Nungi v Mwaura (Being Sued in her Capacity as the Administrator of the Estate of Mwaura Njuguna) (Environment and Land Appeal E016 of 2022) [2024] KEELC 3822 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3822 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E016 OF 2022

JG KEMEI, J

MAY 13, 2024

BETWEEN

JOYCE WANGARI NUNGI ..... APPELLANT

AND

BETH WAITHERA MWAURA (BEING SUED IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF MWAURA NJUGUNA) ..... RESPONDENT

(Being an appeal against the Judgment of the Hon Jacinta A. Owiti, SPM in MELC No. 65 of 2018, Kikuyu delivered on 2/3/2022)

JUDGMENT

1. The genesis of this Appeal arises from the Judgment of the trial Court in MELC 65 of 2018.

2. It is commonly agreed that the Appellant is the sister in law of the Respondent having been married to Leonard Nungi Kiarie (Kiarie). From the record Kiarie was the 1st Plaintiff in the lower Court. The Respondent admitted that Kiarie is a blood brother married to the Respondent.

3. It is common ground that the subject matter of the appeal emanates from land parcel L.R. No. Karai/Karai/82.

4. It is not in dispute that Parcel No. Karai/Karai/82 was owned by Kungu Wainaina. It is stated that Kungu had secured a loan from Continental Credit Finance (CCF) with the land being security for the facility. As fate would have it, he defaulted in 1989 exposing the land to sale by public auction. To redeem the land, Wainaina is said to have approached Njuguna to buy the land to save it from sale. They entered into an agreement with Mwaura Njuguna, the husband to the Respondent to bail him out. An agreement dated 18/11/1989 was adduced in evidence by Respondent. It was part of the terms of the agreement that Kungu Wainaina would sell a portion (5 acres) of his land to clear the loan at CCF to

save the whole land being parcel Karai/Karai/82. The purchase price was Kshs. 55,000/- per acre. With the blessings of WAinaina and his family Njuguna was to pay the outstanding loan directly to the bank.

5. It was the Plaintiff's case that her husband Leonard Nungu Kiarie was invited to the purchase arrangement where Kiarie paid for one acre out of the 5 acres of land, monies which was paid directly to CCF in cash through Njuguna as agreed between the two gentlemen.

6. It was further the Plaintiff's case that after making their contribution of Kshs. 55,000/- for a portion of one acre, they took possession of the one acre and Njuguna too occupied his 4 acres. As they awaited the title for their portion the Plaintiffs stated that they embarked on tilling the land and growing trees for commercial purposes.

7. In 2010 it was claimed by the Plaintiff that Mwaura Njuguna embarked on the subdivision of the land but died shortly before completing the same. A map showing a draft subdivision and excision of one (1) acre was adduced in evidence.

8. Shortly thereafter the Defendant petitioned for Letters of Administration in the estate of Njuguna. The Plaintiffs blame the Defendant for not notifying them of this exercise. It was the Plaintiffs case that the Letters of Administration were fraudulently obtained.

9. Nevertheless, armed with the Confirmation of Grant the land devolved to Defendant on 7/12/2011 according to the green card adduced in evidence. Upon the Defendant becoming registered as owner of the land, the Plaintiff states that she barred/removed them from the land and eventually evicted them altogether.

10. The Plaintiffs sought the following orders:-

    a. A declaration that the Plaintiffs are entitled to one acre from L.R. No. Karai/Karai/959 as joint purchasers with the deceased.

    b. An order to compel the Defendant to unconditionally transfer to the Plaintiffs one acre from L.R. N. Karai/Karai/959.

    c. General damages for breach of contract and mesne profits for loss of use.

    d. Costs of this suit.

11. In her defence and counterclaim the Defendant denied the Plaintiff's claim and contended that her husband purchased the land from Kungu Wainaina in satisfaction of payment of the outstanding loan, the terms of which were captured in the agreement dated the 18/11/1989. That pursuant to the said agreement Njuguna purchased five (5) acres at Kshs. 55,000/- which monies were paid directly to the bank on account of Kungu Wainaina. She denied that Njuguna ever invited the 1st Plaintiff to buy 1 acre out of the 5 acres and sought to put the Plaintiff into strict proof. She denied any attempts to subdivide the land to exercise 1 acre for the Plaintiffs.

12. In her counterclaim she sought the following orders:-

    a. That the Plaintiffs' suit herein be dismissed with costs.

    b. An Order do and is hereby issued directed at the District Land Registrar, Kiambu to forthwith remove the caution by Leonard Nungi Kiarie on LR No. KARAI/KARAI/959.

13. After hearing 3 witnesses the trial Court returned a verdict in favour of the Defendant in the Judgment dated 2/3/2022 in the following terms:-

> " The Plaintiff has failed to prove her claim against the Defendant on a balance of probability hence dismissed with costs to the Defendant."

14. Dissatisfied with the said Judgment of the Court the Appellant filed this Appeal in the following grounds:-

    a. That the Learned Magistrate erred in law by failing to have due regard, take into account and appreciate the substantive legal issues of law and fact raised by the Appellant during the hearing of the Appellant's suit.

    b. That the Learned Magistrate erred in law and fact in finding that the Appellant was a licensee.

    c. That the Learned Magistrate erred in law by not taking into account issues of fraud raised and proved during the hearing of the suit.

    d. That the Learned Magistrate erred in law by failing to reach a determination on all the issues placed before the Court.

    e. That the Learned Magistrate erred in law and in fact by failing to appreciate the existence of oral contracts in matters land.

    f. That the Learned Magistrate erred in law and in fact by failing to appreciate and distinguish the substantive issues of law and fact raised in the submissions, authorities and other documents on record.

    g. That the Learned Magistrate erred in law and in fact by failing to appreciate the existence of oral contracts in matters land.

    h. That in all circumstances of the case, the Learned Judge failed to render justice to the Appellant.

15. The Appellant prays for orders as follows:-

    a. This Appeal be allowed.

    b. The Judgment delivered on the 3rd March, 2022 be set aside.

    c. That the Court be pleased to enter Judgment in favour of the Plaintiff as sought in the Plaint.

    d. The costs be borne by the Respondent.

16. The Appellants submissions are now set out hereunder.

17. The Appellant's written submissions were filed by the law firm of Mbuthia Kinyanjui & Co. Advocates.

18. On whether the trial Court determined all the issues placed before the Court, the Appellant submitted and identified with trust in land. Relying on the case of Twalib Hatayan & Anor. Vs. Said Saggar Ahmed Al-Heidy & Others (2015) eKLR the Appellant analyzed the law on trust giving distinction between resulting and constructive trusts.

19. A case was made for trust in favour of the Appellant as follows: Appellant's husband contributed Kshs. 55,000/- towards the purchase of the property; PW2 & PW3 attested to this evidence; Appellant occupied one acre of the 5 acre parcel of land exclusively for close to 30 years. Respondent's husband

did not dispossess the Appellant and her husband in his lifetime and hence drawing a clear presumption of a resulting trust; the deceased intimated his intention to subdivide the land to carve out one acre for the Appellant's husband.

20. All in all, the Court was urged to allow the claim of trust and at the very least infer a trust in favour of the Appellant. The Court was further informed that Section 28 of the *Land Registration Act* creates overriding interest in land one of which is trusts including customary trusts. That the beneficiaries of the estate of Njuguna held the one acre in trust for the Appellant. The Court was further urged to find constructive trust notwithstanding that there was no purchase agreement that was reduced to writing.

21. On the question of fraud, the trial Court was faulted for failing to determine the issues revolving around fraud.

22. Further the Appellant faulted the Respondent for fraudulently relying on a Certificate of Grant issued in the estate of a third party – Dominic Gitau Kahenya, a stranger to the proceedings herein and to the estate of her husband. In short, that she procedurally procured documents to obtain Letters of Administration to the estate of the late Mwaura Njuguna with the aim of disposing the Appellant's land that rightfully had accrued to her.

23. The Court was informed that oral contracts are provided for in Section 38 of the *Land Act*, especially the ones that arise out of creation or operation of a resulting, implied or constructive trust. The rule that requires contracts to be in writing is modified by Section 38 (2) (b) where the law imports the principles of equity such as in the doctrine of trusts. The Court was referred to the decisions of the Court of Appeal in *Macharia Mwangi Maina & 87 Others Vs. Davidson Mwangi Kagiri* [2014]eKLR; *William Kipsoi Sigei Vs. Kipkoech Arusei & Another* [2019] eKLR.

24. In winding up that point, the Appellant faulted the Court for failing to appreciate that oral contracts in land though prima facie void are enforceable on the basis of constructive trust.

25. On the question of whether the Appellant was a licensee of Njuguna the Appellant faulted the Court for reaching that conclusion in the absence of evidence. That the Court ignored evidence led to the fact that the Appellant took possession of one acre in 1992, planted blue gum trees for commercial purposes and later harvested and sold them. That such possession and activities are inconsistent to the actions of a licensee. That in any event there was no evidence led to show the existence of a license agreement or evidence of payment of licensee fees for the one acre of land by the Appellant and her husband.

26. Further the trial Court was faulted for erring in finding that the Appellant was not entitled to a claim of adverse possession, yet the evidence on record shows the Appellant and her husband took possession and worked the land for over 22 years while enjoying quiet possession while at it. That the deceased never at any one time disturbed them. Citing Section 31(1) and 40 of the *Advocates Act*, it was further submitted that Nyaga Paul Nganga of P.105/5180/03 has no capacity to represent litigants given that he was struck off the Roll of Advocates in 2020. The conclusion attributed to the issue is that the Respondent's case should fail and further that she should be disentitled to costs in the suit in the trial Court. Further that the person acting for the Respondent should be held guilty of an offence against the *Advocates Act* and the Court.

The written submissions of the Respondent

27. Opposing the Appeal, the Respondent filed written submissions through the law firm of Nganga Nyaga & Co. Advocates dated 6/3/2023.

28. The Respondent raised an apparent appeal in its written submission centered on ground No. 4 of the Appeal to the extent that her counterclaim that sought orders for the removal of the caution lodged on the title by Leonard was not considered.

29. With respect to grounds Nos. 1, 2, 4, 5, 6 7 and 8 the Respondent submitted as follows; Leonard was a witness to the agreement between Njuguna and Wainaina and not a co-buyer, Respondent has produced all the receipts of the purchase price (payments made directly to the bank on account of Wainaina to redeem the land); the Appellant and her family have never lived on the land though they had been allowed graciously to cultivate the land by Njuguna.

30. It was further submitted that the subdivision of the land was done by Njuguna for purposes of disposing it to defray his medical expenses and not to give to the Appellant.

31. The Respondent submitted that she evicted the Appellant after the demise of Njuguna because she was fed up with them as they were mere licensees on the suit land.

32. Commenting on the agreement of sale, the Respondent reiterated that the Appellant did not proof ownership of one acre of the land by Leonard. That Leonard executed the agreement as a witness and not a co-buyer. As a result, therefore it was submitted that there was no privity of contract between Leonard and Njuguna. She dismissed the insinuation of the existence of an oral contract as misguided and incorrect in law and fact. That the Appellant cannot vouch for an oral agreement between 3rd parties, as she was not a party to it.

33. Citing Section 3(3) of the *Law of Contract* the Respondent contended that an oral agreement is illegal and unenforceable.

34. On time bar the Respondent contended that the suit was time barred having been filed in 2018 when the cause of action is claimed to have arisen in 1989, a period of 26 years.

35. In addition, the Respondent argued that even if there was any agreement to the land, the same was illegal, null and void on account of non-compliance with the Land Control Board Act with respect to Land Control Board consent that was not obtained.

36. On the alleged forged letters of representation alluded by the Appellant the Respondent contended that the Appellant failed to table evidence in support of any fraud. She castigated the Appellant for failing to table evidence in Court from Kiambu Law Courts in support of the alleged fraud. She reiterated that the allegations are false.

Analysis and determination

37. Having considered the appeal the issues that commend themselves for determination are ;

    a. Whether Njuguna and the Appellant Leonard teamed up to acquire the suit land

    b. If yes whether the doctrine of constructive trust was created in favour of the Appellant.

    c. If yes whether specific performance is available to the Appellant.

    d. Costs of the appeal.

38. It is commonly accepted that the suit land was a subdivision of the larger parcel No Karai /Karai /82 owned by one Kungu Wainaina. The story line begins when Wainaina defaulted in servicing the loan with CCF, the mother title being the security therein. Wainaina in an effort to save his land from the auctioneer's hammer invited Njuguna to purchase 5 acres of the land. An agreement of sale dated the

18/11/1989 captured the obligations of the two gentlemen as thus; the portion to be sold was 5 acres at the price of Kshs 55,000/- per acre; the purchase price was to clear the outstanding loan which stood at over Kshs 250,000/- plus lawyers fees; the money was to be paid directly to the loan account of Wainaina. The agreement was executed by both men in the presence of witnesses. Leonard was one of the witnesses for Njuguna.

39. According to the green card adduced in evidence Wainaina subdivided the land and the same was transferred and registered in the name of Njuguna on the 1/9/92.

Whether Njuguna and the Appellant Leonard teamed up to acquire the suit land

40. It was the case of the Appellant that her husband contributed Kshs 55,000/- for the purchase of one acre, monies that was paid to Njuguna in cash towards the repayment of the loan in the name of Wainaina. That on completion of the purchase Njuguna put them in possession of the one acre since 1992 and for the period of 26 years they tilled the land and planted blue gum trees which they harvested for commercial purposes. She produced documents being a copy of the payment receipts in the sum of Kshs 55,000 dated the 21/2/1990, a proposed subdivision scheme for Karai/Karai/959, search for the suit land dated 2/6/2016 in support of her claim.

41. The Respondent denied the claim of the Appellant and contended that Njuguna purchased the whole land alone. She wondered how her own brother (Leonard) could have had transactions like buying land with her husband Njuguna without first having to go through her. She argued that in the absence of an agreement for sale between Leonrad and Njuguna the Appellants claim is founded on quick sand. Further she stated that in any event Leonard's role was as a witness and not a co-buyer. She produced documents being sale agreement dated the 18/11/1989 between Wainaina and Njuguna; copy of title deed in the name of the Respondent issued on the 7/12/2011, green card for the suit land duly certified on 4/5/17.

42. The 1st issue for determination is whether Leonard paid for the land under or alongside Njuguna. The Appellant led evidence in the positive and produced the receipt dated the 21/2/1990. She argued that the money was paid in cash. The Respondent led evidence and denied the same and insisted that the money was paid by Njuguna alone. I have examined the evidence and the Court notes that there is a threat that runs through the conduct and activities of Njuguna and Leonard. According to the agreement the purchase price per acre is Kshs. 55,000/- and this agrees with the oral evidence of the Appellant and the copy of receipt of similar amount in her possession. She stated that the receipt is one of the documents which Leonard kept. The fact of the custody of the receipt points to evidence that the cash came from Leonard. I say so because on the 21/2/1990 there are receipts for two payments; one for Kshs. 100,000/- vide a cheque and the second one is for cash in the sum of Kshs. 55,000/-. The rest of the payments made on 2/5/90, 8/5/90. 12/7/90 and 7/9/90 were all in form of cheques. There is a clear presumption that the monies in form of cheques came from Njuguna but the one in cash was paid by Leonard. Although it holds true that Njuguna and Leonard never entered into a formal sale agreement, this finding is further strengthened by the fact that Leonard signed the agreement as a witness. The two gentlemen having been brother in laws must have trusted each other to the extent that they did not see the necessity to enter into a written agreement. Since Leonard was buying one acre he was carried under the wings of Njuguna who was negotiating the transaction as the dominant purchaser.

43. The second thread that emerges is the evidence of the Appellant that they were put in possession by Njuguna from 1992 and for the period of over 26 years utilized the land with agricultural activities of their choice- commercial tree growing. This evidence was supported by the testimony of PW2 who stated that the Appellant occupied the land for a long time peacefully and that the problem arose

after the death of Njuguna when the Respondent removed the Appellant from the land. PW3 who is a relative to Wainaina stated that she was aware that Njuguna and Leonard redeemed the land of Wainaina from being auctioned and purchased 5 acres. That out of the 5 acres one acre belonged to Appellant and Leonard who farmed on the same. That as far as she could remember the Respondent and the Appellant have always occupied the suit land each on their 4 and 1 acre respectively.

44. The Respondent denied the possession of the land by the Appellant and her family and argued that they occupied with the permission of Njuguna and with others. That being relatives, they were allowed onto the land out of abundance of the graces of Njuguna and for purposes of working on the land as labourers who would sometimes be paid something small by Njuguna. She admitted evicting the Appellant when she testified thus;

> " I got rid of Joyce Nungi as I was fed up with them."

45. That notwithstanding the Court did not receive evidence of wages, rent paid and or a licencee agreement between Njuguna and Leonard. Based on the evaluation of the evidence placed before the Court I find that the Appellant was put in possession pursuant to the purchase of one acre. It is not plausible that the Respondent did not know about the purchase nor the reason why the Appellant was in occupation of the land for over 26 years, a very long time to anchor gratuitous gesture of a relative offering a hand to another.

46. The Appellant PW2 and PW3 led evidence that in 2010, Njuguna commenced the subdivision of the land so as to give the Appellant their one acre portion. She produced a proposed subdivision of Karai/Karai/959 which bears the approval of the District Surveyor Kiambu on the 1/3/2011. It also bears the name of Mwaura Njuguna, the registered owner of the suit land. It is prepared by a firm of Licensed Surveyors disclosed as J R R Aganyo & Associates. It is dated 10/2/2011.

47. In his examination in chief PW2 testified as follows;

> " The suit land belongs to my neighbor who has been known to me since 1980. Samuel Njuguna came and bought the land. The land was to be repossessed on account of a loan payment default. He bought 5 acres. Joyce Wangari and Waithera were the ladies present and cultivation the land. Samuel Njuguna came to me. He called for a tree to mark the boundary. I got the tree for marking the boundary. Kamwero came to the land in company of his wife. Njuguna was present too. Mwaura told us he was sickling and money was given to the sister in law hence demanded for a share of his land measuring an acre. Kshs. 55,000/- was paid for Mwaura called his children and told them he sold an acre of land to their uncle. I November 2010 Mwaura passed on before transferring an acre of land to purchaser."

48. In his statement he stated that-

> " He came to me and he told me that he wanted to do some work now that who is not "dying can go on a safari, a kikuyu saying insinuating in contemplation of death)."

49. This evidence was not successfully dislodged by the Respondent. The import of this evidence is that Njuguna being sickly wanted to make things right and ensure that the Appellant and her family got their title that they purchased way back in 1989/90. This evidence further serves to show that Njuguna recognized the presence of the Appellant and her husband as occupiers and as owners of the one acre for which they contributed Kshs. 55,000/- in 1990. The subdivision therefore was pursuant to the purchase and was being done to complete what they started in 1989.

50. The Respondent testified and denied that the subdivision was to excise one acre for the Appellant but for sale to defray medical costs for Njuguna who was sickly. She however failed to produce any evidence of the impending sale and or evidence in support of medical expenses attributed to Njuguna. The Court finds this weak to say the least.

51. Further a close perusal of the green card shows that Leonard lodged a caution on the suit land on 18/6/12. It cannot be said that cautioning the land was an act of an idle licensee or a wager as the Respondent would want the Court to believe, but was a desperate act to secure his interest in the suit land seeing that despite his claim the Respondent became registered as owner of the land on the 7/12/11.

52. Finally the Respondent never led any evidence that Njuguna removed the Appellant and her family from the land to show that he recognized their interest in the land.

53. In conclusion therefore, I think I have said enough to show that the 1st issue is answered in the positive.

If yes whether the doctrine of constructive trust was created in favour of the Appellant.

54. The Black's Law Dictionary, 9th Edition defines a trust is defined as 'the right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)'.

55. A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. ... 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 para 1453).

56. 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.

57. On the other hand, a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, Courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).

58. The Court of Appeal in *Juletabi African Adventure Limited & Another Vs. Christopher Michael Lockley* [2017] eKLR that the onus lies on a party relying on the existence of a trust to prove it through evidence. That 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.

59. In the case of Arif Vs. Jadunath Majdmar (1930-1) Vol. LVIII Indian Appeals, 91 (PC), the Privy Council held as follows:

> " Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute."

60. It has been argued by the Respondent that an oral contract is illegal given the provisions of Section 3 (3) of the *Law of Contract Act* read together with Section 38 of the *Land Registration Act*. It was not in dispute that in the circumstances of the case at hand, the presence of an oral contract cannot be gainsaid.

61. In the case of *Willy Kimutai Kitilit Vs. Michael Kibet* [2018] eKLR the Court pronounced itself on the question of an oral agreement as thus;

> " In Yaxley's case, the English Court of Appeal was dealing with the validity of an oral agreement by purchasers of a house to grant a long lease on the ground floor to a builder in exchange for labour, materials and services supplied. Section 2 of the English Law of Property (miscellaneous provisions) Act, 1989 provided in part:-
>
> "(1) A contract for sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document...
>
> (5) This section does not apply to ... and nothing in this section affects the creation or operation of resulting, implied or constructive trusts..."
>
> It was contended in that case that the oral agreement was void and that the doctrine of proprietary estoppel could not operate to give effect to such an agreement.
>
> It was held in part that:
>
> > "an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ..."
>
> On his part Beldam L. J. said at p. 193 para D
>
> > "In my view the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trust effectively excludes from operation of the cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel."

62. It is the view of the Court that though the agreement between Leonard and Njuguna was not in writing it was however enforceable between the parties.

63. In the *Willy Kitilit* decision above the Court went further and stated as follows;

> " *The Constitution* had by virtue of article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and required the Courts in exercising judicial authority to protect and promote that principle, amongst others. It followed that the equitable doctrines of constructive trust and proprietary estoppel were applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land was void and enforceable for lack of consent of the Land Control Board."

64. Applying the dicta in the above decisions to the current case, the Court finds that constructive trust was created in favour of the Appellant and her husband. Having found that the Appellant paid monies for the purchase of the land, was put in possession and occupied for a period of 26 years and even a subdivision had been mooted in their favour, it would be a travesty of justice to allow the Respondent to deny the Appellant her land. The equitable doctrine of constructive trust kicked in when Njuguna became registered as owner of the suit land and he held the land in trust for the Appellant to the extent of one acre. Upon his death the Respondent assumed ownership of land that was encumbered with constructive trust in favour of the Appellant to the extent of one acre. Looking the other way would mean that the Respondent will be unjustly enriched at the expense of the Appellant whose land would have been unjustly alienated without compensation.

If yes whether specific performance is available to the Appellant.

65. In the case of *Reliable Electrical Engineers Ltd Vs. Mantrac Kenya Limited* (2006) eKLR, the Court stated that:-

> " The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant."

66. In this case having held that the oral agreement created a constructive trust, the Court finds that to serve the interests of justice the Court will order specific performance of one acre in favour of the Appellant. This is to balance the scales of justice. Evidence was led by the Respondent that she was not aware that Kshs 55,000/- was ever repaid to the Appellant and her family. The presumption is that it was not paid otherwise she would have demonstrated as such. Equity would frown on the Respondent being allowed to keep the Appellants land for free.

67. I share in the wise words of the bench in the case of Macharia Maina & 87 Others Vs. Davidson Mwangi Kagiri where the Court faced with almost similar facts stated as follows;

> " Article 159(2) (d) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a Court of law and a Court of

equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detects unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property."

Other matters

68. The Appellant has extensively submitted on a claim of adverse possession. However the Court notes that there is no cause of action on adverse that was pleaded. Pleadings are the bedrock of litigation and in their absence no Court ought to pronounce itself on unpleaded matters. Submissions too cannot take the position of evidence.

69. In the upshot I find that the trial Court erred in reaching the decision that it did and for the reasons given I make the following orders;

70. Final orders for disposal;

    a. This Appeal be allowed.

    b. The Judgment delivered on the 3rd March, 2022 be and is hereby set aside in its entirety.

    c. I enter Judgment in favour of the Plaintiff as sought in the Plaint.

    d. The Respondent is ordered to subdivide the land and transfer one acre to the Appellant within a period of 90 days in default the Deputy Registrar of the trial Court be and is hereby authorized to execute all the documents necessary to effectuate the orders of this Honourable Court.

    e. The costs of the appeal and the suit in the trial Court shall be borne by the Respondent.

71. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MAY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kinyanjui for the Appellant

Muthuri HB Njoki for Respondent

Court Assistants – Phyllis & Oliver