



REPUBLIC OF KENYA



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**Ndikwe v Kamau (Civil Appeal E027 of 2023)
[2024] KECA 696 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 696 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E027 OF 2023
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JUNE 21, 2024**

BETWEEN

PRISCILLA NYOKABI NDIKWE APPELLANT

AND

VERONICAH WANGU KAMAU RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court at Nyeri (Olola, J.) dated 28th September, 2022 in ELC Case No. 172 of 2013 (O.S))

JUDGMENT

1. The properties in dispute in this appeal are Nanyuki/Marura/Block4/1101, Nanyuki/Marura/Block4/1102 and Nanyuki/Marura/Block4/1040 (hereinafter ‘suit properties’). 2.The respondent, Michael Muchiri Nderitu, who was substituted by Veronicah Wangu Kamau, filed originating summons dated 25th August 2013, and amended on 13th July 2015, before the Environment and Land Court (ELC) at Nyeri. The respondent asked the ELC to determine whether the appellant, who is the registered proprietor of the suit properties, held the properties in trust for the family of the late Ndikwe Mungatu; and whether the respondent, a granddaughter to the said Ndikwe Mungatu, was entitled to half of the suit properties, by virtue of the existence of a trust.
2. The summons was supported by an affidavit sworn by the respondent dated 15th July 2015. The respondent deponed that the late Ndikwe Mungatu (hereinafter ‘the deceased’), who died in 1968, was survived by two wives, Ngunju Ndikwe, and Julia Ndikwe.
3. The first wife, Ngunju Ndikwe, had four sons and two daughters, namely:
 - i. Gabriel Nderitu (deceased)
 - ii. Joseph Tumuti (deceased)



- iii. Teresia Gathoni
 - iv. Mary Wathima (deceased)
 - v. James Kiguta (deceased)
 - vi. Simon Wamiti (deceased)
4. The children from the second house comprised of six sons and one daughter, namely:
- i. Gitonga Ndikwe (deceased)
 - ii. Wambugu Ndikwe
 - iii. Grace Nyangari (deceased)
 - iv. Mundia Ndikwe (deceased)
 - v. Gichangi Ndikwe (deceased)
 - vi. Gikunju Ndikwe
 - vii. Maina Ndikwe (deceased)
5. The respondent averred that the appellant is a widow to Simon Wamiti Ndikwe, who was one of the deceased's sons from the first house. It was the respondent's case that the suit properties formed part of the deceased's estate, and were subject of succession proceedings commenced in 1988. The respondent deponed that during the succession proceedings, the appellant failed to disclose to the probate court, that there were other beneficiaries of the deceased from the first household, other than herself.
6. The respondent asserted that the second house was given their share of the deceased's estate, which they distributed among its members. However, the appellant received the share meant for the first house, which comprised the suit properties. The respondent averred that she was entitled to inherit from the deceased's estate as she was a daughter to one of the deceased's sons, Gabriel Nderitu, from the first house. The respondent urged the court to find that the appellant held the suit properties in trust for the family comprised of the first household of the deceased.
7. In response, the appellant filed a replying affidavit dated 17th September 2013. She refuted the respondent's claim that she held the suit properties in trust for the first house of the late Ndikwe Mungatu. She averred that the deceased is her father in law, and that none of the deceased's sons have laid a claim against the suit properties, for reasons that they were aware the suit properties belonged to her husband, even though they were registered in the name of the deceased, who was her late husband's father.
8. It was the respondent's case that the suit properties were originally registered as Nanyuki/Marura/Block4/Kimuri/16 and Nanyuki/Marura/Block4/Kimuri10. They were owned jointly by the deceased and one Catherine Ngima Ndegwa. That her husband raised the purchase price that was paid by the deceased. That the original parcels were sub-divided into two, and the deceased received half of the land, which was registered as Nanyuki/Marura/Block4/Kimuri/93 and Nanyuki/Marura/Block4/Kimuri/95. That these two parcels were the subject of succession proceedings when the deceased died, and half of the parcel of land was inherited by William Wambugu Ndikwe, on behalf of the second house, while the remaining half, which constitutes the suit properties, was registered in her name, as her husband, Simon Wamiti, died before the succession proceedings were completed.



9. The appellant averred that the decision of the probate court is yet to be challenged. She deponed that the deceased had other properties: L.R. No. Ruguru/Karuthi/747 which was shared equally between the two houses; Plot No.5 at Gatung'ang'a Market which was allocated to the second house; and L.R. No. Kirimukuyu/Mutathini/498 which was bequeathed to the respondent's father. She averred that parcel No. 498, which was allocated to the respondent's father, was sold by her mother, and the proceeds used to settle her children, including the respondent, elsewhere.
10. The case was heard by way of viva voce evidence. After hearing the parties, the learned trial Judge, in a ruling dated 28th September 2022, found in favour of the respondent. The learned Judge determined that the appellant held the suit properties in trust for the beneficiaries of the deceased's estate belonging to the first house. The learned Judge directed that since the first house had six children, a sixth of the suit properties be transferred to the respondent, being her father's (Gabriel Nderitu) share of the estate, to hold in trust for herself and for the family of Gabriel Nderitu.
11. Aggrieved by this decision, the appellant lodged this appeal citing eight grounds of appeal. In summary, the appellant faulted the ELC for finding in favour of the respondent, stating that the decision was against the weight of the evidence on record. She was aggrieved that the learned Judge shifted the burden of proof to the appellant, and failed to make a finding on whether the respondent discharged her burden of proof, on a balance of probabilities. She faulted the learned Judge for ignoring the principles of equity in awarding the equitable remedy of a constructive trust to the respondent. The appellant took issue with the fact that the learned Judge failed to consider her submissions and documentary evidence, which proved the existence of proprietary estoppel, in favour of the appellant's late husband, with respect to the suit properties. The appellant invited us to set aside the decision of the ELC, and allow her appeal as prayed.
12. The appeal was canvassed by way of written submissions, which had been filed by counsel for the parties herein. The appellants were represented by the firm of Wang'ong'u Ndichu & Company Advocates, while the firm of Kimunya & Company Advocates appear for the respondent.
13. According to the appellant's counsel, no constructive trust existed with respect to the suit properties, as there was no common intention between the parties relating to ownership of the suit properties. Counsel submitted that the respondent failed to establish fraud, undue influence, unfulfilled promises or unjust enrichment to warrant a remedy of a constructive trust from the court. Counsel explained that the respondent failed to prove the existence of a customary trust relating to the suit properties. Counsel urged that the suit properties did not form clan or family land prior to its registration. Counsel asserted that the suit properties were purchased, and that the appellant's late husband contributed a substantial amount of the purchase price, through repayment of the loan secured to purchase the suit properties. Counsel urged that the appellant's late husband's contribution was established by the evidence of the appellant and DW2.
14. Counsel for the appellant submitted that the fact that an outstanding loan with respect to the mother parcel existed as at December 1976 was unchallenged, and the fact that the deceased died in the year 1968. Counsel stated that the appellant's late husband settled the deceased's share of the outstanding loan, which was the reason why the respondent's parents, and other siblings of the appellant's husband, never laid claim on the suit properties. Counsel argued that the respondent was aware of the succession proceedings but decided to file a claim before the ELC, instead of challenging the decision of the probate court, which decision gave the appellant all the right as the registered owner of the suit properties. Counsel urged that the delay by the respondent in lodging the suit before the ELC, 25 years after the succession proceedings were concluded, was prejudicial to the appellant, and that the



passage of time affected the appellant's ability to obtain proof of payment, as her husband, who was the custodian of said documents, died in 1995.

15. Counsel further submitted that the ELC shifted the burden of proof to the appellant to explain why she never indicated during the succession proceedings that the suit properties belonged to her husband, yet the court failed to task the respondent to explain why she never challenged the grant issued to the appellant. Counsel contended that the burden of proving the existence of the trust lay on the respondent. It was submitted on behalf of the appellant that she had established proprietary estoppel, as the deceased made a representation to the appellant's husband, to the effect that he would inherit the suit properties should he assist the deceased in clearing the outstanding loan.
16. On his part, counsel for the respondent submitted that the respondent did not plead customary trust as alleged by the appellant, but rather pleaded trust generally. He explained that the ELC was not wrong in determining that a constructive trust existed with respect to the suit properties. Counsel urged that the appellant was registered as the proprietor of the suit properties on account of being a joint administrator of the estate of the deceased. One half of the estate was awarded to the administrator representing the second house, which share was distributed among the sons of the second house. However, the appellant kept the share meant for the first house all to herself.
17. Counsel submitted that the appellant used her position as an administrator of the estate of the deceased to unjustly enrich herself. It was the submission of counsel that the evidential burden of proof shifted to the appellant, in light of the evidence adduced by the respondent, and in line with the provision of Sections 109 and 112 of the *Evidence Act*. Counsel stated that the ELC properly analyzed the evidence placed before it and came to the right conclusion. Counsel asserted that issue of proprietary estoppel was not canvassed before the ELC, and further, that during the succession proceedings, the appellant's husband did not, at any point, claim that the suit properties belonged to him and was not the deceased's. He submitted that the appellant failed to provide proof of payment of the purchase price. Counsel invited us to dismiss the appeal for lack of merit.
17. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. Of course the Court will do this with benefit of the grounds of appeal put forward by the appellant and the submissions made by the parties to the appeal. This duty was reiterated by this Court in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court observed thus;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect.” See *Selle v. Associated Motor Boat Co.* [1968] EA 123.”
18. Having re-evaluated the record, as well as the arguments from both sides, the issue arising for our determination is whether the appellant holds the suit properties in trust for the respondent, and the first house of the deceased in general.
19. Before we tackle the question whether or not the appellant held the suit properties in trust for the respondent, the appellant, in her grounds of appeal, faulted the ELC for finding that constructive trust existed, yet the respondent did not plead constructive trust. We hold that even though this issue was not pleaded, this did not preclude the trial court from inferring the existence of such a trust, if the circumstances of the case permitted, as constructive trusts fall under the category of trusts established by operation of the law.



20. The Supreme Court in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 Others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) defined a constructive trust as follows:

“A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law...

A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.”

21. Did the learned Judge err in finding that constructive trust existed in this case, which was breached by the appellant? A party seeking a declaration of the existence of a trust bears the burden of placing before a court of law plausible, cogent evidence to underpin such a declaration.
22. This was the holding of this Court in the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR where the Court held thus:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

‘The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.’ See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.”

23. It is common ground that the appellant became the registered owner of the suit properties through a certificate of confirmation of grant which was issued in succession proceedings in Succession Cause No. 18 of 1988, In the matter estate of Ndikwe Mungatu (the deceased). The appellant was married to Simon Wamiti, a son to the deceased from the first house. The deceased had two wives (houses). The respondent is a granddaughter of the deceased. It was the respondent’s case that the appellant held the suit properties in trust for the family of the first house. The respondent’s case was that the appellant substituted her husband, who was the initial joint administrator of the estate of the deceased having been nominated as a representative of the first house in the succession proceedings.
24. The respondent’s further case was that the original parcel of land owned by the deceased measured 200 acres, and that during the succession proceedings, each house was awarded 100 acres each. It was her testimony that the representative of the second house distributed the share meant for the second house among all beneficiaries of the second house, while the appellant kept the share belonging to the first house all to herself. She was categorical that the appellant’s husband did not contribute towards the purchase of the suit properties. It was her testimony that none of her uncles and aunties from the first house were interested in the suit properties, and therefore the suit properties ought to be divided equally between her and the appellant.
25. In rebuttal, the appellant maintained that the suit properties were not meant to be allocated to the first house, but rather to her late husband, as he contributed a substantial amount of the purchase price, through repayment of the loan secured to purchase the suit properties. The appellant’s case was that



- all the children from the first house were aware of this arrangement between the deceased and her late husband, hence the reason why none of the them ever laid a claim on the suit properties.
26. Although the respondent insists that the deceased purchased the suit properties on his own, the evidence on record is that the deceased died in 1968, and that loan payments with respect to the suit properties were still being repaid as late as the year 1989. The letter drafted by Gatome & Associates dated 26th October 1989, showed that money was procured with a view of undertaking the requisite sub-division of the original parcel of land, so that the deceased could get half of the parcel of the land, as he had purchased the original parcel of land jointly with one Catherine Ngima Ndegwa.
 27. Secondly, the evidence by the appellant and her witness, that her late husband provided the money used to purchase the suit properties, was further corroborated by the affidavit dated 6th September 2013, signed by some of the surviving members of the first house, that is: Teresia Gathoni (the only surviving child of the deceased from the first house); Teresia Wairimu, widow to one of the deceased's son, Joseph Mathai; and Alice Kiguta, widow to James Kiguta, another son from the first house. They all deponed that the suit properties belonged to the appellant, by virtue of the fact that her husband paid the purchase consideration for the same. Alice Kiguta testified as DW2. She told the court that the deceased asked his sons to assist him pay for the suit properties, but none did save for Simon Wamiti who stepped up and did so.
 28. We further note that the respondent's witness, William Wambugu, who was one of the deceased's sons from the second house, told the court that before the deceased died, he distributed the ancestral land among his elder sons, and that Simon being the last-born son, did not get a share of the ancestral land. It was his evidence that he was not sure whether Simon paid for the suit properties, or whether the deceased allocated him the same, since he did not get a share of the ancestral land. He further stated that when Simon died, none of the members of the first house objected to the appellant being named as a joint administrator. This is despite the fact that the deceased's daughter, Teresia Gathoni, from the first house, was still alive.
 29. The respondent's sister, PW3, testified that all her uncles, including PW2 (William Wambugu) assisted the deceased in purchasing the suit properties. This was however inconsistent with the evidence of PW2, who was categorical that he did not give out any money towards the purchase the suit properties.
 30. From the foregoing, our re-evaluation of the evidence leads us to conclude that there is sufficient evidence on record showing that the suit properties were allocated to the appellant's late husband, by virtue of the fact that he contributed towards the purchase of the same. The appellant did not hold the suit properties in trust for the first house. The surviving child from the first house, as well as the widows to the sons from the first house, all confirmed that the suit properties were to be inherited by Simon Wamiti during the succession proceedings. 33. We find that the learned judge misapprehended the evidence on record, and came to the wrong conclusion that the appellant took advantage of her position as a joint administrator to disinherit the respondent. This was not the case as demonstrated above. The children of the deceased from the first house seemed to agree that the suit properties belonged wholly to their brother, Simon Wamiti, and not to the first house in general. None of them objected to the appellant substituting her husband as an administrator during the succession proceedings, and further, none of them challenged the final decision of the probate court, which was delivered more than twenty years ago. It was interesting that none of the members of the first house accepted the invitation to join the respondent in the suit against the appellant despite knowing the nature of the suit. It was clear to the court that the respondent was on her own when it came to the issue on the ownership of the suit parcels of land.



- 31. It is our finding that, after a re-evaluation of the totality of the evidence tendered before the ELC, that nothing substantial was placed before the court to demonstrate that the appellant held the suit properties in trust for the first house. The respondent failed to discharge her burden of proving that the appellant was registered as proprietor of the suit properties in trust for her, and the members of the first house.
- 32. We find merit in the appeal lodged by the appellant. It is hereby allowed with costs.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.**

Signed

DEPUTY REGISTRAR

