

*Privy Council Appeal No. 14 of 1962*

Marie Ayoub and others    -    -    -    -    -    -    -    *Appellants*

v.

Standard Bank of South Africa Limited and another as  
Executors of the Estate of Christos Galanos, deceased    -    -    *Respondents*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1963**

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*Present at the Hearing:*

VISCOUNT RADCLIFFE.

LORD MORRIS OF BORTH-Y-GEST.

LORD GUEST.

*[Delivered by LORD GUEST].*

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This appeal raises a short point concerning the financial relations between members of the family of Ayoub whose home was Nairobi.

A property, known as the Cranhurst Estate, held on a Crown Lease for 999 years was purchased with money provided by the appellants. On 24th November 1944 Leslie Hurley, the husband of the third appellant, was registered as the proprietor. Hurley held the 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 is the widow of Christos Galanos. On 11th May 1954 Hurley leased the Estate to one, Zagoritis, for five years at a rent of £3,000 per annum. On 11th November 1955 Hurley transferred the estate in purported consideration of Shs.300,000/- to Christos Galanos. On the following day, 12th November 1955, an Agreement was entered into between Galanos and the four appellants. On 29th November 1955 the Commissioners of Land gave consent to the registration of Galanos as proprietor of the estate. On 18th January 1956 Galanos re-entered the estate without due process of law and evicted Zagoritis on the claim that Zagoritis had defaulted in payment of rent and failed to maintain the estate. Thereafter Zagoritis instituted proceedings against Galanos for wrongful re-entry claiming damages of about Shs.800,000/-. On 5th March 1957 Galanos sold the estate for Shs.700,000/- payable by instalments. Galanos died on 29th June 1957 and the respondents as his executors were made parties to the action by Zagoritis. They subsequently compromised the action by a settlement providing for payment by them to Zagoritis of Shs.133,000/- and costs.

The respondents claimed to be entitled to recoup themselves the amounts paid under the settlement by deducting these from the sums payable to the appellants in respect of the proceeds of the Estate. The appellants denied the respondents' right to such recoupment and, on 11th August 1959, instituted the present proceedings claiming a declaration that the respondents were not entitled to make the deduction claimed. The action came on for hearing before Miles J. in the Supreme Court of Kenya on 25th November 1959 and on 28th January 1960 after hearing evidence and arguments he gave judgment for the respondents. An appeal by the appellants to the Court of Appeal for Eastern Africa was dismissed (O'Connor P. and Gould Ag.V.P., Newbold J.A. dissenting).

Before the trial Judge the following issues were framed for the decision of the Court:—

- “ (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.”

It was matter of agreement that if the respondents were trustees, they were entitled to deduct the sums involved in the settlement, as a trustee in the circumstances has a right to reimburse himself. On the other hand, if the respondents were beneficial owners, they were not entitled to make the deduction. In the events which have happened and in the light of the appellants' arguments the decision of the Courts below would not appear to lead to an inequitable result. But having regard to the issues framed by the trial Judge the sole question which the Board have to consider is whether at the date of his death Galanos was a trustee or whether he was the beneficial owner of the estate. Depending upon the answers to these questions the results follow automatically.

It is first of all necessary to set out in detail the terms of the agreement of 12th November 1955. It is in the following terms:—

“ *AN AGREEMENT* made the Twelfth day of November One thousand nine hundred and fifty-five *BETWEEN CHRISTOS GALANOS* of Nairobi in the Colony of Kenya Company Director (hereinafter called “ Mr. Galanos ” which expression shall where the context so admits include his personal representatives and assigns) of the first part *MARIE AYOUB* of Nairobi aforesaid Widow of the second part *HENRY AYOUB* of Nairobi aforesaid of the third part *ANGELA MARY HURLEY* of Nairobi aforesaid of the fourth part and *CECILE GALANOS* of Nairobi aforesaid of the fifth part (hereinafter the parties of the second, third, fourth and fifth parts are collectively referred to as “ the Ayoub Family ”) *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.

(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.

(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 declare 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.”.

The agreement is signed and witnessed by the parties and is backed up an “ Acknowledgment of Debt ”.

Before referring to the terms of the agreement it will be convenient to dispose of the principal argument for the respondents which is reflected to some extent in the grounds of judgment of the Courts below. It was contended that as Hurley was admittedly a trustee, a transfer by him for no consideration to Galanos who had notice of the outstanding equities constituted Galanos a trustee in the absence of the consent of the beneficiaries. It was therefore necessary, it was argued, for the appellants to show from the terms of the subsequent agreement and any other extrinsic circumstances that the trust was extinguished and that the beneficial interest passed to Galanos. In other words to show that an already existing trust was terminated by the agreement of 12th November 1955. Their Lordships consider that the fallacy underlying this argument is that if the two documents, the transfer and the agreement are to be considered separately as the respondents suggest, then the transfer must be considered on its merits. *Ex facie* of the document it was a sale for Shs.300,000/- (receipt of which Hurley acknowledged in the document) and Galanos was upon this basis a purchaser for value and was not a trustee. It is only when the subsequent agreement of 12th November 1955 is taken into account that it becomes apparent that the consideration was illusory. From these considerations it is clear that both documents must be read together and the question which arises is what from the terms of the instruments they executed were the parties’ intentions.

The law on the matter is accurately stated by Newbold J.A. in his dissenting judgment. In *Cook v. Fountain* 36 E.R.984 at p. 987 it was stated “ so the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; 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 intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. Their Lordships adopt the observations of Lord Halsbury, L.C. in *Smith v. Cooke* [1891] A.C. 297 at p. 299:—

“ I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument. . . . I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses.”

The question therefore is whether from the terms of the Agreement of 12th November 1955 it becomes necessary to imply a trust. The intention of the parties must be gathered from the instrument. Upon the principles above enumerated it would in their Lordships opinion be quite impossible to say that the terms of this document required a trust in order to give effect to the intention of parties. If their intention was to create a trust the absence of the mention of trust in the document is a significant omission. In Recital 1 of the agreement Hurley is not referred to as being a trustee. The terms of Recital 2 state the reason for the transfer and point clearly to Galanos “ taking over ” as beneficial owner and having the estate registered in his name. In Recital 3 the reference to “ purchase money ” indicates that

Galanos is to be the registered owner in virtue of the transfer. Moreover, in Recital 4 although the interests of the Ayoub family are apportioned, it is nowhere suggested that they have the beneficial interest which might have been expected, had a trust been intended. Under Article 1 of the Agreement the family were to get the benefit of the agreement by the discharge of their liability out of the proceeds of sale. Galanos' interest was also secured. The meaning of Article 2 is obscure, but it does not give any assistance to the respondents' argument. In Article 3 Galanos as owner of the property is giving directions to his executors for the realisation of the property after his death. Such a direction is quite inconsistent with Galanos' position as trustee. It is plain to their Lordships that the terms of the Agreement are entirely consistent with Galanos' position as a beneficial owner with contractual obligations to the Ayoub family. They certainly do not point to a trust.

It is not an unreasonable assumption to be gathered from the terms of the document that the intention of the parties was that as the Ayoub family could not be registered as proprietors, Galanos as the rich and able businessman in the family was to take over the property and sell it as and when he thought fit. This was to the advantage of all parties. The family would obtain discharge of their loan out of the proceeds of sale and Galanos would obtain security for his loan over the property. In order to achieve their joint purpose it was necessary that Galanos should be registered as the absolute owner. Although Galanos was not obliged to sell, it was implicit in the Agreement that he would sell at the earliest convenient moment.

For these reasons their Lordships have reached the conclusion that Galanos was a beneficial owner and that the Courts below were wrong in holding that a trust was to be implied. They prefer the dissenting judgment of Newbold J.A. which they find entirely satisfactory.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of the Court of Appeal for Eastern Africa dated the 2nd October 1961 and the decree of the Supreme Court of Kenya dated the 28th January 1960 set aside with costs and the appellants granted the declaration claimed in their plaint dated the 11th August 1959. The respondents must pay the appellants' costs of this appeal.





In the Privy Council

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MARIE AYOUB AND OTHERS

v.

STANDARD BANK OF SOUTH AFRICA  
LIMITED AND ANOTHER AS EXECUTORS  
OF THE ESTATE OF CHRISTOS GALANOS,  
DECEASED

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DELIVERED BY  
LORD GUEST

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