



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC NO. 101 OF 2017**

**FRANCIS MUTHUI MATHANGANI..... PLAINTIFF**

**-VERSUS-**

**ALICE GATHIGIA MENJA..... DEFENDANT**

**JUDGMENT**

**A. THE PLAINTIFF'S CASE**

1. By a plaint dated 5<sup>th</sup> June, 2017 the Plaintiff sought the following reliefs against the Defendant:

- (a) *That the Defendant holds half of parcel of land Kirimukiyu/Mbogoini/563 in trust for the Plaintiff.*
- (b) *That the trust be terminated and the Defendant be forced to transfer half of this land to the Plaintiff.*
- (c) *Costs of this suit to the Plaintiff.*
- (d) *Any other or further relief this honourable court may deem fit to grant.*

2. The Plaintiff pleaded that at all material times prior to 1996 his late father, Mathangani Ngichabi (*the deceased*) was the registered proprietor of Title No. Kirimukuyu/Mbogoini/563 (*the suit property*) and that the Defendant, who was his sister in-law, had caused the same to be fraudulently registered solely in her name without following due process. It was pleaded that the Defendant fraudulently and secretly acquired the entire suit property after the death of the deceased without undertaking any succession proceedings hence the suit.

**B. THE DEFENDANT'S RESPONSE**

3. The Defendant filed a statement of defence dated 27<sup>th</sup> June, 2017 in which she denied the Plaintiff's claim in its entirety. She denied having acquired the suit property fraudulently or that she was holding any portion thereof in trust for the Plaintiff. The Defendant pleaded that she was the absolute registered proprietor of the suit property. She indicated that she would seek leave of court later to produce documents in support of her registration at the trial.

4. The Defendant further pleaded that the Plaintiff's suit was *res judicata* on account of a previously instituted suit being Karatina RMCC No. 34 of 1987 (*the previous suit*) between the parties herein over the same subject matter. The Defendant further pleaded that

the said suit was determined in her favour. She indicated that she shall seek leave of court later to produce the proceedings and judgment in the previous suit at the trial. The Defendant consequently asked the court to dismiss the Plaintiff's suit with costs.

**C. SUMMARY OF EVIDENCE AT THE TRIAL**

**(a) The Plaintiff's evidence**

5. At the trial hereof, the Plaintiff testified on his behalf as the sole witness. He adopted his witness statement dated 5<sup>th</sup> June, 2017 as his evidence in-chief and produced the documents in his list of documents and further list of documents as exhibits. It was his evidence that the deceased had only one wife, 2 sons and one daughter. The daughter was married whereas the Defendant was his late brother's widow.

6. The Plaintiff's testimony was that the deceased was the registered proprietor of the suit property during his lifetime and that upon his death in 1991 he (the Plaintiff) retained the original title deed for the property. It was his evidence that he only discovered that the Defendant had secretly obtained registration of the suit property in 2002 when she wanted to take a loan from Equity Bank on the security of the suit

property. He stated that he cautioned the suit property upon such discovery. It was his further evidence that he was not aware of any succession proceedings having been undertaken with respect to the estate of the deceased hence the Defendant must have acquired the suit property fraudulently as pleaded in the plaint.

7. It was also the Plaintiff's evidence that the previous suit did not concern the suit property but a house he had built on the suit property which the Defendant had refused to vacate despite notice to that effect.

**(b) The Defendant's evidence**

8. The Defendant testified also on her own behalf as the sole witness.

She stated that the suit property belonged to the elder brother of the deceased called Mathangani Ngichabi senior (*senior*) who had sold it to her late husband in the 1960s. She testified that the suit property was fully paid for in 1971 even though it was never registered in her late husband's name. It was her further testimony that the deceased had no land at the time of his death since he had sold his land much earlier. It was also the Defendant's evidence that the instant suit was *res judicata* on account of the previous suit which she contended involved the same parties and the same subject matter.

**D. DIRECTIONS ON SUBMISSIONS**

9. The material on record shows that upon conclusion of the hearing before Hon. Justice Waithaka on 25<sup>th</sup> March 2019 the parties were granted 21 days each to file and exchange their written submissions. The record shows that Plaintiff filed his submissions on 4<sup>th</sup> May, 2019 whereas the Defendant filed hers on 22<sup>nd</sup> May, 2019.

**E. THE ISSUES FOR DETERMINATION**

10. The court has considered the pleadings, the documents and the evidence tendered at the trial. The court is of the opinion that the following issues arise for determination in this suit:

- (a) *Whether the instant suit is res judicata on account of the previous suit.*
- (b) *Whether the Defendant acquired the suit property fraudulently.*
- (c) *Whether the Defendant is holding half of the suit property in trust for the Plaintiff.*
- (d) *Whether the Plaintiff is entitled to the reliefs sought in the plaint.*
- (e) *Who shall bear costs of the suit.*

**F. ANALYSIS AND DETERMINATION**

**(a) Whether the suit property is res judicata on account of the previous suit**

11. The court has considered the submissions and material on record on this issue. The Defendant submitted that the instant suit was *res judicata* on account of the previous suit. The material on record shows that even though the Defendant filed copies of the plaint and summons to enter appearance in Karatina RMCC No. 34 of 1987 she did not tender copies of the proceedings and judgment at the trial. The Defendant submitted that she was unable to obtain copies of the proceedings and the judgment since that suit was filed over 30 years ago hence the difficulty in obtaining them.

12. The Plaintiff, on his part, submitted that the Defendant had completely failed to demonstrate that the instant suit was *res judicata*. It was pointed out that the Defendant had failed to produce copies of the pleadings, proceedings and judgment in the previous suit save for the plaint. The copy of the plaint dated 9<sup>th</sup> November, 1987 indicated that the Plaintiff wanted vacant possession of a house which he had allegedly erected on his father's land in Kaiyaba village. However, the description of the property on which the house was erected was not disclosed in the plaint.

13. The doctrine of *res judicata* is encapsulated in **Section 7 of the Civil Procedure Act (Cap. 21)** as follows:

**“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.**

***Explanation.* —(1) The expression “former suit” means a suit**

**which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

14. In the case of **Independent Electoral Boundaries Commission v Maina Kiai and 5 Others [2017] eKLR** the elements of *res judicata* were summarized as follows:

(a) *The suit or issue was directly and substantially in issue in the former suit.*

(b) *That former suit was between the same parties or parties under whom they or any of them claim.*

(c) *Those parties were litigating under the same title.*

(d) *The issue was heard and finally determined in the former suit.*

(e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

15. The court is far from satisfied that the Defendant has demonstrated the elements of the *res judicata* as required by law. There is no evidence to demonstrate that the issues in the instant suit were directly and substantially in issue in the previous suit in the absence of a complete set of pleadings or proceedings. There is also no evidence on record to demonstrate that the previous suit was heard and finally determined as required by law in the absence of the judgment rendered in the previous suit.

16. Moreover, the material on record shows that the Defendant obtained registration of the suit property in 1996. It would, therefore, follow that the issue of the alleged fraudulent registration could not have been canvassed and adjudicated in 1987 during the lifetime of the deceased. Similarly, the question of whether or not the Defendant was holding one half of the suit property could not have been raised and determined in 1987 since the Defendant was not yet the registered proprietor of the suit property. Accordingly, the 1st issue is answered in the negative.

**(b) Whether the Defendant acquired the suit property fraudulently**

17. Whereas the Plaintiff contended that the Defendant obtained registration of the suit property through fraudulent means, the Defendant contended otherwise. The Plaintiff's evidence at the trial was that the deceased was at all material times the registered

proprietor of the suit property until his death in 1991. He produced a copy of the land register which indicated that Mathangani s/o Ngichabi was registered as proprietor on 23<sup>rd</sup> April, 1959 (Exhibit P. 3). He also produced the original title deed for the suit property as exhibit P.2. He contended that no succession proceedings were ever conducted with respect to the estate of the deceased hence the registration of the Defendant as proprietor of the suit property in 1996 long after the death of the deceased was fraudulent.

18. The Defendant contended that the suit property did not belong to the deceased but to the deceased's elder brother (senior). She further contended that the suit property was purchased for valuable consideration from senior in the 1960's hence she did not obtain it

fraudulently as it was the property of her late husband. The Defendant further testified that the deceased had no land of his own at the time of his demise since he had already sold his land during his lifetime.

19. The court has noted from the material on record that the Defendant did not plead in her defence that the suit property belonged to her late husband as a purchaser from senior. This defence of purchase for value was also not captured in her witness statement dated 27<sup>th</sup> June, 2017. The Defendant did not tender any evidence at the trial of the alleged purchase. She did not explain why the suit property was never transferred to her late husband since 1971 when payment of the purchase price was allegedly completed.

20. Assuming that there was such a purchase, the Defendant did not explain how and from whom she obtained the transfer of the suit property to facilitate her registration as proprietor in 1996. None of the legal instruments which could facilitate transfer of the suit property even under the **Law of Succession Act (Cap. 160)** were produced by the Defendant at the trial. There was also no credible evidence tendered to demonstrate the existence of another Mathangani Ngichabi (senior) as submitted by the Defendant. The only evidence on record

shows that the suit property was registered in the name of Mathangani s/o Ngichabi whom the court believes is the deceased because the Plaintiff produced the original title deed for the suit property at the trial.

21. The court does not believe the Defendant's evidence that there were two brothers in the same family bearing the same name. The court does not also believe the Defendant's evidence that the suit property was bought by her late husband as alleged or at all. The court is of the view that the narrative of a purchase is a mere afterthought concocted for the purpose of the trial for if it were genuine it would have been included in both the Defendant's defence and her witness statement. The existence of senior also appears to have been fictitious since his name did not appear in the land register for the suit property and no witness was called by the Defendant to confirm that he ever existed.

22. The court is satisfied on the basis of the material on record that the Defendant obtained registration of the suit property which belonged to the deceased through dubious and fraudulent means and without following due process. The court is satisfied from the material on record that the deceased was not alive at the time the Defendant acquired the suit property in 1996. The court is further satisfied that no succession proceedings were conducted prior the Defendant's registration as proprietor of the suit property. Indeed, the Defendant conceded at the trial that no succession proceedings were conducted for the estate of the deceased but claimed that he left behind no assets to warrant the filing of succession proceedings.

23. The manner of pleading and proving allegations of fraud were considered by the Court of Appeal in the case of **Vijay Morjaria v Nansingh M. Darbar and Another [2000] eKLR** as follows:

**"It is well established that fraud must be specifically pleaded and that particulars of fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."**

24. As to the standard of proof required in such matters the same was considered in the case of **Koinange and 13 Others v Koinange [1986] KLR 23** and the case of **Evans Otieno Nyakwara v Cleopha Bwana Ongaro [2015] eKLR**. In the latter case, Majanja J held, *inter alia*, that:

**"In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Limited v Trust Bank Limited and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;**

**"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case."**

25. The court has noted that the Plaintiff enumerated several particulars of fraud against the Defendant in this suit. The court is satisfied that the Plaintiff proved the particulars enumerated in paragraph 5 (a), (b) and (c) of the plaint to the required standard. The second issue is consequently answered in the affirmative.

***(c) Whether the Defendant is holding one half of the suit property in trust for the Plaintiff***

26. The Defendant contended that she was the sole and absolute proprietor of the suit property by virtue of her registration as such and issuance of a title deed in her name. She contended that since the capacity of trust was not indicated in the land register and title deed then there was no room for inference of any form of trust. On the other hand, the Plaintiff contended that since the suit property belonged to the deceased both he and the Defendant were entitled to share it equally. He contended that by secretly obtaining registration of the entire suit property in her name she was holding one half thereof in trust for him.

26. The court has already found that the suit property belonged to the deceased who was the Plaintiff's father and the Defendant's father-in-law. The court has also found that the Defendant secretly and fraudulently obtained registration thereof without following due process. The Defendant was certainly intent on improperly and unfairly depriving the Plaintiff of his share of inheritance. The court is thus inclined to imply a constructive trust in favour of the Plaintiff in the circumstances of his case.

27. The court is aware that the law recognizes trust as an overriding interest over registered land. For instance, **Section 28 of the Land Registration Act, 2012** stipulates as follows:

**"28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—**

**(a) spousal rights over matrimonial property;**

- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law.

28. In the case of **Heartbeat Limited V Ng’ambwa Heartbeat Community Children’s Home & Rescue Centre [2018] eKLR** the Court of Appeal considered the issue of trust as follows:

“[26] This Court considered the law on trust in detail in *Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*, and outlined the basic tenets as follows:

“According to the *Black’s Law Dictionary, 9<sup>th</sup> 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 para1453). 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 29<sup>th</sup> 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*).” [Emphasis added]*

29 As indicated earlier, the Defendant obtained registration of the suit property through wrongful and fraudulent means. This is therefore a perfect case where the law should impose a constructive trust in order to avoid unjust enrichment on the part of the Defendant. Accordingly, the court finds and holds that the Defendant is holding half of the suit property in trust for the Plaintiff.

**(d) Whether the Plaintiff is entitled to the reliefs sought**

30. The court has already found and held that the Defendant acquired the suit property through fraudulent means. The court has also found and held that the Defendant is holding half of the suit property in trust of the Plaintiff. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint including determination of the trust and his registration as proprietor of one half of the suit property. The court is also inclined to grant any other consequential order for the purpose of giving full effect to the decree.

**(e) Who shall bear costs of the suit**

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd**

**[1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit.

**G. CONCLUSION AND DISPOSAL**

32. The upshot of the foregoing is that the court finds merit in the Plaintiff's suit. The court is satisfied that the Plaintiff has proved his claim against the Defendant to the required standard. Accordingly, judgment is hereby entered in favour of the Plaintiff in the following terms:

*(a) A declaration be and is hereby made that the Defendant holds one half of Title No. Kirimukuyu/Mbogoini/563 (the suit property) in trust for the Plaintiff.*

*(b) An order be and is hereby made that the said trust is terminated forthwith and that the Defendant do transfer one half of the suit property to the Plaintiff.*

*(c) That in default of the Defendant's compliance, the Deputy Registrar of the court shall sign all forms, mutations and documents to facilitate the transfer of one half of the suit property to the Plaintiff.*

*(d) The Plaintiff is hereby awarded costs of the suit to be borne by the Defendant.*

It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 28TH DAY OF JULY 2021.**

In the presence of:

Ms Mwikali for the Plaintiff

Ms Kagoi holding brief for Mr. Njanja for the Defendant

Court assistant - Wario

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**Y. M. ANGIMA**

**ELC JUDGE**