



Sirma v Singoei (Civil Appeal 109 of 2018) [2022] KECA 708 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 708 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 109 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022

BETWEEN

MARK KIPROTICH SIRMA APPELLANT

AND

SOSTEN KIPLAGAT SINGOEI RESPONDENT

(An appeal arising from the judgment (Ombwayo, J) delivered at Eldoret on 25th January, 2018 in ENVIRONMENT & LABOUR COURT CASE NO. 491 OF 2013)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

- [1] Two brothers claim the ownership of a parcel of land known as Nandi/Kokwet/688. That dispute has been escalated to us as a first appeal.
- [2] At trial in Eldoret Environment & Land Court Case No. 491 of 2013, it was common ground that Mark Kiprotich Sirma (the appellant) is the registered owner of the suit land. It was his case that he purchased the parcel of land from one Jemaiyo Kogo, now deceased and had it transferred and registered in his name. Title to him was issued on 5th August, 1994.
- [3] His case was that he took possession of the land and requested his brother, Sosten Kiplagat Sengoei (the respondent), to take care of his cattle on the suit parcel. He was therefore shocked and dumbfounded when in 1998, his brother refused to vacate the suit land. He avers that the kind gesture of allowing his brother to temporarily stay on the suit land has been abused. In an amended plaint dated 21st November, 2015, he sought the following intervention from the ELC: -
 - “(a) Mesne profits from 1998 when he commenced demanding for vacant possession of the suit land and loss of user from the date of the vacant possession ought to have been given to the plaintiff on demand.



- (b) An order of eviction of the defendant, his agents and/or servants from the suit land.
- (c) An order of permanent injunction to restrain the defendant from further intermeddling, interfering and/or in anyway dealing with the suit land.
- (d) Costs of this suit.
- (e) Any other relief this Honourable Court may deem fit to grant.”

[4] The defence of the younger brother was that he and the appellant jointly contributed to the purchase price of the suit land and that he entrusted the appellant to transact on his behalf. His position is that they jointly purchased several other parcels of land with the appellant but the two agreed that he, the respondent, would occupy the suit land. He contends he was in use and occupation of the suit land long before the appellant registered himself as sole owner. He claims an enforceable right over the property as he contributed to its purchase.

[5] After receiving the evidence of four (4) witnesses, two for each side, Hon. Ombwayo, J returned a verdict in favour of the respondent in a judgment dated 25th January, 2018. At the heart of that decision is the following holding;

“I do find that the facts herein depict an implied trust and therefore, I do declare that the plaintiff is holding title to the property in trust for the family. The defendant filed defence but did not file a counterclaim and therefore, the issue of the dissolution of the trust cannot be determined now. The upshot of the above is that the suit is dismissed with no order as to costs this being a family dispute. I do order that the status quo to be maintained.”

[6] Dissatisfied with that decision, the appellant has filed this appeal and puts forward a whopping 20 grounds. They are repetitive and overlap and this does little to advance the appellant’s cause. Collapsing them into the three grounds they really are, the appellant’s complaint is that the learned judge erred in law and fact in;

- (a) Making a decision that was not based on what had been pleaded.
- (b) Arriving at a decision that went against the weight of evidence.
- (c) Failing to consider that the appellant had obtained consent and transfer over the suit property and was the rightful owner of the suit land.

[7] The appellant’s submissions dated 15th February 2022 are summarized below.

[8] The appellant submits that the failure of the learned judge to hold that the appellant’s title to the land parcel number Nandi/Kokwet/688 was conclusively indefeasible is a sufficient ground to set aside the judgment. The appellant relies on sections 24(a), 25 and 26 of the *Land Registration Act* No. 3 of 2012. Section 24(a) provides for the vesting of absolute ownership to a person upon registration as the proprietor of land; Section 25 provides that the right of such proprietor shall not be liable to be defeated except as provided under the Act; while section 26 provides that a certificate of title issued by the Registrar shall act as evidence for one who seeks to prove that he/she is an absolute and indefeasible owner.

[9] The appellant contends there is undisputed evidence of a title deed which was issued to him on 5th August 1994 (see appellant’s Supplementary Record of Appeal at pages 3-6)The appellant cites the decision in *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare*



(Deceased) & 5 others [2013] eKLR where this Court reiterated the applicability of the Torrens system in Kenya and noted that under that system, the title of a bona fide purchaser for value without notice of fraud could not be impeached.

[10] The appellant elaborates on the provisions of section 25 of the *Land Registration Act*. Under those provisions, the rights of a proprietor of land, whether acquired on first registration or subsequently for valuable consideration or by an order of a court are not be liable to be defeated except as provided in the Act. However, by dint of subsection 2 of the provision, a proprietor is not relieved of any duty or obligation to which a person is subject to as a trustee. He also makes reference to section 28 of the Act which provides;

28. Overriding interests.

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) deleted by Act No. 28 of 2016, s. 11a.
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) deleted by Act No. 28 of 2016, s. 11b.
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law.

Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.

[11] The appellant makes extensive submissions touching on the *Land Control Act*. I understand the gist of those submissions to be that the appellant complied with those provisions before obtaining transfer of the suit land to himself and that the consent he obtained was not challenged by the respondent. I do not know to what end those arguments are made as it is not the respondent's case that the title issued to the appellant was improperly obtained but rather that he holds it in trust for himself and the respondent. The appellant misses the point and I will not rehash what are without doubt irrelevant submissions.

[12] The appellant cites Part V of the Land Act which deals with the administration and management of private land. Section 38 of that Act as amended by section 55 of the *Land Laws (Amendment) Act* No. 28 of 2016 deals with the validity of a contract for sale of land. The appellant argues that section 38(1)



provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed. Again I think this argument and others made by the appellant on the Law of Contract Act do not assist in resolving the controversy in this matter as the defence of the respondent was not predicated on the law of contract.

[13] In concluding his arguments, the appellant's counsel makes this startling statement;

“My Lords, since the Appeal does not challenge on facts, but rather based purely on points of law, we respectively submit that the learned judge (sic) ignored the provisions on the Land Registration Act Section 25, 25(2), 28, 28(2) Sections 39, 40 and 41 & The Law of Contract Act, Chapter 23 section 3(3) on paramount registration of interests on land and how they cannot be defeated as was the case in the learned judge's judgment.”

It is startling because a grievance raised by the appellant in the grounds of appeal is that the impugned decision was against the weight of evidence. Yet, from the portion of the submissions I have highlighted, what bothers the appellant is the conclusions of law reached by the trial court rather than the findings on facts.

[14] In concise submissions dated 14th February 2022, the respondent contends that the learned judge reached a correct conclusion that, on the evidence adduced, the suit land was jointly purchased by the respondent and the appellant. Consequently, when the appellant registered it in his name, a constructive trust was created and the appellant was holding the respondent's share in trust.

[15] The respondent further submits that the learned judge correctly observed the demeanour of DW2, the mother of both the appellant and the respondent, and concluded that she was telling the truth. That this court has the power to re-evaluate the evidence but does not have the privilege of observing the witnesses testify and, unlike a trial court, cannot comment on the demeanour of witnesses.

[16] The respondent submits that the learned judge did not make orders outside of what was pleaded and on page 15 of the judgment, noted that since there was no counterclaim he could not issue any orders in that respect and ordered the status quo be maintained and each party bear its own costs.

[17] The respondent finally submits that there are no cogent reasons proffered by the appellant as to why this Court should interfere with the decision of the trial court and that the appeal should therefore be dismissed.

[18] This is a first appeal and the role of this Court is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in the case of *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based



on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan [1955] 22 EACA 210)."

[19] The appellant who had set out to assert enforcement of rights embodied in the title he holds over the suit land suffered a setback when the trial judge found that the existence of an implied trust overcame what would otherwise be the indefeasible character of his title. A complaint by the appellant is that this holding was not in consonance with the case pleaded by parties. So, as a first issue, I must decide whether trust was pleaded in defence by the respondent.

[20] Whether as a basis for mounting a claim or setting up a defence, trust must be pleaded. As a defence to a claim for recovery of land, the requirement to plead trust would be found in Order 2 Rule 4 (2) of the *Civil Procedure Rules*:

“Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

[21] A further basis for pleading it may be in the provisions of Order 2 Rule 10 which reads :-

- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
 - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

[22] The respondent made the following averments in his defence:-

- (a) Paragraph 11 & 12 of the amended plaint is denied and the defendant avers that he has been peacefully in occupation of the said parcel of land.
- (b) The defendant avers that the plaintiff is his elder brother and states that they jointly contributed the purchase consideration and entrusted the plaintiff to transact on his behalf.
- (c) The defendant avers that they jointly purchased several other parcels of land but the plaintiff and the defendant mutually agreed that the defendant do occupy the suit parcel.
- (d) That the defendant states that he has been in use and occupation of the suit property long before the plaintiff registered himself over the same.
- (e) The defendant states that there has been no protest to them occupying and using the suit land and the first opportunity time put the plaintiff to the strictest proof.
- (f) In response to paragraph 13, 14 and 15 of the amended plaint, the plaintiff is not entitled to the prayers sought therein is put to strict proof.
- (g) The defendant further states that he bought the suit land together with the plaintiff who is his brother and their mother was a witness to all the transactions.
- (h) The Defendant maintains that he has an enforceable right over the said property as he contributed to its purchase and the plaintiff has no right to evict him.



- [23] Are these averments a sufficient plea of trust? Other than stating that he entrusted the appellant, his elder brother, to transact on his behalf, the respondent does not use the word ‘trust’ in his statement of defence. And looking at the other averments I have set out earlier, the defence may not be as elegant as it could be. Yet what makes a pleading sufficient is whether it is a succinct foreshadow or signal to the other party as to the case it has to meet or defence set up to enable the other party prepare its case. Some pleadings are elegant and elaborate, others animated and still others boisterous. This does not however mean that the dull or poorly worded pleadings are any less efficacious as long as they meet the objective of pleadings.
- [24] Back to the defence filed. It pleads as follows; both the respondent and the appellant jointly contributed to the purchase price for the suit land, the respondent entrusted the appellant to transact the land on their behalf; the appellant registered the suit land in his name alone; the respondent has been and is still in possession of the suit land; the respondent took possession even before the property was registered in the name of the appellant; the respondent claims an enforceable right over the suit land and the appellant had no right to evict him. I have no difficulty in holding that the averments read together are a pleading that, although the appellant is the registered owner of the suit land, he holds a part of it in trust for the respondent. As to the nature of trust, the trial judge held that it was an implied trust. What then is the law in this regard?
- [25] In *Warde v Slater* [2017] BCSC 274 the Supreme Court of British Columbia quoted a passage in Waters, Gillen and Smith: *Waters’ Law of Trusts in Canada*, 4th ed. 2012, on the different kinds of trusts:

The following passage from Waters at pp 394–395 is a useful comparison of the different kinds of trusts alleged. I include it because the parties’ submissions were less than clear in this regard:

The courts and the various legislatures of the common law world have sometimes used interchangeably the terms “implied trust”, “resulting trust” and “constructive trust”, and the terminology is therefore somewhat confusing. But essentially, while express trusts are those which come into existence because settlors have expressed their intention to that effect, constructive trusts arise not because of anyone’s expression of trust intent but because B ought to surrender property to A and this is the machinery the court employs in order to get B to do that. In between the express trust, a product of the settlor’s intention, and the constructive trust, a machinery imposed by law, are the implied trust and the resulting trust.

The term “implied trust” is commonly used for two situations. The first occurs where the intention to create a trust is not clearly expressed, but has to be discovered from indirect and ambiguous language. This is all that distinguishes such an implied trust from the express trust. A second common use is where one person has gratuitously transferred his property to another, or paid for property and had the property put into another’s name. The intention of the transferor or purchaser is implied to be that the transferee is to hold the property on trust for the transferor or purchaser. The implication arises out of the fact that Equity assumes bargains, not gifts, and requires the donee to prove that a gift was intended.

The term “resulting trust”, on the other hand, does not allude in any way to intention; it describes what happens to the property in question. It results or goes back to the person who, for reasons we shall examine, is entitled to call for the property. For example, because Equity does not assume gifts, the transferee holds title for the transferor or the one who provided the purchase money. In other words, in this “implied trust” situation the beneficial interest results, or goes back, to the transferor or purchaser ...”



[26] An implied trust therefore can either be a resulting or presumed trust or a constructive trust. Sometimes the lines between a resulting trust and constructive trust can be blurred and on occasion overlap. For example, in *Fulton v Gunn* [2008] BCSC 1159, the Supreme Court of British Columbia held;

“Since the transfer of money to purchase Merridale was from a mother to an adult child, there is presumption of a resulting trust. In my view, Abigail has not adduced sufficient evidence to rebut the presumption of resulting trust on a balance of probabilities. In deciding this issue, I must focus on the intentions of the parties at the time of transfer.

Notwithstanding the able submissions of counsel for Abigail, I am of the view that there is overwhelming evidence that at the time of the transfer of funds to purchase Merridale, Sally intended to be the beneficial owner of the property. I am also satisfied that in no way did Sally intend to advance the money for the purchases of the property as a gift.”

[27] On the same set of facts, the court construed a constructive trust;

“Since I find that the money sent to purchase and improve Merridale was not a loan, my findings that Sally is entitled to Merridale by operation of a resulting trust or, in the alternative, a constructive trust stand.”

[28] A common thread between a resulting trust or constructive trust is that they both serve the same objective; to defeat unjust enrichment and to return property to true owner. That said, it does seem to me that the genre of implied trust that was pleaded by the respondent was a resulting trust.

[29] Although the appellant has made a spirited appeal to us that by dint of sections 24, 25 and 30 of *Land Registration Act*, the appellant’s title to land was conclusive as to ownership and indefeasible, there are the provisions of section 28 (b) of that Act:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (b) trusts including customary trusts;”

[30] In addition, there is section 25 (2) of the statute;

“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.”

[31] Section 25 (2) is the carryover of section 28 of the repealed *Registered Land Act* just as section 28 (b) is the carryover of section 30(g) of the same repealed statute. I make this point because the title held by the appellant was registered in his favour under this past statute and given the similarity in the law, would not matter whether the law to be applied is under the provisions of the current statute or the past regime.

[32] Given my appreciation of the pleadings and my brief restatement of the law, this matter has to turn on whether the respondent led sufficient evidence of the existence of an implied trust. In determining this question, I am keenly aware that our courts have times without number held that a court will not easily



presume trust and will not therefore imply a trust save in order to give effect to the true intention of parties. For example, in *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR this Court held:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See *Ayoub vs. Standard Bank of S.A* [1963] E.A. 619 at pp 622, 623.”

[33] The reason for taking this slow approach is informed by the very nature of an implied trust. It is not expressly stated and the court must take a careful look at the evidence to discover the intention of the parties. The presence of an intention to create a trust must not be hazy. I now turn to the evidence and as I do so the statement of the appellant’s counsel that this appeal is not a challenge of the facts must not be forgotten.

[34] It is common ground that the respondent is in possession of the suit land and resides there. The testimony of the appellant is that he permitted the respondent to stay on the land in 1996 or 1997 after having completed payment of the purchase price in 1993. In his written statement, the appellant has stated;

“On 5th August 1994 I was issued with a title deed to the suit parcel. Upon taking possession, requested my younger brother, the Defendant to help me with taking care which I had bought on the suit parcel. He agreed to the arrangement which was of temporary duration as I had other plans of commencing development on the suit parcel.”

Later in the same statement,

I would further wish to state that my kind gesture of allowing him to occupy the suit parcel was to allow him temporary abode and that at no point in time during his stay on the suit parcel did I ever claim any form rent or monetary gain from him in regard to the suit parcel.”

[35] It was also his testimony that the respondent was only 19 years old when he bought the land and the respondent was employed or engaged in an economic activity. His further evidence was that he had fenced the land and built a farm house. The issue of construction of the house was corroborated by the evidence of PW2.

[36] The testimony of the respondent is that he used his brother to buy the land and contributed to its purchase. Although he stated that he is in possession of 3 acres, he explained that his land is 2 acres and that of the appellant was 1 acre. He reiterated this in answering a question from the trial court;

“The land is 3 acres. He bought one acre initially. I bought 2 acres through him.”

[37] It was also his testimony that he constructed on the land. As for the source of money to buy the land, his testimony was it was from farming and trading.

[38] DW2, Maria Mosbei, is the mother of the two disputants. Her evidence, in part, was:

“The land was bought by Mark but he was given money by Sosten. Sosten stays in the parcel of land. Mark has never stayed in the land. The house was done by Sosten.... Sosten sold maize and gave money to Mark.”

[39] It was her further testimony that,



The land I stay with Sosten was bought by the two of us. Sosten gave Mark money. I gave Sosten money...

We bought the land in dispute the three of us. Sosten gave Mark money. I also sold land.”

- [40] The appellant’s case was premised on registered ownership over the suit land and the respondent set up a defence of an implied trust. Having done so, the onus was on the respondent to prove the implied trust. In resolving this matter in favour of the respondent the learned judge placed a lot of premium on the demeanor of DW2, the mother to the parties herein. Of note in this regard is the following observation by the judge;

“In fact the demeanor of the plaintiff’s mother was of a lady who had tried to settle the family dispute but came to court because she wanted to say the truth.”

- [41] This assessment of the witness by the judge was not challenged in the grounds of appeal nor was it faulted by the appellant in the arguments before us. The trial court had the advantage of seeing the witness testify and the finding of the trial court on her demeanor has not been challenged. Further, nothing in her testimony is inconsistent with the trial court’s assessment that she was a truthful witness. I choose to grant deference to that assessment.

- [42] I am aware that there was no documentary evidence presented to support the respondent’s contention that he gave money to his elder brother. But it has to be remembered that these were two brothers and both the respondent and the mother of the two stated that they had trusted the appellant. I do not think it unlikely that no documents were kept in respect to the transaction.

- [43] The appellant’s own evidence is that he started demanding that the respondent moves out of the suit land in 1998. But I have to wonder why it took him until 2013, 15 years later, to bring a suit for eviction against the respondent. He offered no explanation for this inaction. Could there be some credibility in the respondent’s case?

- [44] That said, on the respondent’s own evidence, he bought only 2 acres of the 3 acre suit land. The purchase price for the remainder came from the appellant. There can be no justification for the respondent to retain more land than he purchased. I have also looked at the valuation report prepared at the behest of the appellant. I observe that the valuer notes the presence of two houses on the suit land. One is permanent and the other, semi-permanent. Both parties stated that they had each constructed houses on the suit land. None states that the other did not. It seems entirely plausible that one belongs to the appellant and the other to the respondent. This lends credence to the contention that both have a stake in the land, 1 acre to the appellant and 2 acres to the respondent.

- [45] I must say this in conclusion. As correctly observed by the trial court, the respondent did not mount a counterclaim and so the issue of the dissolution of trust could not be resolved. There is now an untidy, perhaps also an unhappy, outcome of this litigation. The respondent retains possession of 2 acres but without title over it and the appellant can only use and occupy 1 acre but holding title for the entire 3 acres. I would hope that a spirit of compassion will prevail upon these two brothers to work out an amicable solution to this impasse.

- [46] In the end I propose that the appeal be partly allowed. The respondent shall within 60 (sixty) days of this decision grant vacant possession of 1 acre in Nandi/Kokwet/688 to the appellant. The 1 acre shall be carved out from the portion of land on which the appellant’s house currently stands. Only to that extent does the appeal succeed. Just as the High Court, I would not condemn either of the parties to costs not just because this is a dispute between two brothers but also because there has only been part success.



JUDGMENT OF KIAGE, JA

1. I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.
2. As Mumbi Ngugi, JA concurs, the appeal shall be disposed of as Tuiyott, JA proposes.

JUDGMENT OF MUMBI NGUGI, JA

1. I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed.

DEPUTY REGISTRAR

