



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C NO. 204 OF 2010

STEPHEN MARARO KAROKI - PLAINTIFF

VS

JAMES NGONGA NJOROGE - 1ST DEFENDANT

PRISCILLA NJOKI NJOROGE - 2ND DEFENDANT

JUDGEMENT

1. The Plaintiff is the younger brother to the 2nd defendant and a former brother in law to the 1st defendant. The defendants were married from 1969 to 1997 then divorced. The parties have at various times resided in the USA with their base in Kenya being Kenyans by birth and naturalization. The Plaintiff states that while in the USA, he sent money to the Defendants sometime in 1985 or thereabouts with a request to purchase Plot No. 14225/163 for him. That he asked that the title be registered in their joint names but to hold it in his trust until he returns to Kenya so that he would transfer it to his name.

2. By a Plaint filed on 3.5. 2010 the Plaintiff sought orders against the Defendants *interalia*;-

(a) A Permanent injunction restraining the Defendants, their servants and/or agents in any manner howsoever from trespassing, constructing, alienating, selling, transferring, wasting, leasing and/or disposing of the suit property being L.R. No. 14225/163.

(b) A declaration that the Defendants hold the suit property being L.R. No. 14255/163 in trust and on behalf of the Plaintiff who is the rightful and lawful owner thereof.

(c) An order compelling the Defendants to execute a Transfer in respect of L.R. No. 14225/163 in favour of the Plaintiff and in the absence thereof the same to be executed by the Executive Officer or a Deputy Registrar of this Honourable Court.

(d) Costs of this suit.

3. The Plaintiff avers that the 1st Defendant has reluctantly and persistently refused to transfer the property to him and he is carrying out farming on the land without his permission notwithstanding that he has a beneficial interest, having contributed to the full purchase price. That his refusal to transfer the property to him, his continued farming on the land is unlawful and fraudulent, and is denying him the right ownership of the property.

4. The 1st Defendant filed a defence on the 17th September 2010 and denied the claims of the Plaintiff. He stated that the Plaintiff is not a beneficial owner of the property and challenged him to produce evidence

on any trust and monetary contributions that he claims to have paid towards the purchase of the suit land.

The Plaintiff's case.

5. The Plaintiff claims that he is the beneficial owner of the suit land having financed the acquisition through the remittances of USD 2500/- that he sent to the Defendants to purchase the property for him in 1985. That the money was sent to the 2nd Defendant to buy the land through his sister in law Margaret Karoki who worked at Kenya Commercial Bank Limited. That initially he had wanted to purchase the property and register it in the name of his mother – Mrs Florence Wanjira Karoki but the difficulty was that she was old, illiterate and would have proved cumbersome for her to apprehend the transaction.

6. That he then opted to purchase and have it registered in the names of the Defendants with the understanding that they were both holding the suit property in trust for him and they would transfer the title to him when he is back in Kenya. The Defendants had settled in Kenya at this period.

7. That he is aware that the title was fully paid for and the same registered in the names of the Defendants in 1992 as joint tenants. He avers that the reason why the land was not registered in his name was because he was then residing in the USA and planned to have it transferred by the defendants to his name once he is in Kenya.

8. That before the defendants divorced they visited the Plaintiff's house in California USA and handed over the original title to the Plaintiff and his wife in 1994 for safe keeping but without the transfer documents. By this time, the defendants had settled in the USA. On demand the 1st Defendant later refused to so transfer the title to his name insisting that the suit land belonged to him and his ex-wife. That the title was handed over to the Plaintiff before the Defendants divorced in 1997.

9. He further states that the 2nd Defendant did sign her part of the transfer document in 2008 transferring the interest she held in the suit property to him. The 2nd Defendant persists in his refusal and hence he filed suit.

10. He contended that this is not the only land that he purchased whilst living in the USA in Kenya. He acquired other properties in Rongai and Kitengela where he used to send money to the 2nd Defendant to purchase for him. That those other properties have no disputes. That he showed the Court bank remittances of various monies that he used to send to the 2nd Defendant to acquire those assets.

11. In his evidence, he called PW 2 Margaret Karoki to testify in support of his case. The witness, who is the sister in law to the Plaintiff confirmed that she worked as a secretary at Kenya Commercial Bank. She testified that she used to facilitate clearance of the cash received from the plaintiff and would later hand it to the 2nd Defendant. That she received substantial amounts of money over a period of time and would handle it in accordance to the Plaintiff's instructions some of whom would be handed over to the 2nd Defendant. That she was aware that the Plaintiff was buying land through his sister the 2nd Defendant. She believed that the 2nd Defendant did purchase the land as per the Plaintiff's instructions. She admitted that she did not handle the transactions or know the uses in which the money was utilized in.

The 1st Defendant's case

12. The 1st Defendant filed his defence in which he denied holding the suit land in trust for the Plaintiff and avers that the land belongs to him having bought it with his money and registered it jointly in the Defendants names in 1992. That there is no proof of trust-ship for the Plaintiff in the ownership of the land and challenged the Plaintiff to prove it. He stated that he divorced his wife in 1997 after which she remarried in the USA. On cross-examination, he stated that he cannot recall when he purchased the suit property. He admitted that he has not produced the copy of the sale Agreement in Court as he did not believe it was necessary.

13. In response to further cross-examination the 1st Defendant told the Court that he did not present any evidence in Court on how he paid the purchase price of the suit land. He confirmed that the order dissolving their marriage on 26th October 1998 did not include the suit property as part of matrimonial property settlement because the suit property is situate out of the USA jurisdiction

14. He denied that he ever promised or undertook to re-transfer the property to the Plaintiff. He confirmed that the original title was in the custody of the Plaintiff. He further contended that though he states that the 2nd Defendant and the Plaintiff are colluding to dispossess him the suit land, he has not filed any suit against them.

The 2nd Defendant's Case

15. It must be noted that the 2nd Defendant did not file any defence against the Plaintiff claims and so her case is undefended on record. On record however I have seen a detailed affidavit statement which is in support of the Plaintiff's case. In her affidavit she depones that between 1983-87, her and her former husband, the 1st defendant purchased three properties in their names from Kamuthi Framers Cooperative Society as follows; L.R No 14225/202, 14225/163 and 14225/73. That L.R No 14225/163 though registered in their names, was bought on behalf of the plaintiff. That they held it as custodians pending the transfer of the same to the plaintiff at the appropriate time. The plaintiff was in the USA at that time. That at the time of purchasing the suit property, they had financial challenges and they could not have raised the funds and therefore contacted the plaintiff who had earlier on expressed interest in owning land in the same locality. She averred that the funds for the purchase of the suit property was sent by the plaintiff through Mrs. Margaret Karoki who worked in Kenya Commercial Bank. That she attended to the processing of the titles including paying outgoings such as rates and land rent liabilities on the plot using the monies sent by the plaintiff. That the 1st defendant was residing overseas at this period of time.

16. That she and the 1st Defendant did hand over the original title to the plaintiff and his wife at their home in Santa Rosa California, USA. That at the time of handing over the title to the plaintiff, she and her ex-husband were still married as they only separated and divorced on 7.2.1998 and 27.10.1998 respectively. That the handover of the original title was in accordance with the fact that the title was being held in trust for the plaintiff. She explained that that is why this title was not part of the marital settlement agreement at divorce.

17. That in 2007 she approached the 1st defendant and proposed that they execute the transfer documents in favour of the plaintiff but he insisted that he will only sign them when he meets with the plaintiff in person. That she did sign her part 2008 and left the documents with the plaintiff who was enroute to Kenya. That the title belongs to the plaintiff and should be transferred to him.

Issues, analysis and determination.

18. The issues for determination as I can see from the case are; whether the plaintiff remitted money to the defendants to purchase the property for him; whether there is a presumption of trust between the plaintiff and the defendants in favour of the plaintiff and whether the Plaintiffs claim is time barred.

19. Before I deal with the issues at hand, I would like to address the issue of jurisdiction of this Court. The 1st defendant on para 16 of his defense pleaded that the jurisdiction of this Court is denied. In the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] e KLR**, the Court stated as thus;

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.... The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the Constitution exhaustively provides for the jurisdiction of a

Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a court or tribunal by state law.”

Section 13 of the Environment and Land Act confers wide jurisdiction to this Court to hear and determine land cases. I find that this case falls within the realm of the law that set up this court and find that the court is clothed with the necessary jurisdiction.

20. Did the plaintiff remit the money to the defendants to purchase the property? The plaintiff stated in evidence that whilst in the USA, she heard from her sister the 2nd defendant that there were plots being sold by the Kamuthi Framers Cooperative Society. This was corroborated by the 2nd defendant that in while in Kenya whilst visiting their home in Kamiti he liked their property and expressed interest in buying a property in the same locality should one come up for sale. It is not in dispute that the defendants did buy two other properties from the said Kamuthi Cooperative Society Limited which are registered in their names namely L.R NO. 14225/202 and L.R No. 14225/73. That this opportunity presented itself in the years between 1983 -1987 when the property L.R NO 14225/163 was acquired by the defendants on behalf of the plaintiff. The 2nd defendant states in her evidence that the suit property was purchased for the plaintiff and held by the defendants in custody for the plaintiff.

21. The plaintiff led evidence that he did send the money for the purchase of the suit property through her sister in law one Margaret Karoki who worked in the bank and assisted him facilitate the clearance of the remittances and remit to the 2nd plaintiff or whomever he intended to send monies. The witness Mrs Margaret Karoki confirmed that over a period whilst the plaintiff was residing in the USA, he used to remit monies to her for various needs. She confirmed handing over the monies to the 2nd defendant. Though she says she was aware that the plaintiff was purchasing land, she could not give evidence that the monies remitted through her was indeed utilised to purchase this suit property.

22. The plaintiff presented to Court 3 remittances dated 15.2.90 for USD 7500/-, 28.3.1990 for USD 6500/- and 11.5.1990 for USD 8,500/-. The beneficiary was stated to be Margaret Karoki and the purpose of the funds is stated as purchase of land. It is however clear that the details of this suit property is not stated on the remittances. The plaintiff led evidence on trial that the said remittances were for purchase of two parcels of land in Rongai and one parcel in Kitengela and not for the suit land. He testified that he did remit USD 2500.00 for the purchase of the suit land to the 2nd defendant through his agent Mrs Margaret Karoki. That the purpose of presenting the remittance slips was to demonstrate the way he operated every time he was buying land; sending the money in like manner. He confirmed that he did not have the documentary evidence for the remittance for the suit land.

23. I have noted that the suit land was purchased prior to 1990 and certainly and as correctly stated by the plaintiff the remittances stated above do not refer to the suit land. I have also noted that the transfer document to the defendants indicate the purchase price as Kshs 2000/-. This is not consistent with the plaintiff's evidence that he remitted USD 2500 for the purchase of the suit land. No evidence has been presented in Court by the defendant to explain the variance. It is difficult for the Court given the evidence on record to find that the plaintiff remitted the monies for the purchase of the suit land due to lack of documentary evidence to prove the same.

24. Any presumption of trust? Express trusts in Property arises where one person gives his property or assets to another person for safe custody or keeping. Consent is key by the settlor in this type. However resultant trust and constructive trusts are creatures of equity intended to guard against unjust enrichment or to correct a wrong. In the case of **Lipkin Garmy Vs Karpanale Ltd (1992) 4 ALL ER 512**, the House of Lords held that the concept of unjust enrichment lies at the heart and is the principle underlying the individual instances in which the law does give a right of recovery.

The House of Lords in the case of **Gissing -Vs- Gissing (1971) AC 886**, stated that a resulting trust is

created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that “results” back to the person who provided the money. The key characteristic of a resulting trust is that the person must prove in evidence that they contributed to the purchase of the property. In the case of **Yogendra Pusshotahn Patel -Vs- Pascale Mireilla Baksh & 2 others (2006) e KLR**, parole evidence is admissible to show the purchase price of a property and if provided by several people to show their proportionate share of contribution. Parole evidence is also admissible to rebut the presumptions whenever they arise.

In the absence of evidence of payment for the purchase price, the Court concludes that resultant trust has failed. I will investigate whether a constructive trust was created between the parties in favour of the plaintiff.

25. The requirements for a constructive trust are explained in more detail in **Halsbury’s Laws of England, 4th Edition, Volume 48 at paragraph 690** that I shall quote in extenso:

“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”

There is evidence on record that the plaintiff was in the habit of remitting funds to the 2nd defendant to pay for him various payments including purchase of the land. This has been corroborated by Margaret Karoki who received funds for onward transmission to the 2nd defendant who has confirmed receiving funds and attending to the actual process of buying the land and processing the title in their joint names but to hold in trust for the plaintiff. This creates a presumption of common intention as can be deduced from the conduct of the parties. It is in evidence that the original title was delivered by the defendants to the plaintiff in 1994 before the defendants divorced. The intention of the defendants in so doing can only be interpreted to mean that they were delivering title to the beneficial owner. That act may not depict an action of an absolute registered owner of the suit property. There must have been some mutual understanding between the defendants that it was time to hand over the title to the real owner. The probative value of this evidence is only circumstantial and cannot support a case for the existence of a constructive trust, however believable it may be.

26. The Land Registration Act, 2012, provides under section 66 that a person who acquires land lease or a charge in a fiduciary capacity may be described in the instrument of acquisition with the addition of words as “trustee”. I have examined both the transfer and the entries in the title and I find no such words inserted therein. This does not support a claim for trust on paper.

27. The 2nd defendant has denied holding the property in trust for the plaintiff and asserts that he bought the suit property and registered it in the joint names of the 2nd defendant and himself jointly. However, on

cross examination he did not present any evidence of how he purchased the property. Nothing would have been so easy for the 1st defendant to show to the Court how he contributed to the property purchase to dispel the presumption of trust that has been laid by the plaintiff. He did not do so because in my view, he did not pay a dime for the suit land. In ordinary parlance this would tilt the balance of the scales in favour of the Plaintiff. That is the only logical inference that the Court can give to the facts of the case.

28. That notwithstanding I note that the parties in this case are related and the plaintiff must have relied on the relations (brother in law and sister respectively) to hold the suit property for him in trust. The reason why he did not have the property transferred to him is, he states, that he was resident in the USA and trusted that his property would be safe with his in-laws until he returns to the country to attend to the transfer process. The tragedy is that he was gone for too long to run against the equity of laches and statutory time bar.

29. The 1st defendant pleaded in his defense that the plaintiff's case was time barred having filed the suit 18 years later and that the same is barred by Limitation of Actions Act from recovering the suit property. Section 7 of the said Act provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

It is the plaintiff's evidence on record that the property was purchased in 1985 and the title registered in 1992. It is not in dispute that the plaintiff took no action to recover the suit land before the expiry of the 12 years. He therefore has been caught up by limitation of actions and is hereby barred in law.

30. In the circumstances and for the reasons given above I find that the plaintiffs claim fails and the suit is hereby dismissed.

31. Each party to pay their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND SEPTEMBER 2017

J. G. KEMEI

JUDGE