



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA ELC NO. 155 OF 2018

(FORMERLY NAIROBI ELC NO.1276 OF 2014)

IN THE MATTER OF L.R NO/ LARI/KIRENGA/T.120(WHICH YIELDED

L.R NO. LARI/KIRENGA 365 AND 3666 UPON SUBDIVISION

AND

IN THE MATTER OF CONSTRUCTIVE TRUST IN FAVOUR OF

MARGARET WACUKA KURIA

MARGARET WACUKA KURIA.....PLAINTIFF

VERSUS

JOSEPH KABIRA IRUNGU.....1ST DEFENDANT

LAND REGISTRAR KIAMBU.....2ND DEFENDANT

JUDGMENT

By an Amended Originating Summons dated **4th December 2018**, the Plaintiff sought the following orders against the Defendants;

- 1. A Declaration that the Defendants being brothers of the Plaintiff disinherited her when they pursued administrative proceedings over the Estate of the Plaintiff mother one Ruth Ngina Kuria.***
- 2. A Declaration that the Judgment in Succession Cause No. 2 of 1982, in the then Limuru African Court transfer directing the Defendants to be the sole beneficiaries to the Estate of Ruth Ngina Kuria and therefore entitled to be registered as the Proprietor of L.R No. Lari/Kirenga /T.120 and L.R No. Lari/ Kirenga /450 created a constructive trust in favour of the Plaintiff.***
- 3. A declaration that consequent upon such Constructive Trust, the Plaintiff is entitled to a quarter share in L.R No. Lari/Kirenga/T.120, and L.R No. Lari/Kirenga/ 450 as one of the heirs of the late Ruth Ngina Kuria***
- 4. An order directing the Defendants to transfer to her the said quarter shares in L. R No.Lari/Kirenga/T.120 and L.R No. Lari/ Kirenga/450.***
- 5. In the alternative an order for compensation for the value of her share so established.***

The Originating Summons is premised on the grounds that the Plaintiff and the 1st Defendant are siblings and together with **Iguru Kuria** and **Ndung'u Kuria** they are of the same mother. That the Plaintiff's mother died sometimes in the year **1960**, and at that time, the Plaintiff and her brothers were minors. That at the time of her death, their mother left **L.R T.120 and 450** and the minors were living on the said property. Unknown to the Plaintiff, the 1st Defendant and **Ndungu Kuria Iguru** (Deceased) filed succession proceedings being **Succession Cause No. 2 of 1982**. That in the said cause one **Iguru M.Kuria** was mentioned as a beneficiary even though he did not participate in the proceedings which proceedings had been filed by the Land Registrar.

In a Judgment signed on 7th March 1967, the Court ordered that the 1st Defendant, **Iguru M. Kuria** and **Ndung'u Kuria** be registered as the owners of **L.R 450 and T. 120**, and there was no mention of the Plaintiff as a beneficiary. At that time, as it is now, the Plaintiff was living on **L.R T.120 (later subdivided to L.R 365 and 366)** and that has been her home since her mother died. She contended that despite numerous exhortations, the 1st Defendant and **Ndungu Kuria Iguru** refused to transfer any share of her mother's property to her. That **Iguru Kuria**, one of her brothers avers that the Plaintiff is entitled to a share of their mother's property as one of the beneficiaries. That in **1988**, the 1st Defendant and **Ndung'u Kuria Iguru** assaulted her and were charged and convicted. That there exists a **constructive trust** in favour of the Plaintiff over the suit property.

In her Supporting Affidavit **Margaret Wacuka Kuria** averred that her mother died in the year **1960** and left 5 surviving children. At the time of her death, she was the owner of the suit properties. Further at the time of her mother's demise, she was **15** years and her elder brother **Iguru Kuria**, was not living at home while the other siblings stayed on the suit property. That in **2010**, without her knowledge, the Defendants subdivided **L.R T.120** to yield **L.R 365 and 366**. She further averred that her house stands on **L.R 366** and she is apprehensive that the Defendants will evict her and she did not have any other land. Further she lives on the suit property with her six children and eleven grandchildren. That her Advocate has advised her that when the Defendants were registered as proprietors of her mother's properties', a constructive trust arose and she is therefore entitled to 1/5th of her mother's Estate.

In response to the Amended Originating Summons, the 2nd Defendant **Joseph Kabira Mbira** swore a Replying Affidavit on 5th April 2019, and averred that the Plaintiff was married in **1963** to the late **Kariuki Gatumbi** where she stayed until **1970**. That the Plaintiff and their 1st born sister were married and were staying away from home. Their Uncle **Ernest Kabira Iguru** initiated proceedings in **Limuru African Court in 1967**, so as to protect his interest and that of **Ndungu Misheck** who were minors at the time. That the Court was satisfied and passed a Judgment in their favour clearly stating that the suit properties be registered in their names and **Ernest Kabira** was appointed their guardian.

That the Court did not hold that they were to hold the properties in trust for anyone. He contended that the Court conviction was against the **late Ndung'u and Ernest Kabira**. Further that he did not need the Plaintiff's consent to subdivide as the land in question did not form a trust. He averred that after subdivision, his brother the late **Ndungu** and himself sold **L.R 365 to Peter Kiugu Ngigi**, and the subdivision was pursuant to a Court order dated **23rd April 2010**. That **L.R 366** is owned by **Iguru M. Kuria**, who has all the rights and interests in the said portion and he has no interest over the same.

He further averred that the Plaintiff was given land on a humanitarian ground by **Councillor Alfred Chege**, which she developed and subdivided into two portions which she has sold has built a house on another portion That the Plaintiff is guilty of laches and she cannot rush to Court over a property that has been subdivided. Further that the Plaintiff filed Nairobi **High Court Misc 722 of 1993**, and hence the instant proceedings are an abuse of the Court process. That if there has been any dealings on **L.R 366**, then the same has been done by **Iguru Kuria** who is the owner. That **Iguru Kuria** participated in the proceedings in **Limuru Africa Court**, but did not make any objections.

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for herself and called no witness. The Defendant too gave evidence for himself and called no witness. The 2nd Defendant did not participate in the proceedings.

PLAINTIFF'S CASE

PW1 Margaret Wacuka adopted her Affidavits dated **4th December 2018** and **14th December 2018**. It was her testimony that the Defendants are her brothers and that **Ruth Ngina** was their mother. That their mother owned **T/120** and **L.R 450 Kirenga**, and the Defendants failed to give her share as her three brothers shared out the said land. That the Defendants went to Court and filed a Succession Cause and she was not named as one of the beneficiaries in the Judgment and she was not aware of the same.

She further testified that her mother died in **1960**, and though her mother had five children, all of them are not named in the Judgment. Further that her brothers were misled by their uncle when they were aged **17** and **14** years and shared the land amongst themselves. She told the Court that the parcels of land have been subdivided and that **L.R 450** is registered in the name of **Joseph Kabira** and **Njuguna** who is a purchaser. She produced the green card as Exhibit 1. She further testified that **L.R Lari/ Kirenga /T120** has been subdivided into two parcels of land being **365 and 366** and that the registered owner of **365 is Peter Kinyua** and the owner of **366 is Miriam Wanjiku Chege**. It was her further evidence that the suit properties were sold by **Joseph Kabira**. She denied that **366** is registered in the name of **Iguru Kuria**. She alleged that **Iguru Kuria** has no land to give her.

That she lives on **T. 120**, but she does not live there peacefully as in **1988 Joseph Kabira** sent some three men to assault her and evict her from the suit property. That she was once married in **1961**, but she was later chased away by her husband and she was given a road reserve by the Councillor to build a temporary shelter. Further that her brothers were supposed to hold the land in trust for the other siblings. She further testified that the purchasers of **T. 120**, purchased the suit property while she was in possession and she was not consulted and even for **L.R 450** she was also not consulted. She urged the Court to order that the subsequent subdivisions be cancelled.

She testified that the Judgment made in **1967**, was wrong. It was her testimony that in **1967**, she was 22 years old and older than **Joseph** but **Iguru** was older than her. However, **Iguru** did not participate in the Succession proceedings, but he was given a small portion in **T.120**. She denied knowledge of the Succession Cause and further testified that in **1967**, she was living on **T120**. She also testified that **Iguru** has no land to give her and she denied any conspiracy between the two of them. That she took the instant matter to Kiambu Court and it was interfered with and the case was dismissed. Further that she filed another suit in Nairobi High Court and the Advocate died before the case could be heard. It was her further testimony that **Joseph Kabira** sold **L.R 450** and has left her landless.

DEFENCE CASE

DW1 Joseph Kabira adopted his Replying Affidavit dated **5th April 2019** as his evidence and further produced the list of documents as

exhibits. It was his testimony that his father had two wives and his mother had 5 children. That the Plaintiff is his biological sister and one of their sibling is deceased. That he was born in 1953 and their mother died in 1959, and left them as orphans and they grew up in poverty. It was his testimony that upon the demise of their mother, their second born brother sold all the properties their mother had left behind and wanted to sell their land, but their paternal uncle and the **Iguru** clan intervened and sued **Iguru Misheck**.

In 1967 a decision was made and the Court directed that **L.R 450** be registered in the names of **Ndung'u Iguru** and himself and **T.120** was registered in the name of **Iguru Misheck, Ndung'u Mischeck** and **Kabira Misheck** and since they were minors, their guardian was **Ernest Kabira**, who was their cousin. **Iguru** was of age and so he was not given a guardian.

That when he became of age, they sought to be registered as proprietors of their portions'. That **T. 120** was for the three of them and **L.R 450** is no longer in existence and **Ndungu** sold his portion, but DW1 was left with his portion. He further testified that **T.120** was subdivided into two portions and he took one portion and left **Iguru** with the other portion. That **Margaret** lives on **Iguru's** portion. It was his testimony that he has no interest over **L.R 366**, and when he conducted a search, at Kiambu Lands Registry, he confirmed that it had been registered in the name of **Iguru**. That the Plaintiff had sued the four of them and later removed two of the Defendants. It was his testimony that he was **not** registered as a trustee and he has no land to give to the Plaintiff. That his sister was given land by the County Council of Kiambu, which she subdivided and sold a portion and built rental houses on the remaining portion. He denied assaulting the Plaintiff and he did not have any ill feelings towards her. That his only dispute is that the Plaintiff has claimed land from him after **53 years**.

It was his further testimony that **Margaret**, the Plaintiff herein is not mentioned in the Judgment where Ernest **Kabira** had filed the case as daughters never used to inherit land in those years. He further testified that their mother left a shop at **Kirenga Market, L.R T.120** and **L.R 450** and from the Judgment, the land was inherited by **Ndung'u** and **Kabira Mishek** and plot **T.120** was inherited by the three brothers including **Iguru Misheck**. That from the certificate of official search dated **11th October 2010**, the plot was registered in the name of the three brothers. As per the search dated **2014, L.R 366** is registered in the name of **Lilian Wanjiku Chege** and from the search produced in Court dated **29th January 2020**, there is no **L.R 366**. That he and **Ndung'u** owned **T.365** and they jointly sold the same. He denied selling **L.R 366** and that **Iguru Misheck** has lived on the said plot since **1986**. Further that **Margaret**, the Plaintiff, was only entitled to inherit the said property if she was **not** married, as that was the practice then.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The issues for determination are as follows;

1. Whether the Court in its Judgment in the Succession Cause No. 2 of 1982 in the then Limuru African Court created a Constructive trust over the suit properties

2. Whether the Plaintiff is guilty of Laches

3. Whether the Plaintiff is entitled to the orders sought

1. Whether the Court in its Judgment in the succession cause No. 2 of 1982 in the then Limuru African Court created a Constructive trust over the suit properties.

The Plaintiff has testified that she is entitled to a share of the suit properties that were left behind by her late mother. The Plaintiff has averred that the 1st Defendant and her other brothers filed a Succession Cause and in the said Succession proceedings they disinherited her and distributed the suit properties amongst themselves thereby disinheriting her. The Court has seen the said judgment from the **Limuru African Court**. It is not in doubt that the suit properties that belonged to the Plaintiff's late mother were shared amongst her brothers and the Plaintiff was left out.

The Court is alive to the fact that in the earlier days, there was a notion that women could not inherit from their parent's estate and it was only the men who were entitled to the said estate. However, it is the Court's considered view that just like the men, the women were also entitled to the properties that their parents left behind. If the men had the properties to the exclusion of the Women, then the same would be total discrimination. Therefore, it is the Court's considered view that the Plaintiff herein just like the 1st Defendant and her other brothers was entitled to a share of the suit properties. See the case of **Joyce Kabiti M' Turuchu...Vs... David M' Ntiritu Kiambi [2016] eKLR** where the Court held that;

"As a matter of fact, traditional societies practiced and allowed discrimination of women because of their gender and this was also manifest in inheritance laws. But one bold decision of the Court of Appeal in Rono v Rono & Another, 2008 1 KLR (G & F) page 803, in particular the opinion by Waki, J.A., changed all that and brought in new dawn that loathed any form of discrimination against women. The said judge gallantly stated that:-

"Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short "CEDAW". Article 1 thereof defines discrimination against women as:

"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field".

Therefore, the Court finds and holds that the Plaintiff was entitled to 1/5th of her mother's estate. However, it is clear that the suit properties were only distributed amongst her brothers and the said properties were registered in their names. The Court must then establish whether a **Constructive trust** was created.

When a party claims the existence of a trust, the onus is on the party relying on the existence of the trust to prove that the same exists. 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 Saggar 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”

It is not in doubt that for a Constructive trust to occur, the same must be imposed by the Court. Further in the above case, the Court of Appeal stated that Constructive trust **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.**

In the instant case, it is not in doubt that the suit properties were the properties of the Plaintiff's and the 1st Defendant's mother. That the Court in the **Limuru African Court** vide the Succession Cause granted proprietorship to the 1st Defendant and his other two brothers to the exclusion of the Plaintiff who was also a daughter and a child of the deceased and was also entitled to the said inheritance. It is the Court's considered view that the instant case presents a circumstance in which the Court will consider that the said legal owners of the suit properties were trustees as they got the share that ought to have been divided amongst all of them or all the children of **Ruth Ngina Kuria**.

The Court finds and holds that the Judgment in the **Succession Cause No. 2 of 1982**, in the then **Limuru African Court** created a Constructive trust over the suit properties.

2. Whether the Plaintiff is guilty of Laches

In his Replying Affidavit, the 1st Defendant has accused the Plaintiff of laches.

The **Black’s Law dictionary** defines laches as

“neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.”

Further in the case of **Joshua Ngatu ...Vs... Jane Mpinda & 3 others [2019] eKLR** the Court held that ;

38. In the Court of Appeal Case No.16 of 2012 Nairobi (Civil Application), reference was made to Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221, where at page 240 it was stated thus:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation

in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material....”

39. Thus one of the legal basis of the doctrine of laches is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found. As pointed out earlier on, the transaction that culminated in alienation of the suit land from the plaintiff to other parties occurred sometime in 1977. Going by plaintiff's application of 2008 in ELC 132 of 2007, and taking into account the contents of his supporting affidavit of 4.5.2018, plaintiff was aware of this aged transaction. No plausible explanation has been advanced as to why he is lodging the claim at this time.

40. The other point of consideration is acquiescence on the part of the claimant. Plaintiff has averred that he has always lived on the suit land. How is it that he just sat there on his land while buildings and go-downs were coming up on that land and he took no action at all? Again there is not the slightest plausible explanation given by the plaintiff as to why he did not ventilate his claim in the suit number ELC 132/07 by prosecuting his application of 2008. He is therefore the one who has acquiesced his status and he should not be allowed to drag the present litigants on an endless litigation odyssey.

41. Finally, the court has considered that “circumstances have changed”. For instance, 4th defendant bought his share of the land from MEHBOOB SALEH, VALJI SENGHAI, MOHAMED IQBAL and RAMJI D. PATEL. But the people who allegedly bought the land in 1977 are the RAHEMTULLAS.

42. When circumstances change and time passes, witness go their ways, evidence disappears, even memories falters. The plaintiff is questioning the 1977 transaction. 40 plus years down the line, how are the present defendants expected to look for those RAHEMTULLA'S?, Yet it appears that plaintiff is the one who knew them well. Plaintiff even remembers such finer details like who amongst the RAHEMTULLAS was an alien. He even remembers the alien card number!!. It would be unfair and unjust to subject the defendants to litigation all over again in respect of this transfer which occurred decades ago with the knowledge of the plaintiff.

As already noted above, laches is the neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity. In the instant case, it is not in doubt that the Plaintiff had been aware of the Judgment in the Succession Cause for quite some time. Although the Plaintiff testified that at the time the Judgment was delivered, she was not aware, she did not state when exactly she became aware of the said Judgment that granted her brothers the suit properties to her exclusion. However, as early as **1988**, the Plaintiff was already aware of the said Judgment as the Judgment in her assault case was clear that the parties had a falling out with regards to the said suit property.

The Plaintiff also testified that her brothers had always tried to get her out of the suit property. Further, it is not in doubt that **L.R 450**, has since been sold to a third party and **L.R T.120** has been subdivided into two portions. Further, although the 1st Defendant has denied selling one portion, the Plaintiff has averred that both portions have been sold. Further it is not in doubt that the Constructive trust had been created and the same was against the three brothers that is the 1st Defendant, the late **Ndungu Misheck** and **Iguru Kuria** two of whom have not been sued in the instant suit and one of them is deceased.

In determining whether there is laches, the Court is called upon to determine whether there is lapse of time and delay. The instant case was filed in **2014**. From the year **1967**, when the Succession Cause Judgment was delivered, a long period of time has since passed and it is the Court' considered view that the lapse of time and the delay has made the remedy sought to be impracticable.

Further, in the instant suit, the Plaintiff is seeking remedies as against only one of the brothers while the trust had been constructed against the three of them. Further the properties sought are no longer in existence as the same have since been divided and sold.

Therefore, the Court finds and holds that the Plaintiff is guilty of laches and as already held above in the case of ***Joshua Ngatu ...Vs... Jane Mpinda & 3 others (supra)***, it would be impossible to grant her the orders sought as circumstances have since changed and any orders that are likely to be made will affect third parties who are not parties to the instant suit.

3. Whether the Plaintiff is entitled to the orders sought.

In her Amended Originating Summons, the Plaintiff has sought for a Declaration that her brothers disinherited her when they pursued administrative proceedings and that the Judgment in the **Succession Cause** directing the Defendants to be sole beneficiaries created a constructive trust. The Court having held that a constructive trust was created, finds that the said prayer is merited and is granted only to the extent that a constructive trust had been created.

The plaintiff has also sought for a declaration that consequent upon such trust, she is entitled to a quarter share in the suit property and an order directing the Defendants to transfer the same to her. However, the Court has held and found that the Plaintiff is guilty of **laches** and the remedy she has sought cannot be granted.

For the above reasons, the Court finds and holds that the Plaintiff is not entitled this declaration and is not entitled to ¼ share of the suit property.

The Court further finds that it cannot grant the Plaintiff compensation as the Plaintiff had only sued one brother and left the others and having held that the Plaintiff is guilty of laches, she is not entitled to the same.

Having considered the available evidence, the Court finds and holds that though a Constructive trust was created in favour of the Plaintiff, the Plaintiff is guilty of laches and Consequently, she is not entitled to the prayers sought in the Amended Originating Summons.

The Upshot of the foregoing is that the Court finds the Amended Originating Summons **not merited** and the same is **dismissed** entirely with each party bearing its own costs.

It is so ordered

Dated, signed and Delivered at Thika this 3rd day of December 2020

L. GACHERU

JUDGE

3/12/2020

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

M/s Macheru for the Plaintiff

Mr. Otenyo for the 1st Defendant

No appearance for the 2nd Defendant

L. GACHERU

JUDGE

3/12/2020