Cherelem v Lokudo (Environment and Land Appeal 003 of 2023) [2024] KEELC 3871 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3871 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 003 OF 2023

FO NYAGAKA, J

MAY 16, 2024

BETWEEN

JOHN KEREE CHERELEM ..... APPELLANT

AND

CHEPOCHEMOS LOKUDO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon B. Ondego (SPM) in Kapenguria Land Case No. 29 of 2020 delivered on 25th July 2023)

JUDGMENT

Background

1. The Respondent herein, Chepochemos Lokudo, instituted a suit by a Plaint dated 26/06/2020. It was against the John Keere Chelelem, the Appellant herein. It was her case that she was the biological mother of the Appellant. She pleaded that her son was registered as the proprietor of the land comprised in title No. West Pokot/Kishaunet/474 measuring 0.9 Hectares (hereinafter 'The Suit Land') where he resides with his family, on 06/10/2005.

2. It was her case that despite being so registered, she was a trustee. She pleaded that the trust ought to now terminate and the Appellant ordered to transfer the suit land to her.

3. The Respondent pleaded that upon the Appellant processing the suit land in his name, he treated it as his own to her exclusion and other children and even attempted to sell off some portion of it. Based on the foregoing the Respondent urged the trial court to declare that the suit land was registered in the Appellant's name in his capacity as a trustee. She sought that the trust terminates and that the Appellant ordered to effect the transfer to her name.

4. The Appellant denied the averments in suit by stating that he purchased the suit land upon paying a consideration of Kshs. 80,000/- to the vendor who, upon obtaining consent from the Land Control Board, facilitated the transfer to his name.

5. Upon considering the evidence, the trial court was of the finding that on a balance of probabilities the Respondent had proven that she bought the suit land from the vendor rather than that of the Appellant. It found that the Respondent having bought the land and caused it to be registered in the Appellant's name, there was a constructive trust in favour of the Respondent and it ought to terminate. The Court ordered the Appellant does transfer the suit land to the Respondent.

The Appeal

6. Dissatisfied with findings of the trial court, the Appellant, through the Memorandum of Appeal dated 31/07/2023 appealed to this Court on the following grounds;

    1. That the learned Magistrate erred in law and in fact when he held that the Respondent had established the existence of a trust when the particulars of trust were not proved.

    2. That the learned magistrate erred in law and in fact when he directed the Appellant to transfer the parcel of land to the Respondent herein when there is no legal basis for such finding.

    3. The that learned magistrate erred in law and in fact when he failed to appreciate that the Appellant herein purchased the suit land in 1997 and the legal formalities regarding transfer of the parcel of the land into his names were fully complied with.

    4. That the learned Magistrate erred in law and in fact when he totally ignored the defence evidence in his findings.

    5. That the learned trial Magistrate erred in law and in fact when he held that the Respondent herein had proved her case on a balance of probabilities.

The Submissions

7. The Appellant supported its case through written submissions dated 20/11/2023. It was his position that the Respondent did not state which trust was being referred to in its pleadings. He argued that the trial court granted the Respondent what it did not pray for in contravention of the Court of Appeal decision in Civil Appeal No. 76 of 2014, *David Sironga Ole Tukai v Francis Arap Muge* where it was served;

    > " It is well established principle in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded."

8. To buttress its case on the nonexistence of a trust, the Appellant relied on the decision in Civil Appeal No. 141 of 2012, *In the matter of the Estate of Kipsang Kandie (deceased)* where it was observed among other things that the onus of proving a trust lies on the party who pleads the existence thereof, to prove it through evidence, because the court never implies, presumes a trust but in the case of absolute necessity.

9. On the ground that the trial court did not consider his defence, the Appellant submitted that he demonstrated how he purchased the suit land from Richard Serewon and Zablon Ngeiywa in the year 1997 at a consideration of Kshs.80,000/.

The Respondent's Case

10. Chepochemosei Lokudo challenged the Appeal through written submissions dated 05/02/2024.

11. It was her case that on a balance of probability, she proved, historically, that a trust came into effect. She drew support from the decision in *Francis Muthui Mathangani v Alice Gathigia Menja* (2021) eKLR where the Court observed that in absence of an express trust, there are trusts created by operation of the law, which fall within constructive and resulting trusts. On the foregoing, it was her case that having proved that she bought the land by producing the sale agreement, the Court's hands were tied on the issue of ownership.

12. To bolster the inability of the Appellant to have purchased the suit land, it she argued that the Appellant admitted that despite claiming to have purchased the land and he had no proof of funds. She stated that the Appellant admitted that the transfer was undated, unsigned and that the purported consent was obtained 19 years before the title.

13. In urging the Court to dismiss the Appeal, the Respondent submitted that the trial court duly considered the Appellant's defence.

Issues for Determination

14. Having carefully considered the factual and legal arguments pitting the parties herein, I am of the view that the issues that arise for determination are as follows;

    i. Whether the trial court erred in finding that a trust existed in favour of the Respondent.

    ii. Whether the Appellant purchased the suit land in 1997 and followed the legal formalities regarding transfer.

    iii. Reliefs.

15. I will hence consider the issues sequentially.

Analysis and Determination

16. This being a first appeal, the role of this Court is clear: it must re-evaluate the evidence and make its finding on the matter. As was observed by the Court of Appeal in *Susan Munyi v Keshr Shiani* [2013] eKLR, the Court is under duty to re-look, reassess and reanalyse the evidence before the trial court with a view to coming up with its own findings. The Court observed;

> "As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

17. Similarly, in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR the Court set out the role of the first appellate court in the following terms;

> "This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on 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 the case of *Kenya Ports Authority v Kustron (Kenya) Limited* 2000 2EA 212."

18. Bryan A. Garner (2019). *Black's Law Dictionary*, 11th Edition, Thompson Reuters, St. Paul MN, p. 1817 defines a trust in the following terms;

> " The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds a legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."

19. In *Twalib Hatayan & Another v Said Saggar Ahmed Al Heidy & Others* [2015] eKLR, the Court of Appeal observed as follows;

> " 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 absence of an express trust, we have trust created by operation of the law. These fall within two categories; constructive and resulting trusts."

20. In the case, (*Twalib Hatayan & Another v Said Saggar Ahmed Al Heidy & Others*) the learned Court of Appeal Judges went further and distinguished a resulting trust from a constructive trust in the following manner;

> ...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 ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity* 29th Edition, 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.

21. I now turn to consider the findings of the trial court.

(i) Whether the trial court erred in finding that a trust existed in favour of the Respondent

22. In her testimony, the Respondent stated that the Appellant was her son. She stated that she bought the parcel of land on 07/03/1994 from Zablon Ngeiywa Prutui and Richard Serewon for Kshs. 50,000/-. Initially it was part of parcel No. West Pokot/Kishaunet/304 but upon subdivision it became West Pokot/Kishaunet/474 measuring approximately 0.9 hectares. She produced the land sale agreement as P.Exhibit 1. She wrote in her statement that she allowed her son to occupy the land in 2002 and he got registered on 06/10/2005 without her permission. She testified that she did not know when the son went to change the names from hers to his but he processed the title on 18/07/2017. She added that the Defendant has since excluded her and his siblings from occupation and use.

23. To corroborate the ownership fact, PW2, the son in-law and a brother in-law to the Appellant, stated that he was familiar with the Sale Agreement since he was a witness to the transaction. He added that he was the one who invited the Respondent herein to buy the parcel since he had already bought his comprised of approximately 2 acres. It became registered in his name as West Pokot/Kishaunet/477. His testimony was that at the time the Respondent bought the land, the Appellant was away in school.

Lastly, he said that the Appellant's mother invited him to start occupying the land she had been cultivating since 1994 in 2002.

24. In cross-examination he stated he did not know whether the Appellant was taken to the Land Control Board for the transfer.

25. Alice Chemutai, yet another witness to the transaction, testified as PW3. She gave evidence that the Respondent bought the land from Richard Ngeiywa and Zablon Ngeiywa. On cross-examination she admitted that she did not know in whose name the suit land was registered after the transaction. She was surprised that the Appellant herein was registered on the title deed.

26. In his defence, the Appellant testified as DW1. He stated that he bought the suit land from Richard Serewon and Zablon Ngeiywa Putui at Kshs.80,000/-. He testified that the transaction was oral. Thereafter he obtained consent and a transfer to his name. He produced them as D.Exhibit 1 and 2 respectively. He added that he did not hold the land in trust for his mother since she did not participate in its purchase.

27. On cross-examination, he admitted that he did not have any sale agreement to prove the purchase. He also conceded that the transfer document neither had signature, rubberstamps nor the registrar's signature. He admitted further that the consent he produced as D.Exhibit 1 was neither dated nor had a signature. He testified that he bought the suit land in 1997, only four (4) years after finishing class 8. Further, that the consent to transfer was for 2021.

28. Wilson Yegon testified as DW2. His evidence was that he witnessed the Sale Agreement. The sale took place in 1997 and he was the one who invited the Appellant to come to the land to buy from on Richard. The agreement was done at the Chief's office and later the seller took the Appellant to the Land Control Board. He stated that the parcel number was 474.

29. In cross- examination he admitted that in 1997 the parcel did not exist. The mutation for parcel No. 304 showed it was made in 2005.

30. DW3, Wilson Lokudo, also testified. He was a brother to the Appellant and son to the Respondent. He stated that it was his brother (the Appellant) who bought the land and not his mother.

31. In cross-examination he admitted that he born in 1980 and was 17 years old when the land was bought. He insisted that he was present when the land was bought and his mother knew the appellant had title to it.

32. I have interrogated the trial court's Judgment. From the outset, it correctly noted that in terms of his claim as a purchaser of the suit land, the Appellant fell short the mandatory requirement in Section 3(3) of the *Law of Contract Act* that requires all disposition in land to be in writing and witnessed accordingly. His evidence was that he bought the land but he did not produce any written agreement to that effect. On the contrary the Respondent produced as P.Exhibit 1 an original agreement between the vendors and her. It was witnessed.

33. In further support of the Defence case the Defendant produced an application to the Land Control Board and a transfer form as D.Exhibit 1 and D.Exhibit 2. The Court notes that both documents were incomplete as they were not properly signed. They cannot pass for evidence of the completion of the transaction. Moreover, the Application to the LCB was dated 12/02/2001 but it was not accompanied by any consent form to show that indeed the same was ever granted. The transfer form was barely sign: it was signed only by individuals purporting to the sellers and the purchaser but not witnessed by anyone at all.

(ii) Whether the Appellant purchased the suit land in 1997 and followed the legal formalities regarding transfer

34. Upon considering the evidence of the Respondent herein, the Court was satisfied that Respondent was the buyer of the land. The Appellant did not demonstrate how he got to buy the land and register himself as owner. This was evidence of fraud. There was no documentary evidence, apart from the incomplete and defective application for the LCB and the transfer form the Appellant produced to prove his case. As stated above, Section 3(3) of the *Law of Contract Act* is clear on how transactions on land should be evidenced. The totality of the evidence of PW1, PW2 and PW3, shows that it was Respondent who bought the land and is entitled to ownership thereof.

35. As regards the contested existence of a trust, the trial court upon considering the facts of the case, the evidence presented and the principles set in the decision in *Francis Muthui Mathangani v Alice Gathigia Menja* [2021] eKLR and relied on by the Respondent herein made the following finding;

> " ... that since the defendant has acquired the property by wrong doing, the courts can then decide to impose a constructive trust which is an equitable remedy imposed by the courts against one who has acquired property by wrong doing.
>
> This kind of trust arises where the intention of the parties cannot be ascertained just as in our case."

36. Since the Respondent bought the land, invited the Appellant to come onto it in 2002 and start using it, and eventually he was registered as owner, the registration created a trust. The trial court's appreciation of the facts, the evidence adduced and applicable legal principles on trust cannot be faulted. Whereas the Respondent produced the Sale Agreement evidencing purchase, the Appellant had none. The testimony of the Appellant and his witness did not corroborate the claim that he purchased of the suit land.

37. Further, it is notable that before the trial court made its final verdict it correctly made reference to Section 28(b) of the *Land Registration Act*, which is relevant in the circumstances of this suit. It recognizes trust as overriding interest on registration. The learned trial magistrate observed;

> " .... there was a constructive trust which automatically arises where a person who is already a trustee takes advantage of his position for his benefit. Proof of parties' intention is immaterial for the trust will nonetheless be imposed by the law for the benefit of the settler."

38. Having keenly reassessed the totality of the evidence, the documentary and oral evidence, there is no reason to depart from or disturb the trial court's findings. As regards the Appellant's contention that his defence was not considered, I do find that it has no merit since the trial court meticulously appreciated the documentary evidence presented by the Appellant including the Transfer and consent besides the oral evidence of DW1, DW2 and DW3 and the pleadings, wherein it correctly noted the defects there on the documentary evidence and the insufficiency of the oral testimony, all which disentitled the Appellant the ownership of the suit land.

39. In the premises, I find no merit in the whole Appeal and I hold so. I hereby dismiss it in entirety with costs to the Respondent. Further, the judgment of the Subordinate Court is varied to read that the Plaintiff shall also have the costs of the suit, and Defendant is hereby ordered to cease any activities, occupation and use of the suit land within the next sixty (60) days in default eviction to issue against him, except if he is expressly permitted by the Respondent in presence of witnesses to continue occupation and use.

40. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 16TH DAY OF MAY, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE