



Ngigi (Suing as the personal representative of the Estate of Leonard Ngigi Nganga (Deceased)) v Ngigi (Environment & Land Case 70 of 2017) [2023] KEELC 17547 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 70 OF 2017**

YM ANGIMA, J

MAY 18, 2023

BETWEEN

**KENNETH MUNGAI NGIGI PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
LEONARD NGIGI NGANGA (DECEASED)**

AND

MARGARET WANGUI NGIGI DEFENDANT

JUDGMENT

A. The Plaintiff's Case

1. By a plaint dated 14.02.2013 the Plaintiff sought the following reliefs against the Defendant:
 - a. A declaration that the Defendant holds title for L.R. No. Nyandarua/Silanga/30 registered in her name in trust for the estate of Leonard Ngigi Nganga (deceased).
 - b. A permanent injunction be issued to restrain the Defendant/Respondent by herself, her agents, servants or any person acting under him from selling, transferring, charging, leasing and/or dealing in any manner whatsoever that interferes with all that parcel of land known as Nyandarua/Silanga/30.
 - c. Costs of the suit and interest thereon.
 - d. Such orders and relief that this honourable court might deem just and fit to grant.
2. The material on record indicates that the Plaintiff was the son of the deceased by his 1st wife whereas the Defendant was the 2nd wife of the deceased. The Plaintiff pleaded that the Defendant was at all material times registered as proprietor of Title No. Nyandarua/Silanga/30 (the suit property) in trust



for his late father Leonard Ngigi Nganga (the deceased). It was further pleaded that prior to the death of the deceased he intended to terminate the trust and regain ownership of the suit property but unfortunately died before the process of reconveyance could be concluded.

3. It was contended that prior to the death of the deceased, the Defendant had obtained the consent to transfer from the relevant Land Control Board (LCB) and that she had even signed a transfer form in favour of the deceased. The Plaintiff further contended that the Defendant was in fact holding the suit property not only in trust for the deceased but also in trust for the surviving children of the deceased by his first wife.
4. The Plaintiff's case was that the Defendant had since the demise of the deceased refused to proceed with the intended reconveyance but sought to dispose of the suit property to the prejudice of the Plaintiff and other beneficiaries of the trust. It was contended that despite service of a demand and notice of intention to sue the Defendant had failed to make good the claim hence the suit.

B. The Defendant's Response

5. The Defendant filed a statement of defence dated 25.03.2013 denying liability for the Plaintiff's claim. She pleaded that the suit property was gifted to her absolutely by the deceased in 1972 in her capacity as his wife. She denied that she was holding it in trust for the deceased as alleged by the Plaintiff and put him to strict proof of his allegation.
6. The Defendant conceded that she had obtained the consent of the LCB for the purpose of transferring the suit property to the deceased for tactical reasons only to enable her deal with it through the deceased and free of interference by the family of the deceased's first wife. The Defendant contended that the Plaintiff's only entitlement was to a share of Title No. Limuru/Bibirioni/588 which was in the name of the deceased.
7. The Defendant further pleaded that the suit was time-barred under the *Limitation of Actions Act* (Cap. 22) since it was filed about 17 years after the death of the deceased. It was also pleaded that the suit was not filed in good faith since the Plaintiff's siblings who were said to be beneficiaries of the alleged trust were not parties to the instant suit. The court was consequently urged to dismiss the suit with costs.

C. The Plaintiff's Reply

8. There is no indication on record of the Plaintiff having filed a reply to defence. Consequently, by operation of law under Order 2 rule 12 of the Civil Procedure Rules, 2010, there was a joinder of issue upon the defence.

D. Summary of Evidence at the Trial

a. The Plaintiff's Evidence

9. At the trial hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted his witness statement dated 14.02.2013 as his evidence in-chief. He also produced the 8 documents in his list of documents as exhibits. The gist of the Plaintiff's evidence was that the deceased was the legitimate owner of the suit property and that he only transferred it to the Defendant in 1977 to hold it in trust for him. It was his evidence that in 1994 prior to the death of the deceased the Defendant had initiated the process of reconveying the suit property to the deceased but the process could not be concluded due his untimely demise.



b. The Defendant's Evidence

10. The Defendant also testified at the trial on her own behalf. She adopted the contents of her witness statement dated 25.03.2013 as her evidence in-chief. It was her evidence that the deceased had transferred the suit property to her absolutely as a gift while it was still charged to Settlement Fund Trustees (SFT) and that she was the one who repaid the loan. It was her further evidence that the deceased had two wives and that the 1st wife (the Plaintiff's mother) was residing at Parcel 588 in Limuru at the material time. It was her case that the deceased had acquired the suit property for her benefit hence the reason it was transferred to her. She stated that the only reason she initiated a transfer process into the name of the deceased was to enable her deal with the property through him since the Plaintiff's brother had cautioned the property.
11. The Defendant also called his grandson who testified as PW2 but his evidence was merely hearsay. He testified that he was born in 1985 and that whatever was contained in his witness statement was based on stories he heard from other people.

E. Directions on Submissions

12. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that both the Plaintiff's and the Defendant's submissions were filed on 08.02.2023.

F. The Issues for Determination

13. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the Plaintiff filed a list of 11 issues whereas the Defendant filed a list of 10 issues. In the circumstances, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules, 2010. Under the said rule the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
14. The court has considered the pleadings, evidence and documents in this matter and is of the opinion that the following issues arise for determination herein:
 - a. Whether the Defendant was holding the suit property in trust for the deceased.
 - b. Whether the Plaintiff's suit is statute-barred under the law.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.

G. Analysis and Determination

a. Whether the Defendant was holding the suit property in trust for the deceased

15. The court has considered the evidence and submissions on record on this issue. The Plaintiff submitted that he had demonstrated the existence of a trust with respect to the suit property. The Plaintiff cited several authorities on the issue of trust (including customary trust) such as Isack M'Inanga Kiebia -



vs- Isaya Theuri M'Lintari & Another [2018] eKLR; Ngugi -vs- Kamau & Another (Environment & Land Case 36 of 2020) [2022] KE ELC 2261 (KLR) (23 June, 2012) (Judgment); Charles Kangayia -vs- Alfred Musavi & Another [2020] eKLR; Twalib Hayatan & Another -vs- Said Saggar Ahmed Al Heidy & Others [2015] eKLR; and Jeremiah Imbusi -vs- Asitiba Imbisi & 3 Others [2020] eKLR.

16. It was submitted that there was sufficient evidence on record to demonstrate that there a clear intention on the part of the deceased and the Defendant that the suit property was to be held in trust. It was further submitted that the Defendant's action of commencing the reconveyance process by signing a transfer form and obtaining the consent of the LCB was indicative of the existence of a trust. As a result, the court was urged to find and hold that the existence of a constructive trust had been established.
17. On the other hand, the Defendant submitted that the Plaintiff had failed to demonstrate the existence of a trust and cited the cases of Juletabi African Adventure Limited & Another -vs- Christopher Michael Lockley [2017] eKLR and the case of Isack Kiebia M'Inanga -vs- Isaya Theuri M'Lintari & Another (Supra) in support of her submissions. It was submitted that a court should not easily impose a trust unless there was a clear intention on the part of the concerned parties to create such a trust. It was submitted that during his lifetime the deceased had not expressed any intention that the Defendant was holding the suit property in trust for him or in trust for the Plaintiff or his siblings. It was also submitted that Plaintiff's brother had cautioned the suit property during the lifetime of the deceased claiming a beneficial interest therein. It was argued that if the deceased had intended that the Plaintiff and his siblings should be beneficiaries he could have expressly provided for them either during his lifetime or through a will.
18. The court is alive to the fact that the suit property was not ancestral land, clan land or land granted during a land adjudication process. It was land which was purchased from the SFT by the deceased. It is common ground that the deceased was the original allottee and that he transferred the same to the Defendant in the 1970s and the Defendant was ultimately issued with a title deed in 1977. The deceased had his ancestral land in Limuru in Kiambu County where he had settled his first wife and her children. The deceased apparently moved to settle in Nyandarua County with the Defendant who was his second wife.
19. The point of dispute between the parties was whether the transfer of the suit property to the Defendant was an absolute gift or whether it was transferred so that she may hold it merely as a trustee. There was no dispute that at the time the deceased initiated the transfer process in 1971 the Defendant was already his wife. There is no doubt from the record that as far back as 1988 the Plaintiff's brother, Simon Nganga Ngigi, had cautioned the suit property claiming a "beneficiary" interest. The material on record does not demonstrate that the deceased ever intervened to affirm his son's perceived interest in the suit property. On the contrary, the evidence on record shows that he only intervened to ensure removal of the caution so that the Defendant could deal with the property. Such conduct on the part of the deceased does not demonstrate that he was the beneficial owner of the suit property. Similarly, the conduct of the Defendant in seeking to sub-divide and deal with the suit property was not indicative of one who was merely holding it in trust for someone else. In the circumstances of this case the court is unable to find any intention on the part of the deceased and the Defendant to create a trust in favour of the former or the first wife and her children.
20. It has been held that the existence of a trust is a question of fact to be proved on evidence tendered before a court of law. The court is far from satisfied that the material on record demonstrates the existence of a trust. The evidence on record shows that prior to his death the deceased had been ailing for about 2 years. There is no evidence on record to the effect that he ever called a family meeting to disclose the existence of the alleged trust. There is no evidence that he left behind a valid will indicating that he had a legal or equitable interest in the suit property which could be shared by beneficiaries of



his estate. The court is thus of the opinion that the transfer of the suit property by the deceased to the Defendant who was his wife was absolute in law.

21. The Plaintiff relied upon the doctrine of constructive trust as enunciated by the Court of Appeal in the Twalib Hayatan Case (supra). In the said case the court held, inter alia, that:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

22. It was apparent from the above quotation that proof of the intention of the parties is not material in demonstrating the existence of a constructive trust. In this particular case, however, there is no evidence on record to demonstrate that the Defendant acquired the suit property through any form of wrongdoing or reprehensible conduct. There is no evidence that the Defendant abused or took advantage of any position of trust bestowed upon her by the deceased. The evidence on record simply shows that the Defendant was gifted the suit property by the deceased during his lifetime. In fact, there was no evidence on record to demonstrate that the deceased had raised any complaints or concerns against the Defendant in connection with her dealings or intended dealings with the suit property. In the premises, the court finds no basis for imposing a constructive trust as sought by the Plaintiff.

23. The Plaintiff’s submission that the Defendants action of signing a transfer form and obtaining a consent to transfer from the LCB was indicative of the existence of a trust does not find favour in the eyes of the court. The Defendant explained at the trial that she initiated the transfer process merely as a tactical move to enable her deal with the suit property through the deceased since Plaintiff’s brother had cautioned the suit property. She was desirous of selling the suit property but she could not do so in face of a caution. The court is of the view that the Defendant sufficiently explained herself on this aspect. In any event, an intended transfer of a gift which does not go through cannot confer a legal interest upon the intended transferee.

24. The issue of incomplete gifts was considered by Majanja J. in the case of Onarat Vuko Mariko V Ciakuthii Njoroge & 2 Others [2014] Eklr as follows:

“...In this respect I adopt the passage in Halsburys Laws of England (3rd Ed. Vol. 18) at para. 755 dealing with incomplete gifts, which states as follows, “Where a gift exists merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under law, to complete or perfect it If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.” I find that had the deceased intended to transfer the property to the family of Ruanderi, he would have done so during his lifetime as Ruanderi died before him...”



b. Whether the Plaintiff’s suit is statute-barred under the law

25. The issue of limitation of action was raised by the Defendant in her statement of defence. It is evident from the material on record that the Defendant did not pursue the issue of limitation of action in her written submissions. The Plaintiff did not also address the issue of limitation in his submissions. It would also appear from the proceedings that the issue of limitation was not canvassed at the trial. In the premises, it is not necessary to determine the issue of limitation in view of the court’s holding on the issue of trust.

c. Whether the Plaintiff is entitled to the reliefs sought in the suit

26. The court has already found and held that the Plaintiff has failed to demonstrate the existence of a trust in relation to the suit property. It would therefore follow that the Plaintiff has failed to prove his pleaded case to the required standard. As a result, the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.

d. Who shall bear costs of the suit

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

28. The court has considered the fact that the Plaintiff and the Defendant are close relatives. They are not only family members of the deceased but also the joint administrators of his estate. In the circumstances, the court is of the opinion that each party should bear his own costs of the suit. Consequently, the court shall make an order that effect.

H. Conclusion and Disposal Orders

29. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his case against the Defendant to the required standard. The court is not satisfied that there is adequate evidence on record to demonstrate the existence of the alleged tract with respect to the suit property. Consequently, the Plaintiff’s suit is hereby dismissed in its entirety. Each party shall bear his own costs of the suit.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 18TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Kinuthia holding brief for Mr. Mwangi for the Plaintiff

Mr. Ndegwa holding brief for Wahome for the Defendant

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

