



**Okechi v Mokuia (Environment & Land Case 1106 of 2016)
[2023] KEELC 17001 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1106 OF 2016**

JM ONYANGO, J

APRIL 20, 2023

BETWEEN

MARY MAROBA OKECHI PLAINTIFF

AND

RICHARD ONDERI MOKUA DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of Originating Summons seeking a declaration that the defendant holds land parcel number South Mugirango/Botabori/734 (hereinafter referred to as the suit property) in trust for the plaintiff and that same be transferred to plaintiff
2. The Originating Summons is based on the Plaintiff's Supporting affidavit sworn on December 7, 2016 in which she deposes that she has been staying on the suit property for more than 12 years and therefore claims the same by way of adverse possession. She avers that the suit property was originally registered in the name of her mother-in-law one Biyaki Masureti (now deceased). Her late husband subsequently sold the land to the defendant and transferred the same to his name. After some time, the defendant and plaintiff entered into an agreement for the refund of the purchase price to the defendant after which he would transfer the land back to the plaintiff. The plaintiff duly paid the said purchase price to the defendant in the form of 7 heads of cattle but the defendant refused to transfer the land to her. She further deposes that the defendant has never stayed on the suit property as it is her and her sons who have been occupying the land for a period in excess of 12 years.
3. Despite being served with the Originating Summons, the Defendant did not file any response. The case therefore proceeded by way of formal proof.

Plaintiff's case

4. The plaintiff testified as the sole witness in support of her case.



5. She relied on her witness statement filed in court on May 4, 2018 as her evidence in chief. She testified that her late husband sold the suit property to the defendant's late father one Mokuwa Mokuwa and had it transferred to his name. After his father's death the Defendant had the land registered in his name. Long After her husband and the defendant's father had died, the defendant and the plaintiff entered into an agreement dated October 30, 2000 for a refund of the purchase price so that the Defendant could transfer the land back to the plaintiff. The Plaintiff refunded the purchase price in the form of 7 heads of cattle but the defendant refused to transfer the land to the plaintiff. The plaintiff told the court that she had been in occupation of the land since 2000 without any interruption. She stated that the defendant had burnt her house and he was charged with the offence of arson vide Ogembo SRM Criminal case No. 331 of 2011. He was found guilty and convicted. The plaintiff produced the documents in her list of Documents which include the Adjudication Register for land parcels No. South Mugirango/Botabori/734 and 713, a copy of the extract of the register in respect of the suit property, a letter from the chief dated July 27, 2009, a certificate of official search dated 7.8 02 and death certificates for Miyaki Masureti and Daniel Okech Masureti as plaintiff's exhibits 1-7.
6. After the close of the plaintiff's case, learned counsel for the plaintiff filed his submissions dated July 27, 2022 in which he summarized the plaintiff's case and urged the court to grant the reliefs sought by the plaintiff.

Analysis and determination

7. The only issue for determination is whether the plaintiff has proved that the defendant is holding the suit property in trust for her and whether he should be directed to transfer the same to the plaintiff.
8. It was the plaintiff's uncontroverted evidence that her late husband sold the suit property to the defendant's father. The Certificate of Official Search dated August 7, 2002 produced by the Plaintiff shows that the land was transferred to the defendant's father one Mokuwa Mokuwa on June 5, 1971. The defendant subsequently had the suit property transferred to his name on May 19, 2011. It was the plaintiff's evidence that on October 30, 2000 after both her husband and the defendant's father had died, the plaintiff and the defendant entered into an agreement for the refund of the purchase price so that the defendant could give back the land to the plaintiff. The plaintiff refunded the purchase price in form of 7 heads of cattle but the defendant refused to transfer the suit property to the Plaintiff despite the fact that the plaintiff has been in possession of the suit property since 2000.
9. Even though the plaintiff has been in occupation of the suit property for more than 12 years, strictly speaking the plaintiff cannot sustain a claim for adverse possession against the defendant as he was only registered as the owner of the suit property in 2011. It is however clear that having received the refund of the purchase price from the plaintiff a constructive trust was created in favour of the Plaintiff. The defendant cannot be allowed to keep both the land and the consideration for the same. In arriving at this finding I am guided by the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR where the court held as follows:

“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 v 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”.



10. In view of the foregoing, it is my finding that the plaintiff has proved her case on a balance of probabilities. I therefore enter judgment for the plaintiff and make the following final orders:
- a. A declaration is hereby issued that the Defendant holds land parcel number South Mugirango/Botabori/734 in trust for the Plaintiff.
 - b. The defendant is directed to transfer land parcel number South Mugirango/Botabori/734 to the Plaintiff within 45 days from the date of this judgment failing which the Deputy Registrar of this court shall sign the necessary documents to effect the transfer of the suit property to the plaintiff's name.
 - c. The costs of this suit shall be borne by the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 20TH DAY OF APRIL 2023.

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J.M ONYANGO

JUDGE

In the presence of;

1. Sagwe for the Plaintiff

2. No appearance for the Defendant

Court Assistant: A. Oniala

