



**Makato v Ndambuki (Sued as the Administrator of the Estate of
the Late Mutwiwa Ndambuki Muli) (Environment & Land Case
E066 of 2021) [2022] KEELC 13766 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E066 OF 2021**

A NYUKURI, J

OCTOBER 19, 2022

BETWEEN

JOSEPH MUSYIMI MAKATO PLAINTIFF

AND

SYOWAI MUTWIWA NDAMBUKI DEFENDANT

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MUTWIWA
NDAMBUKI MULI**

JUDGMENT

Introduction

1. Vide a Plaint dated June 22, 2021, the Plaintiff averred that he was the registered owner of LR NO MACHAKOS/MUA HILLS/402 measuring 5 acres and the beneficial owner of 4 ½ acres part of LR NO MACHAKOS/MUA HILLS/1678, which he had been in active possession for more than 25 years. Further that he purchased the said property from Mutwiwa Ndambuki Muli (deceased).
2. He further alleged that he purchased 1 ½ acres vide a sale agreement dated October 30, 1989 and later on, purchased 8 acres vide a sale agreement dated October 14, 1990. His case was that on completion of payment of the consideration, the deceased subdivided his land into two portions being MACHAKOS/MUA HILLS/401 which remained in the deceased's name and MACHAKOS/MUA HILLS/402 measuring 2.02 Ha. which he transferred to the Plaintiff.
3. The Plaintiff contended that MACHAKOS/MUA HILLS/402 did not include the total acreage purchased by the plaintiff and the deceased and the Plaintiff agreed that the deceased would transfer to the Plaintiff 4 ½ acres of land from MACHAKOS/MUA HILLS/401, but the latter passed on in the year 2003 before he could transfer the same to the Plaintiff.



4. The Plaintiff lamented that contrary to the agreement between the Plaintiff and the deceased, the Defendant who is the administrator of the deceased's estate, vide Machakos Succession Cause No 286 of 2004, fraudulently transmitted MACHAKOS/MUA HILLS/401 to herself.
5. Further that upon transmission, the defendant subdivided MACHAKOS/MUA HILLS/401 and sold part thereof to third parties but retained MACHAKOS/MUA HILLS/1678 measuring 2.52Ha due to the Plaintiff's occupation of the 4 ½ acres thereof. The Plaintiff contended that a constructive trust was created in his favour as he has a beneficial interest in 4 ½ acres in MACHAKOS/MUA HILLS/1678 (suit property), and that the defendant's failure to transfer the same to him constitutes breach of trust.
6. Consequently, the Plaintiff sought for the following orders;
 - a. A declaration that the Defendant and the Estate of the Late Mutwiwa Ndambuki Muli hold 4 ½ Acres of LR NO MACHAKOS/MUA HILLS/1678 in trust for the Plaintiff by virtue of a constructive trust.
 - b. A declaration that the Plaintiff is the bona fide owner and/or beneficial owner of 4 1/2 Acres in LR NO MACHAKOS/MUA HILLS/1678.
 - c. A Permanent Injunction restraining the Defendant whether by herself, her servants or agents or anyone claiming howsoever from her from dealing, constructing, trespassing, charging and/or transferring or evicting, interfering with quiet possession or whatsoever dealing with LR NO MACHAKOS/MUA HILLS/1678.
 - d. An order directing the Defendant to unconditionally transfer 4 ½ Acres to be excised from LR NO MACHAKOS/MUA HILLS/1678 to the Plaintiff and in default the Deputy Registrar of the High Court to execute the requisite documents to facilitate transfer.
 - e. Costs of the suit and interest thereof from the date of filing the suit.
 - f. Any other relief or remedy that the Honourable Court may deem first and fit to grant.

Plaintiff's Case

7. PW1, Joseph Musyimi Makato, the Plaintiff herein, adopted his witness statement dated June 22, 2021 as his evidence in chief. He testified that in 1989 he purchased 5 acres from the deceased at a cost of Kshs 65,000/= to be excised from LR NO MACHAKOS/MUA HILLS/159. That later, on October 30, 1989, the deceased and one Patrick Kilonzo Mbai sold the Plaintiff 1 ½ acres at a cost of Kshs 19,000/= . That the said land had been bought by Patrick Kilonzo Mbai from the deceased in 1977 and therefore upon sale, Patrick demolished his two houses and gave vacant possession of the same to the Plaintiff.
8. The Plaintiff further stated that on October 14, 1990, he entered into another agreement with the deceased for sale of three acres of land at a consideration of Kshs 51,000/= which he paid in full between October 14, 1990 and August 30, 1993. That he also paid a further sum of Kshs 4,000/= for survey fees. That on the face of the agreement for 3 acres which was witnessed by the defendant and their son one Muli Mutwiwa, the deceased acknowledged having sold to the Plaintiff a total of 8 acres.
9. It was the Plaintiff's testimony that the deceased subdivided LR NO MACHAKOS/MUA HILLS/159, into LR NO MACHAKOS/MUA HILLS/401 and LR NO MACHAKOS/MUA HILLS/402 and registered the latter title in the Plaintiff's name.
10. He stated that he owned land measuring 9 ½ acres in Mua Hills, which he had occupied for over 25 years. He alleged that 5 acres are registered in his name vide LR NO MACHAKOS/MUA HILLS/402



while 4 ½ acres form part of LR NO MACHAKOS/MUA HILLS/1678. He further testified that on the 4 ½ acres comprised in LR NO MACHAKOS/MUA HILLS/1678, he had put up a permanent house, his workers' house, a store, granary, pit latrine and a goat shed. That he also had 25-year-old trees, bananas, paw paws, lemon trees and plums. He stated that each year he plants maize and beans on the said property.

11. He also testified that LR NO MACHAKOS/MUA HILLS/1678 was registered in the name of Syowai Mutwiwa Muli, who is the widow of Mutwiwa Ndambuki Muli who died in 2003.
12. The Plaintiff alleged that the Defendant filed Machakos Succession Cause No. 286 of 2004, but failed to disclose that she held 4 ½ acres in trust for the Plaintiff and failed to include him as a creditor to the estate. That thereafter the defendant subdivided LR NO MACHAKOS/MUA HILLS/401 into MACHAKOS/MUA HILLS/672 and 673 and subsequently subdivided LR NO MACHAKOS/MUA HILLS/672 into smaller portions among them, LR NO MACHAKOS/MUA HILLS/1678 measuring 2.52 Ha, part of which the Plaintiff occupies 4½ acres.
13. The Plaintiff expressed his anxiety and stated that he feared that the defendant intended to deprive him of his land because on 15th March he was summoned by the County Surveyor on allegations that he was occupying part of the Defendant's land. His position was that there was constructive trust as the Defendant held the suit property in trust for him.
14. He produced a sale agreement dated October 14, 1990 with acknowledgments dated February 10, 1991, February 16, 1991, March 30, 1991, August 12, 1991, August 25, 1991, March 21, 1992, March 15, 1993, May 16, 1993, August 29, 1993 and August 12, 1991 as P- Exhibit 1; sale agreement dated October 30, 1989 as P-Exhibit 2; transfer, mutation , land control board consent and receipt in respect of LR NO MACHAKOS/MUA HILLS/159 as P- Exhibit 3; title and official search of LR NO MACHAKOS/MUA HILLS/402 as P-Exhibit 4; green card for LR NO MACHAKOS/MUA HILLS/401 as P-Exhibit 5; official search for LR NO MACHAKOS/MUA HILLS/1678 as P-Exhibit 6; pleadings in Machakos Succession Cause No 286 of 2004 as P-Exhibit 7; letter from the County Surveyor dated March 18, 2021 as P-Exhibit 8; letter from the County Surveyor dated March 15, 2021 as P-Exhibit 9; letter from the Chief Mua Hills Location dated November 4, 2020 as P- Exhibit 10; registration form for caution and receipt as P-Exhibit 11, bundle of photographs as P-Exhibit 12; certified Survey map for Mua Settlement Scheme as P-Exhibit 13 and a sale agreement dated October 14, 1990 as P-Exhibit 14. That marked the close of the Plaintiff's case.
15. The Defendant neither entered appearance nor filed Defence despite service and she did not participate in the suit. Subsequently, the Plaintiff filed submissions.

Plaintiff's Submissions

16. Counsel for the Plaintiff submitted that the Plaintiff's suit was predicated on the Doctrine of constructive trust. It was submitted for the Plaintiff that since there was a sale agreement between the Plaintiff and the deceased, a constructive trust was created whereof the deceased and any one succeeding him as a legal representative became a trustee over the suit property.
17. Counsel referred to the book '*Equity & Trusts*' by *Alastair Hudson* at page 474 where it was stated that; -
Where a contract is effected for the sale or transfer of property, that contract will operate so as to transfer equitable title in that property from the original owner to the other contracting party. The transfer of equitable title takes effect by means of a constructive trust. On the basis that each party has a right in equity to specific performance, and on the basis further that the contract is one to transfer title in property, it is said that the party so entitled acquires a right to the entire equitable interest in that property.



18. Counsel submitted that on establishment of a constructive trust, the trustee has a legal duty to transfer ownership of the property to the rightful owner. Further, that the fact that the title deed to the suit land was procured in 2021 in the name of the Defendant without taking into consideration the Plaintiff's interests, demonstrates breach of constructive trust.
19. Counsel relied on Section 28 of the *Land Registration Act* No 3 of 2012 to argue that the Plaintiff's interest in the suit property as purchaser and being in possession, was protected as an overriding interest. Reliance was placed on the decisions in the cases of *Maingi Mutisya Nzioka v Mbuki Kisavi [2014] eKLR*; *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR*; *William Kiptarbei Korir & 6 Others vs Danson Muniu Njeru [2018] eKLR* and *Peter Okiabera Omwenga v Samuel Nyabiba Nyakeri [2018] eKLR* for the proposition that constructive trust is based on common intention where there is an understanding or agreement between the parties which is acted upon by the claimant.
20. Counsel also relied on the cases of *Willy Kimtai Kitilit vs. Michael Kibet [2018] eKLR*; *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri and Francis Soita vs John Simiyu Ndalila [2018] eKLR* for the proposition that the provisions in the *Land Control Act* cannot vitiate a claim based on constructive trust.
21. Counsel submitted that the lack of consent of the Land Control Board cannot vitiate or extinguish a claim for constructive trust. Counsel finally stated that the Plaintiff was entitled to declarations of the ensuing constructive trust and prayed that the orders sought in the Plaint be allowed.

Analysis and Findings

22. Having considered the pleadings, the Plaintiff's testimony and the submissions, the issues that arise for determination are; -
 - i. Whether the doctrine of constructive trust is applicable in this case.
 - ii. Whether the court should grant the orders sought.
23. The *Black's Law Dictionary 11th Edition* defines Constructive trust as follows;

An equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title. The court declares a constructive trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary; the device does not create a 'trust' in any usual sense of the word. The name of the remedy came about because early cases applying it involved trustees who wrongfully appropriated funds from trusts, making it convenient to say that they remained constructive trustees of whatever they had wrongfully acquired. The term persists because the analogy between the remedy and a real trust is strong: in both cases the legal holder of title to property has no right to the enjoyment of it.- Also termed implied trust; involuntary trust; trust de son tort; trust ex delicto; trust ex maleficio; remedial trust; trust in invitum.
24. Essentially, constructive trust is an equitable remedy where the court upholds the claim of a person where title to his property is wrongfully held by another person.
25. The proviso to Section 28 of the repealed Registered Land Act, under which the defendant was registered as proprietor of the suit land, provided that the registration of a person as proprietor of land



did not relieve him of his duty which he was subject to as trustee. This provision is also entrenched in Section 25 of the [Land Registration Act](#) No 3 of 2012. Besides, Section 28 of the same Act provides that trusts are overriding interests to which all registered land is subject to.

26. In the case of *Willy Kimtai Kitilit vs. Michael Kibet* [2018] eKLR, the Court of Appeal had the following to say as regards a constructive trust;

There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the [Land Control Act](#). By Article 10 (2) (b) of the [Constitution](#) of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10 (1) (b)). Further, by Article 159 (2) (e) the courts in exercising judicial authority are required to protect and promote the purpose and principles of the [Constitution](#). Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the sixth schedule to the [Constitution](#), the [Land Control Act](#) should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the [Constitution](#).

27. Similarly, in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR, the Court of Appeal held as follows;

The transaction between the parties is to the effect that the Respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the [Land Control Act](#) is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive justice and not technical justice.

28. In the case of [William Kipsoi Sigei v Kipkoech Arusei & another](#) [2019] eKLR, the Court of Appeal held as follows:

Taking into account the *Macharia Mwangi Maina* decision and the *Willy Kimutai Kitilit* decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in *Macharia Mwangi Maina* decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.

We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the [Land Control Act](#). We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent.

29. It is therefore clear that where a purchaser has been put into possession of purchased property by the title holder without transfer of the title to the former, an enforceable constructive trust may arise.

30. In the instant case, the Plaintiff testified that he purchased 9 ½ acres from the late Mutwiwa Ndambuki Muli. He produced several agreements to that effect. I note that in the agreement dated August 29, 1993 for 3 acres, the defendant herein was one of the witnesses thereto. The Plaintiff confirmed that the land measuring 5 acres sold to him in the year 1989, at Kshs 65,000/-, being LR NO MACHAKOS/



MUA HILLS/402 was transferred to the Plaintiff upon grant of a consent from the Land Control Board. This is clearly demonstrated from the search certificate and the Land Control Board consent produced by the Plaintiff. From the evidence on record, it is clear that the suit property is agricultural land whose transfer would require consent from the Land Control Board. However, in this matter, although the Plaintiff took possession of the other land measuring 4½ acres comprised in LR NO MACHAKOS/MUA HILLS/1678, no consent from the Land Control Board was obtained in regard thereof and hence no transfer to the Plaintiff was effected.

31. The Plaintiff stated that he has been in occupation of the suit property for over 25 years. I have perused the photographs produced in evidence which show that there is a permanent house and other structures on the suit land. In addition, there are trees, bananas, maize and other crops on the land. The Plaintiff testified that he is the one who planted the same.
32. The Defendant did not file any defence or testify to challenge the Plaintiff's averments. Therefore, the Plaintiff's evidence remains uncontroverted. Having considered the constitutional dictates in Article 10 (2) (b) of the *Constitution*, which provides that one of the National values is equity, and Article 159 which enjoins this court to facilitate substantive as opposed to technical justice, it is my conclusion that equity elevates the interest of a bona fide purchaser above that of the registered proprietor of such purchased property, where there is a land sale agreement between the registered proprietor and the purchaser. The fact that there is a sale of land agreement between the Plaintiff and the late Mutwiwa Ndambuki Muli is not contested.
33. In my considered view, although the purchase of the suit property was not blessed by a consent of the Land Control Board, nevertheless, the fact that the registered proprietor, upon receipt of the full consideration from the Plaintiff, put the Plaintiff in possession of the suit property which possession has continued for a period of over 25 years, demonstrates the existence of an enforceable constructive trust in favour of the Plaintiff. Therefore, the Plaintiff is entitled to the ownership of the 4½ acres comprised in LR NO MACHAKOS/MUA HILLS 1678.
34. I note that the Plaintiff has sought, among other prayers, for a permanent injunction against the Defendant in respect of LR NO MACHAKOS/MUA HILLS/1678. That parcel is more than 4½ acres. I also note that the Plaintiff's interest in the same is only 4½ acres and therefore the injunction can only be in respect of that which belongs to the Plaintiff and no more. In addition, the Plaintiff cannot stop the defendant from transferring LR NO MACHAKOS/MUA HILLS/1678 and at the same time seek for an order for the defendant to transfer 4½ acres thereof to him. I therefore decline to issue orders of injunction in the terms sought by the Plaintiff.
35. In the premises, I enter judgment for the Plaintiff against the Defendant in the following terms;
 - a. A declaration be and is hereby made that the Defendant and the Estate of the Late Mutwiwa Ndambuki Muli hold 4½ Acres of LR NO MACHAKOS/MUA HILLS/1678 in trust for the Plaintiff by virtue of a constructive trust.
 - b. A declaration be and is hereby made that the Plaintiff is the bona fide owner and/or beneficial owner of 4½ Acres in LR NO MACHAKOS/MUA HILLS/1678.
 - c. A Permanent Injunction be and is hereby issued restraining the Defendant whether by herself, her servants or agents or anyone claiming howsoever from her from dealing, constructing, trespassing, or evicting, interfering with the Plaintiff's quiet possession of the 4½ acres occupied by the Plaintiff.



- d. An order directing the Defendant to unconditionally transfer 4½ Acres to be excised from LR NO MACHAKOS/MUA HILLS/1678 to the Plaintiff and in default the Deputy Registrar of this court to execute the requisite documents to facilitate transfer.
- e. Costs of the suit are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Mr. Maingi for the Plaintiff

No appearance for the Defendant

Ashley – Court Assistant

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