

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELCA NO. E043 OF 2023

**JOHN GAKURE WAIREGI (Suing as the holder of
Power of Attorney donated by ESTHER WANGUI WAIREGI).....
.....APPELLANT**

VERSUS

JELIOTH WANJIRA KARURI.....RESPONDENT
*(Being an appeal from the judgment/decree delivered by Hon. K. Kibelion Principal
Magistrate (PM) on 29th November, 2023 in Nakuru CMELC No. 101 of 2018)*

JUDGMENT

1. This appeal arises from a judgment delivered on 29th November, 2023, in Nakuru ELC No. 101 of 2018. The Appellant being aggrieved by the said judgment, lodged a Memorandum of Appeal dated 13th December, 2023, and listed the following grounds:

1) THAT the learned Trial Magistrate erred and misdirected himself in fact and law in failing to find that the Respondent held the suit land being Njoro/Njoro Block 5/309 in trust.

2) THAT the learned Trial Magistrate erred and misdirected himself in fact and law in failing to declare that on the evidence title No. NJORO/NJORO BLOCK 5/309 was trust property.

3) THAT the learned Trial Magistrate erred and misdirected himself in fact and law in disregarding the Plaintiff's evidence that the parcel of land Title No. NJORO/NJORO BLOCK 5/309

was removed from succession because it was purchased by members of the family for their mother/grandmother Esther Wangui Wairegi, and was held or supposed to be held in the names of the Respondent and her deceased husband in trust.

- 4) *THAT the learned Trial Magistrate erred and misdirected himself in fact and law in finding that the Respondent title was infeasible.*

- 5) *THAT the learned Magistrate was in error of law and fact in disregarding evidence that the suit land was removed from the list of property in the Respondent deceased husband succession cause being Nairobi HC Succession Cause No. 1220 of 2012 In the Matter of the Estate of Godfrey Wairegi Karuri since it did not form part of his estate as the land was to be held in trust for his mother.*

- 6) *THAT the learned Magistrate findings went against the weight of evidence before him.*

- 7) *THAT the learned Magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.*

2. A brief background to this appeal is that the Appellant had filed a plaint dated 22nd March, 2016, seeking a permanent injunction restraining the Respondent from trespassing onto land parcel Njoro/Njoro Block 5/309 and an order of

cancellation of the title in the Respondent's name. The Respondent filed a Statement of Defence dated 4th April, 2016, in which she denied the claim in the plaint and urged the court to dismiss the suit with costs.

3. The matter was heard and determined whereby the Trial Magistrate in his judgment dated 29th November, 2023, partly allowed the case in granting the Plaintiff a lifetime license to utilize the suit property.
4. The Appellant being dissatisfied with the judgment filed the current appeal.

APPELLANT'S SUBMISSIONS

5. Counsel for the Appellant filed submissions dated 21st January 2026, and identified two issues for determination:
 - a) ***Whether the learned Trial Magistrate erred in law and facts in failing to find that the suit property was purchased by family members for the benefit of their mother and therefore held in trust.***
 - b) ***Whether the lower court erred in disregarding the import and substance of the removal of the suit land from the list of the deceased property in Succession Cause No. 1220 of 2012.***
 - c) ***Who should bear the costs of the appeal?***
6. On the first issue as to whether the learned trial Magistrate erred in law and fact in failing to find that the suit property was purchased by family members for the benefit of their mother and therefore held in trust, counsel submitted that the Plaintiff who is the Appellant herein called 2 witnesses who testified and produced documents in support of his case. However, the Defendant, the Respondent herein, neither testified nor called any witnesses to controvert the Plaintiff's testimony. Further, the learned Trial Magistrate in his Judgment

(Pages 100-105 of the Record of Appeal), held that the Appellant herein is entitled to a share of the parcel, and a lifetime license to utilize the suit property.

7. Counsel further submitted that the suit property was bought through contributions from family members for the purpose of settling their mother, and that there was evidence of email correspondences, contributions and subsequent registration of the property in the deceased's name who was one of the Appellant's sons.
8. Ms. Kimathi, submitted that a resulting trust arose due to the contribution of the purchase price and registration in another person's name and relied on the Court of Appeal case of **Mwangi & Another V Mwangi [1986] KLR 328**, where the court held that where purchase money for land is provided by someone other than the registered proprietor, a resulting trust is presumed in favour of the person who provided the consideration. Counsel also cited the case of **Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** where the court held that, 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 a trust is implied.
9. It was counsel's submission that the Respondent's late husband allowed the mother to occupy the home until her demise, he added that this long-term undisputed occupation coupled with family intention, established a constructive trust which the Respondent did not challenge.
10. Counsel also submitted that the vendor through his affidavit confirmed that the Respondent's late husband informed him that he bought the suit property as a gift to his mother the Plaintiff and relied on **Section 28(b) of the Land**

Registration Act and the cases of Sisto Wambugu v Kamau Njuguna [1983] KLR 172, Mutsonga v Nyati [1984] KLR 425: Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR, Juletabi African Adventure Ltd & Another v Christopher Michael Lockley, [2017]eKLR, and the Supreme Court case of Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another [2018] eKLR.

11. It was Ms. Kimathi's submission that the email correspondences from the Respondent's late husband, Godfrey Wairegi Karuri, dated April and May 2011, (Produced as P Exhibit No 2 and PExhibit No 7), addressed to the entire family requesting financial contribution towards the purchase of a home for their mother stating "***This will be the place where she is going to spend the balance of her life...I am inviting any contribution...this is a home for Mother/Grandma.***" That was clear evidence that the intention was not to benefit the Respondent but their mother, Esther Wangui Wairegi. Further, the Appellant testified that the family including Tom Wairegi and others contributed financially. (Produced as P Exhibit No 4) which is *prima facie* proof of a resulting trust under the principles in **Mwangi v Mwangi and Twalib Hatayan, (supra)**.
12. According to counsel, the court ignored the principle that registration does not extinguish beneficial interests, and further, the Trial Magistrate ignored doctrines of equity that prevent unjust enrichment and ensure that property is held in accordance with intention and contribution.
13. On the second issue, as to whether the lower Court erred in disregarding the effect of Succession Cause No. 1220 of 2012, counsel submitted that the Plaintiff/ Appellant had produced the Supplementary Deed of Family Settlement and Variation (at page 29-30 Record of Appeal)which in paragraph 1 which had

removed the suit land **Njoro/Njoro Block 5/ 309** from being considered as part of the deceased property. According to the Plaintiff's witnesses' testimony, the removal was by consent of the parties, including the Respondent herein, and was informed by the fact that the suit land though registered in the name of the deceased and the Respondent did not form part of the deceased Estate as it had purposely been purchased for their mother and the deceased and his wife, the Respondent only held it in trust for their mother, the Appellant herein.

14. Ms. Kimathi therefore stated that the Trial Court wrongly disregarded critical and uncontroverted documentary evidence from the Nairobi High Court Succession Cause No. 1220 of 2012, where the suit property was excluded from the deceased's estate after finding that it was family-purchased and intended for the mother. Further, the Respondent provided no evidence of contribution or intention, therefore, the Trial Magistrate had no jurisdiction to contradict the superior Court's finding.

15. Counsel submitted that the Respondent neither testified nor called any witnesses therefore the Appellant's claim was uncontroverted and relied on the cases of **AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998(UR), MOTEX KNITWEAR L/M/TED VS OOP/TEX KNITWEAR MILLS LIMITED NAIROBI (M/L/MAN/) HCCCNO. 834 OF 2002, North End Trading Company Limited (carrying on the business under the registered name of) Kenya Refuse Handlers Limited vs. City Council of Nairobi (2019) eKLR Edward Mariga through Mobisa Mariga vs. Nathaniel David Shulter & another (1979) eKLR and CMC Aviation Ltd v Crusair Ltd (No.1) (1987) KLR 103, TRUST BANK LIMITED v PARAMOUNT UNIVERSAL BANK LIMITED & 2 others [2009]KEHC**

4030 (KLR), and *Gitau V Mbugua [2024] KEHC 15751 (KLR)*, and urged the court to allow the appeal as prayed.

RESPONDENT'S SUBMISSIONS

16. Counsel for the Respondent filed submissions dated 25th February 2026, and identified the following issues for determination:
 - a) *Whether the trial court erred in upholding the Respondent's registered proprietorship under the Land Registration Act.*
 - b) *Whether fraud or illegality was pleaded with particularity and proved to the strict standard required to impeach title.*
 - c) *Whether the Appellant proved an enforceable trust or beneficial interest capable of defeating or qualifying registered title.*
 - d) *Whether the trial court erred in granting a lifetime license as a lawful and proportionate remedy on the pleadings and evidence.*

17. Counsel submitted that the Appeal, invites this Court to undertake the most intrusive intervention in land litigation, that is to cancel a registered title and substitute ownership in favour of a non-registered party, and a relief is never granted on the strength of family dissatisfaction, suspicion, or sympathetic narratives. It is only granted where the law's strict thresholds are satisfied, particularly the standards under section 26 of the Land Registration Act and the controlled rectification jurisdiction under section 80 of the Land Registration Act.

18. On the first issue, counsel relied on **Section 24, 25(1), 26 and 80** of the **Land Registration Act** and the case of **Elijah Makeri Nyangw'ra V Stephen Mungai Njuguna [2013] eKLR**, and submitted that the trial court having found that the Respondent was the registered proprietor, and in the absence of proof

meeting the statutory threshold for cancellation and rectification of Title, the learned Trial Magistrate properly declined the relief of cancellation of title.

19. According to counsel, the Appellant pleaded that the Respondent fraudulently acquired the suit property but he did not prove the fraud and relied on the case of **R.G. Patel v Lalji Makanji [1957] EA 314** and **Vijay Morjaria V Nansingh Madhusingh Darbar & another [2000] eKLR**. Counsel submitted that the emails and deed of variation relate to family discussions or arrangements and are not primary land registry evidence showing forgery, falsified entries, unlawful instruments, or collusion that would satisfy the threshold for cancellation under section 26(1) of the Land Registration Act. Further, that the affidavit by the vendor was only marked for identification but was never produced as evidence.

20. On the third issue, counsel submitted that a trust as alleged by the Appellant must be proved by evidence demonstrating the factual foundation upon which the trust arises, and relied on Section 28 of the Land Registration Act, and the case of **Twalib Hatayan Twalib Hatayan & another V Said Saggat Ahmed AlHeidy & others [2015] eKLR**, whereby the court explained that the doctrines are evidence-driven and not activated by broad appeals to fairness.

21. Mr. Odera further submitted that the Appellant did not prove that the purchase-money contribution was traceable, quantified, and tied to the acquisition of the suit land. According, to counsel, the Appellant only produced a transfer slip for a contribution of USD 6,000 by Tom Wairegi but failed to produce a sale agreement, completion documents, or other payment records linking the said amount to the purchase price and relied on the case of **Peter Ndungu Njenga V**

Sophia Watiri Ndungu [2000] eKLR. He added that PW1 admitted that he did not contribute to the purchase of the plot.

22. On constructive trust, counsel submitted that the trial court made a factual finding that Esther Wangui Wairegi's occupation was permissive and at the behest of the Respondent and her husband, which was a humanitarian arrangement of accommodation. The trial court was therefore correct to treat the occupation as a license rather than elevate it into a proprietary entitlement.
23. According to counsel, the title produced by the Appellant showed on its face that the Respondent and her late husband were registered together as co-proprietors without distinct shares being specified, thus joint tenancy which resulted to right of survivorship under **Section 91** of the **Land Registration Act**. Further, there was no evidence that the joint tenancy was severed before death of the Respondent's husband, thus making her the sole proprietor of the suit property.
24. On the final issue, it was counsel's submission that the Trial Magistrate properly exercised his judicial discretion consistent with the issues that were live before the court in granting the lifetime license to the Appellant without altering the register. Counsel further submitted that the trial court had found that the Respondent was the registered proprietor of the suit property with permissive occupation to the Appellant. That a lifetime license was proportionate as it protected the dignity and continued occupation of the elderly occupier while respecting the statutory protection of registered title and cited the case of **Odd Jobs V Mubia (1970) EA 476**.

25. In conclusion, counsel submitted that the Appellant neither proved fraud to the required standard, nor any resultant or customary trust, and urged the court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

26. The Appellant listed 7 grounds of Appeal in the Memorandum of Appeal, but the court will condense them into two issues for determination:

- a) *Whether the learned Trial Magistrate erred in law and fact in failing to find that the suit property was purchased by family members for the benefit of their mother and therefore held in trust.*
- b) *Whether this Appeal has merit and who should bear the costs of the Appeal?*

27. This is a first Appeal and the court is cognizant of primary role as was held in the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**, where the Court of Appeal held that:

“On a first appeal from the High Court, the Court of Appeal 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”

28. Similarly, in the case of **Abok James Odera t/a A. J Odera & Co. Associates V John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

29. The background of this appeal as per the evidence in the record of Appeal, indicates that it was the Appellant’s case that the family bought the suit land for their mother Wangui Wairegi to be held in trust for her. It was the Appellant’s case that his brother Tony Wairegi contributed USD 6,000 towards the purchase of the suit land of which he produced email correspondence to show the transfer.

30. Peter K. Wairegi gave evidence as PW2, and stated that the suit land was purchased with family contributions of which he only mentioned Tony Wairegi’s and not the other family members’ specific contributions. He also stated that the suit land was meant to be held in trust for their mother and that their elder brother fraudulently registered the suit land in his name.

31. It is on record that the Respondent filed a defence and never testified in the lower court, but I notice that the Trial Magistrate considered the averments in the statement of defence without any evidence being tendered.

32. In the case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, stated as follows:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

Similarly, in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff. The plaintiffs have given evidence on oath supported by documentary evidence, which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.”

33. In the case of **Kenya Power & Lighting Company Limited v Pamela Awino Ogunyo** [2015] eKLR, held as follows:

“We note, in any event, that the appellant made various allegations in its statements of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-

leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out. A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107-109 of the Evidence Act which place a burden of proof or what may be called evidential burden of proof on the party making the assertion”

34. It follows that the Trial Magistrate considered the allegations in the Defendant’s statement of defence, which were not supported by any evidence adduced by the Defendant or her witnesses. For that error, on the part of the Trial Magistrate, it follows that the Appeal has merit.
35. The Trial Magistrate therefore arrived at a conclusion that was prejudicial to the Appellant by including mere allegations by the Defendant in the analysis of the case and the judgment. This matter involved family members who should have benefited from the court’s robust alternative dispute resolution mechanisms, but they did not take the cue.
36. The upshot is that the Judgment of the lower court dated 29th November 2023 is set aside and referred back to the lower court for retrial before a court other than that of Hon. K. Kibelion, Principal Magistrate. Each party is to bear their own costs. The hearing of this matter is to be fast-tracked and fixed for hearing within 30 days.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH
DAY OF APRIL 2026.**

**M. A. ODENY
JUDGE**

