017 whilst the defendant filed submissions on 26th September 2017. The Gravamen of the plaintiff's submissions is that the defendant is a trustee of their deceased mother.

Mr. Momanyi, learned counsel for the plaintiff submits that the plaintiff has proved on a balance of probabilities that the land was purchased by the deceased and registered in the names of the defendant.

To buttress this submission, he argues that the fact that the seller of the property testified that the real purchaser was the deceased, then the defendant was a trustee and not the indefeasible owner.

Mr. Momanyi further relies on the evidence of Paul Mburu Ngethe who had been entrusted with the funds and who states that the money used to buy the land belonged to their late mother and the defendant was registered as trustee.

Mr. Omusundi learned counsel for the defendant submits that the defendant and her brother Samson Njuguna Ngethe acquired indefeasible title over the land registration number 1946, 1947, 1948, 1949 and are subject only to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title to that proprietor shall not be subject to any challenge save on grounds of fraud or misrepresentations to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. It is submitted that the plaintiff has not proved the above. The defendant further submits that there is no evidence of an existing trust between the defendant and the mother to the parties herein.

I have considered the pleadings, evidence and submissions on record and do find that this suit was filed by Naomi Njeri Ngethe against Monica Wanjiku Ngethe claiming that she bought the land using her own

money but registered the same in the names of the defendant as a trustee. It is not in dispute that the defendant is the registered owner of the suit properties. The defendant is registered as the absolute proprietor of the suit property. It is evident that on 5th August 1985, Lumule Lokibor of identity card number 0282798/69 sold one acre of plot number 124 to Julie Cheptarus for Kshs. 18,800. The default clause was that whoever breached the agreement would pay the money plus 18.5 interest. Mr. Lumule Lokibor paid Kshs.15,000 and was left with a balance of Kshs. 3000. On the 15th of August 1985, the seller was paid Kshs. 2000 leaving a balance of Kshs. 1000 which was paid on 27th August 1985 and therefore clearing the payment of the purchase price.

On the 5th of April 1986, the defendant herein entered into agreement with Julie Cheptarus Kandie for the purchase of the said one acre purchased from Lumule Lokibor for a consideration of Kshs. 20,000 which money was paid by cheque no 747230 of Kshs. 20,000. On the 24th October 1992, the defendant and Samson Njuguna Ngethe entered into another agreement with Lumulie Lokibor for the sale of the said one acre for Kshs. 33,000 but this was to facilitate the payment of rates. On cross examination by Mr. Momanyi the defendant states that she used to receive money from her mother and that their relationship was good. That her mother contributed towards the purchase of the property and that she put up a house on the property with the authority of the defendant. She used to work for her mother and had an account but no cheque book. She agrees that the purchase price was paid by Paul Mburu who states that he was given the money by his mother to buy the land. The defendant's allegations that her mother did not have money and yet it was the mother who had employed her did not add up to the allegations that she paid the money and not the mother. Moreover, the defendant does not explain why she paid through Mr. Mburu who denies that allegation. She could have paid the money directly and not through Paul Mburu. In fact, the defendant failed to explain totally why the purchase price was paid by Paul Mburu and not the defendant. This court concludes that she did not have money of her own.

The defendant appeared confused on the share of Samson Ngethe as at one point she states that her Mother contributed Kshs. 4000 that was the share of Samson and at some point, she states that her late mother had no share. Samson Ngethe on his part was so categorical that the property belonged to their late mother. In the pleadings, she states that the money was contributed by her brother Samson and in her testimony, it was contributed by the mother. The evidence of Sam son Ngethe is a demonstration that the money used to buy the parcel of land was given by Naomi Njeri Ngethe through Paul Mburu. In fact, the defendant did not pay any Money as the money was paid by the late Naomi Ngethe who appears to have trusted her daughter in respect of the land.

The seller of the property was Lumule Lokibor whom this court considers an independent and honest witness who gave evidence that he was the owner of land reference Uasin Gishu/Kimumu/124 which was subdivided into numbers Uasin Gishu/Kimumu/641 and 642. He sold parcel number 642 to Naomi Njeri Ngethe who requested him to have the parcel transferred to Monica Wanjiku Ngethe and Samson Njuguna Ngethe his daughter and Son and therefore the same was registered in the names of the defendant and Samson Njuguna Ngethe. Monica Wanjiru Ngethe was to guard the property.

Mr. Paul Mburu Ngethe's evidence that he paid for the land using a cheque from his bank account on behalf of his late mother after she gave him money and that he was instructed by his mother to register the property in the names of the defendant is credible and steadfast compared to the defendant who could not explain how she paid the purchase price. The defendant states that she bought the land from Julian Cheptarus Kandie for Kshs. 20,000. The relevant law is enacted in Sections 24, 25, and 26 and 28 of the **Land Registration Act no 6 of 2012** that provides for interests conferred by registration.

Section 24 of the land registration Act provides that subject to the Act 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 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 the lease.

Section 25 provides for the rights of the proprietor of land thus 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 to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and 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. Further, that that 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.

Section 26 provides that Certificate of title should be held as conclusive evidence of proprietorship. Thus, that 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 on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. 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.

Section 28 of the Land Registration Act which provides for Overriding interests in land which are not noted in the register and this includes trusts including customary trusts apply in this case and therefore the court finds that the plaintiffs mother had an overriding interest in the property. Moreover, the doctrines of equity, thus the creation or operation of a resulting, implied or constructive trust, which are part of our laws pursuant to **Section 3** of the Judicature Act apply. This court finds that though the defendant is registered as the absolute proprietor of the suit properties, the plaintiff has established that the defendant was registered as trustee on behalf Naomi Njeri Ngethe. The plaintiff has demonstrated the existence of an implied trust in the arrangement between the defendant and her late mother which is not expressly defined as a trust in a certificate of title but the nature of the arrangement the parties made demonstrates its existence. The defendant's late mother purchased the suit property in the name of the defendant and therefore there is a presumed intention that the defendant held the suit properties for her late mother. The common law of England, as modified by equity" which brings in the equitable doctrines of implied constructive and resulting trusts arising out of the facts set out herein applies.

The upshot of the above is that it is hereby **declared** that the defendant is a trustee of the deceased Naomi Njeri Ngethe over land reference number Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu/1947 and Uasin Gishu/Kimumu/1949 and **a further declaration** that the deceased Naomi Njeri Ngethe or her estate was the beneficial owner of the suit land parcels. **Moreover, an inhibition** order is hereby issued stopping the defendant her agents and or servants from dealing with the suit parcels of land references number Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu/1947 and Uasin Gishu/Kimumu/1949 in anyway that will be detrimental to the deceased Naomi Njeri Ngethe's estate. **Last but not least**, an order is hereby issued that the suit parcels of land reference Uasin Gishu/Kimumu/1946, Uasin Gishu/Kimumu/1947 and Uasin Gishu/Kimumu/1949 be and are hereby transferred to the administrator of the estate of the deceased Naomi Njeri Ngethe's. No order as to costs this being a family dispute.

Dated and signed at Eldoret this 26th day of July, 2018.

A. OMBWAYO

JUDGE