



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J.MOHAMMED, J.J.A)

CIVIL APPEAL NO 7 OF 2017

BETWEEN

TITUS KUTO KIPUNGAR.....APPELLANT

AND

SELINA TAMINING 1ST RESPONDENT

PIUS ROTICH2ND RESPONDENT

MUSA KOSKEI.....3RD RESPONDENT

JAMES KIPYEGO.....4TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court (Obaga, J.) dated 7th November 2016 in Environment and Land Case No 181 of 2013)

JUDGMENT OF THE COURT

Background

1. The appellant, **Titus Kuto Kipungar (Titus)**, was the plaintiff before the Environment and Land Court (ELC) wherein he sought for an order of eviction of **Selina Tamining (Selina)**, the 1st respondent, **Pius Rotich (Pius)** the 2nd respondent, **Musa Koskei (Musa)**, the 3rd respondent and **James Kipyego (James)** the 4th respondent (collectively referred to as respondents) from a portion of the property known as **LR No West Pokot/Siyoi/263** (the suit property). In his amended plaint filed on 20th January, 2015, the appellant described himself as the administrator of the estate of his father, the late **Kipungar Chepkat Kipsoen** who was also known as **Sangara Chepkati (Sangara)** and the registered proprietor of the suit property. He claimed that in April 2010, the respondents entered onto a half acre portion of the suit property without any colour of right, constructed houses on it, and refused to move out of the suit property despite being asked to do so. He urged the court to grant an order of eviction against the respondents as well as costs of the suit.

2. **Selina** was the wife of **Samuel Kukwai Lopor (Kukwai)** who was a brother to **Sangara**. **Pius, Musa** and **James** are the children of **Selina** and **Kukwai**. The respondents filed a joint defence and counter claim on 11th February, 2014. In their defence, they denied encroaching onto a portion of the suit property, and claimed that they were residing on it rightfully. They claimed that **Kukwai** was allocated the suit property by the Government in 1962 and he invited his brother, **Sangara**, to live with him on the suit property. **Selina** stated that she had been living with her husband, **Kukwai** on the suit property since 1962 and had never moved out. The respondents further claimed that the appellant fraudulently registered the property in his name, yet **Kukwai** had agreed to share the property equally with his brother, **Sangara**. The respondents therefore counterclaimed against the appellant for an order that the appellant holds the suit property in trust for them, and that they have a right to reside and utilize the suit property.

3. In his judgment, the learned judge (Obaga, J) found that the suit was misconceived and that the appellant could not seek to evict the respondents who had been on the suit property for a period of 56 years. The learned judge further found that the respondents had adduced credible evidence imputing the existence of a trust and ordered that the trust by the appellant be terminated, that the title held by him be cancelled, and titles be issued in favour of the appellant and the respondents in equal shares.

4. The appellant was aggrieved with this order, and filed this appeal in which he impugns the entire judgment of the trial court. In his memorandum of appeal, he raises grounds of appeal, *inter alia*, that, the trial court erred in finding that a trust existed; in entertaining the counterclaim despite the fact that none of the respondents had taken out letters of administration for the estate of the late **Kukwai**;

entertaining allegations of fraud outside the period prescribed by the Limitation of Actions Act; failing to find that the appellant had properly acquired title to the suit property by transmission; relying on evidence that had been produced by witnesses who were not competent to produce the same; and in ordering that the suit property be shared in equal portions between the appellant and the respondents. For these reasons, the appellant contended that the trial court arrived at the wrong decision in its judgment, and urged us to set aside the judgment and decree of the trial court and grant orders of eviction and demolition of houses and any other structures that the respondents have erected on the suit property. The appellant also prayed for costs.

Submissions by Counsel

5. At the hearing of the appeal, the appellant was represented by learned counsel, **Mr. Nyamu** while the respondents were represented by learned counsel, **Ms. Arunga**. Both counsel relied on their written submissions. The appellant submitted that there was no evidence to show that the 1st respondent had been in occupation of the suit property since 1962. Referring to the letter written by **Kukwai**, dated 7th September, 1970 to the District Magistrate's Court at Kitale the appellant submitted that the said letter did not make reference to the suit property and as such, the trial court erred in relying on it to find that the respondents had been in occupation of the property.

6. It was the appellant's further submission that none of the respondents had taken out letters of administration for the estate of **Kukwai** with respect to the suit property, and therefore ought not to have been entertained. In the appellant's view, the counterclaim by the respondents was founded on the fact that the suit property initially belonged to **Kukwai** who had died by the time the suit was filed; and that the respondents responded to the suit as if they were legal representatives of the estate of **Kukwai** while they were in fact not legally entitled to do so. For these reasons, the appellant submitted that the trial court erred in entertaining the defence and the counterclaim.

7. The appellant found fault with the trial court's finding that the appellant was holding the suit property in trust for the respondents, and for imputing fraud on the part of the appellant. He contended that the particulars of trust or fraud were not pleaded and proved by the respondents. Further, that there was no evidence that the suit property was ever allocated to **Kukwai** by the Government, and as such, the trial court ought not to have imputed a trust in favour of the respondents.

8. The respondents also relied on their written submissions in which they claimed that the trial court did not err in finding in their favour; that the evidence on record established that **Kukwai** had lived on the suit property together with his family from the 1960s and that the respondents were therefore not intruders to the suit property. It was the respondents' further submission that even if the appellant had been registered as proprietor of the suit property, he held it in trust for them and based on this, the trial court reached the correct conclusion. Counsel urged us to dismiss the appeal with costs.

Determination

9. We have carefully considered the pleadings, the rival submissions of the parties, the authorities cited and the law. In this first appeal, our duty is to re-evaluate, re-assesses and re-analyze the evidence given in the court below and reach our own conclusion on the issues raised. This duty was restated by this Court in ***Eva Naima Kaaka & Another v Tabitha Waithera Mararo [2018] eKLR (Civil Appeal 132 of 2017)*** as follows:

“This being a first appeal, the duty of this Court is to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that an appellate court would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion.”

10. The appellant testified that the respondents invaded the suit property in the year 2010. He claimed that he was registered as the owner of the suit property, having been so registered by transmission after the grant of letters of administration in respect of his father's estate was confirmed. He also produced in evidence the green card to the suit property which indicated that the suit property was registered in his favour in 2005.

11. In cross-examination, the appellant conceded that **Kukwai** had been living on the suit property before the time the appellant was born in 1978, and that while he (the appellant) was growing up, **Kukwai** had been living on the suit property with his family. The appellant also conceded that during his father's lifetime, his father never sought to evict his brother **Kukwai**, and that it was he (the appellant) who first sought to evict **Kukwai** from the suit property after **Sangara's** death. The appellant also called **Ben Wanyama Situma (Situma)**, a surveyor as a witness who produced a survey report which indicated that the respondents occupied 1.87 acres of the suit property.

12. The respondents called the 2nd respondent as a witness to testify in support of the respondents' claim. The 2nd respondent testified that he was born in 1970, and that he had been on the suit property his entire life. He also claimed that the suit property was rightfully his fathers and that his father had filed suit in Kitale RMC Land Case No 8 of 1968 against two neighbours who had encroached on the suit property. Further, that when **Kukwai** discovered that the suit property had been registered in the name of the appellant's father, **Sangara**, he placed a caution on the property, and filed Kitale HCCC No 131 of 2005 against the sons of **Sangara** but died before the suit was determined.

13. **Selina** also gave evidence in which she stated that she and her husband, **Kukwai** moved into the suit property in 1962; that she cleared and begun cultivating the suit property; and that she and her husband established their home on the suit property.

14. From the evidence that was led by the parties, it is apparent that the 2nd, 3rd and 4th respondents have been living on the suit property their entire lives. The evidence of Selina, in particular was not controverted by the appellant, and we find that the trial court did not err when it found that the 1st respondent and her husband moved into the suit property in 1962. The trial court observed as follows:

“It is clear that the plaintiff was not being honest when he claimed that the defendants invaded the suit land in the

year 2010. The plaintiff did not want to mention the fact that he is related to the defendants. The truth came out during cross-examination when he conceded that the defendants were on the suit land before he was born in 1978. It even turned out that he and two others had been sued by the husband of the first defendant in the year 2005. He was therefore lying on oath when he claimed that the land was invaded in 2010. I therefore find that the defendants did not invade the suit land in 2010 as the plaintiff had claimed.”

15. The learned judge found the evidence by the appellant wanting, and rejected the assertions made by the appellant that the respondents only occupied the suit land in 2010 when they invaded the land. We are in agreement with the finding of the learned judge as the evidence showed that the respondents occupied the suit land long before 2010.

16. We now turn to consider if the appellant was holding the suit property in trust for the respondents. It is not contested that the appellant was registered as proprietor of the land following a transmission in a succession cause in respect of his father’s estate. ***Black’s Law Dictionary, 10th Edition*** defines a trust as:

“A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another’s benefit; the confidence placed in a trustee; together with the trustee’s obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it.”

17. It is trite law that a court will not ordinarily presume the existence of a trust, but may do so to give effect to the intention of the parties, otherwise the party alleging the existence of a trust must prove it. In ***Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR (Civil Appeal No. 2 of 2000)***, this Court held that:

“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.” (Emphasis supplied)

18. The evidence led by the parties herein indicates that it was the intention of **Kukwai** and **Sangara** to share the suit property. We can see no other reason why, as the appellant himself conceded, his father never evicted **Kukwai** from the suit property. It is also clear to us that **Kukwai** had engaged in various dealings with a view to securing his interest in the suit property. This included filing suit both in Kapenguria and in Kitale to secure his interest in the suit property and registering a caution when he discovered that **Sangara** had registered the suit property in his name.

19. Applying the aforementioned principles to the instant appeal, we find that **Kukwai** intended to share the suit property with **Sangara**. The fact that the suit property is registered in the appellants’ name is immaterial and does not vitiate the respondents’ right to the suit property as the appellant remains a constructive trustee in regard to the suit property. It is on record that **Selina** has been in possession of a portion of the suit property since 1962. In the circumstances of this case, the respondents would suffer injustice if they are evicted from the suit property or their homes and other structures erected thereon are demolished. The doctrine of constructive trust therefore comes into play to ensure that the respondents herein, as the rightful owners retain a portion of the suit property that **Selina** has been occupying since 1962.

20. On the appellant’s contention that the counterclaim ought not to have been entertained as none of the respondents were legal representatives of the deceased **Kukwai**, we do not agree. The respondents were sued in their personal capacities, and in their joint defence and counterclaim, they responded that the suit property had previously belonged to their father **Kukwai**, and further that they had lived thereon, all their lives. They were, therefore claiming that the appellant held the suit property in trust for them. In any case by Article 159 (2) (d) of the Constitution, the Court would be guided by the principle that justice should be administered without undue regard to procedural technicalities.

21. From the record, the learned judge appreciated the pleadings and considered the evidence on record in support of both parties. We find that the learned judge correctly applied the applicable principles of law to the said evidence and arrived at the correct conclusion.

22. In the result, this appeal is without merit and it is dismissed with costs to the respondents.

Dated and Delivered at Eldoret this 25th day of July, 2019

E. M. GITHINJI

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.