



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION CAUSE NO. 10 OF 2017**

**IN THE MATTER OF THE ESTATE OF KONINI OLE KIMANTIRU (DECEASED)**

REGINA NJAMBI.....1<sup>ST</sup> APPLICANT

SIMON GITAU KAHIA.....2<sup>ND</sup> APPLICANT

VERSUS

NAIRUGU NEPKINE LOISHORNA.....RESPONDENT

**RULING**

The applicant filed summons before this court dated 13<sup>th</sup> December, 2018 seeking from this court an order directing that the Deputy Registrar Kajiado High court do execute transfer documents vesting the suit land referred as Ngong/Ngong/6099 to the administrators of the estate of Kahia Giathi. In support of the summons stated to be brought under Section 47 and 82 of the succession Act and Rule 73 of the Probate and Administration rules are grounds on the face of the application and an affidavit by Simon Gitau Kahia. After service upon the administrators of one Nairugu Nepkine Loishorna, there was no rejoinder or replying affidavit as answer to the issues raised in the summons.

**The Law**

Approach to the application the principles which apply in considering applications of this nature are provided for in the case of *Macharia Mwangi Maina & 57 others v Davidson Mwangi Kagiri 2014 eKLR* where the court held:

*“It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & Another vs Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126(1) of the Registered Land Act is merely permissive and not mandatory. In Mutsonga vs Nyati (1984) KLR and Kanyi vs Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.”*

*In Yexley vs Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc v Rosset, 1991 1 AC 107, 132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case .....Lord Denning in Hussey v Palmer (1972) 3 ALL ER held that a constructive trust is a trust imposed by law whenever justice an good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”.*

The respondent did not file any affidavit to dispute grant of a vesting order. In compliance of the declarations made by this court in its ruling dated 15<sup>th</sup> October, 2018. A party seeking a vesting order must show and satisfy the court that there was a transaction for sale of land where both parties created a binding contract that the seller of the land chose to allow the purchaser vacant possession but rescinded in signing the

transfer forms to convey the property rights to the new owner. This being the case in this application I rely on the principles at the doctrine of equity constructive trust as stated in by Pomeroy on equity jurisprudence 3<sup>rd</sup> Edition General Books London 194 where the learned author held:

***“Conversion is often seen as the result of applying the maxim done. Equity must recognize and protect beneficial title and equitable interest title and equitable interest arising, brought about by the change in estates, and looks on agreements regarding those things as actually performed. The result of the application is that where land had been directed to be sold or charged the land is treated in equity as money. Secondly equity’s constructive trust jurisdiction arises on the making of the contract intending to transfer property, denial of the original intention would be unconscionable.”***

That now leaves me with the key issue, whether or not the father to the applicant was a bona fide purchaser for value without notice. As pointed out earlier in my judgment, the applicants case was that the registered proprietor, of the suit land now deceased passed on before executing the transfer documents as outlined in Section 6(1) of the Land Contract Act. In the circumstances the agreement for the sale of land and transfer documents were left to be executed by the personal representatives to the estate. To cap it all the applicants’ family continue to reside on the same parcel of land for over thirty years and as proved by the evidence on record.

The applicant’s efforts to apply to the land control board to vest registration rights of the parcel of land in their names has been obstructed or denied by the administrators of the estate of the deceased who commenced the negotiations for the sale of the property.

In the present case the applicant has satisfied the court that he is entitled to an order of specific performance based on a constructive trust. This has been applied in various circumstances to promote justice where sellers of land in which they had conveyed interest to land to a purchaser but though their illegal acts purport to keep both the purchase price and the suit land.

I would in the circumstances and peculiar facts of this case allow the summons dated 13<sup>th</sup> December, 2018 by granting a vesting order upon the Deputy Registrar of the High Court to execute transfer forms in place of the legal representatives to the estate of Konini Ole Kimantiru to transfer the property referred to as Ngong/Ngong/6099 to the applicants. Costs of this application be in the cause.

**Dated, signed and delivered in open court at Kajiado this 30<sup>th</sup> day of January, 2019.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Wambugu for the applicant

M/S Nairugu Nepkie Loshorna