IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 134 OF 2010

BETWEEN

T M C …..... 1ST APPELLANT

J M C …..... 2ND APPELLANT

AND

E W T …..... RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Nyeri*

(Kasango, J.) dated 14th October, 2008

in

H.C.C.A No. 59 of 2006)

****

JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court (Kasango, J.) wherein the learned Judge set aside *inter alia An order of* declaration that the respondent held ***Parcel No. Loc.19/Kiawambogo/[particulars withheld]*** *(suit land),* in trust for herself and the appellants and one C W C (C) which was issued by the learned Resident Magistrate at ***Muranga in Civil Case No 235 of 2005***.

[2] By a Plaint filed at the Resident Magistrate's Court at Muranga, the appellants and C who is since deceased, sought the following orders:-

- ***Declaration that the defendant (respondent) is holding the suit land in trust for herself and the plaintiffs (the appellants);***

- ***An order for subdivision of the suit land into four equal portions.***

[3] The appellants, C, *(deceased),* and E T C, *(deceased),* are children of the late J C and J C. The respondent is the widow of E T C. The appellants averred that their late mother, J, purchased the suit land from her step- brother, M wa M; the purchase price was paid by instalments; J partly paid the purchase

price with livestock. It was the appellants case that part of the purchase price was met by the dowry which their mother had received in respect of their sister in the year 1963. During the demarcation period in 1960, J was in Rift Valley with the appellants and consequently, E having been charged with the responsibility of taking care of the land was registered as the proprietor of the suit land. They alleged that E held the suit land in trust for the family.

[4] The appellants contended that during the lifetime of their brother, E, the respondent fraudulently transferred the suit land to herself as the sole registered proprietor. The appellant in the Plaint set out the particulars of fraud allegedly committed by the respondent. They averred that the respondent effected the said transfer while E was mentally sick; she knew at all material times that E held the suit property in trust for the family. They claimed that the suit was instigated by the fact that the respondent refused to subdivide the suit land into four equal portions.

[5] In response, the respondent filed a statement of defence denying the allegations in the Plaint. She maintained that her late husband had purchased the suit land without any assistance from the appellants; her late husband voluntarily and legally transferred the suit land to her.

[6] At the hearing, the appellants and C testified that their mother, J, purchased the suit land from their uncle and paid the purchase price in instalments. During the demarcation period, the 2nd appellant and C were with their mother in Rift Valley where she was working for a White settler while the 1st appellant was working in Nakuru. Consequently, E being the eldest son was registered as the proprietor of the suit land. The appellants maintained that E did not purchase the suit land because he had been detained from the year 1950 to 1957 and upon his release it was the 1st appellant who was assisting him financially.

[7] PW1, C, testified that the respondent was married by E after their mother had purchased the suit land. He stated that he was born in Rift Valley in the year 1945 and lived there until 1995 when he went back to the suit land. Since then he has been occupying the suit land and had developed it extensively. C gave evidence that he and the 2nd appellant had cultivated the land but it was only the 2nd appellant who resided thereon. He also testified that their mother returned to the suit land in the year 1960 and lived there on until she passed away in the year 1991. He testified that E was willing to subdivide the suit land unfortunately he suffered from mental illness and passed away in the year 2002 before doing so.

[8] It was the 2nd appellant's evidence that he entered the suit land in the year 1997 and built a house on a portion pointed out to him by E. He stated that he had planted tea bushes thereon. The 1st appellant testified that he started working in 1952 as a clerk in Bahati sawmills in Nakuru and he later went to work in Tanzania. He gave evidence that he used to send money to his mother to enable her make payments towards the purchase price. After returning to Kenya from Tanzania he settled in Nairobi and has never lived or carried out any developments on the suit land.

[9] The respondent testified that she was with her late husband, E, when he purchased the suit land. Initially the suit land comprised of two portions which were subsequently consolidated during the demarcation period. She stated that in the year 1962 E purchased one portion measuring 7 acres from one Kuria Maheri and another measuring 6 acres from Kamau Mundia; E paid partly in cash and partly with livestock. According to the respondent, the appellants never contributed towards the purchase price. She stated that E built on the suit property in the year 1962 while the 2nd appellant built on the suit land in the year 1997 after she allowed him access thereon. She maintained that she allowed the 2nd appellant to occupy the suit land on humanitarian grounds.

[10] The respondent testified that the appellants were aware when her late husband transferred the suit land to her and they never raised any objections. Prior to her husband's death, the appellants never claimed any portion of the suit land. According to the respondent, the appellants only started making claims after the death of her husband.

[11] The respondent testified that the appellants approached her and demanded portions of the suit land. Sensing danger, the respondent agreed to give each of them and C 1 ½ acres. An agreement to that effect

was drawn up and the necessary consent was obtained from the Land Control Board. However, before the subdivision could be effected the appellants demanded for the suit land to be divided into four equal portions. She confirmed that she was still willing to give the appellant's 1 ½ acres each.

[12] DW2, Kuria Maheri, confirmed that he had sold a portion of the suit land measuring 7 acres to E. He testified that the purchase price was Kshs. 50,000/= and Ezra only paid 10,000/=. According to him, the respondent would pay him the balance of Kshs. 40,000/=. DW3, Nelson Chege Wanyiri, testified that he was one of the members of a committee that was deliberating on the dispute between the parties concerning the suit land. He stated that at the conclusion of the deliberations it was agreed that 7 acres of the suit land belong to the respondent while the remaining portion of 6 acres would be divided into four equal portions.

[13] The trial court was convinced that the appellants had proved their case to the required standard and allowed the appellant's suit as prayed. Aggrieved with the decision, the respondent preferred an appeal in the High Court. The High Court vide its judgment held that the appellants had not proved the existence of a trust and set aside the trial court's judgment. It is that judgment that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law in failing to appreciate that the respondent's deceased husband held the premises known as Loc. 19/Kiawambogo/[particulars withheld] in trust for himself and the appellants and C.***

- ***The learned Judge erred in law in failing to appreciate the appellants evidence did not require corroboration by an independent witness.***

- ***The learned Judge erred in law in holding that the appellants failed to prove their case whereas the appellant had proved their case on a balance of probability.***

- ***The learned Judge erred in law in failing to appreciate that the respondent in offering the appellants and their deceased brother 1 ½ acres each was admission of the appellants claim that her deceased husband held the suit in trust for the appellants' family.***

- ***The learned Judge erred in law in failing to appreciate that the evidence adduced in the lower court pointed to the fact that the suit premises was family land.***

- ***The learned Judge erred in law in failing to appreciate that there was no competent appeal before her and the respondent's appeal ought to have been dismissed with costs.***

- ***The learned Judge erred in law in allowing the appeal whereas she had concluded that the respondent and her witnesses had contradicted each other.***

[14] Mr. Muchai, learned counsel for the appellants, submitted that the learned Judge erred in the way he appreciated the evidence tendered by PW3 (the 1st appellant). He stated that the appellant's mother purchased the suit land partly with the proceeds of the dowry she had received in respect of one of her daughters. The 1st appellant used to send money to E, the respondent's late husband, who would in turn forward it to the vendor of the suit land. He contended that the respondent in her evidence admitted that she did not know how the suit land was acquired; her deceased husband owned land at Gatunga measuring six acres.

[16] Mr. Muchai argued that despite the respondent allegations that she and her deceased husband purchased 7 acres she did not know the actual purchase price. In contradiction to the respondent's evidence, DW2 testified that he had sold a portion of 7 acres of the suit land to the respondent's husband for a consideration of Kshs. 50,000/=; that her deceased husband only paid Kshs. 10,000/= and a balance of Kshs. 40,000/= was still outstanding. Placing reliance on the decision in ***Wageche Mariyu -vs- Muturi Mariyu,- Civil Appeal No. 135 of 2010,*** Mr. Muchai argued that PW1's, C, evidence was credible and there was no need of an independent witness to corroborate the same. According to Mr. Muchai, the suit

land was registered in the name of E, the respondent's late husband, because he was the eldest son in the family; E held the suit land in trust for the family. He urged the Court to allow the appeal.

[17] Mr. Waguta, learned counsel for the respondent, in opposing the appeal submitted that he supported the decision of the High Court; the learned Judge exhaustively evaluated the evidence tendered by all witnesses and arrived at the correct conclusion. According to Mr. Waguta, the evidence adduced by the appellants was not sufficient to prove the existence of a trust. He submitted that the 1st appellant testified that he refused the 1 ½ acre which the respondent had given him because the terrain was bad. Mr. Waguta argued that the respondent was able to give an explanation of how her late husband had bought the suit land. He maintained that the allegation that the appellant's mother had purchased the suit land was not proved. This is because there was no proof that the 1st appellant actually sent money to the respondent's husband or the amount of dowry their late mother received with which the suit land was allegedly purchased. He further argued that the appellants did not give an account of what they did since the land was registered in their late brother's name until his demise in the year 2002; the question that arises is, why the appellants never claimed the suit land during the lifetime of their brother, E?

[18] This is a second appeal and by dint of ***Section 72 (1)*** of the ***Civil Procedure Act***, Chapter 21, Laws of Kenya this Court's jurisdiction is restricted to matters of Law. In ***Kenya Breweries Ltd -vs- Godfrey Odoyo – Civil Appeal No. 127 of 2007***, Onyango Otieno, J.A expressed himself as follows:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court in a second appeal, confines itself to matters of Law unless it is shown that the two courts below considered matters they should have considered or looking at the entire decision, it is perverse". (See also this Court's decision in Maina vs. Mugiria (1983) KLR 78.)"***

Based on the foregoing the issues that arise for our determination are twfold:-

- ***Did the appellants prove the existence of a trust?***
- ***Did the learned Judge properly re-evaluate the evidence tendered in the High Court?***

[19] It is trite law that he who makes an allegation must prove it. In this case, the appellants alleged the existence of a trust; that the respondent held the suit land in trust for the appellants and C (deceased) as well as for herself. Therefore, the issue for determination is whether the appellants proved the existence of the alleged trust over the suit land. In ***Mumo -vs- Makau, (2004) 1 KLR 13,*** this Court held that trust is a question of fact and has to be proved by evidence. In ***Mbothu & 8 others -vs- Waitimu & 11 Others, (1986) KLR 173,*** this Court expressed itself as follows:-

> ***"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."***

Further, this Court in ***Gichuki -vs- Gichuki,- Civil Appeal No. 21 of 1981*** stated that a party relying on the existence of a trust must prove through evidence the creation and existence of such trust.

[20] Thus, was the existence of a trust established from the evidence on record? The trial court found that the appellants had proved to the required standard the existence of a trust while the High Court in overturning the trial court's decision was of the view that the appellants had not established the existence of a trust. As set out above, this being a second appeal, this Court's jurisdiction is restricted to matters of law. In this case, the two lower courts made different findings of fact on the issue of trust. This Court's duty is to examine the evidence and determine of the High Court as the first appellate court properly re-evaluated the evidence.

[21] The appellants claimed that their mother purchased the suit land from her step brother while the

respondent claimed that her late husband, E, purchased the suit property from Kuria Maheri and Kamau Mundia. None of the parties produced any documentary evidence of the alleged purchase of the suit land. Therefore, the decision in this matter largely depends on the credibility of witnesses. The trial court was of the view that the appellants were credible and believed their version. The trial court stated:-

> ***"I agree with the plaintiffs (appellants) submissions, that there was some inconsistency in the testimonies of DW1(respondent) and DW2 on the consideration that was paid by the defendants husband. While DW1 stated that her husband paid Kshs. 200/= per acre, DW2 stated that the whole purchase price was 50,000/= but was only paid Kshs.10,000/=.....On the other hand the plaintiffs created a flow as to how the land was registered in the name of their elder brother,Ezra. To me this is the true version an further my holding is fortified by the fact that at the time of demarcation and consolidation elder sons could be registered as proprietors of lands absolutely. The acquisition of the land by the plaintiff's mother was well explained by them and I uphold their evidence on this."***

[22] Was the High Court right in reversing the decision of the trial court on its findings of fact? In the case of ***Ephantus Mwangi & Geofrey Nguyo Ngatia -vs- Duncan Mwangi Wambugu, (1982-1988) 1 KAR 278,*** this Court held that it would hesitate before reversing the decision of a trial Judge on his findings of fact. It will only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that his or her impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown demonstrably to have acted on wrong principle. See also the authority in the case of; - ***Peters -vs- Sunday Post, [1958] E.A. 424*** at p. 429 Sir Kenneth O'Connor P said:-

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the 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 that evidence should stand. But this 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."***

[23] In determining the two issues that we have identified as falling for our determination, we are conscious that it was the trial court that had the advantage of seeing and hearing the witnesses. The learned Judge of the High Court as the first appellate was mandated to re evaluate the entire evidence and arrive at an independent conclusion of the matter. We on our part are supposed to deal with issues of law as provided for under ***Section 72(1)*** of the ***Civil Procedure Act***. Both courts arrived at different conclusions and for that matter we have to look into the correctness of the conclusions drawn by the Judge, although derived from the primary evidence, because if those conclusions are erroneous they become points of law.

[24] The first conclusion was the holding that the appellants failed to prove the existence of a trust regarding the suit land which was registered in the name of the respondent's husband in 1960. This is what the Judge said in her own words;

> ***"The learned magistrate in my view wrongly shifted the burden of proof to the appellant. It was the respondents who had filed the claim seeking declaration of trust. That being the case they had a burden to prove that a trust did indeed exist. In my view it matters not that the appellant and DW2 contradicted each other in respect of the purchase price. What is pertinent is that the land was registered in the name of E from early 1960's. The respondents did not either during his lifetime or during the lifetime of their parents lay claim to the land...I find that the respondents did not prove their case."***

[25] We find the above conclusion not entirely correct for reasons that a claim based on trust was not limited to the lifetime of E or the appellant's mother. It was predicated on the facts that E, as the eldest brother of the appellants held the suit premises in trust for the appellants. Determination of trust is a

matter of fact. We find the following facts were not contested in both courts below; the suit land was registered in the name of E the appellant's eldest brother after demarcation in 1960; that the appellant's mother one J W C was at the time of registration working for a White Settler in Rift Valley; that when she stopped working, she settled and lived on the suit land until when she passed away in 1991; that 2nd appellant settled on the suit land in 1959, he has been residing there to date; the respondent had expressed willingness to transfer a portion of one and half acres of the suit land to the appellants on humanitarian grounds but later rescinded that gesture.

[26] The Judge having found the defence evidence inconsistent, and since the above facts were not controverted, we find this evidence establishes it was more likely than not that E was registered as trustee as the eldest son, in line with the customary norms. See the ***Gatimu Kinguru v Muya Gathangi, [1976] KLR 253 at page 263*** where Madan J. (as he then was) said: -

> ***"Under Section 143(1) a first registration may not be attached even if it is obtained made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom, which may be described as a custom of primogeniture holding and by consent of everyone concerned. The Section does not exclude recognition of a trust provided it can be established. Parliament could not intend to destroy this custom of one of the largest sections of the peoples of Kenya. It would require express legislation to enable the court to so hold."***

[27] Besides the reasons advanced by the trial magistrate which we agree with, there are two other profound angles to this matter which in our view were not considered, but which were born out of the evidence and consequently go along long way to fortify our conclusions. Firstly this land was acquired during the period of land demarcation; it was registered in the 1960's in the name of E. There were allegations which were not denied by the respondent that E was suffering from mental illness and that is when he transferred the land to the respondent. When that second transfer was effected, the 2nd appellant and his family were in occupation of part of the suit land. This registration was as per the provisions of sections 27 and 28 of the repealed Registered Lands Act that vested absolute rights upon the appellant as the registered owner is subject only to the overriding interests.

[28]. These overriding interests are noted under Section ***30(g) of the Registered Act*** which provides: -

> ***"Unless the contrary is expressed in the register, all registered land shall be subject to sum of the following overriding interest as may for the time being subsist and attest the same, without their being noted on the register-***
>
> ***(a) ….***
>
> ***(9) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not discharged."***

In our own appreciation of the evidence, 2nd appellant was in occupation of the suit land, not as a trespasser but as a beneficial owner who had legitimate expectations to benefit from the land held by his elder brother, therefore the Land Registrar ought to have made an enquiry before issuing the title to the respondent.

[29] The other profound issue which was overlooked by the Judge but was dwelt with extensively by the trial magistrate, was the fact that the respondent had agreed to transfer to the appellant one and half acres each of the suit land on humanitarian grounds. The trial magistrate rightly appreciated this evidence when he stated the following in his judgment:-

> ***"The defendant had (sic) exposed willingness to transfer 11/2 acres to the plaintiffs on humanitarian grounds. In her defence filed herein she pleaded that she had rescinded this gestures. This was happening after her husband had passed away. 41/2 acres is by no means***

a small portion of land out of 13 acres. One wonders then how she settled on this amount of land. It is clear that the 3rd plaintiff has settled on the land where she lives with his family and carries on his farming (sic) cultivates there.

It is my considered view that the defendant recognize that the plaintiffs have a stake in the land and that is why she expressed her willingness to part with a portion of it and also let the 3rd plaintiff settle there".

[30] Based on the foregoing, we find there is merit in this appeal, the appellants proved the claim of trust and considering the respondent has been in occupation of the suit land for over 50 years and she was willing to cede a portion thereto; we are of the view the order that would render itself just in the circumstances and which should have been allowed is for the respondent to transfer the four and half acres to the appellants. According we set aside the judgment of the High Court dated 14th October, 2008, and substitute in its place with the following:-

1. ***A declaration that the respondents holds four and half acres of land out title no LOC 19/KIAWAMBOGO/ [particulars withheld] in trust of the T M C, C M C and J M C***

2. ***The said land be transferred to the appellants within 6 months from the date of this judgement; in default, the Deputy Registrar of this court is authorized to sign the relevant documents.***

3. ***The appellants to bear the costs of subdivision.***

4. ***This being a family matter each party to bear their own costs of this appeal.***

Dated and delivered at Nyeri this 7th day of April, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR