



REPUBLIC OF KENYA



**Makenzi & another v Mutua & another (Environment & Land Case
E23 of 2020) [2024] KEELC 372 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E23 OF 2020
CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

FIDELIS NDONYE MAKENZI 1ST PLAINTIFF

JOHN NDONYE MISI 2ND PLAINTIFF

AND

GEOFFREY MISI MUTUA 1ST DEFENDANT

MBULA MBILIKA 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated the 7th September, 2020, the Plaintiff prays for Judgment against the Defendants for:
2.
 - a. A declaration that the land known as Mavoko Town Block 3/3523, Mavoko Town Block 3/2640 and Commercial Plot No. 161 and 87, Lukenya Ranching and Farming Co-operative Society Ltd are held in trust by the deceased Jonathan Mutua Misi for the Plaintiffs' family and the deceased's.
 - b. An order directing the Land Registrar to subdivide the above-mentioned parcels of land equally among the families of the deceased Jonathan Mutua Misi, Misi Makenzi Wilson and the 2nd Plaintiff herein.
 - c. Costs of the suit.
 - d. Any other relief this Honourable Court deems fit to grant.
3. The Defendants filed a Defence and Counter-claim dated the 16th February, 2021 where they sought the following Orders:



- a. An order of permanent injunction restraining the Defendants herein from encroaching, entering, cutting down grass, on constructing or in any other manner interfering with land parcel No. Mavoko Town Block 3/2640 and commercial plot 161 and 87, Lukenya Ranching and Farming Cooperatives Society Ltd whether by themselves through their agents and persons claiming under them.
 - b. Mesne profits.
 - c. Costs of this Counter-claim.
4. The matter proceeded for hearing where the Plaintiffs had three witnesses while the Defendants had two witnesses.

Evidence of the Plaintiffs

5. The Plaintiffs claim that the suit land which is registered in the name of Jonathan Mutua Misi (deceased) was supposed to be held in trust for them as their mother paid for the shares at Lukenya Ranching and Farming Cooperative Society Limited hereinafter referred to as 'Lukenya Ranching', using her cow but the said Share No. 290 was registered in the deceased name since he was the eldest son, on behalf of the three brothers. The Plaintiffs' claim to have each settled on respective portions of the suit land which forms part of Share No. 290. They confirm that five (5) acres of land from share No. 290 had been sold to assist all of them including the deceased children and the 2nd Plaintiff managed to build a permanent house. The Plaintiffs are claiming forty (40) acres of land from the deceased estate. They contend that they used the suit land even during the deceased lifetime. They argue that the forty (40) acres of land should be divided between John Misi and Wilson Makenzi since Mbilika (the deceased wife) already resides on a twenty (20) acres piece of land from the deceased estate. The Plaintiffs' produced the following documents as exhibits: Sale Agreement dated 29th July, 1996; KCB Bank Receipt; Photographs; Copy of Certificate of Title and Copy National Identity Card for 2nd Plaintiff.

Evidence of the Defendants

6. The Defendants confirm that Share No. 290 Lukenya Ranching belongs to Jonathan Mutua Misi (deceased). They claim that the 1st Plaintiff trespassed on the suit land after the deceased demise and constructed a house thereon after he left detention. They admit that five acres of land from the deceased estate was sold but deny that the proceeds therefrom were shared among the families of Jonathan Mutua Misi, Wilson Mackenzie and John Ndonye Misi. They however admit that the proceeds of sale of the five acres was deposited into the account of John Ndonye Misi since they did not have bank accounts. They insist that the Plaintiffs have trespassed on one of the parcels of land which emanated from Share No. 290 Lukenya Ranching.

Submissions

Plaintiffs' Submissions

7. The Plaintiffs in their submissions relied on their pleadings as well as the oral evidence tendered including exhibits produced. They argued that they had implied trust over the suit properties as the deceased held the said land in trust for them. They insisted that they hence have proprietary interest over the suit land. They further submitted that they even sold five acres of land from the estate of Jonathan Mutua Misi (deceased) and all the families of the respective brothers benefited from the said sale. It was their further submission that they have resided on the suit land and utilized it together. They



reaffirmed that despite the fact that occupation may not be a necessary ingredient to prove possession, there is actual and uncontroverted occupation of one of the properties by the 1st Plaintiff and sharing of proceeds of sale of properties emanating from Share No. 290 Lukenya Ranching. To support their averments, they relied on the following decisions: Lalichandra Durgashanker Pandya & Another v E K Baya & Others (2021) eKLR; Samson Ngugi Philip Kangori v Peter Njuguna Samson (2018) eKLR; James N. Kiarie v Geoffrey Kinuthia & Another (2012) eKLR and Isaack M'inanga Kiebia v Isaya Theuri M'lintari & Another (2018) eKLR.

Defendants' Submissions

8. The Defendants in their submissions reiterated their averments as per their Defence including Counter-claim as well as the testimony of the witnesses. They insisted that the Plaintiffs had not established sufficient evidence on existence of a trust over the suit properties. They argued that the 1st Plaintiff did not have locus to institute this suit as he was the son of the late Wilson Mackenzi Misi and he had not taken out Letters of Administration to be a legal representative of his estate. They challenged the allegations that Share No. 290 Lukenya Ranching was paid through delivery of cow and stated that this averment was baseless. They cast aspersions on the Sale Agreement dated the 29th July, 1996 insisting it was unsigned, unattested and cannot be relied upon. Further, that even if Plot No. 179 measuring five (5) acres was sold, parties did not have capacity to do so. Further, they denied that the proceeds from the said sale were shared equally with the three families. They further submitted that the Plaintiffs are not entitled to any share of the deceased estate even if they were relatives. They contended that the 1st Plaintiff is a trespasser on the suit land and have sought to have been evicted therefrom. They further reiterated that the claim is statute barred. To support their averments, they relied on the following decisions: Alfred Ngau & 5 Others v City Council of Nairobi (1983) eKLR; Gichuki v Gichuki (1982) KLR 385; Mbutu & 5 Others v Wastrimu & 11 Others (1986) KLE 171; Twalib Hatayan v Said Saggar Ahmed Allteidy & Others (2015) eKLR; Kakamega HC Succession Cause No. 194 of 2011 In the matter of the estate of Wando Sande (deceased) and re estate of John Musambayi Katumanga (deceased) (2014) eKLR.

Plaintiffs' Supplementary Submissions

9. The Plaintiffs' insist they have locus standi in this matter as the 1st Plaintiff had not brought the suit on behalf of his deceased father's estate. Further that this suit is not statute barred since there is no legal requirement barring the maximum time in which a claim for trust in land ought to be brought, or else the said right is extinguished. To support their arguments, they have relied on the case of Esther Makumbi Matundu v Mwan'ga Kisyula (2019) eKLR.

Analysis and Determination

10. Upon consideration of the Plaintiff, Defence including Counter-claim, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:
 - a. Whether the 1st Plaintiff had locus standi to institute this suit.
 - b. Whether the deceased Jonathan Mutua Misi held the suit properties in trust for himself and his other brothers John Ndonge Misi and Wilson Makenzi Misi.
 - c. Whether the Plaintiffs are entitled to orders sought in the Plaintiff.
 - d. Whether the Defendants are entitled to orders sought in the Counter-claim.
11. As to whether the 1st Plaintiff had locus standi to institute this suit.



12. The Defendants have claimed that the 1st Plaintiff did not have locus standi to institute this suit on behalf of the estate of his late father Wilson Mackenzi Misi since he had not procured Letters of Administration Intestate to make him a legal representative of the said estate. In the case of Alfred Ngau & 5 Others v City Council of Nairobi (1983) eKLR, it was held that:

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”
13. See also the case of Christopher Mutiembu Machimbo & 3 others v County Surveyor, Trans-Nzoia & 4 others [2022] eKLR.
14. I have perused the Plaint dated the 7th September, 2020 and note that there is no indication anywhere that the 1st Plaintiff had filed this suit as the legal representative of the estate of Wilson Makenzi Misi. In the circumstance while associating myself with the decisions cited, I find that the 1st Plaintiff indeed had locus standi to institute this suit.
15. As to whether the deceased Jonathan Mutua Misi held the suit properties in trust for himself and his other brothers John Ndonye Misi and Wilson Makenzi Misi.
16. The Plaintiffs claim the deceased held Share No. 290 Lukenya Ranching in trust for himself and his brothers John Ndonye Misi Makenzi and Wilson Misi which fact is disputed by the Defendants. It is not in dispute that the deceased owned Share No. 290 Lukenya Ranching. It is further not in dispute that out of the said Share No. 290, it produced Mavoko Town Block 3/3523, Mavoko Town Block 3/2640, Commercial Plots No. 161 and 87. What is in dispute is the Plaintiffs’ claim that the deceased held the said share in trust for himself and his brothers. PW1 in his testimony claimed that it is their mother who gave a cow for the purchase of Share No. 290 at Lukenya Ranching and she trusted the deceased as the eldest son and had it registered in his name to hold in trust for others. PW1 further testified that the deceased used to send him to Lukenya Ranching offices and he even signed respective documents on his behalf. Further, that they even sold five (5) acres of land from share No. 290 together with the deceased family and equally shared the proceeds of the sale, out of which he even built his house. However, this position was denied by the Defendants. PW1 stated that both the 1st Plaintiff and himself reside on the forty (40) acres of land emanating from Share No. 290. PW3 in his testimony confirmed during cross-examination that he was involved in the purchase of Share No. 290 by taking one cow from his father who was a brother Ruth Kaleu Misi (mother to the deceased, John Misi and Wilson Misi), to Lukenya Ranching. He was emphatic that his father gave his sister one cow which he personally delivered to Lukenya Ranching to commence the purchase of Share No. 290. DW1 and DW2 admitted that they were both not there when Share No. 290 was purchased from Lukenya Ranching. DW1 further admitted selling five acres of land emanating from Share No. 290 but denied that the proceeds were shared with the families of his father’s brothers. However, DW2 who was the widow to the deceased admitted that at the time she got married to the deceased, he had Share No. 290. Further, that they sold the five (5) acres land when they were with the children of the deceased as well as the 2nd Plaintiff. She testified that the purchase price was deposited in the account of the 2nd Plaintiff. She confirmed that 1st Plaintiff has resided on Mavoko Town Block 3/2640 for over ten (10) years and put up a mabati house thereon. DW1 also admitted that they had given the 2nd Plaintiff part of proceeds of sale to finish constructing his house. Which now brings the question that if both Plaintiffs were residing on the land emanating from Share No. 290, for a long time, without being evicted therefrom, could the deceased have held the said Share No. 290 on behalf of the brothers or not.



17. On resulting trust, the Halsbury's Laws of England, 4th Edition Vol. 48 at paragraph 597 describes it 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.”

18. On trust, Section 2(b) of the [Land Registration Act](#) provides stipulates thus:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register - (b) trusts including customary trusts;”

19. In the case of *Zipporah Wanjiru Mwangi Vs Zipporah Wanjiru Njoroge* (2017) eKLR, the Court of Appeal held that:

“A party relying on the existence of a trust must prove through evidence the existence and creation of such a trust.”

20. While in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, the Court of Appeal while dealing with the issue involving trust held inter alia:

“Dealing with the first issue, 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...” Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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. (See Black's Law Dictionary) (Supra). 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 para1453). 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...

This leaves us with resulting trusts; upon which the appellants had laid their claim. 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 (see Black's Law Dictionary) (supra). 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)....”

21. Based on the evidence before Court, noting that both Plaintiffs have been residing on the suit land emanating from Share No. 290, for over a decade and the Defendants have never attempted to evict them. Further, noting that the 2nd Plaintiff entered into the land where he resides before the deceased demise, while associating myself with the decisions cited and relying on the legal provisions I have quoted, insofar as the parcels of land emanating from the Share No. 290 Lukenya Ranching were registered in the deceased name, I find he was holding the same in trust for himself and his two brothers - John Ndonye Misi and Wilson Makenzi Misi (deceased.) However, since the properties are in the deceased name, I opine that parties can only deal with distribution of the aforementioned parcels of land in the succession cause being Machakos High Court Succession Cause No. 95 of 1995 in the matter of the Estate of Jonathan Mutua Misi, and not herein.
22. In the foregoing, I find that the Plaintiffs are hence entitled to orders sought in the Plaint while the Defendants are not entitled to orders they have sought in the Counter-claim.
23. On the issue of costs, since the parties herein are related, each party will bear their own.
24. It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and will enter Judgment in their favour. I further find the Defendants' Counter-claim unmerited and will dismiss it.
25. I will proceed to make the following final Orders:
 - a. A declaration be and is hereby issued that the land known as Mavoko Town Block 3/3523, Mavoko Town Block 3/2640 and Commercial Plot No. 161 and 87, Lukenya Ranching and Farming Cooperative Society Ltd are held in trust by the deceased Jonathan Mutua Misi for the Plaintiffs' and deceased's families.
 - b. This matter be and is hereby referred to the Machakos High Court Succession Cause No. 95 of 1995 for distribution of the parcels of land being Mavoko Town Block 3/3523, Mavoko



Town Block 3/2640 and Commercial Plot No. 161 and 87, Lukenya Ranching and Farming Cooperative Society Ltd, which form part of the estate of Jonathan Mutua Misi (deceased).

- c. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024

CHRISTINE OCHIENG

JUDGE

