IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 4 OF 2016

BETWEEN

BURHAN ALI MANSUR.....APPELLANT

AND

MUMIN MAHMOUD MWANZI.....1ST RESPONDENT

HASHIM MAHMOUD MWANZI .....2ND RESPONDENT

ADNAN MAHMOUD.....3RD RESPONDENT

MUSA MAHMOUD.....4TH RESPONDENT

ASIA MAHMOUD.....5TH RESPONDENT

ASHA MAHMOUD.....6TH RESPONDENT

SAID WANJIRU MAHMOUS ALIAS

ZAIDA MAHMOUD MWANZI.....7TH RESPONDENT

HUSSEIN MAHMOUD.....8TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Nyeri (L.N Waithaka, J), dated 20th April, 2015

in

ELC No. 67 of 2015

(Consolidated with Nyeri HCCC No. 23 of 2012))

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JUDGMENT OF THE COURT

The parties herein who are cousins and are third generation occupants of some ancestral land in Nyeri that is subject to this appeal. The said ancestral land which was known as LR No. AGUTHI/GATITU/38 (original land) was purchased by one Sheikh Mwanzi (Sheikh) from one Ndirangu Wang'ombe (Ndirangu). Sheikh was an Imam who migrated to Kenya to teach Islam. He together with his wife, Zainabu Mwanzi (Zainabu) and their 3 children, namely; Asha Binti Mwanzi (Asha), Fatuma Binti Mwanzi (Fatuma) and Mahmoud Sheikh Mwanzi (Mahmoud) settled on the original land.

The appellant is the only son of Fatuma, who is deceased and the respondents are the children of Mahmoud, who is also deceased.

According to the 1st respondent, the original land was registered by Sheikh in the name of Fatuma as he was an immigrant and as such could

not be registered as a land owner. The said registration in favour of Fatuma was for her benefit and that of her siblings, being Mahmoud and Asha. Prior to his death, Sheikh distributed the original land to his children in accordance to Islamic law. 2/3 of it was bequeathed to Mahmoud while the remaining 1/3 was bequeathed to Asha and Fatuma to be shared equally. Sheikh gave his children physical possession of their respective shares.

In 1990, Mahmoud, Fatuma and Asha, caused the original land to be subdivided as per the wishes of Sheikh and; LR. No. AGUTHI/GATITU/2438 for Mahmoud. The sisters' 1/3 was subdivided into 6 equal portions with each taking 3: LR. No. AGUTHI/GATITU/2439-2441 for Fatuma and LR. No. AGUTHI/GATITU/2442-2444 for Asha who physically subdivided it for the benefit of her children. All the subdivisions remained registered in the name of Fatuma, she had already relocated to Mombasa, and she sold her share of inheritance thus fully benefiting from the original land.

Thus it was that the rest of the properties namely LR. No. AGUTHI/GATITU/2438, 2442, 2443, 2444 (suit properties) were still in the name of Fatuma at the time of her death in 1993 but the respondents always had exclusive possession and use of the suit properties and made substantial developments thereon over the years. Fatuma never once challenged, disputed or interfered with their possession.

Now, the appellant, who had never resided on the suit properties as he lived with his mother, Fatuma in Mombasa, where she died and was buried, obtained confirmation of grant over her estate in 2010. He then caused himself to be registered as the proprietor of the suit properties, and this in deliberate defiance of an award of the Land Dispute Tribunal in Nyeri given on 12th September 2005 that ordered him to give back the suit properties to the claimants. The Tribunal made the award after finding that the appellant held the suit properties in trust for the intended beneficiaries. The claimants therein were Zainabu and Saida, a daughter to Asha who had made the claim on their own behalf and for the rest of the beneficiaries.

That rather lengthy background is the historical context to the Originating Summons (application) dated 31st December 2012, wherein the 1st and 2nd respondents herein applied to the High Court for the following orders;

> *a) THAT it be declared that the respondent holds parcels of land L.R. NO's AGUTHI/GATITU/2438, 2442, 2443 and 2444 in trust for the benefit of the family of MAHMOUD SHEIKH MWANZI (dcd) in respect of L.R. NO. AGUTHI/GATITU/2438 and for the benefit of the family of ASHA BINTI MWANZI (dcd) in respect of L.R. NO'S AGUTHI/GATITU/2442, 2443 and 2444.*
>
> *b) THAT the trust so declared be determined by cancellation of the respondent as the proprietor of the suit properties and in place thereof the same be registered in the names of the identified beneficiaries thereof respectively as per paragraph 19 of the supporting affidavit herein.*

The applicants stated that they, together with the other intended beneficiaries had been deprived of their inheritance by the appellant. They maintained that he had no beneficial interest in the suit properties since his mother sold her share of inheritance. He therefore held the said suit properties in trust for the children of Mahmoud and Asha.

In response to the application, the appellant filed a Replying Affidavit dated 27th February 2012. He denied holding the suit properties in trust for the family of Mahmoud and Asha. He deposed that the suit properties were purchased by Fatuma and since the property was a first registration the same was indefeasible, save as provided for by the law. He acquired ownership of the same by transmission via **Nairobi High Court Succession Cause No. 21 of 1994**. He claimed that Mahmoud unsuccessfully tried to revoke that grant and for that reason he validly acquired ownership.

The Originating Summons was consolidated with **Nyeri High Court Civil Case No. 23 of 2012** which was filed by the appellant. Therein he prayed for an order of eviction of the respondents, their agents and or servants from the suit properties. This was on the premise that the suit properties had devolved to him as the only child and the sole beneficiary of Fatuma's estate vide the High Court Succession Cause. The appellant claimed that the respondents trespassed into the suit properties following Fatuma's death and had resisted his efforts to evictthem. He therefore needed the Court's intervention to enable him grant vacant possession to one Antony Maina Ng'ang'a (the second plaintiff therein), who had purchased the suit properties.

The respondents filed a defence and a counterclaim which rehashed the averments in their Originating Summons application and we shall not restate them.

The learned **L.N Waithaka, J** considered the submissions and evidence presented before the court. She allowed the Originating Summons and, holding that the appellant's suit was unmeritorious, she dismissed it.

Aggrieved by that judgment, the appellant filed the instant appeal containing 24 grounds, a multitude by any standards; which, abridged, are that the learned judge erred by;

> a) Finding that Fatuma created a customary trust in favour of Mahmoud and Asha over the suit properties and by extension the appellant held the same in trust for the respondents.
>
> b) Failing to find that the appellant had been declared the sole beneficiary of the suit property via the High Court Succession Cause.
>
> c) Failing to find that since Mahmoud failed in his bid to revoke the grant and an appeal on the same was never made, he remained the legitimate owner of the suit properties.
>
> d) Purporting to sit on appeal of the said High Court Succession Cause by making conflicting orders.

e) Relying on the finding of the Land Disputes Tribunal in Nyeri yet the same had no jurisdiction to hear and determine the issues that were before it.

f) Finding that the respondents have been in possession and occupation of the suit properties for a prolonged period while no evidence was adduced in support of the same.

During the hearing of the appeal, **Mr Ngugi** appeared for the appellant, while there was no appearance for the respondents, although the firm of **C.M King'ori & Co. Advocates** are on record, and were served with a hearing notice on 3rd July 2020. Both parties had filed written submissions. Which are inordinately long, an outstanding 28 and 18 pages, respectively. There is no reason for such lengthy submissions. Nothing is gained by a multiplicity of words. We decry such verbosity.

The appellant's Counsel faulted the learned judge for not following the adage precedent that a court may presume and imply a trust only when it is absolutely necessary and if proven by evidence. He contended that the respondents failed to prove: that indeed Sheikh purchased the suit properties; that Fatuma was registered as the owner in order to hold the land in trust for herself, Mahmoud and Asha; and that they had resided on the original land since it was purchased. Counsel claimed that because most of the evidence adduced in support of these assertions was not cogent, the learned judge ought not to have attached any weight to it.

Counsel submitted that the learned judge further erred by finding that there existed a customary trust yet the parties herein are Muslims hence governed by Islamic Law. Additionally, since the respondents did not bring the claim of trust before the Probate Court, then the appellant still remains the sole beneficiary of the suit properties. In the same vein, the learned judge also erred by holding that the grant merely made the appellant an administrator of Fatuma's estate whilst failing to appreciate that it also confirmed him as the sole beneficiary. Finally, the application by the respondents was inordinately delayed and the learned judge ought to have considered that aspect. In the end, we were urged to allow this appeal.

The respondents' Counsel submitted that there was cogent and clear evidence to support the finding of the High Court, as follows: PW3's testimony to the effect that Sheikh bought land from his father, Ndirangu; the appellant's letter dated 7/6/93 where he acknowledged the original land was acquired by Sheikh; the letter from Fatuma dated 13/4/90 is further evidence of the existence of trust; and the letters dated 20/4/90 and 8/5/90 all contain statements corroborating the existence of a trust.

He further argued that Mahmoud and Zainabu were buried on the suit properties and Fatuma permitted intergenerational occupation favouring the respondents as a matter of course and she never objected to it. The appellant's assertion that he ought to have been sued in his personal capacity as a trustee has no basis in law. The concept of Muslim customary trust exists as there are specific laws on how to distribute properties as was adduced in the suit. The laws are not specific to any tribe but apply to those who ascribe to the religion.

Also, the conferment of the appellant as the administrator of Fatuma's estate did not nullify the pre-existing trust. Therefore, the orders given by the learned Judge did not conflict with the process in the High Court Succession Cause. Since there is no time limitation on actions in respect of determination of a trust, the issue of inordinate delay does not arise. The learned judge's reliance on the finding of the Land Disputes Tribunal was in tandem with **Section 34** and **Section 44 (1) (d**) of the **Evidence Act**. As a final point, we were urged to dismiss the appeal.

We have considered the record of appeal and concluded that the twin issues for determination are whether or not the appellant, by reason of being Fatuma's son held the suit properties in trust for the respondents and whether the High Court Succession Cause conferred to him beneficial ownership of the suit properties. We are well aware of our role as a first appellate court, which is to reconsider the evidence, re-evaluate it and come to an independent conclusion bearing in mind that the trial judge had the advantage of seeing and hearing the witnesses. This was well elucidated in **SELLE -VS- ASSOCIATED MOTOR BOAT CO [1968] EA 123** & **MOGONCHI V MOGONCHI [2004] eKLR**.

The **Black's Law Dictionary**, **9th Edition** defines a trust as;

> ***"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."***

In arriving at the conclusion that the appellant held a customary trust over the suit properties for the benefit of the respondents, the learned Judge stated in part;

> ***"It is, therefore clear from the foregoing, that the respondent's mother held the suit properties for herself and her siblings. After she obtained her share of the suit properties, she left for Mombasa without coming back. Consequently, her registration as owner of the suit properties and that of the respondent after administration of the estate, is subject to the overriding interest contemplated in Section 28 as read with Section 30(g) of the Registered Land Act…"***

Before a court can affirm the existence of a customary trust, it must be satisfied of the existence of certain elements. The said elements were stated by the Supreme Court in **ISACK M'INANGA KIEBIA V ISAAYA THEURI M'LINTARI & ANOTHER [2018] eKLR** as whether;

> ***"1.The land in question was before registration, family, clan or group land***
>
> ***2.The claimant belongs to such family, clan, or group***

3.The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

4.The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5.The claim is directed against the registered proprietor who is a member of the family, clan or group."

It is undisputed that the parties belong to the same family, being that their parents were siblings, which fact satisfies the second, third and fifth element. Consequently, the rest of the elements can be satisfied once we establish whether the original land that resulted in the subdivisions comprising the suit properties belonged to the family of Mahmoud, Fatuma and Asha or whether it belonged to Fatuma solely.

The 2nd respondent who testified as PW1 explained that since Sheikh was not a Kenyan national, Fatuma was the only one available to be registered since Mahmoud was younger and Asha their older sister was residing in Tanzanian at the time. Additionally, the 1st respondent who testified as PW2, stated that he sourced a buyer for Fatuma's share of the original land and witnessed the sale of the same. He further testified that Fatuma handed over the original titles to Mahmoud, and, that Mahomoud and Zainabu were both buried on the suit properties.

The pivotal testimony of PW3, Ibrahim Ndirangu, confirmed that his father sold the original land to Sheikh. He further confirmed that Sheikh and his family took immediate possession of the land and constructed houses thereon. He affirmed that he assisted in constructing of more buildings thereon at the behest of Mahmoud.

The appellant, who testified as DW1, did not controvert the foregoing testimonies. He essentially stated that he did not know from whom Fatuma bought the original land from; he affirmed that Mahomoud and Zainabu were buried there and he did not raise anyobjection over the same, and that he did not have evidence to challenge or contradict the assertion that Sheikh bought the original land from Ndirangu.

From the record, it is clear that the appellant did not produce an iota of evidence to controvert the evidence of trust that was adduced in court. The appellant made allegations but failed to satisfy the principle that he who alleges must prove, and the dictates of **Section 109** of the **Evidence Act**. The allegation that Fatuma purchased the original land was foiled by the contents of the letter dated 13th April 1990 from Fatuma to Zainabu which the learned Judge referred to in her judgment. In the letter that was written in Kiswahili, Fatuma indicated her desire to sell her portion of the original land for Kshs. 200,000 and to transfer the remaining portion to Mahmoud or his children. She also cautioned them against procuring a loan against the original property because in the event of default, they may not have a place to live.

The letter clearly indicated that Fatuma was entitled to only a portion of the original land, which she wanted to sell. It also expressed her willingness to transfer the remaining property to Mahmoud or his children, a clear confirmation that indeed Fatuma was holding the property in trust for her siblings, debunking the appellant's theory that she bought and held it for herself.

On a balance of probabilities, we find that the respondents proved their case that Sheikh bought the original land and out of convenience registered it in the name of Fatuma to hold in trust for Mahmoud and Asha. The respondents have been residing on suit properties since the same was purchased and have made considerable developments thereon. Therefore, Fatuma created a trust for the benefit of Mahmoud and Asha. It follows that, the learned Judge did not err by holding as such. We uphold her.

Although Fatuma's was a first registration, the same is not indefeasible as regards pre-existing rights. The Supreme Court shed much needed light on this issue that had caused quite a jurisdictional storm in our courts in times past, in **ISACK M'INANGA KIEBIA V ISAAYA THEURI M'LINTARI & ANOTHER (Supra)** thus;

"…In this regard, there would have been no difficulty in construing a "customary trust" under the proviso to Section 28 of the Act. Surely, before a first registration, what other trust, if not "a customary one", could have subsisted over land held under African customary law as to bind a registered proprietor"

This explodes the notion that since Fatuma's registration was a first registration it automatically and invariably made the appellant's right as a beneficiary indefeasible. The High Court Succession Cause made the appellant an administrator over the estate of Fatuma but that did not extinguish the trust created prior to the first registration. Therefore, the appellant did not acquire ownership over the disputed properties.

The appellant also raised the issue of time limitation and faulted the learned Judge for not considering the same. We think, with respect, that the said ground has no legs to stand on in light of the holding by this Court in **ESTHER NYAMWERU WARUHIU & ANOTHER V GEORGE KANG'ETHE WARUHIU [2019] eKLR**;

"The above finding notwithstanding, we also wish to add that in light of the case law assessed above, on the effect of the statute of limitation on customary law trusts, even if such a period of limitation had been pleaded and considered by the Judge as she did, the finding would not have survived on appeal for the reason that time of limitation does not run against a customary law trust claim, whether such a trust is noted on the register or not."

Finally, the appellant complained that there could not have existed a customary trust since all the parties subscribe to the Islamic faith. We find no substance in this argument since the principle of trust is an equitable remedy that applies to all regardless of their faith. Moreover, the learned judge was clear that it was a customary trust based on the Islamic Customary Laws.

The upshot is that we find no reason to disturb the judgment of the learned judge. This appeal is unmeritorious and the same is dismissed in its entirety.

As this is a family dispute, we order that each party bears its own costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

HANNAH OKWENGU

…….……

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR