



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C. CASE NO. E013 OF 2020

LEAH WANJIKU GICHOBI.....PLAINTIFF

VERSUS

BILHA WANJIKU KARONJO (Sued on her behalf

and as the Administratrix/Administrator of the Estate

of the late MOSES KARONJO GATHIGO Alias

KARONJO GATHINGO).....1ST DEFENDANT

IRENE WAMBUI KANGETHI.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff moved this Honourable Court by way of a Complaint dated and filed on 30th November, 2020. In the said complaint, the plaintiff seeks judgment be entered against the defendants for: -

- a. Specific performance of the sale agreement dated 23rd May, 1978 and/or a declaration that plaintiff is entitled to the whole of title number Mutira/Kangai/714 under constructive trust.**
- b. An order compelling the defendants to transfer the whole of the title number Mutira/Kangai/714 to the plaintiff.**
- c. Costs of this suit and interest.**

2. The Defendants entered appearance and defended the suit by way of a joint statement of Defence dated 25th February, 2021 and filed on 9th March, 2021.

3. The suit was heard viva voce on 3rd November, 2021 and the parties agreed through their advocates on record to file written submissions. The Plaintiff filed hers on 23rd November, 2021 while the defendants filed theirs on 30th November, 2021.

PLAINTIFF'S CASE

4. The plaintiff adopted her witness statement dated 30th November, 2020 as her testimony.

5. She produced the documents as listed on her List of documents dated 30th November, 2020 as her evidence. They were marked as Plaintiff Exhibit 1 – 13 respectively.

6. She testified that vide the sale agreement dated 23rd May, 1978, she bought land parcel number Mutira/Kangai/714 at a cost of Ksh. 30,000 and the late Karonjo Gathingog acknowledged receipt thereof.

7. On 31st May, 1978 she was issued with the letter of consent by the Mwea Land Control Board. She was subsequently given vacant possession of the suit property and the original land certificate.

8. She testified that in 1978, she constructed a house and later in 1982 she buried her late husband on the suit property and nobody opposed

the burial.

9. She testified that though she bought the suit property, the same was not transferred to her and thus it is still in the names of the late Karonjo Gathingo.

10. She testified that on 9th July, 2019 vide the ruling in High Court Succession Cause Number 898 of 2013, the Honourable Judge held that she indeed entered into an agreement with the deceased in the year 1978 and the same is enforceable by way of specific performance.

11. She testified that the title had been used to secure a loan with AFC. Upon reporting the issue to the Chief, she was told to wait for the decease to complete paying the loan.

12. She prayed that judgment be entered in her favour as prayed in the plaint.

DEFENDANTS' CASE

13. The defense called one witness, the 2nd Defendant herein.

14. She adopted her witness statement dated 25th February, 2021 in her evidence.

15. She testified that the suit property is registered in the name of the deceased and it was subject of Kerugoya Succession Cause Number 898 of 2013 whereby it was distributed to them.

16. She testified that it beats logic why the plaintiff failed to transfer the suit property in the lifetime of the deceased even after obtaining the alleged Land Control Board consent to transfer.

17. During cross examination she testified that the plaintiff has constructed a house on the suit land, however she doesn't cultivate the entire land. That she only cultivates a quarter of it.

18. She testified that the prayer for specific performance is unavailable as claimed and thus the plaintiff's case should be dismissed with costs.

PLAINTIFF'S SUBMISSIONS

19. The plaintiff submitted that she had proved her case on balance of probabilities as required by law.

20. She submitted that the nature of the dispute herein falls under the jurisdiction of the Environment and Land Court as provided under *Article 162 (2) (b) of the Constitution of Kenya* and *Section 13 of the Environment and Land Court Act*. Further the Honourable Judge in Kerugoya Succession Cause Number 898 of 2013 held that the claim herein be filed in this Court.

21. She submitted that the ruling and observation of Hon. Justice L.W. Gitari in Kerugoya Succession Cause Number 898 of 2013 have an effect of a judgment in rem as provided under *Section 44 of the Evidence Act*.

22. She relied on the case of *Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) e KLR* and submitted that nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust.

23. She submitted that she was protected under *Section 30 (g) of the Registered Land Act* (repealed and *Section 28 of the Land Registration Act* and that the acts of the deceased created an overriding interest in favour of the Plaintiff over the suit property. She relied on the case of *Willy Kimutai Kitilit Vs Michael Kibet (2015) e K.L.R.*

24. She submitted that specific performance is an equitable remedy that is protected under *Article 10(2) of the Constitution of Kenya*. Thus, she is entitled to the order of specific performance and the Court should grant the prayers sought in the plaint.

DEFENDANTS' SUBMISSIONS

25. They submitted that Specific Performance is an equitable doctrine which is explained in the case of *Thrift Homes Ltd Vs Kenya Investment Ltd (2015) e KLR* whereby the Court stated that specific performance is an equitable remedy which is discretionary and is granted on well settled principles.

26. They submitted that the plaintiff did not give sufficient reasons for the delay in asserting her proprietary rights and that she didn't show any steps she took to have the land transferred to her names in the lifetime of the deceased.

27. They submitted that the plaintiff is not entitled to an order of specific performance as she is seeking for an equitable relief forty-two years late and thus it is not just and fair that the orders should be granted against them who are innocent parties to the transaction since they were not aware of the alleged sale.

28. They submitted that those who seek assistance should move with speed as delay defeats equity. She relied on the case of *Joshua Ngatu*

29. They prayed that the plaintiff's case be dismissed with costs.

ANALYSIS

30. I have considered the pleadings, evidence, exhibits, submissions and relevant law.

31. From the materials presented, the following issues comment for determination: -

a. Whether the suit land was validly sold to the plaintiff and if so whether the sale agreement is enforceable;

b. Whether the plaintiff deserves the order of specific performance;

c. Whether the plaintiff is entitled to the whole of title number Mutira/Kangai/714 under constructive trust; and

d. Who should bear the costs.

WHETHER THE SUIT LAND WAS SOLD TO THE PLAINTIFF AND IF SO WHETHER THE SALE AGREEMENT IS ENFORCEABLE

32. The plaintiff's case is that she bought land parcel number Mutira/Kangai/714 from the late Karonjo Gathingo at a cost of Ksh. 30, 000 vide the sale agreement dated 23rd May, 1978 and the deceased acknowledged receipt thereof.

33. On 31st May, 1978 she was issued with the letter of consent by the Mwea Land Control Board. She was subsequently given vacant possession of the suit property and the original land certificate. Thereafter, in 1978 she constructed a house and later in 1982 she buried her late husband on the suit property and nobody opposed the burial.

34. I have looked at the plaintiff's exhibit No. 3 which is the agreement dated 23rd May, 1978. I am convinced that indeed the late Karonjo Gathingo sold the suit land to the plaintiff. I am also convinced that the deceased received the full purchase price of Kshs. 30,000.

35. This indeed explains why the deceased applied for consent of Land Control Board on 29th May, 1978 and a Letter of Consent was subsequently issued in favour of the plaintiff on 31st May, 1978.

36. It further explains why the Plaintiff entered occupation of the suit land in 1978 in performance of the agreement and continued to live, cultivate and develop it as demonstrated by the photographs which are produced as Plaintiff's exhibit 8, both in and after the lifetime of the deceased openly without objection and interruption by anyone.

37. The Defendants who did not dispute that the signature on the said agreement does not belong to the deceased have been well aware of the plaintiff's occupation on the suit land and have not taken any step to have her removed from therein. Their denial of the existence of the Sale Agreement between her and their late father is therefore in bad taste.

38. It is my view that the said agreement is not only valid but also enforceable in law.

WHETHER THE PLAINTIFF DESERVES THE ORDER OF SPECIFIC PERFORMANCE

39. The Plaintiff's case is that though she bought the suit property a while back, the same was not transferred to her and thus it is still in the names of the late Karonjo Gathingo. During cross examination, she testified that the title had been used to secure a loan with AFC and upon reporting the issue to the Chief, she was told to wait for the deceased to complete paying the loan.

40. The Defendants' case is that the plaintiff is not entitled to an order of specific performance as she is seeking for an equitable relief forty-two years late and thus it is not just and fair that the orders should be granted against them who are innocent parties to the transaction since they were not aware of the alleged sale.

41. I have already given my opinion hereinabove that the Defendants are not being truthful in asserting that they are innocent parties to the transaction since they were not aware of the alleged sale.

42. Be that as it may, I agree with the defendants that there has been delay by the Plaintiff in enforcing the agreement. However, it is my view that the Plaintiff has explained the delay.

43. Further and upon the demise of the deceased, the Plaintiff was not involved in the succession proceedings which prompted her to file the summons for rectification of grant dated 31st July, 2013 which is Plaintiff's exhibit No. 10. From the Ruling which is Plaintiff's Exhibit No. 13, it appears that the suit land was preserved for prosecution before a Court with jurisdiction.

44. It is thus evident that contrary to the submissions by the Defendants, the Plaintiff took the necessary steps to ensure that the suit land was transferred to her both during and after the lifetime of the deceased.

WHETHER THE PLAINTIFF IS ENTITLED TO THE WHOLE OF TITLE NUMBER MUTIRA/KANGAI/714 UNDER CONSTRUCTIVE TRUST

45. The Plaintiff made an alternative prayer that she be declared that she is entitled to the suit land by way of a constructive trust.

46. *Section 28 of the Land Registration Act, 2012* 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) deleted by Act No. 28 of 2016, s. 11(a); (b) trusts including customary trusts;”

47. In the case of *Charles K. Kandie Vs Mary Kimoi Sang [2017] e KLR*, the Court of Appeal held that: -

“14. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki Vs Gichuki (1982) KLR 285 and Mbothu & 8 Others Vs Waitimu & 11 Others (1986) KLR 171.*

48. In the case of *Twalib Hatayan & another Vs Said Saggah Ahmed Al-Heidy & 5 others [2015] e KLR*, the Court of Appeal held as follows pertaining trusts: -

“Dealing with the first issue, 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...”

..... Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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. (See Black’s Law Dictionary) (supra). 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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

This leaves us with resulting trusts; upon which the appellants had laid their claim. 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. (See Black’s Law Dictionary) (supra). 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).”

49. From the foregoing, I am convinced that indeed a constructive trust was created in favour of the Plaintiff. This is because the deceased entered into a valid sale agreement with the Plaintiff, received the full purchase price, applied for land control board consent which was issued in favor of the plaintiff and gave her vacant possession. Due to this, the Plaintiff has been occupying, cultivating, burying loved ones, and developing thereon since 1978 to date openly and without interruption from anyone.

50. I am thus of the opinion that the Plaintiff has proved on a balance of probabilities that she is entitled to the suit land by way of constructive trust.

WHO SHOULD BEAR THE COSTS

51. It is trite law that award of costs though discretionally, follow the cause unless there is a good reason to order otherwise.

52. It is my view that there is no good reason to deny the Plaintiff costs.

CONCLUSION

53. In view of the foregoing, I find and hold that the Plaintiff has proved her case on a balance of probabilities and enter judgment as follows:-

a. **A declaration be and is hereby issued that the plaintiff is entitled to the whole of title number Mutira/Kangai/714 by way of constructive trust.**

b. **An order is hereby issued compelling the defendants to transfer the whole of the title number Mutira/Kangai/714 to the plaintiff.**

c. **In default of (b) above, the Deputy Registrar of this Honourable Court is hereby directed to execute all the necessary documents required for the transfer of title number Mutira/Kangai/714 from the name of the late MOSES KARONJO GATHINGO alias KARONJO GATHINGO to the plaintiff.**

d. **Costs of this suit and interest be borne by the defendants jointly and severally.**

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-