



Gikandi & 2 others (Duly Appointed Officials of Hiuka Gikandi Women Group) v Wanjohi (Environmental and Land Originating Summons 1 of 2022) [2024] KEELC 13341 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13341 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2022
JO OLOLA, J
NOVEMBER 22, 2024
IN THE MATTER OF LR. 6326/14 MWEIGA (IR7494)
IN THE MATTER OF DETERMINATION OF TRUST

BETWEEN

VIRGINIA WANGECHI GIKANDI 1ST APPLICANT
LUCY WANJIKU KAGWI 2ND APPLICANT
TERESA WAMBUI MWANGI 3RD APPLICANT
DULY APPOINTED OFFICIALS OF HIUKA GIKANDI WOMEN GROUP

AND

STEPHEN MWANGI WANJOHI RESPONDENT

JUDGMENT

1. By the Originating Summons dated 25th March 2022, Virginia Wangechi Gikandi, Lucy Wanjiku Kagwi and Teresa Wambui Mwangi suing in their capacity as officials of Hiuka Gikandi Women Group (hereinafter “the Applicants”) pray for the following:-
 1. A declaration that the trust created in favour of the Applicants over LR. No. 6326/14 Mweiga (I.R 7494) vide the Court Order of 26/02/2002 made in Nairobi High Court Succession Cause No. 98 of 1993, has survived the subsequent subdivisions and change of proprietorship of the said land parcel;
 2. An order that the said trust be determined, with the Applicants being registered as owners of four (4) plots measuring 0.045 Ha each in LR. No. 6326/14 Mweiga (I.R.1494) or its subsequent subdivisions thereof;



3. An order authorizing the Deputy Registrar of the court to sign all documents on behalf of the Respondent in order to transfer the said four (4) plots to the Applicants; and
 4. That the costs be provided for.
2. The Originating Summons is supported by an Affidavit jointly sworn by the Applicants. It is the Applicants' case that when the Respondent and his family members were in the process of administering the estate of their father John Wanjohi Waithitu in Nairobi High Court Succession No. 98 of 1993, a creditor – Continental Credit Finance Limited protested against the confirmation of the grant until such a time that the debt owing from the estate was settled.
 3. The Applicants aver that in order to settle the debt, parties in the said Succession Cause agreed to sub-divide the said LR. No 6326/14 Mweiga into Plot Nos. 3 – 43 each measuring 0.045 Ha and to sell the same. Having learnt of the availability of the said plots, the Applicants acquired Plot Nos. 13, 14, 15 and 16 in the sub-division plan and paid the full purchase price thereof. The Applicants accuse the Respondent of harassing them with various court proceedings and interfering with their possession of the said four (4) plots.
 4. Stephen Mwangi Wanjohi (the Respondent) did not file any response to the Originating Summons nor did he testify at the trial herein.

The Applicants' Case

5. In support of their case, the Applicants called one witness at the trial.
6. PW1- Teresa Wambui Mwangi is the Applicants' treasurer. Relying on the Supporting Affidavit filed by the Applicants she told the court that they had bought the four (4) plots through a Court Order. She further told the court that even though they were issued with a Clearance Certificate, the Respondent as the Administrator of the Estate of John Wanjohi Waithitu who was the previous owner thereof had refused to process their titles and were threatening instead to relocate them elsewhere.

Analysis and Determination.

7. I have carefully perused and considered the Applicants' Originating Summons, the testimony of their sole witness and the evidence adduced before the court. I have similarly perused the submissions and authorities placed before me by the Learned Advocates representing the parties herein. The Respondent neither filed a response to the Originating Summons nor did he testify at the trial herein.
8. By their Originating Summons as filed herein the Applicants urge the court to declare that a trust was created in their favour over LR. No. 6326/14 Mweiga through the Court Order issued on 26th February 2002 in Nairobi High Court Succession Cause No. 98 of 1993. The Applicants further urge the court to declare that the said trust created as such did survive the subsequent sub-divisions and change of proprietorship of the concerned parcels of land.
9. It is the Applicants' prayer that the said trust be determined and that they be registered as the owners of some four (4) plots of land each measuring some 0.045 Ha comprised in the said LR. No. 6326/14 Mweiga or its subsequent sub-divisions.
10. In support of their case, the Applicants called their Treasurer Teresa Wambui Mwangi (PW1) who testified as to how their Hiuka Gikandi Women Group had come to purchase four (4) plots of land that were previously part of the land parcel known as LR. No. 6326/14 Mweiga registered in the name of John Wanjohi Waithitu.



11. It was the Applicants' case that following the death of the said John Wanjohi Waithitu, his family including the Respondent herein had initiated Nairobi High Court Succession Cause No. 98 of 1993 seeking to administer his estate. As it turned out, the deceased had left some outstanding debt with Continental Credit Finance Limited. When the said company learnt of the proceedings, it did file a protest in the Succession Cause urging the court not to confirm the grant until such a time that the outstanding debt was settled.
12. The Applicants told the court that it was then that the deceased's family agreed to sub-divide the suit property under a court guided process that would enable them to sell certain plots hived off the suit land to settle the debt. It was the Applicants' case that as a result, the suit property was sub-divided into a number of plots each measuring 0.045 Ha. Having learnt of the availability of the said plots, the Applicants acquired Plot Nos. 13, 14, 15 and 16 in the sub-division plan and paid the full purchase price therefor.
13. The Applicants told the court that after the conclusion of the Succession Cause, the Respondent who is the sole surviving administrator of the Estate of John Wanjohi Waithitu started frustrating them and had declined to process titles in the Applicants' name and had instead been filing cases in court to ensure the Applicants did not get their rightful share of the land.
14. As it turned out, these averments by the Applicants remained largely uncontroverted as the Respondent neither filed an Affidavit in Reply to the Originating Summons nor did he testify at the trial. In his submissions herein the Respondent asserts that this suit is res judicata as he had filed another suit being Nyeri CMCC No. 114 of 2018 against the Applicants. It is the Respondent's case that the earlier suit was determined on 29th March 2023 and the Trial Magistrate had already made a finding in favour of the Applicants in reference to their entitlement to the suit property.
15. The doctrine of res judicata is provided for under Section 7 of the *Civil Procedure Act* as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
16. I have looked at the pleadings filed in the said Nyeri CMCC No. 114 of 2018. That suit was filed by the Respondent herein seeking an order of injunction to restrain the Applicants herein from constructing houses on a parcel of land therein described as LR. No. 6326/35 and a declaration that the sale of the same or part thereof to the Applicants was illegal for noncompliance with the law and for want of consideration. The Respondent further sought an order of rescission of the sale of the said parcel of land.
17. In the absence of any testimony from the Respondent, it was unclear to me if indeed the said LR. No. 6326/35 was the same as the suit property described herein as LR. No. 6326/14. What was clear was that the court had not been asked to make any determination on the issue of trust. Having heard the dispute before her and in the Judgment delivered on 29th March 2023, the Hon. F. Muguongo SRM simply concluded as follows:-

“In view of the foregoing, what the Plaintiff has served this court is nothing but a sensational claim that is anchored on no evidence at all, and a claim that is totally dislodged by the evidence tendered by the defendant.



To answer the first issue framed herein, the court finds that the sale of part of the parcel of land LR No. 6326/35 to the defendant was legal and the sale transactions were fully completed as evidenced by the Clearance Certificate issued to the defendant by Nanga Central Marketing Services Limited. On this premise, the Plaintiff's claim lacks merit and it is hereby dismissed with costs."

18. Arising from the foregoing, it was evident that that court had not dealt with the issue of whether or not the Respondent herein holds the property described as LR. No. 6326/14 in trust for the Applicants and the issue of res judicata did not therefore arise.
19. In the matter before me, it was not disputed that the suit property formed part of the estate of the Respondent's father and that some 43 plots had been hived off the same to enable the Respondent and his then Co-Administrator to pay for the liabilities due to the estate. Having looked at the evidence produced herein, I had no doubt that the sale was done through an entity known as Nanga Central Marketing Services Ltd that received money from the Applicants and paid for the debt owed by the estate to Continental Credit Finance Ltd.
20. In considering the circumstances under which a trust is created in *Jutelabi African Adventure Limited & Another –vs- Christopher Michael Lockley* [2017] eKLR, the Court of Appeal did hold as follows:

"..... 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..... 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 Paragraph 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial for the trust will nonetheless be imposed by the law to the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment....

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 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 Paragraph 177). Therefore, unlike constructive trusts, courts will readily look at the 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 Paragraph 177 Supra).

21. In the matter before me, the Applicants have clearly demonstrated that they paid money to Nanga Central Marketing Services Ltd and that the said property Agent subsequently issued them with a Beacon Certificate on 29th August 2006 for Plot Nos. 13, 14, 15 and 16 as were to be excised from the suit property. The Estate of John Wanjohi Waithuti as administered by the Respondent was the beneficiary of the said payment and I was left in no doubt that title to the said plots of land were held by the Respondent in trust for the Applicants.



22. In the premises, I do find merit in the Originating Summons dated 25th March 2022 and hereby make the following orders:-

1. A declaration is hereby issued that the trust created in favour of the Applicants over LR. No. 6326/14 Mweiga (I.R. 7494) in Nairobi High Court Succession Cause No. 98 of 1993 has survived the subsequent subdivisions and change of proprietorship of the said parcel of land.
2. An order is hereby issued that the said trust be determined and that the Applicants be registered forthwith as the proprietors of the four (4) plots each measuring 0.045 Ha presently comprised in the said LR. No. 6326/14 Mweiga (I.R. 7494) or its subsequent subdivisions.
3. An order is hereby issued authorizing the Deputy Registrar of this court to execute all documents and instruments on behalf of the Respondent in order to transfer the said four (4) plots to the Applicants.
4. The Respondent shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 22ND DAY OF NOVEMBER, 2024.

In the presence of:

Ms. Lucy Mwai for the Applicants.

Mr. C.M. Kingori for the Respondent.

Court Assistant: Kendi.

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J. O. OLOLA

JUDGE

