



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 181 OF 2016

JOEL MUSEMBI KITHUKU.....PLAINTIFF

VERSUS

BERNADET MBATHA.....1ST DEFENDANT

KIEMA KITHEKA.....2ND DEFENDANT

RULING

1. The Plaintiff is seeking for the following orders in the Notice of Motion dated 31st October, 2016:

a. That an order of injunction do issue against the Respondents herein, or her agents, servants or employees restraining them from disposing off or dealing in any adverse manner whatsoever with the property known as Mavoko Plot No. L.R. 337/509 pending the hearing and determination of this Application and/or suit and/or any orders necessary to meet the ends of justice.

b. That an order issued against the 1st Respondent Bernadet Mbatha and the 2nd Respondent Kiema Kitheka or their respective agents and/or servants and/or employees or representative to deposit all rent collected in respect to all that property known as Mavoko Plot No. L.R. 337/509 in Court pending the hearing and determination of this Application and/or suit.

c. That the Respondents be ordered to account for all rental income received from November, 2015 from the development on Mavoko Plot No. L.R. 337/509.

d. That the court do grant any other order(s) that it deems fit.

e. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the beneficial owner of the land known as L.R. No. 337/509 (*the suit land*); that in the year 2004, his brother, Jacob Nyamai Kithuku (*deceased*) entered into an Agreement of Sale to purchase the suit property from one Muthoka Mulwa and that he (*the Plaintiff*) was to contribute towards the development of the suit land.

3. It is the Plaintiff's case that the transfer was never effected due to the sickness of the deceased; that he took possession of the suit land in July, 2004 and supervised the development of the suit land; that he oversaw the construction of twelve (12) single-room houses at a cost of Kshs. 940,404 of which the

deceased contributed Kshs. 500,000 while he contributed the balance and that the deceased applied for a loan of Kshs. 600,000 which he transferred on his account.

4. It is the Plaintiff's case that he agreed with his late brother that the rental income received from the houses developed on the suit land would be applied towards refunding the deceased and himself and that the profits earned were to be shared between the two of them on a pro rata basis.

5. According to the Plaintiff, he paid the loan using the rental income until December, 2013 when the loan was fully repaid and that in the year 2013, they expanded the development on the suit property whereby he used his money to build four (4) more rental houses on the plot while the deceased used his funds to put up six more houses.

6. The Plaintiff deponed that he relinquished his position as a supervisor to the 2nd Respondent, who is his nephew, who continued remitting the rental income to the deceased via Mpesa and that when his late brother died, the 2nd Defendant remitted the rental income to the 1st Defendant.

7. The Plaintiff finally deponed that the 1st Defendant has maintained that the Plaintiff does not have an interest in the suit land; that he is the joint and beneficial owner of the suit land and that an account of the rental income should be given.

8. In response, the 2nd Defendant deponed that he was employed by the deceased and his wife (*the 1st Defendant*) to be the caretaker of the suit land in August, 2013 after the Plaintiff was dismissed for misappropriation of funds; that after the deceased died, he started sending the collected rent to the 1st Defendant and that the Plaintiff's allegations are unfounded and meant to disinherit the rightful beneficiaries of the deceased.

9. The 1st Defendant on the other hand deponed that the Plaintiff has not established any proprietary interest in the suit land; that it is the deceased who bought the suit land from the late Muthoka Mulwa and that the Plaintiff has not produced any agreement to back his allegations.

10. The 1st Defendant finally deponed that the Plaintiff was employed as a caretaker of the suit premises and was dismissed in August, 2013 for misappropriation of rent and that the transfer documents were signed by the deceased alone.

11. The Vendor's son, Boniface Peter Muthoka, deponed that his father, the late Muthoka Mulwa, sold the suit land to the late Jacob Nyamai Kithuku; that he was given the power of attorney to sign the agreement and the transfer on behalf of his father and that he is willing to facilitate the transfer of the land to the 1st Defendant's late husband.

12. The Plaintiff filed a Supplementary Affidavit which I have considered.

13. In his submissions, the Plaintiff's advocate submitted that co-ownership may arise in equity by virtue of a resulting or constructive trust.

14. Counsel submitted that a constructive trust arises for example when it would be inequitable for a land owner to deny the claimant an interest in land in a situation where the claimant acts to the detriment of a person with a common intention.

15. Counsel relied on several decisions that I have considered.

16. The Defendants' advocate submitted that the suit land belongs to the Estate of the deceased, not the Defendants; that the parties herein do not have the *locus standi* to be sued; that the Plaintiff was only employed as the caretaker of the suit land and that he is not entitled to the suit land.

17. In his Complaint, the Plaintiff is seeking for an order declaring him as a part beneficial owner of land

known as Mavoko L.R. No. 337/509; an account of all the rental income received in respect of the suit land and distribution of the same between himself and his late brother.

18. In the meantime, the Plaintiff is seeking for an order of temporary injunction and for the deposit of all the rent collected from the suit land in court.

19. The Plaintiff's suit and Application is premised on the doctrine of constructive trust.

20. According to the Plaintiff, he contributed towards the development of the suit land and that when his brother died in the year 2015, the 2nd Defendant, on the instructions of the 1st Defendant, stopped paying him the rental income from the suit land.

21. It is not in dispute that the late Jacob Nyamai Kithuku (*deceased*) purchased the suit property from Muthoka Mulwa (*deceased*). The said land has not been formally transferred to the late Jacob Nyamai.

22. The 1st Defendant has annexed on her Affidavit the Sale Agreement that was entered into between the late Jacob Nyamai and Muthoka Mulwa dated 30th June, 2004.

23. The Plaintiff has annexed a purported agreement showing that he entered into an agreement with his late brother for the construction of 40 rooms in the suit land.

24. The one paged document annexed on the Plaintiff's Affidavit is neither signed nor dated. The Plaintiff did not explain why that document, which is the basis of his claim, was never signed and dated by either of them. The document, in my view, is unenforceable and has no basis in law.

25. The Plaintiff has deponed that he contributed towards the development of the suit property to the tune of Kshs. 440,404.

26. According to the Plaintiff, his late brother managed to secure a loan of Kshs. 600,000 for the purpose of developing the land which he deposited in his account.

27. Indeed, the Plaintiff's own statement shows that the amount of Kshs. 600,000 deposited on his account by the late Nyamai was used to develop the suit land. The said statement of account does not indicate the sum of Kshs. 440,404 which the Plaintiff purports that he contributed towards developing the suit land.

28. It is not therefore clear to this court how the Plaintiff raised the said funds when his own bank statements show the only deposits that was made on his account was the Kshs. 600,000 from the deceased.

29. The detailed Mpesa statements attached to the Plaintiff's Affidavit showing the monies he used to send to the deceased seems to reinforce the Defendants' deposition that the Plaintiff was merely an agent who used to collect the rent from the suit land and forward the same to the deceased.

30. Indeed, if the Plaintiff was entitled to the share of the suit land, he would not be forwarding the entire rental proceeds to the deceased.

31. According to *Halsbury's Laws of England, 4th Edition, Volume 48, paragraph 690*, 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.

32. 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 doing so, he was acquiring a beneficial interest.

33. I have not seen any evidence to show that the deceased, by agreement, arrangement or understanding agreed with the Plaintiff that the property is to be shared equally or otherwise between them.

34. I have also not seen any evidence show that there was any common intention between the Plaintiff and his deceased brother that they should share the suit land neither have I seen any evidence of the direct contribution by the Plaintiff towards the development of the suit land.

35. Although an oral agreement is enforceable on the basis of a constructive trust or proprietary estoppel (*See Yaxley vs. Gotts & Another (2000) Ch 162*), I am not satisfied, prima facie, that a constructive trust exists in the circumstances of this case.

36. It is for those reasons that I find that the Plaintiff has not established a prima facie case with chances of success to enable this court to grant him an order of injunction.

37. Having not established a prima facie case with chances of success, I shall not order for the deposit of the rental income in this court.

38. The totality of the above analysis leads me to only one conclusion, that the Application dated 31st October, 2016 should be dismissed.

39. I therefore dismiss the Application dated 31st October, 2016 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2017.

O. A. ANGOTE

JUDGE