



**Kibutiri (Sued as the legal representative of Loise Wanja Kibutiri) v Njoro & 2 others  
(Sued as the legal representative of the Estate of James Njoro Kibutiri) & another (Civil  
Appeal (Application) 156 of 2019) [2024] KECA 508 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 508 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 156 OF 2019  
DK MUSINGA, S OLE KANTAI & PM GACHOKA, JJA  
APRIL 26, 2024**

**BETWEEN**

**DAVID MUTHEE KIBUTIRI (SUED AS THE LEGAL REPRESENTATIVE OF  
LOISE WANJA KIBUTIRI) ..... APPLICANT**

**AND**

**THOMAS KIBUTIRI NJORO, GEORGE KAMAU KIBUTIRI & ROBERT  
NDUNGU KIBUTIRI SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JAMES NJORO KIBUTIRI) ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KIBUTIRI NJAU (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF ELIUD NJAU KIBUTIRI) ..... 2<sup>ND</sup> RESPONDENT**

*(An application for Leave to Appeal from the Judgment and Decree of the Court of Appeal of Kenya at Nairobi (Ouko (P), Okwengu & Makhandia, JJ.A.) delivered on 25th September 2020 Civil Appeal No. 156 of 2019 As Consolidated with Civil Appeal No. 192 of 2019))*

**RULING**

1. Before this Court is an application dated 14<sup>th</sup> November 2020, brought by the legal representatives of the Estate of Loise Wanja Kibutiri pursuant to the provisions of Article 163 (4) (b) of the *Constitution*, rule 24 of the *Supreme Court Rules*, section 3A and 3B of the *Appellate Jurisdiction Act*, and rules 1(2) and 43 of Rules of this Court, seeking leave to appeal to the Supreme Court, and stay of execution against the judgement by this Court on 25<sup>th</sup> September 2020 in Civil Appeal No. 156 of 2019 as consolidated with Civil Appeal No. 192 of 2019.
2. The background to this application is that Loise Wanja Kibutiri, (Loise), (through her legal representative), filed ELC Suit No. 94 of 2001 against James Njoro Kibutiri (James) and Eliud Njau Kibutiri (Eliud), (through their legal representatives), claiming entitlement to a share of a parcel of



- land known as L.R. No. 165/1/3 (the suit property) measuring about 127 acres by reason of her contribution of the purchase price.
3. She claimed that although James and Eliud, who are her brothers are the registered owners of the suit property as tenants in common in equal shares, she contributed Kshs. 12,000 whereas James and Eliud contributed Kshs. 118,900 and Kshs. 9,000 respectively towards the purchase price. She contended that as per an agreement dated 7<sup>th</sup> July 1991, the suit property was to be registered in their three names and each would be entitled to a share thereof, commensurate to their respective contribution. She averred, *inter alia*, that James and Eliud held the suit property in trust for themselves and for her.
  4. The suit was opposed by James and Eliud, who denied the existence of a trust as alleged. They averred (through Eliud) that by an Indenture of Conveyance dated 12<sup>th</sup> August 1964, one Peter Njoroge Kinuthia, Kamau Kinuthia, James and himself became the registered proprietors of the suit property as tenants in common in equal shares. They further averred that it was stated in the First Indenture that the suit property was bought at a consideration of Kshs.140,000 paid to the vendor by the four purchasers in equal shares; that for the purpose of managing and running the farm on the suit property, James and Eliud together with the said Peter Njoroge Kinuthia and Kamau Kinuthia formed a partnership known as Kiambaa Young Farmers by way of a Deed of Partnership dated 10<sup>th</sup> September 1964, which was registered under the Business Names Act; and that the capital of the said partnership was Kshs.180,000/- which was provided by the said partners in equal shares.
  5. Eliud further averred that by an Indenture of Conveyance dated 30<sup>th</sup> September 1967, the said Peter Njoroge Kinuthia and Kamau Kinuthia sold and conveyed the suit property to himself and James as tenants in common in equal shares at a consideration of Kshs.44,169.80; secondly, by James and Eliud assuming the liability for the debt due to the Land and Agricultural Bank which then stood at Kshs.72,262.62, and thirdly, by James and Eliud assuming the liability of the debt to the Agricultural Finance Corporation which then stood at Kshs.41,245.30. He stated that Loise was not a member of the partnership of Kiambaa Young Farmers and was therefore not entitled to a share of the proceeds from the suit property. He denied the claim by Loise that she contributed Kshs.12,000/- towards the purchase price for the suit property, pointing out that this alleged contribution was not captured in both the First and the Second Indentures.
  6. The trial court, vide a judgment dated 31<sup>st</sup> July 2015, held that no trust was created in the arrangement between Loise and James, but instead they entered into an oral contract for Loise to be given a portion of the suit property commensurate to her contribution of Kshs.12,000/-. The trial court further held that Loise was entitled to a share of the suit property commensurate to her monetary contribution of Kshs.12,000/- towards the purchase price. In the end, it ordered the suit property to be subdivided as follows: James: 108 acres, Loise: 11 acres, Eliud: 8 acres.
  7. Loise and the Eliud preferred two separate appeals before this Court to wit; Civil Appeal No. 156 of 2019, and Civil Appeal No. 192 of 2019. This Court, vide a judgment dated 25<sup>th</sup> September 2020, set aside the trial court's judgment to the extent that Loise was entitled to the suit property and substituted the apportionment made by the learned judge with an order that left intact Eliud's share at 50 % (63.5 acres), and awarded Loise 6.35 acres being her entitlement from James' share on the basis of the Kshs.12,000/= paid to him, leaving 57.15 acres for James. That is the decision that is the subject of this instant application.
  8. The applicant averred that the intended appeal involves matters of general public importance which should be adjudicated by the Supreme Court. The main contention is that this Court misapprehended the nature of the doctrine of the resulting trust, which is a creature of the law. Further, that this Court made a conceptual error where it ignored the fact that the appellant acquired a beneficial interest in



- the property in 1964 when it was bought and registered in the name of her two brothers and two non-family members, and not in 1967 when the non-family members transferred the interest they held in the property held by her two brothers. In addition, this Court misapplied the doctrine by not applying the maxim of equity that equality is equity.
9. It is contended that the jurisprudence that will emerge from the intended appeal will clarify important principles in acquisition of property which will apply to the present and many other generations of Kenyans.
  10. The application was unopposed as there was no replying affidavit by the legal representatives of the respondents.
  11. At the hearing of the application there was no attendance by the respondents' advocates, and neither did they file any submissions, though they had been duly served with the hearing notice.
  12. The applicant, through the firm of Kamau Kuria & Company Advocates, filed her written submissions dated 10<sup>th</sup> February 2024 which were briefly highlighted by Mr. Kuria, Senior Counsel, who submitted, inter alia, that the application had satisfied all the requirements set out in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR. Specifically, that the applicant wants the Supreme Court to determine three (3) things: the nature of the property concept of resulting trust; when the right to property vests under resulting trust doctrine; and what the court is to do when the contributions to purchase a property by many people are not ascertained.
  13. The applicant abandoned the prayer for stay, noting that this Court has no jurisdiction to grant a stay of execution of the judgment.
  14. Article 163(4) of the *Constitution* succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of the *Constitution*, and in any matter, where it is certified that the appeal involves a matter of general public importance.
  15. Rule 40(b) of the *Court of Appeal Rules* 2010 (now rule 42 of the *Court of Appeal Rules* 2022) provides that:
    - “ 40. Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, an application for such a certificate may be made-
      - a. ....
      - b. by motion or chamber summons according to the practice of the superior court, within fourteen days after that decision....”
  16. We note that this application was filed on 5<sup>th</sup> November, 2020 forty-one (41) days after delivery of the impugned judgment. No extension of time was granted by the Court prior to the filing of the application. We note that this is an anomaly that renders the entire application incompetent. The rule is clear on the timelines and if the applicant had good reasons to explain the delay it ought to have invoked the relevant provisions for the extension of time. In view of this glaring anomaly, we cannot take any other step.
  17. Consequently, the application is incompetent and is hereby struck out. As the respondents did not participate in the hearing of the application, we make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**D. K. MUSINGA (P)**



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**JUDGE OF APPEAL**

**S. ole KANTAI**

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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**

