IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 62 OF 2015

BETWEEN

FREDRICK MAKOKHA.....APPELLANT

AND

PETER SIFUNA WASWA.....1ST RESPONDENT

JOHNSTONE MAKETA WASWA.....2ND RESPONDENT

WANGILA WASWA..... 3RD RESPONDENT

(Being an appeal from a Judgment of the High Court in Bungoma ***(Hon. A. Omollo, J)*** *dated on 16th April 2015*

in

H.C.C.C No. 49 of 2009 (OS))

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JUDGMENT OF THE COURT

[1] This appeal arises from a Succession dispute between three siblings, the appellant Fredrick Makokha and his brothers Peter Sifuna Waswa, Johnstone Maketa Waswa and Wagila Waswa *(1st 2nd and 3rd respondent respectively).* All the parties are sons of one Waswa Makhara *(hereinafter referred to as the deceased)*. The subject of the dispute is a property known as W. Bukusu/N. Myanga/755 *(hereinafter referred to as the suit property),* measuring 28 hectares. The deceased owned the suit property at the time of his death.

[2] The deceased who died on 19th November 1987, was survived by 3 widows and 25 children. The deceased had married five wives but two i.e the late Teresa Waswa, the late Juliana Waswa predeceased him. Annet Waswa, Frida Nekesa and Beatrice Namalwa were the surviving wives.

[3] The respondents who were administrators of the estate of the deceased pursuant to a grant issued by the High Court at Bungoma in Succession Cause Number 190 of 2007 (herein referred to as the Succession Cause), moved the High Court by way of an originating summons, contending that the appellant who is the eldest son of the deceased transferred the suit property to himself fraudulently to the disadvantage of the respondents and other beneficiaries; that he subsequently subdivided the suit property into 6 portions W. Bukusu/N. Myanga/1761/1760/1759/1758, 1757 & 1756; that he thereafter sold W. Bukusu/N. Myanga/1757 to Little Sisters of St. Francis of Assis even though there were beneficiaries who were in occupation of the suit property.

[4] The respondents sought declarations that the suit property belonged to the deceased; and that the transfer of the suit property to the appellant and the subsequent subdivision of the same was fraudulent. The respondents also sought further orders that the titles resulting from the fraudulent subdivision be cancelled and the suit property ordered to revert back to the estate of the deceased so that all beneficiaries can inherit.

[5] The appellant opposed the summons contending that prior to his death the deceased had gifted the suit property to him as the eldest son; that the appellant obtained title to the suit property; that subsequently the appellant subdivided the suit property into 6 portions and obtained

titles for each subdivision; and that the respondents were all along aware that the title to the suit property was no longer in the name of the deceased. The appellant explained that he was not aware of the succession cause filed by the respondents, nor was he aware of the confirmation of the grant for the estate of the deceased. The appellant dismissed the verdict of the land dispute tribunal, arguing that it was a nullity since the tribunal was not seized with the requisite jurisdiction. He maintained that the transfer of the suit property and the subsequent subdivision was lawful.

[6] During the trial, the 1st respondent who testified on behalf of the other respondents stated that at the time of his death the deceased owned four parcels of land, that is, the suit property West Bukusu/N. Matekha/324; West Bukusu/N. Matekha/1044 and a plot in Bumula market. West Bukusu/N. Matekha/1044 measuring 2.2 hectares was transferred to the second appellant, while the suit property is still in the name of the deceased and is occupied by the deceased's sons Johnston Waswa, Bernard Waswa, Patrick Waswa and Christiano Juma. Upon the death of the deceased they discovered that the appellant had registered himself as the owner of the suit property. As far as they are concerned the deceased in his lifetime never mentioned anything about gifting the appellant the suit property, and the appellant is holding the suit property in trust for them as they have nowhere else to go.

[7] Subsequently, 1st and 2nd respondent referred the dispute concerning the suit property to the Bumula Land Disputes Tribunal. The Tribunal found in favour of the respondents, and ordered that each son gets a share of the suit property. However, the suit property has since been subdivided by the appellant into seven portions, and two portions L.R 1760 transferred to Philip Gichabe while L.R 1757 has been transferred to Little Sisters of St Francis.

[8] In his evidence, the appellant testified that the deceased transferred the suit property to him because he had a dispute with a neighbour over the suit property, and wanted the appellant to represent him in the case with the neighbour because he *(deceased)* was unwell. The appellant further explained that the deceased appeared before the Land Control Board and obtained consent of the Board for the transfer; that the title in the appellant's name was obtained on 29th August 1985 while the deceased was still alive; and that transfer of the suit property to the appellant was legitimate.

[9] It was the appellant's testimony that the respondents did not inform him of the succession cause, nor did he see the need of filing the said succession proceedings as the suit property was already in his name. The appellant maintained that all the beneficiaries were apportioned their shares at a meeting presided over by the area Chief and clan elders in the presence of the respondents; that the apportionment was done according to the houses and the share for every house was identified and demarcated; that the house of the 5th wife, Aluta Waswa, who had 5 daughters sold their portion to Philip Gichabe while the appellant sold his share to Little Sisters of St Francis; that Frida Waswa and her children were in occupation of LR. No.1044 and LR No. 324.

[10] The appellant conceded that the 3rd respondent was entitled to L.R No. 1758, while the 1st respondent was entitled to LR. No 1761 and 2nd respondent to L.R No. 1759. He stated that he had no objection to signing the transfers in their favour. The appellant explained that the first dispute the family ever had over the suit property was on 22nd December 1992 when the 1st respondent complained to the area Chief that his portion was small and he was added a further 0.8 hectares; and the 1st respondent lives on the land that is N. Myanga/1761.

[11] During cross-examination, the appellant denied transferring the suit property without consent from the Land Control Board. He reiterated that the total acreage of the suit property was 28 hectares out of which their *(appellant's)* house got 17.6 hectares comprised of L.R. Nos. 1756 and 1757; the second house was given L.R. No. 1761 measuring 0.87 hectares and after the 1st respondent complained 0.8 hectares was added to them to be curved out L.R. No. 1756; the third house has L.R. No. 324 measuring 5.6 hectares, in addition, the third house had an adjacent property, that is, L.R. No.1044 measuring 2.2 hectares, and a further 1.85 hectares from L.R. No. 1759 giving them a total of 9.65 hectares; the fourth house was given L.R. No. 1758 measuring 6.2 hectares while the fifth house was given L.R. No. 1760 measuring 0.94 hectares, which they sold to one Philip Gichabe.

[12] Upon considering the evidence the trial judge found that since the suit property was already in the name of the appellant at the time the deceased died, it could not form part of the estate of the deceased; that the respondents had failed to prove the allegations of fraud; and that the prayer for cancellation of the titles based on fraud could not be granted. However, the trial judge noted that the appellant had admitted that the respondents had a right over the suit property, and having considered what each house was given found the distribution inequitable. The learned judge therefore directed that the suit property be redistributed as follows: the 1st house gets 9 hectares, the 2nd house to get 5 hectares, the 3rd house to get 4 hectares and the 5th house to get 1 hectares. In regard to the interest of the third parties who had bought two of the cancelled subdivision of the suit property, the trial judge clarified that their share was included in the shares of the 1st and 5th houses that had sold to them. Consequently, the trial judge ordered that the suit property be re-surveyed in order to accommodate the new sizes for each household.

[13] It is this decision that has provoked the current appeal. The appeal is predicated on grounds that the trial judge erred in law and fact by amongst other things: ordering for a re-survey whilst being fully aware that some of the parcels belonged to third parties who were not party to the suit; cancelling the existing titles including L.R. No. W. Bukusu/N. Myanga/1760 and 1757 without hearing Philip Gichabe and Little Sisters of St. Francis of Assis who were registered as proprietors of the subdivisions; exercising her discretion to share out the suit property yet the title to the suit property was no longer in existence as the title had been closed on sub-division and new numbers created; failing to take cognisance of the fact that the pleadings and evidence were at variance; and coming up with findings that cannot be supported by law.

[14] During the hearing of the appeal, Mr. Murunga appeared for the appellant while Mr. Anwar appeared for the respondent. The said counsel made oral submissions. For the appellant it was submitted that the learned judge erred in ordering for a re-survey of the suit property when the land had been closed for sub-division; that the third parties to whom some of the subdivisions were transferred were condemned unheard, as they were not party to the suit in the High Court; and that having found that the suit property did not form part of the estate of the deceased and that the respondents had failed to prove the allegation of fraud against the appellant, the learned judge ought to have dismissed the suit and not based her judgement on what was not pleaded. Counsel explained that the respondent had pleaded for orders in regard to the property in East Bukusu but the learned judge proceeded to distribute the property in West Bukusu without any amendments having been made to the pleadings.

[15] For the respondent, it was submitted that the judgment made by the High Court was proper and well reasoned. It was argued that the evidence produced during the proceedings related to the West Bukusu property as it clearly showed that the suit property had been sub-divided into several parcels; that the error in the title was a mere typographical mistake that did not in any way prejudice the appellant; that even though there was cancellation of title the interest of the third parties was taken into account by the learned judge; that the third parties who were purportedly affected by the orders have not complained as they are not parties in the appeal nor have they sought to review the said orders of the High Court; that the issue of trust was pleaded by the respondents; and that the learned judge was right in exercising her discretion in favour of the respondents.

[16] We have carefully considered this appeal and the evidence that was adduced before the learned judge as well as the submissions made before us. As a first appellate court we are alive to our duty as captured in ***Wensley Barasa v Immaculate Awino Abongo [2017] eKLR***; as follows:

> ***"As a first appellate court, it is our duty to re-examine afresh the evidence and material tendered before the High Court and draw our own conclusions, but we should be slow in overturning the decision of the trial court, bearing in mind that we have not seen or heard the witnesses so as to be able to assess their credibility."***

[17] During the trial before the learned judge, the main issue was whether the suit property was part of the deceased's estate and whether the appellant had fraudulently transferred the suit property to himself to the exclusion of the respondents and other beneficiaries. In this regard, the appellant maintained that the deceased transferred the suit property to him as a gift. In his evidence before the trial court, the appellant testified that the deceased transferred the suit property to him before his death, and explained the reason why the deceased transferred the suit property to him. The explanation revealed that the deceased transferred the suit property into the name of the appellant because he wanted the appellant to step into his shoes in pursuing a dispute involving the suit property, which dispute the deceased could not attend to due to his ill health.

[18] It is obvious that in transferring the suit property to the appellant the deceased did not intend to give the appellant a gift but wanted to make him a trustee over the land on his own behalf and that of the deceased and any other person having an interest in the suit property. The appellant clearly understood this and that is why after the death of his father he summoned the clan elders and the Assistant Chief and purported to distribute the suit property in accordance with the deceased's 5 houses.

[19] We find therefore, that although the respondents did not prove that the appellant had fraudulently transferred the suit property to himself, they established that the appellant was holding the suit property in trust for himself and other beneficiaries. Among the issues that the trial court was required to address in the originating summons was whether the heirs of the deceased have any interest in the suit property i.e. E. Bukusu/N. Myanga/755 or the titles created out of the deceased's property. It turned out during the evidence that the parties were in agreement that the correct number of the suit property was "West" Bukusu/N Myanga/755 and not "East" Bukusu/N. Myanga/755. Ideally, an appropriate amendment ought to have been sought to correct the mistake but this was not done.

[20] In ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR***: this Court addressed the issue of pleadings as follows:

> ***The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.***

[21] In the same decision, the Court acknowledged that there is an exception:

> ***"The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in ODD JOBS V MUBIA[1970] EA 476,Law, JA; speaking for the predecessor of this Court stated that:***
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> > ***"[A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision."***

[22] In this case, the failure was not to plead a specific issue but a failure to correct a typographical error, that is correction of "E' Bukusu/N. Myanga/755 to "W" Bukusu/N. Myanga/755. Besides, the evidence adduced showed that both the appellant and the respondents were clear on the property that the pleadings related to, that is, West Bukusu/N. Myanga/755. Therefore the failure to amend the pleadings did not cause any prejudice, as the parties were clear on the subject of litigation and the issue concerning it.

[23] There was sufficient evidence regarding the question of the respondents' interest, including the appellant's own concession. In her judgment the learned judge aptly guided herself in addressing the issue by referring to the dictum of Lord Denning in **Hussey vs Palmer [1972] 3All ER 744** followed in **Macharia Mwangi Maina & Others vs Davidson Mwangi Kagiri [2014] eKLR**

[24] Further, the following extract from the judgment of the learned judge reveals her appreciation of the respondents' position:

> ***"Cestui qui trust is defined by the Law dictionary as,*** *"he who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another."* ***My interpretation and understanding of the provisions of this order is that it includes the plaintiffs because although the title was in the name of the defendant they had an interest by virtue of a trust created by their father's transferring his right over the land to the defendant".***

[25] We cannot fault the learned judge, as it is apparent from the circumstances that the respondents were actually in occupation of various portions of the suit property, and that the appellant was holding the suit property as the eldest son of the deceased in trust for the respondents as against third parties. A constructive trust therefore arose in favour of the respondents. A look at the respondents originating summons that was filed in the High Court reveals that the respondents' pleadings were poorly drafted, as there was no direct pleading of a trust. Nonetheless, this was implicit in the question whether the heirs of the deceased had an interest in the titles that were created out of W. Bukusu/N. Myanga/755. In our view, the respondents' claim was not at variance with the pleadings. Since the appellant was holding the suit property in trust, he had no right to sub-divide the suit property without taking into account the interests of the other beneficiaries.

[26] It was the appellant's contention that the learned Judge erred in exercising her discretion in re-distributing the suit property when it was clear that the said property had been closed on subdivision. This argument cannot hold because the sub-divisions were subject to the respondents interests as beneficiaries under the constructive trust.

[27] Did the learned Judge err by ordering for the re-surveying of the property and did the same result in the cancellation of the titles in favour of the third parties? Under Order 37 Rule 1 of the Civil Procedure Rules, 2010, an administrator of a deceased person or any person claiming to be a *cestui que* trust can move the court for any relief that may require determination of the question affecting the right or interest of the *cestui que* trust without determination of the estate or trust. The court also has jurisdiction to determine any question arising directly out of the administration of the estate or trust. In this case, the learned judge dealt with the issue whether the respondents' had an interest in the suit property and also the manner in which the appellant had dealt with the respondent's interests. The learned judge found it necessary not only to determine the question, concerning the rights of the respondents but also to correct the injustices to the respondents that had arisen from the appellant's actions as a constructive trustee. In the circumstances, the order for re-distribution was within the trial judge's jurisdiction. In ordering the re-distribution, the learned judge was alive to the interests of the third parties and directed that their shares be included in the portion of the parties who had sold to them, that is, the appellant and the 5th house. Thus the third parties were not prejudiced and have not complained.

[28] We come to the conclusion that the learned judge cannot be faulted for the orders made in favour of the respondents as they were beneficiaries with equal rights to those of the appellant. Accordingly, we find no merit in this appeal and do therefore dismiss it in its entirety. As the dispute involves family members, the order that commends itself to us in regard to costs, is that each party shall bear their own costs.

DATED and Delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.