



Waithaka & 2 others v Waithaka; Kariithi (Interested Party) (Environment & Land Case E173 of 2023) [2024] KEELC 6873 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E173 OF 2023**

JA MOGENI, J

OCTOBER 17, 2024

BETWEEN

CHARITY MURINGO WAITHAKA 1ST PLAINTIFF

ABEL KANG'ETHE WAITHAKA 2ND PLAINTIFF

IRENE GATHONI WAITHAKA 3RD PLAINTIFF

AND

CATHERINE WAMUYU WAITHAKA DEFENDANT

AND

JAMES MURIUKI KARIITHI INTERESTED PARTY

JUDGMENT

1. When the parties in this matter appeared in court on 30/11/2023, I asked them to consider mediation the reason being that this was a family matter, where the plaintiffs had sued their mother. When the parties appeared before the Deputy Registrar on 7/12/2023, the defendant declined to go for mediation. On 24/01/2024, when the parties next appeared in court, the court was notified that the 3rd plaintiff who is a sister to the 1st and 2nd plaintiff had withdrawn from the suit. This case is a typical example of what the good book talks about; that in the last days children will rise against their own parents and vice-versa and that those will be difficult days. It seems that days are here upon us.
2. The brief background in this matter is that the 1st, 2nd and 3rd plaintiffs herein are children (biological children) of the defendant who is their biological mother and the interested party is the biological maternal uncle of the plaintiffs and a co-administrator in the estate of Charity Muthoni Benson and therefore the co-owner of land registration number LR 2327/53 the suit property. I would have preferred that this matter be handled through court annexed mediation but the parties were not keen to go for mediation thus the case at hand and the judgment herein.



3. The 1st and 2nd plaintiffs who appeared in person filed a plaint dated 10/05/2023 seeking judgment against the defendants and for the following orders:
 1. This court do declare that land parcel L.R 2327/53 (Original Number 2327/8/45) is held by the Defendant and Interested Party on a constructive and legal trust vide Re Estate of Charity Muthoni Benson High Court Succession Cause 759 of 1987
 2. This court do issue an injunction restraining the sale of the above-mentioned parcel of land, or any transfer of title without the express written consent of the Plaintiffs and the Interested Party.
 3. This court do grant costs in the cause.
 4. This court do make any other orders it deems fit in the best interest of justice.
4. The plaintiff aver that the defendant is in the process of disposing of land parcel L.R 2327/53 NAIROBI, which parcel of land is held in trust for the family under Article 63(2)(a) of the Constitution of Kenya, including the Plaintiffs.
5. It is the plaintiff's contention that while the Defendant and the Interested Party are listed as administrators of the said parcel of land, vide Re Estate of Charity Muthoni Benson High Court Succession Cause 759 of 1987, the Defendant has been benefiting almost exclusively to the detriment of the Interested Party and the Plaintiffs—her brother and children respectively
6. Further that pleas not to dispose of the suit property has fallen on deaf ears and the Defendant has failed to consider the beneficiaries of the Estate of the Late Charity Muthoni Benson, as the Defendant is now keen on disposing off the land.
7. The defendant and Interested Party filed a joint statement of defence dated 25/01/2024 and stated that the Interested Party was filing the statement of defence under protest as there was no leave sought from the court to enjoin him as an interested party. He further stated that he had donated Power of Attorney to the Defendant to deal with affairs relating to the estate of the Late Charity Muthoni Benson.
8. It was their contention that this suit was defective since the subject matter of the suit property being LR No. 2327/53 Nairobi was sub-divided in 1999 into two parcels which were transferred to a third party hence parcel number L.R Number 2327/53 does not exist hence there is no cause of action.
9. The defendant and interested party further aver that the plaintiffs are not beneficiaries of the estate of the late Charity Muthoni Benson and are therefore devoid of any locus standi to file the instant suit. Thus the defendant and interested party deny to be disposing of any property where the plaintiffs have any interest or at all and if they were which is denied they would be seized of the right to do so by virtue of section 24, 25 and 26 of the Land Registration Act, 2012. At the same time the defendant and interested party deny existence of any Trust Constructive or otherwise.
10. The defendants contend that the plaintiffs are squatting on the parcels of land belonging to the defendant and interested party as licensees and that if the plaintiffs had any locus or beneficial interest they could have claimed it through Nairobi HC Succession Cause No. 759 of 1987 in the Estate of Charity Muthoni Benson.

Plaintiff's Case

11. The plaintiffs testified in the case as PW1 and PW2. The 1st Plaintiff Charity Muringo Waitaha, PW1-adopted her witness statement dated 7/02/2024 and a list of documents of even date as her exhibits. PW1's evidence was that the Defendant and the Interested Party are administrators in the Estate of



- the Late CHARITY MUTHONI BENSON who is our late grandmother as evidenced by the copy of certificate of confirmation of grant produced and marked marked “CMW-1”. That regardless of the confirmation of the grant, proper transfer and distribution of the estate is yet to happen according to the latest search that they carried out which she produced as “CMW-3”.
12. She testified that the Defendant has ever since been enjoying exclusive benefits from the parcel of land, even to the detriment of the Interested Party who is a co-administrator of the land. That the intention of the grant was to establish the parcel of land as land held in trust for the entire family, but unfortunately the Defendant has treated the land as her own exclusive parcel of land. That the defendant’s action of treating the land as though it was her own was depicted through her action of entering into a sale agreement over LR 2327/53 (Original No. 2327/8/45) with one JOSEPH KENYATTA OBALLAH and one ELSEBA ALUOCH ONYANGO for a sum of Kshs 30,000,000 (Thirty Million Shillings Only) A copy of the sale agreement was attached and marked as “CWM-3”. She further testified that the Interested Party was misled by the Defendant to agree to the transaction on the basis of a non-existent debt in land rates to the Nairobi City County a copy of the statement was attached and a receipt marked as “CWM-4” and “CWM-5”.
 13. It is her testimony that their mother who is the defendant despite the pleas to have her consult with them has refused and she has also declined to preserve the land for posterity, especially for their uncle who is the Interested Party. That she is insistent on disposing of the property. That this property is the only family property and that she wants the court to urgently intervene and save their family heritage.
 14. On cross-examination, she testified that the defendant is her biological mother and that the interested party is an administrator. Further that she lives on the suit property and that her claim is that the defendant is holding the suit property in a constructive trust for all beneficiaries. She told the court that she is not listed as a beneficiary as per the grant which is produced at page 69 of the defendant’s bundle.
 15. She further stated that she had no claim in the land as she has stated in her witness statement at page 51 of the bundle but that she is in court because of her uncle who is the interested party who however has not given her a legal authority to appear for him. In addition, she testified that she did not have any authority from her aunt also who she claims to have been left out of the division of the estate. That whereas she claims that her uncle has a mental incapacity she has no medical report to support this claim. She stated that whereas a constructive trust is handed over to an individual or body to be held in trust, the copy of the grant does not show that the property is held in trust. That they have lived on the suit property since they were born and that the grant therefore is defective.
 16. PW2- Abel Kang’ethe Waithaka testified and stated that he is an accountant and he adopted his witness statement dated 7/02/2024 and the list of documents on even dated. The contents of his witness statement and documents were similar to those of PW1. On cross-examination he testified that he was not an administrator and that he was also not listed as a beneficiary although he lives on the suit property which is owned by his grandmother. That he also draws rent from the property and that he grew up on the suit property.
 17. When cross-examined further he testified that his mother sold part of the suit property and she paid his school fees while he studied in Hungary and UK. Upon his return he went to live on the suit property. It was his testimony that he has sued his mother because she has not distributed the suit property to her sister and his brother who is his uncle. He stated that he had not filed a suit in the Family Division to challenge the grant issued.
 18. PW3- James Lando adopted his witness statement dated 7/02/2024 and upon cross-examination he stated that he is a former police inspector and an ex-NIS Inspector. It was his testimony that he was in court as the next of kin or nearest relative since the defendant’s mother was a sister to his mother. He



- testified on cross-examination that the suit property used to belong to deceased Charity Muthoni. That whereas he had stated in his witness statement that the interested party suffers from mental incapacity, he did not have a certificate to prove his claim. With that the plaintiffs closed their case.
19. The defence evidence comprised of the testimony of the defendant only, Catherine Wamuyu Waithaka as DW1. The Defendant adopted her witness statement and list of documents dated 25/01/2024. She testified that her sister settled in Germany and she was not interested in the estate of the deceased. That she had a Power of Attorney which is specific to collection of rent for the Masts of Telkom and Airtel dated 2/04/2014. When asked what the role of the administrator is she stated that the role of an administrator is to take care of the property and ensure that liabilities are dealt with.
 20. She testified that the interested party is taken care of by herself that she pays a lady to take care of him since she is a care-giver to Mr Mwaniki the interested party. She testified that the property she was selling was to raise money to offset the rates. That the suit property fetches Kshs 88,000 a month and that the interested party does not get money from the suit property since he has no bank account. That she holds the PIN for the Interested Party's Mpesa since the Interested Party has capacity issues.
 21. She testified that they were about to sell the house before this suit came up and that the suit property LR No. 2327/53 was subdivided and sold to Eunice Wairimu Mbogo as LR 2327/131 and then LR 2327/132 was to be registered in the name of Charity Muringo Waithaka and the interested Party James Muriuki Kariithi. It was her testimony that she was not told about mediation and that if she had understood she would have sought for it. She testified that according to her the plaintiffs are harassing her and her brother. That they have not sub-divided the suit property yet.
 22. She further testified that her brother had donated a specific power of Attorney and it is for Telkom and not for the distribution of the suit property. She stated that the interested party benefits from the income from Telkom Kenya, and that she takes care of the bills and also she pays the workers. She testified that she received Kshs. 2.2 million from airtel but she never gave or paid the Interested Party any money. That the interested party is not married and he has no family. Further that he has never complained and that she takes care of him since the people who surround him will take the resources away from him.
 23. When asked about the capacity of the interested party, she stated that according to her he has capacity to sign legal documents but that he had no capacity to take care of finances. She testified that she had an insurance by APA on top of her NHIF but that the Interested Party only had NHIF and that this is because he is okay with NHIF only.
 24. She testified that the title currently is in the name of the deceased and that the disposal as intended vide the agreement produced at page 20-23 of the bundle is wrong since she had no title although she was using the grant to dispose of the property. She stated that she was not aware that she could not use a grant to dispose of the suit property. She also stated that she disposed of part of the 5 acre estate to educate the 2nd plaintiff as an administrator and that she was not aware that she was using a share of her proceeds and that when she disposed of the estate she never gave her brother any money. That she received Kshs 30,000,000 and she used Kshs 7,000,000 to educate her son and the rest she built houses which are rented from which she draws Kshs. 60,000 per month when the tenancy units are all occupied and that the interested party does not receive any money from the units since she takes care of him. It was her testimony that she had no power of attorney to represent her sister who is in Germany and was also not included in the grant.
 25. On re-examination she stated that the plaintiffs were not party to the succession cause and that they never challenged the grant in court. That the 2nd plaintiff stayed away and only came back during Covid time. It was her testimony that she never sold the suit property but that she went to court when part



of the suit property was grabbed and she was compensated by being paid Ksh 30,000,000. She testified that her son lives on the suit property and he draws rent from the property from some facilities.

26. She testified that the interested party has never brought a suit against her and that when the grant was confirmed she tried to pursue the title since the confirmation in 1985. She stated that her children had no right over the suit property since it was her mother's property. With this the defence closed their case.

Submissions

27. At the close of the evidence, the parties elected filed their written submissions, the plaintiffs' submissions are dated 28/05/2024 and the defendant and Interested Party's submissions are dated 5/06/2024.
28. The plaintiffs through their joint submissions largely dwelt on the issue of administration of the estate of the late Charity Muthoni Benson which is not the jurisdiction of the Environment and Land Court. The Defendant and Interested Party's Counsel submitted largely on the issue of succession in response to the plaintiffs submissions. He further submitted that the plaintiffs had no proprietorship over the suit property and that they lack locus to prosecute the instant suit.

Analysis and Determination

29. I have carefully considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly considered the submissions and authorities placed before me by the Learned Advocate for the defendant and Interested party and the plaintiffs who appeared in person.
30. The plaintiffs herein have urged the Court to declare that the defendant and interested party are holding the suit property in a constructive and legal trust. At the same time the plaintiffs have urged the court to restrain the defendant from selling the suit property. They want the court to declare that they have an interest in the suit property through a constructive trust.
31. As was stated in Peter Moturi Ogutu -vs- Elmelda Basweti Matonda & 3 Others (2013) eKLR:
- “Where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”
32. The courts have held in several decisions that when a party claims the existence of a trust, the onus is on the party relying on the existence of the trust to prove that the same exists. In the case of Juletabi African Adventure Limited & another ...Vs...Christopher Michael Lockley [2017] eKLR the Court relied on the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, where the same Court of Appeal held that;

“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...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely



interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

33. The courts have thus distinguished between a resulting trust and a constructive trust and clearly shown that in a situation of resulting trust there must be contribution but in a situation of a constructive trust this is not the case. Therefore, it is not in doubt that for a Constructive trust to occur, the same must be imposed by the Court. Further in the above case, the Court of Appeal stated that Constructive trust arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.
34. In the instant case, in support of their case the plaintiffs testified that the defendant who is their mother has not given any money to the interested party nor her sister who resides in Germany and also in listing the beneficiaries to the estate of the late Charity Muthoni Benson she did not list the plaintiffs. That they have always lived on the land which is registered in the name of the late Charity Muthoni Benson who is their grandmother. PW2- testified that he even draws rent from some houses on the suit property a position that was supported by the defendant.
35. On the other hand, the Defendant testified that she obtained the grant and that whereas the plaintiffs had an opportunity to object to the grant they did not. She also stated that the plaintiffs being grandchildren to the late Charity Muthoni Benson were not entitled to benefit from her estate since the property belonged to her mother. She also testified that she had not sold the suit property but that she was compensated from the people who had grabbed a portion of the suit property.
36. The defendant did not place before the court any evidence to show that she had been compensated Kshs 30,000,000 after grabbers occupied a portion of the suit property. She testified having used a portion of the compensation to pay school fees for her son the 2nd plaintiff. The defendant did not also present before the court any document from her sister who stays in Germany clearly stating that she was not interested in the suit property. On the part of the interested party, neither the plaintiffs nor the defendant presented a certificate or letter to show the court that he had no mental capacity. It was however the testimony of both the plaintiffs and the defendant that the interested party was incapacitated mentally. Which begs the question how did he give the defendant a power of attorney albeit limited to the income from the masts only?



37. In reference to a constructive trust. The requirements for such a trust are explained in Halsbury's Laws of England, 4th Edition, Vol. 48 at Paragraph 690 as follows:

“A constructive trust will arise in connection with a legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.”

38. In the matter before me, clear evidence has emerged that the plaintiffs in addition to being the children of the defendant indeed stayed on the suit property and therefore it is not proper that the defendant would choose to dispose of the suit property without considering their livelihood and their dependency on the suit property which clearly as can be seen and deduced from the evidence presented she holds in a legal constructive trust for the entire family.

39. Whereas some courts have held and rightly so that children do not benefit from their grandparents, this is a case where the children lived off the grandparents property and that is what they called home. Thus disposing of the suit property without considering this important factor can render them homeless. None other than the mother who is the defendant testified that indeed she sold part of the property to pay fees for her son who is the 2nd plaintiff.

40. There is also the issue of the interested party who seems for all intents and purposes to be incapacitated although no evidence was presented by neither party on the issue of his incapacity. Both the defendant and the plaintiffs claimed that the Interested Party who is a son of the late Charity Muthoni Benson is incapacitated but there was no evidence to support this claim. The defendant alleged that it is because of the Interested Party's incapacity that the suit property was divided in a manner that would take care of his need. Again this averment was not supported with any documentation as proof. It is not enough that the defendant states that she has a skewed power of attorney which does not even represent the interest of the interested party.

41. In the end I am persuaded that I need to declare that indeed there is a legal constructive trust where the defendant is holding the suit property in trust for the family and any distribution of the estate will have to take this glaring fact into consideration. Since the issue of distribution of the estate is not the forte of this court the parties will pursue this in the right forum.

42. Given the foregoing the court issues the following orders:

1. A declaration is hereby issued that land parcel L.R 2327/53 (Original Number 2327/8/45) is held by the Defendant and Interested Party on a constructive and legal trust vide Re Estate of Charity Muthoni Benson High Court Succession Cause 759 of 1987
2. An injunction is hereby issued restraining the sale of the above-mentioned parcel of land, or any transfer of title without the express written consent of the Plaintiffs and the Interested Party.
3. This being a family matter the court declines to issue any orders to costs let each party bear its own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER 2024.

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MOGENI J

JUDGE

In the Virtual Presence of:

Mr. Kangethe with Ms Charity for 2nd and 1st Plaintiff

No appearance for 3rd Plaintiff, Defendant and Interested party

Caroline Sagina - Court assistant

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MOGENI J

JUDGE

