



Akech (Administrator of the Estate of Jared Akech Omalo) ((Administrator of the Estate of Jared Akech Omalo)) v Anyango (Administrator of the Estate of Petro Anyango Otieno) ((Administrator of the Estate of Petro Anyango Otieno)) (Environment and Land Appeal E007 of 2023) [2024] KEELC 6494 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

AY KOROSS, J

OCTOBER 3, 2024

BETWEEN

**CAROLINE ACHIENG AKECH APPELLANT
(ADMINISTRATOR OF THE ESTATE OF JARED AKECH OMALO)**

AND

**JAMES OTIENO ANYANGO RESPONDENT
(ADMINISTRATOR OF THE ESTATE OF PETRO ANYANGO OTIENO)**

(This is an appeal against the judgment of the Hon. PM J.P. Nandi, which was delivered on 17/02/2023 in Bondo PM ELC Case No. E08 of 2023)

JUDGMENT

Background of the appeal

1. To understand the setting of this appeal, it is paramount to summarize the nature of the case that was before the trial court in which the appellant was the defendant and the respondent the plaintiff.
2. Caroline Achieng Akech (Caroline) was the registered owner of the disputed parcel of land known as West Asembo Nyagoko 2194 measuring 1.2 Ha. (suit property) which was previously registered in her husband's name Jared Akech Omalo (deceased appellant).
3. James Otieno Anyango (James) is the son of Petro Anyango Otieno (deceased respondent) who ostensibly bought the suit property from the deceased appellant.



4. In a plaint dated 21/02/2022 in which James represented the estate of the deceased respondent, he averred the deceased respondent had bought the suit property from the deceased appellant having entered into a written agreement on 13/02/1971 whereby the purchase price was ksh. 30,000/-.
5. He stated that upon full settlement, the deceased respondent was put in exclusive possession and resided upon it together with his family, and thus a trust was created which was an overriding interest.
6. In particularizing breach of trust against the deceased appellant which included failing to act in good faith and ignoring the deceased respondent's equitable interest, James averred that all attempts to settle the matter by having the suit property transferred to him were resisted by the deceased appellant.
7. Consequently, he sought declarations that he was entitled to exclusive possession of the suit property and that Caroline held the suit property in trust for him, mandatory and permanent injunctions, and costs of the suit.
8. In representing the deceased appellant's estate, Caroline who was self-represented, filed a defence dated 16/03/2022 whereby she admitted she was the registered owner of the suit property.
9. However, she largely denied the deceased respondent's assertions. In responding to some of the averments in the plaint, she stated that the deceased respondent possessed a neighbouring parcel of land and not the suit property. She stated though the deceased respondent had never occupied the suit property, James had trespassed on it. She further stated she had duly succeeded the deceased appellant's estate.
10. The matter was slated for hearing and both parties testified. Apart from the parties, the deceased respondent's evidence was led by his son Johnson Adenyo Anyango who testified as PW2.
11. James testified as PW1 and produced documents that were marked as Pex a-f and consecutively, they were composed of the suit property's green card, grant of letters of administration ad litem, a purported agreement for sale and payments thereof which were in Dholuo language, certificate of translation, a bundle of photographs and a demand letter.
12. Caroline who testified as DW1 similarly too produced several documents which were marked and produced as Dex 1-7 and serially, they were composed of the grant of letters of administration, confirmation of grant, gazette notice, copy of the suit property's title deed, official search certificate of the suit property and that of land parcel no. West Asembo/Nyagoko/2193.
13. Upon closing parties' cases and submissions being filed, the learned trial magistrate in his impugned judgment recognized a singular issue as arising for resolution; whether the deceased appellant held the suit property in trust for the deceased respondent/James.
14. On this issue, the learned trial magistrate concluded that it was the intention that the suit property would be transferred to the deceased respondent by the deceased appellant and consequently, a holding of constructive trust was made. In finding the deceased respondent had proved her case, the learned trial magistrate granted the deceased respondent the reliefs sought in the plaint.

Appeal to this court

15. Aggrieved by the impugned judgment, the deceased appellant moved this court on 6 grounds of appeal set out in the memorandum of appeal dated 2/03/2023 and they were inter alia: -
 - a. The learned trial magistrate erred in law and fact by misinterpreting land laws.



- b. The learned trial magistrate erred in law and fact by finding the deceased appellant was in possession and occupation without proof from government surveyors,
 - c. The learned trial magistrate erred in law and fact in not considering Caroline's evidence or seeking the evidence of the area chief and thus arrived at an erroneous decision.
 - d. The learned trial magistrate erred in law and fact in not allowing the deceased appellant to defend his case.
 - e. The learned trial magistrate erred in law and fact in not satisfying himself that the agreement for sale was not valid, original, complete, or properly executed.
 - f. The learned trial magistrate erred in law and fact in failing to consider the deceased appellant's documentary evidence and submissions.
16. Upon raising these grounds, the deceased appellant urged this court to set aside the impugned judgment and substitute it with an order dismissing the deceased respondent's claim with costs.

Parties' submissions

17. As directed by the court, the appeal was canvassed by written submissions, and the appellant who was self-represented, filed written submissions dated 22/11/2023.
18. At a glance, one may perceive that the appellant's submissions identify 6 issues for determination, nonetheless, on scrutiny, they addressed grounds (a) and (b) of the appeal which were consolidated into a singular issue-whether trust existed over the suit property.
19. However, it is noted the 2nd limb of ground (b) of proof of occupation and possession by a government surveyor albeit raised as a ground of appeal and addressed in the submissions, was never an issue for determination before the trial court.
20. Additionally, the issues of fraud, misrepresentation, and illegality were never pleaded by any of the parties, made a ground of appeal, evidence led on them, or was the production of the original agreement for sale ever made an issue before the trial court. Further, the purported chief's letter dated 13/04/2023 as addressed in the submissions and deals with ground (c) of the appeal, raises new evidence on appeal.
21. From the submissions, this court notes grounds (d) and (f) of the grounds of appeal were abandoned while ground (e) was addressed.
22. Nonetheless, the deceased appellant introduced new issues in her submissions that were not grounds for appeal; whether Caroline was the registered owner of the suit property, whether she was the deceased appellant's beneficiary, and whether the deceased respondent was lawfully in occupation of the suit property.
23. By the firm of Ms. Odongo Awino & Co. Advocates, the deceased respondent filed written submissions dated 18/12/2023 in which counsel canvassed a singular issue; whether the suit property was held in constructive trust for the deceased respondent.
24. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and legal authorities parties relied upon to advance their respective arguments. However, before identifying these issues, this court must dispense with particular issues that arose from the records, grounds of appeal, and submissions.



Preliminary issues

25. Understandably, the deceased respondent is self-represented and may not comprehend the legal intricacies of appeals but this notwithstanding, the shortcomings cannot be overlooked.
26. Earlier in this judgment, this court shed light on new evidence or issues that were introduced by the deceased appellant either in the grounds of appeal or submissions. Further, the record of appeal introduced a strange letter by the chief of West Asembo Location dated 13/04/2023 that was authored post-judgment and was never produced before the trial court.
27. These pieces of new evidence cannot be entertained at an appellate level as they were never succinctly raised as issues for determination before the learned trial magistrate to enable him to render a determination on them. Additionally, some of the issues raised in the submissions were never raised as grounds for appeal. In the submissions, the deceased appellant should have restricted himself to matters raised on the grounds of appeal.
28. If the deceased appellant wanted to introduce new evidence on appeal, then, he should have moved this court under the provisions of Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28, and 29 of the Civil Procedure Rules.
29. This court's position is anchored in the Court of Appeal decision of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR where Asike-Makhandia JA stated that the only evidence that can be entertained by an appellate court was only that which formed part of the record.
30. Consequently, the letter dated 13/04/2023 is expunged from the court record while any new evidence raised in the memorandum of appeal or submissions will be disregarded.

Issues for determination

31. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
32. The role of an appellate court was aptly stated in the decision of Watt v Thomas [1947] AC, 484 at p 485 which was cited with approval in the Court of Appeal decision of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR thus: -

Lord Simon's speech in Watt v Thomas [1947] AC, 484 at p 485 as follows:

“...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”



33. Reminding myself of the role of an appellate court, I have carefully considered the records and parties' rival submissions, provisions of law and authorities relied upon and the issues that arise for determination are:-
- a. Whether there was a valid agreement for sale.
 - b. Whether constructive trust existed over the suit property.
 - c. What orders should this court issue including an order as to costs?

Analysis and determination

34. The last 2 issues for resolution are interrelated and they shall be addressed consecutively.

a. Whether there was a valid agreement for sale.

36. Agreements for sale in Kenya are governed by the *Law of Contract Act*. Before Section 3 (3) of the *Law of Contract Act* amendments became operative from 1/06/2003 (See Statute Law (Misc. Amendments) No.2 of 2002), the law gave allowance for contracts in land to either be oral or in writing. As for oral contracts, certain conditions had to be fulfilled. This repealed Section 3 (3) stated thus: -

- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –
- (i) Has in part performance of the contract taken possession of the property or any part thereof or
 - (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” Emphasis added.

37. In the impugned judgment, the learned trial magistrate stated as follows in paragraphs 12 and 13: -

“The plaintiff produced the sale agreement dated 13/2/1971 which was finalized on 20/11/1984.”

38. My understanding of this extract of the judgment was that the learned trial magistrate was satisfied there existed a written agreement for sale. In their pleadings, parties took opposing positions with the deceased respondent averring a written agreement for sale was entered on 13/02/1971 while the deceased appellant albeit in her defence stated that there never existed an agreement for sale, contradicted herself and testified as follows: -

“There was an agreement that the land will be sold to them and that was why they were cultivating the land.”

39. An examination of the purported agreement for sale entered on 13/2/1971 between the deceased respondent and Haroon Omallo (Haroon) who was the deceased appellant's father shows the suit property was sold for ksh. 30,000/-. Nonetheless, this alleged written agreement for sale does not meet



the threshold of the repealed Section 3 (3) of the Law of Contract Act as it was never executed by the parties.

40. In my view, this purported agreement is in the real sense a meticulous journaling by the deceased respondent or his family members. They made entries of a historical record of how the deceased respondent purchased the suit property from Haroon, the purchase price, who paid it, how the purchase price was paid, whom it was paid to, and who the witnesses were. The dating of each event was duly chronicled.
41. The existence of such an oral agreement was lent credence by Caroline's testimony, and in the absence of a written agreement, I am satisfied that the agreement for sale was oral, and to this extent, I disagree with the learned trial magistrate's conclusion that the agreement for sale was in writing.
42. From the evidence, Caroline got married to the deceased appellant sometime in 1983- 1984 and she may not have been familiar with transactions over the suit property and she did not rebut the records of payments as adduced by James.
43. From the evidence, the purchase price was paid in cash and kind. Some of those that were paid in kind included giving the deceased appellant a sheep or paying for his transport. All these payments were quantified. As of 20/11/1984, a total sum of kshs. 32,000/= had been paid to either Haroon or the deceased appellant.
44. It appears that though the deceased respondent had been utilizing the suit property before 13/4/1982, he was barred from doing so until he cleared payments toward the balance of the purchase price. There were attempts by the deceased appellant and one George W. Otieno Anyango to enhance the purchase price to kshs. 48,000/- but nothing came of it as the journal entry of 20/11/1984 concludes:

“I George Otieno Anyango gave Jared Aketch Omallo balance for land Sh. 3,900/= and transport 1,000/=”

45. This date of journaling on payment of the balance of the purchase price coincides with Caroline's testimony that the deceased respondent entered the suit property in 1984. I, therefore, find there was a valid oral agreement for sale whose terms were fulfilled in 1984.

b. Whether constructive trust existed over the suit property and (c) What orders should this court issue including an order as to costs?

46. Trusts including constructive trusts are recognized as overriding rights within the provisions of Section 28 of the Land Registration Act and these trusts being overriding rights are ordinarily not noted in the register. Consequently, a proprietor's title is defeasible on the grounds of a constructive trust. Within the provisions of Section 25 of the Land Registration Act, certain trusts can still be noted in the register.
47. Once so noted, such trusts, not being overriding interests, bind the registered proprietor on the terms noted in the register. Since the deceased respondent's trust was not registered in the suit property's title, it follows his claim of customary trust was properly before the trial court.
48. In the decision of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, the Court of Appeal on analysis of Articles 10(1) (b), 10 (2)(b), and 159 (2) (e) of the Constitution of Kenya, stated equity is a constitutional principle of justice and in the exercise of judicial authority, courts are called to defend and encourage equitable doctrines including constructive trust.



49. The Court of Appeal in the decision of *Maina & 87 others v Kagiri (Civil Appeal 6, 26 & 27 of 2011 (Consolidated))* [2014] KECA 880 (KLR) (22 January 2014) (Judgment) upheld the applicability of the doctrine of constructive trust in oral agreements when it stated: -

“In *Yaxley v Gotts & another*, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel.”

50. The Black’s Law Dictionary, 11th Edn, has defined constructive trust thus: -

“An equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it.”

51. The essence of the doctrine of constructive trust and the circumstances of its application were expounded in the book of Rotherham, Craig. *Proprietary Remedies in Context*, Bloomsbury Publishing Plc, 2002 page 10 in the following manner: -

“Constructive trusts are sometimes used merely to protect what we have come to see as an existing equitable proprietary right. This is true of constructive trusts imposed upon a person who has received trust property and cannot claim to be a bona fide purchaser of the legal title for value without notice. While it is often asserted that the constructive trust is imposed irrespective of the intention of the parties, intention is an essential ingredient in many instances in which the device is employed. A constructive trust is imposed where it would be unfair not to give effect to an owner’s intention to transfer property despite the lack of formalities normally required for such a transfer.”

52. In his decision, the learned trial magistrate reasoned that because of the fruition of the agreement for sale, he held constructive trust had arisen. Given the finding of the 1st issue, this court concurs with the holding of the learned trial magistrate.

53. The deceased respondent having fulfilled his obligations, it was the intention of the parties that the deceased appellant and his heirs in title including Caroline were to transfer the suit property to the deceased respondent.

54. Upon failure to effect the transfer, it therefore ensued that the deceased appellant and Caroline held the suit property in trust for the deceased respondent and it was unconscionable for the deceased appellant to claim rights over the suit property. The arrival of this conclusion is guided by the decision of *Maina (Supra)* where the court stated: -

“In the instant case, it was the Respondent who put the Appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The Respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the Respondent cannot renege.”

55. Consequently, I find the learned trial magistrate did not err in finding the deceased appellant, and by extent, Caroline held the suit property in a constructive trust.



56. Ultimately and on issue (c), I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 17/02/2023. Since it is trite law costs follow the event, the costs of this appeal are awarded to the respondent.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF OCTOBER 2024.

HON. A. Y. KOROSS

JUDGE

03/10/2024

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

In the Presence of:

Appellant

N/A for respondent

Court assistant: Ishmael Orwa

