



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Muriuki & 3 others (Environment & Land Case 6 of 2020)
[2022] KEELC 15090 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 6 OF 2020
YM ANGIMA, J
NOVEMBER 24, 2022**

BETWEEN

JAMES GACHIRI MWANGI PLAINTIFF

AND

JOHN WAWERU MURIUKI 1ST DEFENDANT

SARAH WAITHIRA WAWERU 2ND DEFENDANT

SAMUEL WAWERU NDUNGU 3RD DEFENDANT

MARTIN MACHARIA WAMBUI 4TH DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By an originating summons dated February 25, 2020 brought under section 38 of the *Limitation of Actions Act* (cap 22) and order 37 of the *Civil Procedure Rules 2010* the Plaintiff sought determination of the following questions:
 - a. Whether a trust deed was created between the Plaintiff and the 1st and 2nd Defendants over LR No Laikipia/Marmanet/2294 and 2295 measuring 1.25 acres being subdivision of LR No Laikipia/Marmanet/55 (extension) on July 30, 2007 and October 4, 2007 respectively.
 - b. Whether the Plaintiff has acquired title deed by adverse possession over LR No Laikipia/Marmanet/2294 measuring 1.25 ha being subdivision of Laikipia/Marmanet/55 (extension).
 - c. Whether LR No Laikipia/Marmanet/2294 and 2295 should forthwith be registered in the name of James Gachiri Mwangi and the 3rd and 4th Defendants be ordered to sign all the necessary transfer instruments in favour of the Plaintiff and in default the Deputy Registrar of the court be authorized to sign the same.



- d. Whether the District Land Registrar Laikipia should dispense with the production of the original title deeds for LR No Laikipia/Marmanet/2294 and 2295 while transferring the land to the Plaintiff.
 - e. Who shall pay costs of the suit.
2. The said originating summons was supported by a supporting affidavit sworn by the Plaintiff on February 25, 2020 and the exhibits thereto. The Plaintiff pleaded that sometime in 2007 he bought from the 1st and 2nd Defendants a portion of 0.25 acres of land to be excised from LR No Laikipia/Marmanet/55 (extension) measuring about 2.145 ha. He further pleaded that he thereupon took possession of the said portion and planted trees and cultivated thereon. He further stated that the 1st and 2nd Defendants disappeared soon after the sale hence they did not transfer the said portion of land to him.
 3. It was the Plaintiff's case that sometime in 2019 he received a demand letter to vacate the land he had bought and that come 2020 the 3rd and 4th Defendants entered his land on the basis that they were purchasers for value of parcel Nos 2294 and 2295 which he contended fell within the land he had bought in 2007.

B. The 1st and 2nd Defendant's Response

4. There is no indication on record of the 1st and 2nd Defendants having entered appearance to the originating summons or having filed any response thereto.

C. The 3rd and 4th Defendants' Responses

5. The 3rd Defendant filed a replying affidavit sworn on April 23, 2020 in answer to the originating summons. He stated that he was the registered proprietor of Parcel No 2295 having bought it for valuable consideration from the 1st and 2nd Defendants vide a sale agreement dated April 12, 2019. He stated that it was the 1st and 2nd Defendants who were in possession at the material time and that they were the ones who handed vacant possession to him. It was his case that a title deed for the said parcel was issued to him on April 29, 2019 and that upon taking possession he embarked on developing the land by fencing it and constructing a pit latrine and a borehole thereon. He denied that the Plaintiff had acquired Parcel 2295 through adverse possession or that he was holding it in trust for the Plaintiff.
6. The 4th Defendant filed a replying affidavit sworn on April 16, 2020 in answer to the originating summons. He stated that vide a sale agreement dated November 28, 2018 he together with Mary Wangechi Wambugu bought a portion of ½ acre of land from the 1st and 2nd Defendants which was to be excised from Parcel 55. He further stated that upon sub-division the said portion was assigned Parcel 2294 which was subsequently transferred to them in March, 2020. It was the 4th Defendant's case that he took possession of Parcel 2294 from the vendors in January 2020 and started developing it by fencing it, depositing building materials, and digging a pit latrine thereon. He also denied that the Plaintiff had acquired Parcel 2294 through adverse possession or that he was holding it in trust for him.

D. The Plaintiff's Rejoinder

7. The Plaintiff filed a supplementary affidavit sworn on April 23, 2020 in response to the replying affidavits filed by the 3rd and 4th Defendants. The Plaintiff denied that the 1st and 2nd Defendants were the ones in possession of Parcel 2294 and 2295 at the time they sold the same to 3rd and 4th Defendants. He contended that at the time the 3rd and 4th defendants took possession in 2020 he had already cultivated the two parcels and planted maize.



8. It was contended that some of the developments on the 2 suit properties were undertaken after the court had issued interim orders in the suit stopping such developments. The Plaintiff also pointed out that the 4th Defendant's title was issued after the filing of the instant suit.

E. The Issues for Determination

9. The court has noted that the parties did not file an agreed statement of issues in this matter. Accordingly, the court shall frame the issues for determination as provided for in law. Under order 15 rule 2 of the *Civil Procedure Rules*, a court may frame issue from any of the following:
- a. The allegations contained in the pleadings.
 - b. The contents of documents produced by the parties.
 - c. Statements made on oath by or on behalf of the parties.
10. The court has considered the pleadings, affidavits, documents and evidence on record in this matter. The court has noted that the Plaintiff withdrew his claim for adverse possession on March 16, 2022 and opted to pursue the remainder of the prayers in the originating summons. The court is thus of the opinion that the following issues arise for determination in the suit:
- a. Whether the Plaintiff has demonstrated his claim over the suit properties on account of trust.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether The Plaintiff Has Demonstrated His Claim Over The Suit Property On Account Of Trust

11. The court has considered the pleadings, documents, evidence and submissions on this issue. This is really the key issue which shall determine the outcome of the suit. It is perhaps necessary to define what a trust is and the various types of trust in law. In this regard, the court can do no better than refer to the Court of Appeal decision in *Heartbeat Limited v Ng'abwa Heartbeat Community Children's Home and Rescue Centre* [2018] eKLR where it was stated that:

“(26) This court considered the law on trust in detail in *Twalib Hatayan & another v 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]

12. Although Plaintiff pleaded in his originating summons that he bought the suit properties from the 1st and 2nd Defendants, the evidence he tendered at the trial was that he actually bought it from the 1st Defendant, John Waweru in 2007 at a time when the SFT was the registered proprietor. During cross examination by the 3rd and 4th Defendants' advocate the Plaintiff stated as follows:

“...The seller was John Waweru and he is the one who sold the land to me. Sarah Waweru who was the registered proprietor did not sign the sale agreement. She was the mother of John Waweru. The purchase price was paid to him. I did not pay any money to Sarah...”

13. So, in those circumstances could it be said that the 3rd and 4th Defendants were holding Parcels 2294 and 2295 at the request of the 1st and 2nd Defendants for the benefit of the Plaintiff? And what would be the basis of such a trust? The court is of the opinion that there is no evidence on record to demonstrate that the 1st and 2nd Defendants created any such trust with the 3rd and 4th Defendants in favour of the Plaintiff. In any event, the Plaintiff's dealings with the 1st Defendant took place in 2007 whereas the 3rd and 4th Defendants came into the picture in 2018 and 2019.
14. It is evident from the Plaintiff's submissions that he preferred to rely upon a constructive trust as opposed to an express trust. As indicated above, a constructive trust is imposed by law against someone who has acquired property through wrongful means in order to prevent unjust enrichment. Again, the court is unable to find any evidence on record to justify the imposition of a constructive trust against any of the Defendants. As indicated earlier, the 1st Defendant was not the owner of the suit property in 2007 when he purported to sell a portion thereof to the Plaintiff through the 3 sale agreements he signed. A vendor or purported vendor cannot become a trustee with respect to property he does not own for the benefit of a third party.



15. There is no evidence on record to demonstrate that the 3rd and 4th Defendants acquired the suit properties through wrongful means in 2018 and 2019 when they bought them from the then registered proprietors who were the 1st and 2nd Defendants. There is even no evidence to demonstrate that the 3rd and 4th Defendants were aware of the Plaintiff's claim upon the suit properties at the time of purchase. A perusal of the land register for Parcel 55 does not indicate any caution or encumbrance placed by the Plaintiff to claim either a purchaser's interest or beneficial interest in it. The only person who appears to have lodged a caution was the 4th Defendant claiming a purchaser's interest.
16. The Plaintiff relied upon, *inter alia*, the cases of *Jackson Kamau Kanyuru v Stephen Githinji Were* [2018] eKLR and *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR in support of his submissions that the court should imply a constructive trust in his favour. The court is of the opinion that those two cases are distinguishable from the instant cases. The case of Jackson Kamau Kanyuru was a claim for specific performance of an agreement for sale of the suit property which devolved upon the Defendant. It is noteworthy that the suit property had not been sold and transferred to third parties at the time of filing suit and it was not a claim based upon trust or constructive trust. On the other hand, the case of Willy Kimutai Kitilit concerned the sale of the suit property by the owner thereof and the land had not been sold and transferred to third parties prior to the action. The court is thus of the opinion that a constructive trust over the suit properties has not been established by the Plaintiff.

b. Whether The Plaintiff Is Entitled To The Reliefs Sought In The Suit

17. The Plaintiff's claim against the 3rd and 4th Defendants was based on trust and specifically constructive trust. The court has found that the Plaintiff has failed to demonstrate the existence of the alleged trust. The reliefs sought by the Plaintiff were dependent upon proof of the existence of the trust. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the originating summons.

c. Who Shall Bear Costs Of The Suit

18. 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 finds no good reason why the successful litigants should be deprived of costs. Accordingly, the 3rd and 4th Defendants shall be awarded costs of the suit. The 1st and 2nd Defendants are not entitled to any costs since they did not participate in the hearing.

G. Conclusion and Disposal Order

19. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to prove his claim against the defendants to the required standard. Accordingly, the plaintiff's suit is hereby dismissed with costs to the 3rd and 4th defendants only.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 24TH DAY OF NOVEMBER, 2022
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Waichungo holding brief for Ms. Muriithi for the Plaintiff

Mr. Nderitu Komu for the 3rd and 4th Defendants



N/A for the 1st and 2nd Defendants

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

