



**Arekai v Olweny & another (Environment & Land Case 374 of 2013)
[2023] KEELC 22154 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 374 OF 2013
A OMBWAYO, J
DECEMBER 7, 2023**

BETWEEN

SAMMY KEMOO AREKAI PLAINTIFF

AND

ELIAKIM W OLWENY 1ST DEFENDANT

NORAH ATIENO OLWENY 2ND DEFENDANT

JUDGMENT

1. Sammy Kemoo Arekai hereinafter referred to as the plaintiff has come to this court against Eliakim W Okweny and Norah Atieno Olweny hereinafter referred to as the defendant by way of plaint stating that at all material times leading to this suit, the Plaintiff is the rightful owner of al that unsurveyed piece of land measuring approximately 2 Acres and commonly referred by parties as parcel No. 245 (Part) Molo Ndenderu original known as Elburgon/Turi Block 2/ 625 Ndenderu.
2. The Plaintiff acquired the said suit property following a Sale Agreement dated 20th February 2013 between the Plaintiff as the Purchaser and the 1st Defendant Eliakim W. Olweny as the Vendor for a consideration of One Hundred and Thirty Thousand Shillings Only).
3. That sometimes in March 2013, the 2nd Defendant claimed to be the owner of the Plaintiff's suit land and subsequently gave notice dated 30th April 2013 for the Plaintiff to vacate the suit land within 30 days.
4. The Plaintiff later learned that the 1st Defendant had transferred and registered the said piece of land in the names of the 2nd Defendant who is the wife. The 2nd Defendant served the Plaintiff with a Notice to vacate dated 30th Apr^{il} 2013 claiming ownership.
5. As a result of the said transfer and Notice, the Plaintiff is likely to be dispossessed of his property through some fraudulent actions of the 1st and 2nd defendant.



6. The plaintiff has particularized fraud as entering into a sale agreement with the Plaintiff with no intention of honouring the same. Refusing to receive the balance of the purchase price and transferring and registering the whole piece of land to the name of the 2nd Defendant with an intention of defeating justice. Lastly, purporting to evict the Plaintiff using the 2nd Defendant who is the wife of the 1st Defendant.
7. The plaintiff prays for a declaration that the Plaintiff is the proprietor of parcel of land measuring 2 Acres to be surveyed out of Elburgon/Turi Block2/625 Ndenderu and commonly known by the parties as No. 245 (Part) Molo Ndenderu.
8. An Order for cancellation of Title No. Elburgon/Turi Block 2/625 Ndenderu in the name of Norah Atieno Olweny and al Order do issue for the Transfer of a portion measuring 2 Acres to the Plaintiff Sammy Kemoo Arekai plus costs of this suit.
9. The 1st defendant was a minor when the suit was filed and defence filed. The 2nd defendant filed defence and counter claim stating that the plaintiff has never been the proprietor of the suit property and that she was not aware of any transaction between the plaintiff and 1st defendant. The 2nd defendant states that she issued a notice to the plaintiff to vacate her land. She is the registered owner of the suit property and that there has never been a transfer of the land. She prays for a declaration that she is the lawful and or beneficial owner of Elburgon/Turi/block2/625 (Ndenderu) She prays for an order of eviction of the plaintiff.
10. When the matter came up for hearing, the plaintiff testified that he bought 2 acres from the 2nd defendant husband Mr. Eliakim Olieny. He paid Kshs130,000 to acquire the property. He produced the agreement of sale. His father lived on the land before subdivision and that he was born and brought up on the land but later purchased 2 acres from Mr. Olweny. Mr Olweny transferred the land to Norah Atieno Olweny despite the plaintiff having purchased part of it . His mother was buried on the land.
11. On cross examination he states that when he bought his land it was No.245 but after subdivision it became 625. He is claiming 1.5 acres. He admitted that he paid 130,000 and not 150,000.
12. Defence witness 1 on her part states that her name does not appear in the agreement and that she did not receive any payment. The parcel of land is in her name. According to Norah Olweny there is no link between parcel No. 245 and 265 .
13. On cross examination she admits that Eliakim Olweny was her husband but he died. He gave them the land as a gift but the plaintiff still lives on the land.
14. I have considered the evidence on record and do find that on 20th February 2002 the plaintiff entered into agreement with Eliakim Washington Olweny for the sale of part of Land Parcel of land Number Molo/Ndenderu/245. Mr Olweny agreed to transfer 1.0 acres of land to the plaintiff at a consideration of Kshs100,000 which was to be excised from 245. They agreed that Mr Olweny would add the plaintiff some land on a later date after consultation with his family. The agreement between the parties shows that the plaintiff was entitled to 2 acres at Ksh100,000 each. The plaintiff did not pay for 2 acres but he paid for 1.3 acres because he paid a total of 130,000.
15. In Civil Appeal Number 22 of 2013, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, this Court held;

Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of



Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

16. The plaintiff produced a valid sale agreement that is capable of being executed and that the agreement satisfies the provisions of the law of contract Act.

17. Moreover, the plaintiff has proved that the 2nd defendant is holding 1.3 acres of the suit parcel of land in trust for the plaintiff having purchased the portion from the defendant’s husband and having settled on the same with the consent of the 2nd defendant’s husband. The sale of the property to the plaintiff and subsequent handing over possession to the plaintiff created an implied trust.

18. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the Land Registration Act, 2012. Section 24(a) provides:

24. Subject to this Act

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

19. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act.

20. The rights of a registered owner are however subject to overriding interests declared by section 28 of the Land Registration Act as not requiring noting in the register.

21. Section 28 of the Land Registration Act provides that:

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;”



22. The concept of trust must however be proved. The Court of appeal in the case of *Mumo v Makau* [2002] 1EA.170, held that “trust is a question of fact to be proved by evidence....”
23. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, the Court of Appeal dealt with the issue of trust at length.
24. The Court made reference to *Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR and re-stated 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).”

25. The plaintiff has established that the defendant had a duty to transfer a portion of 1.3 acres to the plaintiff but failed to do so and therefore the declares the existence of a constructive trust and therefore the plaintiff has proved his case on a balance of probabilities and therefore I do grant a declaration that the Plaintiff is the proprietor of parcel of land measuring 1.3 Acres to be surveyed out of Elburgon/ Turi Block2/625 Ndenderu.
26. I do grant an Order for excision of 1.3 acres of Title No. Elburgon/Turi Block 2/625 Ndenderu in the name of Norah Atieno Olweny and Transfer of the said portion measuring 1.3 Acres to the Plaintiff



Sammy Kemoo Arekai. The counter claim does not succeed as the plaintiff has acquired an interest in the suit. The counter claim is dismissed. Costs to the plaintiff.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY
DECEMBER 2023.**

A. O. OMBWAYO

JUDGE

