



**Gathogo (Suing as the Legal Representative of Peter Gathogo Githinji
- Deceased) v Wahome & 3 others (Environment and Land Appeal
E016 of 2023) [2024] KEELC 5067 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

LN GACHERU, J

JULY 4, 2024

BETWEEN

**LOISE NJOKI GATHOGO (SUING AS THE LEGAL REPRESENTATIVE OF
PETER GATHOGO GITHINJI - DECEASED) APPELLANT**

AND

GODFREY GITHINJI WAHOME 1ST RESPONDENT

JAMES MAINA WAHOME 2ND RESPONDENT

JOHN KIERU WAHOME 3RD RESPONDENT

JULIUS KINGARU WAHOME 4TH RESPONDENT

JUDGMENT

1. Vide an Amended Memorandum of Appeal dated 2nd November, 2023, and filed before this Court on 6th November, 2023, the Appellant sought for the following reliefs:
 1. That the appeal be allowed and the dismissal order of the suit be set aside.
 2. That the orders sought in the Complaint dated 18th July, 2019, be allowed as prayed.
 3. The costs in this court and the court below be granted to the appellant.”
2. The Appellant and the Respondents are paternal cousins through their respective fathers namely, Githinji Gathogo(the Appellant’s father) and Wahome Gathogo(the Respondents’ father), who were siblings, both now deceased. The Appellant’s main prayer at the trial Court as set out in the Complaint dated 18th July, 2019, and filed in Court on 19th July, 2019, was that the estate of his father Githinji Gathogo was entitled, by virtue of a trust, to 2 Acres (0.81 Hectares), out of Land Parcel No. LOC.14/ Kiru/1227, (the suit property) which land is registered in the name of the Respondents’ father.



3. The Appeal challenges the decision of the trial Court delivered on 9th May, 2023, in ELC Case No. 8 of 2019 (Chief Magistrate's Court - Murang'a) dismissing the Plaintiff's (now Appellant) claim. The gravamen of the present Appeal is the trial Court's finding and holding to the effect that the Plaintiff (the now Appellant herein) failed to prove on a balance of probabilities that the Defendants (the Respondents herein) were holding the suit land on behalf of the Plaintiff or on behalf of the family of Githinji Gathogo (deceased).
4. The Appeal is anchored on the twelve (12) grounds set out on its face, as detailed below:
 - i. The trial Court erred in fact and in law in misconstruing the appellant's case to be one based on a customary trust instead of a resulting trust.
 - ii. The trial Court erred in fact and in law in relying on case law that dealt with customary trust instead of a resulting trust.
 - iii. The trial Court erred in fact and in law in finding that there was trust whether customary or constructive despite the very elaborate evidence in the appellant's witness statement on which he was scantily, if at all, cross-examined.
 - iv. The trial Court erred in fact and in law in allowing itself to be misdirected by the Respondent who valiantly attempted to suggest that the appellant was claiming the family land on an inheritance/beneficiary basis. This was in disregard of the appellant's explanation that he had filed the said Succession proceedings in error, which he rectified by filing Murang'a CMC. ELC. No.8 of 2019.
 - v. The trial Court erred in fact and in law in implicitly finding that the appellant's case was res judicate due to the Succession proceedings.
 - vi. The trial Court wrongly considered property in the name of the appellant and his late father as being material in the proceedings in Murang'a CMC. ELC. No.8 of 2019.
 - vii. The trial Court misapprehended the law of trusts hence its finding that a trust can never be implied by the Court unless there is an intention to create a trust in the first place.
 - viii. The trial Court erred in fact in finding that the root of the title of Land Parcel No. LOC.14/KIRU/1227, in the name of Wahome Githinji was established through the written statement of the respondent.
 - ix. The trial Court erred in law in that after finding that the registration of Wahome Githinji and subsequently in the Respondents' names did not relieve them of their duties as trustees. The Court fell into error in concluding that because of family ties a trust could not arise.
 - x. The trial Court erred in fact and in law in not dealing at all with the significance or otherwise of the consent obtained from the Land Control Board by Githinji Gathogo And Wahome Gathogo, for the subdivision and transfer of 2 Acres out of Land Parcel No. LOC.14/KIRU/1227, by Wahome Gathogo To Githinji Gathogo, which evidence was a string factor establishing the constructive trust.
 - xi. The trial Court misapprehended the evidence of the appellant that he had been in occupation of 2 Acres out of Land Parcel No. LOC.14/KIRU/1227, since 1973 and had put up 5 houses over the said period and no eviction Order or proceedings had ever been initiated by Wahome Githinji, or the Respondents, while in the meantime, Wahome Gathogo, and the Respondents



herein were well settled and living on the remaining 3 Acres in land parcel No. LOC.14/ Kiru/1227.

- xiii. The trial Court introduced Suo motto the concept of the Kikuyu Customary Muramati (the family head or the administrator of the deceased's estate) based on the case of In Re estate of Ruth Ngethe Munyua (Deceased) [1997] eKLR, to imply that Githinji Gathogo, being the first born of Gathogwas the Muramati. the Court therefore misconstrued the appellant's case as one for resolving a family (Succession) dispute.”
5. The Court admitted the Appeal under Section 79(B) of the *Civil Procedure Act* on 25th September 2023, and directed that the same be canvassed by way of written submissions.

Appellant's Submissions

6. The Appellant filed written submissions on 22nd December, 2023, through the Law Firm of J.N Mbuthia And Company Advocates, wherein two issues were identified for determination being:
 - i. Whether there was a resulting trust [in respect of the suit land]; and,
 - ii. Whether the issues raised by the Plaintiff before the trial Court were res judicata
7. The Appellant submitted that he had adduced sufficient evidence before the trial Court to demonstrate the existence of a resulting trust in favour of his father's estate particularly, the application for consent of the Land Control Board for the subdivision and transfer of the suit property dated 20th June, 1973, executed by Wahome Gathogo and Githinji Gathogo, wherein, the former was granted 3 Acres and the latter 2 Acres, out of the suit land.
8. The Appellant further submitted that the trial Court disregarded the clear evidence which demonstrated the creation of a resulting trust in favour of the Githinji Gathogo, in respect of 2 Acres from the suit property. The Appellant insisted that the aforesaid consent for transfer of the suit land was not challenged by the Respondents herein at the trial Court as a forgery; save for claims by the Respondents during cross-examination that they were NOT aware of the same.
9. Further, he submitted that the trial Court failed to appreciate the full significance of the consent to transfer the suit land dated 20th June, 1973, whereas the aforementioned document established the existence of a trust relationship between the two brothers Githinji Gathogo and Wahome Gathogo, in respect of suit property which was not revoked.
10. Further, it was also submitted that the consent to transfer the suit land dated 20th June, 1973, formed the basis for the Appellant's father to develop the 2 Acres out of the suit property granted to him by putting up five (5) houses and planting tea bushes and coffee thereon. The Appellant stated that occupation of the suit land by his predecessor-in-title demonstrated the existence of a resulting trust.
11. The Appellant further submitted that the 2nd Respondent herein Godfrey Githinji Wahome, admitted during cross-examination that the Appellant was in possession of the suit property; and, although the Respondents attributed the Appellant's possession to refusal to vacate the suit land, they failed to provide any evidence before the trial Court of ever having lodged a claim for trespass against the Appellant. Further, that the Respondent's failed to present evidence of any summons or minutes from the local Chief requiring the Appellant to vacate the suit land, apart from a single meeting called by the local Chief at the behest of the Respondent's father which was not supported by any minutes.
12. The Appellant also submitted that the trial Court premised its decision dated 9th May, 2023, on the issue of customary trust whereas the Plaintiff (now Appellant) did not raise the existence of a customary



trust in respect of the suit land nor did the Defendants (Respondents herein) deny the existence of the same.

13. The Appellant added that the trial Court went out on a frolic of its own by bringing up the issue of the age of the registered proprietor of the suit land as well as the age of the Appellant's father, which issue was not raised by any of the parties before it. Further, he submitted that the trial Court anchored its decision on the holding of the Court in the case of *Isaack Kiebia M'Inanga Vs Isaaya Theuri [M'Lintari & Another SCoK No. 10 of 2015](#)*, notwithstanding that the aforesaid case was distinguishable from the issues raised in the suit before the trial Court.
14. Further, it was argued that the trial Court allowed itself to be misdirected by the Respondents herein, who brought up different land parcels from the suit land namely, LOC.14/Kairo/694, and LOC.14/Kiru/906, and succeeded in deflecting the Court's focus from the suit property which was the only article of property at issue in the proceedings before the trial Court.
15. The Appellant further submitted that although he pleaded a resulting trust in the proceedings before the trial Court, the question of a resulting trust was not addressed at all by the Court. Citing the holding of the Court in the case of *Baron Mathenge Munyoki Vs Dedan Mbangua Kithusi [2022] eKLR*, he submitted that his occupation of the suit land constituted sufficient evidence establishing the existence of a resulting trust in respect of the suit land because a resulting trust arises from the circumstances of a particular case.
16. On the issue of res judicata, raised by the Defendants at the trial Court, the Appellant submitted that res judicata pertains to jurisdiction; and that case number Nyeri HC Succ. Cause No.668 of 2011 (filed by the Respondents), being a succession matter, the Court which heard and determined the same lacked the jurisdiction to address a question of resultant trust, a matter reserved for the Environment and Land Court (ELC). The Appellant further submitted that that the preceding situation also applies to case number Nyeri HC Succ. Cause No.668 of 2011, which case, he admitted in his submissions, that he filed under the mistaken belief that it could resolve the dispute over the suit property.
17. It was also submitted that the trial Court dismissed the suit before it based on a misapprehension of the law to the effect that: the Succession Court in Nyeri HC Succ. Cause No.668 of 2011, had determined the ownership status of the suit land with finality. The Appellant subscribed to the position that the registration of a person as owner of a parcel of land on basis of a decision of a Succession Court cannot determine the issue of a trust pertaining to land; secondly, that such a decision cannot constitute a bar to subsequent litigation on grounds of res judicata.

Respondents' Submissions

18. The 2nd, 3rd and 4th Respondents filed their written submissions on 29th January, 2024, through the Law Firm of Kiminda & Co Advocates, wherein, five (5) issues for determination were identified as follows:
 - a. Did the Appellant establish the existence of trust over the ownership of LR.Loc.14/Kiru/1227?
 - b. Considering the several successions matters over the suit land, was the issue of ownership of LR.Loc.14/Kiru/1227, settled therefore rendering the suit res judicata?
 - c. Did the Court err by considering evidence relating to other parcels of land i.e., LOC.14/Kairo/694 and LOC.14/Kiru/906, merely because the Appellant had not pleaded their existence?



- d. Did the trial Court misconstrue the Appellant’s case by addressing the Court’s mind on Kikuyu Customary trust as proclaimed in the case of *Isaack Kiebia M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No. 10 of 2015*?
- e. Was the Appellant’s suit a nullity ab initio for instituting a suit against a deceased person while aware of the foregoing situation?”
19. The Respondents submitted that at the time of the filing of the suit before the trial Court in year 2019, the Appellant was well aware that the 1st Respondent was deceased as of year 2014; and, to avoid confirming knowledge of the 1st Respondent’s demise, the Appellant denied during the trial having made any acquaintance with the 1st Respondent (his paternal cousin). They attributed the Appellant’s disavowal of having known the 1st Respondent to the assertion that he served suit papers upon the 1st Respondent some five (5) years after the death of the latter.
20. The Respondents also submitted that the Appellant, having advanced the claim of service of suit papers upon a deceased person, was faced with a dilemma, and, to resolve the same dilemma, attempted to withdraw the suit before the trial Court. They further submitted that the suit before the trial was a nullity ab initio and incapable of being withdrawn under Order 24 Civil Procedure Rules, because the 1st Respondent is one of the proprietors of the suit land, and the latter’s interest therein is not severable from that of the 2nd, 3rd and 4th Respondents. They further submitted that PW2 did confirm during the trial that the 1st Respondent was deceased at the time of filing the suit before the trial Court.
21. It was the Respondents’ further submissions that the trial Court was not misdirected on the question of trust for the reason that the Plaintiff’s (now Appellant) claim was founded on trust, although the nature of trust was not disclosed. The Respondents argued that on the basis of the facts presented by the Plaintiff (now Appellant), the trial Court was correct to address itself on the issue of a Customary trust, and to enter the finding and holding that the Appellant failed to establish the existence of a Customary trust in respect of the suit property.
22. It was the Respondents’ submissions that the issue of Resulting trust is being introduced for the first time by the Appellant in the present Appeal, and was not raised at the trial Court. Further, that the Appellant wishes this Court to disregard his submissions at the trial Court, which spoke to a trust of an undisclosed nature, but whose facts were adjudged by the trial Court to point to an insufficiently-proved Customary Trust.
23. Citing Black’s Law Dictionary, 9th Edition for a description of a “Resulting Trust”, the Respondents submitted that a Resulting trust cannot apply to the suit land as the Appellant did not adduce any evidence demonstrating that his father ever transferred any parcel of land to the Respondents’ father or advanced any sum of money to the Respondents’ father to purchase a parcel of land on his behalf. They buttressed these submissions by citing the provisions of Section 26(1) (a) and (b) of the [Land Registration Act](#), which sets out the procedure for challenging a title deed.
24. With regard to the Appellant’s claim that the trial Court committed an error of fact by addressing itself to other parcels of land apart from the suit property, the Respondents’ response was that they introduced land parcel numbers LOC.14/Kairo/604, and LOC.14/Kiru/906, to the suit to dispel the impression created by the Appellant that his father was landless and his brother (the Respondents’ father) was denying him his land. They added that the Appellant’s father is the registered owner of land parcel number LOC.14/Kairo/604, located within the vicinity of the suit property.
25. Further, it was submitted that the Appellant did not explain to the trial Court why the consent to transfer the suit land dated 31st May, 1978, was never effected by his father who died in 1986, some eight



years following the execution of the aforesaid document. They also submitted that they were unaware of the said consent to transfer, and only learnt of it during the trial; Further, that their father who died in 1998, never spoke to them of it, and the only inference to be drawn from the prevailing circumstances was that the Appellant's father failed to satisfy some condition of the transaction entered into with their father, which led to lack of completion of the transfer of 2 Acres of the suit land in his favour.

26. On the question of res judicata, it was submitted that the suit property was the subject of the proceedings in Nyeri HC Succ. Cause No. 650 of 2011, wherein, the Court determined the matter relating to the suit land by confirming a Grant of Letters of Administration, which distributed the suit property. Further, that in Nyeri HC Succ. Cause No. 650 of 2011, the Appellant sought for revocation of the aforesaid Grant and he did not raise the question of trust at that stage.
27. The Respondents further submitted that the Appellant, thereafter, abandoned his claim for revocation of Grant before the Nyeri Court and instituted Murang'a HC Succ. Cause No.415 of 2013, and followed by an Environment and Land Court (ELC) suit before the Magistrate's Court in Murang'a.
28. It was their submissions that in Nyeri HC Succ. Cause No. 650 of 2011, the Appellant laid claim to an interest and rights in the estate of the Respondents' father, which claim was dismissed by the Court. It was stated that the Appellant has introduced the issue of trust upon failing to establish his claim in Nyeri HC Succ. Cause No. 650 of 2011; therefore, this Court should not allow him to commence numerous lawsuits over the same suit land.

Applicant's Reply To Respondents'

Submissions

29. The Applicant filed a reply to the Respondents' submissions on 30th January, 2024. While responding to the Respondents' claim that the suit before the trial Court was a nullity and, therefore, incapable of being withdrawn, the Appellant submitted that he was granted leave by the Court to withdraw the suit against the 1st Respondent herein on 17th August, 2022, and the same can be verified on page 75 of the record of the present Appeal.
30. On the issue of trust, the Appellant refuted the Respondents' averment that in the proceedings before the trial Court, he did not disclose the nature of trust which he was claiming. He submitted that paragraph 4 of the Plaintiff did reveal the character of the trust that he was asserting, and that trust was not a customary trust. The Appellant reiterated that both the trial Court and the Respondents in their submissions did not address the particulars of trust as set out on paragraph 4 of the Plaintiff dated 18th July, 2019, and in the Appellant's witness statement even dated.
31. Further, it was submitted that this Court should decline the Respondents' invitation to take judicial notice of the fact that: at the time of land consolidation during the early 1960s, a single person could not be registered as proprietor of two parcels of land in the same locality within the former Central Province of Kenya.
32. The Appellant argued that the trial Court did not take judicial notice of the preceding allegation and categorized his claim as being founded on customary trust without laying a proper basis to justify such a categorization. Further, that the Respondents' submissions that this Court do take judicial notice of the preceding, constituted an admission by the Respondents that the trial Court had based its decision on a customary trust on the basis of insufficient evidence.
33. It was also submitted that Section 60 (1) of the *Evidence Act* provides that the Courts may take Judicial Notice of all matters of general or local notoriety. Relying on the holding of the Court in the case



of Isaac Aluoch Polo Aluochier Vs National Alliance and 542 Others [2016] eKLR, the Appellant, submitted that to succeed in his claim, the party urging the Court to take judicial notice of some facts needs to present evidence from which the facts in issue may be judicially noticed by the Court. The Appellant further submitted that the Respondents were seeking to introduce evidence before this Court and were disguising the same as a call to take judicial notice of some facts.

34. The Appellant reiterated that the Land Control Board's Consent, which he presented before the trial Court constituted good evidence of the existence of a trust in respect of the suit land and the Respondents failed to impugn the same. Further, that the trial Court lacked material on which to base its rejection of the said Consent, save for the speculative claims by the Respondents to the effect that the Appellant's father failed to satisfy some unknown conditions of the transaction with their father hence non-completion of the transfer of the 2 Acres from the suit property to the Appellant's father.
35. On the question of res judicata, the Appellant submitted that the Respondents while conceding that the Succession Court did not address itself to the issue of trust, entered the submission that the same Succession Court was capable of settling the issue of trust. It was argued that the jurisdiction of a Court is everything and the Respondents failed to demonstrate how a Succession Court derived the jurisdiction to determine questions founded on trust.
36. Having carefully considered the available evidence as contained in the Record of Appeal, the rival written submissions, cited authorities and the relevant provisions of law; this court as an Appellate court finds the issues for determination are as follows;
 - i. Was the suit before the trial Court incompetent on grounds of the demise of the 1st Respondent prior to the filing of that suit?
 - ii. Were the issues raised by the Appellant before the trial Court res judicata?
 - iii. Was the trial Court correct in its holding that the Appellant failed to establish the existence of a customary trust in respect of the suit land?
 - iv. Is the suit property subject to a Resulting trust?

i. Was the suit before the trial Court a nullity on grounds of the demise of the 1st Respondent prior to the filing of the suit?

37. This court has considered the instant Appeal together with the written submissions, and finds that this is a first Appeal. Therefore, the court is allowed to consider both the law and the facts, as provided by section 65(1)(b) of the *Civil Procedure Act*, which provides;

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;”

38. Further, the duty of the Appellate court is set out in section 78 of the *Civil Procedure Act*, which duty is to re-consider, re-evaluate, re-analyze and re-assess the available evidence before the trial court, and then come up with its own independent conclusion, while always bearing in mind that this court has not seen nor heard the witnesses, like the trial court did, and therefore should give allowance to that.
39. In the case of Kurian Chacko Vs Varkey Ouseph AIH 1969 Kerala 16, which was cited with approval in the case of Bwire Vs Wayo and Saloki (Civil Appeal E032 of 2021 [2022]), the court held that a first



appellate court is the final court of fact ordinarily and therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage, and that anything less than a full re-evaluation of the entire evidence by the appellate court would amount to visiting an injustice upon a litigant.

40. This Court is also alive to the fact that the trial Court exercises discretion too, as set out by *the Constitution* and Statutes as does this court, and its decision cannot be interfered with simply because this is an Appeal. In the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, the Court proclaimed as follows regarding the scope of the appellate powers;

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”

41. Further in the case of *Mbogo & Another vs Shah*, [1968] EA, p.15, the Court held that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

42. Further, in the case of *Mwanasokoni Vs Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and in the case of *Kiruga Vs Kiruga & Another* (1988) KLR 348, the court held that the appellate Court will not ordinarily interfere with findings of fact by the trial Court, unless they were based on no evidence at all, or on a misapprehension of it, or the trial Court is shown demonstrably to have acted on wrong principles in reaching its findings.

43. Similarly, in the case of *Abok James Odera t/a A.J. Odera & Associates Vs John Patrick Machira- & Co. Advocates* [2013] eKLR, the duty of the first appellate Court was set out as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the learned trial Judge are to stand or not and give reasons either way.”

44. This was also echoed by the court in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

45. It is trite that any suit commenced against a dead person is a nullity in law. In the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others* (2018) eKLR), the Court cited with approval



the Indian case of *C. Muttu vs. Bharath Match Works* AIR 1964 Kant 293 where the Court held as follows:

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

46. However, if a suit is instituted against several Defendants, the same does not become a nullity for reason of the demise of one of them. In *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others* (2018) eKLR), the Court cited the holding in another Indian case of *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267 where it was proclaimed as follows:

“... if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

47. Relying on the preceding guidance from the Courts, the suit before the trial Court does not become a nullity with regard to the 2nd, 3rd and 4th Respondents herein on account of having been filed following the 1st Respondent’s death, which occurred prior to the filing of the same suit.
48. At any rate, the Appellant withdrew the suit against the 1st Respondent and upon procuring the requisite leave of the Court, as attested by the Record of Appeal on pages 74 and 75 thereof. In the circumstances, the Court holds and finds that there was a valid suit against the 2nd, 3rd and 4th Respondents in the proceedings before the trial Court.

ii.) Whether the issues raised by the Appellant before the trial Court were res judicata?

49. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

50. The Black’s law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are;

- 1) an earlier decision on the issue,
- 2) a final Judgment on the merits and



3) the involvement of same parties, or parties in privity with the original parties...”

51. In the case of *Kennedy Mokuva Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR*, the Court identified three issues for consideration when determining claims based on *res judicata*, as follows:

“A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

In order therefore to decide as to whether an issue in a subsequent Application is *res judicata*, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. what issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”

52. The jurisdiction of this court is set out under Section 13 of the Land and Environment Court Act which provides as follows:

- 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- 2) In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes?
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.”

53. In the current case, the Respondents submitted that the Appellant’s claim over a portion of the suit property was capable of determination by the Succession Court, which adjudicated over the matter of the estate of registered owner of the suit land. The Court has previously entered the finding and holding that the suit before the trial Court concerned a trust in respect of the suit property.

54. It is the finding and holding of this Court that under constitutional and statutory framework pertaining to the organization of Courts of Law in Kenya, a Succession Court is not possessed of any jurisdiction to determine issues of trust relating to land and the same mandate is exclusively reserved for this court pursuant to Section 13 of the Land and Environment Court Act.



55. Accordingly, the Court finds and holds that the issues raised in the proceedings before the trial Court and in the current Appeal were not rendered res judicata on account of the decisions delivered by the Succession Courts in respect of estate of the registered proprietor of the suit property.

iii.) Was the trial Court misdirected to hold that the Appellant failed to establish that the suit land was the subject of a Customary Trust?

56. It is trite that he who alleges must prove. Sections 107, 109 and 112 of the *Evidence Act* provide as follows:

Section 107 of the *Evidence Act*, stipulates as follows:

- “(1) 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 facts it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

57. The Appellant contended that his father and the Respondents’ father, who were siblings, executed an Application for the Land Control Board’s Consent dated 20th June, 1978, wherein, the Appellant’s father was entitled to 2 Acres out of the suit land, which transaction, however, was not completed. In the current case, the Appellant’s claim over 2 Acres from the suit land is not founded on allegations to the effect that the suit land is family land.

58. In the case of Anthony Francis Wareham t/a AF Wareham & 2 others vs. Kenya Post Office Savings Bank [2004] eKLR, the Court proclaimed that:

“... cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings...”

59. Section 26(1) of the *Land Registration Act* provides that:

“The certificate issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

60. The Court in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR), held as follows:

“While sections 25, 26 and 28 of the *Land Registration Act* recognized that the rights of a registered proprietor of land were absolute and indefeasible, those were only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests included trusts. In the absence of any limitation as to the trusts, that included constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property was provided under law, and included a constructive trust. Section 28 of the *Land Registration Act* provided that the registration was subject to overriding interests. One of the overriding interests was a trust, which included constructive trust.”

61. It is trite that the standard of proof in civil cases is on a balance of probabilities. The Court in *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372, defined the standard of proof on a balance of probabilities as follows:

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.

62. Further, Section 3 of the *Law of Contract Act* states as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) The contract upon which the suit is founded –
- (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

63. In the proceedings before the trial Court, the registered owner’s title over the suit land was not put under challenge on grounds of acquisition through fraud or misrepresentation. It was the Respondents’ contention that the Appellant did not disclose the nature of the trust under which he was claiming 2 Acres from the suit land. In response, the Appellant submitted that it was clear from paragraph 4 of his *Plaint* dated 18th May, 2023, that his claim pointed to a Resulting trust. For ease of reference, paragraph 4 states as follows:

“The late Wahome Gathogo held 0.81 hectares (2 Acres) out the said land in trust for Githinji Gathogo, the Plaintiff’s father on the following grounds:

- a. The late Githinji Gathogo’s 2 acres were incorporated into that of Wahome Gathogo to enable the resultant land to reach the Kiambuthia-Kanjama Road.
- b. The 2 deceased persons namely Githinji Gathogo and Wahome Gathogo resolved that the Plaintiff should settle on 2 acres of the suit land.



- c. The late Githinji Gathogo and Wahome Gathogo were about to finalise the issue of the trust which they had agreed to dissolve through a subdivision and transfer of the 2 Acres to Githinji Gathogo and Land Control Board consent had been issued in that regard.
- d. Pursuant to the acknowledgement of the trust, Peter Githinji Gathogo was allowed onto the suit land in or about 1973 and has extensively developed it by building 5 houses in the course of time and also planted 2,000 tea bushes and 400 coffee trees.”

- 64. If the facts pleaded by the Plaintiff(Appellant), in paragraph 4 above are assumed to be undisputed, the question that would arise is whether those facts formed a sufficient basis upon which the trial Court could imply the existence of a Resulting trust in respect of the suit land, as claimed by the Plaintiff (now Appellant).
- 65. In the current case, it was the Appellant’s submission that, in the proceedings before the trial Court, he did not claim that the suit property was subject to a customary trust. It was his further contention that his father owned 2 Acres out of the suit land which was combined with 3 Acres belonging to his younger brother (the Respondents’ father) to constitute 5 Acres, which is the total acreage of the suit land because the two brothers wanted their land to abut the Kiambuthia-Kanjama Road.
- 66. Upon perusal of the pleadings and evidence tendered before the trial Court, the Court is satisfied that in those proceedings, the Appellant did not make allegations to the effect that the suit property was subject to a customary trust under the Kikuyu customary law.
- 67. On re-evaluating and re-considering the totality of the evidence availed by the parties before the trial Court and submissions filed before this Court, the Court holds that the facts raised by the Plaintiff(Appellant), in the suit before the trial Court weigh heavily towards the existence of a Resulting trust in respect of the suit property, rather than a customary trust under the Kikuyu customary law.

iv.) Is the suit property subject to a Resulting Trust?

- 68. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR, the Court held as follows;
 - “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.”
- 69. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & Others (2015) eKLR, the Court set out on the law on trusts as follows:
 - “According to the Black’s Law Dictionary, 9th Edition; a trust is defined as: ‘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. ...

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)."

70. A Resulting trust is defined in the Halsbury's Laws of England, 4th Edition Vol. 48 at paragraph 597 as follows:

"A resulting trust is a trust arising 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 it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended."

71. While discussing the burden of proving the existence of a Resulting trust, the Court of Appeal in the case of *Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Center* [2018] eKLR stated that:

"Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley – Civil Appeal No. 75 of 2016* (unreported). It was upon the respondent to establish that it was the parties' intention that the appellant would purchase and hold the suit parcels in trust for it. Did it do so?"

72. The Court has perused the Application for the Land Control Board's Consent dated 20th June, 1978. On the same document, it is clearly indicated that Wahome Gathogo, the Respondents' father and registered proprietor of the suit property, made an application to subdivide the suit land measuring approximately 5 Acres into two portions as follows: Githinji Gathogo to receive 2 Acres and Wahome Gathogo to receive 3 Acres after subdivision.

73. The Application for the Land Control Board's Consent dated 20th June, 1978, was executed by the Respondents' father as the registered proprietor of the suit property. At the trial Court, the



aforesaid document was not challenged by the Respondents as a forgery. The mental capacity of the Respondent's father to execute the foregoing document was not questioned during the trial.

74. In the case of *National Bank of Kenya Ltd versus Pipeplastic SamKolit (K) Ltd & Anor* [2000] eKLR, the Court held as follows:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract; unless coercion, fraud or undue influence are pleaded and proved...”

75. The intention of the Respondents' father to allocate 2 Acres from the suit property to the Appellant's father was not controverted by the Respondents save for claims that the Appellant's father must have failed to satisfy some condition of the transaction entered into with their father.

76. The Court holds and finds that the Application for Land Board's Consent dated 20th June, 1978, which was executed by the registered proprietor of the suit land clearly and distinctly expressed his intention to demise 2 Acres from the suit property to his brother, Githinji Gathogo, the Appellant's father and predecessor-in-title.

77. The Respondents failed to disclose to the Court the particular condition or contractual term allegedly breached by the Appellant's father, leading to non-completion of the aforesaid transaction. In any event, the Court cannot base its findings and decision on unsupported claims.

78. Consequently, the Court holds and finds that by executing the Application for the Land Control Board's Consent dated 20th June, 1978, the Respondents' father created a Resulting trust in favour of his brother, the Appellant's father, in respect of the 2 Acres from the suit property currently occupied by the Appellant.

79. It is the further holding of this Court that the Appellant occupied the portion of the suit land which he is claiming on the strength of the agreement struck between his father and the Respondents' father, which agreement is attested to by the Application for the Land Control Board's Consent dated 20th June, 1978.

80. From the evidence tendered before the trial Court, the Court is satisfied that the Appellant has been in occupation of the suit land since 1978 and carried out developments thereon as stated in the pleadings, which fact was not denied by the Respondents who, however, attributed his possession to a mere refusal to vacate.

81. Moreover, the Respondents failed to present sufficient evidence to buttress their position that, pursuant to Section 60 of the *Evidence Act*, the Court should take judicial notice of the allegedly- notorious fact that in the early 1960s when land consolidation was underway in the former Central Province, it was not possible for a single individual to be registered as proprietor of two or more parcels of land located in the same vicinity.

82. The Court holds and finds that the aforesaid Resulting trust is not negated by the fact that the beneficiary thereof is, or, could be the registered owner of a separate parcel of land located in the vicinity of the suit property.

83. Having carefully considered the available evidence, the Court holds and finds that the instant Appeal is merited. The decision of the trial Court delivered on 9th May, 2023, is hereby upset and set aside in its entirety. The Court holds and finds the Appellant is entitled to the 2 Acres of the suit property being Loc.14/Kiru/1227, which he is currently occupying and which is subject to a resulting trust in his favour.



84. Consequently, the Court having set aside the Judgment of the trial Court dated 9th May 2023, finds and holds that the Appellant is entitled to the prayers sought in the Plaint dated 18th July 2019, in terms of prayers No. 1, 2 & 3.

85. The current dispute being between family members, the Court directs each party to bear its own costs before the trial Court and in respect of the present Appeal.

The Appeal is allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS DAY OF 4TH OF JULY, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo - Court Assistant

Mr Ndonga H/B for Mr Mbutia for the Appellant

2nd Respondent

M/s Mwangi H/B for Mr Kiminda for the 3rd Respondent

4th Respondent

L. GACHERU

JUDGE

~~4/7/2024~~

