



**Gekong'a v Gembe & 4 others (Environment & Land Case
438 of 2016) [2024] KEELC 4296 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 438 OF 2016**

A OMBWAYO, J

MAY 23, 2024

BETWEEN

MONGARE GEKONG'A PLAINTIFF

AND

JANE IMALI GEMBE 1ST DEFENDANT

ELIJAH OMBOGO 2ND DEFENDANT

JAMES MICHOMA 3RD DEFENDANT

SAMUEL OSORO 4TH DEFENDANT

AMOS OTARA 5TH DEFENDANT

JUDGMENT

1. Mong'are Gekong'a, (hereinafter referred to as the plaintiff) filed this suit by way of plaint which was amended on 15th November 2001 and the amended plaint filed on the same date. The plaintiff's claim was that during the month of March 2001, Kenya Commercial Bank advertised land known as L.R. NO. 13287/17 (I.R 47993/1) for sale by public auction. The 2nd Defendant did bid for the purchase of the said parcel of land on behalf of the Plaintiff and the other four Defendants.
2. The auction went through and the Bank through Diligent Auctioneers Limited sold out the land for Kenya Shillings Three Million Five hundred Thousand (3,500,000.00) only.
3. The Kenya Commercial Bank Limited's Advocate for this deal, Mr. Odera, advised the partners to this suit to pay directly to the bank and each party to pay as per his/her contribution. It was agreed that each 11B1ber was to get acres equivalent to his contribution to the bank. A total sum of (Kshs. 3.5 Million) was finally paid to the bank. The Plaintiff herein paid a total sum of Kshs.1.4 Million.



4. According to the plaintiff, it had been agreed that the Title Deed from Kenya Commercial Bank be transferred to the 2nd Defendant who would finally transfer the same to the rest of the members corresponding to their acres. Finally when the full payment had been made, the partners to this suit sat down to discuss on the sub-division and payments for the various transfers.
5. Mr Mong'are laments that when it came to discuss the subdivision and transfers, the 1st, 2nd and 3rd defendants insisted that each acre was going for Kshs.80,000.00 instead of Kshs.70,000.00 as advised by one Solomon Kimeli of Diligent Auctioneers Limited. Besides, the 1st, 2nd and 3rd Defendants indicated that there were other contributors whose name they wanted to keep as a secret. The Plaintiff having been dissatisfied with the turn of events, protested and demanded a full statement of account and list of all the participants. It is at this point that the 1st and 2nd Defendants conspired and hid the entire file to transaction and have since kept it secretly at a place unknown to the Plaintiff.
6. It is the Plaintiff's claim that the Plaintiff and all the defendants were group members who were purchasing parcel of land known as L.R NO.13287/17 (I.R 49993/1) Nakuru from Kenya Commercial Bank jointly but the 1st, 2nd, 3rd defendants later conspired to deny the plaintiff his rightful share of acreage proportionate to this contribution upon the said parcel of land.
7. The plaintiff prays for judgment in terms of an order to be issued for the disclosure of all the contributors to the purchase of land as L.R. M). 13287/17 (I.R 47993/1) Nakuru. Furthermore, an order be issued for the disclosure of all the amount each member paid to the bank. Moreover, a declaration to be made that each member do get acres equivalent to his/her contribution paid to the bank. Lastly, an order be issued upon the 2nd defendant either to deposit the Title Deed to this parcel of land in court or in a neutral place agreed upon by all the parties awaiting final transfer of the respective portions to each member plus costs of the suit.
8. A draft consent was filed by the parties on 3rd December 2015 that the property be shared as follows: -
 Mr. Mong'are Gekong'a 17.01 Acres
 Mr. Samuel Osoro 9.72 Acres
 Dr. Amos Otara 4.86 Acres
 Mr. Elijah Mbogo 3.63 Acres
 Jane Imali Busolo 2.43Acres
 Mr. James Michoma 3.63Acres
 E Obino 2.43Acres
 Mr. F Mounde 4.86Acres
9. The only party who did not agree to sign the consent was the 2nd defendant.
10. The 2nd defendant contends that this saga is fairly straight forward. That in July 1997, one Bernard Kiplangat Rono, who was the registered proprietor of L. R No. 13287/17 measuring 19.98ha situated at North Njoro obtained a loan of Kshs 4,255,000 from KCB LTD and the said title was charged as a security therefor. A month later, he took a further loan of Kshs 644, 565,000 in a second mortgage.
11. Mr Rono defaulted in repayment of the said loans and the bank realized the said security by disposal of the said land in a public auction. During an auction conducted by the duly authorized auctioneers on 23rd March 2001, the 2nd defendant's bid of Kshs 3,500,000 was accepted and this bid was approved by the bank's advocates on behalf of the bank.



12. Upon compliance with the terms of the auction, a Certificate of Sale was issued to 2nd defendant and the same was also signed by 3rd Defendant in his capacity as a witness thereto. The 2nd Defendant, subsequently encountered a shortfall in his finances and he sought advice from Nakuplan Consultants on how he might raise the money needed to complete the transaction.
13. He was advised that he could sell about 40 acres out of L. R No. 13287/17 at the price of Kshs 80,000 per acre which amount was deemed to be sufficient to plug the unexpected shortfall. The 2nd Defendant accepted the advice given and contracted the said Nakuplan Consultants to manage the marketing of the property being sold assisted by the 1st defendant with regard to legal technicalities.
14. When the matter came up for hearing, PW1, Mong'are Gekong'a testified that during the period 2000/2001 he joined a group of people from his community who started a project of buying properties for future investments. The group's main objective was to buy land starting with Nakuru then spreading outside Nakuru. That in the course of our deliberations, the year 2001 land became available being sold through public auction. The land was L.R. No. 13287/17 (I.R. 47993/1) Nakuru within Ngata area - Nakuru. That they had just started the group and had not elected the office bearers but Mr. Michoma was mainly chairing the meetings. The said land was being sold through the firm of Adera & Company Advocates using Diligent Auctioneers. They came together and agreed to pay for the said land which was 50 acres and going for Ksh.70,000 per acre thus Kshs.3.5 million.
15. The membership was not limited and each member was to get land equivalent to his contribution and it was further agreed that each member to deposit his share with the bank. It was further agreed that Mr Elija Ombogo, the second defendant could follow up the transaction on behalf of the members and Mr James Michoma to deal with the planning aspect of it. It was further agreed that the land be transferred from Kenya Commercial Bank Ltd to Mr. Elija Ombogo directly then to the rest of the members.
16. As the process was on going and especially after the title deed had been issued to the group, some members started behaving strangely and hiding all the crucial information from the plaintiff. The plaintiff felt dissatisfied and moved to this court in this case. He had contributed Kshs.1.4 million equivalent to 20 acres. After filing the case the concerned members had several meetings the plaintiff agreed to surrender 2.5 acres of his land and retained 17.5 acres.
17. Mr James Michoma was immediately mandated to do the planning of the said land and the survey was carried out and beacons put in place in favour of each of the members. By the year 2001 each member took and settled on his share and the process of survey and planning continued and when everything was ready but Mr. Elija Ombogo refused to sign the consent releasing the title deed. Mr. Elijah Ombogo has no interest over this land as he sold all his share in 2006 to one Isabella Kemuma Sitima.
18. PW2, James John Nyandieka testified that he is a qualified surveyor authorized to carry out survey work. That in August 2008, he was contracted by the 3rd defendant on behalf of all owners of LR NO. 13287/17 to subdivide the same into 8 portions as per the plan dated 18th July 2008 prepared by Nakuplan Consultants. That he commenced the work by visiting the ground in the company of the 3rd defendant who pointed out the land. He thereafter carried out the subdivision into 8 portions measuring 7.03. Ha, 3.955Ha, 0.9064Ha 1.746Ha, 1.897Ha, 1.922Ha, 1.499Ha and 0.7235Ha; as per the plan and fixed all the beacons. He thereafter prepared a cadastral map number F/R 502/13 dated 12th August 2010 which contained the new LR numbers from 13287/341 to 13287/348 showing the acreages as stated above.
19. He further followed up the process and obtained the Deed plans dated 5th November 2010 for each plot. The same were handed over to James Michoma. The survey work is complete and the only part remaining is registration of individual titles after surrendering the Mother title.



20. He carried out survey as per the agreed plan and there was no dispute witnessed while on the ground.
21. DW1, the 2nd defendant testified that sometimes on 6th March, 2001, he saw an advertisement in the Daily Nation newspaper by Diligent Auctioneers Ltd inviting members of the public to purchase a piece of land situated within Nakuru County which was to be held on 23rd March, 2001 .
22. On the said date he went to where the auction was being conducted and he participated in the exercise and was the highest bidder at Kshs.3.500.000/= and was therefore declared the winner. He did not participate as a representative of any other party. He denied the existence of any group of people as claimed by the plaintiff. He instructed the firm of Imali Gembe and Co. Advocates to act for him in the said transaction .
23. The Plaintiff became aware of the land when he was informed by Caleb B. Nyamwange sometimes in the month of May 2001 almost 2 months after the purchase. The plaintiff was among the people who agreed to purchase the portion of land he offered for sale at Kshs. 80,000/- per acre. The plaintiff purchased 1 7.5 acres amounting at Kshs.1,400,000/= on the same terms as the other purchasers. The plaintiff deposited the said amount into KCB at the instructions of his agent (Nakuplan Consults). The amount paid was meant to offset his debt (balance of the purchase price). When the plaintiff came to have the transaction reduced into writing, he insisted that the amount he had paid was for 20 acres instead of the 1 7.5 acres. As a result there was a dispute regarding the purchase price and the amount of land purchased. Hence there was no contract of sale.
24. DW2, 3rd defendant testified that the above parcel of land measuring 19.68Ha (approximately 48.5 Acres) was sold by public auction on the 23rd of March, 2001 by Kenya Commercial Bank through Diligent Auctioneers. He knew the parcel of land well and approached friends to team up to buy the land. Initially Elijah Ombogo, Jane Imali and himself undertook and paid the 25% deposit for the land. They agreed Elijah Ombogo to sign as the purchaser on their behalf and he was to be the witness. Thereafter they approached other friends (totaling five) to join and pay the balance of the purchase price and share the land prorata amongst the 8 of them.
25. The partners were to share and pay incidental costs such as legal fees, stamp duty and other administrative costs as per shareholding. The land was thereafter transferred to Elijah Ombogo on 8th August, 2021 to be as a trustee on behalf of the purchasers. His firm by the name Nakuplan Consultants was appointed to do the subdivision scheme plan for the land to be shared among the members as per their contributions towards the purchase. The shares were agreed as per the following apportionments;
- Elijah Ombogo - 4.3 Acres (1.7 Ha)
Eric Obino - 2.4 Acres (0.9Ha)
Amos Orasa - 4.8 Acres (1.9Ha)
Florence Mounde - 4.8 Acres (1.9Ha)
James Michoma - 3.6 Acres (1.4Ha)
Jane Imali - 1 Acres (0.7Ha)
Samuel Osoro - 9.8 Acres (3.9Ha)
Mongare Gekonga - 17.1 Acres (7.0Ha)
Total - 48.6 Acres (19.6 Ha)



26. On completion of the planning process, the parties took possession of their various parcels after the beacons were put in place by the surveyor. However, one of the purchasers disputed the apportionments of the land on the basis that he did not get his full share out of the fifty Acres. Efforts to explain that the land purchased was forty-eight (48) Acres and every purchaser had to lose a small fraction prorata in the sharing out did not resolve the matter. The issue ended up in court in civil suit No. 367/ of 2001 where he sued the other land purchasers. For the last 21 years they have been in and out of court trying every way to resolve the matter. On various occasions they have had out of court discussions and entered into verbal and sometimes written agreements that have not quite resolved the matter. In the meantime, the parties agreed to proceed with the survey and processing of deed plans as the plaintiff agreed to the sharing as originally done. The deed plans were acquired in November 2010 as LR. Nos. 13287/341-348 and ready for registration to the individual owners. There is no dispute among the members on the sharing out of the land as originally agreed. The members are settled on the land for the last 20 years.
27. I have considered the pleadings, evidence on record and rival submissions and do find that in the month of March 2001, Kenya Commercial Bank advertised land known as L.R. NO. 13287/17 (I.R. 47993/1) for sale by public auction. The 2nd Defendant did bid for the purchase of the said parcel of land on behalf of the Plaintiff and the other four Defendants. The auction went through and the Bank through Diligent Auctioneers Limited sold out the land for Kenya Shillings Three Million Five hundred Thousand (3,500,000.00) only. The 2nd defendant did not pay the whole purchase price but teamed up with the plaintiff and the other defendants to pay the purchase price to the bank
28. The Kenya Commercial Bank Limited's Advocate for this deal, Mr. Odera, had advised the partners to this suit to pay directly to the bank. It was agreed that each person was to get acres equivalent to his contribution to the bank. A total sum of three million five hundred shillings (Kshs. 3,500, 000) Million was finally paid to the bank. The Plaintiff herein paid a total sum of one million five hundred (Kshs.1, 400,000)
29. I do believe the plaintiff that it had been agreed that the Title Deed from Kenya Commercial Bank be transferred to the 2nd Defendant who would finally transfer the same to the rest of the members corresponding to their acres. Finally when the full payment had been made, the partners to this suit sat down to discuss on the sub-division and payments for the various transfers as demonstrated by PW1, DW1 and DW3. When it came to discuss of the subdivision and transfers, the 1st, 2nd and 3rd defendants insisted that each acre was going for Kshs.80, 000.00 instead of Kshs.70, 000.00 as advised by one Solomon Kimeli of Diligent Auctioneers Limited. Besides, the 1st, 2nd and 3rd Defendants initially appeared to have attempted to short change their colleagues and appeared to have had other contributors whose names they kept as a secret. The above facts depict the existence of a trust since the parcel of land was registered in the names of the 2nd defendant to hold the same on behalf of the persons who purchased the land. The type of trust depicted herein is a constructive trust.
30. It is trite that The *Land Registration Act*, No 3 of 2012, under which the 2nd defendant is registered is the law that governs registration of titles. Section 25 of the *Land Registration Act* provides that the rights of a proprietor shall not be liable to be defeated except as provided under the Act, subject to encumbrances and conditions in the register; and to such liabilities, rights and interests declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. Moreover, as is stipulated under section 25(2) nothing in this provision shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee.
31. Under section 26 of the *Land Registration Act*, No 3 of 2012, a Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor



shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. However, this is subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Further, the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation and where the certificate of title was acquired illegally, un- procedurally or through a corrupt scheme.

32. Section 28 provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may for the time being subsist and affect the same, without being noted in the register. These overriding interests include, trusts.
33. It is very clear that sections 25, 26 and 28 of the [Land Registration Act](#) recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts.
34. The Supreme Court of Kenya in [Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others](#) (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), has held that applying the provisions of article 24 of the [Constitution](#) therefore, the limitation of the right to property is provided under law, and includes a constructive trust and that the doctrines of equity are part of our laws by virtue of section 3 of the [Judicature Act](#). And while the [Constitution](#) entitles every person to the right to property at article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. That while sections 25 and 26 of the [Land Registration Act](#) provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust. The Supreme Court of Kenya went further to observe that:-

“In addition, we also note that the concept of trust is not new in our jurisdiction. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* Petition 10 of 2015 [2018] eKLR, we observed that the courts, vide section 163 of the [Registered Land Act](#) (repealed by the [Land Registration Act](#) No 3 of 2012) have been more willing to import the doctrines of implied, resulting and constructive trust as known in English law, into section 28 of the Act.”

35. In this the purchase price to the suit property was paid by a group of 8 people and therefore they are all entitled to the same according to their shares. This is a classic case to invoke the doctrine of constructive trust because the 2nd defendant in breach of his fiduciary duty to distribute the property in dispute to the partners he chose to retain the title for his own benefit despite the fact that parties have settled on their shares. The retention of the title in his name was intended for unjust enrichment.
36. The Canadian Supreme Court in [Soulos v Korkontzilas](#), [1997] 2 SCR 217, referred to by the supreme court of Kenya, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

“The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often



involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”

37. SiThe Supreme court of Kenya furether referred to a matrimonial property dispute, where the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows:

“As is pointed out by Scott, Law of Trusts, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”;

38. The Supreme Court of Kenya held that a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”

39. The Supreme Court further referred to the United States Supreme Court holding in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) where it was stated thus:

“Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same..”

40. The concept of constructive trust has also been inferred in a number of decisions of the superior courts. The Court of Appeal in *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others*, Civil Appeal No 51 of 2014 [2015] eKLR held that:

“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.”

41. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* Civil Appeal No 6 of 2011, consolidated with No 26 & 27 of 2011 [2014] eKLR and in *Willy Kimutai Kitilit v Michael Kibet*, Civil Appeal No 51 of 2015 [2018] eKLR, the Court of Appeal, in matters involving the sale of land, held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case. The applicability of the doctrine of constructive trust is therefore now settled.

42. The upshot of the above is that the plaintiff has demonstrated that the 2nd defendant is registered as the proprietor the suit property as a trustee and therefore should ensure that the plaintiff and other beneficiaries get their fair shares. I do give judgment in favor of the plaintiff and therefore I do grant an order for the disclosure of all the contributors to the purchase of land as L.R. M). 13287/17 (I.R. 47993/1) Nakuru. Moreover, I do make an order for the disclosure of all the amount each member paid to the bank. Lastly. I do grant a declaration that each member do get acres equivalent to his/her contribution paid to the bank. Costs of the suit to be paid by the 2nd defendant to the plaintiff because



he is the person in whose name the title is registered and was the stumbling block in the process of sharing the property. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF MAY 2024.

A. O. OMBWAYO

JUDGE

