



**In re Estate of Christopher Nyaboga Abuya (Civil Appeal
E090 of 2022) [2024] KEHC 8441 (KLR) (1 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E090 OF 2022**

TA ODERA, J

JULY 1, 2024

**N THE MATTER OF THE ESTATE OF CHRISTOPHER NYABOGA
ABUYA**

BETWEEN

JUSTUS OMOMNYWA MOSE APPELLANT

AND

BENJAMIN MAERI NYABAYO RESPONDENT

*(Being an appeal from Judgment and order of the Court dated 3rd October 2022 in Kisii
Chief Magistrate's Succession No.593 of 2018 by the learned Magistrate Hon. P.K. Mutai)*

JUDGMENT

1. Justus Omonywa Mose, herein Appellant being dissatisfied with the above mentioned Judgment and Order of the court dated 3rd October, 2022 appeals to the High Court of Kenya at Kisii against the entire ruling and order on the following grounds :
 1. That the learned magistrate erred both in fact and in law failing to consider the Appellant's evidence on record thereby occasioning a miscarriage of Justice.
 2. That the learned magistrate erred in fact and in law in failing to find that the Appellant is beneficiary in the estate of the deceased who was holding the land in trust for them.
 3. That the learned magistrate erred in fact and law in failing to consider the evidence on record of the Appellant which failure occasioned a great miscarriage of justice.
 4. That the learned magistrate erred in fact and law by overlooking and dismissing the appellant's case without first considering that the land was family land.



5. That the learned magistrate erred in fact in coming to conclusions and the judgment he came contrary to evidence and exhibits produced by the Appellant, the law urged before him.
 6. That the learned erred in fact and law in proposing an award of dismissal with costs of the Appellant's case.
 7. That the learned trial magistrate erred in law and in fact in not considering the Appellant's submissions.
 8. That the learned trial magistrate erred in law and in fact in not awarding the Appellant any award under in the estate.
2. Reasons Wherefore the Appellant prays that: -
1. The Appeal be allowed.
 2. The Judgment and Order of the court dated 3rd October, 2022 be and is hereby set aside and be substituted with an appeal of this court.
 3. The costs of the Appeal be granted to the Appellant.

Facts

3. The appellant moved the Lower Court in Succession cause no. 593 of 2018 (estate of Christopher Nyabayo Abuga (deceased) by way of an affidavit of protest dated 7.5.2019 seeking to be recognized as a beneficiary to the estate of deceased on allegation that deceased held 6.5 acres out of land parcel no. Kitutu /Bomatara /109 in trust for his mother one Marcella Kerubo Mose /Further that the dispute went to The Land Disputes Tribunal and decided in favour of the applicant's family. The trial magistrate found that the applicant and the petitioner are not related in any way did not prove the doctrine of trust and no documents were produced to support the contention that the matter was handled by the Tribunal. The trial Court heard the parties and held that the applicant has no claim over the suit land and is thus not a beneficiary.
4. Also that the appellant produced a survey report filed by the appellant clearly indicated that Plot no. West Kitutu/Bomatara /108 encroached on a portion of plot no. Kitutu/Bomatara /109 by approximately 6.5 acres. Further that the court erred in failing to find that the disputed portion is not occupied by the family of deceased and that since the court adopted the said tribunal findings then the issue of trust was established.
5. It was submitted that the issue of trust is a matter of evidence as was held in the case of *Felista Muthoni Nyaga vs Peter Kayo Mugo* (2016_ eKLR. In the case of *Susan Gacheri Mugambi vs Maureen Florence Kagwiria & 2 others* (2016) eKLR
6. Appellant submitted that the only issue for determination is whether the learned trial magistrate erred in fact and law by failing to consider the evidence.
7. It was submitted that the objector filed proceedings of Kisii Misc no. 96 of 2011 which proceedings adopted the decision of Mosochi land disputes Tribunal case no. 4 of 2004 in which the Tribunal affirmed the fact that the family of appellant had moved from the land parcel herein.
8. Appellant submitted that Benjamin Nyabayo a son to deceased admitted that he was present when the land was surveyed and that Sarah Anyiego occupied part of the estate but he was unable to explain how come Sarah was occupying the land.



9. It was also contended that the learned Trial Magistrate failed to consider the evidence given in court with regards to the conduct of the family of deceased as cited the case of *Kyengo Maitha vs Patricia Nduku Lazarus & 5 others* (2018) eKLR where it was held”.

This is a first appellate court and the duty of this court is to re-evaluate the entire evidence on record and arrive at its own conclusion bearing in mind that it had no opportunity of seeing the witnesses during their testimony as was held in the case of *Abok James t/a AJ Odera vs John Patrick Machira t/a Machira & CO. Advocates* (2013) eKLR. I have carefully considered the Appeal and the submissions.

10. The sole issue arising for determination is;

Whether the appellant the court erred in failing to find that deceased held 6.5 acres in trust for the family of the appellant.

11. The appellant’s case was that his protest was based on trust since the land disputes tribunal held that his father resided on land no. 108 but later moved out due to the dispute. I have looked at the land disputes tribunal decision in Mosochi land dispute no. 4 of 2004 which was adopted in Kisii Misc civil suit no 96 of 2011 (*Justus Omonywa Mose vs Nyabayo Abuba & Sara Anyega*). I have seen the County surveyor’s report dated 24.10.2013 filed in the supplementary record of appeal. The same indicates that there is no plot sandwiched between the two parcels i.e parcels no. West Kitutu/Bomatara 109 and West Kitutu/Bomatara/ 108 and that plot no. 108 encroached onto plot no 109 by 6.5 acres. There is also letter dated 24.10.23 from land registrar addressed to the “Deputy Registrar Chief Magistrate’s Court” referenced Court Decrees Misc. application no.134 of 2007 and Misc. Application no. 96 of 2011.
12. It also states of the said encroachment by land 108 onto 109 by 108 and that the complainant Mr. Justus was claiming the said disputed portion and that if the encroached portion is claimed by the owner of 109 then he will get it back. The claim by the applicant was thus dismissed as false.
13. In the case of *Twalib Hatayan Twalib Hatayan & Another vs. Said Saggat Ahmed Al-Heidy & Others* (2015) eKLR, the Court held 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*)."

14. 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."

15. In the instant case, I have seen the County surveyor's report dated 24.10.2013 filed in the supplementary record of appeal. The same indicates that there is no plot sandwiched between the two parcels i.e parcels no. West Kitutu/Bomatara 109 and West Kitutu/Bomatara/ 108 and that plot no. 108 encroached onto plot no 109 by 6.5 acres. There is also letter dated 24.10.23 from land registrar addressed to the "Deputy Registrar Chief Magistrate's Court" referenced Court Decrees Misc. application no.134 of 2007 and Misc. Application no. 96 of 2011.

It also states of the said encroachment by land 108 onto 109 by 108 and that the complainant Mr. Justus was claiming the said disputed portion and that if the encroached portion is claimed by the owner of 109 then he will get it back. The claim by the applicant was thus dismissed as false.

16. The relationship between the father to the applicant and deceased is not clear. Looking at the said letters none of them indicates that the deceased held land in trust for Justus. I have also not seen any number attached to Justus' land and infact the appellant testified that their land has no umber.
17. This is a succession cause and section 29 of the *law of succession Act* lists who are dependants of a deceased and their ranking. The appellant or his mother do not fall within the said section.



18. A title deed in the name of a deceased is a prima facie evidence of ownership. A person who has a dispute with the estate of a deceased is not automatically a beneficiary by virtue of the said dispute. A title succession court also respects the sanctity of a title deed and that it is prima facie evidence of land ownership by a deceased unless proven otherwise. It suffices to say that no trust was established by appellant was rightly held by the trial court.
19. The recourse of the appellant in the circumstances lies in the Environment and Land Relations Court and not in the succession court.
20. I find no merit in the appeal and uphold the decision of the Learned Trial Magistrate. I proceed to dismiss the appeal with costs to the respondents.

T.A ODERA

JUDGE

1. 7.24

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF COURT:

No appearance for the Appellant

Omwega for the Respondent

Court Assistant: Oigo

