



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE 985 OF 2012

Formerly HCC 151 of 2011

ROSE NASWA MASINDE.....PLAINTIFF

VS

LILIAN NEKESA SIMIYU MUKOPI.....DEFENDANT

(Suit by plaintiff seeking declaration that the defendant holds property in trust for her; suit land purchased at an auction; plaintiff who was out of the country having provided the purchase price with the understanding that defendant will hold the property in trust for her; defendant registering suit land in her name and seeking to dispose it; defendant arguing that she is the absolute owner of the land; trust; instances when a proprietor can be said to be holding land in trust; where one purchases land through the agency of another person; whether the registration of such person as proprietor will be subject to a trust; whether such person can be declared a trustee; judgment entered for the plaintiff; finding that defendant was trustee for the plaintiff; defendant ordered to transfer land to the plaintiff)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

1. The plaintiff filed this suit on 1 September 2011, seeking the following orders against the defendant :-

(i) A declaration that land parcel Eldoret Municipality Block 10/75 is the property of one Victoria Kamule Masinde and that the registration of the defendant as owner is fraudulent and null and void.

(ii) An inhibition order stopping the defendant her agents, servants or any other person claiming under her from dealing with the suit parcel Eldoret Municipality Block 10/75 in any way that will be detrimental to Victoria Kamule Masinde's interest.

(iii) An order to have the suit property referenced Eldoret Municipality Block 10/75 transferred to the plaintiff.

(iv) Costs of the suit.

2. In her plaint, the plaintiff pleaded that she is the mother of Victoria Kamule Masinde and that she has filed this suit on her behalf. She holds a power of attorney donated by Victoria. The defendant is described to be a daughter in law of the plaintiff. It is pleaded that in the month of January 2006, the land parcel Eldoret Municipality Block 10/75 (the suit property) which was registered in the name of Lystra

Enterprises Limited, a company associated with the plaintiff and her son (former husband to the defendant), was sold by Barclays Bank Limited to recover money owed by the company. It is averred that Victoria Kamule Masinde, who was then working overseas, purchased the land in the public auction through the defendant and that the defendant was acting as her trustee. However, the defendant proceeded to register the property in her own name which is said to have been done fraudulently. It is inter alia averred that the defendant could not have properly registered the property since all title and transfer documents were retained by the plaintiff. It is pleaded that the defendant has always been a trustee of Victoria Kamule Masinde despite her being the registered owner of the suit property.

3. The defendant upon being served with summons, filed a statement of defence. She denied all averments of the plaintiff and pleaded that she purchased the suit property through public auction on her own behalf, and not as trustee, or on behalf of anybody else. She has pleaded that the title documents got lost in the year 2010 and fell in the wrong hands, and the said persons are now claiming ownership of the property.

B. EVIDENCE OF THE PLAINTIFF

4. The first witness of the plaintiff was Majune Kraido, an advocate of the High Court of Kenya practicing in Bungoma town. He testified that he knew both plaintiff and defendant. The plaintiff has been his long time client. He knew the defendant as she was married to Kenneth Masinde, son of the plaintiff, who was also his client for a long time before his demise. He testified that he also knows Victoria Kamule Masinde as daughter to the plaintiff. He testified that in November 2005, Victoria, who was then working with UNICEF in Congo DRC, called him and asked him to assist her purchase the suit property, which had been put up for sale by public auction by Barclays Bank, through Watts Auctioneers. That property was initially owned by Lystra Limited, a company owned by the plaintiff and Kenneth Masinde. The plaintiff and Kenneth had approached Victoria to bail them out but Victoria opted to purchase the property instead.

5. On the day of the auction, 10 January 2006, PW-1 sent his clerk to attend the auction and make a bid. He bid Kshs.280,000/= which was accepted. PW-1 testified that he made a down-payment of Kshs.70,000/= through banker's cheque and that the balance was to be paid within 90 days. He produced the banker's cheque as an exhibit. He further testified that on 20 April 2006, he transferred Kshs. 150,000/= from his client account to the account of Collection Africa Ltd, who were collecting the money on behalf of Barclays Bank. He produced the deposit slip as an exhibit. The last payment of Kshs. 100,000/= was made by way of banker's cheque which again was produced as an exhibit. In total, he paid Kshs. 320,000/= which was more than the bid of Kshs. 280,000/=. This he explained was because of a penalty of Kshs. 40,000/= which was imposed by Collection Africa because of delayed payments. He produced a letter to that effect as an exhibit.

6. PW-1 testified that since Victoria was out of the country, she directed that the property be transferred to the defendant on the understanding that the defendant would later transfer the property to Victoria when she came back. This was done because Victoria was not available to complete the transaction. The certificate of lease was therefore given to the defendant by Collection Africa. The defendant also took custody of the Transfer by Chargee instrument.

7. At that point, PW-1 thought that he had completed his task. However in August 2011, he was called by the CID Eldoret who asked him to attend their offices in relation to the suit property. On 9 August 2011, he attended the CID Eldoret, and came to learn that the plaintiff had filed a complaint on fraudulent disposal of property, the issue being that the property had been transferred to the defendant, and she was in the process of disposing it to a third party. PW-1 recorded a statement, which statement, was produced as an exhibit. PW-1 explained that there was a delay in registering the transfer since the property had accumulated rates of Kshs. 485,103/=. He further testified that all original documents were in the hands of the plaintiff.

8. In cross-examination, PW-1 testified that he had no documentary proof that the money he paid came from Victoria. He also stated that there was no written document appointing the defendant as trustee. The request that the defendant should hold the property in trust for Victoria was verbal, and based on mutual

understanding and trust, since the defendant was a sister-in-law to Victoria. A written agreement could not be prepared owing to the absence of Victoria. He testified that he was not aware that the defendant expended her own money to purchase the property.

9. The plaintiff testified as PW-2. She testified that she holds a power of attorney donated by Victoria which instrument she produced as an exhibit. She testified that the land was initially registered in the name of Lys

tra Ltd of which she and Kenneth Masinde were directors. They charged the land to Barclays Bank, but there was default, and the bank moved to sell. Victoria decided to purchase the property and used the defendant, who was her sister in law, to buy the property on her behalf. All necessary documents transferring the property to the defendant were signed, but PW-2, as mother to Victoria, retained them. She never released any of them to the defendant and she stated that she was at a loss as to how the property came to be registered in the name of the defendant. At some point she got wind that the defendant was intending to sell the property and she placed a restriction.

10. In cross-examination, the plaintiff testified that since the defendant was married to her son, they dealt with her as a member of the family. She further testified that it is the defendant who bidded at the auction. She herself did not attend the auction. She stated that it was the defendant who handed over the original documents to her. As far as she knew, the defendant was acting in trust for Victoria. The plaintiff was cross-examined on a transfer instrument between the defendant and Victoria, and she testified that she was not aware of a sum of Kshs. 300,000/= (which was noted in the transfer instrument) having exchanged hands between the defendant and Victoria.

11. PW-3 was Evans Ogeto Miyienda, an advocate of the High Court practicing in Eldoret town. He testified that he prepared a transfer of lease instrument for the suit land, with the defendant being transferor, and Victoria being the transferee. He drew the document in the year 2009, but no date was placed in the instrument upon request by the parties, since they were not ready to have the instrument registered immediately. He testified that both defendant and Victoria executed the document, but he did not attest to their signatures, as the parties stated that they would come back for attestation when they were ready to register the instrument. The document reflected a consideration of Kshs. 300,000/= . He knew the parties personally as he was a close friend of Kenneth Masinde.

12. In cross-examination, PW-3 inter alia testified that he did not witness the Kshs. 300,000/= exchange hands although the parties had confirmed to him that money had exchanged hands. He further testified that he never prepared a sale agreement. The two parties had been referred to him by Kenneth Masinde.

13. With that evidence the plaintiff closed her case.

C. EVIDENCE OF THE DEFENDANT

14. The defendant testified as the sole witness. She stated that she was married to Kenneth Masinde upto the year 2010 when they divorced. She testified that when the suit property was put up for sale, she developed an interest, and she called the auctioneer who then showed her the plot. She then purchased the same in the public auction. After the purchase, the bank gave her all the title documents and she registered the property in her name. She then took possession of the land and sold it to a Mr. Patel. She denied ever having been given money by Victoria to buy the land. She testified that she knows PW-1, but denied ever having received any money from him, on behalf of Victoria. She denied ever having been a trustee for Victoria.

15. In cross-examination, the defendant stated that when she purchased the property she was still married to Kenneth Masinde, and that prior to the purchase, she knew that the land was owned by her husband. She testified that she purchased the property with the full knowledge of her husband and that he assisted her to buy the property. Challenged to produce documents to demonstrate how she bought the property, the defendant stated that they all got lost including the title deed. She stated that she reported the loss of the title deed to the police when the title was still in the name of Lystra Ltd, and that she swore an

affidavit to that effect, and was issued with a police abstract. With these documents, she requested the Bank to draw another transfer instrument as one of the lost documents included the transfer instrument. She then registered the documents and got title to the suit land. On the transfer instrument that she executed in favour of Victoria, the defendant stated that her husband told her to sign it and that she was not aware that by executing it, she was transferring the land to Victoria. She stated that Kenneth had copies of her ID Card and PIN because he was her husband and that he could have given them to the plaintiff.

D. SUBMISSIONS OF COUNSEL

16. In his submissions, Mr. C.D Nyamweya for the plaintiff, submitted inter alia that there was no evidence tendered by the defendant that she purchased the property at the public auction. He submitted that there is an implied trust under Section 3 (3) of the Law of Contract Act.

17. Mr. Kigamwa for the defendant, on the other hand, submitted that the version of PW-1 was not true as the name of the Clerk who is said to have bid at the auction was never disclosed. He contended that it is the defendant who was the bidder and purchaser of the suit property. He further submitted that there was no evidence of any money having been transferred from Victoria to PW-1. He averred that in any case, the plaintiff held a power of attorney donated by Victoria since 2004 and she could have bid on her behalf, or that Victoria could formally have appointed the defendant as her agent. He further submitted that only Lystra Ltd have mandate to challenge the registration of the defendant as owner of the suit land and that if there was any irregularity, the Land Registrar ought to have been enjoined to this suit. He submitted that the defendant never handed the title documents to the plaintiff but that they got lost.

18. He further submitted that any claim based on trust ought to have been made by way of Originating Summons and not by way of plaint. As to the transfer executed in 2009, counsel contended that the instrument is null and void, since at that time, the land was not registered in the name of the defendant. He further averred that the instrument is not enforceable for want of attestation. He contended that if at all there was a trust, the instrument could not have reflected a consideration of Kshs. 300,000/=. He averred that the defendant could not be a trustee, and that if there was any such trust, then it ought to have been registered. Counsel further submitted that there is no prayer for rectification of the register and that the same cannot therefore be granted. He relied on the cases of ***Omar Salim Bendo v Luke Mutiso & Another (2005) eKLR*** and ***Nairobi City Council v Thabiti Enterprises Ltd (1995-1998) 2 EA 231***.

E. DECISION

19. It is with the above background that I need to determine this matter.

20. No issues were drawn, but in my view, the following matters need to be determined in order to arrive at a fair determination of this suit.

(1) Who purchased the land at the auction ?

(2) Was the registration of the defendant as owner made fraudulently ?

(3) Was the defendant a trustee of Victoria ?

(4) Who ought to be declared the owner of the suit land ?

I will straight away delve into the first issue.

Issue 1 : Who Purchased the Land at the Auction ?

21. It is not in contention that the suit property was put up for sale by public auction. The sale took place on 10 January 2006. There is conflicting evidence on who made the bid at the auction. PW-1 stated that he sent his clerk to bid, and that he did bid, whereas the defendant stated that she was the one who bid. I am unable to resolve this conflict, but thankfully, I do not think that it is necessary to do so. What is important is who intended to buy the property, which question can be resolved, by finding out who contributed the resources to purchase the property. On this point, the evidence of PW-1 is relevant.

22. PW-1 stated that the resources were availed by Victoria Masinde, and that it was he (PW-1), who drew the banker's cheques and deposited the money to the bank or to the bank's agent. He testified that he was making these payments on behalf of Victoria. I have no reason to doubt the evidence of PW-1. He produced copies of banker's cheques and deposit slips which had been in his possession. He stated that it was he who made the banker's cheques on behalf of Victoria Masinde. The defendant, on the other hand, save for saying that she bid and paid the purchase price, offered absolutely no evidence on how she made the actual payments. The defendant did not dispute that the property was purchased through the banker's cheques and cash deposits that were tendered in evidence by PW-1. She never tendered any evidence of her own that she is the one who purchased the banker's cheques or made the cash deposits. If she did make the payments, there would have been nothing easier than to demonstrate evidence of payment. None was forthcoming and as I have mentioned earlier, I really have no reason to doubt the evidence of PW-1 on this score.

23. I find that the payments for the purchase of the suit land were made by PW-1 and not the defendant, and that PW-1 was acting as agent for Victoria Masinde, and not the defendant. The sale however seems to have been made in the name of the defendant as purchaser, an issue that I will revisit at a later stage of this judgment.

Issue 2 : Was the registration of the defendant as owner made fraudulently ?

24. It is not in contention that all the title and transfer instruments were handed over to the defendant since the records did show that she was the actual purchaser at the auction sale. What happened to the documents thereafter is contested. The plaintiff testified that the defendant handed over to her the documents and that she has kept them ever since. This was because the defendant was not meant to be the owner of the suit land but a mere conduit for Victoria to purchase and eventually become proprietor of the property. The documents therefore needed to be handed over, to be held in custody for Victoria, so that Victoria could later utilize them and register herself as the proprietor. I believe it is for this reason that the plaintiff contended that the defendant could not possibly have been properly registered as proprietor without first producing the original title and transfer instruments. The defendant on the other hand, testified that the documents got lost and that she reported the loss to the police.

25. Again on this point, I opt to believe the evidence of the plaintiff. The defendant stated that there was an affidavit drawn and a police abstract issued to her by the police confirming the loss of the documents. But no such affidavit nor police abstract was ever produced in evidence. Moreover, if the title documents did get lost, then the proper avenue would have been to apply to the Land Registrar for a new title to be issued pursuant to Section 35 of the Registered Land Act (CAP 300) (now repealed). No such application has been displayed to this court, and there is no way a new title document would have properly been made, without following due process. Neither could a transfer be made without first producing the original title document as required by Section 33 of the Registered Land Act.

26. It is therefore my view that the process of registration of the defendant as proprietor of the suit land was not done above board and was fraudulent. Although the Land Registrar was not enjoined to these proceedings, I do not see how that can be fatal, as the perpetrator and beneficiary of the fraud could only be the defendant, and I have demonstrated above, that her registration as proprietor could not have been made in accordance with the law.

Issue 3 : Was the defendant a trustee of Victoria ?

27. The core issue at the centre of this proceedings is whether the defendant is a trustee of the plaintiff. It

has been argued by counsel for the defendant that there can be no trust, first because the defendant was acting in her own capacity, and secondly because there is nothing in writing alluding to any trust. On the other hand, the plaintiff's position is that since Victoria was not within the country, they opted to use the defendant to purchase the property, with the understanding that the defendant will then re-transfer the property to Victoria. To support that position, the plaintiff inter alia produced the transfer instrument from the defendant to Victoria. She stated that they relied on the relationship of sister-in-law to have the defendant hold the property on behalf of Victoria.

28. I agree with counsel for the defendant that the law is that contracts for the disposition of land need to be in writing as required by Section 3(3) of the Law of Contract Act, CAP 23, Laws of Kenya. However, the requirement of writing does not affect the creation of resulting, implied or constructive trusts. The law is drafted as follows :-

*No suit shall be brought upon a contract for the disposition of an interest in land unless—
the contract upon which the suit is founded—*

(i) is in writing;

*(a
) (ii) is signed by all the parties thereto;*

S.) and

3

(3)

*(b) the signature of each party signing has been attested by a witness who is present when the
) contract was signed by such party:*

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act ([Cap. 526](#)), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything (4) in that subsection affect the creation or operation of a resulting, implied or a constructive trust.
(emphasis mine).

29. Trusts can be created expressly but can also be created informally or be implied (See ***Snells, Equity, 13th Edition, Sweet & Maxwell, Chapter 9***). One of the recognized categories of this form of trust is where one person purchases a property, but the same is conveyed in the name of someone other than the purchaser. In the case of ***Dyer v Dyer (1788) 2 Cox Eq, 92 at 93***, (quoted in ***Snells, Equity, supra, page 206***) it was stated as follows :-

"The clear result of all the cases, without a single exception, is ,that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; ad it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffer."

30. Apart from the above, a proprietor does hold land subject to any trust. This was the position under Section 28 of the RLA, which provided as follows :-

S. 28 The rights of a proprietor, whether acquired on first registration or whether acquired 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 -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. (emphasis mine).

31. That position is reiterated in the current law. Section 25 of the Land Registration Act, Act No.3 of 2012, provides as follows :-

S. 25 - Rights of a proprietor

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—

(1 (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) 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.

(2) 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. (emphasis mine)

32. A registered proprietor will therefore hold land subject to a trust. One of the rationales is to avoid a situation where there is unjust enrichment.

33. This case is not too dissimilar to the case of ***L.N vs S.M.M, High Court at Malindi, Civil Case No. 21 of 2011 (2013) eKLR***. In that case, the plaintiff sought to be declared the owner of certain property which property was registered in the name of the defendant. It was demonstrated that the property was purchased by resources provided by the defendant and that the intention was for the defendant to purchase the property on her behalf. Angote J, after reviewing various decided cases, held that the evidence pointed at a trust and held that the defendant held the land in trust for the plaintiff.

34. I come to the same conclusion in this case. As I mentioned earlier, the defendant did not in any way demonstrate that she contributed a cent towards the purchase of the suit land. I am inclined to believe the version of the plaintiff that the suit land was to be held by the defendant, on the understanding that she will later transfer the same to her sister in law, Victoria Masinde. That is why there was prepared a transfer instrument from the defendant to Victoria Masinde. In as much as the transfer instrument is undated and unattested, such that it cannot be of any utility in transferring the interest of the defendant, that instrument goes to demonstrate the intention of the parties, which was that the defendant would hold

the property on behalf of Victoria, and at the opportune time, transfer the property to Victoria. A trust can, and will be implied in order to give effect to the intention of the parties (See *Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171.*)

35. In this case, the defendant was trusted, as one would trust a sister-in-law. It is sad, that despite being so entrusted, the defendant got greedy at some point, and decided to short-change the true purchaser by seeking to have the suit land as her own and in fact seeking to sell it. This was a clear breach of trust and is reprehensible conduct on the part of the defendant.

36.

Issue 4 : Who ought to be declared the owner of the suit land ?

36. I have already held that the defendant was holding the property in trust for Victoria Masinde. It follows that the proper and real owner of the suit land is Victoria Masinde and not the defendant. I therefore issue a declaration that Victoria Masinde is the owner of the land parcel Eldoret Municipality Block 10/75 and that the defendant is merely holding the property in trust for Victoria Masinde.

37. It was argued that the plaintiff's claim should have been filed by way of Originating Summons but I personally do not see the soundness of this argument. Any suit, unless specifically barred, can be initiated by way of plaint. Even if I am wrong on this, at most, this would be a mere technicality that could not have prejudiced the defendant and is curable by Article 159 (2) (b) of the Constitution. That argument fails.

F. THE FINAL RELIEFS

38. On the basis of the foregoing, the plaintiff's suit must succeed. I have agonized over whether or not to grant the plaintiff costs given the relationship that she has with the defendant. I would probably have not made any order on costs, given this relationship, but I am revolted by the conduct of the defendant and in this instance I must grant costs to the plaintiff.

39. What relief then should I give to the plaintiff ? In her plaint the plaintiff sought an order to have the suit property transferred to the plaintiff. I do not see why I should deny her this order.

I therefore make the following final orders :-

(1) I declare that the real proprietor of the land parcel Eldoret Municipality Block 10/75 is Victoria Kamule Masinde.

(2) I order the defendant to execute all necessary transfer instruments to transfer the suit land to Victoria Kamule Masinde or to her assign, and if the defendant fails to execute the requisite transfer instruments within 45 days, I direct the Deputy Registrar to do so and I further order the Land Registrar Uasin Gishu, to register Victoria Kamule Masinde as proprietor upon presentation of the requisite transfer instrument and payment of any requisite fees.

(3) I issue an order of permanent injunction barring the defendant from occupying, utilizing, or in any other way dealing with the land parcel Eldoret Municipality Block 10/75.

(4) The defendant will bear the costs of this suit.

It is so declared and ordered.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JUNE 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. C.D. Nyamweya of M/s C.D. Nyamweya & Co present for the Plaintiff.

Mr. B.K. Langat holding brief for Mr. Kigamwa of M/s Wambua Kigamwa & Co for defendant