



REPUBLIC OF KENYA



KENYA LAW
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**Muasya v Nywoki & 2 others (Environment and Land Appeal 59 of 2018)
[2023] KEELC 20019 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 59 OF 2018
A NYUKURI, J
SEPTEMBER 20, 2023**

BETWEEN

MILU MUASYA APPELLANT

AND

MUSEMBI NYWOKI 1ST RESPONDENT

PETER NYWOKI 2ND RESPONDENT

MWIKALI NYWOKI 3RD RESPONDENT

*(Being an Appeal from the Judgment of Hon. A. Lorot H.R (Senior Principal Magistrate)
at Machakos Law Courts dated 27th August, 2018 in Civil Suit No. 878 of 2014)*

JUDGMENT

Introduction

1. This is an Appeal against the Judgment of Honourable A. Lorot, Senior Principal Magistrate delivered on August 27, 2018 in Machakos Civil Suit No 878 of 2014. In the impugned Judgment, the learned Senior Principal Magistrate dismissed the appellant's suit where the appellant had sought for orders of eviction and permanent injunction restraining the Respondents from interfering with the parcel of land known as Muthetheni/Kalamba/427 (hereinafter referred to as the suit property).

Background

2. Milu Muasya, the appellant herein and Nywoki Muasya (hereinafter referred to as the deceased) were brothers. The deceased was the father of the 1st and 2nd respondents and husband to the 3rd respondent. On November 7, 2014, Milu Muasya filed a Plaintiff against the three Respondents herein before the Chief Magistrate's Court vide Civil Suit No 878 of 2014 seeking for orders of permanent injunction to bar the Respondents from interfering with land known as Muthetheni/Kalamba/427 (suit property).



He also sought for orders of eviction against the respondents as well as costs of the suit. The basis of his claim was that the three respondents without any color of right had trespassed on the suit property, cleared vegetation, planted crops and erected illegal structures thereon, when he was the absolute registered proprietor of the suit property.

3. In their Defence filed on November 20, 2015, the defendants denied the plaintiff's claim and averred that they entered the suit property in 1984 upon a mutual oral agreement to exchange the deceased's portion on parcel known as Muthetheni/Kalamba/440 with the plaintiff's portion in the suit property. They stated that they had been in possession of the suit property openly, continuously and without interruption since 1984 and that it is only after their father's death in 2006 that the plaintiff began laying claim on the suit property.
4. The matter proceeded to trial and upon hearing evidence on both sides the learned trial Magistrate dismissed the Plaintiff's case on the basis that there was an oral agreement between the deceased and the plaintiff to exchange part of parcel Muthetheni/Kalamba/440 with a portion of Muthetheni/Kalamba/427.
5. It is the above decision that provoked the instant Appeal. In the Memorandum of Appeal filed on 26th September, 2018, the Appellant raised the following Grounds of Appeal:
 - a. That the learned Magistrate erred in law and in facts by finding that there was an oral agreement between the Appellant and the deceased Nywoki Muasya for exchange of a portion of land title No Muthetheni/Kalamba/427 and land title No Muthetheni/Kalamba/440.
 - b. That the learned Magistrate erred in law and in facts by making a finding that the Appellant had not proved the case on a balance of probabilities.
 - c. That the learned Magistrate erred in law and in facts by making a finding that the decision taken by the "aa-Kitondo" clan was valid despite the fact that the appellant was not represented at the meeting and/or deliberation.
 - d. That the learned Magistrate erred in law and in fact by relying on a decision from an illegal entity known as "aa-Kitondo" clan.
 - e. That the learned Magistrate erred in law and in fact by failing to appreciate that the Appellant has absolute indefeasible title to the land known as Muthetheni/Kalamba/427 to the exclusion of everybody else.
6. Consequently, the appellant sought the following orders:
 - a. That the Appeal be allowed.
 - b. That the costs of this Appeal be awarded to the Appellant.
 - c. Any further relief that this honourable court feels just to grant.
7. The Appeal was canvassed by way of written submissions. On record are the appellant's submissions filed on July 6, 2022 and the Respondents' submissions filed on February 20, 2023.

Appellant's submissions

8. Counsel for the appellant submitted that the Appeal raised two issues namely:
 - a. Whether the learned Magistrate properly exercised his mandate as required by law to evaluate the evidence according to the facts and the law; and



- b. Whether there was valid agreement between the Appellant and his brother pertaining the ¼ of an acre that was to be surrendered from the parcel of land known as Muthetheni/Kalamba/427.
9. While relying on the case of *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, counsel submitted that it is the duty of this court as the first appellate court to re-evaluate, re-assess and re-analyze the record and make its own conclusions.
 10. On the first issue, counsel submitted that the learned trial Magistrate misconstrued the evidence presented before the trial court and consequently acted on the wrong principles in arriving at the findings he made. To buttress this point, reliance was placed in the case of *John K. Malembi v Trufosa Cheredi Mudembei & 2 others* (2019) eKLR for the proposition that a trial court is expected to identify legal and factual issues for consideration and to analyze evidence tendered to determine proved facts.
 11. It was submitted for the Appellant that the Appellant tendered evidence to show that he was the registered proprietor of parcel Muthetheni/Kalamba/427 which he obtained as a result of inheritance while his brother the late Nywoki Muasya was registered as proprietor of parcel Muthetheni/Kalamba/426. Counsel submitted that the Appellant produced title in evidence, which is protected under Section 26 of the *Land Registration Act*. Counsel argued that while the trial court found that a title could be impeached where there was fraud or mistake, there was no evidence to show any fraud or mistake in the Appellant's registration of the suit property.
 12. Counsel argued that the Appellant discharged his evidentiary burden of proof but the Respondent failed to give evidence to impeach title. In that regard the court was referred to the case of *Mbutbia Macharia v Annah Mutua Ndwiga & another* (2017) eKLR and Section 107 of the *Evidence Act*, for the proposition that where a Claimant discharges their evidentiary burden of proof, the opposing party is under duty to adduce evidence to rebut what has been claimed.
 13. On whether there is a valid agreement between the Appellant and his brother pertaining the ¼ of an acre to be surrendered from the suit property, counsel argued that Section 3(3) of the *Law of Contract Act* provides that a contract over land must be in writing and properly executed by the parties and witnessed. Counsel argued that there was no evidence of any oral agreement alleged to have been entered into between the Appellant and his late brother. Counsel contended that the trial court's finding that the Defendant's entry on the suit property was based on an agreement between brothers was erroneous and not based on evidence.

Respondents' submissions

14. Counsel for the Respondent submitted that the only issue for determination was whether the Appeal was merited. It was submitted for the Respondent that a first appellate court has the duty is to re-evaluate, re-assess, and re-analyze evidence and make its own conclusions bearing in mind that it had no opportunity to see or hear witnesses.
15. Counsel contended that the gist of the Appeal was a portion of ¼ of an acre held by the Appellant in trust for the benefit of his late elder brother's family. Counsel argued that the Appellant had a duty during the trial in the lower court to challenge the Respondent's claim that there was an oral agreement between the Appellant and his late brother when they agreed to exchange a portion of ¼ acre of land from the suit property and the Appellant to get his late brother's share of land in Title No Muthetheni/Kalamba/440. Counsel submitted that the Appellant inherited Muthetheni/Kalamba/427 measuring 0.9Ha, and Muthetheni/Kalamba/440 while his late brother inherited Muthetheni/Kalamba/426 measuring 0.9Ha; the three properties having been their deceased father's land. Counsel maintained



that there was no candid and valid explanation given by the Appellant as to how he had inherited two parcels of land from his deceased father, while his elder brother only got one parcel. It was further contended that the Appellant did not give any evidence to support his acquisition of the suit property be it a valid purchase and no explanation was given as to how he got a larger share than his elder brother, notwithstanding that there was no succession proceedings.

16. Consequently, counsel submitted that there was a constructive trust through a binding oral agreement or arrangement entered between the Appellant and his deceased brother, which led to the deceased ceding his share in Muthetheni/Kalamba/440 in exchange of $\frac{1}{4}$ of an acre in Muthetheni/Kalamba/427.
17. On whether an oral agreement could not suffice in view of the provisions of Section 3(3) of the *Contract Act*, counsel relied on the case of *Charles Odongo Ngani v Milka Akinyi Otieno* (2017) eKLR for the proposition that prior to 1st June, 2003 when the amendment of Section 3(3) of the *Law of Contract Act* became effective, that Act had a proviso to Section 3(3) which allowed filing of suits founded on unwritten agreements where a party to such a contract had taken possession. In that regard, counsel argued that Section 3 of the *Law of Contract Act* does not affect the transaction between the Appellant and his late brother.
18. Counsel further submitted that the evidence before the trial court was self-explanatory as to how the Respondents came into occupation and possession and use of the disputed $\frac{1}{4}$ an acre of land being a portion of the suit property. Counsel argued that the occupation and settlement on the suit property was always justifiable from the conduct of the parties.
19. Reliance was placed on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR for the proposition that a constructive trust is based on common intention, being an arrangement reached between parties and acted upon by the Claimant. Counsel submitted that from the evidence of PW2, who was the Appellant's daughter-in-law, the Respondents were on the suit property before 1996 and therefore principles of equity under Article 10 of the *Constitution* of Kenya 2010 are applicable.
20. As regards the applicability of Section 26 of the *Land Registrations Act*, counsel submitted that the Appellant was erroneously registered as owner of the entire parcel number Muthetheni/Kalamba/427 and therefore the mere registration of the Appellant as the proprietor thereof is not absolute and indefeasible. Counsel submitted that from the photographs presented in court by the Respondents showing that they had put up permanent houses and had occupied $\frac{1}{4}$ an acre of the suit property openly, continuously and uninterruptedly since 1984, that it is only after the deceased's demise in 2006 when the Appellant began laying claim on the suit property.
21. Counsel relied on Section 7 of the *Law of Limitation of Actions Act* to content that the claim filed by the Appellant was time barred. To buttress this position reliance was placed on the case of *Margaret Nduka Waguchu v Teresiah Wambui Nguigi* (2017) eKLR.

Analysis and determination

22. I have carefully considered the Appeal, parties' rival submissions and the entire record. The issue that arise is whether the trial court was justified in dismissing the Appellant's claim on the basis that there was an oral agreement between the Appellant and his late brother as seen in their conduct and acquiescence in the context of their relationship, acting in good faith.
23. As a first appellate court, the duty of this court is well known in law; which is to re-analyze, re-assess and re-evaluate evidence in the trial court and make its own conclusions bearing in mind that it had no



opportunity to see or hear witnesses. (See the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR).

24. From the record, it is not disputed that the Appellant and Nywoki Muasya (deceased) were brothers and therefore the 1st and 2nd Respondents are sons of the deceased while the 3rd Respondent is the widow of the deceased. In addition, it is not in dispute that the Appellant's father (now deceased) had land which upon adjudication was registered as Muthetheni/Kalamba/426; Muthetheni/Kalamba/427; and Muthetheni/Kalamba/440. While parcels 427 and 440 were registered in the Appellant's name, parcel 426 is registered in the name of the deceased.
25. The Appellant's claim was anchored on the fact that he is the registered proprietor of the suit property, and therefore he should enjoy it to the exclusion of everyone else including the Respondents
26. On the other hand, the Respondents' position is that the deceased orally agreed with the Appellant to give up his share in the parcel known as Muthetheni/Kalamba/440 so as to get a share of ¼ of an acre in the Appellant's parcel Muthetheni/Kalamba/427. That it is on the basis of this mutual agreement that the deceased's family entered the suit property in 1984. The Appellant's rebuttal to this is that an agreement for land must be in writing as per the provisions of Section 3(3) of the Law of Contract Act.
27. Having considered the Plaintiff, I note that the Appellant neither disclosed when the Respondents entered the suit property nor the fact that there is any relationship between himself and the Respondents. He also did not specify the extent of the Respondents' trespass on the suit property. On the other hand, the Respondents were specific that they entered the suit property in 1984 on the basis that the deceased gave up his share in land parcel Muthetheni/Kalamba/440 in exchange of a similar portion in the suit property and that they have been in possession thereof openly, continuously and uninterruptedly since 1984 and it was only after the demise of the deceased in 2006 that the Appellant began laying claim on the suit property. The Respondents insisted that the suit was statute barred.
28. I have considered the Appellant's evidence with that of PW2 who is his daughter-in-law. While the Appellant stated in evidence in his Witness Statement that the Respondents entered the suit property in 2007, PW2 testified that when she got married in the Appellant's home in 1996 she found the Respondents living on the suit property. The Respondents produced photographs of their houses on the suit property. Having considered the Plaintiff's evidence, it is clear and I find that the Respondents entered the suit property way before 1996. The Appellant having conceded to the fact that the three parcels being 427, 426 and 440 belonged to their parents and that the deceased's family moved into the suit property during the lifetime of the deceased, but he never sued him only filing suit after his death only confirms that there was an arrangement between the Appellant and the deceased, which arrangement created a constructive trust on the part of the Appellant for the benefit of the deceased's family.
29. The *Black's Law Dictionary* defines construct trust 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 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 to which the wrongdoer gains title. The court declares a constructive trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary; the device does not create a "trust" in any unusual sense of that word. The name of the remedy came about because early cases applying it involved trustees who wrongfully appropriated funds from trusts, making it convenient to say that they remained constructive trustees of whatever they



had wrongfully acquired. The term persists because the analogy between the remedy and a real trust is strong; in both cases the legal holder of title to property has no right to the enjoyment of it.

30. In the case of *Lloyds Bank Plc v Rosset*, (1991) 1 AC 107, 132 which was cited with approval in the case for *Baron Mathenge Munyoki v Dedan Mbangula Kithusi* (2022) eKLR, the court held as follows:

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.

31. Similarly in *Steadman v Steadman* (1976) AC 536, 540, the court held as follows:

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.

32. Essentially therefore a constructive trust arises where the holder of a legal title is not in equity the owner of the property whose title he holds but the same is held for the benefit of another as required by good conscience of humanity.

33. Having considered the fact that the Appellant allowed the deceased’s family to occupy ¼ an acre of the suit property way before 1996 and having not filed suit against the deceased’s family during the deceased’s lifetime, it is clear that there was a constructive trust created on the part of the Appellant for the benefit of the deceased and his family. The mere fact that the arrangement between two brothers was not reduced in writing does not negate the existence of a constructive trust. It is not surprising for two siblings to agree on property without any written document and therefore I reject the Appellant’s argument that as there was no written agreement in contravention to Section 3(3) of the *Law of Contract Act*, the arrangement between the brothers cannot be enforced by the court.

34. In the premises, I find and hold that the trial court did not err in finding that the conduct of parties demonstrated an oral agreement. In the premises, I find no justification to interfere with the findings of the trial court. As there is no merit in this Appeal, the same is hereby dismissed with costs to the Respondents.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Mutua for Respondents

No appearance for Appellant

Ms Josephine Misigo- Court Assistant

