



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 549 OF 2017

JOHN NJOMO GITARI.....PLAINTIFF

VERSUS

MARY WANJIKU KIOI.....DEFENDANT

JUDGMENT

By a Plaint dated **23rd May 2017** the Plaintiff sought for Judgement against the Defendant for the following orders: -

- a) A declaration of trust that the Defendant holds title No. Karai/Karai/495, in trust for the beneficiaries of the Estate of Gitari Kioi (Deceased) being his four families house hold units*
- b) The entire title No. Karai/Karai/ 495, be subdivided into four parts and each quarter portion vest on the Plaintiff and Defendant as trustees for the four family household units of Gitari Kioi(Deceased).*
- c) Costs of the suit*

In his statement of Claim, the Plaintiff averred that the Defendant is the wife of **Walter Kioi (Deceased)**, and a daughter in law of one **Gitari Kioi (Deceased)** . That **Gitari Kioi** was married to four wives being **Wairimu Gitari, Grace Wangui Gitari, Susan Kamwati Gitari and Josephine Wamuyu Gitari**. That the suit property which is as a resultant of subdivision of Title No. Karai/Karai/70, belonged to **Kioi Nagi (Deceased)** who was the father to **Gitari Kioi (Deceased)** . That in Succession Case of **Kioi Nagi (Deceased)** being **Nairobi, Succession Cause No. 1434 of 1992**, the Grant was confirmed and orders issued that the title search be transmitted to one **Walter Kioi**, the Defendant's husband. That the said **Walter Kioi** got registered as proprietor **in trust**, for the **four** household units in equal shares and that the Defendant as a widow to **Walter Gitari holds** the suit property as a trustee for the four household units.

Despite service of Summons, the Defendant did not enter appearance and therefore failed to defend the suit. The matter therefore proceeded by way of formal proof wherein the Plaintiff testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 John Njomo Gitari, adopted his witness statement dated **23rd May 2019**, and produced his list of documents as Exhibit 1. He testified that the Defendant is his step brother's wife who was registered as the owner of their ancestral land. It was his testimony that his step brother passed on, but the Defendant refused to have the land sub divided into four portions as his father had four wives. Further, that the land should be subdivided as per the **four** houses and he has brought the suit on behalf of the four families. He urged the Court to allow his claim.

On **3rd June 2020**, the Court directed the Plaintiff to file written submissions and in compliance with the said directives, the Plaintiff through the Law Firm of **Muturi Njoroge & Company Advocates** filed his Written Submissions dated **3rd October 2020**, which the Court has carefully read and considered.

The issue for determination is **whether the Plaintiff is entitled to the orders sought**.

As the Court noted earlier despite service, the Defendant did not enter appearance. Therefore, the Plaintiff's suit remains uncontroverted. See the case of Shaneebal Limited ...Vs... County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru MunyororoVsJoseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

Though the suit has not been defended, the Court will not wholly believe the Plaintiff's evidence without interrogating the veracity of the evidence placed before it. The Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of Gichinga Kibutha...Vs...Carooline 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 has sought for a declaration that the Defendant holds the suit property in trust for the beneficiaries of the Estate of **Gitari Kioi**, and that the Court orders that the same be subdivided into **four** portions and the same be held in trust by him and the Defendant in trust for the said beneficiaries.

In the case of Juletabi African Adventure Limited & another ...Vs...Christopher Michael Lockley [2017] eKLR the Court relied on the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others [2015] eKLR, where the same Court of Appeal held that;

“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).” Emphasis added”

From the definition of what a trust is and the type of trust that can be construed, there is no doubt that for the Court to find that the Defendant holds the suit property in trust for the Plaintiff and other beneficiaries, then the Court must be satisfied that the Defendant holds a legal title and that the said title is at the request of the Plaintiff or for the benefit of the Plaintiff and the said beneficiaries.

The Court has noted that though the evidence by the Plaintiff is unchallenged, it was not automatic prove of the case. He still had an obligation to prove the same, as per the requirement of the Law.

For the Court to find that there was a **trust** on behalf of the plaintiff, the Plaintiff needed to prove that the Defendant holds a legal title over the suit property. The Plaintiff has produced a certificate of title in evidence. However, the said certificate of title relates to **L.R Karai/Karai/4**, and the same is registered to one **James Karanja Kioi**. Further the Supporting Affidavit and the Judgment that the Plaintiff seeks to rely on has no mention of the Plaintiff. Though the Judgment relates to **L.R 70**, which the Plaintiff testified that the suit property was a resultant subdivision of, and how it is to be subdivided and the acres to be subdivided, there is no evidence of how the same relates to the suit property or any evidence that the suit property is its subdivision. The Plaintiff has not provided any evidence of the **nexus** between the Defendant, her husband, the Plaintiff and the suit property.

Having failed to prove that the Defendant holds a legal title to the suit property, it is the Court’s considered view that there is no way the court can find that the Defendant holds the said land in trust. It is not even clear who the registered owner of the suit property is, as the Plaintiff did not even attempt to produce an official search. Further the Plaintiff did not produce any evidence that showed that he was a beneficiary of the suit property. Further there was no evidence that the suit property was a subdivision of **L.R 70**. In short there is no documentary evidence with regards to the suit property.

Therefore, the Court finds and holds that the Plaintiff has failed to prove his claim on the required standard of balance of probabilities. Consequently, the Court finds that the Plaintiff’s claim **not** merited and he is not entitled to the orders sought.

Having now carefully read and considered the pleadings by the Plaintiff, the evidence adduced and the Written Submissions, the Court finds and holds that the Plaintiff’s claim as contained in the Plaint dated **23rd May 2017**, is **not** merited and the same is dismissed entirely with no orders as to costs.

It is so ordered.

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

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 **Ruling** 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. Njoroge holding brief for Muturi Njoroge for Plaintiff

No appearance for the Defendant

L. GACHERU

JUDGE

10/12/2020