



Ng'ang'a & 2 others v Wango (Suing as the Administrator of the Estate the Late Ishmael Wango) (Appeal E003 of 2023) [2024] KEELC 5830 (KLR) (6 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
APPEAL E003 OF 2023
BM EBOSO, J
AUGUST 6, 2024**

BETWEEN

**ANN WANGUI NG'ANG'A 1ST APPELLANT
MOSES NJOROGE MBUCIRI (BOTH SUED PERSONALLY AND ALSO
AS THE ADMINISTRATORS OF THE ESTATE OF LEONARD CHEGE
(DECEASED) 2ND APPELLANT
ANN WANGARE KINYUGO 3RD APPELLANT**

AND

**PERPETUA WAMBUI WANGO RESPONDENT
SUING AS THE ADMINISTRATOR OF THE ESTATE THE LATE ISHMAEL
WANGO**

((Being an Appeal against the Judgment of Hon M. Kinyanjui, Principal Magistrate, delivered on 20/12/2022 in Kiambu Chief Magistrate Court MCL & E Case No. 335 of 2017))

JUDGMENT

1. This appeal challenges the Judgment rendered on 20/12/2022 by the Kiambu Chief Magistrate Court [Hon M Kinyanjui, Principal Magistrate] at Kiambu in Kiambu CMC MCL & E Case No 335 of 2017. Perpetua Wambui Wango [the respondent] was the plaintiff in the said suit. She initiated the suit in her capacity as the Administrator of the estate of the late Ishmael Wango. Ann Wangui Ng'ang'a [1st appellant] and Moses Njoroge Mbuciri [2nd appellant] were the 1st and 2nd defendants respectively, and were sued both personally and also as Administrators of the estate of the late Leonard Chege. Anne Wangare Kinyugo [the 3rd appellant] was the 3rd defendant.
2. The dispute in the trial court revolved around the question of ownership of land parcel number Dagoretti/Thogoto/T.88 measuring approximately 0.21 of an acre [referred to in this Judgment as



- “the suit property” or “the suit land”]. In 1968, the land was registered in the name of the late Leonard Chege to hold it as a trustee. The registration did not, however, identify the beneficiaries of the trust. The late Ishmael Wango caused a caution to be registered against the title in 1971, alleging the interest of a purchaser.
3. Leonard Chege died in 1994. Eighteen (18) years later, his son [the 1st appellant] and his daughter [the 2nd appellant] initiated Kikuyu SPMC Succession Cause No 248 of 2016 in which they identified the whole of the suit property as the only asset constituting the assets of the deceased. They procured an order from the succession court vacating the caution. They also procured a Certificate of Confirmation of Grant distributing the suit property as the free asset of the deceased and vesting it in the two appellants. Subsequent to that, on 7/7/2017, during the subsistence of an interpartes interim preservative court order issued by the Kiambu Chief Magistrate Court [Hon J Kituku], the 1st and 2nd appellants caused the suit property to be transferred to the 3rd appellant.
 4. One of the key issues that fell for determination by the trial court was whether the late Leonard Chege and his estate held the title to the suit land in trust for the late Ishmael Wango. The trial court found in the affirmative and proceeded to cancel the registrations that had been effected in 2017. Further, the trial court decreed the Land Registrar to register the respondent as the proprietor of the suit property.
 5. Invariably, one of the key issues that fall for determination in this appeal is whether the late Leonard Chege and his estate held the title to the suit property in trust for Ishmael Wango. Before I analyse and dispose all the issues that fall for determination in the appeal, I will briefly outline: (i) the background to the appeal; (ii) the grounds of appeal; and (ii) the parties’ respective submissions in the appeal.

Background

6. The suit in the lower court was initiated by the respondent [in her capacity as the Administrator of the estate of the late Ishmael Wango] through a plaint dated 1/7/2017. The plaint was amended on 21/8/2017. She sought the following reliefs against the appellants:
 - (i) a declaration that she was the rightful owner of the suit property;
 - (ii) in the alternative, a declaration that the suit property belongs to the estate of the late Rev Ishmael Wango and was held in trust for him by the late Leonard Chege;
 - (iii) an injunctive order restraining the appellant against occupying, trespassing on, developing or interfering with the suit property;
 - (iv) a declaration that the appellants’ titles to the suit property were null and void and of no legal effect;
 - (v) an order cancelling the impugned registrations and decreeing the Land Registrar to register the respondent as the legal owner of the suit property;
 - (vi) an eviction order; and
 - (vii) costs of the suit.
7. The case of the respondent was that the late Leonard Chege and the late Mbugiri Waruingi were siblings and were cousins to her late father, Rev Ishmael Wango. She contended that the late Leonard Chege held the suit property in trust for his brother, Mbugiri Waruingi. It was her case that in the 1960s, her late father, Rev Ishmael Wango, purchased the suit property from the late Mbugiri Waruingi and upon paying purchase price in full, he was given the land.



8. The respondent contended that in 1969, the late Leonard Chege executed an instrument acknowledging the trustship between him and the late Mbuciri Waruingi and also acknowledging assignment of the late Mbuciri Waruingi's interest in the suit property to Rev Ishmael Wango through sale. She added that, pursuant to the instrument, the late Leonard Chege undertook to transfer the land to the beneficiary.
9. It was her case that despite repeated requests, the late Leonard Chege failed to transfer the land to Rev Ishmael Wango. This prompted Rev Ishmael Wango to file RMCC No 4578 of 1969 against Leonard Chege in which the court decreed the latter to transfer the suit land to Rev Wango upon him depositing Kshs 760 in court, a condition which Rev Wango complied with. It was her case that both Rev Wango and the late Chege passed on before completing the registration of the land in the name of Rev Wango.
10. The respondent contended that on 12/5/2017, the appellants fraudulently obtained a title deed to the suit land in their name after unilaterally lifting the caution which had been placed against the title by the late Rev Ishmael Wango on 21/10/1971. The respondent also claimed ownership of the suit land by virtue of the provisions of Sections 7 and 18 of the Limitations of Actions Act [adverse possession], contending that had been in open adverse possession of the suit land for a period exceeding twelve (12) years since 1969.
11. The 1st and 2nd appellants entered appearance in the suit and filed a defence dated 4/9/2017. They amended the defence on 19/3/2018. Their case was that their father, Leonard Chege (deceased), was the registered proprietor and the absolute owner of the suit land at the time of his death. They contended that they were aware that there had been an attempt to purchase the suit land by the late Rev Ishmael Wango but payments were never made and thus no transfer was ever effected. They further contended that they filed succession proceedings relating to the estate of the late Leonard Chege (deceased) and upon obtaining a certificate of confirmation of grant, they sold the suit land to the 3rd appellant.
12. The 3rd appellant entered appearance and filed a statement of defence dated 16/3/2018. Her case was that she acquired the suit land from the 1st and 2nd appellants upon entering into a sale agreement and paying the agreed consideration. The 3rd appellant contended that she only became aware that the suit land was the subject of a court case when she attempted to fence it and was informed by the local Administration Police that a lady by the name Prof Mugenda was in possession of a court order stopping anyone from accessing the suit land. She was given a copy of the said court order.
13. Upon conclusion of trial, and upon receiving submissions from the parties, the trial court pronounced itself as follows:

“My conclusion from my analysis of all the issues in dispute herein is that a trust has clearly been established by the plaintiff as existing in the suit title number Dagoretti/Thogoto/T.88. I do make the following orders:

- i. A declaration that the said parcel of land known as title number Dagoretti/Thogoto/T.88 belongs to the estate of the late Reverend Ismael Wango which was being held in trust for him by Leonard Chege (deceased).
- ii. An injunctive order restraining the defendant's by themselves their agents, representatives and servants from occupying, trespassing developing or in any way interfering with the plaintiffs or her deceased's fathers rights to the said property.



- iii. A declaration that the defendant's title to the suit property are null and void and of no legal effect.
- iv. An order directed to the Land Registrar to effect cancellation of the title document issued to the 1st and 2nd defendants in respect of the suit property on 12/5/2017 and cancellation of the illegal transfer of the suit property by the 1st and 2nd defendants to the 3rd defendant effected on 7/7/2017 and an order directing the Land Registrar to register the plaintiff as the legal owner of parcel of land known as title number Dagoretti/Thogoto/T.88.
- v. Eviction of the defendants from the parcel of land known as title number Dagoretti/Thogoto/T.88.
- vi. Each party will bear their own costs.

Appeal

14. Aggrieved by the Judgment of the lower court, the appellants brought this appeal, advancing the following nine (9) verbatim grounds:
 1. That the learned trial magistrate erred in law and in fact in failing to take into consideration the appellants' submission as she deliberately failed to render herself on the issues raised by the appellants in their written submissions.
 2. That the learned trial magistrate erred in law and fact by holding that a trust had been created in favour of the respondent herein as a result of a land sale agreement notwithstanding that the said agreement was not in writing and or availed in court.
 3. That the learned trial magistrate erred in law and fact by failing to recognize that there was no privity [sic] of contract for sale of land between the appellants and the respondent herein.
 4. That the learned trial magistrate erred in law and fact in granting an order for cancellation of the title document in respect of parcel No. L.R Dagoretti/Thogoto/T.88 notwithstanding that the said land is registered in the name of the 3rd appellant who was an innocent purchaser for value without notice.
 5. That the learned trial magistrate erred in law and fact in issuing a permanent injunction restraining the appellants from selling, disposing of and/or transferring the subject parcel of land.
 6. That the learned magistrate erred in law and fact and misdirected herself on the law and applicable case law for ordering an eviction against the appellants herein.
 7. That the learned trial magistrate erred in law and in fact in failing to consider all the issues in controversy placed before her by the appellants.
 8. That the learned trial magistrate erred in law and in fact in finding in favor of the respondent contrary to the evidence on record.
9. That the learned trial magistrate erred in law and in fact in disregarding the appellant's evidence thus arriving at a wrong judgment.
15. The appellants urged this Court to:
 - (i) allow the appeal in its entirety;



- (ii) vary, quash and/or set aside the Judgment and Orders issued by the Learned Magistrate on 20/12/2022;
- (iii) condemn the respondent to pay costs of this appeal and the appellants' costs in the lower court; and
- (iv) grant any other relief it may deem fit.

Appellants' Submissions

16. The appeal was canvassed through written submissions dated 2/10/2023 and supplementary submissions dated 5/2/2024, both filed by M/s Mbuthia Kinyanjui & Company Advocates. Counsel for the appellants identified the following as the issues that fell for determination in the appeal:
- (i) Whether the learned trial magistrate erred in law and in fact by holding that a trust had been created in favour of the respondent;
 - (ii) Whether the learned trial magistrate erred in law and in fact by failing to recognize that there was no privity of contract for sale of land between the appellants and the respondent;
 - (iii) Whether the learned trial magistrate erred in law and in fact in granting an order of cancellation of title document in respect of Parcel No. L.R Dagoretti/Thogoto/T.88;
 - (iv) Whether the trial court erred in fact and in law in granting permanent injunction and eviction orders;
 - (v) Whether the 1st and 2nd appellants were in contempt of court order at the time they transferred the suit property to the 3rd appellant; and
 - (vi) Whether Leonard Chege Waruingi is the same as Leonard Chege.
17. On whether the learned trial magistrate erred in law and in fact by holding that a trust had been created in favour of the respondent, counsel for the appellants submitted that a trust is a fiduciary relationship where a settlor gives the trustee the right to hold the property for the benefit of a beneficiary. Counsel further submitted that the registration of a trust therefore required the name of the trust, the beneficiary and the description of the details of the trustee. Counsel added that the trust document produced as an exhibit during trial in the lower court fell short of revealing the identity of the settlor and failed to specify who the intended beneficiary was. It was the position of counsel that the respondent failed to establish existence of a trust in favour of the late Rev Ishmael Wango.
18. On whether the learned trial magistrate erred in law and in fact by failing to recognize that there was no privity of contract for sale of land between the appellants and the respondent, counsel submitted that under the doctrine of privity of contract, a contract cannot confer rights or impose obligations on any other person other than the parties to the contract. Counsel referred to the proceedings at the trial court and submitted that the oral testimony presented during trial unequivocally demonstrated that the respondent did not personally engage in a land sale agreement with any of the appellants. Counsel faulted the respondent for failing to produce evidence to support her assertion that her deceased father, Rev. Ishmael Wango, and the late Mbuciri Waruingi entered into a land sale agreement. Counsel relied on the decision in the case of *Agricultural Finance Corporation v Lendetia Ltd* in submitting that a contract cannot be enforced by or against a third party.
19. Counsel submitted that no evidence was tendered in the lower court or in the appeal to show that the late Rev Ishmael Wango complied with the court order directing him to pay Kshs 750.00 in RMCC No. 4578 of 1969. Counsel urged the Court to comprehensively examine the evidence presented and



- the proceedings in the lower court and arrive at a determination that there was no privity of contract between the appellants and the respondent.
20. On whether the learned trial magistrate erred in law and fact in granting an order of cancellation of the title document in respect of parcel No. L.R Dagoretti/Thogoto/T.88, counsel submitted that the respondent failed to produce the sale agreement between the late Rev Ishmael Wango and Leonard Chege (deceased) to show that he indeed purchased the suit land. Counsel further submitted that the respondent's list of documents dated 12/7/2017, 21/8/2017 and 8/4/2019 did not contain the consent of the Land Control Board; evidence of payment of purchase price for the suit land; and the minutes of the meetings the respondent stated that she had attended to discuss issues relating to the suit land. Counsel relied on Section 3(3) of the [Law of Contract Act](#) and Section 38 of the [Land Act](#) in submitting that the trial court was deprived of jurisdiction to decide in favour of a party who was not in compliance with the provisions of the [Law of Contract Act](#) in relation to a contract for disposition of an interest in land.
 21. Counsel faulted the respondent for failing to produce evidence to support the allegation that the appellant acquired title to the suit property illegally and fraudulently. Counsel relied on Sections 107, 109 and 112 of the [Evidence Act](#) in support of his submission. Counsel contended that the only piece of evidence that the respondent relied on as proof of ownership of the suit land was the green card produced as exhibit 7 in the lower court. Counsel contended that the said green card did not capture the name of the late Rev Ishmael Wango as the proprietor, adding that it captured the name of Leonard Chege (deceased) as proprietor and trustee.
 22. Counsel submitted that the 3rd appellant exercised due diligence and confirmed that indeed the 1st and 2nd appellants were the registered owners of the suit property. Counsel further submitted that the Land Registrar testified during trial at the lower court that there was nothing on the green card preventing the transfer to the 3rd appellant and that the transfer was above board. Counsel faulted the lower court for failing to scrutinize the evidence tendered by the appellant proving that indeed the 3rd appellant was an innocent purchaser for value without notice.
 23. On whether the trial court erred in fact and in law in granting permanent injunction and eviction orders, counsel submitted that it was clear from the evidence produced at the lower court that the 1st and 2nd appellants were the true owners of the suit land and that the 3rd appellant was the current and absolute owner of the land. Counsel added that an order of permanent injunction could not therefore issue against the true owner or title holder in favour of a person whose goal was to acquire the suit land through an unlawful, wrongful and an unprocedural means.
 24. On the question of eviction, counsel urged the Court to discharge the eviction order issued by the lower court in its Judgment, contending that it was issued in violation of Article 40 (1) of [the Constitution](#) of Kenya 2010 which guarantees and protects the right to acquire and own property.
 25. On whether the 1st and 2nd appellants were in contempt of court orders at the time of transferring the suit property to the 3rd appellant, counsel submitted that the respondent first filed Kiambu CMC E & L Case No. 265 of 2017 against the 1st and 2nd appellants as a beneficial owner of the suit land and as the daughter of the late Rev. Ishmael Wango. Counsel further submitted that at the time of filing the said suit, the respondent was not the legal representative nor the administrator of the estate of the late Rev Ishmael Wango (deceased) hence she lacked the locus standi to sue on behalf of the deceased.
 26. Counsel relied on the decisions in the cases of Alfred Njau v City Council of Nairobi [1983] KLR 625 and Julian Adoyo Ongunga v Francis Kiberenge Abano Migori: Civil Appeal No. 119 of 2015 in submitting that where there is no locus standi to sue, the court lacks jurisdiction to entertain the suit. Counsel contended that at the time of filing the initial suit, the respondent lacked locus standi to file



the suit on behalf of the estate of Rev. Ishmael Wango (deceased) hence the issuance and the subsequent extension of the injunctive orders dated 29/5/2017 was null and void. Counsel further contended that the 1st and 2nd appellants were therefore entitled to disregard or disobey the said invalid orders without the danger of being cited for contempt. Counsel submitted that the 1st and 2nd appellant were not in contempt of the injunctive orders given that the transfer was effected on 7/7/2017 while the valid court order was issued on 12/7/2017.

27. On whether Leonard Chege Waruingi was the same as Leonard Chege, counsel submitted that the 1st and 2nd appellants produced the identity card of Leonard Chege during trial at the lower court to show that Leonard Chege and Leonard Chege Waruingi referred to the same person. Counsel added that the respondent neither raised any objection during trial nor did she cross-examine the appellants on the said identification document. Counsel contended that a Chief's letter which was used in Succession Cause No. 248 of 2016 also referred to Leonard Chege Waruingi and Leonard Chege as the same person. Counsel urged the Court to allow the appeal and set aside the Judgment delivered on 20/12/2022.

Respondent's Submissions

28. The appeal was opposed through written submissions dated 15/8/2023 and supplementary submissions dated 26/9/2023, filed by M/s Ngonyo Munyua & Company Advocates. Counsel for the respondent submitted that the Judgment of the lower court was appropriate and ought not be set aside because the 1st and 2nd appellants were in contempt of a court order issued in Civil Case No. 265 of 2017 on 29/5/2017 when they transferred the suit land to the 3rd appellant on 7/7/2017. Counsel contended that the court record showed that the appellants' counsel was present in court on 5/7/2017 when the injunctive order issued on 29/5/2017 was further extended to 12/7/2017, hence the 1st and 2nd appellants were aware of the existence of the said court order.
29. Counsel submitted that the late Leonard Chege appeared in the land register and in the title as a trustee, hence he did not have any absolute proprietary rights to vest in the 1st and 2nd appellants, adding that, similarly, the duo in turn did not have any interest capable of being transferred to the 3rd appellant. Counsel further submitted that the transfer to the 3rd appellant was null and void.
30. Counsel implored the Court to note that the searches produced in the lower court by the 1st and 2nd appellants did not disclose that Leonard Chege (deceased) held the suit land as a trustee. Counsel contended that the said searches were intended to mislead the lower court into believing that Leonard Chege (deceased) was the absolute owner of the suit land. Counsel further contended that in the application for Confirmation of Grant dated 8/8/2016 in Kikuyu SPMC Succession Cause No 248 of 2016, the 1st and 2nd appellants annexed a search dated 27/7/2016 that did not disclose that Leonard Chege (deceased) held the suit land as a trustee. Counsel added that the 1st and 2nd appellants deliberately concealed the fact of trusteeship from the Succession Court. Counsel added that the evidence of trusteeship of Leonard Chege (deceased) adduced by the respondent at the subordinate court was overwhelming and indisputable.
31. On whether Leonard Chege is the same as Leonard Chege Waruingi (deceased), counsel submitted that the suit land was registered in the name of Leonard Chege and the declaration dated 11/8/1969 is also signed by Leonard Chege. Counsel further submitted that the 1st and 2nd appellants referred to Leonard Chege Waruingi in Succession Cause No. 248 of 2016 and in the Grant that was subsequently issued. Counsel contended that the suit land ought not to have been transferred to the 1st and 2nd appellants on the basis of a Grant that had been issued in the Matter of the Estate of Leonard Chege Waruingi (deceased) given that the name did not conform to the name on the title to the suit land.



32. Counsel contended that the 3rd appellant failed to prove that she was an innocent purchaser for value given that the transfer from the 1st and 2nd appellants to her was in contempt of the court order issued on 29/5/2019 in Kiambu CMCC No 256 of 2017. Counsel added that the sale agreement with respect to the transfer of the suit land to the appellant was undated; the attestation part did not state the date of attestation; and there was no evidence that any consideration was paid. Counsel submitted that the appellants did not produce any transfer documents or any consent from the Land Control Board or spousal consent with respect to the said transaction.
33. Counsel submitted that the respondent was in adverse possession of the suit land given that she had been in occupation of the suit land since 1965. Counsel added that the respondent's occupation was only interrupted in 1981 by one Moses Njoroge Mbuciri who had invaded the suit land to cut some trees. Counsel added that there was no further interruption by any person after that until the time the suit at the lower court was filed. Counsel relied on the decision in the case of William Ngethe Waweru & 13 Others v Kanyamwi Trading Company Limited [2020] eKLR to submit that the lower court had the jurisdiction to hear and determine the issue of adverse possession. In conclusion, counsel urged the Court to dismiss the appeal with costs.

Analysis and Determination

34. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the legal frameworks and the jurisprudence relevant to the issues that fall for determination in the appeal.
35. Based on the grounds of appeal and the submissions that were tendered in this appeal, the following are the key issues that fall for determination in the appeal:
 - (i) Whether the late Leonard Chege and his estate held the title to the suit land in trust for the late Ishmael Wango;
 - (ii) Whether the suit land formed part of the free assets of the estate of the late Leonard Chege;
 - (iii) Whether, in the alternative, the estate of the late Rev Wango acquired a crystalized title to the suit land under the doctrine of adverse possession;
 - (iv) Whether the 1st and 2nd appellants passed a valid title to the 3rd appellant;
 - (v) What order should be made in relation to costs of this appeal. I will dispose the above issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
36. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



37. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

38. The first issue is whether the late Leonard Chege and his estate held the suit land in trust for the late Rev Ishmael Wango. The second issue is whether the suit land formed part of the free assets of the estate of the late Leonard Chege. The two issues are intertwined. They will therefore be discussed and disposed together.

39. The Land Registrar appeared before the trial court as a witness twice. He tendered the land register relating to the suit land. It is clear from the evidence of the Land Registrar, from the onset, that the late Leonard Chege was registered not as an absolute proprietor but as a trustee of the suit land. The only missing detail was the identity of the beneficiary of the trust.

40. Moses Njoroge Mbuciri testified as DW3. His verbatim testimony in relation to the above registration reads as follows.

“Exhibit No. 5 entry No. 2, 3.10.68 Leonard Chege – it indicates trustee because he was the eldest.”

41. Twice, DW2 stated that Leonard Chege was registered as trustee because he was the eldest son. It does clearly emerge that, during trial, evidence was tendered showing that the late Leonard Chege held the suit land in trust for his sibling, Mbuciri Waruingi. Evidence was also tendered indicating that Mbuciri Waruingi who was the beneficiary under the trust wholly sold his interest in the suit land to the late Rev Ishmael Wango. PW1 led evidence establishing the trust. Among the documents procured by PW1 was an acknowledgement dated 11/8/1969 signed by Leonard Chege. The acknowledgement reads as follows:

“I LEONARD CHEGE of Ngong in Kenya hereby declare that land parcel Dagoretti/Thogoto/T.88 now registered under my name and which Mbuciri Waruingi has sold to Rev. Ishmael Wango does not in fact belong to me but belongs to the said Mbuciri Waruingi and further declare that I am ready at all times to transfer the said land parcel to the said Mbuciri Waruingi or to such other person or persons as the said Mbuciri Waruingi may direct me to transfer to.

DATED this 11th day of August 1969.

SIGNED by the said

LEONARD CHEGE SIGNED

In the presence of :

SIGNED

1.MOSES CHEGE

SIGNED

2.REV. ISMAIL WANGO



SIGNED

3.PERPETUA WAMBUI

SIGNED

4.EDWARD KAGIRI

ADVOCATE

BOX 7122

NAIROBI”

42. The land register and the above duly executed acknowledgement are not the only documentary evidence that was tendered to establish trustship. The respondent tendered a letter dated 4/2/1983 from M/s Waruhiu & Muite Advocate to the Officer in Charge of Kikuyu Police Station. A perusal of the letter indicates that, in an attempt to end the trust, the Rev Wango sued the late Leonard Chege and obtained an order requiring the latter to convey the land to the former. It is confirmed in the said letter that Rev Ishmael Wango deposited in court the sum of Kshs. 760/- which he was required to deposit. The late Leonard Chege did not, however, end the trust.
43. In the circumstances, it is clear that the totality of the evidence that was placed before the trial Court indicated that, from the onset in 1968, the late Leonard Chege held the suit land as a trustee, not as an absolute proprietor. Secondly, the initial beneficiary under the trust was the late Leonard Chege’s brother, Mbuciri Waruingi. Thirdly, the said beneficiary [the late Mbuciri Waruingi] sold his interest in the land to the late Rev Ishmail Wango. Further, the late Leonard Chege was made aware of, and acknowledged in writing, the fact that Mbuciri Waruingi had sold his interest in the land to the late Rev Ishmael Wango. Fifth, the Resident Magistrate Court affirmed the trusteeship in RMCC No. 4579 of 1969 and decreed the late Leonard Chege to end the trust by conveying the land to the late Rev Ishmael Wango.
44. For the above reasons, this court finds and agrees with the trial court that the late Leonard Chege held the suit land in trust for the late Rev Ishmael Wango. It is the further finding of this court that the suit land did not form part of the free assets of the late Leonard Chege and was therefore not available for distribution under the *Law of Succession Act*. I now turn to the third issue.
45. Did the estate of the late Rev Ishmael Wango prove the alternative claim of a crystalized title under the doctrine of adverse possession? PW1 testified that the late Rev Ishmael Wango purchased the suit land from his cousin, Mbuciri Waruingi, with a view to settling her on the land because she had differed with her husband and she did not have a home. She testified that she had possession and used the land from 1965 till 2017. She added that when the 2nd appellant cut her trees in 1981, she moved to court and the court “awarded” her the land. On the part of the appellants, DW1 testified that they left the land many years back because they were many. He added that the structures on the land were done “7 years ago”. On the structure that was on the suit land, DW1 stated as follows:
- “Page 17 of consolidated bundle has a structure. It was built by Perpetua the plaintiff when we gave them space. It was a store. I usually go to the plot. Page 14 – It is the structures she built and the next buildings the plot she bought.”
46. From the above evidence, it does emerge that the estate of the late Rev Ishmael Wango has had possession of the suit land from the time he acquired it from the late Mbuciri Waruingi who was the original beneficial owner of the suit land. Although the trial court did not make a finding on the question of adverse possession, this court, as a first appellate court, is satisfied that the respondent



proved both the claim that was anchored on trust and the alternative claim that was anchored on adverse possession. That is my finding on the second issue.

47. Did the 1st and 2nd appellants pass a valid title to the 3rd appellant? The court has made a finding to the effect that the suit land was trust property and did not form part of the free assets of the late Leonard Chege. The 1st and 2nd appellants were aware of this fact because it was in the land register. They procured a search that concealed this important fact. They misled both the succession court and the 3rd appellant. They knew the suit property was not available for succession as part of the assets of the late Leonard Chege. Put differently, they knew they did not have a valid title to pass to the 3rd appellant. That is not the only illegality they engaged in.
48. On 29/5/2017, the Chief Magistrate Court at Kiambu issued a temporary injunctive order in Kiambu Chief Magistrate Court Civil Case No 265 of 2017 in the following terms:

“IT IS HEREBY ORDERED

1. That the application dated 29th May 2017 be and is hereby certified urgent.
2. That a temporary order of injunction be and is hereby issued restraining the defendants/respondents either by themselves, their servants, agents, representatives or workmen from trespassing, occupying or transferring or in any other way interfering with the applicant’s right over the parcel of land known as LR No Dagoretti/Thogoto/T.88 pending interpartes hearing on 14th June 2017.

J. KITUKU

PRINCIPAL MAGISTRATE”

49. On 14/6/2017, the above order was extended in the presence of counsel for the 1st and 2nd appellants in the following terms:

“IT IS HEREBY ORDERED

1. That the defendant is granted 7 days to put in written submissions on preliminary objection. Thereafter plaintiff granted 10 days to respond.
2. That mention be on 5/7/17.
3. That Interim Orders be extended”

50. On 5/7/2017, the order was extended in the presence of counsel for the 1st and 2nd appellants in the following terms:

“IT IS HEREBY ORDERED

1. That the applicant is granted 10 days to file submissions.
2. That mention to confirm filing of submissions be on 12/7/2017.
3. That interim orders be extended.”

51. It does emerge from the land register that on 7/7/2017, during the subsistence of the above court order, the two appellants caused the suit land to be transferred to the 3rd appellant. Clearly, that was an affront to the rule of law. If they had legal issues relating to the capacity in which the plaintiff in



the said suit had initiated the suit, the lawful thing to do was to abide by the court order and move the court to set it aside. They did not do that. They decided to engage in illegal conduct. Clearly, they cannot be said to have passed a valid title to the 3rd appellant through the above fraud and illegalities. That is the finding of the Court on the fourth issue.

52. Having examined the key issues that fell for determination in this appeal, the court finds that there is no merit in the appeal. The appeal is rejected/dismissed.
53. On costs, no proper basis has been laid to warrant a departure from the general principle in Section 27 of the *Civil Procedure Act*. Consequently, the appellants will bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the presence of:

Ms Odhiambo for the Appellants

Ms Micah holding brief for Mr Mbabu for the Respondent

Court Assistant: Elvis Hinga

