



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 471 OF 2017

MARY ANNE OBONDO.....PLAINTIFF

=VERSUS=

MOSES NAMUSASI CHIKATI.....DEFENDANT

JUDGMENT

1. Parties to this suit are siblings. The plaintiff is an elder sister of the defendant. The dispute in the suit relates to Title Number **Dagoretti/Riruta/2533**. By a plaint dated 13/7/2017 and filed in court on the same day, the plaintiff brought this suit seeking the following orders:

- a) A declaration that the defendant is holding Parcel Number DAGORETTI/RIRUTA/2533 in trust for the plaintiff***
- b) An order that the defendant do transfer Land Parcel Number DAGORETTI/RIRUTA/2533 to the plaintiff***
- c) The defendant do execute transfer documents to effect order 2 above or in the alternative the deputy registrar do execute the transfer documents***
- d) An order that the defendant pays mesne profits for the period stayed in the house***
- e) Costs of this suit***

2. The plaintiff's case is that she bought the suit property from John Kibagendi Moriasi and his wife Gladys Magoma Mororia in 2008 at Kshs 2,000,000. Because she was out of the country most of the time at that particular period, she requested the sellers and the defendant herein to process the contract documents and the resultant title in the name of the defendant, her younger brother whom she trusted. The defendant was to hold the title in trust for her. The title was indeed processed in the name of the defendant but the defendant has since declined to convey the title to her.

3. On 12/10/2017, the defendant filed a statement of defence dated 5/10/2017. His case is that the suit property belongs to him because he had an agreement with the plaintiff that she would assist him to pay for the property because he had worked for her in the past. He contends that he paid Kshs 100,000 while the plaintiff paid Kshs 1,900,000. He contests the allegation of trust and contends that the suit property was conveyed to him in his own right as a purchaser for consideration. He urges the court to dismiss the plaintiff's claim.

4. Hearing notice in this suit was served by the Court Registry. On the day appointed for hearing of the case, only the plaintiff and her witness (the vendor) attended court. Satisfied that the defendant had been served with a hearing notice on 13/12/2017 through post, the court proceeded to hear the case.

5. The plaintiff testified as PW 1. She stated that in the year 2008, she bought the suit property from John Kibagendi Moriasi who was her colleague at USAID. The purchase price was Kshs 2,000,000. She purchased the property through her brother, the defendant herein, because she was out of the country most of the time. Soon after paying purchase price, her employer instructed her to attend various missions abroad, including Cyprus, Germany and United States of America where she was a resident at the time of testifying. She stated that their understanding was that her brother would hold the title in trust and convey it to her at her convenience. She added that subsequent entreaties to have the defendant convey the property to her had been ignored and it was apparent that her brother (the defendant) was intent on swindling her the property.

6. John Kibagendi Moriasi testified as PW 2. He stated that in 2008, jointly with his wife, they sold the suit property to the plaintiff. The sale agreement was executed by the plaintiff's sibling, Moses Namusasi Chikali (the defendant), at the plaintiff's request because the

plaintiff was frequently traveling around the world and was out of the country most of the time. He stated that the plaintiff told them that he trusted the defendant to hold the property in trust for her. PW 2 further testified that at the request of the plaintiff, they executed the transfer in the name of the defendant to hold the property in trust for the plaintiff who was the purchaser. He further stated that the entire purchase price was paid to them by the plaintiff. He reiterated that the person who purchased the property from them was the plaintiff and that the defendant was a trustee executing contract documents, receiving and holding the property on behalf of his sister, the plaintiff herein.

7. In written submissions dated 10/8/2018, Mr Oboye, counsel for the plaintiff submitted that a resulting trust obtains between the plaintiff as beneficiary and the defendant as trustee because the plaintiff purchased the suit property and caused it to be conveyed to the defendant as a trustee. He added that a resulting trust is exempted from the mandatory requirements of Section 3(3) of the Law of Contract Act. Counsel relied on the decision in **Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi (2014)eKLR** and submitted that the plaintiff is the beneficial owner of the suit property while the defendant is a trustee. He urged the court to grant the prayers sought in the plaint.

8. I have considered the parties' pleadings, the evidence tendered, and the submissions made. I have also considered the relevant legal framework and jurisprudence on the key issue in the suit. The single issue for determination in the suit is whether the defendant holds Land Title Number Dagoretti/Riruta/2533 in trust for the plaintiff.

9. The defendant filed a statement of defence in which he stated that he purchased the suit property at Kshs 2,000,000 and that the plaintiff paid Kshs 1,900,000 on his behalf because he had worked for the plaintiff as a houseboy for 8 years without a salary and further that he had saved his money with the plaintiff between 1997 and 2001 on the promise that the plaintiff would assist him acquire a home of his own. No evidence was led to support that defence.

10. On part of the plaintiff, she tendered evidence to support her case as outlined in the statement of claim. She also called one of the vendors as a witness, Mr John Kibagendi Moriasi. Mr Moriasi testified that he sold the suit property to the plaintiff and because of the plaintiff's work schedule, they agreed that the property would be conveyed to the defendant to hold it in trust for the plaintiff. He reiterated that the trust was there at the time of executing the contract and at the time of conveyance of the property into the name of the defendant. He denied selling the property to the defendant in his own right as a purchaser.

11. In the absence of any controverting evidence, I am satisfied that the evidence led by the plaintiff unequivocally establishes all the essential elements of a trust. The net result is that the plaintiff's suit succeeds in terms of prayers (a), (b), (c) and (e) of the plaint.

12. Prayer (d) relates to *mesne* profits. Throughout her testimony, the plaintiff was silent on this particular limb of her claim. Similarly, throughout the 15 page written submissions, her counsel was silent on the claim for *mesne* profits. In the absence of any evidence to lay a basis for assessment and grant of *mesne* profits, the court will not make any award in respect of *mesne* profits.

13. In summary, the plaintiff's suit against the defendant succeeds and the plaintiff is granted prayers (a), (b), (c) and (e) of the plaint.

DATED AND SIGNED AT NAIROBI BY HON JUSTICE B M EBOSO THIS 27TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

DELIVERED AT NAIROBI BY HON JUSTICE E O OBAGA THIS 29TH DAY OF NOVEMBER 2018.

E O OBAGA

JUDGE