



**Gikonyo & another v Kamau (Environment & Land Case
E26 of 2021) [2024] KEELC 4277 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E26 OF 2021**

**A OMBWAYO, J
MAY 22, 2024**

BETWEEN

HARUN GIKONYO 1ST APPELLANT

TERESIA WAIRIMU 2ND APPELLANT

AND

MARTHA WACHUKA KAMAU RESPONDENT

(Being an appeal against the Judgment of Hon L Arika Delivered on 17th November, 2021 in Nakuru CM ELC No.170 of 2019 Formerly Nakuru HC ELC 118 of 2016)

JUDGMENT

Introduction

1. The genesis of this appeal is the suit brought by way of plaint by Martha Wachuka Kamau (hereinafter referred to as the respondent) against Harun Gikonyo and Teresia Wairimu (hereinafter referred to as the appellants). In the plaint, the respondent herein sought a declaration that she was the registered owner of Nakuru/Municipality/Block 27/767 (hereinafter referred to as the suit property). She sought an order that the appellant be evicted from the suit property and an injunctive order restraining the appellants from ever trespassing on the suit property.
2. The cause of action arose vide facts that at all times material to this Suit, Land Parcel No. Nakuru Municipality Block 27 / 767 belonged to her husband John Kamau Gikonyo (hereinafter referred to as the deceased) and later by operation of the law, to the Estate of the Deceased. The respondent is the second wife of the Deceased while Monicah Mugure Kamau is the first Wife.
3. The respondent averred in the lower court that before his demise, the Deceased got wind of the fact that some third parties intended to grab his aforesaid Land which he had not yet developed.



4. The respondent alleged that her husband approached his Sister Damaris Waithera who had rented a House in the vicinity of the Plot and requested her to move on to the Plot and live there until such time as the respondents husband would be ready to take over the same and develop it. Damaris Waithera was to live onto the said Property freely but to provide security on the same to avoid imminent grabbing of the suit property by the aforesaid third parties. The respondent claimed that the Deceased's Sister Damaris Waithera brought onto the suit premises the appellants who are her children.
5. The said Damaris Waithera later Passed on sometimes around the Years 1998, 1999 or thereabouts and was buried at South Cemetery (Makaburini) Nakuru and upon her death, the respondents husband did not evict the appellants but allowed them to stay on the suit property under the same terms as earlier agreed between himself and the appellants' mother. That before her deceased husband could develop and /or otherwise deal with the property as he wished, he passed on. Upon the demise of her husband, the family filed Kisumu High Court Succession Cause No. 123 OF 2013.
6. The respondent stated in the pleadings in the lower court that a Grant was, issued and later confirmed in the month of October the year 2008. That among the Properties, the second House of the Deceased inherited in the said Succession Cause is Land Parcel no. Nakuru Municipality Block 27 / 767. That the respondent became the Registered Owner of the suit Property, a title document having been issued to her on the 6th day of August 2014. Upon issuance of a Certificate of Lease in her favour in the Year 2014, she approached the respondents and requested them to organize themselves and move out as she wished to make use of the suit Property. The appellants adamantly refused to move out prompting the respondent to request his Brother-In-Law; the appellants Uncle to prevail upon them to move out in vain.
7. On their part the appellants filed defence and counter-claim stating that the suit land belonged to John Kamau Gikoyo (Deceased) who gave it to his sister Damaris Waithera who is their mother. Damaris Waithera took possession and developed the same until 1998 when she passed on and left the appellant in possession and they have continued in possession without interruption until the filing of the suit. The appellants alleged to have an indefeasible interest in the land and are rightfully in possession. They prayed that the suit be dismissed. In the counter-claim the appellant alleged that John Kamau Gikoyo surrendered his right and interest in the land to the appellants and their mother Damaris Waithera and the latter continued possession and developed the land. They have been in possession for a long period of time hence are entitled to the same. The appellants prayed for a declaration that they are the lawful proprietors of the tease in respect of Nakuru Municipality Block 27/767 and an order for cancellation and/or revocation of the Certificate of Lease issued in the name of the respondent and for a Certificate of Lease to be issued in the names of the appellants.
8. In the Alternative a declaration that the respondent holds the Certificate of Lease in respect of Nakuru Municipality Block 27/767 in trust for herself and the appellants and an order for the Defendant to transfer the their interest to them
9. Moreover, an order of permanent injunction restraining the respondent, by herself, her agents, servants and/or assigns or any person acting on her behalf or instructions, from entering, remaining, developing, charging, selling, transferring or in any other manner whatsoever dealing with Nakuru Municipality Block 27/767. The appellants sought costs and-interest of the suit.
10. In the reply to defence and defence to counter claim, the respondent denied allegation by the appellants and stated that the appellants stay on the property was under the same terms agreed between their mother and the deceased husband the respondent. She prayed that the suit be dismissed.



11. Before the lower court, the respondent testified that her husband John Kamau Gikoyo gave the appellants mother possession of the land until such a time when he would get money to construct but died before constructing on the land. After the death of her husband, she asked the appellants to leave but they refused. They have no documents to the land and the land belongs to the appellant. She produced a certificate of confirmation of grant rates clearance certificate and payment receipt, certificate of lease. On cross examination she stated that her husband told her that he gave the land to his sister so that it could not be grabbed. Peter Harun Njoroge Gikoyo a brother of John Kamau Gikoyo testified that his brother gave his sister the suit plot to hold it until the time he would develop it.
12. The 1st appellant Harun Gikoyo Kamau adopted his witness as his evidence in chief. He stated that his uncle gave his late mother the suit property and his mother constructed a three roomed mud walled house. His mother left them on the land when she died and that is where they call home. On cross examination he states that they were given land to live on and build on and therefore it is their land.
13. After hearing the parties and considering submissions the Learned Magistrate found that the land was registered in the names of the respondent after a grant of letters of administration intestate and confirmation of grant and transfer of land to the respondent.
14. The learned magistrate further found that the appellant lived on the land out of good will extended to their mother by their later uncle and that they did not own the land as of right. The learned magistrate found that the concept of trust does not arise and therefore granted an order that the respondent was the lawful owner of the land. Moreover, the learned magistrate granted an order of eviction of the appellants and a permanent injunction as prayed.
15. The appellants have come to this court on appeal seeking prayers that the judgment of the trial court in Nakuru CM ELC No.170 of 2019 be set aside, vacated and discharged and in its place judgment be entered dismissing the respondent suit in its entirety and therefore allow the appellant counter claim dated 28th February 2018. That costs of the appeal and the lower court suit be granted to appellant.
16. The grounds of appeal that the learned Magistrate did not give reasons for her decision to counter-claim and by failing to analyze, scrutinize, dissect and give regard to DW1. That the learned magistrate failed to appreciate the evidence of DW2.
17. The appellant contends that the trial magistrate erred in law and in fact in finding that the Grant in the Kisumu Succession cause was conclusive proof of ownership and that the Appellants herein had failed to raise objections and thereby failing to appreciate that even in the testimony of the Respondent.
18. The trial magistrate erred in law in finding that there was no sufficient evidence that the Respondent allowed the Appellants to continue living on the land when in fact; the Appellants occupation and use of the land pre-dated the Respondent's purported proprietorship and that permission had been given by the original owner of the parcel of land John Gikonyo whose succession proceedings were knowingly hidden from the Appellants in order to defeat their rightful ownership of the suit parcel of land.
19. The trial magistrate erred in law and in fact in failing to appreciate the applicability of doctrines of common law and equity as allowed by Section 3 (3) of the *Judicature Act* and for those reasons failed to acknowledge that a resulting trust or constructive trust arose by virtue of the fact that the Appellants herein had been in occupation of the suit property by the direction of the original deceased owner and that at the time of his demise, he had not withdrawn the said permission.



20. The trial magistrate erred in law and in fact in failing to apply the doctrines of common law and equity and especially the doctrine of constructive trust when by a scrutiny of the conduct of the original deceased owner, it would be inequitable to allow his estate to deny to the Appellants a beneficial interest in the property in which they are and have been in possession during and after the lifetime of the deceased original owner.
21. According to the appellant, the trial magistrate erred in law and in fact in failing to appreciate that prior to registration of the Respondent as the proprietor of the land, there had been an unconditional surrender of proprietary rights by John Gikonyo to the 1st Appellant's mother Damaris Waithera and that at the time, the conduct of the original owner John Gikonyo was so clear that he had surrendered the land to the Appellants family and that they had beneficial ownership and use of the suit property.
22. The trial magistrate erred in law and in fact in failing to scrutinize and interrogate the municipal law, common law and the law of Equity and especially with regards to operation of constructive or resulting trust and as a consequence reached a decision that was bereft of good reasoning and merit.
23. The trial magistrate erred in law in finding that the counterclaim was unmerited when there was no proper scrutiny of the pleadings and interrogation of the applicable law supporting the counterclaim.
24. The- trial magistrate erred in law and fact in issuing eviction orders against the Appellants when they had beneficial interest in the suit property and the law of equity mandated that this Court finds in the interests of Justice, that the Appellants were properly in occupation of the land.
25. The trial magistrate erred in law and in fact in allowing the Respondent's case in its entirety despite the weight of the evidence and facts in the Appellants case.

Rival Submissions

26. The gravamen of the appellant's submissions is that the trial court did not properly analyze the appellants counterclaim. The analysis was limited to appellants amended defence and counter claim of 27th February 2018. The appellant stated that the learned magistrate steered clear of the issued of surrender of rights and intent by the deceased husband of the respondent and the fact that the appellants took possession in 1990 and have constructed on the land.
27. The appellants submits that the omission by the learned magistrate was substantive and were not inadvertent. The omissions by the learned magistrate watered down the appellant's evidence. The appellant further submits that the proceedings in the Kisumu Succession cause were not a conclusive proof of ownership.
28. The appellant further submits that the doctrine of resulting and constructive trust were not considered by the learned magistrate as allowed by section 3 (3) of the *Judicature Act*. Lastly the appellants submit that the trial magistrate appreciated that prior to the respondent registration, there had been an unconditional surrender of property rights by John Gikonyo to the 1st appellants mother Damaris Waithera.
29. The gist of the respondent's submissions is that the original counter claim filed on the 13th day of May 2016 was not accompanied by a verifying affidavit as required by Order 7 rule 5 of the Civil Procedure Rules 2010. The respondent submits that the counter-claim dated 12th May 2016 and filed on 13th May 2016 is defective for failure to comply with mandatory Provisions of Order 4 rule 1 (2) of the Civil Procedure Rules 2010. There was prayer to amend the counter claim and that there was no verifying affidavit to the counter claim.



30. The respondent further submit that the respondent holds the certificate of lease by virtue of the provisions of section 24(a) of the *Land Registration Act*. The respondent submits that section 26(a) of the *Land Registration Act* provides the respondent rights to the parcel of land. There are no allegation of fraud and no evidence of fraud. The respondent further submits that the counter claim in her cannot be granted because, if granted it will set aside the decision of the High Court in succession cause No. 123 of 2003.
31. On constructive trust, the respondent submits that whoever alleges must prove and that it was upon the appellants to prove the existence of trust. The respondent submits that the intention of parties in this case was very clear thus that the appellant's mother would live on the property without paying rent but to provide security to the plot to prevent land grabbers until when the deceased would require the property. The respondent submits that there was no intention for the parties to create a trust. The appellant failed to prove the existence of a trust. Moreover, that the appellant did not acquire the property through wrongdoing.

Analysis and Determination

32. This is a first appeal to this court hence the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in one of the celebrated and over quoted cases *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) E.A 123
33. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. It has been held that a first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.
34. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Considering the scope of Section 78 of *Civil Procedure Act*, Cap 21 Laws of Kenya this court is obligated to appreciate the entire evidence and come to a different conclusion.
35. This court has considered the pleadings, evidence on record and rival submissions and do find the undisputed facts of the case being that the appellants are children of Waithera Damaris who was the sister to John Kamau Gikonyo the husband to the respondent. In the 1990's, the appellants mother was allowed to use the suit property for residential purposes instead of renting a house. Their mother set up a home on the land. Their mother passed on in 1998 and that they continued utilizing the land as their home and for residential purposes without any interference by their uncle. Their uncle passed on in the year 2001 and was buried in Muhoroni. The respondent started demanding the land in the year 2016 after obtaining the grant of the letters of administration intestate in the estate of John Kamau Gikonyo and confirmation of grant and transmission of the land in her name. She demanded that the appellants do vacate the land but they declined prompting this case. The honorable magistrate after hearing the case found that she had no reason to disturb the rights granted to the plaintiff through



succession cause or any sufficient cause for cancellation of the registered title. The learned magistrate found that the counter claim had no merit. The appellants have appealed at the issues in the appeal can be summarized as follows:-

1. Whether the learned magistrate erred in fact and law by not considering the counter claim.
 2. Whether the learned magistrate erred in law and fact in failing to consider the issue as to the existence of trust.
 3. Whether the learned magistrate erred in law by finding that she had no reason to interfere with the respondent's rights as found in the succession cause.
38. On the 1st issue, I do find that the counter claim was properly before the learned Magistrate despite the fact that the original counter claim was not accompanied by a verifying affidavit as required by law. The respondent prays that the same be struck out but this court finds that doing so will be going against the spirit of Article 159 (3) of *the Constitution* of Kenya that forbids this court from unduly relying on procedural technicalities. Order 4 Rule 1(2) was meant to deal with the mischief of parties filing many suits in respect of the same cause of action in different courts.
39. On the 2nd issue, as to whether the learned magistrate erred in law by failing to find existence of an implied trust. The *Land Registration Act*, No 3 of 2012, 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.
40. 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.
41. 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.
42. 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. 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.”

43. This court finds that the facts of this case are clear, that the husband of the respondent placed the appellant's mother in the suit land and allowed them to make the same his home in the early 1990's, the appellants mother died in 1998 and left the appellants in possession, the respondents husband never evicted them, the respondent husband died in the year 2001, the appellants where never evicted until 14 years later in 2016 that the respondent came to court to evict them.
44. I do find that the conduct of the deceased John Kamau Gikonyo depicted an intention to gift the appellants with the property as their home. The said Gikonyo could not have intended his sister to act as a guard to the property against land grabbers for approximately 20 years until the filing of the suit. The fact that he did not interfere with the possession of the land and use by his nephew and niece depicts a person who had surrendered the rights on the property to the appellants. I do find that the learned magistrate erred in failing to find the existence of an implied trust in favour of the appellants. I do find that the conduct of the said Gikonyo created a beneficial interest to the appellant's mother and the appellants.
45. On the 3rd issue, I do find that the grant to the respondent of the letters of administration intestate, confirmation of grant and transmission did not interfere with the existing trust created by John Kamau Gikonyo. The respondent merely became a trustee holding the title to the property in trust for the appellant who had beneficial interest in the same. The learned magistrate erred by finding that she had no reason to interfere with the rights of the respondent obtained in the succession cause because the respondents on registration as the owner of the land became trustee by virtue of the beneficial interest of the appellants on the land, created by the deceased John Kamau Gikonyo. Ultimately the appeal is allowed and judgment of the lower court is set aside, judgment is entered dismissing the respondents suit in the lower court, the counter claim is allowed in terms that the respondent holds the certificate of lease in respect of Nakuru/Municipality /Block27/767 in trust for herself and the appellants and that the respondent to transfer the property to the appellants. No order as to costs as the parties are family members.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF MAY 2024.

A. O. OMBWAYO

JUDGE

