



**Wahome & 4 others v Mathenge (Environment & Land Case
450 of 2014) [2023] KEELC 18592 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 450 OF 2014**

JO OLOLA, J

JULY 6, 2023

BETWEEN

**FG WAHOME 1ST PLAINTIFF
JW MUNUHE 2ND PLAINTIFF
PH GITONGA 3RD PLAINTIFF
JM MUMU 4TH PLAINTIFF
FN KAROBIA 5TH PLAINTIFF**

AND

STANLEY WANJOHI MATHENGE DEFENDANT

JUDGMENT

1. This suit was initially filed on April 24, 1989 as Nairobi High Court Civil Suit No 1751 of 1989. It was subsequently transferred to Nyeri High Court on November 19, 2008 before again being transferred to this Court in 2014.
2. By their Complaint dated April 19, 1989, FG Wahome, JW Munuhe, PH Gitonga, JM Mumu and FN Karobia trading as Nyeri Young Investors (the Plaintiffs) sought orders against Stanley Wanjohi Mathenge (the Defendant) for:
 - (a) A declaration that the Defendant holds the suit premises in trust and for the benefit of the Partnership operating under the name and style of Nyeri Young Investors;
 - (b) An order for the Defendant to transfer the legal title in respect of the suit premises to the joint names of Partners or their nominees;
 - (c) An order for eviction against the Defendants;



- (d) General damages and mesne profits the quantum thereof to be determined by this Honourable Court;
 - (e) Costs of this suit;
 - (f) Interest on (a) and (b) above at Court rates; and
 - (g) Such further or other relief as this Honourable Court may deem fit and just to grant in the circumstances of this case.
3. Those prayers arise from the Plaintiffs' contention that in or about the year 1971, both the Plaintiffs and the Defendants started operating a partnership under the name and style of Nyeri Young Investors with the aim of contributing funds and then investing the same in acquiring properties and other ventures agreed upon by the Partners.
 4. The Plaintiffs aver that on or about February 3, 1972, the partners bought the parcel of land known as LR No 275/067 Amboni measuring 7 acres and situated within Mweiga Settlement Scheme after which they agreed that the same be registered in the Defendant's name to hold in trust and for the benefit of all the Partners.
 5. The Plaintiffs further assert that on or about September 28, 1980, they met and agreed that the Defendant was at liberty to buy off the Plaintiffs' interest on the suit property at a consideration of Kshs 50,000/-. It is their case that the Defendant has since however failed to honour the agreement and that he has continued to solely utilize the subject parcel of land to his own benefit and hence the prayers sought in the Plaint.
 6. But in his Statement of Defence dated September 12, 1989 as filed herein on September 29, 1989, Stanley Wanjohi Mathenge (the Defendant) denies the Plaintiffs' claim and states that the purpose for which the Parties hereto came together was for the purchase of land for each individual and that accordingly each one of them had contributed Kshs 2,150/- to enable the Defendant to buy the suit land in 1971.
 7. The Defendant denies that there was an agreement that the suit property be registered in his name in trust for the Plaintiffs and/or that the Parties met in 1980 and agreed that he buys off the Plaintiffs' interests on the suit property at a consideration of Kshs 50,000/-.
 8. The Defendant asserts that the Plaintiffs have no right to the suit land and states that he is not in any way accountable to them in regard thereto.

The Plaintiffs' Case

9. In support of their case, the five (5) Plaintiffs called one (1) witness at the trial.
10. PW1 – Peter Gitonga Githaiga is a resident of Kahiga village and the 3rd Plaintiff herein. He told the Court that out of the original five (5) Plaintiffs herein, three (3) of them had passed away and been substituted and that it was only the 1st Plaintiff and himself who were still alive.
11. Relying on his Statement filed herein on November 2, 2016, PW1 told the Court that all the Parties herein had since the year 1963 been friends. Sometimes in 1971, the friends thought of starting a joint venture to buy property together. They then formed a group called Nyeri Young Investors. They opened an account with National Bank of Kenya into which they deposited their contributions with the signatories being the Defendant, the 1st Plaintiff and the 5th Plaintiff.



12. PW1 testified that they used to contribute Kshs 250/- per month per person. Sometimes in 1972, they agreed they had sufficient money to acquire their first property. In that respect, the Defendant had come across a piece of land that was on sale at Mweiga Settlement, Amboni. PW1 told the Court they discussed and agreed to buy the land. PW1 further told the Court they sent the Defendant to negotiate on their behalf with the owner who was known as Wamathai Wakarigu. They agreed on a consideration of Kshs 12,500/- for the 7.2 acres.
13. PW1 testified that they later came to learn that there was an outstanding loan to be cleared before the land would be transferred. They agreed to pay the loan of Kshs 9,000/-. The Defendant who was their treasurer then paid Kshs 12,500/- to the vendor and Kshs 9,000/- to Mweiga Settlement Scheme with the instructions of the Plaintiffs. For reasons unknown to the Plaintiff, they later came to learn that the property had not been transferred into their joint names.
14. PW1 testified that on September 28, 1980, they held a meeting to discuss the issue of the ownership of the land. The group then decided to have the land retained in the Defendant's name on condition that he would refund the costs to the other Partners. The Defendant who was present at the meeting agreed with the resolution.
15. PW1 further testified that on March 5, 1982, the Defendant did send to the Plaintiffs an irrevocable written confirmation to refund to them all their monies with some reasonable interest. He however never honoured the pledge. Again in January 1984, the Defendant agreed to raise Kshs 40,000/- within one month failing which the parcel of land would be transferred to the Plaintiffs but he again never paid.
16. PW1 told the Court that on February 18, 1984, the Defendant offered them shares in lieu of the money but they declined the offer. They then asked the Defendant to surrender documents relating to the suit land and they drove to his home where he surrendered the documents.
17. PW1 testified that on May 24, 1987, the members agreed to sub-divide the land into six (6) portions. They were to meet on January 30, 1988 with the surveyor and then travel to Mweiga to mark/peg the plots. The Defendant however became hostile and warned them against entering the land. The Plaintiffs then lodged a caution on the land and proceeded to file this suit.
18. On cross-examination, PW1 told the Court they came up with the name of the group but they did not register it. They would hold their meetings in PW1's house in Karatina. Their purpose was to buy land. PW1 denied that they had agreed to operate a bar.
19. PW1 conceded that the issue of buying the suit property was brought by the Defendant. They first gave him a cheque of Kshs 6,000/- towards the purchase. The land cost them Kshs 12,500/- in total. PW1 told the Court that other than the copies of the cheques, they had nothing else to show that they had paid for the land. He told the Court they trusted the Defendant and that he would inform them of every step he was taking in the purchase. He denied that the balance of the purchase price came from the Defendant.
20. PW1 told the Court the Plaintiffs did not attend the Land Control Board (LCB) during the period of transfer of the land. He conceded that they did not consider taking over the land until the time when the Defendant failed to refund them their monies.



The Defence Case

21. The Defendant (DW1) equally testified as the sole witness in his case. Relying on his Statement dated October 26, 2016, DW1 told the Court they had a group called Nyeri Young Investors. The group was never registered but was more of a social association with no by-laws.
22. DW1 testified that in 1970, they decided to form the group with the aim of contributing money for unspecified enterprises. On December 16, 1970 when they started the group, they each contributed Kshs 250/-. They increased the amount of contributions gradually from Kshs 250/- to Kshs 500/- in April 1971. The group used to bank the amount in an account. DW1 as the treasurer was one of the signatories.
23. DW1 testified that he came up with the idea of buying land for each and every one of them. The group agreed to the idea and DW1 told them about the suit property whose price he had negotiated and was being sold for Kshs 12,500/-. He further told the group the land was subject to the Settlement Fund Trustees loan which had accumulated at Kshs 5,000/-.
24. DW1 told the Court the Group then agreed to lend him Kshs 6,200/- towards the purchase. They drew a cheque in his name and he cashed the amount and paid the same to the vendor's Advocate's account. DW1 told the Court he pursued the issue until he bought the land. It was their agreement that his monthly contributions should form part of the repayment of the loan.
25. DW1 testified that thereafter the members lost contact and they did not have another meeting until 1980. They met at Kiganjo and began talking about the future of the suit property. They agreed that the land was paid for with cash from the group and that he should join the others to buy land for each individual. DW1 told the Court the land was not for every member. He had bought the same from money he borrowed from the group and he was ready to refund the amount they lent him.
26. On cross-examination, DW1 conceded that their group had a Bank account and that he was the Treasurer. He further conceded he got a cheque from the joint account to pay for the land. At that time there were no minutes taken at their meetings.
27. DW1 conceded that at some point in the 1980's while serving a prison sentence, he sent out letters to the other members requesting for time to repay the loan. He told the Court he did not recall that they had agreed that the best resolution to the issue was for them to share the land.
28. DW1 told the Court he had written to the Plaintiffs never to go back to the land after they went there one day without his authority and took measurements with two people who were unknown to the Defendant. After that letter the Plaintiffs never went back to the land. He told the Court he could not refund the Plaintiffs' money because he wrote to them a letter calling for reconciliation but they refused to call for a meeting and hence DW1 does not know what to refund them.

Analysis and Determination

29. I have carefully perused and considered the pleadings filed herein by the Parties, the testimonies of the two witnesses who testified as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the Parties.
30. The dispute herein relates to a 7.2 acre parcel of land known as LR No 275/067 situated at a place known as Amboni within the Mweiga Settlement Scheme in what is now Nyeri County. On or about October 16, 1986, the said parcel of land was registered in the name of the Defendant herein. Prior to



the said registration, the parcel of land was in the name of the Settlement Fund Trustees (SFT) which had issued the same to one Wamathai Wakarigu in the early 1970s.

31. By an agreement in writing dated March 24, 1971, the said Wamathai Wakarigu as vendor sold the said parcel of land to the Defendant herein as the purchaser at a consideration of Kshs 12,500/-. The circumstances under which the Defendant acquired the subject property as the purchaser and how he came to solely utilize the same is the main subject of this dispute. According to the Plaintiffs herein the acquisition of the land and its subsequent registration was for the Defendant to hold the same in trust for the benefit of both the Plaintiffs and the Defendant. The Defendant on his part denies that there was any such agreement that the property be acquired and registered in his name in trust for the Plaintiffs.
32. From the material placed before me, there was no dispute that the original five (5) Plaintiffs as well as the sole Defendant herein were in their youth, the best of friends. Newly employed and teeming with energy in the early 1970s, they proceeded sometime in 1971 to open a joint current account with the National Bank of Kenya, Moi Avenue Branch in Nairobi.
33. It was apparent that while the Parties initially merely associated as friends, with time, they started considering themselves as members of a group. They called that group the Nyeri Young Investors. According to the Defendant who was both a signatory to the joint account and the treasurer of the group, the aim of contributing money to the account was for general unspecified enterprises as the group would consider necessary. It was however the Plaintiffs' case that the account was opened purposely to save money to buy parcels of land for the members of the group.
34. Regardless of the purpose for which the account was opened, it was not in dispute that when the suit property was being purchased, the initial deposit of Kshs 6,200/- was drawn from the account. According to the Defendant, he was the one who paid the balance of the purchase price to the vendor together with a further sum of Kshs 9,000/- that was said to be due and owing to the SFTs. It was his case that their intention was to buy everyone a piece of land and that the Plaintiffs had each contributed to the purchase to enable him (the Defendant) to acquire the parcel of land as his own but the Plaintiffs had no right to the land nor was he accountable to them therefor.
35. That contention by the Defendant did not appear to be entirely factual going by the subsequent events. There was no dispute amongst the parties that after this initial transaction, they did not meet in a long period of time and that after 1972, not much contribution had been made to the joint account.
36. While there was evidence of some meeting in 1975 in which the parties agreed to resume subscriptions of Kshs 100/- per month to the account, the parties came to have a major meeting in the year 1980. On September 28, 1980, the group met at Kiganjo in the presence of the Defendant wherein they recorded their resolution as follows:

' Minute 1/80.

Unanimous agreement has been made between the presiding members that the piece of land Scheme No. 275 Plot No 67, situated at Mweiga that SW Mathenge be the future owner on condition that the former contributions by the joint members be refunded wholly or part thereof. The approximate initial contribution was Kshs 15,000/-. The outstanding unpaid loan was Kshs 4,640/-, to Land Settlement in 1973.

The piece of land in question owes each partner approximately Kshs 3,500/-.

Further agreement was made to the future owner SW Mathenge to refund to each Partner all contributed money back to cover their expenses. This should be done between himself



and the individual member and be informed to other members. Then owner to pay Kshs 2,500/- on top of the contribution, being interest only.'

37. While the above resolutions could have benefitted from better drafting, it was apparent that until this time, the six members of the group considered themselves to be joint shareholders of the piece of land that had been purchased in the name of the Defendant and it was only by this resolution that they were committing to relinquish their shares thereto on condition that the Defendant would refund their contributions.

38. It was further evident that the Defendant had accepted that to be the position. Accordingly by a resolution drawn by himself on March 5, 1982 and addressed to his five colleagues he committed himself as follows:

' I, S Wanjohi Mathenge of PO Box 15, Mweiga, Nyeri Kenya wish to state and confirm that, that piece of land Scheme No 275/67 Amboni Mweiga; I agreed and I confirmed that I should refund the money that the underlisted paid initially for the land, within the period stipulated by them.

The refundable money is in the sum of shillings three thousand five hundred (Kshs 3,500/-) plus an interest of shilling five hundred only (Kshs 500/-) to each listed below.

I therefore, confirm that the foregoing statement is full and true to the best of my knowledge and belief, and I agreed that failure to comply with the above will mean to forfeit the above piece of land to the listed below.'

39. Asked during cross-examination about the said note, the Defendant conceded that he wrote the same telling the Court as follows:

' It is true I was requesting for time to pay as I was (then) in prison. I eventually left prison but I did not settle the debt. There was a reason.'

40. Arising from the foregoing, this Court had no difficulty in arriving at the conclusion that the suit property was acquired jointly by the six members styling themselves as the Nyeri Young Investors. The Defendant herein was not only present at the meetings that declared that the property be shared but also signed the resolutions to that effect. While he sought to refund his friends their contributions he never did.

41. As it were, it was clear to me that before the resolution by the membership in the year 1980, the Defendant was not utilizing the suit property. Indeed, he did not deny the Plaintiff's contention that they are the ones who had placed the Defendant's wife in occupation of a house built on the property at a time when the Defendant was serving a prison sentence at Kamiti Prison and the wife and children were unable to fend for themselves.

42. Having by his own admission conceded to the Plaintiffs interests in the land and having failed to reimburse the Plaintiffs for the contributions they made towards the purchase of the suit property, it was difficult to see how the registration of the Defendant as the proprietor of the suit property on October 16, 1986 could be construed to have deprived the Plaintiffs of their interest on the land.

43. All indications are that a constructive trust arose as between the Defendant and the Plaintiffs. A trust will automatically rise in favour of the Plaintiffs as they are the ones who advanced the money that the



Defendant used in purchasing the suit property. As was stated by Lord Reid in *Steadman v Steadman* [1976] AC 536, 540;

' If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not be allowed to turn around and assert that the agreement is unenforceable.'

44. In the circumstances herein, I was persuaded that the Plaintiffs had proved their case on a balance of probabilities. In the result, Judgment is hereby entered for the Plaintiffs as against the Defendant as follows:

- (a) A declaration is hereby made that the Defendant holds the suit property in trust and for the benefit of himself and the Plaintiffs;
- (b) An order is hereby made requiring the Defendant to transfer the legal title in respect of the suit premises to the joint names of the Plaintiffs and the Defendant and/or their respective nominees;
- (c) The said trust between the Defendant and the Plaintiffs is hereby determined with the direction that the suit property be sub-divided equally and the resultant sub-divisions transferred to the names of the Parties herein;
- (d) The costs of this suit shall be borne by the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 6TH DAY OF JULY, 2023.

In the presence of:

Mrs. Wahome for the Plaintiffs

Mr. Kebuka Wachira for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

