



Ndambuki v Wambua & 2 others (All Sued as Administrators of the Estate of the Late Beth Nduku Wambua) (Environment & Land Case 120 of 2015) [2023] KEELC 19079 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 120 OF 2015**

**A NYUKURI, J
JULY 26, 2023**

BETWEEN

FRANCIS NDAMBUKI PLAINTIFF

AND

GEORGE MUKONZA WAMBUA 1ST DEFENDANT

PAUL MUTUA WAMBUA 2ND DEFENDANT

SAMUEL MUINDI WAMBUA 3RD DEFENDANT

**ALL SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE BETH
NDUKU WAMBUA**

JUDGMENT

1. Vide a plaint Dated April 16, 2015, the plaintiff sought against the defendants jointly and severally the following orders;
 - a. A declaration that the estate of the late Beth Nduku Wambua holds L.R No.Machakos/Kiandani/2366 in trust for the Plaintiff.
 - b. A declaration that the Plaintiff is the bona fide and/or beneficial owner of land known as L.R No.Machakos/Kiandani/2366 and subsequent title in favour of the late Beth Nduku Wambua is null and void.
 - c. A declaration that the title deed for L.R No.Machakos/Kiandani/2366 in favour of the late Beth Nduku Wambua was acquired illegally, unprocedurally, is rooted in fraud and/or misrepresentation of facts therefore the estate of the late Beth Nduku Wambua has no legitimate proprietary right over the same.



- d. A permanent injunction restraining the 1st, 2nd and 3rd defendants whether by themselves or their servants or agents from dealing, constructing, disposing, trespassing, interfering, charging and/or whatsoever dealing with L.R No.Machakos/Kiandani/2366.
 - e. A permanent injunction restraining the 1st, 2nd and 3rd defendants whether by themselves or their servants or agents from evicting and/or interfering with the plaintiff's quiet possession over L.R No.Machakos/Kiandani/2366.
 - f. An order directing the 1st, 2nd, and 3rd defendants to unconditionally transfer the title in L.R No.Machakos/Kiandani/2366 to the Plaintiff.
 - g. Cost of the suit and interest thereof from date of filing of the suit.
 - h. Any other relief that the honorable court may deem just and fit to grant.
2. The Plaintiff averred that he was the beneficial owner of land known as L.R No. Machakos/kiandani/2366 (hereinafter referred to as suit property) which he purchased from the Nzyuko's family, by an agreement dated October 17, 1975 whereof he paid a consideration of Kshs. 3,000/ and subsequently took possession thereof. That at the time of purchase, the suit property had not been adjudicated upon and was known as plot No. 108. That the property was adjudicated under Kiandani Registration section and duly registered as Machakos/Kiandani/2366.
 3. The plaintiff further stated that contrary to the contractual obligations, in the sale agreement the defendant's mother Beth Nduku Wambua, now deceased (hereinafter referred to as the deceased) fraudulently misrepresented ownership details at the Ministry of lands and obtained a title deed thereof in her names. He further stated that in 2012, he came to know that the 1st, 2nd and 3rd defendants had filed Succession Cause No. 665 of 2010 without disclosing the plaintiff's interest in the suit property, prompting the Plaintiff to file an objection. He stated that both the deceased and the defendants knew the suit property belonged to the Plaintiff and that therefore the registration thereof constitutes constructive trust.
 4. The suit was opposed. The defendants filed a joint statement of defence dated May 8, 2015. They denied all the allegations in the plaint and stated that the first registered owner of the suit land was the late Beth Nduku Wambua, and that the registration was done on 1st September 1989 as per the green card. They also stated that as the cause of action arose in 1975 the same was time barred as no leave of court was sought. They also stated that the agreement cited by the Plaintiff related to plot parcel number Plot No.108 which is not the subject of this suit.
 5. They further stated that if the plaintiff had a valid claim, he ought to have raised the same within the process of land adjudication. They stated that the purported seller was not the husband to the late Beth Nduku nor the father to the defendants and that they were strangers to the allegations of fraud. They also averred that this matter was substantially in issue in High Court Succession Cause No.665 of 2010 and that this suit was incompetent.
 6. In response to the defence by the defendants, the Plaintiff filed a reply to defence on May 25, 2015. He stated that the plot No.108 Kiandani was sold to the plaintiff by one Simeon Nzyuko, which came to be known as Machakos/Kiandani/2366 after demarcation and adjudication process carried at Kiandani scheme. In response to the claim being time barred, he stated that the claim was founded on constructive trust which excludes the application of laches to a beneficiary of such trust, where there is fraudulent breach of trust. He argued that a constructive trust was created by the Agreement entered into in 1975 between the Plaintiff and Simeon Nzyuko. He also challenged the allegation of having



sold the property to a third party since the defendants lacked capacity to do so by dint of the Law of Succession Act.

7. The matter proceeded by way of viva voce evidence

Plaintiff's Evidence

8. PW1 was the plaintiff, Francis Ndambuki, who adopted the contents of his witness statement dated April 16, 2015 as his evidence in chief. His evidence was that on October 17, 1975, he entered into a written agreement for sale over the suit property, then known as Plot No.108 with the late Simeon Nzyuko's family, whereof Beth Nduku, Joseph Nzyuko Kimeu, Joseph Nduva Nzyuko and Teresia were witnesses. He informed the court that he had paid Kshs. 3,000/= and agreed that since the land was not adjudicated, "Mzee" would facilitate the same. He testified that after adjudication, the parcel of land was given title Number L.R No. Machakos/Kiandani/2366.
9. The plaintiff further testified that one Beth Nduku had taken out a title over the suit land while still alive, that he had persuaded her to transfer the same to him but she had refused. He testified that the Defendants had taken out letters of administration vide Machakos Succession Cause No.665 of 2010 and that it is during the succession cause that he learnt that the suit land had been sold to one Kitumbi Ventures. That in 2015 he was informed by his neighbours that the defendants had trespassed on the suit property and were erecting a fence thereon. He stated that he had had possession of the suit property for more than 20 years. He produced twelve documents in support of his case; namely, affidavit of Joseph Nzyuko dated December 22, 2014; Sale Agreement dated October 17, 1975; Letter dated September 17, 1978 from Simeon Nzyuko; Survey map from the county surveyor office at Machakos; Letter dated March 5, 2010 from Francis Musau Ndambuki; Green card in respect to L.R Machakos /kiandani/2366; Certificate of search dated 3rd December 2014; Certificate of search dated 24th July 2012; Notice of motion dated 22nd May 2012 in respect to Machakos Succession Cause No.665 of 2010; and Affidavit of protest dated 16th January 2015 in respect to Machakos Succession Cause No. 665 of 2010. He also produced documents attached on his further list of documents dated October 16, 2018, which are proceedings in Machakos Succession Cause No. 665 of 2010 and a ruling of August 15, 2018 in Machakos Succession Cause No. 665 of 2010.
10. Upon cross-examination, he stated that his claim was for parcel number 2366. He testified that it is his Advocate who had written the words 'Plot No.108 Kiandani' on the agreement and that those words were not in the agreement. He further stated that after purchasing the suit property, he had relocated to Molo and that he used to fence the land every often between 1975-2015. He stated that he was selling stones from the plot. He also testified that he did not participate in the land adjudication process and that he had not seen any document showing that plot No.108 became No.2366.
11. He further stated that Nzyuko Muteti was the seller in the 1975 Agreement and also that Simeon Nzyuko was the seller. He then stated that Beth Nduku Wambua was the daughter-in-law to Nzyuko and that she had signed the 1975 sale agreement as Nduku Mwalimu, as she was referred to then. He stated that he came to know of the plot having been registered in the name of the deceased in the year 2000. He also testified that the plot he had bought was 50 by 100 feet and that from the year 2010, he had wanted to build but he was told he needed to get a title deed before he could build. He stated that at the time of entering the agreement in 1975, he had confused Beth to be the wife to Nzyuko since it is wives who accompany their husbands to such transactions.
12. Joseph Nzyuko Kimeu testified as PW2 and adopted his witness statement dated 16th April 2015 as his evidence in chief. He confirmed to have been a witness to the sale agreement between the Plaintiff and one Mr.Nzyuko who was the seller together with Joseph Nduva Nzyuko and Ms. Teresia Ngao. He



stated that he had signed as a witness and that the purchase price for the subject property was Kshs. 3,000/-. Upon cross examination, he stated that the purchase price was not paid during the agreement but the following month. He confirmed that the Plaintiff then left Machakos but he kept coming once in a while to fence the suit land. He also stated that the said Nduku Mwalimu is the same person as Beth Nduku and that they met her in her house, there being no other Nduku in the homestead. He stated that the plaintiff was in possession of the land but was not living on the land.

13. Jimmy Danson Mulwa testified as PW3. He adopted his witness statement dated February 28, 2019 as his evidence in chief. He stated that the Plaintiff's plot is fifth from his and next to the main road. He stated that his mother Sarah Katumbi bought a plot from Nzyuko Simeon measuring 50 x 100 at Kshs. 3,000/- and that in 1976 they put up a permanent house thereon. He testified that Beth Nduku Wambua was married to Wilson Wambua Nzyuko the son of Simeon Nzyuko, who was a teacher and therefore she was also called Beth wa Mwalimu. He further stated that he had noted some trucks offloading some building materials on the subject land in the year 2008 and notified the contractor that the land belonged to someone else, the Plaintiff. On cross examination, he stated that the whole land was one block and that the fence was put up by the Plaintiff and that the Plaintiff has never done anything on the land. That marked the close of the Plaintiff's case.

Defendant's Evidence

14. DW1 was, Paul Wambua Mutua, the 2nd Defendant herein. He adopted his witness statement filed on 8th May 2015 as his evidence in chief. His testimony was that the 1st and 3rd Defendants were his brothers. He stated that the Defendants do not know the Plaintiff as he was a stranger to them. He did state that he was the son of the late Beth Nduku Wambua and Wilson Wambua Nzyuko. It was his testimony that his late father did not sell the suit property to the Plaintiff as alleged. He further stated that the suit property was the property of one Beth Nduku Wambua, being a first registration in her name, who later sold it to Kitumbi Ventures, who have been in occupation all along. He produced documents attached to his list of documents, namely, a copy of the search of Title No. Machakos/Kiandani/2366 and grant of letters of administration in High Court Succession Cause No.665 of 2010. He prayed that the property be given to the person who had purchased it, being Kitumbi ventures.
15. Upon cross examination, he confirmed that Mr. Nzyuko Mutetei was his grandfather and that he did not know if he had land at Kiandani. He also stated that he was young at the time of division of the family land and that he only saw the sale agreement after institution of this case. He also confirmed to have participated in the Succession Case No.665 of 2010. When shown the said sale agreement, he confirmed that witness number 4 was Nduku Mwalimu and that his mother was Beth Nduku. He also stated that he had produced a search with his mother registered as the owner of the suit property and that there was a caution placed by the Plaintiff in 2010. That he has never seen the agreement between his late mother and Katumbi ventures. He also confirmed that before 2010, there were building stones on the land and that he did not know whom they belonged to. He stated that PW2's mother Sarah Katumbi's land was next to theirs but that he did not know who sold her the plot. He confirmed that Japheth Mutetei was his paternal uncle.
16. On re-examination, he stated that the suit property was different from the subject of the agreement. He stated that it is the Plaintiff who cautioned the land. He further stated that he did not know when Kitumbi ventures bought the land. He testified that in 2010, the suit property had a fence and stones but he did not know the person who fenced the land. That marked the close of the defence case.
17. The parties filed written submissions in support of their respective cases. On record are the plaintiff's submissions filed on January 30, 2023 and the defendant's submissions filed on January 27, 2023.



Plaintiff's Submissions

18. Counsel for the plaintiff submitted that the plaintiff had established his claim on the required standard demonstrating that there was a sale over the suit property and therefore a constructive trust had crystallized in his favour.
19. The Plaintiff's main submission was on the doctrine of constructive trust as highlighted under paragraph 10 of the plaint. He cited two books that define what constructive trust is, namely, "Equity & Trusts" by Alastair Hudson and *The Law of Trusts and Equitable Obligations* (Butterworths, 1998). He further cited the cases of *Maingi Mutisya Nzioka vs Mbiuki Kisavi* [2014] eKLR, *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, *William Kiptarbei Korir & 6 Others vs Danson Muniu Njeru* [2018] eKLR and *Peter Okiebera Omwenga vs Samuel Nyabiba Nyakeri* [2018] eKLR for the proposition that a constructive trust exists by dint of the intentions of the parties at the time of entering the agreement and consequences thereof.
20. Counsel further cited section 28 of the *Land Registration Act* No. 3 Of 2012 which provides for overriding interests, including trusts. Regarding the sale agreement, counsel submitted that the same was not subject to provisions of section 3 (3) of the *Law of Contract Act*, since the same was entered into in 1975 yet the provision was brought into operation by an amendment in 1990. They prayed that the suit be allowed with costs to the Plaintiff.

Defendants' Submissions

21. Counsel for the defendants submitted that the purported sale agreement of 1975 was in Kamba language and had not been translated to the court hence cannot be relied on as evidence in this case. They cited provisions of section 23(1) of the *Environment and Land Court Act* that the language of the court is English. They also placed reliance on the case of *Bibiana Nekesa Wandala v Daclas Wafula Wamalwa and 3 others* [2020] eKLR where the court disallowed the Plaintiff from using an agreement written in Bukusu language. They hence prayed that the 1975 agreement be disregarded by the court.
22. It was further submitted that the alleged cause of action was time barred since the agreement in dispute was entered into in 1975 but the suit was filed in 2015, against the provisions of section 4 (1) of the *Limitation of Actions Act*. They also cited the case of *Nthiga Cigana v Nyaga Titima* [2013] eKLR to contend that the suit herein was hopelessly out of time for contravening the provisions of the *Limitation of Actions Act*.
23. Counsel further argued that the alleged agreement of 1975 did not have the name of the alleged seller, Simeon Nzyuko, hence was void. They further argued that the Defendants had been sued in their capacity as administrators of the estate of one Beth Nduku and questioned why the administrators of Simeon Nzyuko were not sued. They further argued that the connection between plot number 108 and the suit property had not been clarified by the Plaintiff, as was found in the succession court which refrained from making a determination on the particular suit property.
24. They concluded by inviting the court to consider the decision in *Gurpreet Singh v Chatur Bhuj Goel* (1988) Air 400 as was considered in *Protus Hamisi Wambada & Another v Eldoret Hospital* [2020] eKLR where the court was of the view that where a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the same compromise must be in writing and signed by the parties.



Analysis and Determination

25. The court has considered the pleadings, the evidence on record and the rival submissions by the parties. It is uncontested that the suit property is registered in name of the Beth Nduku Wambua (deceased) and that the defendants are the administrators of the deceased's estate. The contested fact which forms the basis of the issue for determination is whether there is constructive trust in the circumstances of this case. Constructive trust being an equitable remedy in my view time limitation cannot apply to a trust, as the issue is the intention of the parties at the time of the agreement. Therefore this claim is not time barred.

26. Constructive Trust is defined in the *Black's Law Dictionary*, 11th Edition, as follows;

"An equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property which the wrongdoer gains title."

27. In the case of *Twalib Hatayan Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR the Court of Appeal re-stated the law on trusts as follows:

Dealing with the first issue, according to the Black's Law Dictionary, 9th Edition; a trust is defined as

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the *Trustee Act*, ... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... 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 para 1453). 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. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the



case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).”

28. Therefore, constructive trust is an equitable remedy granted to a person who demonstrates beneficial interest in a property where the party holding title acquired title by wrong doing. Equity is one of the national values and principles of governance under article 10 (2) (b) of *the Constitution* of Kenya 2010 which binds all state organs including this court whenever it interprets any laws. Equity means a sense of fairness, impartiality and evenhanded dealing (see definition of “equity” in *Black's Law Dictionary* 11th Edition). Therefore, an equitable remedy is a remedy meant to achieve fairness.
29. Section 107 of the *Evidence Act* places the burden of proof in a suit on the claimant. In this case, the Plaintiff was obligated to show that he lawfully acquired the suit property for him to seek refuge in the equitable relief of constructive trust, as an equitable remedy seeks to achieve fairness. To rely on trust in the circumstances of this suit, the Plaintiff was obligated to demonstrate that he had beneficial interest in the suit property.
30. In the instant matter, the plaintiff claimed to have purchased the suit property from the family of Simeon Nzyuko. He produced an agreement in Kamba language without translation into the language of the court. That notwithstanding, his own witness, PW 2 testified that as of the date of the agreement there was no payment of the purchase price but that the same was paid the following month. No evidence of payment was provided by the plaintiff to show that payment of the agreed amount was done the following month. This is material in view of the defendant's allegation that the plaintiff was a stranger to them and that he never purchased the suit property. In addition, the plaintiff stated in cross examination that the agreement was not signed by the seller although he alleges to have bought the suit property from the family of Nzyuko. In my view, therefore the evidence of the plaintiff does not show that he purchased the suit property. Although the Plaintiff alleged to have been in possession of the suit property, he did not present any cogent evidence to demonstrate such possession. In any event, possession could only be legitimized by a valid agreement.
31. Having analysed the evidence as done above, I am not satisfied that the plaintiff purchased the suit property. An equitable remedy must have a basis. As the plaintiff has failed to demonstrate purchase of the suit property, I find and hold that he has not demonstrated any beneficial interest in the suit property to deserve the equitable remedy under the doctrine of constructive trust. In the circumstances, I find and hold that the Plaintiff has failed to prove his case on the required standard and the same is hereby dismissed with costs.
32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

