



REPUBLIC OF KENYA



**Nabiswa v Walela (Environment & Land Case E003 of 2023)
[2024] KEELC 3264 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E003 OF 2023**

EC CHERONO, J

APRIL 11, 2024

BETWEEN

SAMWEL WALELA NABISWA PLAINTIFF

AND

OTEMA WALELA ALIAS MAURICE OTEMA WALELA DEFENDANT

JUDGMENT

1. By way of a plaint dated 13th March, 2023 the Plaintiff sought for the following orders against the Defendant;
 - a. A declaration that the defendant's registration as the proprietor of the land comprised in Title Number Ndivisi/Muchi/207 is in his capacity as a trustee for the plaintiff and which trust should now terminate, and the defendant ordered to transfer the said land to the plaintiff and in default the Deputy Registrar of the court to execute all such documents as would facilitate the transfer of the said land of the plaintiff.
 - b. An order preserving the suit land while pending the hearing and determination of the suit.
 - c. Costs.
 - d. Interest on (c) above.
 - e. Any other relief this honourable court may deem fit to grant.
2. The plaintiff contends the defendant is his son having been born in the year 1962. That the defendant is the registered proprietor of Land Parcel No. Ndivisi/Muchi/207 measuring 4.6 Ha or thereabouts ('the suit land') where they both reside with their families. It is averred that the defendant is registered as a trustee for the plaintiff and he should be ordered to transfer the land to him and in default, the deputy registrar to execute all documents so as to facilitate the transfer.



3. It was further the plaintiff's case that the suit land was given to him by his father Nabiswa Kwendo in the year 1957 and he (the plaintiff) had the land registered in the name of the defendant in 1967 and a title deed issued on 2nd October, 1972. The plaintiff averred that the reason for doing this was to deter him from the temptation of using the suit land as security for a loan. It was his averment that the defendant has however started using the land as his own to the exclusion of the other family members by attempting to subdivide and share the same among his children.
4. When served with the plaint, the defendant entered appearance and filed a statement of defence dated 19th April, 2023. In his defence, the defendant averred that in the year 1970, the plaintiff told him that his grandfather Nabiswa Kwendo had gifted him Land Parcel No. Ndivisi/Muchi/207 measuring 4.6 Ha while he (the plaintiff) had been gifted Parcel no. Ndivisi/Muchi/201 measuring 1.8 Ha registered in his name. The defendant averred that the plaintiff is also the registered owner of Parcel no. Ndivisi/Muchi/204 measuring 1.6 Ha. It is further averred that the plaintiff subsequently purchased other parcels of land but sold them for purposes of raising school fees.
5. It was his defence that sometime in the year 1993, he temporarily migrated to Parcel no. Ndivisi/Muchi/204 leaving the plaintiff in charge and occupation of Parcel no. Ndivisi/Muchi/207 and 201 which he utilized to cater for school fees needs. The defendant alleged that unknown to him, the plaintiff started sub-dividing the suit land amongst his children to his detriment. He insisted that the suit land belongs to him and He sought to have the plaintiff's case dismissed with costs.
6. After pre-trial directions were completed, directions were taken for the matter to proceed by way of viva voce evidence. In support of his case, the plaintiff called three witnesses while the defendant called 1 witness.

Parties Evidence

7. PW1 Samwel Walela Nabiswa relied on his witness statement dated 13th March, 2023 and 2nd September, 2023 as his evidence in chief. He equally produced as evidence his list of documents dated 13th March, 2023 which contained 2 items as PExhibit 1-2 and another list of documents dated 2nd September, 2023 which contains 2 items PExhibit 3-4. The witness stated that it was not true that the defendant was gifted the suit land by his grandfather since it was him who had it registered in his name in trust. He further testified that at the time a title of the suit land was being issued the plaintiff was 10 years old.
8. In cross examination the witness reiterated his testimony as above and added that the said Nabiswa Kwendo died even before the defendant was born. During re-examination, he stated that the said Nabiswa Kwendo died in February 1962 while the defendant was born on 5th December, 1962 and that at the time, death certificates were not being issued.
9. PW2 William Matibula Wafuko adopted his witness statement dated 2nd September, 2023 as his evidence- in- chief. He testified that he knew the parties in this suit and their relationship. He went on to reiterate PW1's statement. During cross examination, the witness stated that he used to live in a neighboring piece of land since the defendant was a baby and that he sold his land to the plaintiff i.e land parcel no. Ndivisi/ Muchi/201. In re-examination, he testified that he sold the land to the plaintiff in 1965.
10. PW3 Nekesa Matende adopted her statement dated 2nd September, 2023 as her evidence in chief and reiterated PW1's testimony as her evidence in chief, cross-examination and re-examination.
11. DW1 Maurice Otemwa Walela relied on his defence, supporting affidavit and documents attached therein being a certificate of official search for the land parcel no. Ndivisi/Muchi



198,199,200,209,208,8957,211,201and 204, proceedings in Webuye SPM ELC Case No. 92 OF 2020, a copy of a limited grant issued in Bungoma Succession Cause No. 215 of 2020 and an area map. It was his evidence that the suit land was given to him as the first grandchild by his grandfather in 1962. He testified that he was born in June, 1992.

12. In cross-examination he testified that he was born in mid1963 while his grandfather died late 1963. It was the witness's testimony that he was registered as the owner of the suit land in 1972 and that his father was gifted land parcel no. Ndivisi/Muchi/201 by Nabiswa Kwendo and the allegation that he purchased the same from PW2 was false. It was his evidence that he moved from the suit land so that the plaintiff could plant sugarcane to educate his siblings. He thereafter reiterated the averments of his defence.

Parties Submissions

13. Directions were thereafter taken for the parties to file submission.
14. The plaintiffs filed their submissions dated 17th November, 2023 where he discussed four issues. In summary the plaintiff submitted that he the land is indeed registered in the defendant's name however the same is held in trust for the plaintiff. It was his argument that the land was initially clan land which was given to the plaintiff by his father and was registered in the defendant's name so as it could not go to waste. He submitted that he had sufficiently explained his interest in the suit land in his evidence which he argued the defendant had not controverted. Counsel relied on the case of *Isaac M'inanga Kiebia v Isaaya Theuri M'Lintari & another* Petition No. 10 of 2015 and *Njenga Chogera v Maria Wanjira Kimani & 2 others* Civil appeal no. 322 of 2003
15. The defendant equally filed his submissions date 5th December, 2023 where he restated his pleadings and evidence. He sought the protection of Section 24, 25 and 26 of the *Land Registration Act, 2012* claiming that the suit land was his absolutely.
16. Upon consideration of the Plaintiff, Defence, witness testimonies, exhibits and submissions, the following are the issues for determination:
 - a. Whether the defendant is the absolute owner of land Parcel no. Ndivisi/Muchi/207.
 - b. Who bears the costs of the suit.
17. It emerges from the evidence that the defendant is the plaintiff's son having been born between December 1962 and June 1963 since both parties gave varying dates. It is not in contention that the suit land belonged to Nabiswa Kwendo-deceased who was the plaintiff's father and the defendant's grandfather. The said Nabiswa Kwendo (deceased) is said to have died in February 1962. It is common ground that the suit property is registered in the name of the defendant with a certificate of title having been issued in his name on 1st February 1972.
18. The plaintiff contends that his father prior to his death shared his land amongst his sons and he (the plaintiff) was allocated the suit land which he registered in the defendant's name to avoid the temptation of using the same as collateral for a loan. It was his case and evidence that at the time his father died, the defendant had not been born and it was therefore impossible for the defendant to have been allocated the suit land as he alleges. The plaintiff pointed out that at the time the suit land was registered in the defendant's name, he was merely 10 years old and was incapable of understanding the transaction involved.
19. The defendant on the other hand argued that the plaintiff informed him while he was still young that he had been allocated the suit land by his grandfather as the first grandson. It was his evidence that he



- allowed the plaintiff to utilize the suit land and he(defendant) relocated to another parcel of land to allow the plaintiff plough on the land and utilize the funds to educate his siblings. It was his contention that this therefore did not mean that the plaintiff earned any interest over the land as he was there with his permission and consent.
20. The plaintiff sought to have the suit land registered in his name claiming that the defendant held it for him in trust. *Black Law Dictionary Ninth Edition* describes ‘Trust’ as
- “The right enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one another (the trustee at the request of another for the benefit of a third party”
21. In the case of *Mumo v Makau* Civil Appeal No. 56 of 2001 (2004) KLR 13 that was cited by the defendant, it was held that:
1. Trust is a question of fact and has to be proved by evidence. Section 28 of the *Registered Land Act* Contemplates the holding of land in trust.
 2. There is nothing in the *Registered Land Act* which precludes the declaration of trust in respect of registered land, even if it is a first registration.
22. In the same case Madan J. referred to his earlier decision in *Mwangi Mwangi Muguthu v Maina Muguthu*, High Court Civil Case No. 377 of 1968 where he had stated as follows:
- “As regards Section 126, there is no need to register the defendant as “trustee.” ... In any event this section does not make registration “as trustee” obligatory. It states may be described by that capacity.”
23. In the case of *John Gitiba Buruna & Another v Jackson Rioba Buruna*, Kisumu, Civil Appeal No. 89 of 2003, the court stated that:
- “Although the rights of a registered owner of land are indefeasible under section 28 of the *Registered Land Act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”
24. While discussing the burden of proving trust, the Court of Appeal the case of *Heartbeat Limited v Ng’ambwa Heartbeat Community Children’s Home & Rescue Center* [2018] eKLR stated that:
- “Moving on to the pertinent issue of whether there was evidence of a resulting trust in favour of the respondent, we are cognizant that the onus lay with the respondent to prove the same through evidence. See *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* – Civil Appeal No. 75 of 2016 (unreported). It was upon the respondent to establish that it was the parties’ intention that the appellant would purchase and hold the suit parcels in trust for it. Did it do so?”
25. Section 27(a) of the now repealed *Registered Land Act* (replica of Section 24 of the *Land Registration Act*) under which the suit land is registered provides that; the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
26. Section 28 of the now repealed *Registered Land Act* (replica of Section 25 of the *Land Registration Act*) provides that the registration of a party as the owner of land does not relieve him of his duty/



obligation to which he is subject as a trustee. The overriding interests alluded to in Section 25 are set out in Section 28 of the Land Registration Act and among the listed interests is trusts including customary trusts. Section 30 of the Registered Land Act gives life to the overriding interests whether or not they are registered in the title.

27. I am guided by the above quoted authorities and provisions of the law in my examination of facts and evidence as presented by the parties. As stated, a trust cannot be inferred and the alleging party must prove the same in evidence. The plaintiff being the one claiming the existence of a trust must bring himself to the satisfaction of the court on the requirements of Section 108 and 109 of the Evidence Act and since this is a civil case, he has to discharge his burden of proof on a balance of probabilities.
28. I have examined the evidence presented and in my view, I find the plaintiffs version of the facts more plausible that the land in question was family land, that it originated from his father and that the defendant is a member of his family i.e. his first born son, the plaintiff has been in occupation and use of the suit land and that he opted to register the land which was allocated to him by his father in the name of the defendant to avoid temptations of using it as collateral for loans which would have rendered his family landless. See Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR.
29. I take issue with the allegation by the defendant that he was allocated the land by his grandfather. It has been stated on oath that the defendant's grandfather-Nabiswa Kwendo died even before the defendant was allocated the land. It is therefore difficult for this court to believe the scenario as presented by the defendant to this extent. Further, the defendant is ideally supposed to benefit from his father, the plaintiff herein as opposed to benefitting from his grandfather.
30. Further, it has been established that the plaintiff has been in actual occupation and possession of the suit land where the defendant acknowledges he (plaintiff) has a sugarcane plantation.
31. Having carefully re-examined the credibility of the witnesses, I have no hesitation in believing the evidence of the plaintiff and his two witnesses and in rejecting that of the defendant. I am satisfied that even though the suit land was registered in the defendant's name, he was to hold in trust for himself and the rest of the family.
32. I am therefore satisfied that the plaintiff has proved his claim to the required standard and do hereby allow proceed to allow in terms of prayer (a) of the plaint dated 13th March, 2023. Noting the nature of relationship between the plaintiff and the defendant, I order that each party bears its own costs of the suit.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF APRIL, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wangila for M/S Munialo for plaintiff
2. Defendant-present
3. Bett C/A

