



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi & 30 others v Irungu & another (Civil Appeal 210 of 2018)
[2025] KECA 1483 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1483 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 210 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 19, 2025**

BETWEEN

AMBROSE KIMANI MWANGI & 30 OTHERS & 30 OTHERS APPELLANT

AND

STEPHEN IRUNGU 1ST RESPONDENT

EDWARD MWANGI 2ND RESPONDENT

*(Being an appeal from the judgment of the Environment and Land Court
at Murang'a (Kemei, J.) dated 2nd July, 2018 in ELC No. 138 of 2017)*

JUDGMENT

1. The dispute before the Environment and Land Court (ELC) revolved around ownership of Plot number Loc12/SubLoc1/1221/19 (hereinafter referred to as the 'suit property'). It was the appellants' case that in 1950, the Town Council of Kangema allocated the suit property to one Mwangi Ngari, on condition that he was to immediately start developing the same. That Mwangi Ngari, unable to solely raise the funds to commence construction, invited one Zabron Mwangi Gaga and twenty (20) other clansmen to partner with him in the construction. That the partners raised money which was later converted to shares and construction began.
2. The partners agreed to have the suit property registered in the names of Mwangi Ngari and Zabron Mwangi Gaga, in trust for themselves and the twenty partners. That Zabron Mwangi Gaga passed away on 19th January, 1984, and was succeeded by the respondents. That the respondents, vide Succession Cause No. 77 of 2009, claimed ownership of half of the suit property. The appellants averred that they filed an application for revocation of the grant issued by the probate court, which application was dismissed on a technicality. The appellants urged that they have been in actual physical possession and use of the suit property for over fifty (50) years, and are entitled to their respective shares of the suit



property. The appellants sought for a declaration that the respondents held the suit property in trust for the appellants and themselves in equal shares.

3. Vide a statement of defence dated 18th March, 2017, the respondents denied the averments by the appellants and stated that the suit property was jointly owned by Mwangi Ngari and Zabron Mwangi Gaga in equal shares. The respondents denied any knowledge of the alleged partners and stated that if they indeed existed, then they were invited onboard by Mwangi Ngari, in respect of his share of the suit property, and not by Zabron Mwangi Gaga. The respondents averred that the appellants' claim of existence of a trust was a non-starter and inconsistent with their earlier pleading of adverse possession in Nyeri High Court Civil Case (O.S) No. 46 of 2011, and Nairobi HCCC (O.S) No. 98 of 1989. It was their contention that this suit was *res judicata* on account of the two named cases lodged before the High Courts in Nyeri and Nairobi.
4. The case was heard by way of viva voce evidence. After hearing the parties, the learned Judge, in a judgment dated 2nd July, 2018, dismissed the appellants' suit. The learned Judge determined that the appellants failed to adduce any evidence to prove their claim that a constructive trust existed, between themselves and the respondents, with respect to the suit land, and additionally failed to prove that there is any partnership existed between themselves and the registered owners of the suit land. The learned Judge further held that the appellants' suit was time barred in so far as it related to a claim in land.
5. The appellants, aggrieved by this decision, lodged the appeal before us, which was founded on five (5) grounds of appeal.

The gist of their appeal is that the learned Judge erred in law and fact: in failing to find that a constructive trust existed between the appellant and the respondents with respect to the suit property; in failing to find that the conduct of the parties gave rise to a constructive trust; in determining that a partnership could only be lawful if so registered, thereby misconstruing the appellants' case; in holding that the appellants' suit was time barred while this question did not form part of the pleadings; and, lastly, in allowing the respondents to adjudicate new issues in their submissions, and making a finding on the said issues.

6. The appeal was canvassed by way of written submissions. Mr. Ng'ang'a for the appellants averred that the evidence on record proved that a constructive trust existed between the parties, in relation to the suit property. It was his submission that the suit property was initially allocated to Mwangi Ngari, who invited his clansmen to assist him develop the same. That the clansmen contributed individually and the suit property was developed from the year 1959. Counsel urged that the parties would share profits from the development every end of the year, and continue to do so to date. It was his contention that the register produced by the appellants indicated the individual members and their respective contributions to the development of the suit property. Counsel further submitted that the question of whether the suit was time barred was not pleaded, and was further not established by the respondents. Counsel urged that time started running when the grant with respect to the estate of Zabron Gaga was issued to the respondents in 2010. In the end, counsel invited us to allow the appeal and set aside the decision of the superior court.
7. In rebuttal, Mr. Mbuthia for the respondents maintained that the suit property was owned by Mwangi Ngari and Zablon Gaga in equal shares, as was evidenced by the first registration of the suit property. He averred that any partnership that may have been entered into by Mwangi Ngari with respect to his share of the suit property did not extend to Zablon Gaga. It was his submission that the appellants failed to sufficiently establish that the respondents held their share of the suit property in trust for the appellants. With respect to the question of whether the suit was time barred, counsel for the respondents submitted that the same was pleaded by the respondents in their statement of defence.



Counsel urged that Section 4(a) and (e) of the Limitations of Actions Act provides for a period of six years within which one is required to lodge a claim arising out of a contract, or for equitable relief, and that in this case, the cause of action arose before the death of Zablun Mwangi Gaga in 1984. He urged us to dismiss the appeal.

8. We are alive to our mandate as a first appellate court to analyze and re-assess the evidence on record, and reach our own conclusions. This duty was reiterated by this Court in *Gitobu Imanyara & 2 other v Attorney General* [2016] eKLR, where the court observed thus;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.” See *Selle v. Associated Motor Boat Co.* [1968] EA 123.

9. We have carefully re-evaluated the evidence before the trial court in light of the grounds of appeal put forward by the appellants. We have also considered the submissions made by the parties to this appeal. The first issue for determination by this Court are whether the plaintiff established existence of a constructive trust in respect of ownership of the suit parcel of land. The second issue for determination is whether there existed a partnership between those whom the appellants are claiming title of and the deceased to whose estate the respondents are beneficiaries. The third issue for determination is whether the appellants’ suit was barred by limitations of actions Act.
10. On the first issue it was the appellants’ case that the original allottees of the suit parcel property, that is Mwangi Ngari and Zabron Mwangi Gaga invited them in 1950 to be partners in the construction of the commercial premises on the suit property. The appellants stated that they were clan members of the said Mwangi Ngari and duly invested in the construction of the suit property. They produced a document which showed a list of members of the said partnership. They also produced receipts in abid to prove that they had been paying rates to the defunct town council of Kangema. On their part, the respondents denied the allegations by the appellants and stated that if any partnership existed it was between Zabron Mwangi Gaga and not Mwangi Ngari.
11. On re-evaluation of the evidence adduced, and the submissions made on this appeal, it was clear to us that the appellants failed to establish the existence of a constructive trust between themselves and Zabron Mwangi Gaga the owner of the half share of the suit property. We agree with the definition adopted by the trial court in terms of what constitutes a constructive trust. The trial Court quoted Halsbury laws of England 4th Edition Vo. 48 at Para 69:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where:

- i. There was a common intention that both parties should have a beneficial interest.
- ii. The claimant has acted to his detriment in the belief that by so doing, he was acquiring a beneficial interest.

The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that other party’s words of conduct



notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.”

12. The evidence adduced by the appellants clearly showed that they were invited to construct a commercial building on the half share of the suit parcel of land owned by Mwangi Ngari. No documentary evidence was produced by the appellants to support their claim that they had entered into an agreement with Zabron Mwangi Gaga for the development of the half share of the suit parcel of land. We agree with the trial court that if the appellants had any claim, it would have been with the estate of Mwangi Ngari, who according to the evidence adduced was deceased. The appellants were under a duty to establish to the satisfaction of the court that Zabron Mwangi Gaga dealt with them and therefore a constructive trust arose which they were legally entitled to enforce. We, therefore, hold that the appellants’ assertion that there existed a constructive trust was not proved to the required standard of proof on a balance of probabilities.
13. As regards to whether there existed a partnership between the appellants and Zabron Mwangi Gaga, there is no documentary evidence which was produced to show that such a partnership was ever entered into or an agreement entered between the appellants and the said Zabron Mwangi Gaga. We agree with the trial court that the absence of a duly registered partnership deed militated against the appellants’ case. The existence of a partnership cannot be inferred in the circumstances the appellants painted in their evidence before the trial court. What emerged from the evidence is that the appellants had an agreement with Mwangi Ngari, the owner of half a share of the suit property and not Zabron Mwangi Gaga.
14. With regard to whether the appellants’ suit was barred by *limitation of actions Act*, it was evidence from the evidence adduced before the trial court that the appellants have morphed their case from one claim to another. For instance, the appellants filed Nairobi HC Civil Suit No. 98 of 1988 (OS) against Mwangi Ngari and the estate of Zabron Mwangi. The appellants claim was based on adverse possession. They sought orders from the Court that they are entitled to be declared as joint proprietors of the suit property together with the defendants. The suit was dismissed on 24th February 1999 for want of prosecution. No effort was made to revive the suit. Another suit was filed before the HC at Nyeri being Civil Case No. ELC 41 of 2011. It is this suit that was transferred to Muranga ELC before it was dismissed provoking the present appeal. The applicants also challenged Jemimah Wangechi Thuita when she sought to be granted letters of administration intestate to administer the estate of Zabron M. Gaga. This was in Kangema SRM Succession Cause No. 77 of 2009 which was later transferred to the High court and was registered as Muranga HC Succession Cause No. 22 of 2013. In this Succession Case, the appellants claim to be beneficiaries of the estate of the deceased. The attempt was however unsuccessful. The court held that the appellants were not beneficiaries from the estate of the deceased because they had no familial relationship with the deceased. They lodged an appeal to this Court being Nyeri Civil Appeal No. 51 of 2015. The appeal was disallowed.
15. As it is evident from the above, the appellants have approached the Court making various claims against the predecessor in title to the respondents and against the respondents. It is clear to this Court that the appellants are playing a game of chance with the Court hoping that in one of their many litigations they would hit the bulls’ eye and succeed. This Court agrees with the trial court that the appellants’ claim based on agreement allegedly that took place in 1958 and being prosecuted by some of the parties who have substituted the deceased original persons who entered into the agreement without obtaining grants of letters of administration makes their entire suit against the respondents barred by the limitations of actions Act.



16. It is clear from the foregoing that the appeal lacks merit and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF SEPTEMBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

Deputy Registrar

