



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CAUSE NO. 1 OF 2017(O.S)**

**ROBERT K KOECH.....1<sup>ST</sup> PLAINTIFF**

**MOSES K. KOECH .....2<sup>ND</sup> PLAINTIFF**

**FRANCIS M. BIOMDO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**WILLIAM KIPKORIR MUTAI.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiffs commenced this suit by way of Originating Summons dated 17<sup>th</sup> February, 2017 seeking a determination of the following questions:

*a) That the Respondent being the registered proprietor of all that parcel of land known as KERICHO/SOSIOT/1530 measuring about 0.8 hectares be declared and registered as the trustee for the Applicants of 2 acres of the said land.*

*b) That the Plaintiffs be deemed the registered owner of 2 acres of the land known as KERICHO /SOSIOT/1530.*

*c) That in the alternative and without prejudice to the foregoing, the Respondent's title to 2 acres of the parcel known as KERICHO/SOSIOT 1530 be deemed to have been extinguished through the adverse possession of the Applicants and the Applicants be registered as the proprietors of 2 acres of the said land.*

*d) That the costs of this suit be borne by the Respondent.*

2. The application is supported by the affidavit of Robert K. Koech sworn on the 17<sup>th</sup> February 2017. It is opposed by the Replying affidavit of William Kipkorir Mutai (Defendant) sworn on the 27<sup>th</sup> March 2017.

3. The parties agreed to canvass the suit by way of affidavit evidence and written submissions by default.

4. In his supporting affidavit the 1<sup>st</sup> Plaintiff avers that sometime in 2001 the Plaintiffs and two other persons jointly purchased land from one David Yegon with each of them contributing the purchase price as follows:

Robert K. Koech	Kshs. 350,000
Moses Koech	Kshs. 270,000
Francis Biomdo	Kshs. 200,000
Evaline Malel	Kshs. 200,000
Joyce Bii	Kshs. 60,000

5. Thereafter, one of the buyers sought a refund of her money in the sum of Kshs.220,000 while another buyer traded her share of Kshs. 60,000 with the Respondent.

6. He further avers that the Applicants appointed the Respondent to manage the tea farm and distribute the income from the farm in proportion to each of the contributors shares. This went on smoothly from 2002 to 2005 but in 2006 none of the Applicants received any payment.

7. He avers that the Applicants held a meeting with the Respondent where it was agreed that the land be sub-divided so that each party would get a portion of land equivalent to their contribution. Accordingly the parties were to get land in the following proportions:

William Mutai	0.14 acres
Francis Biomdo	0.45 acres
Moses Koech	0.61 acres
Robert Koech	0.8 acres

8. He avers that the Respondent was unwilling to have the land shared out as afore-mentioned as they later learnt that he had had the entire parcel of land registered in his sole name.

9. He further avers that even though the suit property is registered in the Respondent's name, the Applicants have been exclusively using and cultivating 1.86 acres thereof since 2001 and they have planted trees and tea bushes thereon. He further avers that the said use and occupation of the land has been open, peaceful and with the knowledge of the Respondent with the result that the Respondent's title to the said 2 acres of land has been extinguished by reason of the applicant's adverse possession thereof.

10. In his Replying Affidavit the Respondent denies that the applicants contributed to the purchase of the suit property. He claims that the land they purchased jointly was a different parcel of land. He also denies that they are in occupation thereof as he claims to be the only one in occupation by virtue of the fact that he is the registered owner thereof.

### **Issues for Determination**

11. The following issues emerge for determination:

- i. Whether the plaintiffs contributed to the purchase of land parcel number KERICHO/SOSIOT 1530
- ii. Whether the Respondent is holding the said title in trust for the Applicants
- iii. Whether the Applicants are entitled to a portion of the suit property by adverse possession
- iv. Who should bear the costs of this suit

## **Analysis and Determination**

12. With regard to the first issue counsel for the applicants has submitted that the suit property was purchased by the applicants and two other persons whose respective contributions are clearly set out in the applicant's supporting affidavit. It has been submitted that the respondent merely acted as broker and only managed to contribute to the sale when one of the purchasers traded her share with the respondent. The Respondent has not sufficiently rebutted the applicant's affidavit evidence on this. I therefore find and hold that the applicants have proved that they contributed to the bulk of the purchase price of the suit property and are therefore entitled to their proportionate share of the same.

13. With regard to the second issue it has been submitted that even though the Respondent registered the suit property in his name, he holds the same in trust for the applicants' benefit and interest. He has submitted the said trust was express as the applicants held a meeting whose agenda was to appoint him as the applicant' trustee and manage the farm diligently.

14. In the case of *N.W.K V J.K. M & Another* (2013) eKLR citing Halsbury's *Laws of England*, 5<sup>th</sup> Edition Vol 72 para 280 the Court stated as follows:

***Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal state to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.***.....

*“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.*

*The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.*

*Where the evidence is that the matter was not discussed at all, the Court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust.”*

15. See also the case of **Mani Gichuru & Kamau Mani V Gitau Mani HCCC No 340 of 1977** where

Muli J ordered the Defendant to transfer a portion of the disputed land to the 2<sup>nd</sup> Plaintiff and the Defendant and each was to maintain occupation of their respective portions.

16. He submitted further that since the Applicant have been in exclusive occupation and possession of the suit property since 2002 to date, which occupation has been open, continuous and uninterrupted for more than 12 years, they are entitled to the property by virtue of the doctrine of adverse possession.

17. In his submissions, counsel for the Respondent has raised a pertinent issue which is the fact that the applicants were initially required to file written submissions in respect of the application for injunction dated 17<sup>th</sup> February 2017 but instead chose to file submissions in respect of the O.S which prompted the court to direct that the Respondents file theirs in respect of the O.S. I agree with the counsel for the Respondent that this suit ought to have been canvassed by way of viva voce evidence so as to be able to canvass all the issues in controversy. However, it is not unusual for parties to choose to proceed with an O.S by way of affidavit evidence and written submissions. If the respondents had any objection to the matter proceeding by way of affidavit evidence, they ought to have raised their objection at an appropriate time. In the circumstances the clock cannot be reversed.

18. Counsel has submitted that the applicants have failed to prove that they purchased the property or that they are entitled to it by adverse possession and their case ought to be dismissed. I am inclined to believe the applicants version as they have explained in detail how they property was acquired and what role the respondent was to play, this having been discussed at a meeting between the parties in meetings held between 2002 and 2006. This affidavit evidence leads me to the inference of a constructive trust in favour of the applicants.

19. I have carefully considered the pleadings, the affidavits and rival submissions and all the documents filed herein and I am satisfied that the Plaintiffs (applicants) have proved their case on a balance of probabilities. I must however point out that the pleadings, particularly the prayers in the O.S could have been drafted better for purposes of clarity. I am however alive to the provisions of Article 159 (2) where the court is enjoined to administer substantive justice without regard to procedural technicalities. I therefore enter judgment for the Plaintiffs as follows:

- a) That the Respondent being the registered proprietor of all that parcel of land known as KERICHO/SOSIOT/1530 measuring 0.8 hectares be and is hereby declared as the trustee for the Defendants in respect of 1.86 acres thereof.
- b) That the said portion of 1.86 acres be curved out of the suit property and registered in the names of each of the Applicant according to their respective contributions.
- c) That in order to facilitate b) above, the Defendant do sign the mutation forms and transfer forms respectively within 45 days failing which the Deputy Registrar of this court is hereby authorized to sign the same.
- d) The costs of this suit be borne by the Defendant.

Dated, signed and delivered at Kericho this 20<sup>th</sup> day of March, 2018.

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of :**

*1. Mr. Motanya for the Applicant*

## *2. Rotich - Court assistant*