



Ataka (Suing as the Administrator and Personal Representative of the Estate of Margret Ayoti Ataka) v Bahati & another (All Sued as Administratrix and Personal Representatives of the Estate of Benedicto Bahati Makani – Deceased) (Environment & Land Case 243 of 2017) [2022] KEELC 14961 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 243 OF 2017**

**DO OHUNGO, J
NOVEMBER 22, 2022**

BETWEEN

**TITO MAKARI ATAKA (SUING AS THE ADMINISTRATOR AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGRET AYOTI
ATAKA) PLAINTIFF**

AND

MARY WAIRIMU BAHATI 1ST DEFENDANT

GRACE BAHATI 2ND DEFENDANT

**ALL SUED AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVES OF
THE ESTATE OF BENEDICTO BAHATI MAKANI – DECEASED**

JUDGMENT

1. The plaintiff brought this suit in his capacity as the administrator and personal representative of two estates: that of his mother Margret Ayoti Ataka (deceased) and that of his father Joseph Ataka Benard (deceased). The defendants are sued in their capacity as the administratrixes and personal representatives of the estate of Benedicto Bahati Makani (deceased), their husband and father respectively. The plaintiff moved the court through plaint dated July 13, 2017, which was later replaced by amended plaint dated September 19, 2017.
2. The plaintiff averred in the amended plaint that vide an agreement dated July 19, 2004, Margret Ayoti Ataka (deceased) agreed with Benedicto Bahati Makani that he was to acquire and hold land parcel number Butsotso/Shikoti/1046 for and on behalf of Margret Ayoti Ataka who was in turn to transfer land parcel number Butsotso/Shikoti/1805 which was then registered in the name of Joseph Ataka Benard, the then deceased husband of Margret Ayoti Ataka. That pursuant thereto, Benedicto Bahati Makani was registered as proprietor of land parcel number Butsotso/Shikoti/1046 and held it in trust



for Margret Ayoti Ataka to be transferred to her upon her passing title to land parcel number Butso/ Shikoti/1805 to Benedicto Bahati Makani.

3. The plaintiff further averred that land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674 are subdivisions of land parcel number Butso/ Shikoti/1046 and that the defendants have no rights over the said parcels and that instead, the plaintiff should be registered as the proprietor thereof. The plaintiff therefore prayed for judgement against the defendants for:
 - a. A declaration that Benedicto Bahati Makani - deceased held Land Parcel No Butso/ Shikoti/3673 and Butso/ Shikoti/3674 in trust for Margaret Ayoti Ataka, her personal representatives and Administrators of her estate.
 - (a) (i) A declaration that the defendants hold Land Parcel Nos Butso/ Shikoti/3673 and 3674 respectively in trust for Margaret Ayoti Ataka, her personal representatives and Administrators of her estate.
 - b. An order directing the defendants to transfer Land Parcel Nos Butso/ Shikoti/3673 and Butso/ Shikoti/3674 to the plaintiff in exchange of Land Parcel No Butso/ Shikoti/1805.
 - c. Costs of this suit.
 - d. Any other order that this honourable court deems fit to grant.
4. The defendants filed defence and counterclaim dated 30th August 2017 through which they denied the plaintiff's averments. They averred that the plaintiff's cause of action is based on the agreement dated 19th July 2004 which is time barred by law and that land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674 are lawfully registered in their names. That both Benedicto Bahati Makani and Margaret Ayoti Ataka lacked capacity to enter into the agreements and that if any agreement existed, it was for sale of land parcel number Butso/ Shikoti/1805. They added that the plaintiff trespassed on and occupied land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674.
5. The defendants therefore prayed for judgment against the plaintiff as follows:
 - a. Eviction of the plaintiff and his family from land parcels registration numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674.
 - b. The plaintiff's suit be dismissed and the defendant's counterclaim be allowed.
 - c. Costs of this suit.
6. At the hearing, Tito Makari Ataka, the plaintiff herein testified as PW1. He stated that he is the administrator ad litem of the estate of Margret Ayoti Ataka (deceased) while the defendants are the administratrixes of the estate of Benedicto Bahati Makani (deceased). That land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674 were created out of land parcel number Butso/ Shikoti/1046 and that through agreement made on 19th July 2004, Benedicto Bahati Makani held land parcel number Butso/ Shikoti/1046 in trust for Margret Ayoti Ataka and that the defendants are entitled to land parcel number Butso/ Shikoti/1805 pursuant to the said agreement. That land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674 are also held in trust, were in possession of Margret Ayoti Ataka until her death and remain in occupation by the plaintiff and other beneficiaries of Margret Ayoti Ataka.



7. Under cross examination and re-examination, PW1 testified that land parcel number Butso/ Shikoti/1046 belonged to Joseph Ataka who was PW1's father and that the said plot was later auctioned and transferred to Ali Musa Chibole on July 30, 1999 owing to PW1's father defaulting on a loan that he secured from ICDC. He also conceded that the agreement dated had a handwritten alteration in the plot number '1805' and that as of the date of his testimony, land parcel number Butso/ Shikoti/1805 was registered in the joint names of Margret Ayoti Ataka (deceased) and himself. That the register in respect of land parcel number Butso/ Shikoti/1046 was closed on September 12, 2014 upon subdivision into land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674. That the copy of letters of administration issued to the defendants herein in Eldoret HC Succession Cause No 465 of 2015 in respect of the estate of Benedicto Bahati Makani shows that Benedicto passed away on November 3, 2014. Further, that according to the certified copies of the registers in respect of land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674, the said parcels were registered in Benedicto's name on September 12, 2014. That Benedicto did the subdivision personally in his lifetime.
8. PW1 further testified that he did not raise any objection in Eldoret HC Succession Cause No 465 of 2015 and that he does not know if judgment in this matter will conflict with orders in Eldoret HC Succession Cause No 465 of 2015.
9. The plaintiff's case was then closed.
10. During defence hearing, Mary Wairimu Bahati testified as DW1. She stated that she is the registered owner of land parcel number Butso/ Shikoti/3673 and that the second defendant who is her daughter is the registered owner of land parcel number Butso/ Shikoti/3674. That they obtained title pursuant to letters of administration in Eldoret HC Succession Cause No 465 of 2015 in the matter of the estate of DW1's late husband, Benedicto Bahati Makani. That this suit has been overtaken by events since at the time of filing the suit, the said parcels were already undergoing registration following confirmation of grant in court and that the plaintiff did not object to the confirmation.
11. DW1 further testified that it is not true that her deceased husband held land parcel number Butso/ Shikoti/1046 in trust pursuant to the agreement dated July 19, 2004 as alleged. That the agreement had nothing to do with the said parcel but was specifically meant for land parcel number Butso/ Shikoti/1805. She added that she was a witness to the agreement and that the plaintiff received a sum of KShs 300,000 leaving a balance of KShs 40,000 to be paid after acquiring title documents which she failed to do. That as of July 19, 2004, land parcel number Butso/ Shikoti/1046 was still in the name of Ali Musa Chibole and that by then, nobody had capacity to transact on it. DW1 further testified that purported agreement entered in to on 19th July 2004 did not create a trust. That Margret Ayoti Ataka's rights were extinguished the moment the land was transferred and registered in the names of Ali Musa who sold the portion to Benedicto Bahati Makani.
12. DW1 went on to testify that when they purchased the land the plaintiff's family were on the land and that they remained on it even as of the date of her testimony. She added that she does not have any development on land parcel numbers Butso/ Shikoti/3673 and Butso/ Shikoti/3674 and that prior to her husband's death, they were staying peacefully with the plaintiff's family on the land. She therefore urged the court to dismiss the plaintiff's suit and to order eviction of the plaintiff from the suit properties.
13. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
14. The plaintiff filed his submission on March 30, 2022 and reiterated the contents of the plaint and further submitted that both the plaintiff and the first defendant were witnesses in the memorandum



- of understanding made on June 19, 2004 and that paragraph 4 of the memorandum of understanding was clear that there was no time limit as to when exchange of parcels of land would take place. That the deceased were parties to the memorandum of understanding and respected the same until their death and that it is only after death that the defendants turned against the plaintiff's family and wanted to sell the entire land to a third party.
15. The plaintiff further submitted that due to time, the first defendant's husband subdivided land parcel No Butsotso/Shikoti/1046 into Butsotso/Shikoti/3673 measuring 7.5 acres and Butsotso/Shikoti/3674 for his use by farming sugarcane and left Butsotso/Shikoti/3673 for the plaintiff's family. That this arrangement was to ensure that he holds on to the 2 acres until such time as the plaintiff's mother was able to transfer land parcel Butsotso/Shikoti/1805 to him.
 16. It was the plaintiff's submission that the first defendant clearly understood the position because she was a witness to the memorandum of understanding and further that she initially excluded land parcel Butsotso/Shikoti/3673 from Eldoret High Court Succession Cause No 465 of 2015 which involved her late husband's estate.
 17. The plaintiff submitted that for the above reasons the defendants are estopped from negating the terms of the memorandum of understanding and in stating that the court must give effect to the intent of parties, the plaintiff relied on *Shah v Shah* (1988) KLR as cited by Nyakundi J in *Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd* [2020] eKLR.
 18. In conclusion, the plaintiff argued that the defendants cannot claim to evict the plaintiff's family as that is their ancestral land and that the defendants had not taken any step towards evicting the plaintiff's family until the plaintiff brought this claim and further that the counterclaim ought to fail, and the plaintiff's claim be allowed as prayed.
 19. The defendants filed their submissions on April 27, 2022 and reiterated the contents of the plaint and defence. The defendants raised the following issues for determination: whether the deceased Benedicto Bahati Makani and the defendants herein held land parcels No Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674 in trust for one Margaret Ayoti Ataka as well as her personal representatives and administrators of her estate and whether the plaintiff's submissions address the main issue of a trust forming in favour of the plaintiff.
 20. On the issue of whether the deceased Benedicto Bahati Makani and the defendants herein held land parcels No Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674 in trust for one Margaret Ayoti Ataka (deceased) as well as her personal representatives and administrators of her estate, the defendants submitted that the deceased Benedicto Bahati was the sole registered owner to land parcel Butsotso/Shikoti/1046 which gave rise to Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674 as evidenced by a copy of agreement dated July 19, 2004 between the previous registered owner Ali Musa and the said Benedicto Bahati which agreement was in respect of land parcel Butsotso/Shikoti/1046. That further to this agreement, the said Benedicto Bahati (deceased) and Margaret Ayoti (deceased) entered into a separate memorandum of agreement dated July 19, 2004 in respect to a separate land parcel being Butsotso/Shikoti/1085 which land was registered in the name of Joseph Ataka as the registered proprietor. That subsequent to entering into the land sale agreement, a transfer of land form was duly filled by the previous registered proprietor being Ali Musa in favour of the deceased Benedicto Bahati Makani with a consideration of KShs 540,000 being paid by the deceased and as such, the suit land Butsotso/Shikoti/1046 legally changed hands in favour of the deceased and that subsequently, the said parcel was subdivided giving rise to the present suit parcels being Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674.



21. The defendants further submitted that in proving that the defendants' deceased husband and father was the lawful registered proprietor of the suit land Butsotso/Shikoti/1046, the defendants relied on the certified true copy of the register for Butsotso/Shikoti/1046 which shows how the parcel changed hands from the first registered proprietor up to the deceased Benedicto Makani Bahati. In stating that the certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner thereto, the defendants relied on Sections 24 and 26 of the [Land Registration Act](#).
22. As to whether the deceased Benedicto held the parcel of lands Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674 in trust for Margaret Ayoti Ataka (deceased), the defendants submitted that this contention by the plaintiff is unfounded for reasons that the suit parcel giving rise to the subdivided suit parcels was lawfully registered in the names of the deceased Benedicto Makani and no adverse interest in the name of Margaret Ayoti Ataka (deceased) were ever noted in the encumbrances section of the title thereto and that the plaintiff's reliance on the memorandum of understanding agreement dated July 19, 2004 and executed between the two deceased persons cannot in any way invalidate the agreement for sale dated July 19, 2004 since the said Margaret Ayoti (deceased) did not have any registrable interests on the suit land either by way of being the proprietor or otherwise to warrant any claims on the land. That in any case, the statutory period of 6 years as set under Section 4 of the [Limitation of Actions Act](#) within which the plaintiff would have brought a claim contesting the validity of the said agreement for sale had lapsed. In submitting that the sale agreement takes precedence over the memorandum of understanding agreement, the defendants relied on [Spentech Engineering Limited v Methode Limited & 2 others](#) [2017] eKLR.
23. The defendants further submitted that a resulting trust never arose because Mary Ayoti (deceased) who never contributed any purchase money towards acquisition of the suit land and in any event, the previous registered owner being Ali Chibole intended to confer a beneficial interest solely upon the deceased proprietor Benedicto Bahati Makani and not Margaret Ayoti (deceased). The defendants on defining what constitutes a trust relied on [Halsbury Laws of England](#), 4th Edition Vol. 48 at paragraph 597. Further reliance was placed in [Heartbeat Limited v Ngambwa Heartbeat Community Children's Home & Rescue Center](#) [2018] eKLR.
24. On whether the plaintiff's submissions address the main issue of a trust forming in favour of the plaintiff, the defendants submitted that the plaintiff's submissions failed to adequately address the issue of trust and further submitted that trusts are created through a written document which sets down the duties and powers of the trustee and that a trust having been established by way of a trust deed ought to be stamped and then registered at the lands registry under the [Registration of Documents Act](#) and that the plaintiff's overreliance on the memorandum of agreement cannot prove existence of a trust in his favour and further that the plaintiff cannot claim to derive benefit from the said memorandum of understanding agreement by dint of doctrine of privity of contract since both parties to the said agreement died, thus terminating the agreement. In addition to the foregoing, the defendants submitted that during hearing the plaintiff admitted to not raising objection in the Succession proceeding involving the deceased Benedicto Bahati Makani's estate which primarily revolved around the suit parcel Butsotso/Shikoti/1046 in Eldoret Succession Cause No 465/2015.
25. It was the defendants submission that any contrary judgment given in this court in favour of the plaintiff will have effect on contradicting orders of a court of similar jurisdiction and that the plaintiff was aware of the succession proceedings and that in any event, the plaintiff's interest as well as that of the remaining estate lies only with land parcel Butsotso/Shikoti/1805 as evidenced by a copy of the certificate of confirmation of grant dated December 3, 2007 in Succession Cause No 292 of 2004 in



Kakamega and not the contested parcels, the subject of this suit. The defendants therefore submitted that the entire suit is not merited and ought to be dismissed with costs to the defendants.

26. I have considered the parties' pleadings, evidence, and submissions. The issues that emerge for determination are whether the deceased Benedicto Bahati Makani held land parcels No Butsotso/Shikoti/3673 and Butsotso/Shikoti/3674 in trust for Margaret Ayoti Ataka (deceased) as well as her personal representatives and administrators of her estate and whether the reliefs sought should issue.
27. The Court of Appeal held in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR as follows:

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.

28. Earlier, the same court outlined the basic tenets of trust in *Twalib Hatayan Twalib Hatayan & Anor v Said Saggah Ahmed Al-Heidy & others* [2015] eKLR 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).”

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. ...

29. Applying the above principles to the case at hand, I note that at the core of the dispute is the memorandum of understanding dated July 19, 2004, between Bishop Benedicto Bahati Makani and Margaret Ayoti Ataka, both of whom are since deceased. The memorandum was witnessed by Tito Makari Ataka and Mary Wairimu Bahati, who are parties to this case. A reading of the memorandum reveals that it concerns the parcel Butsotso/Shikoti/1805 which Bishop Ben Bahati (deceased) was desirous of buying from Margaret Ataka (deceased). A further reading demonstrates that the late Joseph Ataka (deceased) had sold Butsotso/Shikoti/1046 which was the family home to Ali Chibole and that Margaret Ataka (deceased) was desirous of buying back the said home. It was agreed in the memorandum that Bishop Ben Bahati Makani (deceased) was to purchase Butsotso/Shikoti/1046 from Ali Musa Chibole at KShs 540, 000 and hold it until such time as Margaret



- Ayoti (deceased) would be in a position to transfer Butso/So/Shikoti/1805 to Bishop Benedicto Bahati Makani (deceased).
30. True to the parties' intentions as expressed in the memorandum of understanding, a sale agreement dated the same day, the 19th of July 2004, was executed between Ali Musa Chibole on one part and Benedicto Bahati Makani and Mary Wairimu Bahati on the other part, pursuant to which Ali Musa Chibole sold land parcel number Butso/So/Shikoti/1046 to Benedicto Bahati Makani and Mary Wairimu Bahati at a consideration of KShs 540,000.
 31. Both agreements are dated the same date, prepared by the same advocate, and as noted above, the first defendant herein was signatory to one agreement and witness to the other. The purchase price in the sale agreement was as agreed in the memorandum of understanding. The motivation for the tripartite transaction was expressly explained in the memorandum of understanding: Benedicto wanted to buy Butso/So/Shikoti/1805, which was still registered in Margaret's deceased husband's name, from Margaret. Margaret in turn wanted to buy back the family home, which she and the family were in occupation of, from Chibole. Margaret could not transfer Butso/So/Shikoti/1805 immediately to Benedicto since succession proceedings in respect of her late husband's estate needed to be completed. In furtherance of the memorandum of understanding, Benedicto acquired Butso/So/Shikoti/1046 and Margaret and Tito Makari Ataka obtained confirmed grant in respect of Margaret's husband's estate. I am persuaded that the trust property was identified by the parties as Butso/So/Shikoti/1046. The purpose of its acquisition by Benedicto was that he holds it for Margaret who was the beneficiary. Regarding the amounts that were payable pursuant to the memorandum of understanding, the defendants neither led any evidence to demonstrate non-payment nor counterclaimed for any unpaid amount.
 32. After acquiring land parcel number Butso/So/Shikoti/1046, Benedicto Bahati Makani subdivided it on September 12, 2014 into land parcel numbers Butso/So/Shikoti/3673 and Butso/So/Shikoti/3674, before passed away on November 3, 2014. I am persuaded that Benedicto Bahati Makani held land parcel number Butso/So/Shikoti/1046 as well as its resultant subdivisions Butso/So/Shikoti/3673 and Butso/So/Shikoti/3674 in trust for Margaret Ayoti Ataka (deceased).
 33. It follows therefore that the plaintiff has established his case. On the other hand, the defendants' counterclaim is not merited.
 34. In the result, I make the following orders:
 - a. The defendants' counterclaim is dismissed.
 - b. A declaration is hereby issued that Benedicto Bahati Makani (deceased) held Land Parcel Numbers Butso/So/Shikoti/3673 and Butso/So/Shikoti/3674 in trust for Margaret Ayoti Ataka, her personal representatives and the administrators of her estate.
 - c. A declaration is hereby issued that the defendants hold Land Parcel Number Butso/So/Shikoti/3673 and Land Parcel Number Butso/So/Shikoti/3674 in trust for Margaret Ayoti Ataka, her personal representatives and the administrators of her estate.
 - d. The plaintiff as the administrator of the estate of Margaret Ayoti Ataka to transfer Land Parcel Number Butso/So/Shikoti/1805 to the defendants within 45 (forty-five) days from the date of delivery of this judgment.
 - e. The defendants to transfer Land Parcel Numbers Butso/So/Shikoti/3673 and Butso/So/Shikoti/3674 to the plaintiff within 45 (forty-five) days from the date of transfer of Land Parcel Number Butso/So/Shikoti/1805 to the defendants.



- f. In default of any of the parties signing the necessary documents to effect the above orders, the Deputy Registrar of this court is hereby authorised to sign on his or her behalf.
- g. No order as to costs of the suit and the counterclaim.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF NOVEMBER, 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Iddi holding brief for Mr Nandwa for the plaintiff

Ms Muthami holding brief for Mr Abok for the defendants

Court Assistant: E. Juma

