



**Shilako v Anguba (Environment and Land Appeal E038 of 2021)
[2023] KEELC 36 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 36 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E038 OF 2021
DO OHUNGO, J
JANUARY 18, 2023**

BETWEEN

DAVID KHAKABO SHILAKO APPELLANT

AND

ALBERT MUCHESIA ANGUBA RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. E Malesi, Principal Magistrate) delivered on 10th August 2021 in Kakamega MCL & E No. 933 of 2018)

JUDGMENT

1. The background of this appeal is that by plaint dated June 8, 2018, the appellant herein filed a suit in the subordinate court against the respondent wherein he averred that he (the appellant) was the registered owner of the parcel of land known as Isukha/Shirere/6871 (the suit property) following successful proceedings in the matter of the estate of Sylvester Mukuya Shilako (deceased) in Kakamega High Court Succession Cause No 64 of 2014. The appellant further averred that despite the respondent's claim that he had purchased a portion of the suit property from the deceased being dismissed in the succession proceedings, the respondent by himself, his relatives, servants and/or agents had without any colour of right trespassed on the suit property and refused to vacate despite the appellant's demand. The appellant therefore prayed for eviction of the respondent, his relatives, servants and agents from the suit property, a permanent injunction restraining them from interfering in any way with the appellant's peaceful use and enjoyment of the suit property and damages for trespass.
2. The respondent filed a statement of defence and counter claim wherein he denied the appellant's allegations and averred that in January 2009 he purchased a parcel of land measuring 0.04 hectares to be hived off parcel of land known as Isukha/Shirere/5865 from the deceased and that he took immediate possession. That the deceased died before transferring to him the 0.04 hectares and that subsequently one Patrick Lilumbi Shilako was appointed as the legal representative of the deceased's estate in



Kakamega High Court Succession Cause No 64 of 2014. That upon conclusion of the succession cause, Patrick Lilumbi Shilako subdivided Isukha/Shirere/5865 and allocated the suit property to the appellant herein yet the suit property forms part of the 0.04 hectares that the respondent had purchased from the deceased and in which the respondent resided.

3. The respondent further averred that the appellant's suit was bad in law and time barred. He prayed that he be declared the bona fide and legitimate owner of the suit property, that the appellant is holding the suit land in trust for him, and that the appellant be ordered to execute the relevant land transfer documents to vest title to the suit property in his name failure to which the executive officer of the subordinate court to do so on his behalf and a permanent injunction restraining the appellant, his servants, employees, assignees and / or any other persons whatsoever from wasting, damaging, alienating or trespassing on to the suit property.
4. Upon hearing the matter, the subordinate court (E Malesi, Principal Magistrate) delivered judgment on August 10, 2021 wherein he found merit in the respondent's counter claim and therefore allowed it as prayed. The appellant's suit was dismissed.
5. Aggrieved by the judgment, the appellant filed this appeal on September 6, 2021 through memorandum of appeal dated September 2, 2021. The following grounds of appeal are listed on the face of the memorandum of appeal:
 1. That the learned trial magistrate erred in law and fact in failing to consider the appellant's plea for the eviction of the respondent.
 2. That the learned trial magistrate erred in law and fact in holding that the appellant's rights to title under sections 24, 25 and 26 of the Land Registration Act could be defeated merely because the succession court had directed the respondent to file his claim in the land court.
 3. That the learned trial magistrate's dismissal of the appellant's claim was against the law and the weight of evidence.
 4. That the learned trial magistrate erred in law and in fact in failing to hold that the respondent's purported purchase of the disputed piece of land was vitiated by want of the requisite land control board consent and the same could not under the law be specifically enforced as sought by the respondent in his counter- claim.
 5. That the learned trial magistrate erred in law and in fact in failing to hold that the respondent's purported agreement for sale of land was not a contract in terms of section 3 of the Law of Contract Act.
 6. That the learned trial magistrate erred in law and in fact in finding that the respondent was a bona fide legitimate owner of the disputed piece of land.
 7. That the learned trial magistrate erred in law and in fact in declaring a resulting trust in favour of the respondent without evidence and contrary to law and precedent.
 8. That the learned trial magistrate erroneously took a narrow view of the case as captured in the very constricted issues formulated by him whose sole intention was to edge out the appellant's case which intent he achieved with abandon.



6. Based on those grounds, the appellant prayed that the appeal be allowed with costs, the judgment of the subordinate court be set aside and be replaced with a decision allowing the appellant's claim and dismissing the respondent's counterclaim.
7. The appeal was canvassed through written submissions. The appellant argued that the suit property had residential rental houses and that the respondent entered the suit property as one of the eight tenants of the deceased and that the trial court was wrong to give the respondent the whole land as the decision in effect technically also unjustly gives the other seven houses and the tenants to the respondent, yet the respondent was categorical that he allegedly bought the suit property. The appellant further submitted that the trial court failed to give any proper weight to the issue of whether the alleged contract of sale of land between the respondent and the deceased was valid and capable of enforcement and further that the respondent did not obtain the consent of the Land Control Board and that as such, the alleged agreement dated January 31, 2009 would become null and void by operation of law.
8. The appellant further submitted that the trial court closed its eyes to the pertinent issue of consent and instead resorted to declaring a trust when none had been proved notwithstanding the judicial precedent cited in *David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR* and further that the trial court accepted the sale agreement as valid without sufficiently interrogating the salient flaws as raised by the appellant. That the purported sale agreement contained neither the title nor the size of the land being purchased and that the full purchase price disclosed therein was not shown to have been paid or at all and that the same was also not executed in accordance with the requirements of section 3 (3) of the *Law of Contract Act*. It was the appellant's further submission that he adduced evidence and proved that he was the registered proprietor of the suit property and that the trial court misdirected itself by taking the position that the appellant's title had to be impeached merely because the probate court directed the respondent to go to the Environment and Land Court. The appellant therefore invited this court to review the entire original record particularly the evidence before the lower court and the submissions made therein and be persuaded to reverse the decision of the trial court in the terms prayed in this appeal.
9. The respondent filed submissions in which he identified issues for determination as being whether the appellant's right to title was defeated merely because the succession court had directed the respondent to file his claim at the land court; whether the respondent's purchase was legally binding and whether he was a bona fide purchaser for value; whether there exists a resulting trust in favour of the respondent and whether the judgment of the subordinate court should be set aside.
10. On the issue of whether the appellant's right to title was defeated merely because the succession court had directed the respondent to file his claim at the Environment and Land Court, the respondent submitted that issues appertaining to use, occupation and title to land and environment are in the domain of the Environment and Land Court and not probate court and as such the probate court was right in ordering the matter to be dealt with by the Environment and Land Court as the succession court had no jurisdiction.
11. On whether his purchase was legally binding and whether he was a bona fide purchaser for value, the respondent submitted that he entered into a valid sale agreement dated January 31, 2009 with the deceased which complied with the requirements of section 3 (3) of the *Law of Contract Act* and that as such he has a right to the suit property. On whether there exists a resulting trust in his favour, the respondent submitted that there was indeed a resulting trust since he advanced Kshs 60,000 to the deceased for the purchase of a portion of the suit property leaving a balance of Kshs 10,000 which was to be paid at the time of signing the transfer documents which unfortunately did not happen due to



the vendor's demise. That as such, the appellant's registration was purely to hold the suit property in trust of the respondent since a resulting trust arises in favour of the person who pays the purchase price even if the land is registered in the name of another. Reliance was placed on the case of Charles K Kandie v Mary Kimoi Sang [2017] eKLR.

12. Lastly, on whether the judgment should be set aside, the respondent submitted that the appellant did not establish his case on a balance of probabilities while he (the respondent) demonstrated a resulting trust that he was in possession and actual occupation of the suit property. That, consequently, the appeal is unmeritorious.
13. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR.
14. I have carefully considered the grounds of appeal, the entire record, and the parties' respective submissions. The issues that arise for determination are whether there was a valid and enforceable sale agreement between the respondent and the deceased, whether the respondent established trust and whether the reliefs sought by the parties were available.
15. There is no dispute that the appellant is the registered proprietor of the suit property. That much is confirmed by the parties' testimonies and by the certificate of official search that was produced by the appellant which shows that the appellant became registered proprietor on August 28, 2017. As can be seen from the certified copy of the register in respect of the parcel of land known as Isukha/Shirere/5865, the suit property was created on August 28, 2017 following partition of Isukha/Shirere/5865 into Isukha/Shirere/6869 to 6873. The deceased was the registered proprietor of the parcel of land known as Isukha/Shirere/5865 from January 7, 2013 to July 19, 2017. There is also no dispute that respondent is in occupation of the suit property. That is why the appellant sought his eviction. According to the respondent, his date of entry into the suit property was in the year 2009 while according to the appellant, he entered in 2010.
16. The respondent contended that he entered into a sale agreement dated January 31, 2009 with the deceased, pursuant to which he purchased the suit property. The appellant argued that the agreement was not executed in accordance with the requirements of section 3 (3) of the Law of Contract Act.
17. Section 3 (3) of the Law of Contract Act provides:
 - (3) No suit shall be brought upon a contract for the disposition of an interest in land unless -
 - (a) the contract upon which the suit is founded -
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
 18. Upon analysing the sale agreement, the learned magistrate came to the conclusion that it accorded with the requirements of section 3 (3) of the Law of Contract Act. I have also perused the agreement and I am



satisfied that it is in writing, is signed by all the parties thereto being the respondent and the deceased, and that their signatures were attested by at least four witnesses including the area assistant chief. Although the appellant faulted the agreement for not mentioning the plot number, that omission does not invalidate the agreement. In any case, parties herein are in agreement that the only land that the deceased owned was Isukha/Shirere/5865 and that their dispute revolves around Isukha/Shirere/5865 and its resultant subdivision which is Isukha/Shirere/6871 (the suit property). As the Court of Appeal observed in Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR, the three essential elements of a valid contract are an offer, acceptance, and consideration. All those elements are present in the agreement.

19. Among the documents that the appellant produced in evidence was a ruling delivered on February 27, 2017 in Kakamega High Court Succession Cause No 64 of 2014. A reading of the ruling reveals that while seeking confirmation of grant, the appellant categorically told the succession court that the deceased sold portions of Isukha/Shirere/5865 to three other buyers besides the respondent. Thus, the idea of a sale to the respondent is not farfetched. I am therefore satisfied that there was a valid and enforceable sale agreement between the respondent and the deceased.
20. The next issue for determination is whether the respondent established trust. The basic tenets of trust were outlined by the Court of Appeal in Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR 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...” ...

Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. ...

21. Subsequently, the court stated in Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR as follows:

It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“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.”

See Gichuki v Gichuki [1982] KLR 285 and Mbothu & 8 Others v Waitimu & 11 Others [1986] KLR 171.

22. As noted earlier, the respondent's case was that he purchased the suit property from the deceased through the sale agreement dated January 31, 2009. The agreement was produced in evidence. It states on its face that the purchase price was Kshs 70,000 out of which the deceased acknowledged receipt



of Kshs 10,000 leaving a balance of Kshs 10,000 which was to be paid before December 2009. The respondent testified that he paid the said balance. The appellant did not plead any claim for any balance of the purchase price.

23. As previously noted, there is also no dispute that respondent is in occupation of the suit property. According to the respondent, he entered into the suit property in the year 2009 pursuant to the sale agreement. Although the appellant contended that the respondent entered the suit property as a tenant in the year 2010, he did not offer any evidence to show the existence of a tenancy relationship as opposed to a sale. On the contrary, he conceded that the respondent buried his deceased wife on the suit property. Ordinarily, a tenant does not bury members of his family on leased land. From the letters of administration, it is apparent that the deceased passed away on March 6, 2013, over four years after the respondent took possession. The respondent was thus in possession with the knowledge and acquiescence of the deceased.
24. I am satisfied that the respondent demonstrated the existence of trust. Although it was conceded that no consent of the land control board was sought or obtained in respect of the sale to the respondent, that is not a bar to him obtaining title. Having received the purchase price and having put the respondent in possession, the deceased and by extension the appellant, have a duty in equity to ensure that the respondent gets title.
25. In William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR the Court of Appeal stated:
 - "20. Taking into account the Macharia Mwangi Maina decision and the Willy Kimutai Kitilit decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created...."
 21. We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent...."
26. In view of the foregoing, the appellant was clearly not entitled to the reliefs that he sought. On the other hand, the respondent established his case was entitled to judgment.
27. It follows therefore that this appeal has no merit. I dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JANUARY 2023.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Nyikuli for the appellant

Respondent present

Court Assistant: E Juma

