



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 243 OF 2016

JOSEPHAT TUTI ANGOYA.....PLAINTIFF

VERSUS

AGGREY KWEYA ANGAYA.....DEFENDANT

JUDGEMENT

The plaintiff avers that the plaintiff and defendant are brothers. That on 17th June, 1999, the decision of the Disputes Tribunal was adopted as the judgment of the court in Maseno Civil Misc. Application No. 4 of 1999 that land parcel No. West Bunyore/Ebusakami/1895 be divided among the three Angoya sons namely, Aggrey Kweya Angoya (Defendant), Josephat Tuti Angoya (Plaintiff) and Wilson Osango Angoya. That subsequently Land Parcel No. West Bunyore/Ebusakami/1895 was subdivided into two West Bunyore/Ebusakami/2772 and 2773. The plaintiff further avers that his late brother Wilson Osango Angoya's family and himself are in actual occupation and utilization of land parcel known as W/Bunyore/Ebusakami/2772 which was recently subdivided to create new title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 on which they have done extensive developments since 1983 or thereabouts when they were allocated the said land while the defendant is in occupation of land parcel known as W/Bunyore/Ebusakami/2773 and there is distinct and clear boundaries separating the said parcels of land known as W/Bunyore/Ebusakami/2773 and 2772. He further avers that his entitlement is in respect of land parcel known as W/Bunyore/Ebusakami/2772 now sub divided to create new title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 is a portion measuring 0.25 hectares and the remaining hectares to be given to the estate of the late Wilson Osango Anyoya. The plaintiff further avers that the original title No. W/Bunyore/Ebusakami/1895 was family property belonging to their late father. The plaintiff further avers that the defendant in bad faith upon filing of the suit herein has gone ahead to further and subsequently cause title number W/Bunyore/Ebusakami/2772 to be subdivided and cause title number W/Bunyore/Ebusakami/3449, 3450 and 3451 and is now threatening to evict, fence inside and cut down the plaintiff's trees. The plaintiff further avers that the subsequent subdivisions and transfer of the said new titles was done by the defendant secretly, fraudulently without the knowledge and or consent of the plaintiff while the suit herein is subsisting and pending hearing and final determination. The plaintiff prays for orders that:-

(a) An order that the new titles W/Bunyore/Ebusakami/3449, 3450 and 3451 be cancelled and the same be reverted to tile number W/Bunyore/Ebusakami/2772.

(b) Declaratory orders that the defendant is holding in trust the suit land W/Bunyore/Ebusakami/2772 now subdivided to create title numbers W/Ebusakami/3449, 3450 and 3451.

(c) An order that the plaintiff's rightful share of land parcel W/Bunyore/Ebusakami/2772 now subdivided to create title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 portion measuring 0.25 hectares be transferred and registered in the plaintiff's name.

(d) An order of permanent injunction to issue restraining the defendant, his agents, representations, assignees and or any other persons claiming in his name, direction and or authority from subdividing, transferring, cultivating, working on, occupying, tilling, disposing, alienating and or in any manner whatsoever from dealing and or interfering with the applicant's occupation and or utilization of the parcel of land known as W/Bunyore/Ebusakami/2772 now sub divided to create title numbers

W/Ebusakami/Ebusakami/3449, 3450 and 3451 measuring 0.25 Hectares and in default the executive officer of the court to authorized to sign all the relevant forms to effect a transfer thereof to the plaintiff.

(e) Costs of this suit.

The defendant herein denies that the then Land Tribunal had decided that the parcel of land known as West/Bunyore/Ebusakami/1895 be divided among the plaintiff, defendant and one Wilson Ajango Angoya and avers that the same was bequeath to him by his step mother one Rispa Nabwan Angoya. The defendant herein avers that there was no order to stop him from doing anything on the suit land as he is the registered proprietor of the same. The defendant avers that the plaintiff is not entitled to the said parcel of land as he has his and that the parcel of land West/Bunyore/Ebusakami/1895 belonged to the defendant's step mother one Rispa Nabwan Apamo who has no relationship with the plaintiff as the plaintiff is not the defendant's biological brother. The defendant avers that he has a good title and states that there was no fraud committed as he is the owner of all that parcel of land known as West/Bunyore/Ebusakami/2772 and states that he is not under any obligation to inform the plaintiff of what he ought to do with his land. The defendant avers that land cannot be transferred to people that are not beneficiaries of the estate of the land Rispa Nabwan Apamo. The defendant avers that the orders sought for are not tenable, as the same cannot be issued to somebody that lacks a beneficial interest in the land and further states that a permanent injunction can only be issued to somebody who is not a residing on the land in issue whereas the defendant resides on the same land.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is a finding of fact that the defendant is the registered proprietor of the suit land parcels Nos. W/Bunyore/Ebusakami/3449, 3450 and 3451. The plaintiff testified that on 17th June, 1999, the decision of the disputes tribunal was adopted as the judgment of the court in Maseno Civil Misc. Application No. 4 of 1999 that land parcel No. West Bunyore/Ebusakami/1895 be divided among the three Angoya sons namely, Aggrey Kweya Angoya (Defendant), Josephat Tuti Angoya (Plaintiff) and Wilson Osango Angoya. That subsequently Land Parcel No. West Bunyore/Ebusakami/1895 was subdivided into two West Bunyore/Ebusakami/2772 and 2773.

The plaintiff further avers that his late brother Wilson Osango Angoya's family and himself are in actual occupation and utilization of land parcel known as W/Bunyore/Ebusakami/2772 which was recently subdivided to create new title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 on which they have done extensive developments since 1983 or thereabouts when they were allocated the said land. PW2 the area Chief at the material time corroborated the plaintiff's evidence. He stated that he divided the suit land into three for the three brothers. He stated that their parents died and were buried on the suit land. PW3 was the secretary in a meeting held in 1983 to discuss the suit land. The land belonged to Rispa Nabwan Angoya who was their father's sister in law who did not have any children. The land was registered in the defendant's name in 1969 as the other brothers were younger. It was agreed that the land be divided into three and all the three brothers agreed. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Sagggar Ahmed Al-Heidy & Others (2015) eKLR, this Court expounded on the law on trusts as follows:-

"According to the Black's Law Dictionary, 9th Edition; a trust is defined as

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

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 the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

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 Edn, 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 (see Snell's Equity at p.177) (supra)."

In applying the principles to the case before us, all indications are that a constructive trust arose as between the plaintiff and the defendant. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR the Court stated that;

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. 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 is implied."

The plaintiff testified that he continued residing on his share of the suit parcel of land and has been residing therein from 1983. The plaintiff avers that his late brother Wilson Osango Angoya's family and himself are in actual occupation and utilization of land parcel known as W/Bunyore/Ebusakami/2772 which was recently subdivided to create new title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 on which they have done extensive developments since 1983. The issue of the plaintiff's occupation of the suit land was not opposed. The defendant stated that the land was given to him by Rispa Nabwan Angoya in 1969 and the plaintiff is not entitled to the same. That the plaintiff has lived there for a long time and he wanted to transfer a portion to him but has now changed his mind. It has come out in evidence that the defendant has since sold land parcel known as W/Bunyore/Ebusakami/2773 to a third party and now the plaintiff, defendant, their families and their deceased's brother's family all reside on land parcel formally known as W/Bunyore/Ebusakami/2772 which was recently subdivided to create new title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451. From this evidence I come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable.

Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman – vs- Steadman* (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

For these reasons I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that half (1/3) of original land parcel No. West Bunyore/Ebusiekwe/2772 is held in constructive trust for the plaintiff by the defendant.

2. An order that the new titles W/Bunyore/Ebusakami/3449, 3450 and 3451 be cancelled and the same be reverted to title number W/Bunyore/Ebusakami/2772.

3. An order that the plaintiff’s rightful share of land parcel W/Bunyore/Ebusakami/2772 now subdivided to create title numbers W/Bunyore/Ebusakami/3449, 3450 and 3451 being a portion measuring 1/3 be transferred and registered in the plaintiff’s name.

4. An order of permanent injunction to issue restraining the defendant, his agents, representations, assignees and or any other persons claiming in his name, direction and or authority from subdividing, transferring, cultivating, working on, occupying, tilling, disposing, alienating and or in any manner whatsoever from dealing and or interfering with the applicant’s occupation and or utilizing a portion of the parcel of land known as W/Bunyore/Ebusakami/2772 now sub divided to create title numbers W/Ebusakami/Ebusakami/3449, 3450 and 3451 measuring 1/3 and in default the executive officer of the court to authorized to sign all the relevant forms to effect a transfer thereof to the plaintiff.

5. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE



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