



REPUBLIC OF KENYA



**Ng'ang'a & 5 others v Ng'ang'a (Environment & Land Case 191 of 2012)
[2023] KEELC 22064 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 191 OF 2012
MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

**LUCY GATHONI NG'ANG'A 1ST PLAINTIFF
THAIRU NG'ANG'A NJURANGA 2ND PLAINTIFF
PETER MUNGAI NG'ANG'A 3RD PLAINTIFF
CATHERINE NUNGARI NG'ANG'A 4TH PLAINTIFF
STANLEY NG'ANG'A NGUGI 5TH PLAINTIFF
GRACE WAMBUI NG'ANG'A 6TH PLAINTIFF**

AND

JENIFFER WANJIKU NG'ANG'A DEFENDANT

JUDGMENT

1. This matter was commenced vide the Originating Summons dated 12th April, 2012 amended on 9th January, 2019 brought pursuant to the provisions of Order 37 of the Civil Procedure Rules (Cap 21, Laws of Kenya) and Section 35 of the [Limitation of Actions Act](#) and Section 28 (b) of the [Land Registration Act](#) wherein the plaintiff sought the following relief:
 - a. A declaration that the Defendant's right to claim the property known as Kabete/Kabete/T.161 measuring approximately 0.21 acres by prescription is barred under the [Limitation of Actions Act](#) Cap. 22 of the Laws of Kenya and Title extinguished on the ground that for a period of over 12 years, the Plaintiffs have been openly, peacefully and of right been in possession and occupation of the above mentioned property that is to say for a period of over Twelve years preceding the presentation of this originating summons.



- b. In the alternative, a declaration that the Defendant holds the title to Kabete/Kabete/ T.161 in trust for the Plaintiffs.
 - c. A declaration that the Plaintiffs are therefore the rightful owners of the property known as Kabete/Kabete/T.161 measuring approximately 0.21 acres by prescription adverse possession or as a result of a trust and all the said premises and all developments thereof and should be jointly registered as such in place of Janiffer Wanjiku Ng'ang'a.
 - d. That there be an injunction a permanent injunction restraining the Defendants from interfering, selling, transferring and or alienating and or in any other manner interfering with by herself themselves, her agents and or servants with the said property Kabete/ Kabete/T.161 measuring 0.21 acres.
 - e. Costs of the suit and any other relief that this Honourable Court may deem fit to grant.
2. Initially, one Stanley Ng'ang'a Thairu was sued as the 1st Defendant but the suit against him was withdrawn vide the Notice of Withdrawal of Suit dated 24th September, 2013.
 3. The O.S was initially premised on the Supporting Affidavit of the 1st Plaintiff herein, Lucy Gathoni Ng'ang'a sworn on the 12th April, 2012. She deposes that she is the daughter to the 1st Defendant herein, the 2nd – 4th Plaintiffs are her brothers and sister respectively, whereas the 5th and 6th Plaintiffs are her nephew and niece respectively. She deposes that the 1st Defendant inherited the land known as Kabete/ Kabete/T.161 from his father whereof the grant to their grand father's estate was confirmed only in July 2009. Later, the 1st Defendant called some plaintiffs and showed them where to build stating clearly that it was their father's land and he would therefore distribute it to all his children.
 4. Subsequently in the year 1998, he also showed the deponent where she was to build house as she was unmarried. The 4th Plaintiff too was also showed where to build her house. It was only the 2nd Defendant who was not shown where she was to build her house since she was away. They each embarked on building their respective homes. The 5th and 6th Plaintiffs are children of the deponent's brother, Charles Ngugi who abandoned them and their mother and they have been living on the subject property.
 5. The 1st Plaintiff, Lucy Gathoni Ng'ang'a died on the 2nd June, 2021. The 4th Plaintiff, Catherine Nungari Ng'ang'a filed a witness statement dated 21st January, 2022. She states that the Plaintiffs are the owners of the suit property by virtue of having lived there for the last 20 years. The Plaintiffs allege that they were given the land by their late father, Stanley Ng'ang'a Thairu (deceased) who in turn had inherited it from his own father and thus it was clan land.
 6. She restates the averments contained in the Supporting Affidavit of Lucy Gathoni Ng'ang'a (deceased). She further states that all the Plaintiffs were shown their respective portions except Janiffer Wanjiku Ng'ang'a, the Defendant herein who was away.
 7. She argues that their mother passed away on October 21, 2009 and that was when the Defendant herein came back and moved into their late mother's house and started taking care of their father. She asserts that the consent to transfer the land to their father's name was granted in 2011. In January, 2012, their father went to the Land's Board at Kikuyu with the Defendant seeking to transfer the subject land to the Defendant. They however, objected to the grant of the consent to transfer and later placed a restriction by way of a caution on the subject property.
 8. She further states that on 28th March, 2012, the Land Registrar informed them that they had 30 days within which to present a court order barring him from transferring the land failing which he would do so.



9. The Plaintiffs stated that the Defendant together with some of their uncles had identified prospective purchasers for the suit property during the pendency of the suit with an intention to dispose it off. This would cause irreparable damage to them as it is the only home they have always known.
10. That the circumstances under which the entire land was transferred to the Defendant are unclear and tainted with fraud and malice as their father had aged considerably and was senile. He had not only lost memory but his cognitive abilities as well.

Replying Affidavit

11. In response to the Originating Summons, the Defendant filed a Replying Affidavit dated 27th March 2019. She deponed that she is the registered owner of the suit property. The same was transferred to her by her late father, Stanley Nganga Thairu, who died in September, 2015. She annexes copies of the Transfer of Title, Application for Registration dated 17th August, 2015, Receipts for resubmission and copy of Title Deed issued to her on the 2nd September, 2015.
12. She depones that as the registered owner of the suit property, her late father had absolute and indefeasible right over the property and could dispose it as he wished. As the registered proprietor, she equally has an absolute and indefeasible right over the property. She attaches Certificates of Official Search dated 16th December, 2014 and that of 1st February, 2016.
13. The Defendant accuses the Plaintiffs of maliciously and mischievously lodging cautions on the said property without any colour of right. She attaches copies of the correspondences for the removal of caution. The Plaintiffs therefore have no right whatsoever or claim over the said property. The Plaintiffs' suit is misconceived, incompetent and should be dismissed with costs.
14. The matter proceeded by way of viva voce evidence and parties gave evidence as below; -

Plaintiffs' Case

15. PW I, Catherine Nungari Ngángá adopted her witness statement dated 21st January, 2022 as her evidence-in-chief. She further restated the averments contained in the witness statement as stated herein above. PW 1 emphasized that she placed a caution on the title on 6th March, 2015 and that she has been living on the land for the last 54 years although she has not built on the land but she had been shown where to build her home.
16. In cross-examination, PW 1 stated that she was not aware who the registered proprietor of the land was. She asserted that when their late father and the Defendant went to the Land Control Board, he was sick. He could not even recognize them. She stated that their father was staying with the Defendant in his house. Their father did not write anywhere when he showed them where to build. The Defendant was not shown where to build as she was not there.
17. It was PW 1's testimony that they demolished the house where the Defendant was staying with their late father and shared the materials. This was after the Defendant moved out of the house on her own volition. The suit property is about ¼ an acre.
18. In re-examination, PW1 testified that the Defendant came into their father's house in 2009. She stayed in the house until their father died. She prayed that the plot be returned to their father's name to enable them share it out equally.
19. Dr. George Kungu Mwaura, testified as PW 2. He is a qualified medical practitioner. He stated that on 20th March, 2013, he examined one Stanley Ngángá Thairu, an 87-year-old male African. He stated that the patient had been being treated at Kinoo Medical Clinic for about 4 years.



20. It was PW2's evidence that his physical examination of the patient revealed that he was a victim of 'senile dementia' – characterized by severe loss of memory, lack of orientation in time and space. This makes the person confused and unable to walk. The patient was a total dependent and had to be taken even to the washroom. His prognosis was that the patient had poor health. The patient had been in that condition for 4 years. He could not be in a position to engage in a land transaction. PW 2 produced the Medical Report as PE 9.
21. In cross-examination, PW 2 confirmed examining the deceased on the date he prepared the Medical Report. He stated that he had examined him in the last 4 years before the said date. He averred that he has a degree in medicine & surgery. He has a diploma in Sexually Transmitted Infections which is his specialty. He confirmed that he has no specialization in neurology but he only studied it as a unit. He averred that the deceased was totally dependent. However, he had not indicated who brought him to the Clinic and he could not remember who brought him.
22. During re-examination, PW 2 stated that he is qualified to give an opinion on neurology. In responding to questions from the court, PW2 stated that the person who brought the deceased to his clinic is the one who gave him the history. He however had not recorded who he was.
23. The Plaintiffs then closed their case.

Defendant's Case

24. The Defendant, Jennifer Wanjiku Ngángá testified as DW 1 in support of her case. She adopted her Replying Affidavit sworn on 27th March, 2019 as her evidence in-chief. She produced the documents attached in the Affidavit which were marked as DE 1 – 6 (a), (b) and (c) in the order in which they are listed. She confirmed that the Plaintiffs are her brothers and sisters.
25. It was her evidence that her late father gave her the plot, the suit property herein. She said that she is the owner of the said plot lawfully and procedurally. She averred that the title of the suit property was in her name.
26. DW1 asserts that her father transferred the suit property to her when he was sober. She said that he had no issues as alleged by the Plaintiffs' witnesses. It was only on his last two weeks that he lost his mental faculties. DW 1 argues that she did not ask her father to transfer the suit property. He did it on his own initiative and that his brothers and everyone in the family knew that.
27. It was DW1's evidence that her siblings cautioned the title to the suit property when her father was still alive. She said that her father gave her the title because she took care of him. She said that the Plaintiffs never attended to him, claiming that they were busy every time he called them.
28. She said the process of the transfer of the title was lawful and her father followed the due process. She therefore prayed to the court to evict the Plaintiffs from the land. She said that she is currently renting a house and therefore urged the court to help her get back into her land.
29. During cross-examination, DW1 said that she disagreed with the testimony of the doctor and informed the court that she is the one who was staying with her father at the time. She stated that their mother died on 21st October, 2009 while she (the Defendant) was in Sudan. She averred that she used to stay on the suit property with her parents. The Plaintiffs were living within the plot but not in the same house with her.
30. She confirmed that currently, Thairu Ngángá (2nd Plaintiff) lives within the compound as well as Peter Mungai and the children of her late brother, Charles Ngungi (5th and 6th Plaintiffs). However, only



Thairu was not living in the plot by the year 2009. She averred that there is a pending Criminal Case No. 740 of 2019 in which she is accused of demolishing Mungai's house.

31. She confirmed that the instant case was filed in 2012 whereas the Transfer filed herein is dated 13th March, 2015. At the time of filing the suit, the transfer had not been registered. The caution by the deceased Lucy Gathoni was placed before the property had been transferred to her name. She could however not remember if the caution had been removed by the time of registration of the land in her name.
32. DW 1 informed the court that her deceased father went to the Land Control Board for the consent. She had however not attached a copy of the consent in her bundle of documents. She denied that the suit property was fraudulently transferred to her.
33. In re-examination, the witness stated that she took care of her father from the year 2009 up to the time of his death in the year 2015. She averred that when she came back from Sudan in 2009, her late brother Ngugi had built a house in the plot. She stated that when her father's house was demolished, she was left destitute alongside her son who is 37 years old now. She confirmed that the case in Kikuyu Law Courts is still going on but has nothing to do with subject matter herein. The transfer of the suit property was done by her father's lawyer.
34. In response to the questions from the court, DW 1 informed the court that her father died on 9th November, 2015. She stated that she was not aware whether a succession case has been filed in her father's estate. She further stated that she used to take her father to hospital at Mercy Home at Limuru. She averred that her father had another shamba in Kabete. She could not tell size of the shamba.
35. At that point, the Defendant closed her case.

Court's Directions

36. The court directed the parties to file written submissions. Both parties complied. The Plaintiffs' submissions are dated 3rd July, 2023 whereas the Defendant's submissions are dated 25th July, 2023.

Plaintiffs' Submission

37. The Plaintiffs identify three issues for determination. The first issue is whether or not the Plaintiffs' father had the capacity to transfer the suit property to the Defendant. The Plaintiffs submit that from the uncontroverted evidence of PW2, the Doctor who examined their father, conclusion was that he was old, sick and suffered senile dementia for at least four years leading to him having confused moments, severe memory loss and no orientation of time and space. He was diagnosed to be in very poor health hence dependent on his children for day to day activities.
38. The Plaintiffs submit that other than Defendant merely stating that the doctor was wrong, they did not adduce any report to contradict the evidence by the doctor. The title was issued on the 2nd September, 2015 and their father passed away on the 10th November, 2015. They aver that the Defendant was aware of their father's condition and decided to take advantage of the situation and had the property transferred to her name. The deceased did not have the capacity to transact or transfer the suit property to the Defendant.
39. The second issue is whether or not the Defendant illegally/fraudulently transferred the suit property to herself. The Plaintiffs submit that the suit property was illegally and/or fraudulently transferred to the Defendant as their father was not in the right mental state. The Defendant's title should therefore be impeached as provided for in Section 26(1) of the *Land Registration Act*, 2012. Further, that the procedure in which the transfer was done proves that the Transfer was done illegally in that; the



Defendant did not obtain the requisite Land Board Consent and; that the transfer was done whilst there was still a valid Caution placed on the suit property.

40. The third issue is whether the Plaintiffs are entitled to the reliefs sought. The Plaintiff argue that having proved that the Defendant illegally/fraudulently transferred the suit property, they are entitled to the reliefs sought. They cite the case of Jane Njoki Njuguna & Another –vs- Geoffrey Mwaura & Another (2018) eKLR where the court held that the deceased therein lacked the mental capacity to transfer the parcel of land therein. The court proceeded to impeach the property. The court cancelled the title deeds therein and the title reverted to the deceased estate. The Plaintiffs urge the court to equally cancel the Title held by the Defendant. The Title should thereafter revert back to the estate of the deceased for distribution to his beneficiaries. In the alternative, a declaration be issued that all the deceased's children are owners of the suit property.

Defendant's Submissions

41. The Defendant identifies two issues for determination. The first issue is whether the late Stanley Thairu had capacity to transfer the property. She submits that she took care of her father in his old age and in return he transferred the suit property to her as a gift. She avers that their deceased father had the mental capacity to transfer the suit property.
42. She submits that PW2, the doctor who was called in as a witness, is not a Neurosurgeon or a Psychiatrist to diagnose mental illness. He cannot therefore purport to diagnose mental ailments. His report does not even give the parameters that were used to determine the mental capacity of the patient. Further PW 2 had no information about his alleged patient whom he had treated. It is therefore evident that the deceased voluntarily transferred the suit property to her.
43. On whether the suit property was fraudulently transferred, the Defendant submits that the suit property was transferred to her through the laid down procedures. She argues that the Plaintiffs have not proved the allegations of fraud against her. Regarding the Caution, the Plaintiffs were informed of the intention to remove it. The Plaintiffs failed to show cause why it should not be removed. The Plaintiffs' case therefore fails. The Defendant is the bona fide owner of the suit property. As such the Plaintiffs' suit should be dismissed with costs.

Issues for Determination

44. With the foregoing outline of the pleadings, litigation history, evidence and submissions and of course the relevant law, the following issues emerge for determination: -
 - a. Whether the suit property herein was fraudulently transferred to the Defendant;
 - b. Whether the Defendant holds the suit property herein as a trustee for the Plaintiffs;
 - c. Which orders should the court issue?

Analysis And Determination

A. Whether The Suit Property Herein Was Fraudulently Transferred To The Defendant;

45. From the pleadings and the evidence adduced herein, it is evident that the Plaintiffs and the Defendant are siblings and grandchildren of the late Stanley Ng'ang'a Thairu. The deceased patriarch was the initial proprietor of Kabete/Lower Kabete/ T.16, the suit property herein.
46. It is not in dispute that the Defendant has since 2nd September, 2015 been the registered proprietor of the suit property. Her evidence is that she took care of her father in his old age and in return he



transferred the suit property to her as a gift. She avers that their deceased father had the mental capacity to transfer the suit property.

47. As the registered proprietor of the suit land, the Defendant would be entitled to all the rights and privileges under Section 24(a) of the *Land Registration Act*. That provision reads: -

24 “Subject to this Act –

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- and

48. Under Section 26(1) of the same Act, however, although the Certificate of title issued by the Registrar of Lands is to be taken as “prima facie evidence” that the person named therein “is the absolute and indefeasible owner,” such title can be challenged if: -

- a. it was obtained through fraud or misrepresentation to which that person is proved to be a party; or
- b. where the Certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

49. Section 26(1) of the *Land Registration Act*, is clear that the Certificate of title is only “prima facie evidence”. The title can be impugned if obtained through fraud which is what the defendants have pleaded. It is also clear from Section 28 of the same Act that among the overriding interests to which registered land is subject to are trusts including customary trusts.

50. In attempting to impugn the Defendant’s title to the suit land, the Plaintiffs have argued that the suit property was illegally and/or fraudulently transferred to the Defendant as their father was not in his right mental state to undertake such a transaction. Further, that the procedure in which the transfer was done proves that the Transfer was done illegally in that; the Defendant did not obtain the requisite Land Board Consent and; that the transfer was done whilst there was still a valid Caution placed on the suit property.

51. I agree with the Defendant’s submission that the Plaintiffs did not adduce sufficient evidence to prove that the deceased father, Stanley Ngángá Thairu was not in a proper state of mind while transferring the suit property to the Defendant. The Plaintiffs sought to rely on the evidence of PW2 who is however neither a Neurologist nor a psychiatrist to testify on the mental state of the deceased. In the case of Jane Njoki Njuguna & Another –vs- Geoffrey Mwaura & Another (supra) cited by the Plaintiffs, the Court relied on the evidence of the psychiatrist which is not the case in the instant suit.

52. It is however clear that the transaction was subject to the consent of the Land Control Board. Both parties allude to the same. The Defendant alleged that her late father obtained the consent but did not exhibit any evidence to support the averment.

53. This therefore means that pursuant to the provisions of Section 6(1) of the *Land Control Act*, the transfer was “void for all purposes.” The term void is defined in Black’s Law Dictionary 10th Edition to mean, “of no legal effect; to null”

54. It is also defined as: -

“To render of no validity or effect; to null.”



55. In the famous case of *Macfoy -vs- United Africa Ltd* 1961 3 All E.R 1169, Lord Denning stated that: -
- “If an act is void, then it is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
56. Clearly therefore, no interest in the suit land passed to the Defendant on 2nd September, 2015 as she would like this Court to believe.
57. The Defendant appears to place a lot of premium on the fact that she holds the title to the suit land hence the Plaintiffs should be evicted from ‘her property’. However, as the Court of Appeal stated in *Mumu Maina -vs- Hiram Gathiha Maina* [2013 eKLR: -
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
58. The fact that no consent of the Land Control Board was obtained is proof of irregularity. In any event, how the plaintiff obtained the suit land was, under Section 112 of the *Evidence Act* a matter, within her knowledge. That provision reads: -
- “In civil proceedings, where any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
59. The moment the plaintiffs led evidence that the transfer was fraudulent for lack of the consent, the evidential burden shifted to the Defendant to dislodge that testimony, which she failed to do.
60. It is also worth noting that the Defendant indeed confirmed that the Plaintiffs are and have been living on the suit property. PW 1 stated that she has been on the land for more than 54 years having been born there. Although she has not built on the land she was shown where to build a house. The 5th and 6th Plaintiffs, the children of their late brother Charles Ngungi, have also constructed houses and have been living on the suit property since their childhood. They are 25 years and 23 years old respectively.
61. DW 1 stated in cross-examination that she only came to the suit property in 2009 when her mother passed on. That the 2nd and 3rd Plaintiffs live within the compound on the suit property. The 5th and 6th Plaintiffs, the children of their late brother Charles Ngungi, also live there. She confirmed that it is her father’s house which was demolished upon his demise. Evidently the Plaintiffs have been living on the land ever since they were born. Their deceased father inherited the land from their grandfather.
62. Having found that the Defendant obtained registration of the suit land through irregularly, it would amount to a serious dereliction of duty if I do not exercise the powers reposed in me by Section 80 of the *Land Registration Act* by cancelling that title. I shall make appropriate orders in that regard.
63. Before I do so, there is one important issue that I need to address. That takes me to second issue.



B. Whether The Defendant Holds The Suit Property Herein As A Trustee For The Plaintiffs;

64. As stated elsewhere in this Judgement, the Plaintiffs and the Defendant are siblings. It is also a common ground the Plaintiffs are and have been in occupation of the suit property ever since they were born. They have continued to live thereon even after the demise of their mother in 2009 and their father in 2015. Their deceased father inherited the land from his own father, the Plaintiffs' and Defendant's grandfather. This is clear evidence that the suit property is family land.
65. Section 25 of the [Land Registration Act](#) No. 3 of 2012 provides for rights of a proprietor as hereunder: -
1. 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.
66. Section 28 of the [Land Registration Act](#) on the other hand provides for Overriding interests.
- 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
- b. trusts including customary trusts;
67. The facts herein are sufficient for this Court to infer a customary trust. Therefore, even though the Defendant is registered as the sole proprietor of the suit property she holds the tile to it as a trustee holding the same in trust for herself and her siblings.
68. In the case of *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggat Ahmed Al-Heidy & Others* (2015) eKLR, the Court expounded on the law on trusts 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...”

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 maybe 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).”

69. In the case of *Mwangi & Another -vs- Mwangi* (1986) eKLR, the court while quoting Muli J (as he then was) in (HCCC No 1400 of 1973) stated that:

“I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law as well as created by the intention of the parties that there would be such a trust which under Kikuyu customary law is common. Registrations of titles are creation of the law and one must look into the considerations surrounding the registration of the titles to determine as to whether a trust was envisaged.”

70. Therefore, the Defendant's claim that she is the absolute and indefeasible proprietor of the suit land is not only hollow following the proof that the said registration was obtained irregularly but is also subject to a trust in favour of herself and her siblings. The court, therefore directs that the title to the suit property be cancelled and the register be rectified and the name of Stanley Ng'ang'a Thairu – deceased be reinstated as the proprietor of the land. Thereafter the beneficiaries of the estate of the deceased will be at liberty to file succession proceedings for purposes of distribution of the suit property and any other properties of the deceased due to the estate in accordance with the law.

71. Ultimately therefore and having considered all the evidence herein, this Court makes the following orders: -

- a. A declaration is hereby issued that the suit property herein, Kabete/Kabete/ T. 161 registered in the name of the Defendant herein, Jeniffer Wanjiku Ng'ang'a is held in trust for the of the estate of Stanley Ng'ang'a Thairu - deceased.
- b. An order is hereby issued directing the Land Registrar, Kiambu to rectify the register and cancel the Title held by the Defendant and to reinstate the same to the name of Stanley Ng'ang'a Thairu - deceased.
- c. Parties being family members, there shall be no orders as to costs.

It is so ordered.



JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms Apondi for the Defendant

Mr. Ng'ang'a Ngugi for the Plaintiff

Court Assistant: Yvette

