IN THE COURT OF APPEAL

AT NAKURU

[CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A]

CIVIL APPEAL NO. 63 OF 2017

BETWEEN

JOSEPH MOSONIK.....1ST APPELLANT

TAPLULE MOSONIK.....2ND APPELLANT

AND

KIPKEMOI MOSONIK.....RESPONDENT

(Being an appeal from the Ruling and of the Environment and Land

***Court at Kericho (Munyao Sila J.) dated 1st July 2016* in Civil Suit no. 34 of 2010)**

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JUDGMENT OF THE COURT

The appellants, **Joseph Mosonik** and **Taplule Mosonik** were dissatisfied with the judgment of the Environment and Land Court (**Munyao Sila, J.)** delivered on **1st July, 2016** hence the current appeal.

Briefly, the genesis of this appeal is a family dispute over land parcel No. **KERICHO/KAITIT/371** (also variously referred to as **KERICHO/KAITET/371**) (the suit land) measuring 8.69 hectares. The appellants alleged that they jointly purchased the suit land with the respondent, **Kipkemoi Mosonik** and the same was registered in the name of the respondent to hold in trust for the appellants (the 1st appellant and the respondent are brothers whilst the 2nd appellant is their mother), primarily because their mother, the 2nd appellant, did not have a National Identity Card. According to the 1st appellant, he together with the 2nd respondent, contributed Kshs. 1,500.00 and Kshs. 2,600.00 respectively to aid the purchase while the respondent contributed Kshs.1,900.00. The appellants further contended that on or about **29th of September 1995**, the respondent subdivided the suit land into three portions: **KERICHO/KAITIT/930, KERICHO/KAITIT/931 and KERICHO/ KAITIT/932** and proceeded to sell the various parcels without the appellants' consent. The matter was consequently referred to a panel of elders who resolved that the 21 acres of land, the subject of the dispute, be subdivided among the three parties. The respondent was to receive 12 acres, the 1st appellant 2 acres and the 2nd appellant, 7 acres. The respondent did not comply with this direction prompting the appellants to lodge a suit in the Environment and Land Court vide a plaint filed on **11th May 2010** seeking orders for "***subdivision of the parcel of land KERICHO/KAITIT/371, general damages and cost of the suit."***

In a statement of defence dated and filed on **31st March, 2011,** the respondent denied that the suit land had been jointly purchased by the parties.

He contended that he had purchased the suit land from Kaitet Ranching Farmers Co-operative Society Limited for Kshs. 6,000.00 and had been issued with receipts and a title deed. He maintained that the appellants who were also members of the society, had been allocated land parcel number **KERICHO/KAITET/421** and **KERICHO/KAITET/473** respectively and stated that the suit land had ceased to exist as he had subdivided it into three parcels and sold one parcel, being **KERICHO/ KAITET/932** to one **Paul Kipkorir Rotich.**

The matter was partly heard by **Waithaka, J** and in a judgment rendered on 1st **July, 2016, Sila Munyao, J**. dismissed the appellants' suit with costs and held that the appellants' case as pleaded was fundamentally flawed given that the main prayer sought was for subdivision of the suit land which had ceased to exist as it was subdivided on **29th September 1995** and that the appellants had not tabled clear evidence of the alleged trust.

Aggrieved by this decision, the appellants filed a Memorandum of Appeal before this court listing 6 grounds of appeal which in our view, are inelegantly drawn. These were that:

> "*1.* The ***learned Judge erred in law in holding that the sub-ordinate court had jurisdiction to entertain the suit placed before it while it is well settled in law that the court lacked the requisite jurisdiction.***
>
> ***2. That the learned Judge erred in law.***
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> ***3. The learned Judge erred in law in not addressing and/or confining himself to the issues placed before him thereby arriving at a totally erroneous decision.***
>
> ***4. The learned Judge did not apply the principle of law applicable in deciding the matter/issue before him thereby arriving at wrong findings.***
>
> ***5. The learned trial magistrate erred in law in treating the appeal before her as an appeal against a judgment and thereby writing a judgment on the appeal whereas the appeal was against a ruling and she ought to have written a ruling.***
>
> ***6. The learned trial magistrate erred in presuming that the cause in the subordinate court had been conclusively determined whereas it had not".***

When the matter came up before us for virtual hearing on **8th June, 2020,** learned counsel **Mr. Mutai** appeared for the appellants whilst learned counsel **Mr. Serem** appeared for the respondent. **Mr. Mutai** informed us that as counsel for the respective parties, they had agreed to proceed by way of written submissions without the necessity of highlighting them.

The appellant abandoned grounds 1, 5 and 6 and in submitting on ground 2 and 3 jointly, contended that the learned Judge failed to take into consideration the evidence of PW3 who was a former committee member of Kaitet Ranching Farmers' Co-operative Society Limited and had full knowledge of the purchase of the suit land and who was also one of the village elders who decided the land dispute between the parties in favour of the appellants.

On ground 4, the appellant relied on the Supreme Court case of ***Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR*** in contending that since the 2nd appellant was in actual possession of 7 acres of land since its acquisition, it was evident that there existed a customary trust between the parties.

As this is a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions in the matter. This position was aptly stated in ***Selle -vs- Associated Motor Boat Co., [1968] EA 123****:*

> ***"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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)"***

In our view, the issue before us is whether we should interfere with the learned Judge's findings that there was no evidence of a trust in favour of the appellants in the purchase of the suit land.

As has been stated in various decisions of this Court "***The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties.***

The intention of the parties to create a trust must be clearly determined before a trust will be implied." (See ***Charles K. Kandie v Mary Kimoi Sang [2017] eKLR,*** *and* ***Gichuki vs. Gichuki (1982) KLR 285*** as well as ***Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171****.)*

From the outset it is clear from the appellants' pleadings that their claim was based on a resulting trust given that their allegation that they contributed Kshs. 1500.00 and Kshs. 2600.00 respectively to buy the suit land for Kshs. 6,000.00 and the respondent was registered as the proprietor in trust for them.

The law is clear under **section 107** of the **Evidence Act** that the burden of proof rests on the party who desires the court to give judgment in his/her favour. The success of the appellants' claim was therefore dependent on the evidence presented as proof in support of the legal rights claimed over the suit land.

We have on our part reviewed and assessed the evidence placed before the trial judge. First, there was no cogent evidence adduced by the appellants to prove the existence of a resulting trust. The appellants did not prove any transfer of money to the respondent or the reason why the 2nd appellant did not have an identity card necessitating the alleged trust even though she had land registered in her name being **KERICHO/KAITET/473**. The appellants' reliance on the Supreme Court case of ***Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & another [2018] eKLR***, that a customary trust existed given that the 2nd appellant was in actual possession of 7 acres of land since it's

acquisition also cannot hold given that there is also no proof that the suit land is customary land or that the intention of the parties was that the respondent holds the suit land for the benefit of other members of the family.

We therefore agree with the learned Judge's finding that:

> ***"When a party alleges a trust clear evidence of the same must be tabled. It will require special circumstances for a court to hold that there is a trust on the mere oral allegation that one exists, without there being additional documentary or other surrounding evidence, for example, in the manner in which the parties live, or other explanation or additional facts, to demonstrate that the alleged trust actually exists. If this is not the case, then any person can claim that another holds land in trust for him or her, and by that sole allegation, without additional supporting evidence, a trust would be held to exist, which to me is a fairly dangerous approach, unless indeed it is clear that special circumstances exist which bring one to no other conclusion other than a trust does actually exist. I have not seen any special circumstances in this case…From my above discourse, I do not see any merit in the plaintiffs' case"***

Lastly, the appellants faulted the trial Court's finding that the appellants' case as pleaded is fundamentally flawed. The evidence submitted by the respondent indicates that the suit land had ceased to exist prior to the filing of the suit before the Environment and Land Court in 2010 and it had been subdivided into three parcels, one parcel, being **KERICHO/ KAITET/932** which was sold to **Paul Kipkorir Rotich**. Firstly, a Court cannot act in vain by ordering subdivision against a non-existent title in the terms proposed by the appellants.

In addition, the registered owner of the subsequent subdivision specifically **KERICHO/ KAITET/932** was not a party to the proceedings in the Environment and Land Court and a cancellation/alteration of his title in favour of the appellants would be in breach of the principles of natural justice.

In the end, we find no merit in the appeal and order that it be and is hereby dismissed with costs to the respondent

Dated and Delivered at Nairobi this 20th day of November, 2020.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR