



**Karuri v Wambui (Environment and Land Appeal E029 of 2023)
[2024] KEELC 13679 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E029 OF 2023
LN GACHERU, J
DECEMBER 10, 2024**

BETWEEN

MARY NJOKI KARURI APPELLANT

AND

FLORENCE WAMBUI RESPONDENT

(Being an Appeal against the Judgment delivered on 20th November 2023, by the Hon. MARTIN KINYUA MUTEGI (Mr.) in MCELC No. E013 of 2022 at KANGEMA Law Courts)

JUDGMENT

1. The Appellant herein Mary Njoki Karuri is a sister to the Respondent herein, Florence Wambui and are daughters of Harrison Thuku Kamau alias Thuku Kamau, the original registered owner of the suit land Loc.9/Kanyenyaini/1266.
2. The Appellant was the Plaintiff in Kangema MCELC NO. E013 of 2022, wherein she had sued the Respondent as the 1st Defendant in the said suit for various orders among them;
 - a. A declaration that Florence Wambui (1st Defendant) hold half of land parcel No. Loc 9 / Kanyenyaini/1266, in trust for the Plaintiff (Appellant herein), and
 - b. That the said trust be dissolved in respect of the suit land, and
 - c. That the 1st Defendant(Respondent) be ordered to sign all the relevant transfer documents for purposes of transfer of half of the suit land to the Plaintiff (Appellant herein).
3. In the said proceedings before the trial Court, the Plaintiff (now Appellant) claimed that land parcel No. LOC.9/Kanyenyaini/1266 (the suit property), which originally belonged to their father and now registered in the name of the 1st Defendant (Respondent), was subject to a trust wherein, the Appellant



is entitled to half of the said land while the remaining half should devolve to their deceased sister namely, Hellen Nyambura.

4. The Respondent herein as the 1st Defendant had denied the Plaintiff's(Appellant's) claim, and had averred and admitted existence of a trust over the suit land, and had urged the Court to order that the suit land be subdivided into three equal portions, as she was holding the suit land in trust for herself and her two other sisters.
5. After the viva voce hearing, the trial court entered a Judgment on 20th November 2023, wherein it determined that the Plaintiff (Appellant) failed to prove her case as against the 1st Defendant (Respondent), on the required standard of balance of probabilities, and dismissed the Plaintiff's suit with costs.
6. Being aggrieved by the said Judgement of the trial court, the Appellant herein Mary Njoki Karuri, vide a Memorandum of Appeal filed on 14th December 2023, and a Record of Appeal filed on 6th June 2024, which were premised under Order 42 Rule 1 of the Civil Procedure Rules, sought for the following Orders from this Court:
 - a. The appeal be allowed.
 - b. The Judgment delivered on 20th November 2023, be set aside with costs to the Appellant against the Respondent.
7. The instant Appeal is premised on the following four (4) grounds:
 1. That the trial court erred in law and in fact by delivering a factually defective Judgment that the Plaintiff had not proven its case against the defendants on a balance of probabilities.
 2. That the trial court erred in law and in fact by finding that the suit property held in trust should be divided into three portions.
 3. That the trial court erred in law and in fact by holding that the trustee, the Respondent herein had a beneficial interest in the trust property.
 4. That the trial court erred in law and in fact by aptly failing to consider the Plaintiff's written submissions against the principle of natural justice and fairness.
8. The Appeal was admitted under Section 79B of the *Civil Procedure Act*, and the Court directed that the said Appeal be canvassed by way of written submissions, which directions were compiled by the parties.

The Appellant's Submissions

9. The Appellant filed her written submissions through the Law Firm of Pharis & Co Advocates, and identified three (3) issues for determination as follows:
 - a. Whether this appeal should be allowed in favour of the Appellant?
 - b. Should the Judgment dated 20th November 2023, be set aside?
 - c. Should costs be awarded to the Appellant against the Respondent?
10. The Appellant relied on the definition of the term "trust" as set out under Section 2 of the *Trustees (Perpetual Succession) Act*, and in Black's Law Dictionary, 9th Edition. The Appellant also relied on the same Dictionary, for the definition of the term "Constructive Trust" and the holding of the Court



in the US Supreme Court case of *Harris Tr & Sav Nabk Vs Salomon Smith Barney Inc.* 530 US 238, 250-251, where the Court cited the holding in *Moore vs Crawford* 130 US 122, 128 (1889).

11. The Appellant also relied in the decision of the Court in the case of *Twalib Hatayan & Another Vs Said Saggat Ahmed Al-Heidy & 5 others* Civil Appeal No.51 of 2014 [2015] eKLR, and the following Biblical references: Proverbs 10:9; Proverbs 14:5; and, Zephaniah 3:13.
12. It was her further submissions that the Respondent used the title deed to the suit land as security in a case wherein her brother was facing a murder charge without the Appellant's knowledge and consent, thus violating the duty imposed upon the Respondent as trustee in respect of the suit property. The Appellant also submitted that upon discovery of the use of the title to the suit property as security in a criminal matter, she sought the appropriate relief in Court culminating in the decision of the High Court (Kimondo, J.) dated 14th March 2022, wherein, the accused was given 14 days to provide alternative security.
13. Further, that the Respondent being a trustee in relation to the suit land bears a fiduciary duty to serve the interests of the beneficiaries of the said trust, which duty entails refraining from competing with the beneficiary or developing interests adverse to those of the beneficiary as well as a duty of disclosure.
14. The Appellant argued that the trial Court misapprehended the meaning and nature of a "Constructive Trust". Reliance was placed in the Judgment of the Court in the case of *Njoroge Vs Njoroge & Another* [2012] eKLR, to underscore the proposition that allowing a trustee to also be a beneficiary is likely to compromise the trustee's duty to act in the best interests of the beneficiaries; hence, a trustee's claim to be a beneficiary is necessarily invalid.
15. Further, that from the proceedings before the trial Court, it was revealed that only the Appellant and her sister Hellen Nyambura, both of whom were unmarried, and their mother were allocated land by the father to the parties herein. The Appellant argued that the said gift of land was to the exclusion of her married sisters, who include the Respondent herein.
16. It was her further submissions that the Respondent was registered to hold the suit property only as a trustee, without having any share therein herself. Further, that the Grant in question clearly spelt out the mode of distribution of the assets belonging to the estate of their father, and the trial Court failed to interpret the express objects of the stated trust, as set out in the Grant. Reliance was sought in the reasoning of the Court in the case of *Susan Gacheri Mugambi Vs Maureen Florence Kagwiria & 2 Others* [2016] eKLR.
17. The Appellant further submitted that only the unmarried daughters were bequeathed land by their father, which category excludes the Respondent and which matter the trial Court disregarded. She also submitted that the intention of the settlor was for the Respondent to hold the suit land in trust for the Appellant and her other unmarried sister Hellen Nyambura.
18. For this submissions, reliance was sought in the decision of the Court in the case of *Re Estate of George M'Mboroki* [2008] eKLR, to buttress the argument that the Courts have given recognition to the principle that trustees cannot be beneficiaries as it would give rise to conflicts of interest, which is contrary to the trustee's fiduciary duties. Further, that the trial Court in awarding a portion of the suit property to the Respondent, compromised her position and duty as the trustee thereof.
19. That the Respondent contradicted herself during the trial as to who owned the suit land by stating during cross-examination that the property belonged their father; but, thereafter, changed her position under re-examination by stating that the suit land was given to the Appellant, and his three sisters by their mother as a gift. She described the Respondent as an incompetent witness, and that pursuant to the principle contained in the maxim "Nemo iudex in causa sua", the Respondent cannot be a trustee,



and beneficiary at the same time. The Court was urged to set aside the decision of the trial Court dated 20th November 2023.

20. On the question of costs, the Appellant submitted that she is entitled to costs of the Appeal, and she relied on the provisions of Section 27 of the *Civil Procedure Act* and the Judgment of the Court in the case of Republic V Rosemary Wairimu Munene, Ex-parte applicant V Ihururu Dairy Farmers Co-operative Society Ltd.

The Respondent's Submissions

21. The Respondent filed her written submissions dated 6th September 2024, through the Law Firm of Tim Kariuki & Co. Advocates, and submitted that the suit land originally belonged to the father of the parties herein namely Harrison Thuku Kamau Alias Thuku Kamau. That upon the demise of their father, his estate was distributed vide Nairobi High Court Succession Cause No.2594 of 2007, wherein the suit property was given to the deceased's three daughters namely, the Appellant, the Respondent and Hellen Nyambura (Deceased).
22. The Respondent reiterated the position that the suit property devolved to herself, the Appellant and Hellen Nyambura as a gift from their mother Rahab Wamaitha Thuku (Deceased,) and was registered in her name, being the youngest daughter to hold the said land in trust for herself, the Appellant and Hellen Nyambura (deceased).
23. In her submissions, the Respondent controverted the Appellant's claim that the registration of the Respondent as the proprietor of the suit land was as a trustee only and that she is a beneficiary of a third of the suit land alongside the Appellant and their other sister, Hellen Nyambura (deceased).
24. Further, that according to the evidence adduced before the trial Court, it emerged that the Appellant and Hellen Nyambura (deceased), were beneficiaries of separate parcels of land, and shares from their father as contained in the Certificate of Confirmation of Grant appearing on page 14 of the Record of Appeal. The Respondent argued that in view of the said gifts of land and shares in favour of the Appellant and Hellen Nyambura (deceased), it is inconceivable for the Respondent to be registered as a trustee only, in regard to the suit property and that was not the intention of their mother who caused the suit land to be registered in the Respondent's name.
25. It was further submitted that if their mother had intended that the Respondent to merely serve as a trustee without being a beneficiary of the suit property, she would have caused the property to be registered in the names of the Appellant, and Hellen Nyambura (deceased).
26. Further, that the trial Court could not act as a forum wherein the Respondent would be disinherited of her father's estate as proposed by the Appellant. It was also submitted that the Appellant is mischievous, and wishes to grab the portion of the suit land belonging to the Respondent, because they are not in good terms with each other.
27. This court has considered the Memo and Record of Appeal as filed by the Appellant herein, the rival written submissions, cited authorities, and the relevant provisions of law and finds the issues for determination are;-
 - i). Whether the Appeal is merited.
 - ii). Who shall bear the costs of the Appeal?
28. This is a first appeal, wherein the court has a duty to re-consider, re-analyse and re-assess the evidence adduced before the trial court, and then come up with its own independent conclusion, while taking



into account, that it never saw nor heard the witnesses, as did the trial court. In the case of Family Bank Limited v Panda Co-operative Savings and Credit Society [2022] eKLR, the Court held as follows:

“It is now settled principle that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions. An appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acts on wrong principles in arriving at its findings.”

29. Further, the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123, declared as follows:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

30. Similarly, in the case of *Mbogo & Another vs. Shah* [1968] E.A. 93 at page 96, the Court proclaimed as follows:

“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

31. In the instant Appeal, the Appellant argued and submitted that she is entitled to half rather than one-third of the suit property on grounds that no share thereof ought to devolve to the Respondent herein, who was registered to hold the said land, only as a trustee, on behalf of the Appellant and their other sister HELLEN NYAMBURA (Deceased).

32. The ratio of the trial Court’s holding is evident in the following extract from the said Judgement delivered on 20th November, 2023:

“The suit land had been bequeathed to their mother by their father during his lifetime. Their mother caused the said piece of land to be registered in the 1st Defendant’s name to hold in trust for the Plaintiff and their late sister. Considering the fact that the plaintiff already benefitted in other properties of the estate, while the 1st defendant had not been bequeathed anything by her late father, it’s hard for this Court to fathom that their late mother’s intention was for the 1st defendant to only hold in trust and not get any share of the suit land.”

33. In the proceedings before the trial Court, the Appellant testified during cross-examination as follows:

“Florence is my younger sister. We were 4 sisters. Rahab is my mother. I and my husband Henry had marital issues then. The grant was to subdivide properties of my father Harrison Thuku Kamau. I was given a shamba No. 2343 and also shares in Kihoto Investment and Makadara Group shares, both deal with buying land, bulding and selling. Rahab got a shamba. Florence did not get any shamba. We agreed that Florence holds the shamba in trust. Its our parent who gave us. Hellen also received a piece of land. No. 1266 was to go to my mother.”



34. From the foregoing extract of the trial court's Judgement, it is evident that the Appellant admitted to having contracted a marriage with one Henry, which marital relationship, she informed the Court, was experiencing some challenges. The said admission contradicts the Appellant's contention and submissions that she was unmarried just like her sister Hellen Nyambura (Deceased), and the suit property was allocated to both of them on account of being unmarried, unlike the Respondent, who is enjoying a peaceful marriage.
35. Further, the Appellant acknowledged being the recipient of a separate parcel of land from her late father's estate, being registration No. 2343. This was in addition to the shares that were bequeathed to the Appellant in two land-buying Companies namely, Kihoto And Makadara.
36. Having carefully re-considered and re-analyzed the evidence adduced before the trial court and the impugned Judgment, the court finds and holds that it is inconceivable that the Respondent (1st Defendant), was registered to hold the suit land only as a trustee, without entitlement to any share therein. This court is at loss as to why the Appellant held such a belief that the Respondent herein as the person registered as the proprietor of the suit land, should hold in trust for her sisters, but should not benefit from the said land.
37. Upon careful consideration of the pleadings, oral testimony and the totality of the evidence adduced by the parties before the trial Court, as well as the submissions filed by the parties herein in respect of the instant appeal, this Court in its Appellate jurisdiction is satisfied that the trial Court did not proceed upon the wrong principles nor exercise its discretion wrongly in entering the Judgment dated 20th November 2023.
38. Consequently, this Court holds and finds that the Appellant has failed to prove any of her grounds of appeal, to justify this Court's interference with the impugned Judgement of the trial Court.
39. For the above reasons and accordingly, the instant appeal is found not merited and the same is dismissed entirely with costs to the Respondent herein, who is the successful party in the instant Appeal.

Appeal is dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

10/12/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr.Mbugua Munyiri for the Appellant

Absent for the Respondents L. Gacheru

L. GACHERU

JUDGE

10/12/2024

