

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. E011 OF 2022(O.S)

PAUL OMONDI SEDA

(Suing as the attorney of DAVID OUKO SEDA).....
.....PLAINTIFF

VERSUS

JOHN OUKO ONYANGO.....1ST
DEFENDANT

DAN ONYANGO OCHOLA.....2ND
DEFENDANT

(Both sued as the legal representatives of the estate of
DAUDI ONYANGO AUMA)

JUDGMENT

All that parcel of land known as Title No. Kisumu/Nyahera/933, measuring 3.0 hectares (hereinafter referred to as "Plot No. 933"), is registered in the names of Dan Onyango Ochola, Joab Musa Onyango(deceased), John Oukoh Onyango, and Daudi Onyango Musa. The register of Plot No. 933 was opened on 1st August 1980 with Daudi Onyango Musa, Daniel Ochola Onyango, Joab Musa Onyango and John Ouko Onyango as the first registered owners of the property.

All that parcel of land known as Title No. Kisumu/Nyahera/935, measuring 1.5 hectares (hereinafter referred to as “Plot No. 935”) is registered in the name of David Ouko Seda. The register of Plot No. 935 was opened on 1st August 1980 with Simon Seda Angugo as the first registered owner of the property. On 25th September 2014, Plot No. 935 was registered in the name of George Ouko Seda by transmission as an administrator of the estate of Simon Seda Angugo. On the same date, George Ouko Seda transferred Plot No. 935 to David Ouko Seda as a beneficiary of the estate of Simon Seda Angugo. David Ouko was issued with a title deed for Plot No. 935 on the same date.

The Plaintiff, David Ouko Seda, who is the current registered owner of Plot No. 935, is the son of George Ouko Seda and a grandson of Simon Seda Angugo. The Plaintiff has brought this suit by way of Originating Summons dated 16th May 2022 in his personal capacity as the registered owner of the suit property, and not as a legal representative of Simon Seda Angugo (hereinafter referred to as “Angugo”), the first registered owner of Plot No. 935. The Plaintiff has sued John Ouko Onyango and Dan Onyango Ochola, not in their personal capacity as co-proprietors of Plot No. 933, but as the legal

representatives of Daudi Onyango Auma, also known as Daudi Onyango Musa Auma, deceased. The Plaintiff has claimed that Daudi Onyango Auma, deceased (hereinafter referred to as “Daudi”) is the registered owner of Plot No. 933.

In his Originating Summons and the supporting affidavit, the Plaintiff has claimed that a portion of Plot No. 933 measuring 0.9 of a hectare (hereinafter referred to as “the suit property”) belonged to Angugo and should have formed part of Plot No. 935, which was registered in the name of Angugo. The Plaintiff has averred that in the 1960s, Angugo had given Daudi and his family the suit property to cultivate. The Plaintiff has averred that Angugo moved from Kenya to go and work in Tanzania while his wife worked in Taita Taveta and left the suit property in the possession of Daudi. The Plaintiff has averred that during the land adjudication at Kisumu Nyahera Registration Section between 1969 and 1970, Daudi, by himself or through his agents, took advantage of the absence of Angugo and his wife, and misrepresented to the adjudication officer that the suit property, which was given to him to use temporarily, belonged to him. The Plaintiff has averred that as a result of the misrepresentation, the suit property was adjudicated as part of Daudi’s land, which initially

measured 2.1 hectares only. The Plaintiff has averred that the addition of the suit property to Daudi's land, which was given Title No. Kisumu/Nyahera/933 increased its area from 2.1 hectares to 3.0 hectares. The Plaintiff has averred that the area of Angugo's land, which measured 2.4 hectares, was reduced and registered as Title No. Kisumu/Nyahera/935 measuring 1.5 hectares.

The Plaintiff has averred that Daudi who was given the suit property by Angugo to use temporarily for cultivation, held the property in trust for Angugo and his family. The Plaintiff has averred that Angugo came back to Kenya briefly in the 1980s and found the suit property already registered as part of Daudi's land and a title deed issued to him. The Plaintiff has averred that Angugo died before he recovered the suit property, which was registered in the name of Daudi, through malice, deceit, and non-disclosure of material facts to the adjudication officer. The Plaintiff has averred that his father, George Seda, took over the matter and referred it to the area Chief in 1999. The Plaintiff has averred that the Chief, with the help of the village elders, heard both parties and made a decision on the dispute. The Plaintiff averred that the meeting at the Chief's office resolved that the suit property belonged to Angugo. The Plaintiff averred that Daudi

did not honour the recommendation made by the Chief to the effect that Plot No. 933 be surveyed and a portion thereof measuring 0.9 of a hectare, be carved out and amalgamated to Plot No. 935. The Plaintiff has averred that in the circumstances under which Daudi was given possession of the suit property by Angugo, an implied, constructive, and /or resulting trust arose in favor of Angugo, which was breached by Daudi. The Plaintiff has averred that the trust should be enforced by excising a portion of Plot No. 933 measuring 0.9 of a hectare and amalgamating it to Plot No. 935 owned by the Plaintiff in terms of the prayers sought in the Originating Summons. In the prayers, the Plaintiff has sought the following orders;

1. A declaration that there was an implied resulting and /or constructive trust in favour of Angugo, and consequently the Plaintiff over the suit property as against Daudi.
2. A declaration that the inclusion of the suit property as part of Plot No. 933 instead of Plot No. 935 was fraudulently orchestrated through non-disclosure of material facts by Daudi or his agents to the adjudication officer at the time of adjudication.

3. Revocation of the title for Plot No. 933 and the excising of a portion thereof measuring 0.9 of a hectare to be amalgamated with Plot No. 935.
4. The costs of the application.

The Defendants have opposed the Originating Summons through a replying affidavit sworn by John Ouko Onyango. The Defendants have averred that Plot No. 933 belonged to Daudi, and as the sons of Daudi, they had occupied the property since 1985. The Defendants have averred that Angugo never claimed the suit property while alive, and that it was not until after his death that his children started laying a claim to the property. The Defendants have averred that the Plaintiff's suit is incompetent, frivolous, and misconceived. The Defendants have averred that the Plaintiffs are not deserving of the orders sought.

At the hearing of the Originating Summons, the Plaintiff's attorney, Paul Omondi Seda, adopted his affidavit in support of the Originating Summons as his evidence in chief and produced several documents as exhibits. The Plaintiff's attorney maintained that the suit property should have formed part of Plot No. 935, which was registered in the

name of Angugo, and not part of Plot No. 933, which was registered in the name of Daudi. He stated that the suit property was registered in the name of Daudi in error. The Plaintiff called Gordon Oliech Rombo, Walter Andiego Obuoga and Fredrick Oloo Obuoga as his witnesses. They all corroborated his evidence.

The 1st Defendant gave evidence on his own behalf and on behalf of the 2nd Defendant. The 1st Defendant adopted his witness statement dated 9th October 2023 as his evidence in chief. The 1st Defendant stated that they were living on Plot No. 933, which was a family land occupied by them since the 1960s. He stated that the Plaintiff was occupying Plot No. 935 adjacent to Plot No. 933. He denied that a portion of Plot No. 933 belonged to the Plaintiff. He stated that Angugo and his wife never laid a claim to the disputed portion of Plot No. 933. He stated that of the four registered owners of Plot No. 933, only he and the 2nd Defendant were alive.

After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed submissions dated 8th August 2025. The Defendants did not file submissions.

The Plaintiff's submissions

In his submissions, the Plaintiff framed only one issue for determination by the court, namely, whether the Plaintiff is entitled to the reliefs sought in the Originating Summons. The Plaintiff cited the Supreme Court case of Shah & 7 others .v Mombasa Bricks & Tiles Limited & 5 others, Petition 18 (E20) of 2022 [2023] KESC (KLR) (28) and submitted that a constructive trust arises where the conduct of one party in relation to another's beneficial interest in property is unconscionable or inequitable. The Plaintiff submitted that Angugo, out of goodwill, allowed the family of Daudi to utilize the suit property. The Plaintiff submitted that during the land adjudication exercise, Daudi included the property as part of his land, which was adjudicated and given Plot No. 933. The Plaintiff submitted that he had demonstrated through evidence that Daudi manipulated the adjudication process in the absence of Angugo and fraudulently and wrongfully caused the suit property to be registered as part of Daudi's land. The Plaintiff submitted that Daudi held the suit property in constructive trust for the family of Angugo. The Plaintiff cited Shah & 7 others .v Mombasa Bricks & Tiles Limited & 5 others (supra) and submitted that a constructive trust may be imported into a land sale or transaction where the conduct of the parties offends equity and

good conscience, including situations involving misrepresentation, abuse of trust, or unjust enrichment. The Plaintiff submitted that where a party acquires a title through inequitable means, a constructive trust arises by operation of law to hold such party to account. The Plaintiff submitted that Daudi acquired the suit property through misrepresentation during the land adjudication, which was a wrongful acquisition of land. The Plaintiff urged the court to declare that a constructive trust arose in favour of the family of Angugo, and that the same binds Daudi.

The Plaintiff submitted further that he had demonstrated that the suit property was wrongly excised from the land that belonged to Angugo through misrepresentation amounting to fraud and unconscionable conduct. The Plaintiff cited Twaha Hassan v. Said Hemed Said & Another [2015]eKLR, and submitted that equity will not allow a person to retain an interest acquired through dishonest means. The Plaintiff submitted that the Defendants, as successors in title to Daudi, held the suit property in trust for the family of Angugo. The Plaintiff urged the court to grant all the reliefs sought in the Originating Summons.

Analysis and Determination

I have considered the Originating Summons together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the Defendants in opposition to the Originating Summons. Finally, I have considered the evidence and the submissions by the parties. I am of the view that the issues arising for determination in this suit are the following;

1. Whether a resulting and/or constructive trust has been established in favour of the Plaintiff in respect of the suit property, which is registered in the names of Daudi Onyango Musa, (deceased), Daniel Ochola Onyango, Joab Musa Onyango, (deceased), and John Ouko Onyango.
2. Whether the Plaintiff is entitled to the reliefs sought; and
3. Who is liable for the costs of the suit?

Halsbury's Laws of England, 4th Edition, Volume 48 at Paragraph 597
defines a resulting trust as follows:

“A resulting trust is a trust arising by operation of law:

- i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust**

- either is not declared in whole or in part or fails in whole or part; or
- ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or
 - iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.”

In Heartbeat Limited v. Ng’ambwa Heartbeat Community Children’s Home & Rescue Center [2018] eKLR, the Court of Appeal stated that:

“Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley - Civil Appeal No. 75 of 2016 (unreported). It was upon the respondent to establish that it was the parties’ intention that the appellant would purchase and hold the suit parcels in trust for it...”

In Peter Ndungu Njenga v. Sophia Watiri Ndungu [2000] eKLR, the Court of Appeal stated as follows:

“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 trust is implied.”

In Juletabi African Adventure Limited & another v. Christopher Michael Lockley [2017] eKLR, the Court of Appeal stated as follows:

“27. In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, this Court examined and stated 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 may be 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).

28. Applying the emphasized principles to the case before us, all indications are that a resulting trust arose as between the respondent and the 1st appellant. As stated in the authority above, 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. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1st appellant. See also *Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR.*"

The Court of Appeal in MB v. BBAM (Civil Appeal 181 of 2020) [2022] KECA 895 (KLR) (28 April 2022) (Judgment) (with dissent - S ole Kantai, JA) stated as follows;

"This is for the reason that the presumption of a resulting trust is rebuttable. Gary Watt's text book on Trusts and

Equity 3rd Edition at page 153; clearly states that much as there exists the presumption of a resulting trust, it should be recognised that the presumption “...is easily rebutted by evidence that the transferor intended the transfer to take effect in some other way. It may be that the transferor intended an outright gift, or that he intended the transfer of property by way of loan or some other contractual arrangement.”

The burden was on the Plaintiff to prove his case against the Defendants. The Plaintiff's case, as set out in his Originating Summons, and the prayers he has sought is that the current registered owners of Plot No. 933 hold the portion thereof measuring 0.9 of a hectare (the suit property) in trust for Simon Seda Angugo (Angugo), and consequently, the Plaintiff. The suit property is said to have been owned by Angugo. Angugo is said to have given the Defendant's father, Daudi Onyango Auma (Daudi), permission to use the suit property temporarily for cultivation. The Plaintiff has claimed that in breach of that arrangement between Angugo and Daudi, Daudi caused the suit property to be adjudicated and registered in his name as the proprietor thereof. It is clear from the foregoing that if there was to be any trust relationship in relation to the suit property, it could only be between Angugo and Daudi. The Plaintiff, who never

owned the suit property when the same was allegedly given to Daudi temporarily, cannot claim that Daudi held the property in trust for him.

As I mentioned earlier in the judgment, the Plaintiff brought this suit in his personal capacity. The Plaintiff did not bring the suit as a legal representative of the estate of Angugo. Although the Plaintiff has sought orders in favour of Angugo, Angugo is not a party to the suit. As at the time the suit property was registered in the name of Daudi and others, the person alleged to have been the owner of the suit property was Angugo. It is therefore only the legal representative of Angugo who is now deceased, who can maintain an action for the recovery of the suit property. The Plaintiff, who is not a legal representative of Angugo, cannot purport to move the court for the recovery of a property allegedly owned by Angugo, whether the cause of action is based on trust or otherwise.

At the trial, the Plaintiff produced in evidence a copy of the register for Plot No. 933(P.EXH.5) and a certificate of official search for the same plot (P.EXH. 4). The two exhibits showed that as at the time the Plaintiff brought this suit, the registered owners of Plot No. 933 a

portion of which is being claimed by the Plaintiff in this suit were; Dan Onyango Ochola, Joab Musa Onyango (deceased), John Oukoh Onyango and Daudi Onyango Musa. This suit was brought against John Ouko Onyango and Dan Onyango as the legal representatives of Daudi Onyango Musa, deceased. John Ouko Onyango and Dan Onyango, who are co-proprietors of Plot No. 933, were not sued in their personal capacities. What this means is that out of the four registered owners of Plot No. 933, the Plaintiff sued only one, namely, Daudi Onyango Musa, deceased. The Plaintiff has sought the cancellation of the title for Plot No. 933. Such an order, if made, would affect the interests of all the registered owners of the property, some of whom are not parties to the suit. A court cannot make an order against parties who are not before it.

The Plaintiff claimed that during the land adjudication, Daudi caused the suit property to be registered in his name as part of Plot No. 933. The Plaintiff's exhibits 4 and 5 referred to earlier show that Plot No. 933 was registered in the names of Daudi Onyango Musa, Daniel Ochola Onyango, Joab Musa Onyango and John Ouko Onyango jointly on 1st August 1980 as the first registered owners. They are still the registered owners of the property. Since the property is owned jointly

in undivided shares, it cannot be said that Daudi Onyango Musa (Daudi) owns any particular portion thereof in respect of which a suit may be maintained against him alone to the exclusion of the other registered owners.

I agree with the Defendants that the Plaintiff's suit is incompetent and misconceived. The Plaintiff has *no locus standi* to bring this suit as he was not the owner of the suit property when it was allegedly registered in the name of Daudi in error. Angugo, who is said to have been the owner of the suit property and on whose behalf the Plaintiff has purported to seek the recovery of the suit property, is not a party to the suit. Furthermore, all the registered owners of Plot No. 933 who will be affected by the orders sought have not been made parties to the suit. Even if I were to consider the merit of the claim, assuming that Daudi was the only registered owner of Plot No. 933, I am not persuaded that the Plaintiff has proved his claim to the required standard. The Plaintiff is claiming a portion of land measuring 0.9 of a hectare, which he claims was acquired through misrepresentation and deceit, and merged with Daudi's land to form Plot No. 933. The Plaintiff has claimed that this 0.9 of a hectare portion of land was owned by Angugo and should have been part of Plot No. 935, which

was initially measuring 2.4 hectares. The Plaintiff has claimed that Daudi's land, which after adjudication was registered as Plot No. 933, measured 2.1 hectares before it was merged with Angugo's portion of land measuring 0.9 of a hectare, which brought its total measurement to 3.0 hectares. There is no evidence before the court as to the measurement of Angugo's and Daudi's parcels of land before land adjudication. I find the Plaintiff's claim that a portion of Angugo's land measuring 0.9 of a hectare was excised and merged with Daudi's land not proved. I am also not persuaded that the disputed land/suit property was given to Daudi by Angugo to use temporarily and that it was registered as part of Daudi's land wrongfully. According to the evidence on record, Angugo is said to have been aware of the alleged wrongful registration of the suit property in the name of Daudi as early as the 1980s. There is no evidence placed before the court showing that Angugo took any legal action to recover the suit property from Daudi. This suit was brought 42 years after the suit property was registered in the name of Daudi and others. If, at all, the suit property was acquired by Daudi fraudulently from Angugo, as the Plaintiff wants this court to believe, why did Angugo and the beneficiaries of his estate wait for 42 years to come to court for

redress? As mentioned in the case law I have cited above, trust is a right which is enforceable only in equity. Is it equitable to entertain a 42-year-old claim? Without any explanation for the inordinate delay in coming to court, I find the Plaintiff's claim an afterthought and an abuse of the court process.

For the foregoing reasons, it is my finding that the Plaintiff has failed to establish that the current registered owners of Plot No. 933 hold a portion thereof measuring 0.9 of a hectare in trust for the Plaintiff. Given that finding, the Plaintiff is not entitled to the orders sought against the Defendants in the Originating Summons.

Conclusion

In conclusion, the Plaintiff's suit is dismissed with costs to the Defendants.

Delivered and signed at Kisumu on this 17th day of December 2025

**S. OKONG'O
JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwesigwa for the Plaintiff

N/A for the Defendants

Ms. J. Omondi-Court Assistant

ORIGINAL COPY