



**Kamau & another v Kamau & another (Environment & Land Case
38 of 2020) [2022] KEELC 3136 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 38 OF 2020**

LN GACHERU, J

JUNE 9, 2022

BETWEEN

SIMON WARUINGI KAMAU 1ST APPLICANT

JANE MUTHONI WARUINGI 2ND APPLICANT

AND

JACKSON MARICHU KAMAU 1ST RESPONDENT

KARUGA KAMAU 2ND RESPONDENT

JUDGMENT

1. By an Originating Summons dated 18th November 2020, and filed in Court on 24th November 2020, the Plaintiffs/Applicants moved this Court for determination on; -
 - a. Whether the 1st Plaintiff/Applicant is entitled to equal shares of the property known as Loc.19 Kiawambogo/804 ,(Loc 19 Kiawambogo 2579 and 2580), which was held in trust by the 2nd Respondent on his behalf and on behalf of his siblings including the 1st Applicant herein.
 - b. Whether an Order and Declaration ought to issue that all the title deeds issued in relation to the property known as Loc.19 Kiawambogo/804, (Loc 19 Kiawambogo 2579 and 2580), should be cancelled and the property herein be divided equitably among all the beneficiaries and new title deeds be issued.
 - c. Whether an order and declaration ought to issue that the Respondents do execute all documents and do all such things as necessary to transfer the Applicants' portion in the said property in default the Registrar of this Honorable Court or any such other officer be authorized to execute all such documents and do all such things to transfer the same to the Applicant in place of the Respondent to be held by the Applicant without interruption.
 - d. That costs for this application be in cause.



2. The Summons are premised upon the grounds, facts and the particulars set out on the face of it. The facts founding the Summons are that the 1st Applicant /Plaintiff and the Respondents are sons of Kamau Waruingi, who was the registered proprietor of Loc.19 Kiawambogo/804 (Loc 19 Kiawambogo 2579 and 2580) and Loc. 19/ Kiawambogo/1120(Loc.19 Kiawambogo 3182,3183, 3184 and 3185).
3. Further, that the 2nd Respondent was registered as the proprietor of Loc. 19/Kiawambogo/804, to hold it in trust for himself and his siblings. The Applicants averred on how Kamau Waruingi, had settled his children on their respective parcels of land prior to his demise in 1984, whereby the 1st Applicant was settled on land parcel 1120.
4. That the 1stRespondent herein filed a suit in Muranga CMCC No. 22 of 1991, claiming trust against the 2nd Respondent for land parcel 804, which orders were granted and the land was shared into half between the Respondents herein.
5. It is the Applicants' case that despite the foregoing orders, the Succession Court went ahead and gave orders that land parcel No.1120, should be shared equally among all beneficiaries including the Respondents. Moreover, that the land No. parcel 804, was not included in the said Succession Cause and the fact that the Respondents herein benefited in land parcel No.1120, whereas the Applicants did not benefit in land parcel No. 804, was unjust. Further that the Applicants sought to revoke the grant, but the application was dismissed and the Respondents moved Court for eviction orders. These were reiterated by the 2nd Applicant in her Supporting Affidavit sworn on the 18th November, 2020.
6. The Summons were opposed by the Respondents vide a Replying Affidavit of Jackson Marichu Kamau, sworn on 5th February 2021, and filed on the even date. He averred that the Estate of their father was determined in Succession Cause No. 230 of 1991, and Judgment delivered on 28th January, 2000, against the Applicants. That the Applicants herein filed an Appeal, being Nyeri HCC Appeal No. 32 of 2003, which orders were against the 1st Applicant. That the 1st Applicant refused to comply with the orders of the Appeal Court promoting the 2nd Respondent to file Summons for enforcement of the orders. That these orders led to subdivision of land parcel 1120, into four portions, but the 1st Applicant declined to sign the relevant documentation to effect transfer to his name.
7. The Respondents further deponed that the 1st Applicant filed another Succession Cause being Murang'a HC Suc No. 739 of 2015, for revocation of grant and other orders, and subsequently the said summons were dismissed. The 2nd Respondent and another sought eviction orders against the 1st Applicant, and which issue is still pending in Court. That the 2nd Applicant and her brother moved Court to be joined in the eviction proceedings, but which application was declined, and they appealed which appeal is pending determination.
8. Parties herein had recorded a consent, to dispense with the suit by way of written submissions, but later opted otherwise and moved this Court to set aside the said consent. This Court allowed the said Application and directed parties to proceed via viva voce evidence and the matter proceeded on the 7th February, 2022.

Plaintiffs' Case

9. PW1 Jane Muthoni Waruinge, adopted her witness statement dated 18th November 2020, and the bundles of documents as part of her evidence. She reiterated what she had deponed in the Supporting Affidavit in support of the Summons. It was her testimony that her grandfather Waruinge Kamau, was the owner of land parcels No. 1120 and 804(Kiawambogo). That while the former was to be



shared between her father, the 1st Applicant and Gladys Wambui Kamau, the latter was to be shared between James Karuga Kamau and the 1st Respondent herein. She further testified that she was born on land parcel no 804 in 1968, but later her family moved to land parcel No.1120. That there was discrimination in the distribution of the estate of their grandfather Waruinge Kamau and now she wants this Court to resolve the injustice.

10. On cross-examination, she testified that at the time the land was demarcated in Kiawambogo, she had not been born and what she told this Court was based on what she was told. When asked about land parcel 1120, she testified that the property belonged to her grandmother, who later transferred it to her father, the 1st Applicant in 1976. She contradicted this and testified that her father bought loc 1120, from one Mr. Murithi Muchemi. She also told the Court that the sub-divisions of land was done through Court Orders and further confirmed that the Plaintiffs have filed no appeal against the orders of Court of dismissing the application for revocation.
11. On re-exam, she confirmed that she has the authority of her father as evident in page 115 of their documents. She also affirmed that land parcel Loc 1120, was sold to her father and was not family property.
12. PW2 Zacharia Karema Waruinge, the son of the 1st Applicant, adopted his statement dated 18th November 2020, as evidence. It was his testimony that the Plaintiffs are after the just distribution of the estate of their grandfather to cure the injustice caused by the orders in the Succession Court. About land parcel 1120, he told the Court that his grandfather sold the land to one Muriithi Muchemi and which consideration was paid through the chief's Office.
13. On cross-examination, he testified that at the time of demarcation of Kiawambogo area, he had not been born and what he testified on is based on what he was told. He further testified that his father is suffering from memory loss, but he had told him about the history of the land. It was his testimony that he lives on land parcel No.1120, and the Plaintiffs wish was that this Court sets aside the orders of Succession Court.
14. On re-exam, he said his father is 85 Years, old and cannot come to Court to tender evidence. Additionally, that the Plaintiffs/Applicants never had a problem when land parcel 804, which was shared between the Respondents until when the Respondents were given a share in land parcel 1120.
15. This marked the close of the Applicants case.

Respondents' Case

16. DW1 Jackson Marichu Kamau, adopted his witness statement dated 13th September, 2021, and relied on the contents of his Replying Affidavit dated 5th February 2021, and the annexures thereto. He produced the documents enlisted in his list of documents as exhibits. He also testified that when demarcation was done in 1963, land parcels No.1120 and 804, were registered in the name of Waruinge Kamau and land parcel No.1121 was registered in the name of Gladys Wambui Kamau. That the latter was later registered in the name of the 1st Applicant in 1976 and land parcel No. 804 was registered in the name of the 2nd Respondent to hold in trust for the Respondents. That he moved Court for enforcement of the trust and the land was shared equally. He further told the Court that the total acreage owed by the 1st Applicant is 5.65 acres while the Respondents own 4.75 acres each.
17. On cross-examination, he confirmed, that he testified in the Succession Cause case that their father had three parcels of land. He also confirmed that his father never sold land to Mr. Muchemi and also informed the Court that the said Mr. Muchemi was a village elder. He affirmed his testimony and added that his father had bequeathed land to them and land parcel No.1120 was available for succession.



18. After the close of viva voce evidence, the parties were directed to file and exchange their written submissions.
19. The Applicants filed their written submissions dated 28th February 2022, and raised two issues for determination.
20. On the first issue on what formed the Estate of the deceased, the Applicants referred this Court to testimony of the 1st Respondent in the Succession Cause to the extent that land parcels No.1120 and 804, formed part of the Estate of the deceased. That the foregoing parcels were free property within the meaning of Section 3 of the *Law of Succession Act*. They relied on the case of *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another*{2016}, where the trial Court considered and adopted the meaning of free property defined in *Gitau & 2 Others vs Wandai & 5 others* [1989] 1KR 231. They accused the 1st Respondent of inconsistencies in his testimony in CMCC 22 of 1991, and the instant suit and submitted that he was bound by his pleadings.
21. Reliance was placed on *Republic vs Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria* {2010},eKLR, where the Court invoked the doctrine of approbation and reprobation on, the need for consistency. They also relied on the case of *Dakianga Distributors (k) Ltd vs Kenya Seed Company Limited*{2015}eKLR, where the Court held that parties set the agenda for trial and cannot be allowed to go beyond their pleadings.
22. On whether the suit property was held in trust, the Applicants submitted that the High Court in Civil Appeal No. 32 of 2003, found that the issue of trust could only be determined in a civil suit. It was their further submissions that their father and/ or grandfather intended to have the land held in trust by the 2nd Respondent, when he caused the land to be registered in his name. Further that at that time of demarcation it was not possible to register more than one land in the name of the deceased.
23. They invited this Court to the reasoning in *Alice Wairimu Macharia vs Kirigo Philip Macharia* [2019] eKLR, on determining trust on case to case basis, based on evidence and *Peter Ndungu Njenga vs Sophia Watiri Ndungu* [1998] eKLR, where the Court held that in cases of trust, the intentions of parties should be so clear. In the end, they submitted that the purpose of succession is for just distribution as was found in *In Re Estate of Andashe Munyeti* {2019}eKLR, and the Respondents ought not to have been involved in the succession cause.
24. The Respondents filed their submissions dated 11th April 2022. It was their submissions that the Applicants were not well informed of the history of the suit land as they were born way after demarcation. The Respondents further submitted on the evidence contained in Murang'a PMCC Succession Case No 230 of 1991, which was in support of their case and which confirmed that the deceased had distributed his estate during his lifetime. That the 1st Respondent moved the Court claiming trust in land parcel 804, against the 2nd Respondent. After the testimony of their mother, and that of the 1st Applicant, the Court ruled in his favor and caused sub-division. Further, that the issue of trust was adequately determined by a competent Court and this Court cannot disturb the judgment. They also submitted that the Applicants raised the issue of trust in CMCC 381 of 2015, and which suit is still pending. They invited this Court to determine the issues set out in paragraph 33 of their submissions and urged this Court to dismiss the summons.
25. Before delving into the issues for determination, it is important to point out the number of cases cited by parties.
 - a. Murang'a PMCC Suc No. 230 of 1991: the 1st Applicant petitioned for letters of administration over the Estate of Waruingi Kamau, their father. The 2nd Respondent herein



was an objector in the Petition. It is not clear from the judgment which parcels of land were said to be forming part of the Estate, but the Court directed that the estate of the deceased be shared equally. A perusal of the judgment informs this Court that the parcel of land available for distribution was Loc 1120, measuring 5.8 acres.

- b. Nyeri HC Civil Appeal No. 32 of 2003: being aggrieved by the decision of the trial Court, the 1st Applicant herein preferred an appeal. The Appeal Court found that the parties to the Succession case who are the 1st Applicant and 2nd Respondent herein indicated in their pleadings that the only available land for distribution was land parcel 1120, and which was the only land available for distribution.
 - c. Murang'a HC Succ No. 739 of 2015: the 1st Applicant herein moved Court for revocation of grant on the ground that not all assets of the deceased were included in the succession proceedings being land parcel No. 804. The Court dismissed the summons and held that the summons were "misconceived, mischievous and an unacceptable abuse of the process of Court"
 - d. Murang'a CMCC No. 381 of 2015: the Respondents herein and one Peter Kamau Wambui moved the Court for eviction orders in realization of the Orders of the succession cause. During the pendency of the suit, the children of the 1st Applicant herein moved the Court to be joined in the proceedings, but their application was declined.
 - e. Murang'a HC Civil Appeal No. 48 of 2019: The 2nd Applicant and her brother being the children of the 1st Applicant appealed against the decision declining them to be joined in CMCC 381 of 2015. The appeal is still pending.
 - f. Murang'a SPM No. 22 of 1991: the 1st Respondent filed a suit against the 2nd Respondent claiming trust on land parcel 804, the matter was referred for arbitration and an award issued to the extent that the land be shared equally. The award was not adopted as an order of Court as it was brought beyond the 90 Days period and the matter was set down for hearing. The Court pronounced itself on the 26th September 2002, directing that land parcel No 804, be shared between the Respondents herein equally.
26. From the Respondents record on pages 67-68, there is another case that was filed by the 1st Applicant in Nairobi over the Estate of Kamau Waruingi, and whose status remains unknown. This Court notes the number of cases that have been instituted over the suit property. It appreciates that the mother title for the suit property was closed by the sub-division on 9th May 2003, and two titles being 2579 and 2580, were issued in the names of Jackson Marichu Kamau and Karuga Kamau as per the annexed certificates of search "JM2a" and JM2b". That the suit land was first registered in the name of Karuga Kamau, the 2nd Respondent herein, on 29th May, 1963.
27. Further this Court takes into account that the 1st Applicant was the Petitioner in the Succession Cause whereby the Estate of Kamau Waruingi was sub-divided. It also notes that the suit property was never listed as free property forming part of the estate of the deceased available for distribution. In fact, the Appeal Court in Appeal No. 32 of 2003 noted in page 13 of its judgment "As already stated land parcel No. 1121 and 804 were registered in the names of the Appellant(1st Applicant herein) and the Respondent(2nd Respondent herein) respectively. Therefore they could not have formed part of the deceased's estate"



28. The suit land became the subject matter of determination in Murang'a HC Succ No. 739 of 2015, where the 1st Applicant wanted the Court to include the suit property as forming part of the Estate of the deceased. The Court in dismissing the summons held that;

“11. Those issues were broadly, one, the extent of the estate of the Deceased herein (Specifically whether the Estate extended beyond land parcel L.R LOC. 19/ Kiawambogo/1120 to include land parcels L.R LOC. 19/ Kiawambogo/1121 and L.R LOC. 19/ Kiawambogo/804; and, two, who the persons beneficially entitled to that estate were and their respective shares”

29. Those issues were canvassed before the succession Court by way of oral evidence.....”

The Applicants have now moved this Court claiming trust over the suit property to the extent that the 2nd Respondent was registered to hold the land in trust for the family of Kamau Waruinge. The Respondents opposed the suit on the basis that the suit is res judicata the aforementioned cases. The issues for determination are

- i. Whether this Court has jurisdiction to entertain the instant suit
- ii. Whether the Applicants have met out a case for trust to warrant the orders sought
- iii. Whether the title issued to the Respondents should be cancelled

i. Whether this Court has jurisdiction to entertain the instant suit

30. As pointed out above the suit property has been litigated in various Courts of competent and/or concurrent jurisdiction. Most importantly the issue of trust was determined by the Court in Murang'a SPM No. 22 of 1991, where the 1st Respondent moved the trial Court against the 2nd Respondent.

31. In the said suit, the 1st Respondent's claim was that the 2nd Respondent was holding the suit property in trust for the Plaintiff and the Defendant therein (the Respondents herein). The matter was referred to arbitration at the request of the parties and the Court granted orders on the 2nd July, 1991, directing the matter be heard by the District Officer Kangema, (see page 52-53 of the Applicants' record). The matter was heard by the said District Officer and this Court has had a chance to go through the proceedings at the District Officer's as contained in the Applicants' list of documents and appreciates that the 1st Applicant participated in the proceedings as a witness.

32. This award was not however adopted by the Court for want of delay as it was filed beyond the 90 Days as directed by the Court. On 10th March 1992, the Court directed that the matter proceeds for hearing and the same was heard ex parte on 29th August, 2002. This is because the 2nd Respondent herein failed to attend Court for hearing despite being actively involved in the suit prior to the hearing. A judgment was delivered on the 26th September, 2002 and the Court determined that the 1st Applicant then was entitled to half of the land that he was using land being parcel 1120. This was oblivious of the fact that the 1st Applicant's claim in the said suit was over land parcel 804. While it is apparent that there was an error on the face of the record, it is not within the power of this Court to cast aspersions on the competence of a judgment of another competent Court on its own motion.

33. The Respondents have submitted that the issue of trust is res judicata the aforementioned cases. Before determining whether the suit is res judicata or not, it is important to point out that an issue of trust cannot be raised in a Succession Cause. This was correctly pointed out by the Court in Nyeri HC Civil Appeal No. 32 of 2003. This position was reiterated in the case of *in re Estate of Kanyeki Kimatu (Deceased)* [2020] eKLR.



34. Jurisdiction is granted by statute and the Succession Court is guided by the provisions of the Law of Succession Act. Trust is an overriding interest on land that falls within the jurisdiction of an ELC Court. The issue of trust was competently before the Court in Murang'a SPM No. 22 of 1991, as it was not a succession matter, but a civil case.
35. Having found that this Court has the jurisdiction to determine this suit, this Court moves to determine the issue of res judicata.
36. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.
37. The elements of Res Judicata are laid out in Section 7 of the Civil Procedure Act. These elements were enlisted in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:
- "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."
38. From the foregoing, it is clear that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
39. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A cursory look at the Originating Summons filed herein, the Applicants claim is for trust over land parcels No. Loc 804. Conversely, a perusal of Murang'a SPM No. 22 of 1991, reveals that while the proceedings indicated a claim over land parcel No. 804, the Court pronounced itself on land parcel 1120. This is notwithstanding the judgment of the succession cause earlier that caused land parcel No. 1120, to be sub-divided.
40. However, this Court notes from the copy of Green card for land parcel 804, that there was sub-division based on an order of Court in Murang'a SPM No. 22 of 1991. This Court notes that the judgment of the Court in Murang'a SPM No. 22 of 1991, has already been effected, the error notwithstanding. Further, this Court notes that there is no evidence that has been adduced before it to the effect that either of the parties in the said judgment moved Court to correct the error. The issue of trust runs



through in both cases over land parcel No.804. It is therefore right to conclude that the issue is directly and substantially the same.

41. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title.
42. It is not in dispute that in the former suit, the parties are the Respondents herein and the Applicants herein were not parties to the suit. Further, there is no evidence that the Applicants herein were litigating and/or are litigating under the names of the Respondents. This test therefore cannot pass in favor of the Respondents.
43. While the Court noted above that the 1st Applicant participated in arbitration proceedings, the same were disregarded by the trial Court. The Court in SPM No. 22 of 1991, which decided the former suit was competent and while it determined the issue of trust between the Respondents, it never determined the same in favor of the Applicants. Therefore, this Court finds and holds that the suit is not res judicata and it therefore has jurisdiction to determine the same.

ii. Whether the Applicants have met out a case for trust to warrant the orders sought

44. The Applicants' claim is over land parcel 804, which has since been sub-divided and title issued in favor of the Respondents. Section 24(a) of the [Land Registration Act](#) 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."

45. Section 25(1) of the said Act 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. 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.

46. 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;"

47. The trust that the Applicants want to enforce arose from allegations that the suit land was registered in the name of the 2nd Respondent to hold it in trust for the family. This Court gathered from the testimonies of both parties that demarcation for KIAWAMBOGO was done in 1963, when KAMAU WAIRUINGI was alive. Evidence points out that the 2nd Respondent was the 1st registered proprietor of the suit land and it is not indicated in the green card that he was holding it in trust for the family.



49. It is trite that a claim for trust must be proved and cannot only be inferred from mere statements. The Court in Stephen Wahome Muchiri v Iregi Gichobi [2016] eKLR, relied with approval in the case of Salesio M'itonga v. M'ithara & 3 Others (2015)e KLR where the Court of Appeal stated:-

"It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust... In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same... We concur with the following findings by the High Court:-

"Trust must be proved by credible evidence adduced by the person claiming that a trust exists. Mere utilization of the land is not proof of the existence of a trust."

50. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] Eklr, the Court dealt with the issue of trust at length. The Court made reference to Twalib Hatayan Twalib Hatayan & Anor v Said Saggay 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)."

51. Section 28 of the Land Registration Act, 2012, makes provisions for customary trust. Customary trust was well explained by the Supreme Court in the case of Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another [2018] eKLR where it held as follows:

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group."

52. In the case of Susan Mumbi Waititu –VS- Mukuru Ndata & 4 others (19 of 2007) eKLR, the Court stated that: -

"As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the



suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”.

53. A reading of the above cases implies that the Applicants have a duty to lead evidence as to the existence of either customary trust, constructive or resulting trust. In the Juletabi case (supra), the court held that the onus lies on the 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 [only] 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.”

54. The Evidence Act which guides the procedure of this Court also places a duty on the Plaintiffs/Applicants to lead evidence. Section 107 of the *Evidence Act* provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

55. In addition, Section 108 of the same Act provides as follows:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Further, Section 109 provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

56. PW1 and PW2 gave evidence based on hearsay evidence and they admitted that at the time of demarcation, none of them had been born. As a matter of fact, PW1 was born 5 years later while PW2 was born 12 years later. They produced a bundle of documents including Court proceedings in respect of the estate of the Kamau Waruingi, whereby the Court distributed the Estate of the deceased in terms of the free properties.
57. The Plaintiffs/Applicants have invited this Court to determine whether the property formed part of the Estate of the deceased. While the *Law of Succession Act* and the Rules made thereunder confers power to the succession Court to determine what constitutes the estate of the deceased, the beneficiaries and mode of distribution, (see *In re Estate of Alice Mumbua Mutua (Deceased)* [2017]eKLR) this Court retains the power to determine issues on interest to land and title.
58. The proceedings and/ or testimonies in the trial Courts were not the findings of the said Courts and this Court is not bound by them. In any case, the evidence therein was conflicting and this Court cannot rely on it. The Applicants tendered no evidence to support their claim that the land previously belonged to Kamau Wairungi and was registered in the name of the 2nd Respondent to hold it in trust for the family. Importantly, there was an admission on the part of the Applicants that they moved from



the suit property to land parcel 1120, but they did not give reasons for their moving out of the suit land. The Applicants did not attempt to give reasons why the land could not be registered in the name of their father/ grandfather, yet he was alive at the time the suit land was registered in the name of the 2nd Respondent.

59. On whether the Applicants have established clan ownership over suit land, no evidence was led to show that prior to registration in the name of the 2nd Respondent, the land was owned by a clan. This Court therefore finds and holds that a claim for customary trust cannot issue.
60. Having failed to establish customary trust, did the Applicant prove a resulting or constructive trust? To conclude that either of the trusts has been established, the intentions of parties to create trust must be established. In *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* [2000] eKLR, the Court of Appeal held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

61. The Court in *Juletabi African Adventure Limited*, supra held:

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).”

61. These two trusts are equitable remedies and are granted to deserving parties. There is no evidence that the 2nd Respondent acquired registration of the land through a wrong doing. If that was the case, the



Applicants ought to have challenged the registration of the 2nd Respondent, which has not been done. The Applicants were duty bound to lead evidence into this Court that the Respondents conduct of transferring the suit land in their name was for unjust enrichment. That cannot be the case herein since this Court has noted that the 1st Plaintiff/Applicant benefited from land parcel No. 1120, which was first registered in the name of their deceased mother.

62. Even though the Plaintiffs/Applicants were being economical with the truth and even failed to prove that 1st Plaintiff/Applicant bought land from Mr. Muriithi, this Court cannot find it difficult to conclude that the 1st Plaintiff/Applicant benefited from parcel 1120 exclusively.
63. A resulting trust on the other is as defined in the Halsbury's Laws of England as quoted in the foregoing case. It arises by operation of law:
 - i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or
 - ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
 - iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended
64. From the above definitions and the pleadings of the Parties, this Court finds that a resulting trust does not suffice in the instant suit. The evidence on record points to the fact that the 2nd Respondent was the registered proprietor of the suit land and which was subsequently shared equally with the 1st Respondent.
65. As a matter of importance, the 1st Plaintiff/Applicant instituted the succession proceedings and opted not to include the suit property as forming part of the estate of Kamau Waruingi. He was old enough to know all his father's properties and cannot now move this Court claiming trust just because a judgment was not in his favor.
66. There is no evidence who occupies the suit property, but parties in their testimonies admitted the land is occupied by the Respondents. The 2nd Plaintiff/Applicant testified that she lives in Nairobi and there is no doubt the 1st Plaintiff/Applicant lives on land parcel No. 1120, for which there was an admission that the Plaintiffs/Applicants have grown tea leaves thereon. Based on the foregoing, the Court finds and holds that the Plaintiffs/Applicants have failed on a balance of probability to establish the existence of a resulting trust. (See *Heartbeat Limited vs Ng'ambwa Heartbeat Community Children's Home & Rescue Center* {2018} eKLR)
67. At this point it is important for this Court to consider the multiple proceedings the Plaintiffs/Applicants have been engaged in. This is a rather old estate and parties are still in Court as a result of the endless cases. While it is their right to seek the audience of Courts, it would be an abuse of the Court process to engage in multiplicity of cases. Indeed, Litigation must come to an end, and that is not a cliché, but a principle applicable to our judicial system.

iii. Whether the titles issued to the Respondents should be cancelled

68. As stated herein the *Land Registration Act* (supra) Section 24(a) provides that 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. Further, 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.

69. The suit property has already been sub-divided by the judgment of the Court SPM No. 22 of 1991, as evident by the copy of the green card. There is no evidence that the judgment has been appealed against, varied, reviewed and or set aside. Whether there was as an error or not in the said judgment is not an issue before this Court.
70. Cancellation maybe by a Court Order as provided under section 80(1) of the *Land Registration Act* or by an order of Land Registrar as provided by section 79 of the same Act. Section 80 of the said Act, provides; -
- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
71. In Kisumu Misc No. 80 of 2008 *Republic V Kisumu District Lands Officer & another* [2010] eKLR, the Court held;
- "it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration".
72. In order for this Court to cancel title, it must be established that the said title was obtained irregularly either by fraud, mistake or an omission. The basis for challenging the title was on creation of trust. This Court has already established herein above that the Plaintiffs/Applicants have on a balance of probabilities failed to make a case for the existence of a trust. Therefore, it follows that this Court finds no reason warranting cancelation of titles held by the Respondents herein.
73. Having now carefully considered the pleadings herein, the available evidence, the relevant provisions of law, the written submissions and the cited authorities, the Court finds and holds that the Plaintiffs/Applicants have failed to prove on the required standard of balance of probabilities to existence of a trust.
74. For the above reasons, the Court finds the Originating Summons dated 18th November 2020, by the Plaintiffs/Applicants herein is not merited. The said Originating Summons is hereby dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF JUNE, 2022.

L GACHERU

JUDGE

Delivered online in the presence of;

Joel Njonjo – Court Assistant



Mr. Njuguna for the Plaintiffs/Applicants

Mr. Mwangi Ben for the Defendants/Respondents

L GACHERU

JUDGE

9/6/202

