



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CIVIL APPEAL NO. 124 OF 2010

PATRICK KAKO KAKULU..... APPELLANT

VERSUS

MWANGANGI KAKULU1ST RESPONDENT

MUNYOKI NZOKA2ND RESPONDENT

JUDGMENT

1. The Respondents sued the Appellant in the lower court seeking to recover 1.05Ha of the suit land **Mutonguni/Musengo/1266** registered in the Appellant's name. The Appellant filed a defence denying the claim.
2. The case was tried by the Magistrate who found for the Respondents.
3. Dissatisfied with the trial Magistrate findings/decision, the Appellant appeals herein and set out five (5) grounds of appeal.
4. The background of the case is that PW1 and DW1 are brothers. Their dispute is over the suit land registered in DW1 name.
5. PW1 case is that the subject land was his father's property who died before the land adjudication process was finalized. However, before he passed on, he shared the land between PW1 and PW2.
6. PW1 agreed to sell his share to DW1 at Kshs. 9,000/- and a deposit of Kshs. 300 was paid. DW1 never paid the balance of Kshs. 8,700/-.
7. PW1 was then working in Mombasa. During the adjudication process, it was the evidence of PW1 that DW1 caused the suit land to be registered in his name and PW1 had no problem provided the balance of the purchase price was paid to him. However, DW1 changed his mind and declined to pay the balance of the purchase price.
8. The aforesaid transaction was witnessed by PW3, PW4 and PW5.
9. After the aforesaid happening, PW1 consulted family members and the clan who allowed him to sell his share to PW2 (*2nd respondent*). PW2 took possession and developed the said land. DW1 continued to persist on refusal to give up half share of the suit land prompting PW1 and PW2 (*respondents*) to institute the instant suit.

10. DW1 case was that the suit land arose from his father's subdivision of the family land and giving each of the beneficiaries their shares. According to DW1, he did that in 1964 and the adjudication process was undertaken in 1978. Each of DW1 brothers got their own land. DW1 denied ever been given the suit land to hold for himself and PW1 nor agreeing to buy half share of the suit land from PW1.

11. The trial court considered the evidence tendered and the applicable law and arrived a conclusion that PW1 case was corroborated and upheld the claim for trust and thus granted the prayers sought in the Plaintiff.

12. The parties agreed to dispose the Appeal by way of written submissions which were filed and exchanged.

13. The five grounds raised in the Appeal are that;

a) The court erred in holding that there was a cause of action.

b) The court failed to find that the first registration is indefeasible.

c) The court erred in finding that the 2nd plaintiff properly sued the defendant.

d) The court failed to take into consideration the defendant's defence.

e) The judgment was against the weight of the evidence.

14. I have looked at the pleadings, the proceedings, the evidence on record and the written submissions.

15. The first appellate court is obligated to look at the evidence adduced at trial, evaluate it and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. See **Selle vs Associated Boat Co. Ltd (1968) E.A 123 Naivasha Civil Appeal No. 11/2014, Nelson Ole Keiwua vs Victoria Ltd & another (unreported).**

16. In my considered view, this appeal turns on whether there was a customary trust created in favour of the 1st Respondent against the Appellant over the suit land.

17. PW1, PW4, PW5 and DW1 are all brothers. They were all given pieces of land by their father. PW4 and PW5 testified in favour of their brother, PW1 and confirmed that it was agreed that the suit land be registered in the name of DW1 to hold it in trust for himself and PW1. The Defendant did not show any reason why PW3, PW4 and PW5 who are old men would lie against him in support of PW1. The court noted that they were of honest demeanor, simple and innocent. PW1, PW3, PW4 and PW5 corroborated each other.

18. On ground 1, it is apparent that on the face of the evidence of PW1, PW3, PW4 and PW5, there was a reasonable cause of action as evidence supported a case of trust.

19. On ground 2, it is true that the title was a first registration. The trial court held that **Section 30** of the repealed **Registered Land Act Cap 300** did not divest the proprietor of land from his obligation as a trustee.

20. In Mutsonga vs Nyati (1984) klr 425, the court held as follows: **“the equitable doctrine of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Act... A constructive trust in favour of the Plaintiffs as owner of land under customary law accrued when the land was first registered in the names of the defendant”**. See also **Gathiba vs Gathiba Civil Case No. 1647 of 1984, 2 of 342 Isaac Wanjohi vs A.K Mbwiria & others Nairobi HCCC 383/99 and Muthiora vs Muthiora Civil Appeal 19/83.**

21. It is thus within the trial courts' mandate to hold DW1 was registered as proprietor of the suit land in

trust for himself and PW1 in equal shares and thus ground 2 fails.

22. On ground 3, the court notes that PW2 bought PW1 shares and thus his claim was embedded on PW1 claim. PW2 is in occupation and has done extensive development on the suit land. His claim is a resulting trust as against PW1 share such that if PW1 fails in his claim, so is his claim. The absence of the Land Board Consent to validate his agreement with PW1 cannot defeat his trust claim based on possession. Refer to **Macharia Mwangi & 87 others vs Mwangi Kagiri Nyeri Civil Appeals 6/2011 as consolidated with No. 26 and 27 of 2011.** Ground 3 thus fails.

23. The trial court analyzed the evidence on record and the demeanor of witnesses and found overwhelming evidence in favour of the Plaintiffs claim. PW3, PW4 and PW5 corroborated the case of PW1.

24. The upshot is that the Appellant's appeal has no merit and is dismissed with costs to the Respondents.

It is so ordered.

Dated and Delivered at Machakos this 27TH day of JANUARY, 2017.

O. A. ANGOTE

JUDGE