

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CIVIL APPEAL NO. E021 OF 2021

BETWEEN

HANNAH NJERI KOGI (*Suing as the
representative of the estate of the late ELIJAH
KOGI GICHAGA*)

LABAN MWANGI GICHAGA.....APPELLANTS

AND

SAMUEL MUNYUA GICHAGA.....RESPONDENT

*(An appeal against the judgment and decree of the
Environment and Land Court of Kenya at Nyahururu (M.C.
Oundo, J.) delivered on 29th October 2019*

in

**ELCC No. 14 of 2017
(Formerly Nakuru ELC No. 102 of
2012))**

JUDGMENT OF THE COURT

1. The main issue in this appeal is whether the suit property namely **Nyandarua/Ngorika 346**, the suit land, was held in trust for appellants and the respondent by the respondent, who are siblings, or whether the doctrine of constructive trust can be applied. The respondent's case was that he was the registered owner of the suit land measuring approximately 6.68ha and that the land solely belonged to him, while the appellants, on the

other hand, claimed that he held it in trust for himself and themselves.

2. From the record, the dispute arose in 2009 when the appellants entered on the suit land, cut down trees and other vegetation and damaged the fence. They thereafter proceeded to erect a permanent structure and evicted the respondent. The respondent then filed Civil Suit **Nakuru ELC No.12 of 2012** that was later transferred to **Nyahururu ELC No. 14 of 2017**. In his reliefs, the respondent sought declaratory orders that he is the lawful owner, eviction of the appellants and an injunction to take down the structures erected by them.
3. The appellants on their part denied the assertions by the respondent stating that he obtained title fraudulently from their father, the late Gichaga Munyua. It was their contention that the respondent purchased the suit land in trust for them as a *muramati* for himself and his younger siblings, the appellants included. They averred that they had lived on the suit land since birth and therefore, the appellant did not enjoy absolute rights. For those reasons, the appellants urged the trial court to find that the respondent held the property in trust for them and an order be given for distribution of the property to each beneficiary.

4. After hearing the parties, *Oundo, J.* held in as follows in the impugned judgment dated 29th October 2019:

“117. That in 1965, it had been decided that anybody who had an identity card was to be allotted the white settler’s land within Ngorika through the ballot system. That since he had one, he balloted and was allotted parcel No 60 by the Settlement Fund Trustees (SFT) which also gave him one cow and a calf to help in the repayment of the loan. That he had invited his parents to join him on the suit land where they had all started planting/ploughing in the year 1966. The proceeds from the farm were used to repay the loan at the rate of Ksh.60/= every month. At the time, his step brothers, the Plaintiffs herein were only about 5 years old. Later the land, which measured about 23 acres had been registered in his name.

118. There was also no dispute that the Plaintiff’s father had a parcel of land in Muranga which he had sold and moved to Ngorika. Although the Plaintiffs testified that the proceeds from the sale of the Muranga land had been used to purchase the suit land yet they laid no evidence in court to conform the said allegations. Secondly their explanation that their father had asked the Defendant to be registered in his place for reasons that land could not be allotted to persons who had another land or that because the Defendant was his eldest son, could not hold water for reasons that at the time the balloting was taking place, the land in Muranga had already been disposed of allegedly ‘to purchase the suit land’, therefore their father had no land at the time, and if he

***did, this evidence was not brought forward,
secondly it could not be true that the
Defendant was asked to***

be registered in place of his father as his father's eldest son because there was Meshack, who testified as DW2 and who was their father's eldest and biological son and who ought to have been the proper person to be registered on the suit land following this line of argument.

119. The evidence further revealed that once Meshack was allotted his own parcel of land, their father had moved thereon together with his wife, the Defendant's mother where they had lived until their demise. They had been buried on Meshack's land.

120. From the above narrative it is clear that at the time the Defendant balloted for the suit land, he was in gainful employment and therefore was able to ballot and service the loan and that was why he had been allotted the land. Which narrative was supported by the evidence of Meshack who testified as DW2.

121. Trust was a question of fact and has to be proved by way of evidence; the burden of proof lay on the Plaintiffs to produce credible evidence to prove that their father bought the land comprising of 23 acres. They did not produce any proof that their late father paid any money at all towards the Settlement Fund Trustee (SFT) loan for the suit land and neither did they produce any evidence that they themselves paid any money towards the SFT loan. The only evidence they adduced in court was that they had helped to take farm produce to the society, which was the norm in those years as testified by DW 4, of children who were not in school. I therefore find that there was no direct contribution by the Plaintiffs or their father towards offsetting of the Settlement Fund Trustee loan for the suit

land.”

5. The appellants are dissatisfied with those findings. They filed the notice of appeal dated 6th November 2019. They memorandum of appeal dated 9th March 2021 that raised nine grounds disputing the learned judge's findings. We have taken the liberty to summarize them as follows: the learned judge erred in finding that the suit land belonged solely to the respondent thereby extinguishing their claim for trust over the suit parcel of land when there was overwhelming evidence to prove that the property was to be shared equally amongst the parties herein; that the judge failed to consider their evidence especially that of **DW3**'s; that the trial judge arrived at an incorrect decision in dismissing the appellants' counterclaim; that the loan to the Settlement Fund Trustee was paid by all parties; and that the trial court failed to take into account the fact that the parties' father sold his property to finance the acquisition of the two plots for his family.
6. In view of the foregoing, the appellants prayed that the appeal be allowed by setting aside the judgment of the trial court by allowing their counterclaim with costs.
7. The appeal was heard virtually on 4th February 2026. Present and representing the appellants was learned counsel Mr. Gakinya. The respondent was represented by learned counsel

Mr. Mwongeri. The Parties argued the appeal based on their

written submissions that were orally highlighted.

8. The appellants relied on their written submissions dated 7th October 2024 and a list and bundle of authorities dated 9th March 2021 to submit that they demonstrated with cogent evidence the existence of a customary trust. They argued that the land was bought with proceeds from the land that their father had sold in Murang'a; that they also contributed to the repayment of the loan to Settlement Land Trustees; and that the suit land had been subdivided and that each party had its own, but the learned judge ignored this crucial piece of evidence. For those reasons, they prayed that their appeal be allowed.
9. Opposing the appeal, the respondent filed his written submissions and a list and bundle of authorities all dated 30th January 2026. He was emphatic that the suit property was not held in trust for the appellants by the respondent. He therefore lauded the findings of the trial court. He recapitulated that he was allotted parcel no. 60 by the Settlement Fund Trustees. He was also given one cow and a calf to help with his loan repayment. He invited his parents to live on the parcel of land together with the appellants who

were minors at time as he continued to repay his loan at Kshs. 60.00 monthly.

10. The respondent stated that contrary to the appellants' assertions, their father did not sell their land in Murang'a to purchase the property in Ngorika. He asserted that he balloted for the property and serviced the loan and that the property is registered in his sole name. He therefore urged this court to find that no trust could arise from the circumstances. In any event, no evidence was adduced to support those allegations. For those reasons, they prayed that the appeal be dismissed with costs.
11. We have carefully considered the parties' written submissions, examined the record of appeal and analysed the law. The predecessor of this Court in **Kenya Ports Authority vs. Kuston (Kenya) Limited** [2009] 2EA 212 succinctly elucidated our role as a first appellate court in the following terms:

“On a first appeal from the High Court, this should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

12. The present appeal succeeds or fails on the question of

constructive trust. Was the suit property, solely registered in the name of the respondent or held in trust for the appellants

together with the respondent? In a quest to answer that question, this Court is invited to reconsider the evidence to determine whether the doctrine of constructive trust had arisen. Several decisions have discussed this doctrine in **Maina & 87 others vs. Kagiri** [2014] KECA 880 (KLR) that held as follows:

“20. As Lord Bridge observed in Llyods Bank Plc v

is based on “common intention” which is an agreement, arrangement or understanding

actually reached between the parties and relied

on and acted on by the Claimant....

Constructive

trust is an equitable concept which acts on the

conscience of the legal owner to prevent him from

acting in an unconscionable manner by defeating

the common intention. As was stated by Lord Reid

in Steadman v Steadman (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or

prejudice his

position on the faith of the agreement being he will not then be allowed to turn around and assert that the agreement is unenforceable”.

22. ...Lord Denning in Hussey v Palmer (1972)

3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.”

13. Bearing the above in mind, this Court is compelled to interrogate the evidence adduced at the trial court. From the record, the summary of the appellants' case is as follows: the appellants explained the historical acquisition of the suit parcel of land by

contending that their father, working for a white settler, bought plot no. 60 Ngorikia in 1964 and the following year, the family settled on it. **PW1**, the 2nd appellant, was six years old while **PW2**, the deceased and original 1st appellant, was fifteen years old. **PW2**'s further evidence was that his father sold his land in Murang'a for Kshs. 2,000.00 in order to fund the purchase of the suit land. In support of this allegation, he relied on an application and letter of consent dated 18th March 1996.

14. The appellants continued that the loan was paid in cash and through the proceeds of milk, maize and pyrethrum production. They repaid the loan together with the respondent, in whose name, the property was registered in trust for the appellants in accordance with Kikuyu customary law because he was the firstborn sibling.
15. It was their case that they all participated in the payment of the property, though all receipts were issued in the name of the respondent. However, they said that it was instructive that their mother was buried in this property in 1997, which demonstrated that this was a family property. They further stated that the appellants' stepmother and children moved to Kinangop. They settled on a parcel of land bought by their father, registered in the name of their stepbrother Meshack

Watira Gichaga who also

held the property in trust for the other siblings. When their father died in 1972, he was buried in this property that belonged to his first wife in accordance with Kikuyu customary law.

16. The 2nd appellant's evidence was that the parties have lived on the suit land together with their families. In 1985, the property, measuring 23 acres, was subdivided into three portions and each person received 8 acres. However, in 1986, they discovered that the respondent had disposed of the 1st appellant's portion of the suit land to David Maina Gathoga and later John Adhiambo Akuru. Thereafter, on 7th March 1988, they lodged a complaint against the respondent to the chief of Ngorika area.
17. The 2nd appellant recalled that he was issued with a notice to vacate dated 15th April 1991 while the 1st appellant stated that he was threatened with eviction in 1988. However, the 2nd appellant defied those orders, leading to his arrest. He was then taken to the D.O and his house demolished. The appellants placed a caution on the parcel of land.
18. The appellants thereafter visited the office of the Land Registrar and discovered that the property had been subdivided into plots no. 346, registered in the name of the respondent and 347, registered in the name of Munyua

Gichaga. They were given a

green card for the two properties, confirming that the titles were

issued on 21st November 1988.

19. The appellants stated that on 13th May 2008, an injunction was issued against the respondent. It was on this basis that the 2nd appellant moved back into the property and built on it. However, he did not live peacefully as he was arrested on several occasions on the strength of the complaints of John Adhiambo Akuru, who later sold the property to Patrick Mbugua Njuguna. However, he was acquitted in Nakuru *Criminal Case No. 15 of 2010*.
20. **PW3** Catherine Njoroge, **PW4** Eliud Kimani Macharia and **PW5** James Ndung'u Maina all confirmed that the suit land belonged to the parties' father but was registered in the name of the respondent because he was the eldest son, to hold in trust for the others. They also confirmed that trouble started when the respondent sold the 1st appellant's share.
21. Land Registrar **PW6** Charles Ayiende Morara produced green cards emanating from the suit land. His evidence was that parcel no. 60 was first opened and registered on 7th June 1988 in favour of the Settlement Fund Trustee. The parcel was later discharged and registered in the name of the respondent. The discharge of charge was in the sum of Kshs. 5,300.00. On 21st

November 1988, it was subdivided into two plots. no 346 and 347.

22. Upon subdivision, a title deed was issued on plot no. 346 in the name of the respondent on 18th January 1989. A caution was lodged by the 2nd appellant claiming beneficiary interest on 25th June 1990. On 15th May 2008, a prohibitory order was registered pursuant to the Nyahururu Chief Magistrate's Court. A second caution on the same reason was registered by the 2nd appellant on 22nd December 2016.
23. He explained that plot no. 347 measuring 5 acres was registered in the name of the respondent on 21st November 1998. A caution was registered by the 2nd appellant claiming beneficiary interest on 25th June 1990. The caution was withdrawn under section 133 (1) of the Registered Land Act on 13th February 1990. On 13th February 1991, the property was transferred to James Odhiambo Akuku for a consideration sum of Kshs. 96,000.00 and a title deed issued.
24. On 15th May 2008, a prohibitory order was registered in relation to Nakuru *CMCC No. 883 of 1989*. It was removed on 3rd April 2012 *vide Succession cause No. 1056 of 2007*. On 5th April 2012, the parcel of land was transmitted to Martha Achieng' Odhiambo and Patrick Mbugua Njuguna and a title deed issued. A caution was registered by the 2nd appellant claiming beneficiary interest on 22nd December 2016.

25. On the part of the respondent, evidence was adduced to the effect that he was an employee of a white settler between 1958 and 1965. This was when he obtained the suit land in his name. Testifying as **DW1**, he added that the land was given to him by the then District Officer called Muchiri. During that time, there was a scheme to give land to people with IDs in Ngorika. He balloted for the land and was given plot no. 60 measuring 23 acres. He was given an allotment letter dated 28th April 1965. Four days later, the property was registered in his name. He was also shown where it was located.
26. The respondent recalled that at that time, his father was married to two wives. He moved onto the land with his parents and their families and started ploughing in 1996. His brothers, the 1st and 2nd appellants, were 7 and 5 years old respectively at that time. He stated that he paid Kshs. 30.00 monthly for the property from the proceeds of milk and pyrethrum production since he took out a loan. He produced a receipt dated 24th July 1986 for Kshs. 15,700.00, 18th January 2005 for Kshs. 40.00, 24th July 1986 for Kshs. 1,190.40, 12th April 1994 for Kshs. 300.00 and 23rd July 1966 for Kshs. 629.00 as proof that he paid for the property.
27. Later, the respondent sold five acres of the suit land in order to fully settle the loan. Upon conclusion of this sale, the

appellants

lodged a caution. He also used part of the proceeds to purchase a piece of land in Naivasha where he asked the appellants to relocate to, but they instead sold it in 2007.

28. He continued that his stepbrother Meshack, was given land in Olkalou. His father died in the 1970's and was buried in Meshack's land. Further, Meshack's mother was buried therein. He recalled that his father acquired $\frac{3}{4}$ acres in Murang'a but disposed it off as at the time he was purchasing the suit land. His father was not given another land because he was in possession of another.
29. The respondent denied that the suit land was held in trust for his brothers as he purchased the property in his own name and for his own sake. He relied on the search certificate dated 25th July 2013 for this contention. He also stated that the dispute at the DO's office was resolved in his favour as the appellants were cautioned against harassing him further.
30. The respondent continued that he lived on the suit land with the appellants who started being hostile after their parents passed on. That in fact, the 2nd appellant burnt his house while the 1st appellant physically assaulted him on several occasions. He confirmed that plot no. 346 was registered in the name of Munyua Gichara. He recalled that he sold a portion of his plot to

David Gathogo for Kshs. 90,000.00. He denied that any subdivision of the property took place. He therefore beseeched the trial court to evict the appellant from the suit land.

31. **DW2** Watiri Gichega Kogi, the respondent's elder brother, testified that the appellants are his step brothers and affirmed that the suit land is the property of and registered in the name of the respondent. This was corroborated by **DW3**, Jeremiah Kariuki Wamuyu, the respondent's neighbour and **DW4** Samson Kibe Getito, the chairman of Ngorika farmers as well as his neighbour.
32. **DW2**, **DW3** and **DW4** all testified that the respondent was privileged to be allotted the parcel for he worked for a white man. He balloted for the suit land. They by and large corroborated the respondent's evidence to the extent of how he paid for the property. They also confirmed that the 1st appellant continues to live on the suit land. That the appellants helped the respondent with farming.
33. from the above evidence, it is not disputed that suit property is registered in the name of the respondent. It was later subdivided into plots no. 346 and 347, currently registered in the names of the respondent and James Odhiambo Akuku respectively. It is

also not disputed that a portion of the property was sold to the said James Odhiambo Akuku by the respondent.

34. We have carefully considered the evidence that was adduced by the parties. The main argument by the appellants is that the suit was purchased by their late father and that they also contributed to the repayment of the loan. However, they did not produce any documents to the effect that the father participated in the purchase process. The allotment letter and the receipts produced were in the name of the respondent. It is not disputed that the appellants were of tender age when the respondent balloted for the land. In any event, there is no evidence that in his lifetime, the father of the appellants and the respondent intimated that the respondents' land was held in trust for the family. This Court is alive to the doctrine of customary trust. However, for the doctrine to be applied, it is imperative for the party who alleges that it is applicable to lead cogent evidence that one brother holds land on behalf of the rest.

35. It was incumbent on the appellants to demonstrate with clear evidence that the property was purchased by their father and registered in the respondent's name in trust for them. That burden was however, not discharged. In fact, what is evident is that the respondent purchased the property as a former

employee of a white settler and balloted for the land and it was allotted to him. He adduced several receipts for the loan repayment as proof that he had fully paid the purchase sum solely.

36. In our view, the appellants have not demonstrated a common intention that the parties had a beneficial interest and that the respondent acted to their detriment in the belief that by doing so, he was acquiring a beneficial interest. The appellants tried to persuade the court by stating that the respondent acquired the property as the eldest son of the deceased. However, it is not true that the respondent was the eldest son as **DW2** was older than him. Their claim had no legs to stand.

37. Gathered from the foregoing, it is clear that a constructive trust could not arise from the facts and circumstances of the case. We find it useful to quote the case of **Chase International Investment Corporation and Another vs. Laxman Keshra and Others** [1978] KLR 143; [1976-80] 1 KLR 891 where it was held:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to

pass through them undeterred”.

38. The appellants failed to discharge their burden of proof to the required standard. Accordingly, the present appeal lacks merit. It is dismissed but with no order on costs both in the High Court and this Court, since the parties are siblings and it is only fair that this dispute ends once and for all.

Dated and Delivered at Nakuru this 25th day of March, 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR