



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambua v Munuvi (Environment & Land Case E014 of 2022)  
[2023] KEELC 20935 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20935 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E014 OF 2022**

**TW MURIGI, J**

**OCTOBER 18, 2023**

**BETWEEN**

**BONIFACE MULEI WAMBUA ..... PLAINTIFF**

**AND**

**JOSEPH MUNGÚTU MUNUVI ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 21<sup>st</sup> June, 2022 the Plaintiff prays for judgment against the Defendant for:-
  - a. A declaration that the Defendant holds title to land Parcel No. Nzai/Kalamba/551 on his own behalf and in trust for the Plaintiff.
  - b. An order compelling the Defendant to transfer ½ of the said parcel of land to the Plaintiff within 30 days of this judgment in default the Deputy Registrar of this Honourable court to execute the requisite transfer documents.
  - c. Costs and Interest of the suit.
  - d. Any other relief that this Honourable court may deem fit and just to grant.
2. Though the Defendant was duly served with summons to enter appearance, he only filed a memorandum of appearance on 26/08/2022 but did not file a defence.
3. The matter proceeded for hearing as undefended on 22<sup>nd</sup> March, 2022.

**The Plaintiff's Case**

4. The Plaintiff testified as the sole witness in support of his case.



5. He adopted his statement dated 21<sup>st</sup> June, 2022 as his evidence in chief. He also produced the documents in the list of documents dated 21<sup>st</sup> June, 2022 namely, the certificate of official search and demand letter dated 22<sup>nd</sup> August, 2019 as exhibits 1 and 2 respectively.
6. The Plaintiff testified that he is the beneficial owner of half a share of the suit property. It was his testimony that the suit property was jointly acquired by his grandmother Kisuli Matunge Kiamba and Mumbua Munuvi the mother to the Defendant. He testified that each party was to hold half a share of the suit property. He went on to state that Kisuli Matunge and Mumbua Munuvi died before they could transfer the suit property to their names.
7. It was his testimony that his family has been in occupation of half a share of the suit property since his birth. He informed the Court that the Defendant misdirected the land officers and caused the entire suit property to be registered in his name after the demise of his mother.
8. The Plaintiff contended that he is entitled to half a share of the suit property because it is jointly owned by his grandmother and the mother to the Defendant.
9. The Plaintiff closed his case and filed written submissions on 31<sup>st</sup> March, 2023 which I have considered.

### **Analysis And Determination.**

10. Having considered the pleadings, the evidence on record, and the submissions by the Plaintiff the only issue that arises for determination is whether there exists a trust over the suit properties between the parties herein.
11. Although the suit was undefended, the Plaintiff has a duty to formally prove his case on a balance of probabilities as required by the law.
12. In the case of *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal held that;
 

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
13. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that;
 

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
14. The Plaintiff is seeking for a declaration that the Defendant holds half a share of the suit property in trust for his family. The Plaintiff alleged that the Defendant holds ½ of the suit property in trust for his family.
15. According to the Black’s Law Dictionary 9<sup>th</sup> Edition a trust is defined as:-
 

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settlor)for the benefit of a third party (beneficiary).”
16. A customary trust falls within the ambit of the proviso to Section 28(b) of the *Land Registration Act* which provides as follows:-



Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- a. ....
  - b. trusts including customary trusts.
17. It is clear from the above provisions that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subjected as a trustee.
18. The Plaintiff testified that the Defendant fraudulently caused the suit property to be registered in his names. In paragraph 8 of the Plaint, he listed the particulars of illegality as follows:-
- a. Registering the suit property in his name solely while knowing that the land was to be jointly registered with the plaintiff as a co-proprietor.
  - b. An attempt to illegally defraud and/or deprive the Plaintiff his bona fide portion of the land.
19. The Plaintiff produced the certificate of official search in respect of the suit property as (PEX1). According to the certificate of official search the suit property measuring one point zero hectares is registered in the name of the Defendant. The title deed was issued to the Defendant on 2<sup>nd</sup> March, 2004.
20. The Plaintiff testified that the Defendant misdirected the land officers and caused the suit property to be registered in his name knowing very well that the property was jointly owned.
21. The Plaintiff's evidence was uncontroverted given that the Defendant did not file any defence. I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities.
22. Accordingly, I enter judgment for the Plaintiff against the Defendant in the following terms:-
1. A declaration be and is hereby issued that the Defendant holds title to land parcel No. Nzai/Kalamba/551 on his own behalf and in trust for the Plaintiff.
  2. An order be and is hereby issued compelling the Defendant to transfer ½ of the said parcel of land to the Plaintiff within 30 days of this judgment in default the Deputy Registrar of this Honourable Court to execute the requisite transfer documents.
  3. The Plaintiff is awarded costs and interest of the suit.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF OCTOBER, 2023.**

**IN THE PRESENCE OF:-**

**Court assistant - Mr. Kwemboi.**

**Mr. Munyasya for the Plaintiff.**

