



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 2 OF 2016

BETWEEN

FESTO OYENGO OBONYO.....APPELLANT

AND

MIRIAM NAMUTIBWA OKETCH

ALIAS MIRIAM NEKESA.....1ST RESPONDENT

MICAH NAMAYI.....2ND RESPONDENT

OWITI AMAKOBE OKANGA.....3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe, J) on 29th October 2015

in

Environment and Land Case No. 49 of 2012)

JUDGMENT OF J. MOHAMMED, JA

BACKGROUND

1. By way of a plaint dated 21st December 2012, **Festo Oyengo Obonyo**, the appellant herein, sued **Miriam Namutibwa Oketch** also known as **Miriam Nekesa** (the 1st respondent), **Micah Namayi** (the 2nd respondent) and **Owiti Amakobe Okanga** (the 3rd respondent) in the High Court at Kakamega. In that suit, he claimed ownership of the parcel of land known as **KISA/EMASATSI/1202** (the suit property) measuring approximately 3.19 Ha).

2. In the said plaint, the appellant stated that despite his ownership of the suit property, the respondents entered onto the suit property in the year 2010 and fenced it and begun demarcating it with the intention of dividing it into three equal portions; and that the actions by the respondents were unlawful and an affront to his rights of proprietorship of his land. He therefore sought orders of eviction and permanent injunction against the respondents restraining them, either by themselves, their servants or agents from entering, residing, tilling or in any manner interfering with his interest in the suit property.

3. The 1st respondent is the widow of the appellant's twin brother, **Titus Oketch Obonyo (Titus)** who died on 5th May, 1996. The 2nd respondent was the area chief who the appellant claimed went into the suit property and divided it while 3rd respondent was the appellant's neighbor and was present when the appellant claims that the 2nd respondent divided the suit property.

4. The 1st respondent filed a statement of defence and counter-claim dated 22nd November, 2013 in which she denied encroaching on the suit property. She claimed that she had resided on a half portion of the suit property since her marriage to the appellant's twin brother, **Titus** in 1988; that her husband, **Titus**, died on 5th May, 1996; that the suit property was initially registered in the name of her father in law, **Walter Obonyo Eshikuta (the deceased)** who died in 2009, but the appellant fraudulently transferred the property into his name without the consent

of the 1st respondent or without obtaining letters of administration in respect of the estate of the deceased as required by law; that she had been enjoying possession of a half portion of the suit property from the time she got married to Titus until December 2012 when the appellant asked her to vacate the suit property.

5. The 1st respondent further contended that her half share of the suit property was safeguarded by the fact that the deceased gave the suit property to his two sons: the appellant and Titus, her deceased husband; and that the appellant's act of transferring the suit property to himself and denying her usage of the half share of the suit property that she occupied amounted to a breach of trust.

6. The 1st respondent counter claimed against the appellant *inter alia* for a declaration that the appellant held her portion of the suit property in trust for her and her children; and an order compelling the appellant to subdivide and register her half share of the suit property in her name. The 1st respondent further stated that even if the suit property was registered in the appellant's name, he was holding the same in trust for the 1st respondent and her children; that the property had belonged to the deceased who divided the suit property between the appellant and the 1st respondent's husband, Titus and the appellant was therefore registered as proprietor of the property on behalf of, and for the benefit of the 1st respondent and her children. For this reason, the 1st respondent contended that the appellant had no right to enter into any transaction regarding the land without reference to her.

7. The 3rd respondent also filed a defence dated 13th March, 2014 in which he denied all of the appellant's assertions that he had encroached, tilled, demarcated or occupied the suit property. He stated that he had land of his own elsewhere and had no reason to encroach on any other property. For this reason, he urged the court to dismiss the claim against him with costs.

8. Each of the parties led evidence in support of their claims. The appellant testified on his own behalf as follows: that the suit property was originally a portion of plot number 676 that belonged to his deceased father; that plot number 676 was subdivided into two portions: the suit property (plot number 1202) and plot number 1203; and that the deceased gave the suit property to the appellant, and he obtained title documents. The appellant denied that the 1st respondent was given any portion of the suit property, and that she had ever lived there or been given any property by the deceased; that after the deceased died in 2009, the 1st respondent took possession of the suit property and began to live in the house which his deceased brother, Titus, had been living in; that he asked the 1st respondent to vacate the suit property but later, the 3rd respondent, who was the area chief went onto the suit property and began to subdivide it.

9. In support of the defence case, the 1st respondent testified that she had been married to the late **Titus Oketch Obonyo**, the appellant's brother, from January 1988; that in 1993, her husband, Titus went to his home town and built a house on the suit property; that her husband introduced her to his family and they lived on the suit property for a while and then moved to Nakuru; that after her husband, Titus died, he was buried on the suit property; and she settled on the suit property, living on the same compound with her father in law, the deceased until his death; that after her husband, Titus died, her father in law planted trees, forming a boundary between her husband's property and the appellant's property, and she lived thereon peacefully; that after her father in law died, the appellant began to harass her; that when his wife died, he dug a grave on the 1st respondent's portion of the suit property, and it took the intervention of the 3rd respondent to fill the grave up; that thereafter, the appellant removed the boundary and would not comply with the directions of the area chief to attend meetings to resolve the dispute and re-establish the boundary.

10. **Livingstone Okanga (Livingstone)** the appellant's cousin, testified as DW2 and corroborated the 1st respondent's account of events. He stated that he had met the 1st respondent in 1983 when Titus had introduced her to his family as his wife; that after Titus died in 1996, the 1st respondent moved onto the suit property where both she and the appellant lived peacefully until 2012; and that after the dispute between the appellant and the 1st respondent arose, the 3rd respondent called a meeting which Livingstone attended, and it was resolved that the appellant restores the boundary on the property separating his portion of the property from that of the 1st respondent. **Veronica Oketch** (DW3), the 1st respondent's daughter also testified. Her evidence was that she lived on the suit property from 1996 after her father's death until 2012 when she finished her secondary school education.

11. After hearing the witnesses, a judgment was delivered where the court stated as follows:

“Given the evidence on record, it is clear to me that the plaintiff is trying to take advantage of the situation. He knows very well that the 1st defendant is disabled and that she was his brother's wife. They lived together in Nakuru and together with his brother, they each built houses on their respective portions of the land. Their late father also divided the land among the two. The plaintiff secretly obtained the title to the suit land and his next move is to evict the 1st defendant. There (sic) are illegal plans as the land belonged to his father. His brother Titus left children who are entitled to inherit from their father's share of the land.”

12. The learned Judge ordered the appellant to surrender the title deed to the suit property within (30) days of the judgment and the suit property divided into two equal portions. The suit was dismissed with costs and the 1st respondent's counterclaim granted as prayed.

13. Aggrieved by this decision, the appellant appealed to this Court against the entire judgment. In his memorandum of appeal, he raises various grounds of appeal challenging the judgment of the trial court for failing to take into account: that the suit property was wholly owned by the appellant having acquired it from his father, the deceased; that the 1st respondent was entitled to **Parcel No Kisa/Emasatsi/676** and not the suit property; that **Kisa/Emasatsi/676** had been divided into two portions to wit Parcel numbers 1202 and 1203, the latter of which was the portion that belonged to the 1st respondent's deceased husband.

SUBMISSIONS

14. When the appeal came up for hearing, both parties were unrepresented. The appellant stated that when parcel no. Kisa/Emasatsi/676 was

subdivided, he was not given an opportunity to be heard, and that he was given the suit property by his father while his father was still alive; that his deceased brother, Titus, was allocated the property known as Plot 1203 and as such, the 1st respondent ought not have been bequeathed a half portion of the suit property.

15. The 1st respondent submitted that the judgment of the trial court was unassailable; that a half portion of the suit property belonged to her late husband Titus who was buried on the suit property; and that she had been living in her half portion of the suit property since the death of her husband, Titus. The 1st respondent urged us to dismiss the appeal.

DETERMINATION

16. In this appeal, I remind myself that this Court's primary role is to re-evaluate and re-assess the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999). In doing this, we must also make allowances for the fact that we have neither seen nor heard the witnesses, and rule only on the matters that appear on the record. See Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212.

17. In the suit, the appellant prayed for an order of eviction and permanent injunction against the respondents based on the fact that he was the registered proprietor of the suit property. He annexed a copy of the Title Deed to the suit property, indicating that the suit property was a subdivision of Parcel Number 676 and that a title deed issued in his name on 23rd July 2009. The 1st respondent testified that she had been residing on the suit property since 1996 after the death of her husband, Titus. The appellant would have us believe that the 1st respondent was merely a friend of his deceased brother. However, the evidence led by the 1st respondent, her daughter Veronica and the appellant's cousin, Livingstone, was that the 1st respondent was his deceased brother's widow, and that since her husband died, she and her children had lived on her half portion of the suit property. This testimony was buttressed by a letter written by the 3rd respondent, the area chief indicating that the late Titus was the 1st respondent's husband and that she had lived on the suit property since his death.

18. **Livingstone** produced the green card to the suit property as an exhibit before the trial court, which indicated that the suit property was part of a bigger property that was divided into two portions: Parcel Nos 1202 and 1203. Parcel 1202 was thereafter registered in the name of the appellant's father on 23rd September 1966. The next dealing with the property was the transfer to the appellant which as we have noted was effected on 23rd July 2009. There was however no documentation produced by the appellant indicating how he effected the transfer and registration from his deceased father to himself. In the absence of such documentation showing how he effected this transfer, we are constrained to find that the appellant did not have the right to transfer the property to himself without any reference to the 1st respondent. His title to the property cannot therefore stand.

19. I now turn to consider if the appellant was holding the suit property in trust for the 2nd respondent and her children. It is trite law that a court may presume the existence of a trust. According to the Black's Law Dictionary, 9th Edition; a trust is defined as

"... 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)."

20. 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].

See Ayoub Vs Standard Bank of South Africa [1963] EA 619 at pp 622, 623.

21. I have noted the appellant's assertion in his reply to the counterclaim that there could not have been a trust because it was not noted in the register. To answer this, I refer to the finding of this Court in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR (Civil Appeal 6, 26 & 27 of 2011) where, relying on its earlier decision in Mwangi & another vs Mwangi (1986) KLR 328 noted that;

"The rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory".

22. The principle to be drawn from the foregoing paragraphs is that it is not imperative that the title indicate that there is trust. A court will impute the existence of a trust if the party alleging it gives proof of its existence.

23. As I have noted above, the 1st respondent was occupying the property with the full knowledge of the appellant, having been allowed to do so by his father, the deceased. Having analyzed this evidence, I agree with the trial court that the 1st respondent was properly situated on the suit property, and she cannot be evicted. The evidence led by the 1st respondent and her daughter was that they had lived on a portion of the suit property for a period of over 13 years, until the year 2012. It is clear that even if the appellant proceeded to have the suit property registered in his name, the appellant was only holding half of the portion of the suit property for himself, but the other portion that had been

fenced of was held in trust for the 1st respondent. That being the case I am of the view that the fact that the appellant had the suit property registered in his name, and without any reference to the 1st respondent, was a breach of trust. In the circumstances, it is clear that the 1st respondent proved her claim against the appellant, and I too find in her favour.

24. Accordingly, I find no merit in this appeal and would accordingly dismiss it with costs to the respondents. I uphold the orders of *Chitembwe, J* in the judgment delivered on 29th October 2015 to the effect that:

- (a) The 1st respondent is entitled to a half share of plot number Kisa/Emasatsi/1202;
- (b) The appellant is directed to surrender the title deed of the suit property within thirty (30) days hereof;
- (c) The Kakamega Land Registrar and Surveyor to visit the suit property and divide it into two equal portions. One portion to be registered in the name of the appellant while the other portion to be registered in the name of the 1st respondent, Miriam Namutibwa Oketch alias Miriam Nekesa.
- (d) The Deputy Registrar of the High Court at Kakamega to sign all the relevant documents to effect the transfer of the suit property as herein directed.

JUDGMENT OF H. OKWENGU, JA.

I have read the draft Judgment of my sister Mohammed, JA. The facts relating to this appeal are well captured in the Judgment. I fully concur with the reasoning of my sister Judge. The Learned Judge of the High Court properly considered the issues and came to the correct decision. In the circumstances, the orders of the Court shall be as proposed by Mohammed, JA.

This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

J. MOHAMMED

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR