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35/1963

IN THE PRIVY COUNCIL

No.14 of 1962

ON APPEAL FROM HER MAJESTY'S COURT

OF APPEAL

FOR EASTERN AFRICA

A B E T W E E N :-

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

19 JUN 1964

25 RUSSELL SQUARE  
LONDON, W.C.1.

74104

(1) MARIE AYOUB  
(2) CECILE KYRIAZIS (formerly  
GALANOS)  
(3) ANGELA MARY HURLEY  
(4) HENRY ANTOINE AYOUB Appellants

- and -

STANDARD BANK OF SOUTH AFRICA  
LTD. and WILLIAM P. HOLDER as  
Executors of the Estate of  
CHRISTOS GALANOS deceased

Respondents

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CASE FOR THE RESPONDENTS

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1. This is an Appeal from an Order of the Court of Appeal for Eastern Africa dated the 2nd October 1961 whereby the said Court dismissed with costs an Appeal by the Appellants from a Judgment of the Supreme Court of Kenya at Nairobi (Mr. Justice Miles) dated the 28th January 1960. The said Judgment was given in an action (Civil Case No.1185 of 1959) wherein the Appellants were the Plaintiffs and the Respondents were the Defendants.

p.123A-123B

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2. The said action was begun by a Plaint dated the 11th August 1959 whereby the Appellants claimed in effect a declaration that the Respondents as Executors of one Christos Galanos deceased were not entitled to deduct from the proceeds of sale of an Estate known as Cranhurst Estate Land Reference number 7532 (hereinafter called "the Estate") registered in the name of the said Christos Galanos any part of the sum of Shs. 133,000/- and costs paid by the Respondents to one Christos Dimitri Zagoritis in settlement of an action brought by the said Christos Dimitri Zagoritis against the said Christos Galanos.

pp. 1-3

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3. The principal question to be determined upon this Appeal is whether having regard to a Transfer dated

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181  
pp.174-  
177

the 11th November 1955 and an Agreement dated the 12th November 1955 hereinafter mentioned the said Christos Galanos was a trustee of the Estate for the Appellants in which case the Respondents would be entitled to deduct the said sum and costs from the said proceeds of sale or whether he was entitled to the Estate beneficially in which case the Respondents would not be so entitled. Subsidiary questions which arise are whether the issues framed by the learned Judge were correctly framed and also whether any and, if so, what extrinsic evidence was admissible for the purpose of enabling the Court to construe the said Transfer and the said Agreement.

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4. As regards the Principal question the material facts are as follows :-

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(1) At some time prior to November 1955 one Leslie Norman Hurley became the registered lessee of the Crown Lease of the Estate which he held as trustee for the Appellants.

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(2) By a Transfer dated the 11th November 1955 the said Leslie Norman Hurley transferred the Estate to the said Christos Galanos such transfer being therein expressed to be made in consideration of the sum of Shs. 300,000/- paid by the said Christos Galanos. It is admitted by both the Appellants and the Respondents that no consideration was in fact paid or was intended to be paid.

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(3) An Agreement dated the 12th November 1955 was entered into between the said Christos Galanos (therein called "Mr. Galanos") of the first part and the Appellants of the second third fourth and fifth parts (therein collectively referred to as "the Ayoub Family") the provisions whereof were as follows :-

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"WHEREAS

(1) An Estate known as Cranhurst Estate (hereinafter referred to as "the Estate") and being Land Reference Number 7532 S.W. of Thika Township in the said Colony of Kenya was purchased by the Ayoub Family and registered in the name of the Husband of the party of the fourth part namely Leslie Norman Hurley.

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(2) The Land Control Board has refused to allow the Ayoub Family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.

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(3) At the date of this Agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately Eleven thousand pounds. Although the transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the Estate from the said Leslie Norman Hurley to Mr. Galanos.

(4) The Ayoub Family and each of them hereby declares that they are entitled to one quarter each of the benefit of any sums which may become payable under this Agreement.

NOW IT IS HEREBY AGREED AND DECLARED as follows :-

1. Mr. Galanos shall pay to the Ayoub Family a sum which shall represent the difference between the sale price of the Estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.

2. Pending a sale the Ayoub Family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this Agreement.

3. In the event of the death of Mr. Galanos before a sale of the Estate Mr. Galanos hereby directs that his Executors shall not sell the farm unless the price is agreed by the Ayoub Family and each of them and thereafter account to the Ayoub Family in accordance with the terms hereinbefore stated."

(4) In or about the year 1954 the said Leslie Norman Hurley had sub-leased the Estate to the said Christos Dimitri Zagoritis who failed to pay an instalment of rent which fell due on the 31st October 1955.

(5) On the 18th January 1956 (after the Transfer of the Estate to the said Christos Galanos had been executed by the said Leslie Norman Hurley) the said Christos Galanos re-entered on the Estate and purported to determine the said Sub-Lease claiming to be entitled to do so both on the ground of the failure by the said Christos Dimitri Zagoritis to pay the said instalment of rent and also on the ground that the said Christos Dimitri Zagoritis had committed

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a number of breaches of covenants contained in the said Sub-Lease.

pp.127-132 (6) The said Christos Dimitri Zagoritis and another commenced an action (Civil Case No. 99 of 1956) in the Supreme Court of Kenya at Nairobi by a Plaint dated the 31st January 1956 against the said Christos Galanos claiming (inter alia) damages for wrongful re-entry upon and their eviction from the Estate.

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pp.165-170 (7) On the 5th March 1957 the said Christos Galanos agreed to sell the Estate to one Harris Horn for the sum of Shs. 700,000/- payable as to Shs. 100,000/- on the signing of the Agreement and as to the balance thereof by six equal yearly instalments of Shs. 100,000/- each payable on or before the 1st day of March in each year the first of such payments to be made on the 1st March 1958.

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pp.174-177 (8) The said Christos Galanos died on the 29th June 1957 and subsequently the Respondents having proved his Will and having been made parties to the action by the said Christos Dimitri Zagoritis compromised the said action by a settlement providing for the payment by the Respondents to the said Christos Dimitri Zagoritis of the sum of Shs. 133,000/- and costs and claimed to be entitled to deduct the said sum of Shs. 133,000/- and the said costs from the moneys payable to the Appellants under the said Agreement dated the 12th November 1955.

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p.6 5. The trial of the action took place on the 25th 26, 27th November 1959 before the Honourable Mr. Justice Miles. Paragraph 3 of the Plaint as framed at the commencement of the hearing commenced as follows :-

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"By an Agreement in writing dated 12th November 1955 made between the said Christos Galanos deceased and the Plaintiffs it was agreed that in consideration of an Estate known as Cranhurst Estate Land Reference number 7532 (hereinafter called "The Estate") being registered in the name of the said Christos Galanos deceased and of the Transfer in favour of the said Christos Galanos deceased acknowledging full payment of the purchase price for the Estate despite the fact that the said purchase price had not been paid said Christos Galanos deceased should pay to each of the Plaintiffs who were beneficially entitled to the Estate to the extent of one quarter each one quarter each of a sum representing the difference between the sale price of the estate and any sums which should be due to either the said Christos Galanos deceased personally and/or to Tongoni Plantations

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Limited such sum to be paid within seven days of completion of a sale of the Estate."

A During the trial Counsel for the Appellants obtained leave to amend the said paragraph by substituting the words "had been" for the word "were" immediately before the words "beneficially entitled". p.28

B 6. After hearing argument on behalf of both the Appellants and the Respondents in the course of which Counsel for the Respondents submitted that the Respondents were and Counsel for the Appellants submitted that the Respondents were not trustees of the Estate for the Appellants the learned Judge framed issues as follows :- pp.11-15 p.15

C (1) Whether the Defendants (the Respondents) were trustees and entitled in that capacity to deduct the sums involved in the settlement of Court case No. 99 of 1956.

D (2) If not whether they were entitled to deduct the said sums under the Agreement of 12th November 1955. pp.174-177

7. Rules 1 (5) and 3 of Order XIV of the Kenya Civil Procedure (Revised) Rules 1948, provide (inter alia) as follows :-

E "1. (5) At the hearing of the suit the Court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. F

3. The Court may frame issues from all or any of the following materials :-

G (a) Allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties.

(b) Allegations made in the pleadings .....

(c) The contents of documents produced by either party."

H 8. Later during the trial it was agreed between Counsel for the Appellants and for the Respondents that the only point for decision was (in effect) p.22

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- whether the said Christos Galanos was a trustee of the Estate and they also agreed that if he held it as a trustee the Appellants were not entitled to the declaration claimed in the Plaint but that if he did not hold it as a trustee the Appellants were entitled to the declaration so claimed. A
- pp.22-23 9. It was contended on behalf of the Appellants that extrinsic evidence was not admissible to assist in the construction of the said Transfer and Agreement but the learned Judge held that such evidence was admissible. B
- p.24
- p.29 10. It was also contended on behalf of the Appellants that if the relationship between the said Christos Galanos and the Appellants was that of trustee and beneficiaries the transaction was illegal without the consent of the Land Control Board in writing. C
11. By section 7 of the Land Control Ordinance, 1944, as amended by the Land Control (Amendment) Ordinance, 1949, it is provided (inter alia) as follows :-
- "7. (1) No person shall except with the consent in writing of the Land Control Board .... D
- (b) acquire any right, title or interest in or over any land for or on behalf of any person...."
- pp.24-25 12. Evidence was given for the Appellants by the Appellant Cecile Kyriazis and for the Respondents by the Respondent William Peter Holder. It appeared that the consent of the Land Control Board was endorsed on the said Transfer dated the 11th November 1955 but no evidence was adduced to the Court as to what facts had been disclosed to the said Board. E
- pp.16-21
- p.179
- pp.32-38 13. Judgment was delivered on the 28th January 1960. The main conclusions of the learned Judge were summed up in the following words :-
- pp.36-37 " 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. 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 arrangement was connected with such a trust. Any other constructions would have the consequences which could never have been intended by the parties, G
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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 whatever acts of waste he committed. He could have let the estate at a peppercorn rent to Tongoni Plantations Limited or to any other person."

He also held that this was in accordance with the views put forward by the Appellants' advocate in correspondence after the execution of the said Agreement and he finally held that the Respondents were trustees and were entitled to make the deductions claimed. He refused to decide whether or not the transaction was illegal on the ground (in effect) that the agreement made between Counsel and referred to in paragraph 8 hereof rendered it unnecessary for him to do so. He accordingly dismissed the action with costs such costs to be paid out of the proceeds of sale of the Estate.

pp.40-41

14. The Appellants appealed to the Court of Appeal for Eastern Africa against the whole of the decision of the learned Judge. The Appeal was heard on the 16th and 17th June 1961 before the President (Sir Kenneth O'Connor), Gould J. A. (Acting Vice-President) and Newbold J.A. and on the 2nd October 1961 the Court by a majority dismissed the Appeal, with costs to be paid out of the proceeds of sale of the Estate, Newbold J.A. delivering a dissenting judgment.

pp.79-115  
pp.123A-123B

15. It was contended for the Appellants on the hearing of the Appeal (in effect) that the learned Judge should not have framed the first issue so as to introduce the question of a trust or alternatively that he should not have so framed it without the Defence being amended by pleading the facts relied on as justifying the inference that there was a trust; that if such an issue was introduced it should have been confined to the question whether the said Agreement, or alternatively the said Agreement coupled with the said Transfer, created a trust; that the learned Judge had erred by considering whether a resulting trust arose independently of those two documents without the facts giving rise to such resulting trust being pleaded; that the learned Judge misconstrued the said Agreement, that the effect

pp.48-56  
62-64  
65-71  
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of the said Agreement was to transfer the said Estate to the said Christos Galanos as an absolute owner; and that if the said Agreement was capable of being construed as creating legally enforceable rights and obligations that construction was to be preferred to the construction adopted by the learned Judge which led to an illegality since a trust would have been contrary to the provisions of the said Ordinance.

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pp.95-115

16. Gould J.A. held (in effect) that in view of the agreement made between Counsel during the trial the only issue which the learned Judge had to decide was whether or not there was a trust and in deciding whether or not a trust had been created he was entitled to consider the effect of the said Transfer as well as the effect of the said Agreement and also the fact that, as the said Transfer was made for no consideration, the said Christos Galanos must be a trustee for the Appellants unless evidence was adduced to show that he was intended to take beneficially, which had not been the case; that in the absence of evidence to the contrary the trusteeship of the said Leslie Norman Hurley must be presumed to be in accordance with and not contrary to law and there was no evidence to show that it would have been impossible to obtain the consent of the said Board to the said Christos Galanos continuing that trust; that evidence of the surrounding circumstances was admissible to enable the Court to ascertain and give full effect to the intention of the parties when they executed the said Transfer and the said Agreement; that the learned Judge had not held that a trust arose apart from and prior to the execution of the said Agreement; and that on the question of the construction of the said two documents the learned Judge has arrived at the correct result. viz:- that the effect was to constitute the said Christos Galanos a trustee.

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pp.79-94

17. The learned President agreed with the judgment of Gould J.A. He held (inter alia) that the learned Judge was entitled to frame the issues as he did without requiring the Defence to be amended; that the effect of the agreement made between Counsel during the trial made it unnecessary for the Court to consider whether the transaction was illegal; that the language of the first three recitals to the said Agreement disclosed the existence of a trust by implication of law and there was nothing in the operative part of the said Agreement which was inconsistent with the position of the said Christos Galanos as a trustee; and that it was unnecessary to decide if the evidence of the course of dealing by the parties was admissible but that

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if it was admissible it did not displace, but strongly reinforced that conclusion.

18. Newbold J.A. in his judgment held (inter alia) that there was nothing in either the said Transfer or the said Agreement which expressly declared that the said Christos Galanos was to be a trustee of the Estate or that the Appellants were to have any beneficial interest in the Estate; that the law never implied a trust but in case of absolute necessity; that the circumstances of this case did not require as of necessity that a trust should be implied; that the Courts will not imply a trust save in order to give effect to the intention of the parties; that the intention of the parties to create a trust must be clearly determined before a trust would be implied; that to imply a trust in the circumstances of this case might well defeat the intentions of the parties to the said Agreement; that the Appellants intended to transfer the Estate absolutely to the said Christos Galanos; and that the transaction was never intended to be a trust and did not give rise to an implied trust.

pp.116-123

19. The Appellants were given final leave to appeal from the judgment of the Court of Appeal for Eastern Africa by an Order of that Court made on the 13th April 1962.

20. The Respondents humbly submit that this Appeal should be dismissed for the following (among other)

pp.123C-123D

### REASONS

(1) Because having regard to the provisions of Order XIV of the said Rules the learned Judge was bound to frame the issues on which the decision of the case depended.

(2) Because in framing such issues the learned Judge was entitled to have regard to the submissions already made by Counsel for the respective parties and it was unnecessary for him to require the Defence to be amended.

(3) Because the issues were correctly framed by the learned Judge.

(4) Because in view of the agreement made between Counsel for the respective parties during the trial the only question to be determined at the hearing was whether or not the said Christos Galanos was a trustee of the Estate for the Appellants.

(5) Because for the purpose of construing the said

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Transfer and the said Agreement the learned Judge was correct in admitting evidence of the surrounding circumstances in which the said documents were executed.

(6) Because the learned Judge was correct in holding that upon the true construction of the said documents the said Christos Galanos was a trustee of the Estate for the Appellants.

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(7) Because immediately before the signing of the said Agreement the said Christos Galanos was, on the admitted facts, a trustee of the Estate, and the said Agreement, on its true construction, did not alter his position from that of trustee to that of beneficial owner.

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(8) Because in the absence of any allegation in the Complaint that the said transaction was illegal and of any evidence to show what facts were disclosed to the said Board the said transaction must be presumed to have been in accordance with the law.

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(9) Because for the reasons stated in the judgments of the learned President and Gould J.A. the decision of the Court of Appeal for Eastern Africa was correct and ought to be affirmed.

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H. E. FRANCIS

B. G. BURNETT-HALL

No. 14 of 1962

IN THE PRIVY COUNCIL

ON APPEAL FROM HER MAJESTY'S

COURT OF APPEAL FOR EASTERN AFRICA

AYOUB and OTHERS

- v -

STANDARD BANK OF SOUTH AFRICA LTD.  
and ANOTHER.

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C A S E

FOR THE RESPONDENTS

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