



REPUBLIC OF KENYA



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**Githegi v Mwaura (Civil Appeal 216 of 2016)
[2022] KECA 466 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KECA 466 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 216 OF 2016
HM OKWENGU, AK MURGOR & J MOHAMMED, JJA
MARCH 18, 2022**

BETWEEN

MARY NJAMBI GITHEGI ALIAS MARY NJAMBI GITHEGI APPELLANT

AND

CHRISTINE WAMBUI MWaura RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court
at Eldoret (Odeny, J.) delivered on 31st July, 2019 in ELC No. 277 of 2017)*

JUDGMENT

- [1] This appeal originates from a suit that was filed in the Environment and Land Court (ELC) at Eldoret by Christine Wambui Mwaura (Christine), against Njambi L.K. Githegi alias Mary Njambi Githegi (Njambi), who is now the appellant. Christine is widow to the late Henry Mwaura Thiong'o (Henry) and Njambi is widow to the late Livingstone Kariuki Gathengi (Livingstone). Christine is the administrator of Henry's estate while Njambi and her co-wife Njeri Githegi are the administrators of Livingstone's estate.
- [2] Christine claimed that there was a trust arising between her deceased husband (Henry), and Njambi's deceased husband (Livingstone), pursuant to which Livingstone was prior to his death holding 50 acres forming part of land known as Eldoret Municipality Block LR.14/354 (LR No. 14/354) in trust for Henry, but that Njambi who was aware of the trust had fraudulently, unlawfully and illegally subdivided LR. No. 14/354 into 99 portions, and transferred the plots into her name in total disregard of Christine's interest.
- [3] The reliefs sought in the suit included, *inter alia*, a declaration that Njambi holds a portion of 50 acres in LR. No. 14/354, and/or such portions of new parcels arising out of the subdivisions of LR 14/354 that constitutes 50 acres, in trust for Christine; an order compelling Njambi to sign all the necessary documents to effect a transfer of the portions comprising of the 50 acres; and an order directing the



- Eldoret Land Registrar to rectify the titles by cancelling the registration of Njambi as proprietor of the portions that constitutes 50 acres of the new parcels, and substitute Njambi with Christine.
- [4] Njambi denied Christine’s claim, specifically that Livingstone was holding a portion of 50 acres in trust for Henry, or that she (Njambi) was holding 50 acres in LR 14/354 in trust for Christine. Njambi also denied all the allegations of fraud attributed to her and further contended that Christine’s claim was barred by effluxion of time as it was filed more than 12 years from the date when the cause of action arose.
- [5] The trial initially proceeded before Karanja, J. who heard the evidence of Christine. Thereafter, Odeny J. took over and heard the evidence of Njambi, after it was agreed that the hearing of the suit proceeds from where Karanja, J. had left it. In her judgment, Odeny, J. having considered the evidence, found that there was a trust arising from the arrangement between Livingstone and Henry; that Njambi was a constructive trustee at the time she caused LR. No. 14/354 to be registered in her name; and that in excluding Christine from LR. No. 14/354, Njambi breached the constructive trust between Livingstone and Henry.
- [6] Further, the learned Judge found that there was a consent entered into by Njambi during the distribution of Livingstone’s estate in Probate & Administration Cause No. 8 of 1982; that a meeting held by elders on 25th January, 1996, showed that Njambi was well aware that she was only entitled to 50 acres of land in LR. 14/354 and not the whole parcel comprising 100 acres; and that Njambi was not only deceitful, but also went against a court order in having the land subdivided into 99 portions and registered in her name. The learned Judge therefore allowed Christine’s claim and granted the orders sought.
- [7] In her memorandum of appeal, Njambi has raised 12 grounds in which she *inter alia*, faults the learned Judge in finding that she was holding 50 acres in LR. 14/354 in trust for Christine. She contends that no consideration was paid to Livingstone by Henry, and that Henry had no proprietary interest in LR. No. 776/2/1 and was therefore incapable of transferring any interest in that land, to Livingstone. She also faults the learned Judge for relying on extraneous matters not pleaded or placed before the court for determination.
- [8] Hearing of the appeal proceeded through the GoToMeeting online platform with learned Counsel Mr. Nyachiro present for Njambi, and Mr. Rono Kibet present for Christine. The parties filed and exchanged written submissions which they had the opportunity to highlight.
- [9] In her submissions, Njambi reduced her 12 grounds of appeal into 4 clusters. The first cluster addressed the issue of trust, the second cluster addressed the issue of extraneous facts that she alleged were taken into account by the learned Judge, the third cluster addressed the propriety of Christine’s cause of action, it being alleged that the suit did not disclose a reasonable cause of action, and the fourth cluster addressed the failure by the learned Judge to give due consideration to the evidence before her, and the learned Judge making orders that are unenforceable.
- [10] In regard to the issue of trust, it was submitted that there was no evidence to prove the alleged contribution of Henry towards the purchase of LR. No. 776/2/1, and that the evidence adduced by Njambi as to the ownership of LR. No. 776/2/1 was indisputable; that the evidence was also clear that LR. 14/354 was purchased by Livingstone and other third parties and Henry did not have any proprietary interest in that land. It was argued that Henry could not exchange or surrender shares in LR. No. 776/2/1 to Livingstone as consideration for LR. 14/354, when there was no evidence of any joint acquisition of LR. No. 776/2/1. Therefore, no trust could arise in regard to LR. 14/354.



- [11] In addition, that LR. No. 776/2/1 was government property having been acquired by the Kenya Government and compensation duly made to Livingstone and his co-owners, Samuel Kihuga and Kibera Kimuru on 12th January, 1967, long before LR. 14/354 was purchased; that LR. No. 776/2/1 was incapable of a conveyance or exchange as alleged by Christine, as it was leased to Njambi on a temporary occupation permit.
- [12] Njambi cited Peter Ndung’u Njenga vs Sofia Watiri Ndung’u [2000] eKLR, for the proposition that the existence of a trust has to be proved by way of evidence and this burden is borne by the party alleging a trust, which in this case, was Christine who failed in this obligation. The learned Judge therefore erred in finding that Henry had a proprietary interest in LR. No. 776/2/1 without any documentary proof or evidence on record to sustain such findings.
- [13] In the second cluster, Njambi submitted that the learned Judge allowed herself to be swayed by extraneous facts that had no legal bearing on the dispute at hand; that no evidence of the alleged meeting of 8th January, 1978 was adduced; that in any case, the persons who were alleged to have met had no authority and their deliberations are of no consequence to the issues pertaining to the property in issue, which is in any event the subject of succession law; that there was no clear evidence of the creation of a trust; that the learned Judge did not address her mind to the existence of fraud, misrepresentation and undue influence that was visited upon Njambi in order to get her to agree to the transfer of 50 acres out of LR.14/354 to Christine, without any justification; and that Christine denied executing the hand written agreement. In addition, the learned Judge showed open bias against Njambi in purporting to determine matters that were not for judicial consideration, and made comments regarding Njambi that were not supported by the evidence on record.
- [14] With regard to the third cluster, it was submitted that Christine’s suit did not disclose a reasonable cause of action as the trust alleged in regard to LR. 14/354 was not reduced into writing, nor was it sanctioned by the Land Control Board, and this was entirely ignored by the learned Judge. In this regard, Njambi relied on *Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR*, (Kitilit case) in which this Court held that a land transaction involving a controlled transaction in agricultural land is void, if there is no land control board consent. Njambi distinguished Kitilit’s case from that of *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri [2014] eKLR* (Kagiri decision), where a constructive trust was held to arise. She pointed out that in the Kagiri decision there was an uncontested agreement for sale of the property, and the person claiming constructive trust had demonstrated that they had paid the purchase price of the property and had been placed in actual possession of the property.
- [15] Njambi argued that there was no proof of the alleged oral agreement between Livingstone and Henry, nor was there proof of payment of the purchase price contribution by Henry in regard to LR. No. 776/2/1, nor was Henry ever in occupation of LR. 14/354. It was submitted that Livingstone having relinquished his proprietary rights in LR. No. 776/2/1 to the Government upon compulsory acquisition, and LR. 14/354 having been purchased way before the alleged trust, no trust could have arisen in regard to LR. 14/354
- [16] Finally, in regard to the last cluster concerning the orders made by the learned Judge, it was submitted that the same were unenforceable and directly contradictory, as the orders had the effect not only of depriving Njambi the right to deal with 50 acres of land, but even the remainder of the subject property whose ownership was not in dispute. In addition, that the order of nullification of the registration of the parcels arising from the subdivision of LR. 14/354, and the order directing the cancellation of the registration of Njambi as the proprietor of LR 14/354 and substituting Njambi with Christine, would unlawfully deprive Njambi of the full 100 acres without any justifiable reason. The Court was urged to



re-consider, re-appraise and re-analyse the evidence on record in order to arrive at its own conclusion; and remedy the gross miscarriage of justice visited upon Njambi, by allowing the appeal.

- [17] In her submissions, Christine relied on the principle stated by this Court in *Twalib Hatayan & Anor vs Said Sagar Ahmed Al-Heidy & 5 others* [2015] eKLR, (Twalib Hatayan decision) on the creation of constructive trust. She pointed out that the constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing; that the issue whether Henry had any proprietary interest in LR. No. 776/2/1 was an afterthought, only introduced at the tail end of the proceedings.
- [18] Furthermore, Njambi had at all times between 1976 and 1996 admitted that Christine was entitled to a share of 50 acres in LR 14/354. This was done at the family meeting of 8th January, 1978, a meeting on 1st March, 1978, and also in Probate Cause No. 8 of 1982 wherein Njambi signed a consent to that effect. It was only on 25th January, 1996 that Christine discovered that contrary to the indication that Njambi had given, she had registered the entire land in LR 14/354 comprising 100 acres in her own name.
- [19] Christine urged that there was sufficient evidence in support of the agreement between Henry and Livingstone that a share of 50 acres in LR 14/354 be held by Livingstone in trust for Henry; that Henry had a proprietary interest over LR. 14/354; that in the meeting held on 8th January, 1978 it was confirmed that Henry had contributed Kshs. 8,500 in acquisition of the property; and that in accordance with *Constantine Martin Kithinji Gitobu vs Harriet Nkuene Kirimania & 9 Others* [2020] eKLR, (a decision from the Environment and Land Court), an inference could be drawn regarding the creation of a constructive trust.
- [20] Christine cited this Court's decision in *Willy Kimutai Kitilit vs Michael Kibet supra*, in support of her submission that there was an implied trust created in favour of Henry, as there was a common intention between Henry and Livingstone in relation to LR. 14/354; that Njambi had since the demise of her husband (Livingstone), known that a share of LR. 14/ 354 belonged to Henry; and that Njambi had repeatedly admitted in various forums that Christine was entitled to a share in the land and that she is therefore estopped from resiling from those undertakings. Christine relied on this Court's decision in *Serab Njeri Mwobi vs John Kimani Njoroge* [2013] eKLR, in support of that proposition.
- [21] In regard to ground 6 and 7 that raise the issue of extraneous facts that were not pleaded, Christine submitted that Njambi misled the court as she not only attended the meetings called by the family to resolve the issues, but also signed a consent alongside her co-wife; that the adverse findings made by the learned Judge on Njambi's character, were well founded as the learned judge had the duty to observe and consider the demeanour of witnesses and therefore, the observations on the demeanour of Njambi did not demonstrate any bias.
- [22] Christine cited *Isaack Imaku Kioi vs Phyllis Waitthera Kinyungu & 3 Others* [2018] eKLR, for the proposition that an appellate court ought not to interfere with the trial judge's finding of fact based on the assessment of credibility and demeanour of witnesses who testified before the court, unless the findings were wrong on principle. She pointed out that Njambi had, in total disregard of orders issued by the court on 5th August, 1998, caused LR. 14/354 to be subdivided into 99 portions that were registered in her name, which action was a demonstration that Njambi had no regard to the authority of the court.
- [23] On the Land Control Board consent, Christine submitted that the matter was res judicata as the court had dealt with it in an application brought by Njambi on 18th August, 2005, for striking out Christine's suit on the ground that the land transaction was not sanctioned by the Land Control Board, and that the agreement was not reduced into writing. The court rejected these grounds and dismissed



Njambi's application, and no appeal having been preferred against that dismissal, it was not open to Njambi to revisit the matter.

[24] Christine pointed out that the issue of consent of Land Control Board was not raised before the learned Judge, and therefore the learned Judge could not be faulted for failing to make a finding on the same. All in all, Christine urged the Court to uphold the finding of the learned Judge that there was a constructive trust created in her favour, and that this trust was breached by Njambi who acted fraudulently with the aim of depriving Christine of her share of land in LR. 14/354.

[25] We have reconsidered and evaluated the evidence that was adduced before the trial court, being mindful of our duty as set out in *Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123* that:

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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

[26] From the evidence, it was not disputed that Livingstone and Birure jointly purchased a 200-acre piece of land. This land (originally Eldoret Municipality Block 7739/1) was registered in the name of Birure and Njambi and a Certificate issued as LR 14/9 on 25th January 1990. Subsequently it was subdivided and Livingstone's share of 100 acres registered in Njambi's name as LR 14/354 in 1995. Henry died on 18th July, 1980, while Livingstone died on 7th December, 1977. The registration in Njambi's name was therefore done after the death of both Henry and Livingstone.

[27] The bone of contention between Christine and Njambi arises from ownership of another piece of land, LR. No. 776/2/1 Eldoret, that Livingstone and Henry are alleged to have jointly purchased, and which (due to the impracticability of subdividing the land), Livingstone and Henry are said to have agreed that Livingstone retains LR. No. 776/2/1 absolutely, and Henry is compensated by getting half of Livingstone's share in LR. 7739/1. If these allegations are true, then Henry was entitled to 50 acres out of LR. 14/354 (a subdivision of 7739/1). However, both Henry and Livingstone died long before the land was subdivided and Njambi denies that there was any such agreement between Henry and Livingstone.

[28] The issues that we discern for our determination upon our evaluation of the evidence, are whether Livingstone and Henry had joint interest in LR 7739 (also referred to as LR 14/9) and LR 776/2/1, if so whether there was any agreement or understanding between Livingstone and Henry regarding the exchange of their interest in the two pieces of land, and if so, whether there was a constructive trust created in favour of Henry or Henry's estate in regard to 50 acres out of the subdivision of 100 acres comprising LR. 14/354 that was registered in the name of Njambi, and if so, whether Njambi acted in breach of that trust, and finally, whether Christine proved her case such as to deserve the orders issued by the learned Judge.



[29] This appeal being one that turns on the issue of trust, we reiterate at the outset the statement made by this Court in *Juletabi African Adventure Limited & Another vs Christopher Michael Lockley* [2017] eKLR that:

“25. 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 *Mbothu & 8 Others vs Waitimu & 11 Others* [1986] KLR 171 at p. 189.”

[30] In *Peter Ndung’u Njenga vs Sofia Watiri Ndung’u* (supra) similar views were expressed by this Court as follows:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See *Ayoub vs. Standard Bank of S.A* [1963] E.A. 619 at pp 622, 623.

[31] As the issue of a constructive trust is at the forefront of this appeal, we find it appropriate to reproduce the following passage from the *Twalib Hatayan* decision, in which this Court expounded the law and which decision was also referred to by the trial court.

“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 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.”

[32] In brief what arises from the above decisions is that whereas trusts are normally created expressly by the parties where their intention is made clearly known, a constructive trust may arise through operation of the law where there is no formal trust or express intention to create a trust. In such a situation, the prevailing circumstances must be such as to require equity to come in to guard against unfairness and unjust enrichment. A trust may therefore be inferred in favour of the beneficiary where a person who



is in a position of trust takes advantage of his/her position, for his or her own benefit, to the detriment of the beneficiary.

[33] The basis of Christine’s claim as stated at paragraph 3 the Further Amended Plaintiff was as follows:

“Prior to his demise in 1978 the Defendant’s deceased husband (Livingstone Kariuki Githegi) agreed to surrender and transfer fifty (50) acres of land being half of this (sic) share in Eldoret Municipality Block No. LR 7739 /1 which was jointly owned by himself and one Mr Birure Kihoria (in equal shares of 100 acres each) to the plaintiff’s late husband Henry Mwaura in exchange of and as compensation for the latter’s share in LR 776/2/1 which had been surrendered and transferred to the aforesaid Livingstone Githegi (deceased).”

[34] Section 107 of the Evidence Act states the following regarding the burden of proof:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

[35] Therefore the burden was upon Christine to prove the facts upon which she alleged her right to the 50 acres of land in LR 14/354 arose. Apart from her oral evidence and that of her witness asserting that Henry and Livingstone jointly owned LR No. 776/2/1 Eldoret, and agreed to an exchange of Henry’s interest in LR 776/2/1 with Livingstone’s interest in LR 7739/1, Christine relied on minutes of the family meetings held on 8th January 1978, and 25th January, 1996, which according to her acknowledged Henry’s share in LR. 14/354 and it was agreed that Njambi surrenders the titles for the subdivisions and transfers the 50 acres to Christine upon refund to her by Christine of Kshs. 125,200 that Njambi had incurred in the subdivisions. Christine also relied on a consent order from Probate and Administration Cause No. 88 of 1982 in the Estate of Livingstone, wherein Njambi agreed to a distribution, to which she was only entitled to 50 acres in LR No. 14/354.

[36] In her judgment, the learned Judge stated as follows:

“Given that the parties that entered into the agreement are deceased, a look into the conduct is the most plausible way to establish whether such an agreement existed. The consent order at page 30 of the list of documents, signed by the defendant shows that she was entitled to 50 acres of the Chania farm property. She was aware that she was only entitled to 50 acres of the land, which was her husband’s share.

The minutes of the meeting of the Gachogu family members is evidence that Mr. Mwaura contributed for a share of the 33 acres known as L.R No. 776/2/1 and was to be compensated for his contribution by getting 50 acres of Chania farm. The defendant was present at said meeting and had knowledge of the same.

The agreement between the plaintiff and the defendant for the refund of Kshs. 125,200.00 on 25th January 1996 wherein the defendant acknowledged that the plaintiff was entitled to 50 acres of the land and that payment would be made for the expenses incurred in subdivision is further proof that she was aware of the plaintiff’s entitlement to 50 acres of the suit land.

I find that there existed a trust arising from the arrangement between the plaintiff and defendant’s husbands. The consent and the agreement for the refund are proof that there



was an oral agreement the result of which was the sharing of the suit land. The defendant was a constructive trustee at the time she caused the land to be registered in her name.”

- [37] It is apparent that the learned Judge relied on the family meetings and the alleged consent in the Probate and Administration Cause. While the learned Judge properly directed herself that in the absence of an express agreement, a look into the conduct of the parties was the most plausible way to establish whether such an agreement existed, the conduct that the learned Judge ought to have addressed is the conduct of Livingstone and Henry, and not the conduct of Christine and Njambi as revealed from the family meeting and the alleged consent that took place long after the alleged agreement.
- [38] The question that we find pertinent is this, Livingstone died in 1977, about ten years from the time that LR No. 776/2/1 was purchased. Why did Henry not pursue the alleged exchange of his share in LR No. 776/2/1 with the 50 acres in LR 14/354 during Livingstone’s lifetime? Henry died in 1980, which was about three years after Livingstone had died. Why did Henry not pursue his interest in LR 14/354 within these three years before he himself died? The conduct of Henry was not consistent with an agreement conferring upon him a benefit in LR 7739/1.
- [39] Njambi denied that LR. 776/2/1 was jointly purchased by Livingstone and Henry. According to Njambi, the land was purchased by Livingstone together with Samuel Kihugu and Kibira Kamuru, and was subsequently compulsorily acquired by the Government in 1966. Njambi called Robert Juma Simiyu, (Simiyu) a Principal Land Administrative Officer as a defence witness.
- [40] Simiyu produced certified copies and extracts of the file for LR. No. 776/2/1 which confirmed that this land was purchased by Livingstone, Samuel and Kamuru jointly, but subsequently compulsorily acquired by the Government. Livingstone continued in occupation of LR. 776/2/1 after the compulsory acquisition pursuant to a temporary occupation license issued to him by the Government on 16th January 1967. The temporary occupation license was terminated in 1978 when the Government took over the land.
- [41] The evidence of Christine that LR No. 776/2/1 was purchased jointly by Livingstone and Henry, was clearly negated by the defence through the evidence of Simiyu which showed that Henry was not one of the three persons who jointly owned LR. No. 776/2/1. That land was purchased way back in 1966, and there is nothing to show that Henry contributed to the purchase or had any interest in the land that he could transfer to Livingstone. If Henry had no share in LR. No. 776/2/1 then there was no consideration for the alleged share of Livingstone’s interest in LR 7739/1 that he was alleged to have received in exchange for LR No 776/1/2.
- [42] Moreover, it would appear that Livingstone and his two co-owners in LR. No. 776/2/1 only owned the piece of land for about a year before the land was compulsorily acquired by the Government. Again, it is Livingstone and his two co-owners who were paid the compensation for the compulsory acquisition. Henry did not feature anywhere. The burden of proof was upon Christine to prove the alleged exchange of Henry’s interest in LR. No. 776/2/1 with Livingstone’s interest in LR 7739/1. That fact could not be proved by minutes of meetings which took place on 8th January 1978 and 25th January, 1996 long after the alleged exchange, and when the parties to the alleged agreement were both deceased. These minutes were disputed by Njambi who explained that she was pressurized by the family, contrary to her position that Henry had no interest in LR 7739/1 or its subdivision LR 14/354.
- [43] In her judgment, the learned Judge did not consider the evidence of Simiyu, or give any analysis of the import of that evidence. Nor did the Judge give any reason for ignoring the official Government records relating to Plot LR 776/2/1 that were produced during the hearing, or opting for the minutes of the



meeting of the Gachogu family wherein Njambi is said to have acknowledged that Henry contributed to a share of 33 acres in LR. No. 776/2/1.

- [44] Njambi persistently disputed Christine's claim. The family meeting of 8th January 1978 was a meeting that took place soon after the death of Livingstone. The family was trying to identify the deceased's property and to agree on the way forward in regard to the distribution. There was an indication that Henry claimed an interest in Livingstone's share in LR 7739/1 but that does not mean that Henry's interest was proved. It is evident that Njambi continued to dispute that claim and this was done by a letter from an advocate dated 13th June 1993, and Njambi's subsequent actions relating to subdivision of LR 7739/1. The minutes of the Family agreement dated 25th January 1996 purports to have resolved the matter, but the letter from the Chief dated 8th July 1996 shows that Njambi was still disputing the matter though the District Officer purported to have made a determination in Christine's favour.
- [45] There having been no agreement between the parties, the District Officer was only a mediator attempting to resolve the dispute. His ruling was not binding on the Land Registrar to whom his letter was addressed nor was it binding on the disputants. When Christine referred the dispute to court she was under an obligation to lay before the court the evidence in support of her claim, and was at liberty to use the evidence if any, that she had used to prove her case before the District Officer, but nothing was produced in support of the contention that Henry had contributed money towards the purchase of LR 776/2/1 or that Livingstone had agreed to the exchange or taken any action to put Henry in possession of LR 7739/1 or part thereof.
- [46] As regards the consent alleged to have been made in Probate and Administration Cause No 8 of 1982: In the matter of the Estate of Livingstone Kariuki Githegi, two things stand out. First it purports to be a consent between the two widows of Livingstone, Christine is not party to it. Secondly, the copy of the consent that is part of the court record is incomplete, and it is not clear whether the consent was adopted by the court in the succession cause. For these reasons we concur with the appellant that the trial court erred in relying on the minutes of the family meetings and the consent in the succession matter as both were of limited probative value, and no estoppel could arise therefrom.
- [47] As we have stated earlier, a trust can only be implied by law in cases of extreme necessity in order to give effect to the intention of the parties (that is the trustee and the beneficiary) which though not expressed can be discerned from the circumstances, and to guard against unfairness and unjust enrichment perpetrated by the person in the trust position. Christine did not establish any such circumstances that could justify the court bringing a constructive trust into play.
- [48] We come to the conclusion that the trial court failed to properly analyze the evidence before it and to take into account material evidence that was adduced by the defence. Consequently, it arrived at the wrong conclusion that the respondent had established her claim when she had failed to discharge the burden of proof. This appeal is fully merited and the judgment of the trial court cannot stand. We allow the appeal, set aside the judgment of the trial court and substitute thereof an order dismissing the respondents' suit with costs. The appellant shall have costs of this appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. K. MURGOR



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JUDGE OF APPEAL
J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

