



**Karanja v Mwaniki (Environmental and Land Originating Summons E022 of 2023) [2024] KEELC 3320 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3320 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E022 OF 2023**

**JA MOGENI, J**

**APRIL 24, 2024**

**BETWEEN**

**ANASTACIA WACHUKA KARANJA ..... APPLICANT**

**AND**

**ZACHARY MURIUKI MWANIKI ..... RESPONDENT**

**JUDGMENT**

1. The proceedings before me are as a result of Originating Summons by the Applicant dated 27<sup>th</sup> April 2018. At its heart, the applicant through the summons sought to be entitled to be registered as proprietor of the suit property and for specific orders that:
  1. Determination by the court of whether there is presumption of marriage between the Applicant and the Respondent.
  2. Whether the Applicant is a beneficial owner of [Particulars Withheld] Issued By [particulars Withheld]
  3. Whether the Applicant has established a constructive trust over [Particulars Withheld] Issued By [particulars Withheld]
  4. Should a permanent injunction issue restraining the Respondent by himself, his agents, his servant and/or employees or any other persons claiming title through the Respondent from transferring, assigning, building, selling, charging or in any other way interfering with the Applicants' quiet occupation and use of the property known as [Particulars Withheld] Issued By [particulars Withheld]
  5. Should the Registrar of Titles rectify the Register and enter the name of the Applicant as the registered owner of half share of the suit property.
  6. Should costs of these proceedings be borne by the Respondent



2. The Applicant's case was supported by an affidavit sworn by Anastacia Wachuka Karanja on 10/05/2023. In her Supporting Affidavit, the Plaintiff/Applicant had averred that she has been cohabiting with the Respondent since 2016 and they are blessed with a minor ATNM on 7<sup>th</sup> March 2020 as is evident from the Birth Certificate annexure AWK-1. It was her further averments that the Respondent has been catering for their utility bills including payment of rent and in 2019 they began construction of apartments.
3. She averred that the Respondent and herself both financially contributed towards the construction of the apartments. The Respondent's contribution was from his salary and her contribution was from the chickens and eggs business that she was doing and this is evidenced by the copies of receipts annexed showing purchase of construction materials marked as AWK-2.
4. Further she avers that she was solely responsible and in charge of the day to day construction processes since the Respondent was in full time employment.
5. It was her evidence that the construction is partially done and they moved into one of the one-bedroomed apartments in 2019 where they have been residing to-date. She annexed copies of photographs of the apartment block marked as AWK-3. She further stated that the Respondent relocated to Saudi Arabia to work as a warehouse dispatch officer in November 2021.
6. That the Respondent continued sending to the applicant money for maintenance on average Kesh 50,000 and as evidence the applicant annexed copies of mpesa statements and statements from Cooperative Bank marked as AWK-4.
7. She further avers that they have lived peacefully until 1/05/2023 when she was served with a notice to vacate and or alter terms to the suit premises dated 27/04/2023 which required her to vacate the suit premises within 30 days as evidence the said notice is annexed as AWK-5.
8. She stated that she is a beneficial owner of the suit property and she averred that she had had created a constructive trust over the suit property that was acquired by the Respondent. That upon receiving the notice the applicant upon scrutinizing the said notice and a search on the Law Society portal showed that there is no law firm by such a name as Cheiys Unindo & Company Advocates a copy of a search from the Law Society of Kenya is annexed as AWK-6.
9. The applicant avers that the Respondent is colluding with third parties purporting to be advocates to evict her from a property in which she has created a constructive trust from her actual and financial contribution towards the construction of the same. That the Respondent has also ceased sending her financial assistance.
10. The Originating Summons is not contested. The Respondent did not file any response to the Originating summons despite being served and despite his Counsel Mr Kinuthia seeking more time to file a further affidavit on 25/01/2024 when the parties appeared in court through their counsels on record. At this appearance in court the matter was set for hearing on 28/02/2024 with the concurrence of counsels for both parties on 25/01/2024.
11. When the respondent failed to attend the hearing the suit proceeded undefended. During the formal proof it was the plaintiff's testimony that Chellys Unindo & Company Advocates were colluding with the Respondent to harass and intimidate her yet the said law firm did not exist in the records of Law Society of Kenya.
12. The Court has now carefully considered the available evidence, the exhibits produced thereto, the written submissions, the cited authorities and the relevant provision of law.



13. At the same time, have considered the entire pleadings, evidence of PW1 and submissions including all the authorities relied upon by counsel for the plaintiff. In *Great Lakes Transport Co. (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720*, it was held that issues for determination in a suit generally flow from the pleadings or as framed by the parties for the court's determination. I take into account the issues the applicant has itemized. From my analysis the issues for determination from the filed pleadings, are as follows:
  1. Did the Applicant make any contribution towards the development of the suit property?
  2. Is there a presumption of a constructive trust between the Applicant and the Respondent viz a viz the suit property?
14. The Applicant has pleaded in the Originating Summons around 2019 they began construction of apartment on [Particulars Withheld] issued by [Particulars Withheld] which had been acquired by the Respondent. She was solely responsible and in charge of the day to day construction of the apartments as the Respondent was employed full time. At the same time she made her contribution to the construction through her earnings from the sale of chicken and eggs to hotels and individuals. She has attached copies of receipts showing purchase of construction materials marked as AWK-2.
15. The Respondent did not file a statement of defence and therefore the applicant's suit is unopposed and her evidence is uncontroverted. Consequently, the 1<sup>st</sup> issue is answered in the affirmative.
16. On the second issue, trusts are part of the law of property and arise where one person gives his or her assets to another person for safe custody or to manage the same for him or her. Express trusts occur because of a consent where a settler has consented for his property to be handed to somebody else under the stewardship of a trustee.
17. By contrast, the two main types of imposed or implied trusts, known as "resulting" and "constructive" trusts arise to reverse unjust enrichment or to correct a wrong. Resulting trusts are trusts created where property is not properly disposed of.
18. Where property passes between individuals, English law presumes that the relationship between them makes it an outright gift, and thus not subject to a resulting trust in the event of a failure; this is the "presumption of advancement."
19. Resulting trusts are normally imposed by the courts when a person receives property but the person who transfers the property did not have the intention of transferring his beneficial interest in the property unless there is some objective manifestation of consent to do so.
20. As was held by the House of Lords in the case of *Gissing -Vs- Gissing (1971) AC 886*, a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that "results" back to the person who provided the money.
21. To understand the principle of a resulting trust in the present context, it would be necessary that I reproduce the holding of the House of Lords in the case of *Oxley Vs Hiscock (2005) 3 WLR 715* where it was held as follows:

"When money is provided by two or more parties on the basis that they should have a shared interest in the property, and if there is an agreement on how much each party should have in the property, that is conclusive. But if there is no agreement their beneficial interest is based



on the parties contributions to the purchase price and the whole course of dealing between them in relation to the property”.

22. Resulting trusts are legal presumptions where an intent to create a trust is presumed by the person who buys the property in the name of another. The property is deemed to be held in trust for the purchaser. This presumption is applicable to both personal property and real estate. Being a presumption, it can be rebutted if the Defendant shows that the money was a gift or a loan.
23. Indeed, “resulting” and “constructive” trusts have been imposed by the courts the world over to cure injustices where someone has benefited or has been enriched at the expense of another and the enrichment is unjust and without legal justification. In the case of *Lipkin Garma Vs Karpanale Ltd* (1992) 4 ALL ER 512, the House of Lords held that the concept of unjust enrichment lies at the heart and is the principle underlying the individual instances in which the law does give a right of recovery.
24. The legal solution available to a court of law for unjust enrichment is to impose the twin doctrines of resulting or constructive trusts. Lord Denning in *Hussey -Vs- Palmer* (1972) 3 ALL ER 744. In his usual flair defined a constructive trust as follows:

“Is a trust imposed by law whenever justice and good conscience requires it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”
25. In establishing constructive trust to prevent unjust enrichment, the courts create no fiduciary relationship between the parties. It is not a requirement, in other words, for there to be a fiduciary relationship. It is not a “trust strictu sense.”
26. In the case of *Arumba -Vs- Mbega & Another* (1988) KLR 121 ,the Court of Appeal held that a resulting or constructive trust proportionate to the appellant's expenditure was created where such person spends his money on building and improvements on another person's land with the agreement of that person but without the intention of a gift or loan.
27. The English doctrines of equity are parts of our law and are applicable to land registered under the Registration of Titles Act, cap 281 (now repealed). In *Bilous -Vs- Bilous* (1957) EA 961, the defunct Court of Appeal for East Africa subjected the legal estate of land to equitable doctrine of trust and held as follows:

“It was stated that the system of registration of deeds such as apply in Kenya are in some way incompatible with the recognition of trusts or at least of trusts arising from the inception of the Torrens System in Australia. This view has consistently been rejected wherever the trust is one which affects the registered proprietor directly and not merely by virtue of his having notice of its existence.”
28. The equitable presumption of a resulting trust that arises when the purchase price is contributed by one person was stated in the case which I have quoted in the preceding paragraph. That position was further reinstated in the case of *Calverley =Vs- Green* 56 ALR where it was held as follows:

“Where a person pays the purchase price of a property and causes it to be transferred to another, the property is presumed to be held by the transferee upon trust for the person who provided the purchase price.”
29. As was held by Justice Githinji, as he then was in the case of *Yogendra Pusshotahn Patel -Vs- Pascale Mireilla Baksh & 2 others* (2006) e KLR, parole evidence is admissible to show the purchase price of a



property and if provided by several people to show their proportionate share of contribution. Parole evidence is also admissible to rebut the presumptions whenever they arise.

30. The court in *Yogendra* (supra) further held that the doctrine of resulting trust is said to be based on the unexpressed but presumed intention of the true purchaser or purchasers of the property. The purpose of parole evidence is to show the intention of the purchasers that they intended to create a trust.
31. Consequently, I do not agree with the Applicant's counsel's submissions that the Applicant's claim as against the Respondent should be for a share in the suit property as she has done. What this court ought to do while considering the evidence is the unexpressed but presumed intention of the true purchaser of the property.
32. Justice Waki, as he then was, was faced with a situation which is similar to this case in *Walter Blasius - Vs- Emily Wanyoike e klr* had no hesitation in holding as

“I accept the evidence on record that she was a woman around Malindi town with no known or legal source of income and was staying in one room in Majengo before she met Walter. She never even told her mother what she did for a living although the mother assisted her in looking after the children. I find no sufficient or any evidence from Emily to displace the findings which I now make that Walter was the sole financier of the purchase of the undeveloped plot number 2032, 2033, 2034 and 2035 in Malindi. She never contributed financially and was not in a position to contribute the money for such purchase.”
33. The Applicant in this case has shown by way of parole and documentary evidence that she not only supervised the construction of the suit property on [Particulars Withheld] issued by [Particulars Withheld] but that she also made her financial contribution to the whole project. This evidence has not been rebutted.
34. The Applicant testified that she moved into one of the completed two bedroomed apartments in 2019 where she has been residing to date with the child begotten out of the relationship with the Respondent.
35. While the defence of “a gift” is available to the Respondent, the he did not attempt to rebut the presumption that a resulting trust was created when the Applicant made her financial and in kind contribution towards the development of the suit property.
36. It is a cardinal principle that restitution will not be granted where the Respondent has officiously conferred a benefit on the Applicant. It is true that the Applicant may not have a right of restitution if the Defendant reasonably believed that the benefit conferred to her was a gift and consumed it in that belief.
37. Further the “presumption of advancement” is available as a defence where a person, due to the relationship he/she has with another person “gifts” property to that other person. In *Mutiso -Vs- Mutiso* (1988) KLR 846, the Court of Appeal took cognizance of the fact that the strength of this presumption may be dismissed in modern times and the presumptions to be drawn ought to accord with the social conditions which prevail so as to confirm the most likely intentions of couples in Kenya.
38. The defence of officious gift or payments is not regarded as officious where it is made under a mistake or compulsion, or at the request of the Respondent or in anticipation that a transaction will result.
39. As I have stated in the preceding paragraphs, the Respondent was well aware that the Applicant intended to settle on the suit property. It is for this reason that the Applicant went out of her way to



supervise the construction of the apartments in the belief that this will ease their financial burden of paying rent.

40. Since the money that was sent to the Applicant and the money the applicant made from the sale of eggs was used by the Applicant to buy and develop the suit property, then the Applicant's claim for a portion of the suit property is properly before this court.
41. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's claim in the following terms:
- a. That the Applicant is the beneficial owner of [particulars withheld] the suit property herein;
  - b. That the Applicant has established a constructive Trust over [particulars withheld] in trust for the Respondent.
  - c. A permanent injunction is hereby issued restraining the Respondent or his agents, servants, and/or employees or any other persons claiming title through the Respondent from transferring assigning, building, selling, charging ore in any other way from interfering with the Applicant's quiet occupation and use of the property known as [particulars withheld]).
  - d. That the Registrar of Titles should rectify the register and enter the name of the Applicant as the registered owner of half share of the suit property at the time of registration once the titles are issued.
  - e. The Respondent to pay to the Applicant the Costs of and incidental to this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2024**

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**MOGENI J.**

**JUDGE**

In the virtual presence of :-

Ms. Maina for the Applicant

None appearance for the Respondent

Court Assistant: Caroline Sagina

