



REPUBLIC OF KENYA



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**Joel & 2 others v Mutula (Environment and Land Appeal 28 of 2023)
[2024] KEELC 7172 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 28 OF 2023
CA OCHIENG, J
OCTOBER 30, 2024**

BETWEEN

PETER WAMBUA JOEL 1ST APPELLANT

ANNAH NDUUME MULOVE 2ND APPELLANT

MARTIN MUNYAO MUTUNGA 3RD APPELLANT

AND

BENSON KYALO MUTULA RESPONDENT

(Being an Appeal from the Judgment of Mavoko Chief Magistrate's Court in ELC Case No. 4 of 2020 delivered on 25th May 2023 by Hon. Everlyne Olwande, (CM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 20th June, 2023, the Appellants appealed against the Judgment delivered by Hon. Everlyne Olwande, Chief Magistrate. The genesis of this Appeal is the Judgment in the Chief Magistrate's Court at Mavoko ELC No. 4 of 2020, Benson Kyalo Mutula vs. Peter Wambua Joel and 2 others by Hon. Everlyne Olwande, Chief Magistrate, delivered on 25 May 2023 where she entered Judgment in favour of the Plaintiff (Respondent).
2. The Appellants being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 20th June, 2023 which is based on the following grounds:-
 - a. That the learned trial Magistrate erred both in law and fact in finding that the Respondent had proved his case against the Appellants when the evidence tendered in support of the case was wanting.



- b. That the learned trial Magistrate erred both in law and fact in relying on purported agreements for sale that did not comply with the formal requirements set out in Section 3(3) of the *Law of Contract Act*.
- c. That the learned trial Magistrate erred both in law and fact by failing to appreciate the Appellants testimonies and disregarded it all together and decided the case against the weight of the evidence tendered thereby occasioning a tremendous miscarriage of justice.
- d. That the decision of the trial Magistrate was plainly wrong and biased against the Appellants.
- e. That the learned trial Magistrate failed to consider at all submissions and authorities by counsel for Appellants and failed to critically analyze the same and accord them due weight particularly on the issue whether the Respondent had entered into agreements for sale with the 1st and 2nd Appellants for a total of 9 acres of the suit property thereby occasioning a miscarriage of justice.
- f. That the learned trial Magistrate erred both in law and fact by holding that the doctrines of proprietary estoppel and constructive trust were applicable.
- g. That the learned trial Magistrate erred both in law and fact by making a finding which was not supported by relevant facts and evidence on record.
- h. That the learned trial Magistrate erred both in law and fact by creating a non-existence constructive/resultant trust in favor of the Respondent when circumstances did not dictate.
- i. That the learned trial Magistrate erred both in law and fact by totally disregarding the report by Machakos County Surveyor dated 22nd July 2021 and filed in court on 22nd July 2021 thereby reaching a wrong conclusion.
- j. That the learned trial Magistrate erred and misdirected herself in purporting to make contact for the parties and further ordering transfer of parcels of land which were not contracted for without regard to the rights of the 3rd Appellant.
- k. That the learned trial Magistrate erred both in law and in fact in making a finding that an overriding interest had been created over the 3rd Appellant's title numbers Mavoko Town Block 3/71349 and Mavoko Town Block 3/84015 due to alleged possession and occupation by the respondent.

IT IS PROPOSED to ask the Honorable Court FOR ORDERS THAT:-

1. The Appeal be allowed.
 2. The finding of the lower court and more specifically the Judgment of the lower court delivered by Honorable Everlyne Olwande, Chief Magistrate delivered on 25th May 2023 be set aside and substituted with an order for transfer to the Respondent of 4 acres being land parcel number Mavoko Town Block 3/84104.
 3. The Appellants be granted costs of Appeal.
 4. This Honorable Court be pleased to make such further and other orders as it may deem just in the circumstances of the case.
3. The Appeal was canvassed by way of written submissions.



Appellants' Submissions

4. The Appellants in their submissions analyzed the evidence presented in the lower court including the Judgment of the trial Magistrate. They contended that as a first appellate court, the court had a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court however had to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. They submitted that the Respondent did not produce in evidence any agreement for the purchase of the alleged 2 acres in 1993 and in the absence of any agreement, it cannot be said that there was any disposition of land in terms of Section 3(3) of the *Law of Contract Act*. Further, that agreement for sale and purchase of 3 acres by the Respondent on 1st November 1998 was admitted by the 1st and 2nd Appellants having been duly executed by the 1st and 2nd Appellants and attested accordingly although no evidence was tendered by the Respondent to prove that he paid the balance of the purchase price in the sum of Kshs. 20,000 as alleged. They argued that the Respondent alleged that the agreement for sale dated the 20th October 1999 was meant to consolidate the two(2) acres he allegedly bought in 1993 (which agreement got lost), the three (3) acres he bought in 1998 and three (3) acres he was buying in 1999 but the purported agreement did not make any reference to any previous agreement entered into by the parties and neither did it state that he was purchasing three (3) acres but instead it allegedly indicates purchase of Eight(8) acres. They insisted that as for the alleged agreement for sale or purchase of one (1) acre for the expansion of the Respondent's church ministry dated 18th June 2011, there was no indication he paid for it. To buttress their averments, they relied on the following decisions: Peter M. Kariuki v Attorney General [2014] eKLR; Ngui V Republic, (1984) Klr 729 and Susan Munyi V Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).

Respondent's Submissions

5. The Respondent in his submissions provided a background of the dispute herein, highlighted the proceedings and Judgment in the lower court. He contended that the 3rd Appellant's interest in the suit land is accordingly defeated as the 1st Appellant denied ever selling the property to him. He argued that he has been occupation of the suit land for decades and this is clearly decipherable even from the Appellants' and the witnesses very own testimonies in court. He insisted that the 3rd Appellant's purported occupation of the suit land was shaky and questionable as he admitted that he had not put any structures on the land. He submitted that he was entitled to the suit land by virtue of the doctrine of constructive trust and/or adverse possession in the alternative. Further, that the trial Court did not err in awarding him nine (9) acres of the suit land. He stated that there is no dispute that the 1st and 2nd Appellants intended to sell the suit property to him as admitted by the Appellants' various witnesses. Further, that there was some concession by the 1st and 2nd Appellants' that they received some form of consideration from him as the 1st Appellant in his written statement dated 10th December, 2020 even offered to refund him what he termed as "part payment". He reiterated that there was no consensus as to the exact date he took occupation of the suit land, but it was not in dispute that he had been occupying the said suit land since the 1990s and even developed including fenced off three parcels. He further argued that it was not in dispute that the 1st and 2nd Appellants offered to convey four (4) acres out of the disputed nine (9) acres to him vide the undertaking dated the 13th June, 2020. Further, that the four (4) acres was to be transferred unconditionally which is contrary to the 1st Appellant's court testimony where he alluded that the Respondent was to pay the balance of the purchase price. He also submitted that the doctrine of adverse possession could also be applied to crystallize his interest as by dint of the 1st Appellant's admission, it is apparent that he took possession of the suit land in the 1990s and asserted his rights thereon by living on the property and erecting structures thereon. He



stated that the Appeal is not merited. To support his arguments, he relied on the following decisions: *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123; *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR; *Charles Kangayia v Alfred Musavi & another* [2020] eKLR; *Peter Ndungu Njenga vs. Sophia Watiri Ndungu* (2000) eKLR; *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) and *Mtana Lewa v. Kahindi Ngala Mwangandi* (2005) eKLR.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivaling submissions, the following are the issues for determination:-
 - a. Whether the Respondent purchased various portions of the suit land from the Appellants.
 - b. Whether the Respondent has been in possession of the suit lands over a period of time and if an element of constructive trust arose.
 - c. Whether the 1st Appellant's title to portions of the suit land is valid.
 - d. Whether the Appeal is merited.

I will deal with the issues jointly

7. This being a first appeal, this court is expected to evaluate the evidence presented in the trial court without the benefit of having seen the witnesses and arrive at its own conclusion as stated in *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 where it was held that: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

As to whether the Respondent purchased some portions of land from the 1st and 2nd Appellants.

8. The Respondent claimed he purchased certain portions of land from the 1st and 2nd Appellants as follows: 2 acres in 1993, 3 acres in 1998, 3 acres in 1999 and one acre in 2011. In the Plaintiff dated the 27th November, 2020, the Respondent had sought for the following Orders against the Appellants:-
 - a. A declaration that the Plaintiff is the lawful and/or equitable owner of 9 acres of the property known as land parcel no. Mavoko Town Block 3/71348 and 71349 and/or the resultant subdivisions (formerly Mavoko Town Block 3/3143) situated at Athi River within Mavoko Sub County.
 - b. An order directing the 1st and 2nd Defendants to transfer the property known as land parcel No. Mavoko Town Block 3/71348 and 71349 and/or the resultant subdivisions (formerly Mavoko Town Block 3/3143) situated at Athi River within Mavoko Sub County to the Plaintiff.



- c. A declaration that the Plaintiff is entitled to 8 acres out of land parcel no Mavoko Town Block 3/71348 and 71349 and/or the resultant subdivisions (formerly Mavoko Town Block 3/3143) by dint of the doctrine of adverse possession.
 - d. A permanent injunction restraining the 1st and 2nd Defendants, their agents, servants and/or assigns from alienating, transferring and/or interfering the Plaintiff's interest and occupation in the properties known as Mavoko Town Block 3/71348 and 71349 (formerly Mavoko Town Block 3/3143) situated at Athi River within Mavoko Sub County.
 - e. Costs of this suit and interest thereon.
 - f. Any other or further relief this court may deem fit.
9. The Appellants who were the Defendants, in their Defence denied that the Respondent ever purchased any parcel of land from them. Further, they insisted that he was a trespasser. The trial Magistrate after analyzing the testimonies of the witnesses proceeded to enter Judgment in favour of the Respondent, which forms the fulcrum of this Appeal.
 10. During the hearing the Respondent produced various Sale Agreements to demonstrate that he purchased the disputed parcels land. DW1 who is the 2nd Appellant during cross-examination admitted that she knew Ngonyo who was the mother in law to the Respondent. Further, that they had indeed sold land to the Respondent who had not paid the final purchase price and she threatened to evict him. DW1 further confirmed that the Respondent had been living on the disputed land, sunk a bore hole and was cultivating it. She stated that they indeed measured out the land to the Respondent and recalled that she even sold the Respondent the land where there is a rock. However, DW2 in his testimony denied that they had agreed to give the Respondent four (4) acres of land, insisted that the documents held by the Respondent were fraudulent and disputed measuring out land to him. He admitted that they saw him build a house and drill a borehole but never stopped him. He was emphatic that the Respondent owed them Kshs. 20,000. As for DW1 her only complaint was that the Respondent had not completed payment of the purchase price but she failed to name the figure.
 11. The Appellants have faulted the trial Magistrate for relying on the Sale Agreements insisting that one of them contravened the provisions of Section 3(3) of the Law of Contract Act. However, upon perusal of the Agreements which were produced as exhibits, I note that even though the portion of land being purchased is not indicated therein, they were witnesses and the Respondent was put in possession of the said portions of land, by the 1st and 2nd Appellants.
 12. PW2 Ngonyo Mwecha Mutiso, who was the mother in law to the Respondent confirmed that she used to receive the purchase price and transmit it, to the 2nd Appellant who recorded it in a book. The 2nd Appellant who is mother to the 1st Appellant admitted selling some land and receiving purchase price from the Respondent. In her testimony as DW1, she admitted that she recorded the amounts received in a book but did not have the book in court. She testified that she only wanted the Respondent to finalize paying the purchase price. With this piece of evidence, the learned Magistrate found that there was indeed a sale of land, which I find is the true position.
 13. As to whether the Respondent has been in possession of the suit lands over a period of time and if an element of constructive trust arose. From the testimony of all the Respondent's witnesses, they confirmed that the Respondent had taken possession of the parcels of land he purchased, fenced them, constructed permanent structures thereon and has been cultivating them. The Appellants also admitted that the Respondent was in occupation of a portion of the disputed lands, drilled a borehole, was cultivating them and they had never attempted to evict him. The 1st Appellant however disputed



that the Respondent had purchased eight (8) acres of land. I note PW3 who was a village elder had testified that in the 1990s, he measured out the land to the Respondent. Further, that the Respondent had been in occupation of the land from 1994 and built permanent structures thereon. It was the Respondent's testimony that the 1st and 2nd Appellants after selling him land, allowed him to take possession but at the time of the purchase the title Mavoko Town/Block 3/3143 was in the name of the late father to the 1st Appellant. Further, that the said parcel of land was subdivided in 2018. However, after the subdivision, the 1st and 2nd Appellants, acquired their titles, sold a portion of land to the 3rd Appellant but declined to transfer the portions the Respondent had purchased to him. It was the Respondent's contention that he had registered a caution to protect his interests but the said caution was removed without his knowledge and later the 1st and 2nd Appellants transferred some portion of the resultant subdivisions to the 3rd Appellant when he was already on the suit land. The Respondent claimed he bought an extra one (1) acre where he put up a church. He admitted that he had not paid the balance of Kshs. 10,000 because the transfer of the land had not been effected to him, yet he was in possession. The learned Magistrate after considering this evidence, found that a constructive trust had been created since the Respondent had paid the purchase price, was already in possession of the suit properties, established his home and put up permanent structures thereon.

14. On constructive trust, the Court of Appeal in the case of Peter Mbiri Michuki Vs Samuel Mugo Michuki [2014] eKLR, stated thus:-

“34. In *Mwangi & Another vs Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights..... 35. The dicta in *Mwangi & Another Vs Mwangi*, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.... In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. Section 18 of the *Limitation of Actions Act* provides that subject to Section 20(1), the Act applies to equitable interests in land ... and accordingly a right to action to recover the land ... accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. 36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and taken possession acquired an equitable beneficial interest in the suit property.”

15. Further, the Court of Appeal in the case of *Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & 5 Others* [2015] eKLR, while dealing with the issue of trust held thus:-

“Dealing with the first issue, according to the Black's Law Dictionary, 9th Edition; a trust is defined as: “1. 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).” Under the *Trustee Act*, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust



property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). 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 para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment... This leaves us with resulting trusts; upon which the appellants had laid their claim. 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 (see Black's Law Dictionary) (supra). 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)....”

16. Based on my analysis above while associating myself with the decisions cited, I find that an element of constructive trust was indeed created as there was intention of the parties wherein the 1st and 2nd Appellants, received the purchase price, put the Respondent in possession of the portions of land purchased after measuring it out. Further, that despite constructing permanent structures, drilling a borehole and cultivating the disputed lands, the 1st and 2nd Appellant had never attempted to evict him. I opine that since it is the 1st and 2nd Appellants who were the owners of the suit properties, it was their responsibility to effect the transfer to the Respondent, which they declined, even though one of the Appellant was even an Administrator of the deceased estate.
17. Since the Respondent had indeed been in possession of the eight (8) acres of land from the 1990s and the one acre where the church is from 2011, noting that the never sought to evict him nor blocked him from developing the suit properties, it is my considered view that the Respondent demonstrated through evidence that he had performed all the terms of the contract (the three Sale Agreements which were later condensed into one) except for payment of the balance of Kshs. 10,000 and it is actually the 1st and 2nd Appellants who reneged on the terms of the Agreements, after concluding the succession proceedings.
18. It emerged that there was a negotiation after a meeting with the DCI, wherein the 1st and 2nd Appellants sought to transfer a lesser acreage than the one purchased. To my mind, there was an element of bad faith on their part.



19. It is against the foregoing while anchoring my determination on the principles enshrined in Articles 2, 4 and 10 of *the Constitution* in respect to social justice and equity, I find that the Respondent as Plaintiff in the lower court was indeed entitled to orders as sought in the Plaint. In the circumstances, I find that the title acquired by the 3rd Appellant is not indefeasible but subject to the overriding interest as envisaged under Section 28 of the *Land Registration Act* as he purchased land which was occupied by a previous purchaser.
20. I hence find that the learned trial Magistrate did not err in law and fact in finding that the Respondent had proved his case against the Appellants. I find that the learned trial Magistrate was correct in relying on agreements for sale as they were witnessed and executed by the 1st and 2nd Appellants. I find that the learned Magistrate appreciated the evidence on record that confirmed the intention of the parties and there was no miscarriage of justice as claimed by the Appellants. Since the Respondent had been in possession of the suit properties and developed them, I opine that the learned trial Magistrate properly applied the doctrines of proprietary estoppel and constructive trust. It was further proper for her to order for the transfer of parcels of land to the Respondent. I hold that the learned Magistrate was correct in making a finding that an overriding interest had been created over the 3rd Appellant's titles being Mavoko Town Block 3/71349 and Mavoko Town Block 3/84015 respectively, due to possession and occupation by the Respondent.
21. In the circumstances, I find this Appeal unmerited and will dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

King'oo for Appellant

Omari for Respondent

Court Assistant – Simon

