IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 320 OF 2013

BETWEEN

ZIPPORAH WANJIRU MWANGI ……...APPELLANT

AND

ZIPPORAH WANJIRU NJOROGE …. RESPONDENT

(An Appeal from the ruling of the High Court of Kenya at Nakuru, (Emukule, J.) dated 20th January, 2012 in ***Succ. Cause No. 32 of 1998***

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JUDGMENT OF THE COURT

In 1992, Joel N. Mbugua, now deceased, was the registered proprietor of the parcel of land known as **RUIRU/KIU/BLOCK 2 (GITHUNGURI) 3948** (hereinafter referred to as "the suit land") which measures 0.5000 of a hectare and was registered under the Registered Land Act (Cap.300), now repealed. There is uncontroverted evidence on record in this appeal that the suit land was purchased by Joel N. Mbugua and his wife, Zipporah Wanjiru Njoroge with whom he had four sons and three daughters. Three of the sons who include George Mwangi Njoroge are now dead. The latter was survived by a daughter, Zipporah Wanjiru Mwangi, who is the appellant in this appeal.

In 1996 during his life time, Joel N. Mbugua transferred the suit land to his son, George Mwangi Njoroge as a gift to enable him to use it as a collateral to secure a loan. There was no money passing hands as consideration for the transfer. Ostensibly, the consideration was love and affection by a father to a son.

Joel N. Mbugua died on 21st February, 2001. But prior to his death, he had called his sons and daughters in January, 1996 to a family meeting at which his son, George Mwangi Njoroge (now deceased), requested for assistance to enable him to get financing from his employer, Post & Telecommunications Kenya to enable him to build a home for his family at Banana, Kiambu. The matter was discussed and the family agreed to the request with a rider that the suit land would revert to the father, Joel N. Mbugua. Following this arrangement, the suit land was on 7th March, 1996 transferred from the name of Joel N. Mbugua to the name of George Mwangi Njoroge and a title deed was issued in the name of the latter.

In December, 1997, George Mwangi Njoroge died and his employer held back the loan and returned the

title deed which was collected by the respondent, Zipporah Wanjiru Njoroge who kept it in safe custody. George Mwangi Njoroge was buried at Githunguri, Kiambu, where he lived but not on the suit land.

The record of this appeal also shows that after George Mwangi Njoroge died, his wife, Mary Wanjiku Mwangi instituted succession proceedings in Cause No. 32 of 1998 in Nakuru which the latter's daughter, Zipporah Wanjiru Mwangi, the appellant in this appeal, took over following issuance of summons for rectification of Grant dated 25th August, 2010 which removed the name of Mary Wanjiku Mwangi as administratrix and replaced it with the name of the appellant, Zipporah Wanjiru Mwangi. The succession cause was filed in Nakuru notwithstanding that the suit land is situated in Kiambu where the deceased lived with his family and notwithstanding also that persons likely to claim interest in the estate lived in Kiambu and not in Nakuru.

As a daughter of George Mwangi Njoroge, the appellant, Zipporah Wanjiru Mwangi, is a granddaughter of the respondent, Zipporah Wanjiru Njogoge who is the mother of the late George Mwangi Njoroge.

The respondent was not personally notified of the succession proceedings in Nakuru as notification was published in a Kenya Gazette Notice. Subsequently, upon learning of the succession proceedings after a long period of time, the respondent, assisted by her surviving children, namely Mary Njeri Njoroge, Alice Muthoni Njoroge, John Mbugua Njoroge, Agnes Wanjiru Kihugu and Timothy Kamau Njoroge, filed on 11th April, 2011 summons for revocation or annulment of grant made in the Succession Cause No.32 of 1998 in the High Court at Nakuru. Her contention in the said application was that the suit land was family land and that it was held in trust by George Mwangi Njoroge, the appellant's father. She sought *inter alia* orders in her application for revocation of the grant of Letters of Administration Intestate issued to the widow of George Mwangi Njoroge, Mary Wanjiku Mwangi who passed away before completing the administration of the estate (which was rectified by insertion of the name of the appellant Zipporah Wanjiru Mwangi as aforesaid) and for an injunction to inhibit alienation of the suit land.

On 30th May, 2011, the High Court ordered, *inter alia* that the respondent's summons for the revocation of or annulment of the Grant would be heard and determined by way of *viva voce* evidence.

On 19th October, 2011, the application proceeded to hearing and the respondent testified and was extensively cross-examined. The appellant, however, did not testify. Instead, she filed an affidavit. After analyzing the evidence before him, the learned Judge **(Anyara Emukule, J)** found that the wife of George Mwangi Njoroge, deceased, namely Mary Wanjiku Mwangi and her daughter, Zipporah Wanjiru Mwangi, the appellant, had failed to inform the deceased's family, including the applicant, of her intention to file succession proceedings and of the fact of filing of the petition for Grant of Letters of Administration in the estate of George Mwangi Njoroge. The learned Judge found that this constituted concealment from the court of a fact material to the cause. Consequently, the learned Judge allowed the respondent's summons for revocation of the grant and proceeded to revoke and annul the grant of Letters of Administration intestate issued and confirmed to Mary Wanjiku Mwangi on 11th April, 2000 and rectified on 19th December, 2010 by inserting the appellant's name of Zipporah Wanjiru Mwangi as administratrix as aforesaid. The learned Judge proceeded to appoint the respondent and the appellant as joint administratrices of the estate of George Mwangi Njoroge, deceased. He also directed the joint administratrices to file their respective proposals on the distribution of the suit property, **No. RUIRU/ BLOCK 2/GITHUNGURI/3948**. This is the decision that provoked this appeal. But for this appeal, the matter would have proceeded to hearing in the lower court on the issue of distribution of the suit land.

In her memorandum of appeal, the appellant contends that the learned Judge erred in that he misdirected himself on application of **Sections 47(1)** and **66(1)** of the Law of Succession Act and as to who was entitled to be administrator of the estate; further that he erred in his finding that the appellant was guilty of concealment from the court of a fact material to the cause; that the learned Judge took into account extraneous matters in reaching his decision and in finding that the suit land was a family property and that the respondent was entitled to share in the distribution.

When the appeal came up for hearing on 24th April, 2017, learned counsel **Miss Njeri Njaguah**, appeared

for the appellant and learned counsel **Mr. D. Kirimi** appeared for the respondent. Miss Njeri Njaguah contended that the suit land was not a family property as it had been given as a gift absolutely to the deceased, George Mwangi Njoroge, and that the latter's siblings and mother, the respondent herein, were not entitled to share in its distribution. She contended that there was no evidence to prove the existence of trust and that the decision of the learned Judge was in error.

On his part, Mr. Kirimi opposed the appeal and submitted that the decision of the learned Judge was correct as the transfer of the suit land to the deceased (George Mwang Njoroge) was conditional on its being reconveyed back after the deceased had secured and repaid the loan. Mr. Kirimi pointed out that in accordance with the court's orders, the respondent gave *viva voce* evidence and was extensively cross-examined while the appellant declined to testify but only filed an affidavit. It was Mr. Kirimi's submission that the trial Judge was impressed by the evidence of the respondent which he believed. On the material before him, said Mr. Kirimi, the learned Judge found that the suit land was not given as a gift absolutely to the deceased and as the loan had not been secured following the demise of the deceased, the suit land should revert to the respondent's husband and be distributed to the respondent and her children who include George Mwangi Njoroge, deceased.

As this is a first appeal, we are enjoined to re-evaluate the evidence and come up with our own conclusions and determination in line with the principle articulated by this Court in the case of **Selle v. Associated Motor Boat Co. [1968] E.A 123** that an appeal to this Court from the High Court is by way of a retrial and this Court is not necessarily bound to follow the trial Judge's findings of fact if-

> ***"it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence in the case generally."***

The issues before the learned Judge were whether there were grounds for revocation of the grant and whether the suit land was held by the deceased (George Mwangi Njoroge) in trust. The suit land was registered under the **Registered Land Act**, now repealed. Under **Section 28** of the said Act, a registered proprietor was not relieved from his obligation as a trustee. The learned Judge made a finding that he preferred the *viva voce* evidence adduced by the respondent and was not impressed by the affidavit evidence of the appellant which he did not believe.

As long ago as 1986 this Court correctly stated in **Jabane Versus Olenja (1986) KLR 661, 664** that:

> ***"------- this court has held that it will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them (findings) 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)KAR 278 and Mwanasokoni Vs. Kenya Bus Services (1982 – 88) KAR 870"***

Again, the predecessor of this Court in **Peters. vs. Sunday Post (1958)**

EA 424 Page 429 per Kenneth O'Connor P, stated that-

> ***"it is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But it is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion,"***

Was the learned Judge right in his determination that there was basis for revocation of the grant and that the suit land was family land and that the deceased, George Mwangi Njoroge, held it in trust for the family of Joel N. Mbugua and his wife, the respondent herein? It is trite law that he who alleges (trust)

must adduce evidence to prove it. In **Mbothu & 8 Others vs. Waitimu & 11 Others (1986) KLR 171** this Court with respect, correctly stated that:

> ***"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 ….."***

In **Gichuhi v. Gichuhi (1982) KLR 285**, this Court held that:

> ***" a party relying on the existence of a trust must prove through evidence the existence and creation of such a trust----- "***

The learned trial Judge had before him *viva voce* evidence of the respondent in which the latter was extensively cross-examined. Although the appellant was entitled to give *viva voce* evidence in accordance with the directions of the court, she declined to do so and instead filed an affidavit. No reason was assigned for the appellant's failure to testify. Her counsel told us from the Bar that it was the appellant's right not to do so. In the end, the court had to make a determination on the two issues on the basis of the evidence before it. First, the issue of trust which will determine whether the second issue needs to be reviewed.

The context in which the issue of trust was determined was succession proceedings. The learned Judge gave orders on the procedure to be followed in tendering evidence to enable him to determine the matter. He ordered that *viva voce* evidence would be given. A party who had opportunity to present or adduce evidence but declined to do so cannot be heard to complain if the court makes a fair determination based on the evidence before it. In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by **Article 165 (3) (a)** of the Constitution and **Section 47 of the Law of Succession Act, Cap. 160.** Moreover, the Constitution of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see **Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b); 20 (2); 21(1), 165 (3) (a) and 164 (3).**

The record of this appeal shows that the appellant declined to testify and instead preferred to file an affidavit. The Superior Court discerned that the appellant was untruthful. While the original title deed was with the respondent, ostensibly unknown to the appellant, the appellant proffered in her affidavit the excuse that it had been destroyed by fire during the post-election violence at Githunguri even though the violence did not spread to Githunguri. The learned Judge was not impressed by the appellant in this regard. He stated in his decision –

> ***"Finally, the respondent (read appellant) "killed" her case by her application dated 4th November, 2010 and filed on 4th November, 2010 supported by an affidavit, that the title was burnt during the 2007/2008 Post Election Violence. This is not true as Githunguri was not affected by such incidents of violence. This application was not prosecuted and the easy option of loss was taken that the original title was lost, and another was issued to the respondent (read appellant). That in my view is an absolute abuse of the process of Law."***

The learned trial Judge was impressed by the evidence of the respondent who testified and was cross-

examined at length. In his own words, he stated –

> ***"------in this regard therefore, there is much to be believed on the part of the applicant (respondent) that the land in question though nominally registered in her son's name beneficially remained family land, and subject to administration as family land. This was acknowledged by the respondent's mother (the applicant's mother) when she had her husband buried within her father's compound or land. Her father would have been buried in the suit land, if it was beneficially his own. That is our law, called custom in African customs; a son who has acquired or has been granted by his father, beneficially his own parcel of land, would be buried on such land. This was not the case here. I believe the applicant (i.e the respondent) when she deponed in her further affidavit of 13th May, 2011 that the respondent (i.e the appellant) lied when she alleges that her late father had deposited stones on the suit land, and that the stones were stolen!"***

The learned Judge considered the parties' affidavit evidence and the respondent's *viva voce* evidence before him and formed the impression that the appellant was unaware of the full circumstances under which the suit land was transferred to her father before he died. The learned Judge put it this way:-

> "***------the respondent appears to have been completely ignorant of the terms under which the family made arrangements to have the suit land transferred in (sic) the name of her father, the 3rd born son of the applicant (read respondent in this appeal)…….. it was not unusual for the family to "donate" albeit temporarily, land so that the grantor of the loan is fully secured that the loan would be repaid. If there was default, the whole family would again be involved."***

In **Ayoup vs. Standard Bank of S.A (1963) EA 619** in which the decision of the predecessor of this Court was reviewed on appeal by the Privy Council on the issue as to whether the predecessor of this Court was right in their interpretation of the agreement in the case as regards whether trust could be implied, the Privy Council held that the dissenting judgment of Newbold, J.A., accurately stated the law. The Privy Council quoted in its judgment **Cook vs. Fountain (1676), 36 E.R. 984 at page 987** where it was stated:

> ***"so the trust if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule that goes to both these kinds of trust, it is such a general rule as never deceives; a general rule to which there is no exception, and that is this, the law never implies, the court never presumes a trust, but in a case of absolute necessity ."***

The Privy Council held that:

> ***"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 will be implied."***

In **Ayoup v. Standard Bank of S.A (supra**), the Privy Council made a finding that:

> ***"It is not an unreasonable assumption to be gathered from the terms of the document that the intention of the parties was that as the Ayoup family could not be registered as proprietors, Galanos as the rich and able businessman in the family was to take over the property and sell it as and when he thought fit. This was to the advantage of all parties. The family would obtain discharge of their loan out of the proceeds of sale and Galanos would obtain security for his loan over the property. In order to achieve their joint purpose it was necessary that Galanos should be registered as the absolute owner. Although Galanos was not obliged to sell, it was implicit in the agreement that he would sell at the earliest convenient moment."***

In the case, the Privy Council held that Galanos was beneficial owner and the trial judge and the Court of Appeal were wrong in holding that a trust was to be implied. They preferred the dissenting judgment of Newbold, J.A. which they found entirely satisfactory.

In the instant appeal, the family of Joel N. Mbugua, the father of George Mwangi Njoroge, deceased, (who was the father of the appellant) had no other land besides the suit land. They lived on it. Besides George Mwangi Njoroge, who was the third born son, there were other siblings. None of them was given land by their father. There is no evidence that the latter distributed his land to his children. The issue of the transfer of the suit land to George Mwangi Njoroge to facilitate procurement by the later of a loan by offering the suit land as a collateral was brought to a plenary meeting of the family. The appellant did not controvert that evidence. She did not offer other evidence to contradict the *viva voce* evidence of the respondent. The fact that she eschewed testifying seems from the circumstances of the case to have been to obviate being cross-examined. The appellant and her deceased mother seem from the evidence to have been intent on using any available means to keep to themselves alone the land to which they were not alone beneficially entitled. On the basis of the evidence before him, can it be said that the trial Judge was wrong in coming to the conclusion that he did?

The principle in **Gichuhi v. Gichuhi (1982) EA 285** that "the party relying on the existence of a trust must prove through evidence the existence and creation of such trust" was in this case satisfied. In our view, the suit land is family land of the late Joel N. Mbugua who was the father of George Mwangi Njoroge (deceased).

As regards revocation of the grant, **Section 76 (a) (b)** of the **Law of Succession Act** stipulates-

> ***" 76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion-***
>
> ***(a) that the proceedings to obtain the grant were defective in substance;***
>
> ***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
>
> ***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently***;"

The evidence before the learned Judge shows that the appellant and/or her deceased mother deliberately, and with an intention to deprive the respondent and the deceased's siblings of their right to claim inheritance of the suit land, kept the respondent in the dark about the institution of the succession proceedings and that seems clearly to be the reason that the appellant and her mother filed the proceedings in Nakuru. The allegation that the deceased was beneficially entitled to the land was false and it does not require much imagination to see that that is why the appellant and her mother tried to clandestinely prosecute the succession proceedings in Nakuru without the knowledge of the respondent. The grant was fraudulently obtained and the appellant and/or her mother concealed from the court the fact that the suit land was family land. The learned Judge was entitled to order revocation of the grant as he did. We so find.

Accordingly, the suit land shall be shared by the sons and daughters of Joel N. Mbugua who died intestate and shall be distributed in accordance with the Kikuyu Customary Law (as developed by the Courts) to which he died subject.

In the result, we dismiss the appeal and uphold the ruling by the High Court **(M. J. Anyara Emukule)** dated 20th January, 2012. As this is a family matter, we direct that each party shall bear its own costs.

Dated and delivered at Nakuru this 31st day of May, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR