IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 68 OF 2017

BETWEEN

JOHN NJUGUNA NJOROGE..... APPELLANT

AND

LILIAN WAMBUI NJOROGE

SAMUEL MUNDIA NJOROGE

JAMES MURUGA NJOROGE

FRANCIS NGUGI NJOROGE

PETER KARIUKI NJOROGE

DAVID MBURU NJOROGE..... RESPONDENTS

(Appeal from the judgment of the Industrial Court of Kenya at Nairobi (Nduma, J.) dated and delivered on 25th April, 2014

in

H. C. C. C. No. 148 OF 2008)

****

JUDGMENT OF THE COURT

1. The appellant, **John Njuguna Njoroge**, was sued by the six respondents above named in Civil Suit No. 605 of 2003 in the High Court at Nairobi which was later transferred to the Environment and Land Court and allocated Suit No. 148 of 2008. The claim against the appellant was for a declaration that he held Land Title No. **Nyandarua/Karati/490** in trust for the respondents and for himself. Alternatively, the respondents claimed for a declaration that they had under the doctrine of adverse possession acquired title to the respective portions of the said land which they each occupy. The third order prayed for in the suit by the respondents was for sub-division of the said land into seven (7) equal portions each for each of the respondents.

2. The respondents' claim against the appellant was predicated on the allegation that the appellant held the suit property in trust for the respondents and himself and in the alternative that they have acquired title to their respective portions in L.R No. Nyandarua/Karati/490 by adverse possession. They sought an order that the appellant do sub-divide the land L.R No. Nyandarua/Karati/490 into seven (7) equal portions each to be transferred to each of the respondents who were the plaintiffs in the said suit.

3. The appellant (the defendant in the said suit) denied the allegations that the respondents were entitled to the suit land on the legal basis that the respondents alleged. The appellant also counter-claimed for the portions occupied by the respondents and sought orders for the eviction of the respondents, damages for trespass, costs and return of title documents.

4. The record of appeal shows that the respondents' case (as plaintiffs) was heard before the High Court by various Judges and the defence

was heard by J. N. Mulwa J. who completed the hearing and determination of the suit. The learned Judge found that the appellant was obligated to share the suit land between himself and the respondents. The learned Judge found that the respondents had "established and proved" their claims against the appellant whose defence and counter-claim he found to be devoid of merit and dismissed the same with costs and gave judgment in favour of the respondents in the following terms:

> ***"(1) A declaration is hereby issued that the Defendant holds L.R. No. Nyandarua/Karati/490 for himself and in trust for the plaintiffs in equal shares.***
>
> ***(2) The plaintiffs claim for adverse possession is dismissed.***
>
> ***(3) The defendants counter-claim is dismissed.***
>
> ***(4) That the Defendant is directed and ordered to sub-divide the suit land L.R Nyandarua/Karati/490 into seven equal portions and transfer six of the portions to the plaintiffs."***

5. The appellant was aggrieved by the decision and gave notice of appeal on 21st April 2017 and lodged the record of appeal on 25th May 2017. In the Memorandum of Appeal dated 24th May 2017, the appellant preferred 16 grounds of appeal in which he submitted that the learned Judge breached the rules of natural justice and the right to be heard; erred in holding that the appellant held the said suit property in trust; that the respondents had no locus standi without letters of administration; the learned Judge erred in considering irrelevant and extraneous matters; failed to find that the suit was res judicata; erred in not finding that he had no jurisdiction to deal with the matter; and in making biased interpretation of the law; in failing to find that the appellant alone paid the credit facility; in making judgment in a vacuo and breaching the principles of natural justice.

6. The appeal came for full hearing on 27th September 2017 before us when learned counsel Mr. Peter Mirie and Mr. Muhia appeared for the appellant and the respondent respectively.

7. Learned counsel Mr. Mirie had on the appellant's behalf filed written submissions and a list of authorities incorporating a case digest as had Mr. Muhia on the respondents' behalf albeit without a case digest. In grounds numbers 1, 2 and 15, the appellant contended that the learned Judge misapprehended the facts and committed errors of law and in basing his decision "on suo moto declaration that the registration of the appellant as proprietor of the suit land was shrewd and fraudulent." It was Mr. Murie's submission that the learned Judge's judgment breached rules of natural justice as the parties were not invited to submit on the issue of fraud. Learned counsel contended that the learned Judge ignored evidence and erred in misapprehending the facts and in failing to hold that the title to the suit land did not pass to Njoroge Mbote, the deceased, at the time of his death and that the suit property did not constitute the free property of the said deceased. Counsel alleged bias against the appellant.

8. It was the appellant's counsel's submission that the respondents had no locus standi as they had no grant of letters of administration in the estate of the deceased (Njoroge Mbote) to give them capacity to sue. It was submitted by Mr. Mirie that the appellant had an indefeasible title to the suit land under Section 143 of the Registered Land Act (now repealed) and that the respondents "stole the title deed sought to transfer the suit property and later produced the same in court". That settles grounds 1 to 24. It was the submission of the appellant's counsel that the decision of the learned Judge was against the weight of the evidence. Counsel urged the Court to allow the appeal and set aside the impugned judgment dated 13th April 2017 and in lieu thereof dismiss the respondents' suit in the High Court and allow the appellant's counter-claim.

9. Of the authorities cited by the appellant's counsel, reliance was placed on the case of **Captain Harry Gendy vs. Caspar Air Charters Ltd [1956] 23 EACA 139 t**o buttress the proposition that a judgment must be founded on issues pleaded by the parties. This principle was reiterated in **Galaxy Paints Company Ltd vs. Falcon Guards Ltd [2000] eKLR.**

10. On his part, Mr. Muhia, learned counsel for the respondents opposed the appeal and relied on the respondents' written submissions and authorities both filed on 26th September 2017. Mr. Muhira contended that the deceased, Njoroge Mbote, was allocated Plot No. 163, and signed the letter of acceptance and paid the required sum and took possession. The evidence adduced, he said, did not show that Settlement Fund Trustee gave notice to take back the land through forfeiture. It was the respondents' counsel's submission that once the suit land was allocated to and accepted by the deceased and possession thereof was taken by the latter, and once this was effected, the suit land ceased to be available for allocation to the appellant because there was no repossession on account of breach of the letter of offer and no notice was given for forfeiture. It was counsel's submission that the issue of allotment to the appellant arose from succession proceedings after the death of Njoroge Mbote. It was not as a result of any default of terms of allocation by the deceased who died on 28th August 1967 before the Law of Succession Act, Cap 160 came into force on 1st July 1981. Counsel submitted that the appellant was to hold the land in trust for the respondents. On locus standi, counsel submitted that the respondents did not need a Grant of Letters of Administration to sue the appellant for breach of trust, nor was the decree of the court based on fraud. It was based on trust. Counsel urged us to dismiss the appeal for lack of merit.

11. We have perused the Memorandum of Appeal, Record of Appeal, and the written submissions and authorities filed by both parties and have given due consideration to the oral highlighting of the submissions by both counsel. This being an appeal from a decision of a superior court acting in exercise of its original jurisdiction, we have power to re-appraise the evidence and to draw our own inferences and conclusions but bearing in mind that on the issue of demenour and veracity of evidence, the trial Judge had vantage position as she is the one who observed the witnesses testify before her. Our duty is to give the parties a re-trial of the suit and re-evaluate the evidence with a view to eliminate any errors that may undermine or subvert or cause failure of justice.

12. The germane facts in this appeal are not complicated. The appellant and the respondents numbers 2 to 6 are brothers and the 1st respondent is their mother whose husband was **Njoroge Mbote,** now **deceased**. In effect, Njoroge Mbote (deceased) was the father of the appellant and the 2nd to 6th respondents. Njoroge Mbote, deceased, had a second wife known as **Wamaitha Njoroge** who had three sons

namely Kenneth Mundia Njoroge, James Murunga Njoroge and Peter Kariuki Njoroge.

13. The genesis of the suit land was an allotment by the **Settlement Fund Trustee (SLT),** Karati Settlement Scheme, through the Commissioner of Lands who alloted to the deceased in November 1963 Plot No. 163 at Karati which measured 35 hectares. The record of appeal shows that the offer of the land by the Settlement Fund Trustees to the deceased was accepted by the latter who paid the requisite fees towards conveyancing and registration and stamp duty charges following which the deceased and his two wives and their children took possession of the said land in December of 1963. It is not denied that the deceased died in 1967 leaving the two widows and their children in possession of the land No. 163. The evidence on record shows that the heirs to the estate of the deceased were the deceased's two widows who were entitled to life interest in the Land Title No. 163 and the sons of his two widows, **Lilian Mundia Njoroge** and **Wamaitha Njoroge.**

14. However, when succession proceedings were instituted in Succession Cause No. 15 of 1968, it is the appellant, **John Njuguna Njoroge**, whose name was placed on record as the heir of the estate of the deceased, and who got registered in December 1973 as the proprietor of Land Title No. Nyandarua/Karati/163, much to the chagrin of Wamaitha Njoroge, and her family. The latter moved Tulaga District Magistrate's court with an application for review of the order declaring the appellant as the sole heir of the deceased's land (Nyandarua/Karati/163). The court allowed the review application and issued orders that resulted in the said land No. 163 being registered in both the name of Kenneth Mundia, the first son in the House of Wamaitha Njoroge, and the appellant, John Njuguna Njoroge, as the eldest son in the House of Lilian Mundia Njoroge, the 1st respondent. Both became joint proprietors. The evidence in the record of appeal shows that the said land was in 1987 partitioned into two and the two sub-divided portions alloted **Title Numbers Nyandarua/Karati/489** and **Nyandarua/Karati/490** and parcel No. Nyandarua/Karati/490 was registered in the name of the appellant (John Njuguna Njoroge) to whom a title deed was issued on 16th September 2981. It measured 17.5 hectares. It seems the House of Wamaitha and her three sons settled on their parcel of land No. Nyandarua/Karati/489 peacefully and without any dispute.

15. However, the House of Lilian Mundia Njoroge, the 1st respondent did not enjoy peace. The appellant claimed that land parcel No. Nyandarua/Karati/490 was his property alone. Yet the 1st respondent and her sons, that is to say, the respondents Nos. 2 to 6, continued from before the time of the death of their father to reside on and work the suit land from which they derived their livelihood. They have had their residential houses on it and they grow crops and trees on it and have kept livestock.

16. It was because the appellant declined the request by the 1st respondent to transfer to them their rightful share of inheritance of the suit land that the respondents instituted suit against the appellant whose determination in the impugned judgment delivered on 13th April 2017 by J. N. Mulwa, J. gave rise to this appeal by the appellant.

17. The evidence that the suit land was alloted to the deceased is overwhelming. It is clear that the deceased legally took and became the legal owner of the suit land and at no time is the deceased shown to have breached the terms of allotment so as to risk forfeiture of the suit land to Settlement Fund Trustees. It is also clear from the evidence that the registration of the appellant emanated from the Succession proceedings after the death of the deceased. Quite clearly, the evidence does show that a trust ensued in favour of the respondents to the extent of their respective shares of inheritance in the suit land. Under Section 28 of the Registered Land Act (now repealed) under which the land was registered, the appellant was not relieved from his obligation as a trustee. We so find. The learned Judge directed herself correctly in this regard and reached the correct conclusion.

18. The contention that the respondents did not have Letters of Administration to institute the suit against the appellant in the lower court does not hold water. The respondents brought the suit in their own right as heirs claiming their entitlement. They did not sue in a representative capacity on behalf of the deceased's estate. They therefore did not require grant of Letters of Administration. The evidence demonstrates that the respondents have lived on the suit land from the time the deceased was alive. If the appellant had truly acquired the land as he claimed to have done, the circumstances relating to the presence of the respondents on the suit land which they call their home would have been different.

19. The decision which is the subject of the dispute in this appeal centered on the issue of trust. The authorities by the appellant on the issue of locus standi and alleged capacity for alleged want of Letters of Administration have no relevance to this case in light of the cogent facts we have stated above which gave rise to the doctrine of trust.

20. The learned Judge evaluated the evidence correctly. We find no merit in the appeal. We dismiss it. We award costs to the respondents both in the High Court suit and in this Appeal.

Dated and delivered at Nakuru this 22nd day of November, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

S. 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