



**Kamonde v Kamonde (Environment & Land Case 75 of 2014)  
[2022] KEELC 15699 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15699 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 75 OF 2014**

**EC CHERONO, J**

**JULY 15, 2022**

**BETWEEN**

**JOSHUA JORAM KAMONDE ..... PLAINTIFF**

**AND**

**CHARLES MURIUKI KAMONDE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a Plaint dated 11<sup>th</sup> March, 2014 whereby he prays for judgment against the Defendant for: -
  - a. Determination of trusteeship.
  - b. Transfer of Land Parcel No. Mwerua/Kagioini/1078 to the Plaintiff's name.
  - c. Subdivision and transfer of half share of land parcel No. Mwerua/Kagioini/1079 to the Plaintiff.
  - d. Costs and interest.
2. The Defendant denied the plaintiff's claim by way of a defence dated and filed on 28<sup>th</sup> March, 2014. The Plaintiff filed a reply to the defence on 4<sup>th</sup> April, 2014.
3. The matter was subsequently fixed for hearing which proceeded by way of viva voce and on 2<sup>nd</sup> February, 2022. The court subsequently directed the parties to file and exchange their respective written submissions. The Plaintiff filed his submissions on 17<sup>th</sup> March, 2022 while the defendant did not file submissions.

**Plaintiff's Case And Submissions**

4. The plaintiff called three witnesses.



5. PW1 was Naomi Wangari who referred to her witness statement dated 7<sup>th</sup> October, 2016 and filed in court on 17/10/2016 which she sought to be adopted in her evidence.
6. She testified that the plaintiff and the defendant are brothers and sons of the late Kamonde Baragu who was given land parcel No. Mwerua/Kagioini/234 by the clan during land demarcation and consolidation period and on 24/6/1993, the said Kamonde Baragu was issued with a certificate of Title.
7. She also testified that during the lifetime of their father Kamonde Baragu, he subdivided the said parcel of land into LR Merua/kagioini/1077, 1078 and 1079 which were registered in his name to hold in trust for himself and his two sons who are the plaintiff and the defendant in this case.
8. She further testified that the said Kamonde Baragu (deceased) showed his two sons the portions they were to occupy and cultivate as follows: -The plaintiff occupied Mwerua/Kagioini/1078 measuring 0.53 Ha.The late Kamonde Baragu occupied Mwerua Kagioini/1079 measuring 0.53 Ha.The defendant occupied Mwerua/Kagioini/1077 measuring 0.86 Ha.
9. She testified that the subdivision was financed by one Justus Maina Muriuki and that it was after refunding the said money that they were to get the parcels of land transferred and registered in their names. However, the said Kamonde Baragu passed on before the resultant parcels could be transferred to his two sons. She further stated that before the demise of the said Kamonde Baragu, the defendant caused all the three parcels of land to be registered in his name and that he was so registered to hold the same in trust for himself and the plaintiff.
10. It was her testimony that the plaintiff is entitled to get his share of land parcel No. Mwerua/Kagioini/1078 and to half share of Land Parcel No. Mwerua/Kagioini/1079.
11. PW2 was Justus Maina Muriuki who referred to his witness statement dated 11<sup>th</sup> March, 2014 and asked the Court to adopt as his testimony.
12. He testified that the parties herein are his uncles and he was directly involved when land parcel No. Mwerua/Kagioini/234 was being subdivided after he was requested by the father to the disputants who was also his grand father. namely Kamonde Baragu (deceased). He also stated that the said Kamonde Baragu (deceased) further requested him for financial assistance as the plaintiff and defendant herein could not raise money for the subdivision.
13. The witness also stated that upon sub-division, he demanded the refund of his money and the deceased instructed him to hand over the title deeds to the plaintiff as the first born son.
14. He stated that upon the death of the said Kamonde Baragu, the defendant started threatening the plaintiff telling him that he does not own any land. Thereafter, they proceeded to file a complaint at the Land Disputes tribunal.
15. He testified that the resultant parcels of the said subdivision are all in the names of the defendant and that the plaintiff is entitled to a share of his father's land.
16. PW3 was Charles Murimi Kabui who also sought to adopt his written statement dated 11<sup>th</sup> March, 2014 as his testimony.
17. He testified that the Kamonde Baragu (deceased)) was his grandfather and was given land parcel No. Mwerua/Kagioini/234 by the clan which was later subdivided into three parcels of land being LR No. Mwerua/kagioini/1077, 1078 and 1079.
18. He further testified that before the subdivision, the deceased called for a meeting whereby he told to them that his intentions for subdividing his land was to share the same between his two sons.



19. He also testified that the plaintiff and defendant were shown their respective portions after subdivision. However, the defendant later got registered as the sole proprietor of all the three portions which he has been utilizing.
20. He testified that the plaintiff as the son of the deceased is entitled to equal share of their father's land.
21. In his final remarks, the plaintiff submitted that his evidence is truthful, unshaken and is in consonance with his pleadings, while the defendant contradicted his pleadings and therefore is an unreliable witness.
22. The plaintiff relied in the following cases :- *Jecinta Wanjiku Njuki v Jane Wambura Mugo & 3 Others* [2020] eKLR, *Celina Warui Muriuki v Virginia Wanjiru Nguu* [2020] eKLR, *Mwangi & Another v Mwangi* [1986] 328 and *James Ndun'u Kiarie v Geoffrey Mwangi Kinuthia & Another* [2012] eKLR amongst others.

### **Defendant's Case**

23. The defendant, Charles Muriuki Kamonde referred to his witness statement dated 28<sup>th</sup> March, 2014 and sought to have it adopted as his testimony. He also referred to his list of documents and further list of documents dated 20/4/2015 and 10/12/2019 respectively which he produced in evidence as D-Exhibits No. 1, 2, 3, 4, 5, & 6 respectively.
24. The Defendant's case is that he is the sole proprietor of the suit land parcels No. Mwerua/Kagioini/1077, 1078 and 1079 which were voluntarily transferred to him by his father, Kamonde Baragu (deceased) in 1996.
25. He testified that the original parcel of land LR No. Mwerua/Kagioini/234 was allocated to his late father during land demarcation period to hold in trust for him and that the plaintiff was given his own parcel of land by the clan where he settled and lived all the years.
26. He further testified that his nephew Justus Maina Muriuki misled the deceased to subdivide the land so that he could use one portion to obtain a bank loan. However, during the Land Board meeting, his father Kamonde Baragu (deceased), learnt that he was transferring the land to the said Maina Muriuki and immediately caused the transaction to be cancelled.
27. He also testified that when the deceased realized that he was about to be defrauded of his land by the said Justus Maina Muriuki, their relationship became very hostile and that his nephew filed Civil Suit No. 488 of 1993 at Nyeri in which he was seeking the refund of his monies used during the subdivision and judgment was entered in his favour. He stated that he personally paid the decretal sum on behalf of his late father.
28. It was the defendant's testimony that thereafter, his father asked him to raise money so that he could transfer the 3 resultant subdivisions to him, which he did whereupon they attended the Land Board and the parcels were transferred to him with the full awareness of the plaintiff who did not raise any objection.
29. The defendant further testified that sometimes in 2005, the Plaintiff filed a caution against the said parcels which led him to apply to the registrar for the removal of the same and after the proceedings were duly conducted, the cautions were removed accordingly.
30. He also testified that the plaintiff was granted 30 days to appeal to the Chief Land Registrar but did not appeal and therefore, he is the sole proprietor of the 3 parcels of suit land and that he does not hold any portion in trust for the plaintiff.



31. He prayed that the plaintiff's suit be dismissed with costs.

**Analysis: -**

32. I have considered the parties' pleadings, viva-voce evidence and the rival submissions as well as the applicable law. The issues that comment for determination are as follows: -

- a. Whether the Plaintiff has established the existence of a trust with respect to the suit lands.
- b. Who should bear the costs?

**Whether The Plaintiff has Established Existence of a Trust With Respect to the Suit Lands**

33. The Plaintiff's case is that by sub-dividing land parcel LR No. Mwerua/Kagioini/234 into three resultant portions that is LR No Mwerua/Kagioini/1077, 1078, and 1079 and thereafter transferring the same to the Defendant, their father Kamonde Baragu (deceased) had the intentions to create a trust.

34. 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; .....

35. In the case of [Charles K. Kandie v Mary Kimoi Sang](#) [2017] eKLR, 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 v Gichuki* (1982) KLR 285 and *Mbothu & 8 Others v Waitimu & 11 Others* (1986) KLR 171.

36. In the case of [Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others](#) [2015] eKLR the Court of Appeal held as follows pertaining trusts: -

“Dealing with the first issue, according to the *Black's Law Dictionary*, 9<sup>th</sup> 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 para1453). 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).”

37. From the evidence adduced by the parties and the witnesses, the following facts are not in dispute;-
  - a. the plaintiff and the defendant are brother and their father was Kamonde Baragu (deceased).
  - b. The said Kamonde Baragu (deceased) was the registered proprietor of land parcel No. Mwerua/Kagioini/234.
  - c. Kamonde Baragu was given the said land parcel No. Mwerua/Kagioini/234 by the clan.
  - d. The said parcel of land No. Mwerua/Kagioini/234 Was Subdivided During The Lifetime Of Kamonde Baragu (deceased).
38. It was the plaintiff's contention that the defendant was transferred the suit land parcel No. Mwerua/Kagioini/234, Now Subdivided Into Land Parcel No. Mwerua/Kagioini/1077, 1078 & 1079 to hold in trust for himself and the plaintiff.
39. The defendant also admitted in his witness statement dated 28/3/2014 that his father Kamonde Baragu (deceased) was given land parcel No. Mwerua/baragu/234 by the clan and that the plaintiff has his own parcel of land which he was given by the clan being Parcel No. Mwerua/Kagioini/599 where he has always lived. He produced a copy of the green card as D-Exhibit No. 6. From a cursory perusal, the plaintiff was registered as proprietor of the land on 19/4/1961.
40. Other than making general denials, the plaintiff did not specifically deny that he was not given land parcel No. Mwerua/Kagioini/599 by the clan nor that he has not been living therein from the date



of registration to-date. The defendant alleged that the plaintiff is living on land parcel No. Mwerua/Kagioini/599 given to him by the clan where he lives with his family. The plaintiff did not deny nor controvert the same. That leaves this Court with one irresistible conclusion that the plaintiff is neither in possession nor occupies the suit properties. Occupation and possession of the suit properties are overriding interests on land.

41. From the totality of my evaluation of the evidence, it is clear to me that the plaintiff's claim fails.

#### **Final Order**

42. The upshot of my finding is that the plaintiff has not proved that the defendant is holding the suit properties LR No. Mwerua/Kagioini/234, Now Subdivided Into LR No. Mwerua/Kagioini/1077, 1078 & 1079 in trust for him. Consequently, this suit is hereby dismissed. Since the plaintiff and the defendant are siblings, I order each party to bear their own costs.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS  
15<sup>TH</sup> JULY, 2022.**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of ;

M/S Muturi holding brief for Magee for the Plaintiff

M/S Wambui holding brief for Maina Kagio for the Defendant.

Kabuta, Court Assistant – present.

