



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 221 OF 2018

SAMUEL MACHARIA KIMANI.....PLAINTIFF

VERSUS

VERONICA WANJIKU MACHARIA.....DEFENDANT

JUDGMENT

By a Plaint dated 1st August 2018, the Plaintiff filed this suit against the Defendant and sought for orders that;

- a) *Declaration that the Defendant was holding the parcel of land No. Ruiru /Ruiru East Block 2/4947, in trust for the Plaintiff herein.*
- b) *An order cancelling all the subdivision carried on the parcel of land No. Ruiru/Ruiru East Block 2/4947 and any transfers by the 3rd parties.*
- c) *Vacant possession of the suit properties.*
- d) *Mesne profits*
- e) *Costs of this suit and interest thereon*
- f) *Any other or further relief as this Court may deem fit.*

In his statement of claim, the Plaintiff averred that the Plaintiff and Defendant were husband and wife and the Defendant is the registered owner of **L.R No. Ruiru/ Ruiru East Block 2/4947** and **Wanjiku Macharia alias Racheal Wanjiku Macharia**, is the registered proprietor of **L.R 2/4946**, as trustees of the family under parcel of land situated at Murera, Ruiru along **Thika - Nairobi Super Highway Road**. That on **8th September 1999**, the Plaintiff family entered into an agreement resolution with the Defendant and his two other wives herein **Wanjiku Macharia** alias **Racheal Wanjiku Macharia** and **Rosemary Nyambura Macharia** on sharing of all matrimonial properties. It was agreed that the Defendant herein be given 4 ½ acres of parcel of land in **Kiganjo Ranching Company** and two plots at Kiganjo . That **Wanjiku Macharia** alias **Racheal Wanjiku Macharia** be given 2 acres of land situated at **Komothai/Igi** and one plot as **Komothai/Igi**. That **Rosemary Nyambura Macharia** be given 1½ acre situated at **Githunguri Ranching** . Further that **Samuel Macharia Kimani** take **Ruiru/ Ruiru East Block 2/ 4946 and 4947** .

That despite the Defendant being aware of the agreement on the sharing of the matrimonial properties, has trespassed on **L.R 4946 and 4947**. That the Defendant proceeded to subdivide **L.R 4947**, without the Plaintiff and the family members knowledge. That the Defendant proceeded to unlawfully transfer the subdivisions to third parties. He particularized illegality as, illegally trespassing on the suit property, subdividing and disposing the suit property without the Plaintiff's knowledge, allowing third parties of trespass on the suit property, denying the Plaintiff access and use of the suit properties, refusing to vacate the suit properties , threatening to continue trespassing on the suit properties unless restrained by the Court and trespassing on **L.R 2/4946**. That by the Defendant's conduct, the Plaintiff has suffered damage and continue to suffer as the Defendant has denied him use and enjoyment of the suit properties.

Despite being duly served with Summons to Enter Appearance as per the Affidavit of service dated **7th November 2018** by **Jackson Nduati**, the Defendant failed to Enter Appearance and therefore did not participate in the proceedings. The matter proceeded by way of formal proof wherein the Plaintiff testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 Macharia Kimani, adopted his witness statement as his evidence in Court. He produced his list of document as Exhibit 1. That **Veronica Wanjiku Macharia**, is his second wife and he has 5 children with her. That he does not live with the Defendant.

Thereafter, the Plaintiff filed written submissions which the Court has carefully read and considered, The Court has also read and considered the pleadings and the evidence adduced and finds that the issue for determination is **whether the Plaintiff is entitled to the orders sought.**

Though duly served, the Defendant failed to **Enter Appearance** and or defend the suit and therefore the averments by the Plaintiff in his statement of claim remain uncontroverted.

However, it does not mean that the evidence adduced by the Plaintiff remains automatic evidence as the Plaintiff still has an obligation to prove his claim on the required standard of balance of probabilities as uncontroverted evidence is not automatic prove of the case. See the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR.** where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The Plaintiff alleges that the Defendant held the suit property in trust for the family. The Plaintiff has relied on a resolution dated **8th April 1999**, which the Court has carefully read and notes that the subdivisions were done as per the averments in the Plaintiff and the Plaintiff evidence states that the said resolution noted that Murera farm is entirely for **Macharia Kimani** i.e the two plots, 1 acres and two plots of **Kiganjo Ranching** and therefore the Court finds and holds that as the Plaintiff in his Plaintiff had stated that the suit property is situate in **Murera**, then the same refer to the suit property

A trust is a fiduciary relationship in which one party, known as a trustor, gives another party, the trustee, the right to hold title to property or assets for the benefit of a third party, the beneficiary. In the case of **Charles Kangayia v Alfred Musavi & another [2020] eKLR** the Court held that:-

“the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Sagar Ahmed Al-Heidy & Others (2015) eKLR, this Court expounded on the law on trusts as follows:-

“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).”

In applying the principles to the case before us, all indications are that a constructive trust arose as between the respondents’ father and the appellant’s father. As stated in the authority above, a trust will automatically arise in favour of the person who advances the purchase money. It is a finding of fact that the purchase money for the suit parcel was advanced by the respondents’ father and he was put in possession of the land in 1975. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR wherein the Court stated that;

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

As already noted by the Court, the Plaintiff’s evidence remains uncontroverted given that his allegations to the effect that the Defendant was to hold the suit property in trust for the Plaintiff and that the properties had been distributed, has not been controverted, the Court finds and

holds that the Defendant was holding the property in trust for the Plaintiff. That a constructive trust had been created when the family agreed that the suit property to be transferred to the Plaintiff and therefore the Defendant was holding the suit property for the benefit of the Plaintiff and thus a Constructive trust was created in favour of the Plaintiff.

The Plaintiff has sought for an order for the cancellation of the resultant subdivisions and any transfers to 3rd parties. It is not in doubt that though the Plaintiff has averred that the suit property was registered in the Defendant's name, apart from the valuation report which has not been impugned and which shows that the suit property was registered in the Defendant's name and further that the subdivisions were also registered in her name, no official search has been produced to show that the Defendant is still the registered owner of the suit property.

The Plaintiff has averred that the subdivisions were transferred in the names of third parties. It is not in doubt that this Court cannot give adverse orders against 3rd parties who are not parties to this suit as the same would go against the rules of natural justice. **Section 26 of the Land Registration Act** provides for instances when a certificate of title to land can be impeached. It provides that

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Further See **Section 80(1)** provides;

“the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

The above provisions of law provide for instances in which a Court of law can order for the rectification of titles. The Plaintiff has not produced in evidence any proof that the Defendant is still the registered owner of the subdivisions he seeks to be cancelled. Further, the Plaintiff has acknowledged that the subdivisions have been transferred to third parties. It is the Court's considered view that the said third parties deserve an opportunity to be heard so that the Court can determine whether their registration were acquired through fraud or mistake so as to order for the rectification of the same. Unless the Plaintiff can prove that the Defendant is still, the registered owner of the subdivisions that emanated for the suit property, this Court can sadly not cancel the said registrations as the same would affect third parties. The Court can hence not order for vacant possession as against the said third parties.

The Plaintiff has further sought for mesne profits. Mesne profits are special damages that must be specifically pleaded and proved. The Plaintiff did not specifically plead the same and therefore not entitled to the same.

The Upshot of the foregoing is that the Court finds and holds that the Plaintiff has only proved his case to the required balance of probabilities to the effect that the Defendant was holding the suit property in trust for the Plaintiff.

Therefore, judgement is entered in favour of the Plaintiff against the Defendant in terms of **prayer No. (a)**. The Plaintiff is also entitled to costs as prayed in **prayer No. (e)** of the Plaint dated **1st August 2018**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 26TH DAY OF JULY 2021.

L. GACHERU

JUDGE

26/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ndolo holding brief for Mr. Ndichu for the Plaintiff

No appearance for the Defendant

L. GACHERU

JUDGE

26/7/2021