

GI.2.4.4

35/1963

No. 14 of 1962

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN :-

MARIE AYOUB
CECILE KYRIAZIS (formerly
Galanos)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB (Plaintiffs) Appellants

19 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.

74103

- and -

STANDARD BANK OF SOUTH AFRICA
LIMITED and
WILLIAM P. HOLDER as EXECUTORS
OF THE ESTATE OF CHRISTOS
GALANOS Deceased (Defendants) Respondents

CASE FOR THE APPELLANTS

Record

- 20 1. This is an Appeal, by leave of the Court of Appeal for Eastern Africa from a judgment of that Court (O'Connor P. and Gould J.A., Newbold J.A. dissenting) dated the 2nd day of October, 1961 dismissing an appeal by the Appellants from a Judgment of the Supreme Court of Kenya dated the 28th day of January, 1960 whereby it was held that the Respondents were entitled to make certain deductions from monies in their hands being the proceeds of sale of an estate known as the Cranhurst Estate (hereinafter called "the Cranhurst Estate") situate in the Highlands of Kenya.
- 30 2. By an Agreement in writing (hereinafter called "the Agreement") dated the 12th day of
- p.123 C
pp.79-123

pp. 32-39

p. 80 1.4

pp.174-177

Record

November 1955 and made between Christos Galanos deceased and the Appellants it was agreed that in consideration of the Cranhurst Estate being registered in the name of the said Christos Galanos and of the Transfer in favour of the said Christos Galanos acknowledging full payment of the purchase price for the said Estate the said Christos Galanos should pay to the Appellants (who were beneficially entitled to the Cranhurst Estate to the extent of one quarter each) one quarter each of a sum representing the difference between the sale price of the Cranhurst Estate and any sums which should be due to either the said Christos Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale. The said Agreement further provided that in the event of the death of the said Christos Galanos before a sale of the Cranhurst Estate the Executors of the said Christos Galanos should not sell the said Estate unless the price was agreed by each of the Appellants and that such Executors should thereafter account to the Appellants in accordance with the said Agreement.

10

20

p. 95 1.33 3. At some time prior to November 1955 one Leslie Norman Hurley had become the registered owner of the Cranhurst Estate. The said Hurley was the husband of the third Appellant and it is common ground that he held the Cranhurst Estate as trustee for the Appellants who were beneficially entitled to it in equal shares. The Appellants are all members of the Ayoub family and the second Appellant was the wife of the said Christos Galanos. The Appellants had caused the said Hurley by a Transfer dated the 10th day of November 1955 (being the day before the date of the said Agreement) to transfer the Cranhurst Estate to the said Christos Galanos for a consideration expressed in the said Transfer to be Shs.300,000 but such consideration was never paid or intended to be paid.

30

40

p.40 1.42 4. In the year 1954 the said Hurley had granted a Lease of the Cranhurst Estate to one Zagoritis and on the 18th day of January 1956

p.82 11.34-
40

Record

the said Christos Galanos as registered owner of the said Estate re-entered thereon and evicted the said Zagoritis claiming that the latter had defaulted in payment of rent and had failed to maintain the said Estate.

- 10 5. In the month of January 1956 the said Zagoritis instituted proceedings against the said Christos Galanos (being C.C.No.99 of 1956 in Kenya) for wrongful re-entry claiming, inter alia, about Shs. 800,000/- damages. pp.127-132
6. On the 5th day of March, 1957 the said Christos Galanos sold the Cranhurst Estate for the sum of Shs. 700,000/- payable by instalments. p.165-171
7. The said Christos Galanos died on the 29th day of June, 1957 and the Respondents are his executors. p.32
- 20 8. The Respondents (as such executors as aforesaid) were made parties to the said action and subsequently compromised the same by a settlement providing for the payment by the Respondents to the said Zagoritis of the sum of Shs. 133,000/- and costs. p.2 11.31-35
p.3 1.40
9. The Respondents claimed to be entitled to recoup themselves the amounts paid under the said compromise by deducting the same from the sums payable to the Appellants in respect of the proceeds of sale of the Cranhurst Estate. p.203-204
- 30 10. The Appellants denied the Respondents' right to such recoupment and, on the 11th day of August, 1959, instituted the present proceedings by Plaint claiming a declaration that the Respondents were not entitled to deduct from the proceeds of sale of the Cranhurst Estate the moneys paid to Zagoritis as aforesaid. pp.1-3
- 40 11. The Respondents by their Defence dated the 8th day of September 1959 admitted the Agreement but denied that the Appellants were entitled to the declaration prayed and contended :- pp.3-5
- (i) that the aforesaid settlement was for the

Record

benefit of the Appellants and that the Appellants had agreed with the Respondents that they the Appellants would be liable for any payments incidental to the said action including costs.

(ii) that the Appellants by their prior conduct were estopped from denying their interest in the said settlement.

p.9 12. The action came on for hearing before Miles J. on the 25th day of November, 1959 when Counsel for the Respondents took a preliminary objection that the Plaint disclosed no cause of action. He submitted that the implication of paragraph 3 of the Plaint was that the said Christos Galanos was a trustee of the Cranhurst Estate under a resulting trust and that accordingly he (and the Respondents as his successors) would be entitled to indemnity in respect of the monies paid to Zagoritis under the said compromise as paid out on behalf of the beneficial owners of the Cranhurst Estate unless they had acted unreasonably in making the payment and that the Plaint contained no such allegation.

pp.10-12 20

p.14 13. The Judge overruled the aforesaid preliminary objection and, upon Counsel for the Respondents stating that the Defences of agreement and estoppel referred to in paragraph 11 above were not being proceeded with and that the Respondents case would be that the said Christos Galanos held the Cranhurst Estate upon a resulting trust for the Appellants, the Judge framed the following issues for the decision of the Court namely :-

p.15 "(1) Whether the Defendants as trustees are entitled in that capacity to deduct the sums involved in the settlement of Court case No. 99 of 1956

(2) If not whether they are entitled to deduct the said sums under the agreement of 12th November, 1955."

14. The oral evidence consisted of the evidence of Cecile Kyriazis (the second Appellant) on behalf of the Appellants and William Peter Holder (the second Respondent) on behalf of the Respondents.

pp.24-25
pp.16-21

15. The said Cecile Kyriazis gave the following evidence (inter alia) :-

10 "Mr. Hurley was not a trustee. He was proprietor. When Galanos took over the estate it was his. We made a business arrangement. We trusted my husband as a business man to sell the Estate for us. We trusted him to manage it properly. He knew about these things. It was his. He did as he wanted. We owed him money".

p.25 ll. 9-
17

16. (a) Section 7 of the Land Control Ordinance (Cap. 150 of the Laws of Kenya) provides as follows :-

20 "7.(1) No person shall except with the consent in writing of the Board in exercise of its powers of sub-section (1) of Section 8 of this Ordinance -

(a)

(b) acquire any right title or interest in or over any land for or on behalf of any person or of any company registered under the Companies Ordinance."

30 (b) Section 88 of the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya) provides as follows :-

40 "88.(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage, or otherwise by any means whatsoever, whether of the like kind to the foregoing, or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or

Record

interest whether vested or contingent, in or over any such land to any other person, nor except with the written consent of the Governor, shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this subsection without the written consent of the Governor;"

10

(c) There was no evidence that the consents required by the said section 7(1)(b) and the said section 88 to the Cranhurst Estate being acquired by the said Christos Galanos on behalf of another person were obtained.

p.38 11.23-
30
pp.32-38

17. On the 28th day of January 1960 Miles J. gave judgment in favour of the Respondents. The Judge held :-

20

(i) That the words (in paragraph 1 of the Agreement) "any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Ltd." referred to liability incurred in respect of the management of the Cranhurst Estate and that the said sum of £11,000 "was not set off against the purchase price but remains a debit subject to any adjustment arising out of the management of the Estate".

p.36 1.20

30

p.36 1.30

(ii) That the Agreement did not amount to an agreement for sale since the Agreement imposed no definite obligation on the said Christos Galanos to sell the Estate. The Judge said :-

p.36 11.33-
46

"The position seems to me to be this. It is clear from recital (1) in the agreement that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment, and with knowledge of the outstanding equities.

40

10 Even if there were a payment Galanos had
knowledge of the outstanding equities.
There is nothing in the agreement to
exclude a resulting trust and the arrange-
ment was connected with such a trust. Any
other construction would have the conse-
quences which could never have been
intended by the parties least of all by
the Plaintiffs. It would mean that the
Plaintiffs, whose only asset was this
estate were in effect making a present of
it to Galanos who was, according to the
evidence, a multi-millionaire. He could
keep it as long as he wished without any
obligation on his part to manage it
properly. No court could interfere what-
ever acts of waste he committed. He could
have let the estate at a peppercorn rent
to Tongoni Plantations Limited or to any
20 other person."

The Judge also said that it appeared
from the correspondence that this was the
view of the Appellants themselves.

p.37 ll.11-
35

18. The Judge made no reference in his judgment
to the aforesaid evidence of the said Cecile
Kyriazis. Accordingly not having rejected the
said evidence the Judge must be taken to have
accepted it.

30 19. The Appellants appealed to the Court of
Appeal for Eastern Africa against the said
judgment on the following grounds :-

pp.44-47

- 40 (1) That the Judge erred in framing the issue
reading "Whether the Defendants are
Trustees and entitled in that capacity to
deduct the sums involved in the settlement
of Civil Case Number 99 of 1956" such
issue not having been raised on the
pleadings.
- (2) In the alternative that the Judge erred
in framing the said issue without the
Defence being properly amended and an
adjournment granted to the Appellants.
- (3) That the Judge erred in not acceding to
the Appellants application that the said

Record

issue be struck out and that the pleadings be properly amended.

- (4) That the Judge erred in ruling that extrinsic evidence was admissible to explain the Agreement of the 12th November 1955.
- (5) That the Judge erred in ruling that there was a latent ambiguity in the words "any sums which shall be due".
- (6) That the Judge erred in holding that the construction of such phrase was necessary in order to decide whether there was a Trust. 10
- (7) That the Judge erred in referring to the correspondence to interpret the said agreement of the 12th November, 1955 despite the learned Judge's ruling to the effect that extrinsic evidence was admissible only to show the meaning of the said phrase. 20
- (8) That the Judge erred in construing the meaning of the said phrase set out in paragraph (5) above as meaning that the sum of £11,000 is not set off against the purchase price but remained a debit subject to any adjustment arising out of the management of the Estate by Galanos.
- (9) That the Judge erred in holding that the said agreement of the 12th November 1955 was not an agreement for sale. 30
- (10) That the Judge erred in holding that because the said Galanos purchased from a person whom he knew to be a Trustee with knowledge of the outstanding equities the said Galanos took as Trustee.
- (11) That the Judge erred in not giving effect to the presumption of legality.
- (12) That the Judge erred in holding that it was the view of the Appellants from the said correspondence that the said Galanos was a Trustee. 40

- (13) That the Judge misdirected himself in stating that it was not until there was a change of Advocates that the Appellants' attitude as to the position of the said Galanos relating to the said Estate changed.
- 10 (14) That the Judge erred in failing to consider that because of the relationship between the said Galanos and the second Appellant the Appellants were prepared to rely on the good faith of the said Galanos without the imposition of a Trust enforceable in a Court of Equity.
- (15) That the Judge failed to give any or any adequate weight to the fact that the said agreement of the 12th November, 1955 having been drafted by an Advocate could have been clearly drawn in the form of a intention of the parties.
- 20 (16) That the Judge erred in holding that the said agreement of the 12th November, 1955 constituted a Trust or that a Trust arose in any other manner.
- (17) That the Judge in holding that a Trust arose not as a result of construction of the said agreement of the 12th November 1955 but aliunde went outside the agreed issue and outside the pleadings.

30 Grounds Nos. 1, 2, 3, 9 and 17 above are not now being maintained.

20. The Court of Appeal for Eastern Africa (Newbold J.A. dissenting) on the 2nd October, 1961 dismissed the said appeal.

pp.79-122

21. Sir Kenneth O'Connor P. summarised his views of the material issues thus :-

pp. 93
ll. 24-40

40 "To sum up: Galanos, with knowledge of the equities took a transfer from a trustee, the effect of which was to give him the legal estate in the property transferred, and it was not shown that he ever obtained the equitable estate, that is to say, it was not shown that the legal and equitable estates were co-extensive

Record

and became united in the same individual. On the contrary, on the construction of the Agreement Galanos was a trustee and this conclusion was strongly supported by the oral evidence, if admissible. The salient fact was that Galanos took the transfer from a trustee of an existing trust who had only a legal estate."

22. The learned President stated that he doubted whether the evidence of the said Cecile Kyriazis was admissible and, if it was, that it did not establish that the Cranhurst Estate was intended to be made over to the said Christos Galanos absolutely.

10

p. 91
ll. 20-24

23. Dealing with the argument of Counsel for the Appellants that a legal interpretation of the transaction was to be preferred the learned President said :-

"As a general proposition I agree. The case for such an interpretation in this instance would have been very much strengthened if the consideration expressed in the transfer had not been untruly stated."

26

p. 90
ll. 24-28

24. Gould J.A. said :-

"My own view of the task which was before the court is this. As I have said, if the transfer, established to be a voluntary one, stood alone, there would be a trust in favour of the Appellants unless otherwise rebutted. The transfer does not stand alone but must be read together with the agreement which followed it. It was within the competence of the Appellants and Galanos to arrive at any legal position which they desired; it was a question of what they intended and their intention must be arrived at by construing the transfer and the agreement together. In the approach to such a task, however, I think it is a relevant consideration that the effect of a voluntary transfer standing alone would have been as I have stated."

30

p.109
ll. 25-39

The learned Judge of Appeal reviewed the facts and concluded that the said Christos Galanos held that land as a trustee.

Record

25. Newbold J.A. in a dissenting judgment after citing a passage in Cook v. Fountain 36 E.R. 984, at page 987 to the effect that the Court never implies or presumes a trust except in cases of absolute necessity said :-

pp.116-123

p.119 l.46

10 "Do the circumstances of this case require as of necessity that a trust should be implied? In my view they do not. The persons involved in this transaction were all related or connected; one of them was very wealthy and was owed a considerable sum of money by the others who were beneficially entitled to an estate; and it is clear there was an intention to sell the Estate with the result that the debt could be discharged and any surplus given to the persons entitled to it. It is not an unwarranted assumption that the Appellants considered the person most suitable to obtain a satisfactory sale would be Mr. Galanos, the wealthy husband of one of the beneficiaries, and that the simplest way of achieving this object would be to convey the Estate to him absolutely while at the same time entering into an agreement setting out their various interests in the said proceeds. This, on the facts, I consider a perfectly possible interpretation of the documents and one which would not result in a trust of the Estate arising. While a different interpretation is possible, there is nothing in the circumstances which I regard as requiring as of necessity the existence of a trust".

p.120 ll.7-32

26. Newbold J.A. further stated,

40 "In my view to imply a trust in the circumstances of this case might well defeat the intention of the parties to the agreement. I see nothing in the agreement nor in the circumstances of the transfer which compels me to say that the only intention of the parties concerned was to create a trust. It is true that the consideration mentioned in the transfer was never intended to be paid, but there nevertheless was very real consideration for the transfer. It is also true that if the Appellants transferred the Estate

p.121 ll.19-49

p.122 ll.1-17

Record

absolutely to Mr. Galanos they lost the right to any interim income from the Estate pending the sale and they had no legal means of enforcing a sale save possibly from an implied term that the sale should take place in a reasonable time, but they obtained in effect a discharge of their current liability and, as Mrs. Kyriazis said in evidence, they relied on Mr. Galanos who was a member of the family and a business man who "knew about these things" to sell the Estate to their greatest advantage. In fact he sold the Estate in less than 18 months and the circumstance that the sale price was £35,000 while the consideration mentioned in the transfer was £15,000 is as much evidence that he made an advantageous sale as that the figure of £15,000 was an under-valuation of the Estate. The only direct evidence of the intention of the Appellants at the time of the transfer is that given by Mrs. Kyriazis and is to the effect that no trust of the Estate was intended. It is true that the learned judge, in deciding that a trust was created, would appear to have rejected this evidence, but as I understand the reasoning of the learned judge he appears to have come to this conclusion on a presumed intention of the Appellants from the construction of the documents fortified by statements subsequently made by the advocates in correspondence. With respect to the learned judge, while I agree that a possible construction of the documents is an implied trust I do not think it the only or, in the circumstances, the more probable construction; and I consider the subsequent correspondence by the advocates a somewhat dubious base for implying a trust."

10

20

30

40

p.122 11.44-
51

27. In the circumstances Newbold J.A. concluded that the transaction was never intended to be a trust and did not give rise to any implied trust.

28. The Appellants submit that the judgments of the trial Judge and of the majority of the Court of Appeal for Eastern Africa were wrong and should be reversed and that the relief should be granted to the Appellants as prayed in the Plaint

for the following amongst other

R E A S O N S

1. BECAUSE the presumption of a resulting trust in favour of the Appellants created by the Transfer of the 11th day of November, 1955 was rebutted by :-
 - (i) The evidence of Cecile Kyriazis referred to in paragraph 15 above
 - (ii) The Agreement of 12th November 1955 because :-
 - (a) The Agreement is entitled upon its cover 'Acknowledgment of Debt' and contains no reference to a trust.
 - (b) The Second Recital thereto states that "Mr. Galanos has agreed to take over the farm". The expression "take over" is inconsistent with the proposition that the parties merely intended that the legal estate should vest in the said Christos Galanos but that the beneficial ownership should remain in the Appellants.
 - (c) The Fourth Recital states that "the Ayoub family and each of them hereby declares that they are entitled to one quarter each of any sums which may become payable under this Agreement". It is implicit in these words that the Appellants were not to be entitled to any estate or interest in the Cranhurst Estate but merely to the sums payable under the Agreement.
 - (d) The Agreement merely provides for the payment to the said Christos Galanos of the sums of money specified in Clause 1 thereof and the Agreement contains no provisions of any kind conferring upon or reserving to the Appellants or any of them any estate or interest in the Cranhurst Estate.

Record

- (e) The object of the Agreement was to provide the said Christos Galanos with security for the debt of £11,000 owed to him by the Appellants.
2. BECAUSE apart from the resulting trust arising by virtue of the said Transfer no trust can be inferred from any other circumstances of the case.
3. BECAUSE the correspondence was not admissible for the purpose of determining whether a trust could be inferred and even if admissible contained nothing to support the existence of a trust. 10
4. BECAUSE upon the true construction of the Agreement the words in paragraph 1 thereof "any sums which shall be due either to Mr. Galanos personally or to Tongoni Plantations Ltd.;" do not include expenses of management of the Cranhurst Estate (particularly since it was implicit in the Agreement that the said Christos Galanos was entitled to the rents and profits of the Cranhurst Estate for his own benefit) and extrinsic evidence was not admissible for the purpose of construing the said words (which words contained no latent ambiguity). 20
5. BECAUSE the fact that the said Hurley (who was the predecessor in title of the said Christos Galanos to the Cranhurst Estate) was a trustee for the Appellants is not a valid reason for inferring that the said Christos Galanos was also a trustee for the Appellants. 30
6. BECAUSE effect should be given to the presumption of legality and if the said Transfer and the Agreement created a trust in favour of the Appellants the transaction was illegal.
7. FOR the reasons appearing in the Judgment of Newbold J.A.

PETER FOSTER
MICHAEL FOX.

No. 14 of 1962

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

B E T W E E N :-

MARIE AYOUB
CECILE KYRIAZIS (formerly
Galanos)
ANGELA MARY HURLEY
HENRY ANTOINE AYOUB
(Plaintiffs) Appellants

- and -

STANDARD BANK OF SOUTH
AFRICA LIMITED and
WILLIAM P. HOLDER as
EXECUTORS OF THE ESTATE
OF CHRISTOS GALANOS
Deceased (Defendants) Respondents

C A S E FOR THE APPELLANTS

MERRIMAN WHITE & CO.,
3 King's Bench Walk,
Inner Temple,
London, E.C.4.

Solicitors for the Appellants