IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 297 OF 2009

BETWEEN

JOHN TELEYIO OLE SAWOYO …..... APPELLANT

AND

DAVID OMWENGA MAOBE …..... RESPONDENT

***(Appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Musinga J.) dated on 22rd July, 2009* in HCC NO.149 OF 2005)**

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JUDGMENT OF THE COURT

This appeal is from the judgment of the High Court, ***Musinga J.*** (as he then was) dated 23rd July, 2009 in a dispute over land, parcel number ***Transmara/Osinoni/49*** *(hereinafter "the suit land").* The respondent was the plaintiff in that suit and sought, against the appellant who was the defendant therein, two main reliefs, namely, a declaration that the appellant was registered as proprietor of the suit land in trust for him and further that he be ordered to transfer the suit land to the respondent.

The basis of the respondent's claim was that he had left the suit land in 1992 in the hands of the appellant because he was forced to move out of it by tribal clashes. However on his return the respondent discovered that the appellant had registered the suit land in his name fraudulently particulars whereof he pleaded.

In the defence delivered by the appellant, he denied the fraud and alleged that he had lawfully purchased the suit land from the respondent during the adjudication process and became the registered proprietor thereof on first registration. As a proprietor on first registration, the appellant averred that his registration was indefeasible and further that a trust would not be found in favour of the respondent as he was not related to him nor were particulars of trust given.

After hearing the respondent and his three witnesses and the appellant Musinga J, gave judgment for the respondent in the following terms:-

> ***"Having established that there existed a constructive trust between the plaintiff and the defendant as far as the suit land was concerned, the defendant should transfer back to the plaintiff the entire suit land which I hereby order. Another entry will therefore be made in the register to record this transfer as ordered herein above. If the defendant fails [so] to do***

within the next thirty days from the date hereof, the deputy registrar of this court is authorized to sign and seal the necessary documents.

The defendant shall bear the costs of this suit".

From that decision the appellant has appealed to this Court on some twelve grounds which in the main raise three issues:-

1. *The validity of the transaction between the appellant and the respondent.*

2. *The validity of the respondent's claim in the light of the Limitation of Actions Act and in the absence of particulars of trust.*

3. *The scope of the doctrine of trust and whether the respondent proved the same to the required standard.*

The respondent in his testimony said that at the time he purchased the suit land the process of land adjudication was in progress in the area and he was adjudicated the owner thereof. Before the completion of the process however, tribal clashes broke out in the area and he was forced to move out of the suit land on 3rd April, 1992. At the time he moved out he had seven houses on the suit land: five grass-thatched and two corrugated iron roofed houses. He also had a maize crop on the suit land for which he sought buyers. In May, 1992 the appellant accepted to buy the maize crop at Kshs.130,000/= which he paid in July, 1992. He also requested to be allowed to stay on the suit land until peace returned to the area since, according to the respondent, the appellant had also been a victim of clashes.

The respondent further stated that in 2005 he discovered that his name had been removed from the register of the suit land. That was after he found in 2004 that the appellant had cut down his trees and destroyed his houses in addition to using his bricks to construct a house. He complained to the local administration without success but in the course of those proceedings the appellant had alleged that there had been objection proceedings over the suit land during the adjudication process which had been decided in his favour which allegation, according to the respondent, was false hence the suit.

The appellant gave evidence and told the court that the respondent sold the suit land to him vide an agreement dated 19th July, 1992. He paid the respondent Kshs.30,000/= on that date which sum was not reflected in the agreement. He alleged that there was another agreement which was witnessed by the respondent's brother, ***David Omwono Maobe*** (PW3) and one ***Samuel Sarisa Montet*** but which he did not produce at the trial. In total he testified that he paid to the respondent Kshs.218,000/= made up as follows:- the said Kshs.30,000/=, Kshs.130,000/= by way of a cheque and the balance in the form of nine (9) head of cattle. The respondent then, according to the appellant, signed a transfer form in the office of the Land Adjudication and Settlement Officer, Kilgoris in addition to lodging objection proceedings which ended in his favour. He eventually obtained a Title Deed and has never been investigated for fraud in obtaining the registration of the suit land in his name.

After hearing parties and their witnesses the learned Judge found that the appellant had not been candid and therefore discredited his testimony. He stated as follows:-

"Turning back to this case, I observed the demeanour of the defendant as he testified, carefully listened to his answers to questions both in examination in chief and cross-examination and considered most of the documents which he produced as exhibits. In my assessment the oath that he took to tell the truth and nothing but the whole truth meant almost nothing to him. Though seemingly an intelligent man, some of his answers and/or explanations were almost non sensical and a clear demonstration of a person who knew that he had betrayed the trust bestowed upon him by the plaintiff. According to the defendant the plaintiff filed objection proceedings so that there could be a semblance of a case between them so that he could transfer the suit land to him. This was his answer to the question as to why the plaintiff had to file objection proceedings if at all, he had willingly sold the suit land to him. The defendant

was determined to get the suit land registered in his name as a first registration. No matter what kind of objections the plaintiff would raise thereafter as long as it was a first registration he would be secure; so he thought and/or was made to believe."

The learned Judge accepted, as credible and truthful, the evidence of the respondent. He said:-

"There was no dispute that as at 13th February, 1991 the Adjudication Record showed that the plaintiff was the legal owner of the suit land (see the Adjudication Record P. Exh. 4). The same showed his identity card number as 6550909/69. I accept the plaintiff's evidence that he was forced to move out of his land by the infamous tribal clashes that rocked parts of the Rift Valley Province, including Transmara District in 1992. By then he had put up some houses thereon and was also growing maize and other crops."
….....

The learned judge then concluded as follows:-

"My finding on the first issue is that there was no sale transaction between the plaintiff and the defendant in respect of the suit land."

The learned Judge also found that the respondent did not participate in objection proceedings; that the transfer of the suit land to the appellant was fraudulent; and that the appellant held the suit land in trust for the respondent.

This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. In the case of ***Mwangi -Vs- Wambugu [1984] KLR 453 at page 461, Kneller JA*** (as he was then was) stated:-

"This is a first appeal so this Court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making allowance for this: (Selle & Another -Vs- Associated Motor Boat Company Ltd & Others [1968] EA 123, 126 (CA Z) and Williamson Diamonds Ltd -Vs- Brown [1970] EA 1. 12] (C A T)".

Still on the duty of the first appellate Court, ***Hancox JA*** (as he then was), stated in ***Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278 at page 292,*** as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

In that case the Court held, inter alia, as follows:-

"The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally."

We shall bear the foregoing in mind as we deal with the issues raised in this appeal. The learned Judge of the High Court found in relation to the first issue we have framed above that there was no sale agreement between the appellant and the respondent in respect of the suit land. His reasons for that finding were that the alleged agreement of sale did not reflect an essential term of the sale namely the purchase price, and further that the witnesses the appellant alleged, witnessed the agreement neither

signed the agreement nor testified to that effect.

We have ourselves perused the agreement dated 19th July, 1992 which was produced as D Ex. 3. The document indeed contains no purchase price and how it was to be paid. In his evidence in chief, the appellant told the court that the purchase price was 218,000/= of which he paid Kshs.30,000/= on execution of the agreement which was not reflected in the agreement. He then referred to another agreement which was, witnessed by the respondent's brother, David Omwono Maobe, (PW3) and one Samuel Sarisa Montet. That agreement was never produced at the trial. PW3 on his part denied witnessing any sale agreement between the appellant and the respondent. Samuel Sarisa Montet was not called as a witness.

The appellant also told the court, at the trial, that he paid Kshs.130,000/= by way of a cheque towards the purchase price. That cheque was however dated 14th July, 1992 before the date of the alleged sale agreement and yet it was not reflected in the purported agreement. The balance of purchase price was, according to the appellant, paid in the form of cattle. The document acknowledging the cattle was not produced.

In cross-examination, the appellant admitted that the application for transfer he relied upon to effect the change in registration of the suit land to himself at the adjudication office, pre-dated the agreement of sale as it was dated 12th June, 1991 whilst the agreement of sale was allegedly dated 19th July, 1992. On being asked why the respondent would object to his own registration as proprietor of the suit land, the appellant responded that the objection proceedings were filed to give a ***"semblance of a case".***

Given the testimony of the appellant it is, in our view, difficult to fault the learned Judge of the High Court in his conclusion that the appellant was not candid with the court. The conclusion was based on the evidence adduced before the High Court at the trial. It cannot also be said that the conclusion was based on a misapprehension of the evidence. On the demeanor of the appellant, the learned Judge stated as follows:-

> ***"I observed the demeanour of the defendant as he testified, carefully listened to his answers to questions both in examination in chief and cross-examination and considered most of the documents which he produced as exhibits. In my assessment, the oath that he took to tell the truth and nothing but the whole truth meant almost nothing to him."***

The learned Judge saw and heard the appellant testify before him. He had the advantage of observing the appellant testify and his impression based on the appellant's demeanour is not, in our view, inconsistent with the evidence which was adduced before him. That being our view of the matter, we would hesitate to reverse the decision of the learned Judge of the High Court on findings of facts. We are therefore in entire agreement with the learned Judge that there was no sale agreement in respect of the suit land between the appellant and the respondent.

With regard to the plea of limitation, we note that the appellant indeed pleaded the same in paragraph 12 of his defence. It would however appear, from the record, that the appellant did not frame the same as an issue for determination. The learned Judge referred to the issues framed by the appellant in his Judgment and the same did not include the plea of limitation. We do not therefore have the benefit of the decision of the High Court on the issue. The record further shows that that issue was raised before ***Bauni J*** (as he then was) who concluded as follows on it:-

> ***"As to limitation if indeed the transaction took place in 1991 then the suit will be time barred as it was brought after lapse of 12 years. However the respondent has raised an issue that the cancellation that removed his name in the register and inserted that of respondent was done in 1999 in which case the suit would not be time barred. None of the annextures in the supporting and replying affidavits are clear on those dates. I therefore feel that it would be proper to hear the evidence from both sides, before deciding on that issue".***

And when the evidence was adduced before the High Court, the following emerged: The agreement of

sale produced by the appellant had various dates one of which was 27th December, 1992 when a cheque for Kshs.3000/= was allegedly issued. When the respondent testified, he stated that in 2005 he realized that the records at Lands registry had been changed and his name replaced by that of the appellant. The respondent instituted this suit in November, 2005. In the premises the plea of limitation was not available to the appellant. It is therefore not surprising that he never framed limitation as an issue for the court's determination.

With regard to the failure of the respondent to give particulars of trust, the record shows that that challenge was also raised before Bauni J, who held as follows:-

> *"There is a pleading for trust though the particulars are not itemized as provided for in **Order 6 rule 8.** However, failure to itemize particulars of fraud above cannot make the suit fail as there is a proviso to that rule and also amendments on rectify (sic) such an omission. Thus though this as a first registration the court feels that it would be proper to allow the plaintiff to put his evidence before the court and for the court to decide if such evidence justifies Court's interference under the provisions of **section 143 (2)** Registered Land Act. Each party will be allowed to call evidence to prove their points."*

And evidence which was accepted by the High Court showed that the appellant had acquired the suit piece of land in circumstances which made it inequitable for him to be allowed to retain the same. In other words the respondent proved, to the required standard, that the appellant held the suit land on a constructive trust in favour of the respondent. Having not purchased the suit land as was found by the learned Judge, his registration against the suit land could only have been irregularly obtained.

That leads us to a brief discussion of the effect of ***section 143 (1)*** of the registered Land Act (now repealed) on the registration of the appellant as proprietor thereof. The section reads as follows:-

> ***"143 (1)***
>
> ***Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."***

The learned Judge described the section as a legal absurdity. He showed his revulsion to the section in terms we find unfortunate, with all due respect to him. There was rationale in enacting the said provision given the process leading to the registration. Before registration, elaborate opportunities were open to any one who had reason to complain. Complaints were entertained at every stage during the process of consolidation, adjudication and registration. The entire process was adequately publicized in print and electronic media. Public ***"barazas"*** were used to educate the public of the process. Final appeals were determined by the Minister responsible for land matters. And even if one still felt dissatisfied with the Minister's determination, one would resort to the remedy of judicial review orders of mandamus, certiorari and prohibition. At the conclusion of that elaborate process, it was necessary to protect the final register. Looked at from that perspective, there would appear to be justification for the enactment of ***section 143 (1)*** of the Registered Land Act.

Nevertheless, it would appear that the complaint made by the respondent in this case was not envisaged by the framers of ***section 143 (1)*** of the Registered Land Act. In his case the process leading to his being adjudicated as the owner of the suit piece of land was never challenged. He could not therefore make any complaint at any stage of the adjudication and registration process. He expected his name to appear in the final register which was presented to the Chief Land Registrar under the Land Adjudication Act from which the register of the suit land was opened. But to his shock he was not so registered and instead it was the appellant who was registered as proprietor of his piece of land. In the case of ***John Gitiba Buruno & Another -Vs- Jackson Rioba Buruno [Civil Appeal No. 89 of 2003] (UR),*** this Court, differently constituted, held:-

> ***"a constructive trust arises where the property the subject matter of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property."***

Like the learned Judge, we have come to the conclusion that it would be inequitable to allow the appellant to assert absolute ownership of the suit property given the evidence on record. He holds the suit property on an implied constructive trust in favour of the respondent.

As the decision of this Court in ***John Gitiba Buruno & Another -Vs- Jackson Rioba Buruno*** (supra) shows, declaration of such a trust is not new. In the case of **Phillicery** ***Nduku Mumo -Vs- Nzuki Makau [Nairobi CA No. 56 of 2001] (UR),*** this Court, differently constituted, held as follows:-

> ***"...there is nothing in the Registered Land Act Cap 300 Laws of Kenya … which precludes the declaration of a trust in registered land even if it is a first registration."***

And in ***Obiero -Vs- Opiyo [1972] EA 227,*** it was held that a first registration cannot be challenged except through establishing and proving a trust.

The trust in this case need not have been entered on the register in respect of the suit land. The respondent's interest was protected by the proviso to ***section 28*** of the Registered Land Act. That section is in the following terms:-

> ***"28.***
>
> **The rights of a proprietor whether acquired on first registration, or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject -**
>
> **(a) to the leases charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and**
>
> **(b) unless the contrary is expressed in the register to such liabilities rights and interests as affect the same and are declared by section 30 not to require noting on the register.**
>
> **Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee" (emphasis supplied).**

We think we have said enough to show that this appeal cannot succeed. We find no merit in any of the grounds cited by the appellant. We are satisfied, on our assessment of the evidence and the applicable law, that the learned Judge of the High Court acted on correct principles in reaching his decision. The upshot is that the appeal fails and we order that it be and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and Delivered at Kisumu this 22nd Day of November, 2013

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR