



**Waichungo v Mbau (Environment & Land Case 59 of 2018)
[2022] KEELC 14435 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 59 OF 2018
YM ANGIMA, J
OCTOBER 27, 2022**

BETWEEN

ELIZABETH WAMAITHA WAICHUNGO PLAINTIFF

AND

GRACE WAMBUI MBAU DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated October 29, 2018 the plaintiff sued the defendant seeking the following reliefs:
 - a. A declaration that title No Nyandarua/Ndemi 10673 is held by the defendant in trust for all members of the plaintiff's family in equal shares.
 - b. An order for dissolution of the trust, subdivision and transfer of the resultant subdivision of title No Nyandarua/Ndemi/10673 to the plaintiff and her 8 children namely:
 - i. Isaac Maina Waichungo
 - ii. Mary Wanjiru Mukundi
 - iii. Joseph Kariuki Waichungo
 - iv. Damaris Wangui Waichungo
 - v. Miriam Nyaguthii Waichungo
 - vi. Simon Wangombe Waichungo
 - vii. Leah Njoki Waichungo.
 - viii. Grace Wambui Mbau



- c. Costs of the suit plus interest thereon at court's rate.
 - d. Any other or better relief deem fit by the honourable court.
2. The plaintiff pleaded that in 1983 she was allocated plot No 1363 (parcel 1363) at Ndemi settlement scheme by the Settlement Fund Trustees (SFT). She further pleaded that sometime in 1997 she sold a portion of 2 acres out of the said property and utilized the proceeds to build a house for her late son Julius Mbau (the deceased) who was the husband of the defendant during his lifetime.
 3. It was the plaintiff's case that on April 14, 1997 she subdivided parcel 1363 into 3 parcels namely Nos 2422, 2423 and 2424 out of which parcel 2422 was registered in the name of the deceased in trust for the plaintiff's entire family whereas the other two parcels were transferred to the respective purchasers. The plaintiff pleaded that the deceased was registered as proprietor because she was living at Nyeri at the material time whereas the deceased had agreed to be the caretaker of parcel 2422 on behalf of the entire family.
 4. The plaintiff further pleaded that in 2009 she lodged a caution against parcel 2422 to protect her beneficial interest and those of other beneficiaries and to prevent any adverse dealings by the deceased. It was her case that upon the demise of the deceased in 2011 the defendant secretly filed succession proceedings for estate of the deceased without disclosing the trust in consequence whereof she caused parcel 2422 to be transferred to her. The plaintiff further accused the defendant of causing the caution lodged in 2009 to be unprocedurally removed without reference to her.
 5. It was further pleaded that the defendant had subsequently caused parcel 2422 to be subdivided into parcel Nos 10673 – 10676 without the plaintiff's involvement and caused parcel No 10673 measuring 5.29 ha to be transferred to herself whereas the rest of the parcels were sold and transferred to their respective purchasers. It was therefore contended that the defendant was holding parcel No 10673 in trust for all the members of the plaintiff's family hence the suit.

B. The Defendant's Defence

6. The defendant filed a statement of defence dated September 2, 2019 denying the plaintiff's claim in its entirety. She denied that the plaintiff was the allottee of parcel 1363 and asserted that it was the deceased who was initially allocated the land by SFT. The defendant further pleaded that the plaintiff only assisted the deceased in making the requisite payments to SFT since he did not have adequate funds for that purpose. It was further contended that there was an understanding between the plaintiff and the deceased that the plaintiff would be entitled to a portion of parcel 1363.
7. The defendant further pleaded that sometime in 1997 parcel 1363 was subdivided into 3 parcels two of which were sold whereas the deceased was registered as absolute proprietor of parcel 2422. It was contended that the proceeds of sale of parcels 2422 and 2423 were shared equally between the plaintiff and the deceased hence the plaintiff had no legitimate claim against the remainder of the property.
8. The defendant denied that she or the deceased held parcel 2422 in trust for the plaintiff's family members and put her to strict proof thereof. The defendant further pleaded that she lawfully undertook succession proceedings for the estate of the deceased and lawfully acquired parcel 2422 and that the consent or involvement of the plaintiff was not required since she was not a beneficiary of the estate of the deceased. The defendant consequently prayed for dismissal of the plaintiff's suit with costs.



C. The Plaintiff's Reply

9. The plaintiff filed a reply to defence dated April 15, 2019 reiterating the contents of the plaint and joining issue with the defendant upon her defence. The plaintiff stated at the time she was allocated parcel 1363 the deceased was a school going minor who was not eligible for allocation of land. She further stated that the deposit payable to SFT was provided by her eldest son, Isaac Maina Waichungo who was then working with the Ministry of Works at Nairobi.
10. The plaintiff reiterated that the decision to subdivide parcel 1363 was her own and that the deceased was registered as proprietor of parcel 2422 merely in trust for all the family members. The plaintiff denied that the proceeds of sale of parcel Nos 2424 and 2423 were shared equally with the deceased or that there was an understanding to that effect.

D. Summary of Evidence At The Trial

a. The plaintiff's evidence

11. At the trial hereof, the plaintiff called 2 witnesses and closed her case. She testified as PW1 and she adopted the contents of her witness statement dated October 29, 2018 and further statement dated April 15, 2019 as her evidence in-chief. Her evidence mirrored the contents of her plaint and reply to defence. She also produced the documents in her list of documents as exhibits P1 – P10 respectively. It was her testimony that she was the initial allottee of parcel 1363 and she produced the relevant letter of offer and the charge to demonstrate the allotment. The copy of the green card for parcel 1363 indicated that she was entered in the register as the first proprietor on April 14, 1997.
12. The plaintiff testified that she was the one who put the deceased in possession of parcel 1363 just after he had completed his secondary education and that he did not contribute any money towards acquisition of thereof. She stated that she had 8 children in total and that she put the deceased in possession because the eldest son was working in Nairobi at the time whereas the rest of the children were young and still schooling in Nyeri.
13. The plaintiff's evidence was supported by his son, Isaac Waichungo, who testified as PW2. He adopted the contents of his witness statement dated October 29, 2018 as his evidence in-chief. It was his evidence that when the deceased completed his secondary education the plaintiff decided to send him to parcel 1363 to occupy and develop it merely as a trustee on behalf of all the other family members. It was his further evidence that no formal deed of trust was signed but there was an oral agreement to that effect between the plaintiff and the deceased.
14. It was PW2's further evidence that the defendant had secretly undertaken succession proceedings without involving the rest of the family members and that the plaintiff's caution against parcel 2422 was removed without due notice to the cautioner. It was his case that they were seeking to reclaim the remainder of the property, that is, parcel No 10673 for redistribution amongst all the family members including the defendant.

b. The defendant's evidence

15. The record shows that despite being accorded an opportunity to do so, the defendant did not tender any evidence at the trial. The record shows that she was absent at the trial and her advocate's application for adjournment was declined by the court. In refusing the adjournment, the court noted that it was the 3rd application for adjournment by the defendant who had never complied with pre-trial directions nor filed a trial bundle in preparation for hearing.



E. Directions on Submissions

16. Upon conclusion of the trial on April 26, 2022 the plaintiff was granted 21 days to file and serve her written submissions whereas the defendant was granted 21 days to do likewise upon the lapse of the plaintiff's period. The record shows that whereas the plaintiff's submissions were filed on June 24, 2022 the defendant's submissions were filed on October 12, 2022.

F. The Issues for Determination

17. The court has noted that the parties did not file any agreed statement of issues for determination. Whereas the plaintiff filed a list of issues for determination, the defendant did not file any. Under order 15 rule 2 of the [Civil Procedure Rules, 2010](#) the court may frame issues from the following:
- a. The allegations contained in the pleadings.
 - b. The statements made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
18. The court has perused the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination herein:
- a. Who was the initial allottee of parcel No 1363 Ndemi Settlement Scheme as between the plaintiff and the deceased.
 - b. Whether the deceased was holding parcel 2422 in trust for all the members of the plaintiff's family.
 - c. If the answer to issue 1 is in the affirmative, whether parcel 10673 is subject to the same trust.
 - d. Whether the plaintiff is entitled to the reliefs sought in the suit.
 - e. Who shall bear costs of the suit.

G. Analysis and Determination

a. Who was the initial allottee of parcel No 1363 Ndemi Settlement Scheme as between the plaintiff and the deceased

19. The court has considered the evidence and submissions on record on this issue. Whereas the plaintiff contended in the plaint that she was the allottee of parcel 1363 the defendant contended in her defence that the deceased was the initial allottee of the said property. The plaintiff produced copies of the letter of offer and a charge both dated 1993 indicating that she was allocated parcel 1363 by SFT. The plaintiff further produced a copy of the green card for parcel 1363 which indicated that she was the first registered proprietor of the said parcel.
20. The defendant, however, did not produce any documentary evidence to the contrary. In fact, the defendant did not tender any evidence at all at the trial. There was no evidence to demonstrate that there was any arrangement between the plaintiff and the deceased for the plaintiff to pay the money due to SFT on behalf of the deceased or for them to be part-owners. Accordingly, the court is satisfied on a balance of probabilities that the plaintiff was the one initially allocated parcel 1363 by SFT.



b. Whether the deceased was holding parcel 2422 in trust for all the members of the plaintiff's family

21. Whereas the plaintiff contended that the deceased was registered as proprietor to parcel 2422 in trust for all the family members, the defendant contended otherwise. The plaintiff gave sworn evidence to the effect that she had 8 children at the material time and her intention of transferring parcel 2422 to the deceased was for him to hold it in trust for the rest of the family members and not as absolute proprietor. The plaintiff explained that the deceased was chosen because of his availability as he had just completed his secondary education. The eldest son was working in Nairobi at the time whereas the rest of the children were school going minors. PW2 further testified that he was the one who provided the money which was paid to SFT hence there was no intention to make the deceased the sole beneficiary of the property to the exclusion of everybody else.
22. The court is aware that trust is a question of fact which ought to be proved by evidence. The court is further aware that documentary evidence is not the only means of proving the existence of a trust especially where some of the beneficiaries are still alive. Whereas the plaintiff submitted that she had sufficiently proved the existence of a trust, the defendant submitted otherwise.
23. Whereas a trust may be noted in the register, there is no legal requirement that it must always be noted in the register. Section 28 of the repealed *Registered Land Act* which was applicable at the material time recognized the existence of a trust as an interest which was not required to be noted in the register. The said section stipulated that:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the 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 to:

- a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and
- b. Unless the contrary is expressed in the register, to such liabilities, rights, rights and interests as effect the same and are declared by section 30 not to require noting in the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.”

24. The Court of Appeal in the case of *Heartbeat Limited -vs- Ng'ambwa Heartbeat Community Children's Home and Rescue Centre* [2018] eKLR considered the issue of trust as follows:

“(26) This court considered the law on trust in detail in *Twalib Hatayan & another -vs- Said Saggar Ahmed Al-Heidy & others* [2015] eKLR, and outlined the basic tenets as follows:

“According to 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*).” [Emphasis added]

25. The court has fully considered the oral and documentary evidence which was tendered at the trial. The plaintiff’s evidence was that the deceased was a school going minor at the time she obtained allocation of the suit property from SFT. It was her further evidence that it was PW2 who provided the funds due to SFT on account of the allocation. It was her further evidence that at the time of the deceased’s registration as proprietor he had just completed his secondary education and was not in any gainful employment. The plaintiff’s case was that the deceased was registered as proprietor out of convenience in trust for the rest of the family members.
26. The defendant, who was the legal representative of the deceased, did not testify at the trial to support the allegations in the defence that the deceased was the absolute owner of parcel 2422. The plaintiff’s evidence was that she had a total of 8 children at the time. There was no plausible reason why the plaintiff would gift her entire land to the deceased absolutely and leave out the rest of the children including PW2 who had paid the SFT dues. The court is thus satisfied it was the plaintiff’s intention at the time of transferring parcel 2422 to the deceased that he was to hold it on his behalf and in trust for the rest of the family. The court is satisfied that the transferor’s intention was proved at the trial hence a resulting trust shall arise in the circumstances.



c. If the answer to issue (b) is in the affirmative, whether parcel 10673 is subject to the trust

27. The defendant submitted that she lawfully acquired parcel 2422 through succession proceedings under the *Law of Succession Act* (cap 160) hence acquired an absolute title free from all claims whatsoever. It was further submitted that the defendant was not privy to the trust and that in any event the plaintiff did not stake her claim in the said succession proceedings. The plaintiff's evidence at the trial was that she was not aware of the succession proceedings since the defendant did not involve her or any of her children. It was contended that the succession proceedings were filed and conducted secretly.
28. The court is of the opinion that a trust over a parcel of land runs with the land. The court is further of the opinion that the defendant knew or ought to have known that the deceased was holding parcel 2422 in trust since she was a member of that family by virtue of her marriage to the deceased. The defendant did not testify at the trial on whether or not she notified the plaintiff and the other beneficiaries of the trust of the filing of the succession proceedings. The only evidence on record on this issue is that of the plaintiff and her witness who denied knowledge of the proceedings. The court is thus of the opinion that a trust cannot simply be extinguished through the filing of succession proceedings of which the beneficiaries are not aware. Accordingly, the court finds and holds that the defendant acquired parcel 2422 subject to the subsisting trust and that the remainder thereof, that is parcel 10673 is also subject to the same trust.

d. Whether the plaintiff is entitled to the reliefs sought in the suit.

29. The plaintiff has proved that she was the allottee of parcel 1363 and that she was the first registered owner thereof. The plaintiff has further proved that she transferred parcel 2422 to the deceased to hold it in trust for the rest of the family members whose names were enumerated in the plaint. The court is satisfied that despite the defendant having subdivided and sold portions of parcel 2422 the remainder thereof is still subject to the resulting trust created by the plaintiff in 1997. Accordingly, the court is satisfied that the plaintiff is entitled to the reliefs sought in the plaint and is consequently inclined to grant them.

e. Who shall bear costs of the suit

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court has noted that the parties herein are close relatives. In the premises, the court is of the opinion that the appropriate order to make on costs is for each party to bear his own costs.

H. Conclusion and Disposal

31. The upshot of the foregoing is that the court is satisfied that the plaintiff has proved her claim against the defendant to the required standard. Accordingly, judgment be and is hereby entered for the plaintiff against the defendant in the following terms:
- a. A declaration be and is hereby made that title No Nyandarua/Ndemi 10673 is held by the defendant in trust for all the members of the plaintiff's family in equal shares.
 - b. An order be and is hereby made for the dissolution of the trust, subdivision of the suit property in equal portions and transfer of the resultants subdivisions of title No Nyandarua/Ndemi/10673 to the plaintiff and her children namely, Isaac Maina Waichungo, Mary Wanjiru



Mukundi, Joseph Kariuki Waichungo, Damaris Wangui Waichungo, Miriam Nyaguthii Waichungo, Simon Wangombe Waichungo, Leah Njoki Waichungo and Grace Wambui Mbau.

- c. Each party shall bear his own costs of the suit.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF OCTOBER, 2022
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Ndegwa for the Plaintiff

N/A for the Defendant

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

