



**Warui v Muthoga (Environment & Land Case 36 of 2021)
[2022] KEELC 3162 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 36 OF 2021
AK BOR, J
MAY 5, 2022
(FORMERLY NYERI ELC CASE NO. 107 OF 2016)**

BETWEEN

SIMON MWANGI WARUI PLAINTIFF

AND

CHARITY MUTHONI MUTHOGA DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 25/5/2016 seeking to have the Defendant, who is his daughter, evicted from the parcel of land known as Euaso Nyiro/Ilpejeta Block 1/1757 (“the Suit Property”) and for an order to compel her to remove the caution she registered against the Suit Property. The Plaintiff claimed that his daughter had trespassed on the Suit Property and encumbered it divesting him of his rights over the land.
2. In the Defence and Counterclaim filed in court on 30/6/2016, the Defendant denied that she was a trespasser on the Suit Property and averred that when the Plaintiff was purchasing the Suit Property he ran into financial difficulties and sought the support of his family members to clear the balance of the purchase price. She averred that she gave her father a total sum of Kshs. 114,500/= which he applied towards clearing the balance of the purchase price on the understanding that her father would transfer half the land measuring 6 acres to her. She averred that the Plaintiff was to process two titles, one in her name and that in this regard she gave him Kshs. 8500/= to enable him subdivide the land and obtain two titles over the Suit Property.
3. The Plaintiff disputed the Defendant’s counterclaim and reiterated the averments in the plaint. James Maina Gichere applied to be joined to this suit as an Interested Party through the application dated 29/10/2018 claiming beneficial interest in the Suit Property arising from a sale agreement which he entered into with the Plaintiff on 25/1/2016. He was joined to the proceedings on 27/2/2019. He filed a Defence and Counterclaim on 12/3/2019 vide which he sought an order for specific performance



for the Plaintiff to transfer the Suit Property to him pursuant to the sale agreement dated 25/1/2016, and an order to restrain the Defendant from dealing with the Suit Property. He also sought an order for the Defendant to be evicted from the suit land as well as the costs of the suit.

4. The hearing of this suit commenced on 21/2/2022 when the Plaintiff testified. He stated that he was registered as the proprietor of the Suit Property on 31/5/2011. He purchased the land measuring 12 acres from Leah Wanja Warui and paid the consideration through instalments. He sold 4 acres. He claimed that the Defendant, who is his step daughter trespassed onto the Suit Property in 2011 and built a semi-permanent house on the land. That despite demand to vacate the land and occupy another parcel registered in his name, the Defendant refused to do so. He was emphatic that the Defendant did not have a legitimate claim to the suit land.
5. The Plaintiff produced a copy of the sale agreement dated 16/3/1996 which he entered into with Leah Wanja Weru. The agreement was written in Kikuyu and translated to English. The purchase price is given as Kshs. 187,000/= for 12 acres based on Kshs. 17,000/= per acre. The Plaintiff paid a deposit of Kshs. 40,000/=. The second agreement dated 2/8/96 confirmed a payment of Kshs. 35,000/= towards the purchase price. The Plaintiff paid a further sum of Kshs. 23,000/= on 8/7/96. The agreements were witnessed.
6. The Plaintiff produced the translated versions of the agreements or acknowledgements of payment of the purchase price. The other agreements are dated 13/4/2002, 3/2/006 and 10/2/06. The Defendant witnessed the agreements dated 3/2/006 and 10/2/06 when the Plaintiff paid Leah Wanja Weru Kshs. 60,000/= and Kshs. 21,000/= respectively. He also produced a copy of the title deed over the suit land dated 31/5/2011. He produced a copy of the demand letter dated 26/9/015 which he issued to the Defendant together with her response dated 2/10/2015.
7. On cross examination, the Plaintiff conceded that the Defendant who he seeks to evict from the Suit Property is his daughter. He confirmed that he had other children. He denied that the Defendant had been on the suit land for 10 years even though he conceded that she built the structure on the land in 2006. He denied that he had difficulty raising the balance of the purchase price but confirmed that the Defendant witnessed some of the sale agreements. He subdivided the land in 2011 and excised 4 acres from it which he sold. He maintained that the Defendant had another house in Ngobit. He denied that his daughter had fenced the Suit Property. He denied asking the Defendant to get a surveyor to put beacons on the land in 2006.
8. He stated that when he sold the land to the Interested Party, he explained to him that his daughter had built on the land and that he had attempted to evict her from the land. In his view, the Defendant placed the caution against the Suit Property when she learned that he was trying to sell the land.
9. He entered into a sale agreement with the Interested Party on 25/1/2016 and was paid a deposit of Kshs. 400,000/=. He stated that he did not give the Interested Party possession of the land because there was an outstanding balance of Kshs. 155,850/= on the purchase price that he was yet to pay.
10. The Plaintiff denied that it took a long time before he completed paying for the suit land. He also denied seeking help from his family to clear the balance of the purchase price. He stated that he had attempted to remove the Defendant from the land without success.
11. The Defendant gave evidence. She stated that she changed her name from Charity Muthoni Muthoga to Charity Muthoni Mwangi. She confirmed that her father bought the land from Leah Wanja Weru and that after he had paid a total of Kshs. 72,500/= towards the purchase price, he ran into financial difficulties and the vendor threatened to rescind the agreement.



12. She stated that sometime in 1997, the Plaintiff called his family together and indicated that any family member who was interested in the land could raise the balance of Kshs. 114,500/= after which they would get a proportionate portion of the land. She stated that she was the only one who expressed interest in the proposal. On two occasions she accompanied the Plaintiff when he went to pay the vendor the instalments for the land. She claimed that in actual fact she was the one who paid Kshs. 21,000/= and Kshs. 60,000/=. That she paid the final instalment on 10/2/2006. She stated that on 11/6/2006 she gave her father Kshs. 8500/= which he demanded, ostensibly for purposes of effecting the transfer and registration of the separate titles in their respective names.
13. The Defendant stated that as they continued making payments of the consideration, she had agreed with her father that the 12 acres would be apportioned equally between the two of them and they therefore got a surveyor who divided the land into two equal portions. That with her father's consent and knowledge, she started building the semi-permanent house on her portion on 18/6/2006 or thereabouts. She averred that the Plaintiff dug the first hole for the construction of the house after the surveyor had fixed the boundaries.
14. The Defendant claimed that she planted a live hedge to demarcate the two portions, which is still in place. She waited for the title and upon inquiry, her father would go around in circles. She later learned that on or about 31/5/2011 her father caused the land to be subdivided and sold 4 acres leaving a balance of 7.4 acres which was registered as Euaso Nyiro/Ilpejeta Block 1/1757 in his name. Her father issued a demand letter dated 26/9/21995 requiring her to vacate the Suit Property. She responded on 2/10/2015 and placed a caution to curtail any dealings with the suit land.
15. The Defendant produced a handwritten note of the payments made for the land, as well as copies of the search registered against the land on 21/6/2016 and the handwritten note dated 30/6/2015 signed by the Plaintiff's children confirming the fact that the Defendant was requested by their father to assist in clearing the balance of the purchase price and that they were to co-own the land. The note was signed by seven persons whose names and identity card numbers are indicated.
16. The Defendant also produced a copy of the application she made for the registration of the caution together with a copy of the receipt issued by G. M. Wanjohi & Co. Advocates dated 29/6/2015. She produced photographs depicting the developments on the suit land.
17. On cross examination, the Defendant stated that she was about 20 years when her father bought the land. She stated that the Plaintiff called his family and informed them that he was buying the land. One of her siblings died. She clarified that she agreed with her father regarding her contribution towards the purchase of the land even though this was not reduced into writing. She maintained that the transaction was based on trust. She conceded that the acknowledgements of payment by the vendor did not indicate that she was the one paying the money, but that she signed as a witness.
18. The Defendant stated that her father had other properties and emphasised that she had no interest in those other pieces of land which her father acquired on his own. She maintained that her father showed her where to construct on the land and that he took a surveyor to the land. She explained that she got into the transaction when her father encountered financial difficulty in paying the balance of the consideration for the land. She was emphatic that she gave her father money to pay to the vendor. She stated that her mother accompanied them when they went to make payment to the vendor on 3/2/2006.
19. The Defendant called her uncle, James Mwangi Njogu to give evidence in support of her case. He wrote in his witness statement that he was present when the Plaintiff entered into an agreement with Leah



- Wanja Weru on 16/3/1996. He knew that the Plaintiff was unable to complete the sale transaction and that the vendor had threatened to refund his money so that she could sell the land to another person.
20. He was aware that the Plaintiff called his family together and requested them to assist in saving the land with the promise that whoever contributed their money would get a proportionate share of the land. He stated that it was only the Defendant who expressed interest and contributed a total of Kshs. 114,500/= on diverse dates. He added that she took possession of half the land measuring 6 acres and built a house on the land. He was disappointed that the Plaintiff reneged on that agreement and abused the trust bestowed upon him by his daughter and now wished to evict her from the suit land. He added that the Plaintiff had rejected attempts to have the matter resolved out of court yet it was the Defendant who paid the bigger portion of the purchase price. He urged the court to dismiss the suit and allow the Defendant's counterclaim.
 21. On cross examination, he stated that the Plaintiff informed him that the vendor sent him a letter when he had difficulty in paying the balance of the purchase price. He stated that the Plaintiff told him he would talk to his family but did not know what was discussed at the meeting. He clarified that it was his sister, the Plaintiff's wife, who told him that the Plaintiff had agreed with his daughter that she would complete the payments for the land.
 22. Mr. James Njogu reiterated that he knew the Plaintiff was unable to pay the balance of the purchase price. He was aware that the Defendant moved onto the suit land with her goats and cows. The witness did not know in whose name the suit land was registered.
 23. James Maina Gichere, the Interested Party, gave evidence. He stated that he entered into an agreement with the Plaintiff on 25/1/2016 for the purchase of the entire parcel of land known as Euaso Nyiro/ Ilpejeta Block 1/1757. That upon execution of the agreement he paid a deposit of Kshs. 400,000/= to the Plaintiff and took possession of the land. He indicated in his witness statement that he had been enjoying quiet possession of the land. The sale of the land was subject to the Plaintiff evicting the trespassers from the land. He wrote in the statement that he had paid the Plaintiff an additional sum of Kshs. 155,850/= towards the purchase price and that he claims a beneficial interest in the land. He tendered a copy of the sale agreement in evidence.
 24. On being cross examined, the Interested Party conceded that he had not fully paid the purchase to the Plaintiff and that he was aware that he should first complete payment before he could seek an order for specific performance from the court.
 25. He did not conduct a search before entering into the sale transaction with the Plaintiff. He stated that the Plaintiff did not disclose that there was a caution registered against the land. He confirmed that he found a structure on the land when he went to see it, and that that was the structure in the photographs which the Defendant tendered in evidence. He stated that he agreed with the Plaintiff that the trespassers on the land would be evicted before he took the land without bothering to find out who was occupying the land. He conceded that he had not taken possession because the trespasser was still on the land. He got to know during the hearing that the trespasser was claiming the land that he bought from the Plaintiff.
 26. He relied on paragraph 3 of the sale agreement which stipulated that completion of the sale was pegged on certain conditions which he reiterated had not been fulfilled.
 27. Parties filed submissions which the court had occasion to consider. The Plaintiff submitted that he was the registered proprietor of the suit land. That without his consent, the Defendant registered a caution against the land and trespassed onto his land and erected a temporary structure. He contended that the Plaintiff had failed to prove that she made any monetary contributions towards the purchase of



- the suit. He maintained that the Defendant's claim regarding a constructive trust lacked a legal basis. The Plaintiff alluded to a frosty relationship with the Defendant and urged that the Defendant had failed to prove that she entered the suit land with his consent. He maintained that the Defendant had failed to demonstrate that there was any form of agreement which this court could enforce. He urged the court to dismiss the Defendant's claim to the land.
28. The Defendant submitted that she had a valid claim against her father to the suit land. She relied on the decision in *Juletabi African Adventure Ltd & Another v Christopher Michael Lockley* [2017] eKLR where the court distinguished between a constructive trust and a resulting trust in the context of the facts of that case. The court stated that the general rule was that a resulting trust would automatically arise in favour of the person who advances the purchase money and that it was immaterial whether the property was registered in the name of another person.
 29. The Defendant pointed out that the Plaintiff paid the purchase price over a period of ten years which lends credence to the assertion that he invited his family to assist him complete the payments when he could not raise the outstanding balance. She emphasised the fact that although she was not present when the initial agreement was entered into, she was present in the subsequent meetings when the money was paid to Leah Weru, this was due to the fact that she was the one who gave her father the money to pay on those occasions. The Defendant reiterated the evidence of her uncle that the Plaintiff informed him that he had received a demand letter from the vendor threatening to rescind the contract over non-payment of the balance of the purchase price. The Defendant urged that there was a resulting trust in the circumstances of this case.
 30. The Defendant urged the court to take note of the fact that the Plaintiff was not very forthright in his evidence and denied obvious facts such as the fact that the Defendant had developed the land by fencing it, erecting a house and planting trees. The Defendant urged the court to find that a resulting trust existed in her favour over the land measuring 6.7 acres which is the equivalent of the portion of the purchase price that she contributed. She maintained that she was not a trespasser because her entry on the land was lawful.
 31. The Defendant contended that the sale agreement between the Plaintiff and the Interested Party was legally unenforceable for lack of Land Control Board (LCB) consent and for the Interested Party's failure to conduct due diligence which would have showed that the Defendant had an interest over the land the Interested Party was buying. The Defendant contended that the Plaintiff did not have any proprietary interest in the land which was capable of being transferred to the Interested Party.
 32. There are three main issues for determination in this suit. These are firstly, whether the Defendant is a trespasser on the Suit Property and whether an order for her eviction should issue. Secondly, whether the Defendant has established that a resulting trust was created in her favour over the Suit Property; and lastly, whether this court should grant the orders for specific performance of the agreement dated sought by the Interested Party.
 33. What is not in dispute is that the Plaintiff entered into an agreement with Leah Wanja Weru dated 16/3/1996 for the sale of the suit land at the agreed purchase price of Kshs. 187,000/=. The Plaintiff paid a deposit of Kshs. 40,000/= and made a second payment on 2/8/96. He paid a further sum of Kshs. 23,000/= on 8/7/96. The acknowledgements of those payments were witnessed by different people. The next payments of Kshs. 60,000/= and 21,000/= were made on 3/2/2006 and 10/2/2006 and were witnessed by several persons including the Defendant. The Defendant claims that she is the one who provided the funds which the Plaintiff paid to Leah Weru in 2006.
 34. It emerged from the evidence tendered that the Defendant built on the Suit Property in 2006 which supports her assertion that she gave her father the money that year to complete payment of the



consideration when he got stuck. The Plaintiff has other children and it is noteworthy that the Plaintiff's other children do not lay any claim to the suit land. They executed the document dated 30/6/2015 to confirm that the Defendant assisted their father in paying the balance of the purchase price on condition that she would co-own the land with their father. It is also notable that the Defendant applied for the registration of a caution against the suit land in June 2015, which is when the Plaintiff wanted to sell the suit land. These actions point to the fact that the Defendant did contribute funds towards the purchase of the Suit Property on the understanding that her father would excise and transfer 6 acres to her. Based on that assurance, the Defendant built on the land the year her father completed the payments for the land.

35. If indeed the Defendant had trespassed onto the suit land in 2006 as the Plaintiff alleges, he should have taken steps to evict her from the land soon after she started occupying it and not waited until 2015. The court is inclined to believe the Defendant's evidence that after she had given her father the money to pay off the vendor in 2006, he showed her the portion of the suit land to occupy and that he dug the first hole when she commenced construction of her semi-permanent structure on the land.
36. The Plaintiff stated in his evidence that he had severally asked the Defendant to leave the suit land and occupy another parcel which was registered in his name but she refused. He did not expound on why he was asking the Defendant to go and occupy his other parcel of land if at all she did not make any monetary contribution towards the purchase of the Suit Property. The Defendant was categorical that she had no interest in the Plaintiff's other parcels of land. The court is not satisfied that the Defendant was a trespasser on the suit land. Based on the evidence adduced, the court is satisfied that the Defendant contributed towards the purchase of the Suit Property and that there was a resulting trust created in her favour even though the land was solely registered in the Plaintiff's name.
37. Turning to the last issue, there is no doubt that the Interested Party did not performed all his obligations under the sale agreement so as to be entitled to an order for specific performance. He did not conduct due diligence before buying the suit land from the Plaintiff. The sale agreement expressly mentioned the eviction of the current trespassers. A diligent purchaser for value would have taken time to find out more about the trespassers before making payment. Had the Interested Party done this, he would have established that the Defendant had an interest over the land he wished to purchase.
38. The court is satisfied that a resulting trust was created in favour of the Defendant. Pursuant to Section 28 of the *Land Registration Act*, the Plaintiff held the Suit Property subject to the overriding interest of the resulting trust in favour of the Defendant. Under Section 29 of that Act, the Interested Party is deemed to have had notice of the entry of the caution lodged by the Defendant against the Suit Property at the time he entered into the sale agreement with the Plaintiff.
39. The court declines to grant the orders sought by the Plaintiff. The Defendant is awarded the costs of the suit.
40. The Defendant's counterclaim is allowed in terms of prayers (i), (ii) and (iii). The Defendant is the costs of the counterclaim which will be borne by the Plaintiff.
41. The Interested Party's counterclaim is dismissed.

DELIVERED VIRTUALLY AT NANYUKI THIS 5TH DAY OF MAY 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Douglas Ombongi for the Plaintiff



Mr. Robert Kimunya for the Defendant

Ms. I. Kinyanjui holding brief for Mr. J. Magwa for the Interested Party

Ms. Stella Gakii- Court Assistant

