



REPUBLIC OF KENYA



**Khaoya (Personal representative of Elika Nanjala Mutuka) & another
v Wekesa & 13 others (Environment & Land Case 100 of 2010)
[2023] KEELC 20323 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 100 OF 2010
EC CHERONO, J
SEPTEMBER 26, 2023**

BETWEEN

**JOHN WEKESA KHAOYA (PERSONAL REPRESENTATIVE OF ELIKA
NANJALA MUTUKA) 1ST PLAINTIFF
TERESINA NAMAEMBA 2ND PLAINTIFF**

AND

**PAUL JUMA WEKESA 1ST DEFENDANT
JAMIN WASIKE KITUYI 2ND DEFENDANT
JOSEPH WASIKE KITUYI 3RD DEFENDANT
JAMES ROBERT ETYIANG 4TH DEFENDANT
HENRY NASIO 5TH DEFENDANT
JOHN MASIKA WEKESA 6TH DEFENDANT
MANJARO KUNDU TITILA 7TH DEFENDANT
MZEE KUNDU KIMALILO 8TH DEFENDANT
CHEMIATI WAFULA 9TH DEFENDANT
EMMANUEL WAMALWA 10TH DEFENDANT
BENSON WAMALWA JUMA 11TH DEFENDANT
SOLOMON WAMALWA JUMA 12TH DEFENDANT
WAMALWA WANYONYI 13TH DEFENDANT
VINCUS JOSHUA 14TH DEFENDANT**



JUDGMENT

1. The plaintiffs vide a further Amended plaint dated 22nd June 2018 seek the following orders;
 - a. A declaration for trust against the 1st defendant.
 - b. An order declaring the said sale null and void and revocation of Title Deeds land parcels emanated from land parcel No E/Bukusu/S.nalondo/1945 and S.nalondo/2725 & 2727
2. In a statement of Defence dated 17th November 2010, the Jamin Wasike Kituyi, the 2nd defendant herein filed a statement of Defence denying the plaintiffs' claim and sought to have this suit dismissed with costs. Neither of the other defendants entered appearance nor filed Defence. When this case This came up for hearing 19/6/2023, the plaintiff applied for adjournment on grounds that he had not served the 5th defendant with a Hearing Notice. The application was strenuously opposed by the 2nd defendant and after considering the rival arguments by both sides, this court rejected the application for adjournment for reasons on the court record. This case has dragged on for more than 10 years in our courts since it was filed in court on 11th October, 2010. In one of the many Rulings delivered by my predecessor Justice Boaz N. Olao on 28th July 2022, the learned Judge observed as follows;

“I am beginning to wonder whether John Wekesa Khaoya and Teresina (the plaintiffs herein) are really keen in prosecuting this suit or they derive immense pleasure by simply trooping to this Court Ad Nauseam either to admire the smart Judicial Officers and other staff or just sympathize and laugh at the container which we imported from kakamega court to use as a registry. Either way, I must caution them that this file is now taking up valuable space in our registry. Perhaps we should now consider charging them storage fees!!”
3. The observation by the Judge in his ruling explains how the plaintiffs in this case have taken this Court in circles by bringing all manner of interlocutory applications to prolong the life of the case and increase the volume of the pleadings and proceedings to cause confusion among judicial officers who are posted to the station but are transferred without hearing and concluding the case.

Plaintiff's Summary Of Facts

4. The 1st plaintiff testimony on his behalf and that of his co-plaintiff as PW1 and introduced himself as a resident of Sikata area, West Nalondo sub-location, Nangwe location within Bungoma County. The 1st plaintiff testified that he has brought this case on his behalf and on behalf of Teresina Namaemba, the 2nd plaintiff herein. He stated that his claim is for a declaration of a trust in the suit property land parcel No E.bukusu/S.nalondo/2725 and 2727. The 1st plaintiff also confirmed that he filed this case vide a plaint dated 7th October 2010 in which he was seeking the following orders;
 - a. A declaration for trust.
 - b. An order declaring the said sale null and void.
 - c. General damages
 - d. Costs
 - e. Interests
 - f. Any other order this Honourable Court deem fit to grant.



5. The plaintiff stated that the plaint was Amended on 20th June 2011 to add Joseph Simiyu Kitui and James Robert Etyang as the 3rd and 4th defendants. Thereafter on 21st January 2015, one Henry Nasio and nine (9) others were added as defendants in this suit. He also stated that on 28th June 2018, the plaint was further Amended and Henry Nasio, John Masika Wekesa, Maonjaro Kundutitila, Mzee Kundu Kimimalilo, Chemiat Wafula, Emmanuel Wamalwa, Benson Wamalwa Juma, Solomon Wamalwa Kitila, Wamalwa Wanyonyi And Vincus Joshua were impleaded as the 5th to 14th defendants respectively. He stated that he wishes to rely on the pleadings and the annexures in support of his claim. However, the 1st plaintiff did not specify and specifically produce the documents he was referring to in his evidence. He stated the two titles No E.bukusu/S.nalondo/2725 and E.bukusu/S.nalondo/2727 which are in the names of the 2nd and 3rd defendants were obtained by fraud particulars of which he alleges to have pleaded in his pleadings.

3rd Defendant's Case

6. Joseph Simiyu Kituyi, the 2nd defendant herein introduced himself as a residing in Washington, United States of America. He gave sworn testimony and stated that he does not know the defendants except Jamin Wasike Kituyi, the 2nd defendant herein who is his father. He further stated that the suit land parcel No E.bukusu/S.nalondo/2725 Measuring Approximately 8 acres is registered in his name. He said that his father gave him the land as a gift in the year 2009 or thereabouts after he became sickly. He stated that land parcel No E.bukusu/S.nalondo/2727 is registered in the name of the 2nd defendant, James Robert Etyang. However, he said that he did not know him personally. After he acquired title to the suit land, he was informed that the land has a dispute spanning almost 20 years prohibitions and cautions were subsequently placed on the title after he acquired title to the land.

Legal Analysis And Decision

7. I have considered the pleadings, proceedings, testimony of the plaintiffs and the 2nd defendant as well as the relevant law. From his Further Amended plaint dated 22nd June, 2018, the plaintiff sought the following orders;
- a. A declaration for trust against the 1st defendant
 - b. An order declaring the said Sale null and void and revocation of Title Deeds Land parcels emanated from land parcel No E.bukusu/S.nalondo/1945 and No E.bukusu/S.nalondo/2725 & 2727
8. The plaintiffs did not record witness statements nor did the 1st plaintiff lay a basis for their claim for trust and cancellation of Title Deeds for the suit lands parcel No E.bukusu/S.nalondo/2725 & 2727. At paragraph 5, 6, 7, 8, 9 & 10 of the Further Amended plaint, the plaintiffs averred as follows;
- “ 5. The 1st plaintiff brings this suit under powers of Limited grant ad litem on behalf of Elika Nanjala Mutuka (deceased).
 6. The 2nd plaintiff brings this suit as the beneficiary/heir of the late Mukhwana Ndayakhulia jointly with the 1st plaintiff.
 7. Sometimes in August 1980, the 1st defendant was appointed by clan elders of the late Mukhwana Ndayakhulia , the father to Elika Nanjala Mutuka(deceased) and her two sisters namely Keresenja Nasambu (deceased) and Teresina Namaemba for the estate land parcel No E.bukusu/



S.nalondo/1945 and the two purchases namely Stephen Wanyama Tokoyi (deceased) and Josephine Nekesa –Holding trust.

8. In breach of the said trust the 1st defendant proceeded to succeed title to land parcel No E.bukusu/s.nalondo/1945 by way of transmission and thereafter subdivide the same into (4) new numbers as E.bukusu/S.nalondo/2725-2728 and sold two(2) portions of the subdivided land parcel to the 2nd defendant violating Sec 45(1) & (2) 52 of the [Law of Succession Act](#)(Cap 160) Laws of Kenya.
 9. The 2nd defendant bought the said two portions of land out of the subdivided trust land parcel No e.bukusu/s.nalondo/1945 knowingly that the 1st defendant had no power to sale the same as he (1st defendant) was merely trustee of the estate of the land Mukhwana Ndayakhulia (deceased) for Elika Nanjala Mutuka(deceased) and her two sisters namely Kresenja Nasambu(deceased) and Teresina Namaemba the 2nd plaintiff hereto.
 10. The plaintiffs’ claim against the 1st defendant is for a declaration order that he held the land in trust for the heirs/beneficiaries to the estate of the late Mukhwana Ndayakhulia pursuant to section 45(1) (2), 52 of the [Law of Succession Act](#) (Cap 160) Laws of Kenya.
 11. The plaintiff’s claim against the 2nd defendant is for an order declaring the said sale null and void as he acquired the transfer fraudulently as the 1st defendant had no valid title to land parcel No E.bukusu/S.nalondo/1945 now land parcels No e.bukusu/s.nalondo/2725-2728 pursuant to sections 45 (1) (2), 52 of the Succession Act (Cap 160) Laws of Kenya.”
9. From my reading of the six paragraphs of the further Amended plaint, the plaintiffs admit and confirm the following facts;
- i. The 1st plaintiff has instituted this suit on his behalf and that of the 2nd plaintiff pursuant to a limited grant (Ad Litem) issued to him
 - ii. Sometimes in August 1980, the 1st defendant was nominated by the clan elders as the administrator of the estate of the late Mukhwana Ndayakhulia (deceased) and asked to initiate succession proceedings on behalf of his estate.
 - iii. The 1st defendant filed succession proceedings and proceeded to succeed title to land parcel No E.bukusu/S.nalondo/1945 by way of transmission and thereafter subdivided the land into 4 new resultant numbers being E.bukusu/S.nalondo/2725-2728.
 - iv. That the 1st defendant, being the Administrator of the estate of Mukhwana Ndayakhulia sold two of the resultant portions being land parcels No E.bukusu/S.nalondo/2725 & 2727 to the 2nd defendant herein.
10. The 2nd defendant in his testimony stated that he is the registered owner of land parcel No E.bukusu/S.nalondo/2727 Measuring approximately 8 acres acquired from his father, Jamin Wasike Kituyi (2nd defendant) as a gift sometimes in the year 2009.
11. According to the plaintiffs, Paul Juma Wanyama(deceased) who was appointed the Administrator of the estate of Mukhwana Ndayakhulia(deceased) was merely to hold the Original land parcel No



E.bukusu/s.nalondo/1945 in trust for the estate of the said Mukhwana Ndayakhulia(deceased) and had no powers to sale the same.

12. Section 25 of the *Land Registration Act* No 3 of 2012 provides as follows;

“

“25. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Again section 26 of the same Act provides thus;

1. The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme”

13. The plaintiffs in this case are seeking a declaration that Paul Juma Wanyama (deceased), the administrator of the Estate of Mukhwana Ndayakhulia(deceased) was merely a trustee and did not have powers to sale the two resultant portions to Jamin Wasike Kituyi and by extension, the 3rd defendant herein.



14. In the case of *Heartbeat Limited v Ng'ambwa Heartbeat Community Childrens' Home & Rescue Centre* (2018) eKLR, the Court of Appeal considered the issue of trust as follows;

“(26) This court considered the law on trust in detail in *Twalib Hatayan & another v Said Sagger Ahmed Al-Heidy & others* (2015) eKLR and outlined the basic tenets as follows;

“According to the *Black's Law Dictionary*, 9th Edition; a trust is defined as;

“

- “1. 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...”

15. 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 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 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....”
16. 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*)”
17. As I indicated hereinabove, the plaintiffs in their Further Amended plaint averred that the 1st defendant who is also the administrator of the estate of Mukhwana Ndayakhulia (deceased) sold the suit properties to the 3rd defendant while he was merely a trustee. However, They have not led any evidence



showing that the 1st defendant did not have powers as an administrator to administer the estate of the said Mukhwana Ndayakhulia, including distributing the estate to beneficiaries including the 2nd and 3rd defendants who had a beneficial interest as purchasers.

18. In the absence of any evidence being tendered by the plaintiffs to suggest that the defendants, and particularly 2nd & 3rd defendants obtained registration with or inclusion on the Certificate of Title of the suit parcels of land fraudulently or through misrepresentation, then the court finds that the plaintiffs have failed to discharge their legal duty of proof under Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. There is also no evidence adduced by the plaintiffs that the defendants and in particular the 3rd defendant illegally and without following the due process, or in a corrupt scheme with others, were involved in the registration of the certificate of title, got themselves so registered
19. In view of the matters aforesaid, I find that the plaintiffs have not proved their claim on a balance of probability. Consequently, this suit is devoid of merit and the same is hereby dismissed with costs to the defendants.

DATED, READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY THIS 26TH SEPTEMBER, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

John Wekesa Khaoya-1st plaintiff

2nd Plaintiff-absent

Defendants/Advocate-absent

Joy-C/A-present

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