



Karangi (Suing as the Administrator of the Estate of the Late L.T Col (Rtd) James Karangi) v Mutiso & 3 others (Environment & Land Case 81 of 2010) [2024] KEELC 6972 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 81 OF 2010
CA OCHIENG, J
OCTOBER 22, 2024**

BETWEEN

RICHARD WANJOHI KARANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE L.T COL (RTD) JAMES KARANGI) PLAINTIFF

AND

NATHAN MUTISO 1ST DEFENDANT

PAUL NGEI MUSESAYA 2ND DEFENDANT

NZIOKI WAMBUA 3RD DEFENDANT

JOSEPH KATIKU NGUTI 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated the 3rd April, 2010 which was amended on 1st November, 2019, further amended on the 28th September, 2022, and re amended on 14th December, 2023, the Plaintiff seeks the following Orders against the Defendants:-
 - a. A declaration that Plaintiff has proprietary interests over 4 acres in respect to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions thereto, being LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413 by virtue of a constructive trust subsisting against the Defendants.
 - b. An Order that the Defendants do unconditionally transfer to the Plaintiff 4 acres to be exercised from LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413 and in default the Land Registrar Machakos be directed to issue a title deed for the said portion.



- c. An Order of this Honourable Court directing the Land Registrar Machakos to cause cancellation of title deed to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions thereto, being LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413.
 - d. Costs of this suit and other order this court deems fit to grant.
2. The 1st and 2nd Defendants filed their Statement of Defence dated the 27th July, 2018 where they denied various averments in the Plaint except the descriptive. They contended that the suit land belonged to their late father. Further, that they instituted succession proceedings towards administration of the Estate of their late father and they are now the legal owners of the said land. They denied knowledge of the sale of a portion of the suit land by their father, to the Plaintiff and contended that if the said sale indeed took place, the Plaintiff should prove it, after which they will be ready to transfer the land to him. They further denied refusing to transfer a portion of the suit land to the Plaintiff and argued that it is the Plaintiff who had refused to prove the sale. They further denied the receipt of a demand notice.
 3. The 3rd and 4th Defendants did not file their Statement of Defence.
 4. The matter proceeded for hearing where the Plaintiff called one (1) witness while the Defendants failed to attend court despite being served.

Evidence of the Plaintiff

5. PW1 in his testimony confirmed that his father the late Lt. Col (RTD) James N. Karangi entered into an Agreement dated the 30th August, 1992, with the 1st Defendant's late father Nzevela Mutiso Nzioka for the purchase of four (4) acres of land from L.R No. Mavoko Town Block 2/195. Further, that Nzevele Mutiso Nzioka (deceased) showed their late father the portion of land he had purchased and he took possession and reared livestock thereon.
6. It was his further testimony that LR No. Mavoko Town Block 2/195 was later subdivided into five parcels to wit: Mavoko Town Block 2/9830, 9831, 9832, 9833, 9834 and 9835 respectively. Further, that his father's land falls within Mavoko Town Block 2/9835 which is registered in the name of Nathan Mutiso and Paul Ngei Musesya. He explained that, to protect his interest, his late father sought an injunction including placing a caution on Mavoko Town Block 2/9835. Further, that his late father and the Defendants had an agreement wherein he was to lift the caution after which the Defendants were to transfer the suit land to him, but they failed to do so. The Plaintiff produced the following documents as exhibits: A set of Mutation Form duly filled, Caution dated the 5th November, 2012, Certificate of Official Search dated the 31st October, 2012, Consent Judgment dated 3rd May, 2013, Court Order issued on 27th August, 2013, Letter dated 29th May, 2019 and receipt, Copies of Green Card for LR No. Mavoko Town Block 2/9835, Copy of Plaint in Machakos CMCC No. 242 of 2014, Decree in Machakos CMCC No. 242 of 2014, Copy for Official Search for LR No. Mavoko Town Block 2/9835, Copy of Sale Agreement dated the 30th August, 1992 and Copy of acknowledgement of receipt of purchase price on various dates.

Submissions

7. The Plaintiff in his submissions reiterated the facts as per his pleadings including the viva voce evidence and exhibits. He submitted that his claim revolves around the doctrine of constructive trust and relied on the Sale Agreement as well as the fact that they are in possession of the suit land. To buttress his averments, he relied on the following decisions: *Shah & 7 Others V Mombasa Bricks & Tiles Limited*



& 5 Others (2023) KESC 106 (KLR); Twalib Hatayan & Another V Said Sagggar Ahmed Al – Heidy & 5 Others (2015) eKLR; Hussey V Palmer (1972) 3 ALL ER and Pettkus V Becker (1980) 2 SCR 834.

8. The Defendants did not file any submissions.

Analysis and Determination

9. Upon consideration of the re amended Plaintiff, the 1st and 2nd Defendants Statement of Defence, testimony of the witness, exhibits and submissions, the following are the issues for determination:-

- a. Whether the Plaintiff has proprietary interests over four (4) acres in respect to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions emanating therefrom, by virtue of a constructive trust subsisting against the Defendants.
- b. Whether the Plaintiff is entitled to the orders as sought in the Plaintiff.

As to whether the Plaintiff has proprietary interests over four (4) acres in respect to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions emanating therefrom, by virtue of a constructive trust subsisting against the Defendants.

10. PW1 Richard Wanjohi Karangi testified that his late father Lt. Col (RTD) James N. Karangi entered into an Agreement of Sale dated the 30th August, 1992, with the 1st Defendant's late father Nzevela Mutiso Nzioka for the purchase of four (4) acres of land to be excised from LR number Mavoko Town Block 2/195. It was his testimony that their father was shown the portion of land he purchased by the vendor and proceeded to take possession and reared livestock thereon. The Plaintiff produced the Sale Agreement dated the 30th August, 1992 and Copy of acknowledgement of receipt of purchase price on various dates as exhibits. It was his further testimony that LR No. Mavoko Town Block 2/195 was later subdivided into five parcels to wit: Mavoko Town Block 2/9830, 9831, 9832, 9833, 9834 and 9835 respectively. He claimed his father's land falls within Mavoko Town Block 2/9835 which is registered in the name of Nathan Mutiso and Paul Ngei Musesya. He further produced copies of Mutation and Green Card to confirm this position.
11. I note the 1st and 2nd Defendants filed their Statement of Defence denying the Plaintiff's averments but failed to appear in court to support their allegations. In the case of Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007, Ali-Aroni, J favourable cited with approval the decision in Edward Muriga through *Stanley Muriga v Nathaniel D Schulter Civil Appeal No 23 of 1997*, where it was held that even if a party filed a Defence but failed to adduce evidence to support the assertions made therein, the evidence of the Plaintiff hence remained uncontroverted.
12. See also the decision in Nyamai (Suing as the representative of the Estate of Josiah Nyamai Musyemi - Deceased) v Mutiso & 3 others (Environment & Land Case 413 of 2017) [2023] KEELC 798 (KLR) (15 February 2023) (Judgment) (with dissent).
13. Since the Defendants failed to controvert the Plaintiff's averments and noting that the Plaintiff has been in possession of the suit land, and from the evidence before me, I find that there was indeed a valid sale.
14. PW1 explained that their late father attempted to safeguard his interests by registering a caution on the suit land but was convinced to remove it, by the Defendants to enable them effect transfer to him. However, despite their late father adhering to the terms of the Sale Agreement and also removing the caution, the 1st and 2nd Defendants declined to transfer the portion of the four (4) acres to him. I note there was no contrary evidence to dispute the Plaintiff's possession of the suit land from the 1990s. The Plaintiff contends that due to his being in possession of the land, a constructive trust arose and he is hence entitled to the suit land.



15. From this piece of evidence alone, I note there was intention of the vendor and purchaser that the completion of the Sale Agreement could be effected upon finalization of survey being undertaken which was the responsibility of the vendor or the 1st and 2nd Defendants, who are his legal representatives but they failed to effect the transfer. It is my considered view that there was an element of bad faith on the part of the 1st and 2nd Defendants who in their Defence sought for the Plaintiff to provide proof of sale.
16. 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.”
17. See also the case of Robert Kiptanui Kitur v Jackson Kiprotich Kitur [2022] eKLR.
18. Based on the facts as presented, I find that the Plaintiff had indeed been in possession of the four (4) acres of land from the time he purchased it. Further, that the 1st and 2nd Defendants were indeed in breach of the Sale Agreement dated 30th August, 1992. I opine that the Plaintiff demonstrated through evidence tendered that he performed his duties as per the said Sale Agreement and paid the purchase price as agreed and it is the 1st and 2nd Defendants’ who failed to effect transfer of the four (4) acres to be excised from the mother title to him, despite having taken out Letter of Administration Intestate in respect to the deceased vendor’s Estate. In my view, since the Plaintiff took possession of his four (4) acres as had been agreed and it is actually the deceased vendor who pointed out the said portion to him, an element of constructive trust was indeed created, which the 1st and 2nd Defendants cannot renege on.
19. It is against the foregoing while associating myself with the abovementioned decisions and relying on the principles enshrined in Articles 2, 4 and 10 of *the Constitution* in respect to social justice and equity, that I hold that since the 1st and 2nd Defendants late father received most of the purchase price, while the Plaintiff’s late father had taken possession of the suit land to safeguard his interest; with the 1st and 2nd Defendants having failed to tender evidence to controvert the Plaintiff’s averments, he is indeed entitled to the orders as sought in the Plaintiff.
20. On costs, since the Plaintiff is the inconvenienced party, he is entitled to costs of this suit.



21. In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and will enter Judgment in his favour and proceed to make the following orders:-
- a. A declaration be and is hereby issued that Plaintiff has proprietary interests over four (4) acres in respect to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions thereto, being LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413 by virtue of a constructive trust subsisting against the Defendants.
 - b. An Order be and is hereby issued that the Defendants do unconditionally transfer to the Plaintiff, four (4) acres to be excised from LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413 and in default the Land Registrar Machakos be directed to issue a title deed for the said portion.
 - c. An Order be and is hereby issued directing the Land Registrar Machakos to cause cancellation of title deed to LR No. Mavoko Town Block 2/9835 and/or the resultant subdivisions thereto, being LR No. Mavoko Town Block 2/18411 to LR No. Mavoko Town Block 2/18413.
 - d. The Plaintiff shall be responsible for payment of transfer fees including other incidentals.
 - e. Costs of this suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Maingi for Plaintiff

No appearance for Defendants

Court Assistant – Simon/Ashley

