REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 141 OF 2012

IN THE MATTER OF THE ESTATE OF KIPSANG KANDIE (DECEASED)

BETWEEN

CHARLES K. KANDIE……..APPELLANT

AND

MARY KIMOI SANG ……RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Maraga, J) dated 27th April, 2010

in

Succession Cause No. 475 of 1998)

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JUDGMENT OF THE COURT

1. This is a succession matter in the estate of **Kipsang Kandie** (deceased) who died on 4th August, 1991. The only property in dispute was originally Plot 219 in Eldama Ravine Settlement Scheme but later surveyed and registered as **Baringo/ Eldama Ravine102/107** (the disputed land) measuring about 13.1 Hectares or 32 Acres. When the deceased died, his wife **Mary Kimoi Sang** (Mary) applied for and obtained a grant of Letters of Administration which was issued on 13th March, 2002 and the disputed land was transferred and registered in her name on 28th May, 2002. All that process was carried out with the knowledge of the deceased's brothers **John Kandie** (John), **Charles Kipchumba Kandie** (Charles) and **Francis Kanina Kandie** (Francis).

2. About two and a half years later on the 8th October, 2004, Charles, with the support of Francis, filed an application for revocation of the grant issued to Mary on the ground that it was fraudulently obtained by making a false statement and concealing material facts. He claimed that the disputed land belonged to their father **Kandie Chepkoros** (Mzee Chepkoros) who died on 15th February, 1971. Upon his death, the family agreed that the plot be registered in the name of the deceased to hold in trust for his brothers but he unlawfully transferred it to himself. Mary in turn transferred it to herself in furtherance of the fraud. All these matters, he claimed, were not disclosed by Mary when she applied to administer the estate of the

deceased, hence the fraud. He sought the revocation of the grant and an order that the land be shared out equally between the four brothers.

3. Mary vehemently opposed that application as an afterthought and asserted that the disputed land lawfully belonged to the deceased. She swore that it was bought by her husband way back in 1964 when he was working as a civil servant for the National Irrigation Board in Marigat. It was an allocation from the Settlement Fund Trustees (SFT) which also advanced him the purchase as well as the development funds to be repaid at the rate of Ksh.75 every month. The deceased instructed his employer to deduct the loan repayments from his salary and that was done faithfully until payment in full. At that time, according to her, civil servants were not allowed to be allocated land by the SFT and so the deceased used his father's name, Mzee Chepkoros, as the allottee.

4. Mary further swore that after the death of Mzee Chepkoros in 1971, all the brothers endorsed the deceased as the rightful legal administrator of his estate and he was registered as the sole proprietor of the land and continued to repay the loan. None of the brothers paid anything although they were in employment at the time and they did not reside there. Only Charles requested the deceased for a temporary residence as he looked for his own place in 1980. But in 2004, he incited his two other brothers to invade the disputed land on the pretext that it was their father's. Francis and John came in 2008 but subsequently withdrew from the land at the instance of Mary and went to reside elsewhere. John is indeed not a party to the objection made by Charles and Francis. Mary made full repayment of the loan in 2001 after her husband's death and obtained Title in her name. There was therefore no fraud or concealment of information before the grant of letters of administration was issued, as alleged by Charles.

5. The matter was heard before **Maraga J.** (now the Chief Justice) and Charles, Francis and Mary testified before him orally. Upon evaluating their evidence, the learned Judge found that Mary, as the sole widow of the deceased, was entitled in law to the first priority in order of consanguinity, to apply for a grant of letters of administration in terms of ***Section 66*** of the ***Law of Succession Act (LSA).*** She had committed no fraud and the brothers had no place in the deceased's estate.

6. As to whether the disputed land belonged to Mzee Chepkoros and not the deceased, the learned Judge had this to say:-

> ***"It is trite law that there is a resulting trust in favour of the person who pays for the purchase price of land though registered in the name of another. In this case the objectors have not controverted the widow's testimony that in 1964 when the deceased applied for a settlement piece of land the Government policy forbade civil servant from being allocated settlement land. They have also not produced any proof that their late father paid any money at all towards the SFT loan for the suit land. As a matter of fact they conceded that they themselves did not pay any money. In my view their claim is based simply on the fact that the suit land was originally registered in the name of their late father. I do not belief (sic) their evidence that after the death of their father they got the suit land registered in the name of the deceased in trust for them. They have not said why they deemed that necessary and why they waited until after the death of the deceased to claim a share of it. They have not told me why their brother John Kandie voluntarily vacated the suit piece of land upon being requested by the widow."***

7. Those findings are challenged on five grounds of appeal which may be summarized thus:

> ***THAT the learned judge erred in law and in fact:-***
>
> ***1. in finding that the deceased did not hold the suit parcel of land known as Baringo/Ravine 102/107 in trust for the objector/appellant and his brothers.***
>
> ***2. in failing to appreciate that the suit parcel of land known as Baringo/Ravine 102/107 belonged to the deceased's father who is also the appellant's father and that of his brothers.***

3. in finding that the suit parcel of land belonged to the deceased solely.

4. in finding that the appellant and his brothers did not have to be included in the respondent's petition for letters of administration of the deceased's estate.

5. in failing to appreciate that the appellant and his brothers had for over twenty years resided on the suit parcel while it was registered in their deceased's father's name and were therefore entitled to inherit it together with the deceased.

8. In urging the appeal, learned counsel for Charles, **Mr. J. Githui,** instructed by the firm of Githui & Company Advocates, reduced the grounds to one issue – ***'what is the legal effect of a resulting trust, as declared by the High Court, on the assets of the deceased?'*** According to him, if a person spends his money on property of another person, then a resulting trust ensues and the remedy for the person who spends the money is not proprietary but personal. In other words, the person is only entitled to his money and not the property. Applied to this case, the property belonged to Mzee Chepkoros but the deceased repaid the purchase loan on it and therefore all the deceased was entitled to was his money back as the property reverted to the estate of Mzee Chepkoros. For that proposition, counsel cited the cases of ***Alice Wanjiru Mwaura v. Peter Njuguna Mwaura & Anor [2013] eKLR; Twalib Hatayan & Anor v. Said Saggar Ahmed Al-Heidy & Others [2015 eKLR;*** and ***Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd (CA) [2011] 3WLR 1153.***

9. In response, learned counsel for Mary, **Mr. R. K. Kipkenei** submitted that on the evidence on record, the only reason why the disputed land was allocated in the name of Mzee Chepkoros was because civil servants like the deceased were not allowed to hold government land in those early years of independence. There is further undisputed evidence that it was the deceased who paid the entire purchase price for the land, occupied it and developed it until his death in 1991 without any claims being laid by his brothers. The only intention therefore was that the land belonged to the deceased and that intention was confirmed by the brothers of the deceased who did not oppose the transfer of the disputed land to him after the death of Mzee Chepkoros in 1971. In his submission, Mary simply complied with ***Section 66*** of the ***LSA*** and committed no fraud nor gave false information. According to counsel, it was only Charles who was recalcitrant in this matter since the other two brothers left the land at Mary's instance after realizing that they had no right to the property. As for the authorities cited, counsel distinguished them as inapplicable as none of them related to succession matters.

10. We have considered the record of appeal, the submissions of counsel and the applicable law. On a first appeal, we may, of course, reappraise and review factual as well as legal matters to arrive at our own conclusions subject only to the caution that the trial judge had a better advantage of hearing and seeing the witnesses and was therefore a better judge on their credibility. As was further stated in the case of ***Jabane vs. Olenja [1986] KLR 661*** 664:-

"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."

11. Some crucial facts are either common ground or were proved on a balance of probabilities. Firstly the deceased died intestate and Mary was his sole widow. All other things being equal, she had every right under ***Section 66*** of LSA to apply for grant of representation of her late husband's estate. ***Section 66*** states as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate.

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in

the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy; with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) Creditors."

The trial court was therefore right in the finding that the brothers would not feature in the administration of the estate in those circumstances. If they had any claim on the estate, they would have sued the administrator of the estate and not seek to set aside the grant of letters of administration or be enjoined as co-administrators, as Charles did.

12. Secondly, the disputed property was in Eldama Ravine Settlement Scheme administered by the SFT as an unsurveyed plot 219. Available records show that SFT allocated the plot and gave out the purchase and development loan on it. The allottee or 'settler' in their books, according to a letter dated 21st September, 2004, was Mzee Chepkoros while the purchase and development loans were given to the deceased. Documentary evidence shows that it was the deceased who set up a monthly repayment order through his employer and the two loans were repaid fully by 1978. Neither Mzee Chepkoros nor the brothers of the deceased made any financial contribution to the purchase. There is no evidence on when plot 219 was surveyed and registered under the ***Registered Land Act***, but, according to the Title Deed produced in evidence by Mary who became registered in 2002, the register appears to have been opened in 1980. From the evidence of Charles, however, it appears that the deceased was the first registered owner. He testified thus:

"When my father died we agreed that the land be registered in the name of our late brother Kipsang in trust for all of us. That was around 1974".

The agreement alluded to was not produced in evidence.

13. In the absence of any agreement either between Mzee Chepkoros and the deceased or between the deceased and the brothers, we have to draw inferences from the surrounding circumstances on the ownership of the disputed land, and specifically whether any trust of any description arose. The trial court found that the circumstances gave rise to a resulting trust as between Mzee Chepkoros and the deceased, and that finding is not challenged by the appellant. His only argument is that a resulting trust does not give rise to a proprietary interest but a personal one. Which leads us to a discussion on the law of trusts.

14. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

"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 ***Gichuki vs Gichuki (1982) KLR 285*** **and** ***Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171.***

15. In the ***Twalib Hatayan case (supra)*** which was cited by the appellant, this Court examined and stated the law on trusts as follows:-

"According to the Black's Law Dictionary, 9th Edition; a trust is defined 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)."

Under the Trustee Act, "… the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property…"

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. …..

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra). (Emphasis added).

16. Applying the emphasized portions to the case before us, it is clear that as between Mzee Chepkoros and the deceased, there was no constructive trust since Mzee Chepkoros did not acquire the property by wrongdoing and no unjust enrichment arises. On the evidence, the name of Mzee Chepkoros was used to acquire the disputed land since the deceased could not use his own name as he was in the civil service. That assertion was made on oath and there was no rebuttal. Until his death, Mzee Chepkoros did not raise any issue with his son over the disputed land. Furthermore, there is no evidence that Mzee Chepkoros settled on the land and if so the nature of the settlement. It is asserted on the contrary that he had his own land in Solai and Charles appeared to concede the existence of such land when he testified in cross examination thus:

"My mother has land in Solai where my youngest son lives."

Francis also admitted in cross examination:

"We have another piece of land at Solai. I was supposed to live there."

17. All indications are that a resulting trust arose as between the deceased and Mzee Chepkoros. As stated in the authority above '*a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial'*. It is common ground that all the purchase money was advanced by the deceased. The disputed land was therefore held in trust for him by Mzee Chepkoros. We have examined the submission by Mr. Githui that the deceased was only entitled to a refund of his money and not the land, but we are not persuaded as it is not supported by the authority cited in support; that is, the English case of ***Sinclair***

Investments (supra). That case involved a complex web of fraudulent deals relating to company shares and the fiduciary duty held by Directors. One of the issues was whether the victims of the fraud had proprietary interest in the proceeds of sale of the shares held by another company and its subsidiaries. We have no hesitation in stating that the authority is not applicable in the matter before us, and we reject the submission.

18. Another trust was pleaded as between the deceased and his brothers who include the appellant. It would have been easy for the brothers to produce a trust agreement or a copy of the Title Deed or search certificate indicating such a trust. But there was none. It was in evidence that two of the brothers who had moved into the disputed land after the death of the deceased vacated it, leaving the appellant who said he entered into the land in 1971 when Mzee Chepkoros died. There was no other support for that assertion. On the other hand Mary testified that Charles was allowed by the deceased to reside there temporarily in 1980 as he looked for his own land. It was her word against Charles' and the trial court which heard them chose to believe Mary. We have no reason to differ.

19. In the end we have come to the same conclusion as the trial judge did as follows:-

> ***"Taking all these factors and the evidence on record into account I find that the deceased who was in 1964 a public servant working for the National Irrigation Board registered the suit piece of land in the name of his late father because Government policy at that time did not allow public servants to be allocated Government land. I also find that he thereafter paid the entire SFT loan for it. Upon his father's death he was therefore entitled to transfer it as he did into his name and his widow was in turn perfectly entitled to transfer it to her name when he died. In the circumstances I find that none of the deceased's brothers is entitled to a share of the suit land."***

20. We find no merit in the appeal and order that it be and is hereby dismissed with costs.

Dated and delivered at Nakuru this 23rd day of February, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR