



Ngao v Kitheka (Civil Appeal 152 of 2019) [2024] KECA 21 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 21 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 152 OF 2019
F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA
JANUARY 25, 2024

BETWEEN

NGULUNGU KITHEKA NGAO APPLICANT

AND

ALEXANDER MATUVI KITHEKA RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Machakos (O. A. Angote, J.) dated 15th February 2019 in ELC Case No. 2 of 2018)

JUDGMENT

1. Land disputes can be intriguing. They know neither boundaries nor relationships. The appeal before us concerns two brothers embattled in a legal tussle as far back as 1975 over a parcel of land namely Matinyani/Mutululu/475. The bone of contention is whether the said parcel of land, which is registered in the name of the appellant, is held in trust for the respondent.
2. To contextualize the appeal, we shall give a brief background on the suit. The dispute emanated from the Principal Magistrate's Court Kitui Case No. 311 of 2004. In the suit, the appellant prayed for an order of eviction and permanent injunction against the respondent. The respondent filed a counterclaim and sought a declaration that the appellant held the parcel of land in trust for him, a claim that was vehemently opposed by the appellant. The respondent's case was that at the material times, he was working as a teacher in Mutito. Since he was not at home, he sent money for the purchase of the suit land to the appellant. It was his case that the parties herein jointly bought the two parcels of land 'Matinyani/Mutululu/475 and Matinyani/Mutululu/476 which are adjacent to each other. Both parcels were registered in the name of the appellant. However, each individually occupied their distinct parcels. The respondent occupied Matinyani/Mutululu/475 while the appellant occupied Matinyani/Mutululu/476.



3. Upon hearing the parties, the trial Magistrate (Kimemia P.M.) dismissed the appellant's suit and allowed the respondent's counterclaim in the following terms:

“It is clear that the defendant has been residing on land parcel 475 & the applicant has been residing on land parcel 476. It is clear that the land parcel 475 was bought in 1975 & the plaintiff was registered as the owner. It is clear that the land parcel 476 was bought in 1975 & the plaintiff was registered as the owner. It is clear that this is a 1st registration and the issue of fraud has not arisen & the defendant claim is on trust. I have considered the authorities cited by the defendant & in particular HCCC 1949/76 NBI Ziphania vs Eunice Wanjiru. The defendant has demonstrated that he was living far away at Mutito where he was a teacher & he was sending money to the plaintiff to buy the land parcels as they had agreed to share both parcels.

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On the counterclaim as aforesaid I argued here above, I find that the trust was established by implication of the agreement & hence it is with & in the interest of justice, the defendant has proved the intention & establishment of the trust in the purchase of land & by continued possession. I find therefore that the defendant has proved the counterclaim on a balance of probabilities & I find in favour of the defendant & enter judgment in favour of the defendant as claimed in the counterclaim, with costs & interest in the counterclaim.”

4. Aggrieved by the judgment, the appellant filed ELC Appeal No. 2 of 2018 at ELC Court, Machakos. Upon hearing the parties, the learned Judge (O. A. Angote, J.) in dismissing the appeal held as follows:

23. The doctrine of constructive trust was defined by the Court of Appeal in the case of *Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri* (2014) eKLR as follows:

“A constructive trust is based on common intention which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted upon by the claimant.”

24. The Appellant in this case allowed his brother to live on parcel number 475 since 1975. The Respondent has been living on the said land without any interference from the registered proprietor, the Appellant. Obviously, if someone has been living on your land for more than forty (40) years, the court is entitled to import the concept of constructive trust to protect such an individual from eviction. Furthermore, Section 30(g) of the *Registered Land Act* (repealed) provided that the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession is an overriding interest on registered land.
25. The facts of this case shows that there was a common intention between the Appellant and the Respondent, which intention the Respondent relied upon, to live and utilize parcel number 475. That intention created a trust, which is recognized by the *Registered Land Act*. Indeed, it has been recognized that a 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 a common intention.
26. Having allowed the Respondent to occupy his land since 1975 to date, the Appellant would be defeating a common intention which he had with his brother since 1975, which is unconscionable and not acceptable. Consequently, I find that the learned Magistrate was right when he held that the Respondent had established the existence of a trust.



5. Dissatisfied with the judgment of ELC, the appellant lodged this appeal and challenges the judgment on four grounds namely; that the Judge erred in holding that the agreement dated 29th August 2074 was a forgery and then proceeded to find that a constructive trust had arisen from the forged agreement; that there was no basis to hold that a constructive trust existed; that the Judge interpreted the cited authorities wrongly; and that the appellant's title was indefeasible under section 26 (1) of the Registered Land Act, 2012.
6. When the appeal was called out for hearing on the GO TO virtual platform, Mr. Awiti Advocate appeared for the appellant and Ms. Nyamoro appeared for the respondent. The appellant had filed written submissions dated 21st November 2019, which Mr. Awiti highlighted briefly. Citing the cases of *Lloyds Bank vs. Rosset* [1991] 1 A.C. 107 and *Zipporah Wanjiru Mwangi vs. Zipporah Wanjiru Njoroge [2017] eKLR*, it was the appellant's case that for a constructive trust to arise, there must be evidence of bargain (common intention), agreement and detrimental reliance resulting in an equitable fraud or unconscionable denial of a right. It was submitted that the court on its own cannot presume a trust but should consider the circumstances of the case before imposing a constructive trust.
7. The appellant further submitted that the Judge having found that the agreement dated 29th August 1974 was a forgery, there was no legal basis for holding that a constructive trust arose from the impugned agreement. The case of *National Westminster Bank Ltd vs. Barclays Bank International Ltd* [1974] 3 All ER 836 was cited in support of this argument.
8. The appellant's other argument was that the Judge incorrectly applied the judgment in *Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri* [2014] eKLR. The appellant asserted that in that case, there was evidence that the appellants were in possession and that there was evidence of payment of the purchase price. Contrary to the facts in that cited authority, the court found that the respondent was relying on a forged agreement and therefore, it was erroneous for the court to rely on the said authority as a basis for its decision.
9. Finally, the appellant submitted that as the registered owner, he was entitled to all rights over the property including the right to exclusive possession. The cases of *Azina Said Chepkemboi vs. Noah Martim Too & 2 Others* [2015] eKLR and *Waweru Mathu J.M vs. Danson Otachi Chionja & another* [2015] eKLR were cited in support of this proposition.
10. In opposition, Ms. Nyamoro, relied on the written submissions dated 2nd October 2023, which she highlighted briefly. It was her submission that proof of a constructive trust is a matter of evidence and not law; that under the proviso to section 26 of the *Land Act* 2012, a first registration can be cancelled where fraud is proved and that there was evidence that the respondent and the appellant had lived in their respective parcels of land for over 40 years; that the decree arising from the Magistrate's Court had been effected and the property the subject of this appeal, that is L.R No. Matinyani/Mutulu/475, had already been transferred and is now registered in the name of the respondent; and that the Judge was right in upholding the doctrine of constructive trust.
11. We have carefully considered the appeal, the documents in support, as well as the respective submissions of the parties. In our view, only one question arises for determination, whether the lower courts properly invoked the doctrine of constructive trust. Stated differently, did the learned Judge err in dismissing the appeal and thus upholding the judgment of the Magistrate's Court to the extent that the appellant held the suit land in trust of the respondent?
12. The question of what amounts to constructive trust has been the subject of many decisions. The parties in their submissions did not address this question in detail but as the determination of this question will



answer all the grounds that were raised by the appellant, we proceed to do so. *Black's Law Dictionary* 8th Edition defines a constructive trust as follows:

“The right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal titles; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)”

13. This Court in *Twalib Hatayan & another vs. Said Sagggar Ahmed Al-Heidy & 5 others* [2015] eKLR expressed itself in the following terms:

“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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.”

14. In *Archer & another vs. Archer & 2 others* (Civil Appeal 39 of 2020) [2023] KECA 298 (KLR) this Court stated as follows:

35. A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in *Twalib Hatayan & another vs. Said Sagggar Ahmed Al-Heidy & 5 others* (supra) as follows:

“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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.”

36. Therefore, while the resulting trust focuses on monetary contribution towards purchase of a property, a constructive trust is concerned with the bargain or common intention of the parties relating to ownership of the subject property. It is also notable that the focus in resulting trusts



is on the unilateral intention of the provider of the purchase money, while constructive trusts are rooted on the bilateral intentions of the relevant actors. The House of Lords in *Stack vs Dowden* (supra) held that a common intention is recognised as relevant, only if one party alters his or her position in detrimental reliance upon some form of bargain that would confer upon them a sufficiently defined beneficial interest in the subject property, and an unconscionable denial of rights would result if the legal estate owner tries to evade the bargain. As regards the timing of the bargain, this can precede, be contemporaneous with, or occur after the acquisition of title.

37. The common intention may be proved by direct evidence, that is by way of an agreement or express words and communication between the parties that they are to have beneficial interests in the subject property, or may be inferred by the Court from the parties' actions and conduct. The types of evidence from which the courts are most often asked to infer such intention include contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In *Oxley vs Hiscock* (supra), LJ Chadwick of the English Court of Appeal, after analysing the decisions on how a constructive trust arises when property is purchased in the sole name of one of the parties and there was no express declaration of trust, held as follows:

“68. The first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In many such cases – of which the present is an example – there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge's categories in *Lloyds Bank Plc v Rosset*. In other cases – where the evidence is that the matter was not discussed at all – an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge's second category. And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention.”

15. The Supreme Court of Kenya in *MNK vs. POM; Initiative for Strategic Litigation in Africa* (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) dealt with the question of constructive trust and expressed itself in the following terms:

“78. On our part, on evaluating the evidence, we are convinced that the two parties contributed to the acquisition and development of the suit property which led to their proprietary rights. These proprietary rights arose out of a constructive trust. The Black's Law Dictionary 9th Edition at pg 1649 defines a constructive trust as “the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title.”

85. In England, courts have long recognized that common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which



can be inferred from conduct other than making financial contributions to cohabittees.

16. It is thus clear that with constructive trust, the key element is the intention of the parties at the time of the purchase of the property. With this in mind, we now look to the facts of this case to see whether there was a common intention between the parties that would establish a constructive trust. We note that the appellant has made heavy weather contentions that the learned Judge held that the handwritten agreement dated 29th August 1974 was forged and then proceeded to hold that a constructive trust had been established. On that issue, the learned Judge pronounced himself as follows:
 14. Although the Appellant produced a handwritten Agreement showing that he purchased parcel of land 476 vide an Agreement dated 5th August, 1984, the said Agreement was never translated in the language of the lower court, which is English and Kiswahili. In the circumstances, this court cannot rely on the said document. However, the Application for the consent of the Land Control Board shows that parcel of land number 476 was transferred from a Mr. Charles Yumbia Kithuku to the Appellant in 1984 for a consideration of Kshs. 10,000. The Board then gave its consent to the Appellant on 19th October, 1984.
 15. The fact that the Appellant applied for the consent of the Board for the transfer of parcel of land number 460 from Charles Yumbia in 1984 is consistent with his testimony that he bought the said land in 1984, and was issued with a Title Deed the same year.
 16. The fact that indeed the Appellant bought parcel number 476 in 1984, is inconsistent with the Respondent's assertion that parcel numbers 476 and 475 were one parcel of land which was sub-divided into two as at the time of buying it. Indeed, the purported handwritten Agreement between the Appellant and the Respondent dated 29th August, 1974 in which they purportedly agreed to share parcels of land numbers 475 and 476 "in future" is a forgery.
 17. I say so because by 1974, parcel of land number 476 was still in the name of Charles Yumbia. It was not until 1984 that the Appellant purchased it. The purported Agreement of 1974 could not have therefore captured parcel number 476 as a jointly owned property. Indeed, in the same year, parcel of land number 475 was still in the name of Mwangi Syelunde. It was not until 16th June, 1975 that the Land Adjudication Officer allowed the said Mwangi Syelunde to transfer the land to the Appellant.
 18. The evidence that was produced before the lower court therefore shows that the Respondent did not contribute or participate in the purchase of the two properties. However, the Appellant allowed him to occupy and live on parcel number 475 since 1975. The question that arises is therefore this: does the concept of trust arise in favour of the Respondent?"
17. We have carefully read the judgment and note that whereas the Judge made those findings on the legality of the agreement, his holding on the question of trust was not based on the agreement but rather on the conduct of the parties at the time of purchase and thereafter, more so the fact that each party occupied their respective parcel for many years before the appellant started the legal battles. The Judge addressed this issue as follows:
 21. The *Black's Law Dictionary*, 8th Edition has defined the term "trust" as follows:

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal titles; a property interest held by one person



(the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary).”

22. There are many kind of trusts recognized in law, with the most common in land being customary trusts and constructive trust. The customary trust does not arise in this case because the suit property is not ancestral land. Indeed, the two properties were purchased by the Appellant. However, the Appellant allowed the Respondent to occupy one of his parcel of land since 1975 to date.
 24. The Appellant in this case allowed his brother to live on parcel number 475 since 1975. The Respondent has been living on the said land without any interference from the registered proprietor, the Appellant. Obviously, if someone has been living on your land for more than forty (40) years, the court is entitled to import the concept of constructive trust to protect such an individual from eviction. Furthermore, Section 30(g) of the *Registered Land Act* (repealed) provided that the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession is an overriding interest on registered land.
 25. The facts of this case shows that there was a common intention between the Appellant and the Respondent, which intention the Respondent relied upon, to live and utilize parcel number 475. That intention created a trust, which is recognized by the *Registered Land Act*. Indeed, it has been recognized that a 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 a common intention.
 26. Having allowed the Respondent to occupy his land since 1975 to date, the Appellant would be defeating a common intention which he had with his brother since 1975, which is unconscionable and not acceptable. Consequently, I find that the learned Magistrate was right when he held that the Respondent had established the existence of a trust.
18. A constructive trust can be discerned from the conduct of the parties to establish whether there was a common intention. We have carefully perused the record and note the following:
- i. The appellant and the respondent are brothers;
 - ii. The two parcels of Land Nos. Matinyani/Mutululu/475 and Matinyani/Mutululu/476 are adjacent to each other.
 - iii. Since the purchase of the two parcels of land, the appellant has occupied Land Parcel No. Matinyani/Mutululu/476 and the respondent has all along occupied Matinyani/Mutululu/475.
 - iv. Munyoki Masila who was a witness for the respondent in the trial court stated as follows:

“I know the plaintiff/appellant and the defendant/respondent. They are both my relatives. I have known them since they were born. We live in the same village. Land Parcel No. 475 belonged to Mwangane Lunde and he sold to plaintiff and defendant. The land parcel is registered under plaintiff but defendant is utilizing the land parcel. He has built there and he farms there. I do not agree with plaintiff as he called me to his home and told me they shared the land parcels 475 & 476 with the defendant and that he gave the defendant 475. That is all.”
 - v. The appellant was registered as the proprietor of Land Parcel No. Matinyani/Mutululu/475 on 23rd August 1980.



- vi. The suit in the Magistrate’s Court was filed on 31st August 2004.
19. Looking at the totality of the evidence that was considered by the two courts below and noting that both the appellant and respondent were in peaceful occupation of their respective parcels for 24 years before the appellant filed the suit for eviction, we are not persuaded that the Judge was wrong in finding that a common intention had been established and thus a constructive trust arose. If one was to believe the appellant for a moment, why would he allow his brother, the respondent to occupy the parcel of land for 24 years without raising any question and fail to complain to the police on what he now calls a forged agreement? The documents in the record of appeal and the evidence are consistent with the holding that all along the suit land belonged to the respondent though registered in the name of the appellant. As the learned Judge held, this case falls within the exception captured in section 26 of the Registered Land Act.
20. In view of the foregoing, we find that this appeal has no merit and we resultantly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

F. TUIYOTT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

