



**Mubishi & another (Suing as the legal representative of the Late David Mubichi Mwamba) v Nyange alias Mwamba Nyange (deceased and substituted by Zipporah Kiende Mutea, Florence Gacheri Murungi, Susan Kanorio Mututa and Catherine Mwari Murithi) & 2 others (Environmental and Land Originating Summons E004 of 2020) [2024] KEELC 6562 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6562 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2020  
CK NZILI, J  
OCTOBER 2, 2024**

**BETWEEN**

**ESTHER KINANU MUBISHI ..... 1<sup>ST</sup> PLAINTIFF  
SAMMY KIRIMI MUBISHI ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE LATE DAVID MUBICHI  
MWAMBA**

**AND**

**JULIUS MWAMBA NYANGE ALIAS MWAMBA NYANGE (DECEASED AND  
SUBSTITUTED BY ZIPPORAH KIENDE MUTEA, FLORENCE GACHERI  
MURUNGI, SUSAN KANORIO MUTUTA AND CATHERINE MWARI  
MURITHI) ..... 1<sup>ST</sup> DEFENDANT  
ZACHARY MUTATA M'MAGIRI ..... 2<sup>ND</sup> DEFENDANT  
PIUS MUTUTA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. What is before the court is an amended originating summons dated 20.4.2023 brought under Order 37 Rule 1 (A) & (G) Civil Procedure Rules Sections 28 (b) & 29 of the *Land Registration Act* and Sections 3, 13, 18 & 19 of the Environment Land Court Act, in which the plaintiffs are suing as the legal representatives of the estate of Daniel Mubishi Mwamba alias Daniel Mubishi Mwamba (deceased).
2. The plaintiffs, as the daughter-in-law and grandson of the deceased, have sued the daughters as the legal representatives of the late Julius Mwamba Nyange alias M'Mwamba Nyange, who was also the father



of the late Daniel Mubishi Mwamba, the husband and father of the plaintiffs respectively. Equally sued as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are a son-in-law and grandson of the deceased Julius Mwamba Nyange.

3. The plaintiffs contend that the late Julius Mwamba Nyange was the registered owner of L.R Kibirichia/Ntumburi/375, measuring approximately 5.10 ha, who agreed with the late son in January 2010 to surrender a title deed and handed over vacant possession and ownership of the suit land, following clearance of an existing loan, that the title had secured, extended in favor of the deceased's daughter, who unfortunately fell into loan arrears, putting the land at the verge of public auction.
4. As a result of the said agreement and the concurrence of all the family members, the plaintiffs averred a trust was created and the land is held in trust for the estate of the late, Daniel Mubishi Mwamba.
5. The plaintiffs seek the court to determine the following questions:
  - i. Whether the deceased father had agreed with his deceased son to pay the loan arrears secured by the suit land and, ultimately, his son to own the said land.
  - ii. Whether the said son and his family started to exclusively cultivate on and utilize the suit land from January 2010, up to and including after the death of the deceased on 18.7.2019.
  - iii. Whether the deceased son cleared the loan arrears of Kshs.353,767.19/= as agreed and a discharge of charge was registered to disencumber the suit land so that it could be transferred to him.
  - iv. Whether the deceased father declined to transfer the suit land to the deceased son despite demands.
  - v. Whether the 1<sup>st</sup> defendant holds the suit land in trust for the estate of the deceased sib.
  - vi. Whether the said trust should crystallize in favor of the plaintiffs.
  - vii. Whether the defendants are hindering the plaintiffs from utilizing the land.
  - viii. Whether the plaintiffs are entitled to the reliefs sought.
  - ix. What is the order as to costs?
6. The grounds upon which the amended originating summons is based are that:
  - a. The deceased father had agreed with his late son to clear the loan arrears and, in exchange, own the land.
  - b. Out of the promise, he cleared the loan arrears as agreed, but the late father declined to transfer the land as initially intended.
  - c. The deceased and the plaintiffs had started to utilize the land from January 2010 to the filing of the suit exclusively.
  - d. The defendants have started to obstruct the plaintiffs from exclusive possession, cultivation, user, and enjoyment of the suit property.
7. The particulars of the trust were particularised as follows:
  - i. Approaching, requesting, and agreeing with the deceased son to clear the loan arrears so that he could own the land.
  - ii. Promising to transfer the suit land upon payment of the entire loan.



- iii. Surrendering vacant possession to the son and his family.
  - iv. Letting the son and the family farm on the land for many years.
  - v. Letting the son receive the original title deed after it was discharged and
  - vi. Doing all the above with the knowledge of all the family members.
8. The particulars of breach of trust on the part of the deceased were;
- a. Declining to transfer the suit land upon full repayment of the loan.
  - b. Allowing the co-defendants to interfere with the plaintiff's utilization of the suit land.
  - c. Declining to heed the plaintiff's demand to transfer the suit land.
9. As a consequence, the plaintiffs prayed for:
- i. The declaration that the estate of Julius Mwamba Nyange holds L.R No. Kibirichia/Ntumburi/375 in trust for the estate of his son, as represented by the plaintiffs.
  - ii. The legal representative of the estate of the 1<sup>st</sup> defendant, namely Zipporah Kiende Mutea Florence Gacheri Murungi, Susan Kanorio Mututa, and Catherine Mwari Murithi, be compelled to execute sign the transfer instruments for the suit land to be transferred to the plaintiffs in default of which, the executive officer of the court to do so and the land registrar dispense with the production of the original title deed.
  - iii. Permanent injunction restraining the defendants and their family members, representatives, employees, servant agents, or anybody claiming through from entering into, trespassing onto, farming on or in any way interfering with the plaintiffs peaceful quiet, undisturbed, uninterrupted or exclusive cultivation, development, user and enjoyment of the suit land.
  - iv. Costs.
10. In support of the amended originating summons, the plaintiffs relied on affidavits sworn by Esther Kinanu Mubishi and Sammy Kirimi Mubishi on 17.11.2020, a list of witnesses & witness statements and a list of documents dated 17.11.2020.
11. The defendants opposed the amended originating summons through a replying affidavit sworn by Julius Mwamba Nyange and a witness statement dated 15.3.2021, a replying affidavit of Zipporah Kiende Mutea's list of witnesses, witness statements dated 17.12.2021, list of documents and further list of documents dated 17.12.2021 and 7.6.2023 respectively.
12. On his part, before he passed on during the pendency of this suit, Julius Mwamba Nyange, as the initial 1<sup>st</sup> defendant, confirmed to the court that the plaintiffs were his daughter-in-law and grandson, while the 2<sup>nd</sup> & 3<sup>rd</sup> defendants were his son-in-law and a grandson. The deceased averred that on about 11.9.2007, his daughter Florence Gacheri was undergoing some financial troubles, and in order to help her, he gave a title deed for L.R Kibirichia/Ntumburi/375 as security for a loan of Kshs.330,000 from Meru Central Farmers Sacco before it changed to Capital Sacco.
13. The deceased averred that her daughter was unable to service the loan, and the Sacco threatened to auction the land in order to recover the loan. To save the land, the deceased averred that he requested all his children to help repay the loan and so Daniel Mubishi volunteered on humanitarian grounds and indeed settled some of the loans except a small portion that Florence paid off.



14. The deceased denied there was an intention on his part to transfer the land to his son neither did he enter into any agreement to do so upon repayment of the loan. The deceased averred that if anything, the deceased ought to have pursued the beneficiary of the loan instead of trying to take his property forcefully; otherwise, the idea of the transfer of the land to the plaintiffs was a figment of their imagination not supported by any fact or right.
15. Again, the deceased averred that in 1992, the Agricultural Finance Corp (A.F.C) had advanced him a loan of Kshs.32,000, which was secured by the same title deed and after he was unable to repay, the 2<sup>nd</sup> defendant helped him settle the loan. He averred that he allowed the 2<sup>nd</sup> defendant to occupy 2 acres, and eventually, later in that year, he sold him one more acre of land out of the 12 acres of the suit land; hence, he was the only one occupying the land and not the plaintiffs.
16. The deceased averred that his deceased son had written to the Sacco and informed them that he would settle the outstanding loan, which later could not amount to an agreement for sale.
17. Further, the deceased averred that after the loan was repaid, he approached the Sacco to release his title deed, which sought for a discharge of which was registered but was given a run around in releasing his title deed.
18. The deceased averred that presuming his title deed as lost, he made a report to the land registrar, and the loss was gazetted vide Gazette No. 859, only for him to learn later on that his son had colluded with the Sacco officers to have the original title deed illegally released to him and hence without disclosing that he had collected it to prevent the issuance of a new title deed to him.
19. Additionally, the deceased averred that his late son also colluded with the area chief so as to write a letter dated 9.7.2013 addressed to the Sacco manager, yet the chief was not a party to any of the arrangements that he had with his family regarding the suit land, to be an authority on ownership of land. He termed the letter as written in bad faith and beyond his authority.
20. Similarly, the deceased averred that the suit land was approximately 12 acres and was located in a prime agricultural area; hence, its value was beyond Kshs.310,000/=. The deceased averred that mere possession of a title deed does not confer any ownership rights to a custodian, more so the plaintiffs or his late son, whose possession of the title deed was illegal.
21. The deceased averred that the plaintiffs have been parading the forged documents to all and sundry, claiming ownership and trying to force him to transfer the land then including meeting third parties in his absence to dismiss the ownership of the land. He termed the amended originating summons as lacking merits, justification, incompetent, fatally defective, and an abuse of the court process.
22. After the amendment of the originating summons was amended following the death of the deceased initial 1<sup>st</sup> defendant, Zipporah Kiende Mutea, one of the legal representatives of the initial 1<sup>st</sup> defendant's estate opposed the amended originating summons by a replying affidavit dated 7.6.2023.
23. She adopted the affidavit evidence on oath by her late father and a witness statement dated 15.3.2021 as part of her response. In addition, the 1<sup>st</sup> defendant to the amended originating summons denied that her late father signed the agreement 7.1.2010 appearing in the plaintiff's list of documents dated 17.11.2020. To the contrary, the 1<sup>st</sup> defendant averred that her late father paid Kshs.8,000/= to M/S Mwenda Mwarania Akwalu & Co Advocates for the Sacco to process the discharge of charge for the title deed to be released to him.
24. The 1<sup>st</sup> defendant averred that Sacco, despite the payments, failed to release the title deed to him or disclose the status until he had to gazette the same as missing. The 1<sup>st</sup> defendant averred that her late



- father made a will on 1.5.2020, which was evidence of how he wanted his estate to be shared generally and in particular, the suit land.
25. The 2<sup>nd</sup> defendant on his part relied on witness statements dated 17.12.2021 to oppose the amended originating summons. It was averred that in 1993 the 2<sup>nd</sup> defendant cleared a loan with A.F.C, out of which his father-in-law gave him 2 acres and subsequently bought 1 acre out of the suitland, which 3 acres that he started to utilize immediately and was currently being cultivated by his son and 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant stated that no one else except him was utilizing the suit land.
  26. Again, the 2<sup>nd</sup> defendant stated that he was aware that his sister-in-law had used the title deed as security for a loan that was advanced to her by the Sacco, and when she fell into arrears and the land was at the risk of a public auction, his brother in law (deceased) through and request for assistance from the father in law helped settle the loan. He denied that his loan repayment amounted to a sale agreement or transfer of the suit land to the estate of his late brother-in-law.
  27. At the trial, Esther Kinanu Mubishi testified as PW 1. She adopted her witness statement dated 17.11.2020 as her evidence in chief. She also reiterated the contents of her affidavit in support of the amended originating summons signed on 17.11.2020 as her evidence in chief in support of her oral evidence. PW 1 produced a copy of a limited grant of letters of administration copy of a tile deed, an agreement dated 7.1.2020, a copy of the loan repayment loan dated 9.7.2013; a copy of Sacco's advocates' letter dated 26.1.2013 chief letter dated 9.7.2013, Sacco's advocates' letter dated 7.9.2013, Sacco letter dated 31.10.2013, demand letters dated 31.10.2014, 9.11.2018 and 3.11.2020 as P. Exh No. 1-12, respectively.
  28. In cross-examination, PW 1 told the court that the loan belonged to Florence Gacheri, her sister in law who fell into arrears, and therefore once the deceased rescued the guarantor and the borrower from the intended auction, the registered owner was bound to transfer the land to her late husband in exchange for the loan repayment PW 1 stated that the witnesses to the arrangement were the deceased, husband father in law the bank manager Florence Gacheri and Shadrack Mutuma. According to PW 1 the loan repaid was Kshs.330,000/=
  29. PW 1 said that the letter of the chief was written offer consulting her later, father-in-law. Similarly, PW 1 said that P. Exh No. (6) was given after the loan repayment, though it did not refer to her late husband. As to P. Exh No. 7, PW 1 said that it was put in for security purposes while the demand letters were written after Susan Kanario and Mwamba Nyange started tilling the land.
  30. PW 1 said that the deceased husband took vacant possession of the land in 2010 and started planting food and cash crops. She also stated that by 2018, misunderstandings had arisen between her late husband and her father-in-law. That her late husband and the father-in-law did not negotiate on the consideration since the loan had already been taken out against the title; otherwise, the consideration in the circumstances was the repayment of the loan in exchange for the transfer of the land.
  31. Further, PW 1 said that efforts to seek a refund of Kshs.330,000/= repaid from either Florence or the entire family was futile since they kept on saying that they were going to meet and discuss the refund. PW 1 said that initially, the plaintiffs were for an amicable solution to the matter, but unfortunately, it was not possible. She further said that the plaintiffs did not sue the borrower because she was mentally unstable. As to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW 1 said that she sued them following attempts to chase them from the school and threats not to step into the suit land.
  32. Again, PW 1 said that this took place immediately after her husband passed on in 2019 when her cows were removed from the land to which she made a report both at the office of the chief and at the manager's office. PW 1 insisted that after the repayment of the loan, the late father-in-law knew



- that the original title deed was with his son since it was released to him upon clearing the loan balance. PW 1 said that the visit by their late father-in-law to the police to report a lost title deed was secretly done; otherwise, her late husband, upon request, took the title deed to the land registrar had she denied that Florence cleared the last installment of the loan for the cheque indicated in the loan statement for Kshs.310,000 was paid by her late husband.
33. Sammy Kirimi Mubishi testified as PW 2. Relying on his affidavits sworn on 17.11.2020 as his evidence in chief, he entirely associated himself with the evidence of PW 1. As to the replying affidavit by the grandfather, PW 2 termed it as misleading, for there had been an arrangement to transfer the land upon clearance of the loan, which the late grandfather failed to honor, leading to this suit.
  34. PW 2 confirmed that P. Exh No. (3) was not a typical sale agreement but was a summary in writing of what the parties had agreed verbally, since they did not expect difficulties in honoring it. PW 2 said that the late father acted in good faith to save the entire family from the disgrace of land being publicly auctioned for non-repayment of a loan.
  35. Moreso, PW 2 stated that the consideration for the title to the land was that of saving the land from a public auction. He also said that the agreement was in Kimeru and had no default clause. He urged that its fundamental terms were clear and known, given that the family members had been consulted and had discussed the matter before the letter was written and taken to the Sacco. PW 2 insisted that the late grandfather had agreed to all the terms and hence the reason that the agreement was witnessed by two family members who were present during the dismissal and the arrangement.
  36. PW 2 said that after the loan repayment, his family took over the land until they stopped using it when family wrangles arose. He could not tell if his late parents ever requested the borrower of the loan to refund the Kshs.330,000/= to the late father.
  37. Further, PW 2 said that they had sued the 2<sup>nd</sup> and 3<sup>rd</sup> defendants after they forcefully took vacant possession of the land, evicted them from the land, and literally frustrated the sale agreement. PW 2 said that it took the intervention of the area chief, who ordered all the parties to stop utilizing the land until the matter was resolved in court to avoid any squabbles.
  38. Peter Mureithi Gikunda testified as PW 3. As the operations manager of Capital Sacco, he relied on his witness statement dated 17.11.2021 as his evidence in chief. PW 3 told the court that the agreement dated 7.1.2014 was brought to his office by a son and father after the suit land was placed for public auction, so that the son could repay the loan in exchange for taking over as owner of the land. He denied that the loan was being repaid on humanitarian grounds.
  39. PW 3 said that the agreement was handed over to him by the guarantor, after which his son cleared the loan, and the title deed was released to the son as agreed. He denied that the Sacco withheld the original title deed or colluded with the son, otherwise, the Sacco was merely acting on the arrangements disclosed to it by the two parties.
  40. Additionally, PW 3 denied that a report was made against the Sacco to the police and the Land Registry Meru regarding a lost title deed. Similarly, PW 3 said the Sacco did not receive any demand letter for the release of the title deed to the owner. He also said that a cheque of Kshs.310,000/= was deposited to clear the loan on 26.1.2013 by Daniel Mubishi Mwamba, which cleared the loan balance in the loanee's account as per the earlier agreement.
  41. PW 3 said that before the cheque was brought to them, the late Daniel Mubishi Mwamba had paid in cash a commitment fee of Kshs.44,125.49/=, that he would clear the loan when he visited the office alongside PW 1. He denied that the loanee paid any part of the loan or used her savings to clear the loan. Again, PW 3 said the Sacco acknowledged receipt of the loan repayment by issuing a banking slip



- on top of reflecting the same in the loan statement. Further, PW 3 said that he later received a chief letter P. Exh No. (5). PW 3 also said that the land was not auctioned after the loan was repaid.
42. Murori Mutua testified as PW 4. Relying on his witness statement dated 17.11.2020 as his evidence in chief, he confirmed that after the loan repayment by the late Daniel Mubishi Mwamba, the plaintiff started utilizing the land. He said that the late Daniel Mubishi Mwamba and his brother Julius Mwamba relayed the information to him before he passed on that all his siblings and children at a family meeting had agreed on the arrangement.
  43. PW 4 said that there were two meetings at Julius Mwamba's home in his presence, whose attendees were the children of his late brother save for Zipporah Kiende. PW 4 added that none of the children opposed the agreement that upon Daniel Mubishi repaying the loan, he would eventually take over ownership of the land.
  44. Japheth Gitonga Gatunga testified as PW 5. Relying on his witness statement dated 17.11.2020 as his evidence in chief, he told the court that on 9.7.2015, the late Daniel Mwamba, alongside PW 1, the area manager, Murori Mutua, and Josephat Muthuri came to his office and narrated the dispute before this court to him and produced the agreement made with his deceased father following a family meeting. PW 5 stated that the complaint by the plaintiffs was the failure of their late father-in-law to transfer the land despite the agreement and put them into possession. PW 5 said that after listening to the dispute, he wrote a letter to enable the title deed to be released to him.
  45. Similarly, PW 5 admitted that he did not take down minutes for the meetings, though he was confident of what the attendees said, including who was in possession of the land. PW 5 stated that after Daniel passed on, he attended a meeting at the home of Julius Mubishi on 25.4.2020 to resolve the issue but did not find him at home. PW 5 said that the deceased told him that though his late son had repaid the loan, he was not willing to transfer the land to him.
  46. Rhoda Nyegera testified as PW 6. She relied on a witness statement dated 17.11.2020 as her evidence in chief. Her testimony was that L.R No. 359 was next to her parcel of land. She told the court that she was aware that the suit land was surrendered to the plaintiff in January 2010 by the late Julius Mwamba Nyange, where she looked for casual laborers to till.
  47. PW 6 said that the plaintiffs would temporarily store farm produce at her residence until they could get transport means to take it home.
  48. Jacob Kithinji Kamwaria testified as PW 7. He relied on a witness statement dated 17.11.2020 as his evidence in chief. He confirmed that he was among the elders who met at the chief's office to help resolve the dispute. He said that they were unable to resolve the issue. Similarly, PW 7 said that it was the plaintiffs who were utilizing the land until the chief stopped them to await the outcome of the dispute before the court.
  49. Robert Kimaita Kamunde testified as PW 8. Relying on a witness statement dated 17.11.2020, he told the court that he was aware of the family dispute since, as a former chief, PW 1 made a report to his office on 14.4.2020 that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant had threatened her while working in the suit land. PW 8 said that since the plaintiffs and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were unable to resolve the issue, he directed them to come back on 22.4.2022, together with witnesses and elders.
  50. PW 8 said that the parties appeared before him on 22.4.2020 in the accompany of Angelica Muriuki, Catherine Mwari, Murori Mutua, Joseph Mworia and Nthurima. Upon listening to him, PW 8 said that he directed the parties to attend a meeting at the late Julius Mwamba Nyange's residence the following day on 25.4.2020.



51. PW 8 said that after the visit, the registered owner of the suit land did not refute that his late son had repaid the loan. However, PW 8 said the elder man surprisingly decided to transfer the land; hence they left the matter at that. PW 8 said that the older man was not willing to surrender the whole land to his late son; otherwise, he was willing only to surrender a portion of it. PW 8 said that P. Exh No. (3) did not mention a portion of the land.
52. With leave of court, PW 1 was recalled regarding her supplementary witness statement dated 24.11.2023, as her evidence in chief. She denied that her late husband repaid the loan on humanitarian grounds. According to her the agreement had been copied to all the family members. She also denied the existence of the will relied upon by the 1<sup>st</sup> defendant. According to PW 1, her late father-in-law did not mention the existence of any will when he shared his properties among the children in 2012, leaving aside the unit alone. PW 1 said that she was yet to be called to any office to sign a probate and administration form touching on the estate of the deceased father-in-law.
53. PW 1 further said that despite her sister's in-law capability to offset the loan none volunteered to do so, yet they were in attendance when her late husband took the burden to save the situation. She denied that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had been given two acres of the suit land and bought an extra 1 acre from the deceased; otherwise, there could have been subdivisions and transfers before the deceased passed on. PW 1 similarly denied that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants have been utilizing 3 acres out of the suit land since 2010.
54. In addition, PW 1 stated that during the lifetime of her husband till July 2019, none of the defendants had objected to his use and entitlement of the suit land following clearance of the loan, leading to P. Exh No. (3). PW 1 insisted that she was not aware of a previous loan repayment by the 2<sup>nd</sup> defendant touching on the suit land; otherwise, it would have featured during the many family meetings that took place during the lifetime of the two deceased persons.
55. In cross-examination, PW 1 told the court that the land was held in trust for the plaintiffs, following repayment of the loan and surrender of both the title deed and vacant possession to the late Daniel Mubishi Mwamba by an agreement dated 7.6.2010. PW 1 denied that the plaintiffs were not being unfair and could not be termed as expansionists or greedy. As to the offer of two acres going by the will, PW 1 said that 2 acres of land would not be commensurate with the Kshs.353,667.19/= paid in 2010. According to PW 1, the land ceased belonging to the late father-in-law the moment that the loan was repaid, the title deed and the same surrendered to the plaintiff use or occupation. PW 1 insisted that the plaintiffs have been on the land, including July 2019, until the court order was issued.
56. Zipporah Kiende testified as DW 1 on behalf of the legal representative of the estate of the late Julius Mwamba Nyange pursuant to an authority to act dated 7.6.2023. She relied on a witness statement dated 22.11.2023, a replying affidavit sworn on 7.6.2023 and the one of her deceased father as her evidence in chief. DW 1 relied on a copy of a receipt; copy of the registered bank statements; gazette notice and photographs as P. Exh No's. 1-5 (a) – (g) respectively.
57. Again, DW 1 stated that her late father had no intention of giving out his land to the late son after the repayment of the loan, more so given that P. Exh No. (3) was only signed by his late brother and not the late father. DW 1 said the exhibit per se did not reflect the wishes of her late father; otherwise, she was the one who sent the money to seek and obtain a discharge of charge through the 2<sup>nd</sup> defendant as per D. Exh No. (1). Further, DW 1 said that as per P. Exh No. (6), the original title deed was to be released to her late father.
58. DW 1 told the court it was unprocedural for the late brother to collect the title deed, withhold the information, and subject his father to the process of gazetting its loss. She said that any of the children



of his late father were in a position to and were willing to repay the loan had their brother volunteered to do so. She stated that her late brother did not suggest during the meeting his condition for the offer. Similarly, during the family meeting, the repayment of the loan was conditional on their late father surrendering ownership of the entire land to the plaintiffs. DW 1 said that their late brother unconditionally offered to help save the land from public auction; otherwise, if he had any hidden ulterior motive, the eight family members in attendance were not aware of it.

59. DW 1 denied that the family meeting had reached an agreement that the loan be repaid in exchange for the title deed. D.W. 1 told the court that the loan had been taken for her sister and the owner of Kenani Integrated School to expand it, but unfortunately, she fell ill. According to DW 1, the land belongs to all the children of the deceased late father, and doubted if the deceased would have intended the same to be taken over by one child, at the expense of the rest. D.W. 1 said that the land was approximately worth Kshs.10,000,000/=.
60. In cross-examination, D.W. 1 testified that had her late brother not offered to clear the loan, the rest of the family members would still have volunteered to clear it to save the land from public auction.
61. D.W. 1 stated that she was confident that her late father did not sign P. Exh No. (3); otherwise, he would have stated so in his replying affidavit and the witness statement dated 1.3.2021. Similarly, DW 1 said that even though P. Exh no (3) not subjected to forensic examination through a police report, the signature appearing there did not resemble that of her late father. According to DW 1 her late brother offered to offset the loan to save the land on humanitarian grounds and that is why nothing was put in writing during the meeting.
62. DW 1 further told the court that the land has been under the occupation of the 2<sup>nd</sup> & 3<sup>rd</sup> defendants, a husband and son to her sister, and not the plaintiffs. As to whether the borrower used her shares savings to clear the loan, DW 1 said that she had no receipts or written statement by Florence Gacheri to that effect. He also told the court that she was the one who paid the money to discharge the charge on 20.6.2013, after which Sacco refused to surrender the original title deed to her late father until he had to make a report to the police reasonably assuming it was lost.
63. Additionally, DW 1 said that both the Sacco and late brother withheld the truth from the deceased, hence taking him round and round until he caused the gazette. As to whether the late father demanded in writing for the title deed from the late son, DW 1 said that she had written letters to that effect but was confident her late father orally made it many times orally. DW 1 said that the late brother had declined to attend many family meetings that the late father called.
64. As to the 2<sup>nd</sup> defendant, DW 1 said that she was aware of a previous loan taken with a bank to which the 2<sup>nd</sup> defendant repaid and was rewarded with two acres of the suit land and also sold an extra 1 acre to him, which 3 acres were yet to be excised from the mother title. As to P. Exh No. 10 & 11, DW 1 said that she had not come across any replies to the demand letters by her late father stating that the land was repaid on humanitarian grounds with no intention to surrender the land. DW 1 reiterated that other than the 3 acres of the land under use by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants, the rest remained unoccupied land with effect from January 2018.
65. On the caution and statutory declaration produced as P. Exh No, (7) & (8) DW 1 insisted that the late brother had illegally collected and withheld the title deed from the Sacco without the knowledge or consent of the late father; hence, the statement was misleading. Regarding P. Exh No. (9), D.W. 1 said that her late father had no knowledge of those facts, nor was there intention on his part to surrender the title deed plus the land to the late son; otherwise, he would not have made all the follow-ups to obtain the title deed. She termed P. Exh No. (3) a forgery; otherwise, the onus was on the plaintiffs to authenticate the document as duly signed by the deceased father.



66. DW 1 insisted that the letter dated 31.10.2014 was an afterthought since the gazettelement had occurred on 14.2.2014, by which time Sacco had not disclosed the whereabouts of the original title deed. DW 1 denied receipt of the letter dated 31.10.2014 by her late father. She stated that his late father declined to transfer or sell the land to the late son for such an intention was not in existence, going by paragraph 10 of his replying affidavit.
67. Regarding vacant possession, DW 1 said paragraph 14 of her late father's affidavit had refuted handing over vacant possession to the plaintiffs. DW 1 said that whatever gesture her late brother made in saving the land from the auction had been taken care of in the will where the plaintiffs are expected to benefit with 3 acres of land. She however denied that there was a real danger of an auction when the late brother settled the loan.
68. Zachary Mututa (aka) Zachary Mututa M'Magiri testified as DW 2. Relying on his witness statement dated 17.12.2021 as his evidence in chief, as a son-in-law DW 2 told the court that he assisted the deceased in repaying a loan of Kshs.45,000/= he had taken with A.F.C. for the suit land. As a sign of appreciation, DW 2 said that his late father rewarded him with one acre and gave his wife an extra acre out of the suit land. Further, DW 2 told the court that his late father sold an extra acre to him, making a total of 3 acres. He said that they visited the suit land where beacons for the 3 acres were pegged, and he took over the 3 acres, which he has been tilling through his son, the 2<sup>nd</sup> defendant, since 1993 up to 2020 when the chief Ntumburi stopped him pending the suit before the court.
69. Further, DW 2 said that from 1993 to 2021, he was the only one who has been using a portion of the land the rest remaining bushy. He denied that the plaintiffs have been utilizing the land. As to the Sacco loan, DW 2 stated that court that sometime in 2009, he learned of an intended action sale of the land where he notified his late father-in-law, who convened an urgent family meeting, during which his late brother-in-law offered to clear the loan. DW 2 said that after the loan was repaid, he accompanied the father-in-law to the Sacco officers to collect the title deed but was told to pay Kshs.8,000/- for the discharge of charge. DW 2 said that after DW 1 sent her the money he said it to the lawyer for the Sacco as per D. Exh No. (1) to collect the title deed after 2 days. DW 2 said that he accompanied his father-in-law to the Sacco several who declined to surrender the title deed, hence the registered owner with no option but to make a formal report to the police for a lost original title deed, subsequent to which it was gazette by the land registrar as lost.
70. DW 2 told the court that it was only after the gazettelement that the Sacco and the late brother-in-law disclosed the whereabouts of the original title deed, alleging that the said brother-in-law had collected it without the knowledge, consent, or approval of his late father.
71. In cross-examination, DW 2 said that he had no documents to show payment of Kshs.45,000/= to A.F.C Bank. He said that as a show of extra gratia, he was given one acre of land and eventually bought one acre, making the total three acres since his wife Susan also acquired an acre from his late father-in-law, which they have been using for many years. He said that he had no sale agreement before the court for the same. Similarly, DW 2 said that the 3 acres of land were not transferred to him during the lifetime of the deceased father-in-law.
72. On whether the late brother-in-law was equally entitled to compensation for repaying a loan of over Kshs.310,000/=, DW 2 said that it was only the late father who would have determined that issue during his lifetime.
73. DW 2 doubted if the late father-in-law had received or became aware of P. Exh No. (9), otherwise he would not have taken the trouble of following up the original title as if it was lost. He insisted that the two acres bequeathed to Daniel as per the will was enough compensation for offsetting the loan,



which would be separate from his three acres of the suit land. DW 2 confirmed that his late father-in-law had shared among his children other parcels of land before he passed on, save for the suit land, which in 2013 at the time had its title deed held by the bank up to 2012. Apart from the land given to him and the plaintiffs, DW 3 said that every child of the late father-in-law was entitled to 1 acre of the suit land. In other words, DW 2 said that out of the suit land, the plaintiffs could end up with 3 acres in total. He said that no one in the family had raised concern over the three acres of land that he has been utilizing since 1993.

74. Pius Mutai Mututa testified as DW 3. Adopting his witness statement dated 2.11.2023, he told the court that he had been tilling the 3 acres of land as per photographs produced as D. Exh No. 5 (a) – (f) taken in June 2020, showing his image and that of his wife, former workers, crops and a tractor.
75. DW 3 said that he stopped tilling the land when the area chief stopped him to await the completion of this suit in 2021. He denied that the plaintiffs have been utilizing the land as alleged in their pleadings and testimony. Before 2020, DW 3 stated that before he started working on the land, his parents were the ones tilling it with effect from 1993 following a sale agreement with his late grandfather. DW 3 denied chasing away the plaintiffs from the rest of the suit land, which, in his view, has remained uncultivated since 2012.
76. At the close of the defendant's case parties filed written submissions. The plaintiffs relied on written submissions dated 5.8.2024. The plaintiffs submitted that the furtherance of their case is premised on constructive trust and breach of the same as pleaded in ground 10 (a) to (f) of the amended originating summons and supported by the evidence of PW 1, 1-8 and read together with P. Exh No. 1-12. Relying on Section 28 (b) of the [Land Registration Act](#), Arvind Shah & 7 others vs Mombasa Bricks and Tiles Ltd & others Supreme Court of Kenya in N.R.B. Petition No. 18 (E020) of 2023, the plaintiff urged the court to find that trusts are created either expressly or established by operation of the law.
77. The plaintiffs isolated four issues for the court's determination. On whether or not there was a common intention between the late father and son to create a trust and if indeed it was created, the plaintiffs submitted that given the suit land was not on the verge of being auctioned for non-payment of a loan which is not disputed, the conduct of the two lead to the irresistible conclusion that he was due had a common intention to create trust, in this case, a constructive trust in favor of the son and it was indeed created.
78. As a demonstration of the conduct, the plaintiffs submitted that the same was apparent in paragraph 8 of the affidavit in support of the initial originating summons as to how the deceased approached his son to repay Kshs.353,767.19/=, who upon request accepted to do so. Further, the plaintiffs submitted that the deceased and all his children were aware that once Daniel repaid the loan arrears, he was entitled to own the suit land as indicated in the affidavit that there was a family meeting summoned by the deceased where the issues were discussed.
79. The plaintiffs further submitted that the culmination of the intention and conduct was the agreement dated 7.1.2010 (P. Exh No. 3) executed by the duo. Again, the plaintiffs submitted that the agreement was duly executed by the deceased, who DW 1 confirmed that he was illiterate but used to sign documents. Given that there was no handwriting/signature expert report or evidence of any report on forgery adduced by the defense, who alleged that he did not sign the documents, the plaintiff submitted that he, who alleges was the one with the burden under Sections 107 – 112 of the [Evidence Act](#).
80. The plaintiffs submitted that the act of surrendering vacant possession of them in January 2010 and embarking on cultivation was not denied and that P. Exh No's. (10) & (11) were not replied to or controverted by the defendants. The plaintiff submitted that the evidence of PW 4, 6 & 7 corroborate the issue of vacant possession and use of occupation by them. The plaintiff submitted that the issue of



- clearance of the loan was confirmed by PW 1, 2 & 3 and admitted also by DW 1, 2 & 3. As proof that the late father agreed to the surrender of the land to his son, the plaintiffs submitted that paragraphs 8 & 9 of the affidavit sworn on 17.11.2020, read together with the evidence of PW 1, alongside P. Exh No's. (3) & (10), all corroborate that there was the surrender of vacant possession, use, and occupation of the suit land to the plaintiffs in tandem with the common intention and agreement alluded to above.
81. Regarding the sharing of other properties of the deceased except the suit land, the plaintiffs submitted that DW 2 confirmed that in 2013, the deceased shared his properties save for the suit land, hence leaving a glaring and irresistible conclusion that the deceased knew that the land belonged to his son Daniel. On the cultivation of the land, the plaintiffs submitted that the defendants were not truthful as to who was cultivating the land from 2010 to the present, especially compared to the evidence of PW 6 & 7, the immediate and nearby neighbors who corroborated the evidence of the plaintiffs.
  82. Further, the plaintiffs submitted that the defendants were unable to call any independent witnesses to sustain their claim that they were the only ones on the land generally and, in particular, utilizing the three acres of land. Relying on *Samson Emuru vs Suswa Farm Ltd (2006) eKLR*, the plaintiffs submitted that a party could not divert from his pleadings, and in this case, D.W. 1, 2 & 3 testified on matters of acquisition of 3 acres of the suit land from the deceased father in law which he had not pleaded in his replying affidavit in the first instance.
  83. Additionally, the plaintiffs submitted that any sale agreements did not support the allegations of ownership by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants; hence, the witness was untruthful; otherwise, he would have stated those facts in the witness statement. Regarding the photographic evidence produced by the 3<sup>rd</sup> defendant, the plaintiffs urged the court to find it inadmissible for non-compliance with Section 106B (4) of the *Evidence Act*. Reliance was placed on *Richard Nyagaka Tongi vs IEBC & others (2013) eKLR*.
  84. On the reliefs sought, the plaintiffs submitted that, guided by *Arvind Shah (supra)*, all the evidence tendered by them fit the essentials to found a constructive trust that was created, given there was an agreement arrangement and understanding between the son and father, (now both deceased). Even assuming that there was no agreement in place, the plaintiffs submitted that the plaintiffs were entitled to share what the court considers fair, as held in the last part of paragraph 68 of the cited authority, so as to prevent unjust enrichment to the estate of the late Julius Mwamba in the spirit of good conscience to remedy the breach of duty or loyalty and for the corresponding deprivation.
  85. Similarly, the plaintiffs submitted that had the deceased son not paid the loan; the property would have been sold at an auction. Regarding the supplementary affidavit by PW 1, the deceased father-in-law changed his mind about transferring the suit land, craftily gazette the loss of a title deed, yet he knew it was with his son and flatly ignored the demand letters produced as P. Exh No. (10) & (11), so as to deny the plaintiffs their beneficial interest to the plaintiffs.
  86. The plaintiffs urged the court to find constructive trust applicable in line with Section 3 of the *Judicature Act*, Article 10 (1) (b) of *the Constitution*, *Francis Soita vs. John Simiyu Ndalila (2018) eKLR* and Section 28 (b) of the *Land Registration Act*. On the failure of Florence Gacheri to testify, the plaintiffs submitted the failure to call her as a witness by the defendants to sustain their defense, yet she was the reason for the loan and the intended auction were it not saved by her late brother, was injurious to their case.
  87. In conclusion, the plaintiffs urged the court to remember the demeanor of the witness, the plaintiff being honest and forthbrought. At the same time, the plaintiffs submitted that the defendants appeared shaken and dishonest, contradicted each other, relied on un-pleaded facts, and failed to claim any independent witness such as a neighbor, a relative, a clan elder, or an officer from the Sacco to corroborate their evidence as compared to the plaintiffs.



88. The defendants relied on written submissions dated 22.8.2024. It was submitted that the initial defendant had sworn an affidavit dated 1.3.2021, and while the suit was part heard, he passed on on 2.11.2021, of which the plaintiffs obtained a limited grant to bring the four children of the initial 1<sup>st</sup> defendant as parties to the suit by an amended originating summons dated 20.4.2023.
89. Additionally, the defendants submitted that the plaintiffs went out of their way to shop for and create evidence only finding time to file the present suit eventually. Regarding P. Exh No. (3) the defendants submitted it was a letter dated 2010 written in first person showing that one person wrote it and not more, who was simply requesting to be allowed to pay the loan within a period of four years and requesting the intended auction be forestalled.
90. The defendants submitted that the plaintiffs have gone out of their way to make the letter the central issue in the proceedings, maintaining that it constituted the agreement between the deceased Daniel Mubishi, his late father, that once the loan was repaid to the Sacco, then the late father would transfer the land to him. The defendants submitted that the letter merely requested the title deed to be released to Daniel without mentioning any alleged or intended transfer.
91. The defendants also submitted that the alleged signature of the deceased was denied in his replying affidavit dated 1.3.2021 in paragraph 10 as well as by the appointed legal representatives. The defendants submitted that the plaintiff witnesses did not give particulars of their land parcels to show that they border the suit land, nor were they present during the transaction so as to claim to have been privy to the alleged trust; otherwise, they were regurgitating what the plaintiff's and the deceased had instructed them to come and tell the court.
92. Further, the defendants submitted that it was intriguing that the plaintiff would write demand letters through three different lawyers and the only inference was to create evidence where none was in existence. The defendant submitted that the plaintiff's evidence was not only verbose but also devious, unlike the defendant's, which was succinct and direct. The defendants submitted that there was no dispute that the deceased father, with the concurrence of the family, guaranteed her daughter a loan to top for her school fees only for her to fall sick and in arrears, leading to the Sacco initiating foreclosure measures, which came to the knowledge of the 2<sup>nd</sup> defendant.
93. On the repayment of the loan, the defendants submitted that during a family meeting summoned to discuss the way forward, the late Daniel Mubishi volunteered to repay. The defendants submitted that it was not disputed that DW 1 & D.W. 2 were equally capable of repaying the loan since there was no imminent active and forceful danger that the land would be auctioned. The defendant submitted that it was also not disputed that the late Mwamba Nyange severally visited the Sacco officer who paid for the discharge of charge on 20.6.2013, who discharged the title but was taken in a cycle when he requested for the release with nobody disclosing that he had authorized his son to obtain it.
94. Similarly, the defendants submitted that the deceased reasonably presumed the title deed as lost and made a report to the police, had the loss gazette only to surprisingly learn that in collusion with his late son, Capital Sacco hurriedly wrote the land registrar Meru indicated that the title deed had been released to his son.
95. The defendants submitted that in appreciation of the loan repayment, the deceased offered and intended but for this suit, to give his late son an extra two acres while for the rest of his children, he gave 1 acre each of the suit land the same gesture that he had extended to the 2<sup>nd</sup> defendant in 1993 for helping repay a loan with A.F.C.



96. Again, regarding occupation, the defendants submitted that the plaintiffs have never been in occupation of the suit land except for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who worked on the land between 1993 and January 2021, when the chief stopped them. They also submitted that there was no agreement on the transfer of the suit land to the plaintiffs, once the deceased son paid the loan.
97. On whether there was a legally enforceable agreement, the defendants submitted that P. Exh No. (3) talked of the title being released to me or my dependants while P. Exh No. (10) talked of a sale and P. Exh No. (11) demanded the signing of an application for land control board consent and transfer form. Therefore, the defendants submitted that the three exhibits assume there was an agreement in the first instance.
98. Assuming P. Exh. No. (3) was an agreement, the defendants submitted that the same fell short of the requirements of Section 3 (3) of the Law of Contract Act and that if it was oral, still no consideration was paid at all, and possession was equally seriously disputed and contested more so at present after the area chief stopped any of the parties from utilizing the land. Reliance was placed on James Njenga Buruga vs Christopher Kamau Burugu Nkubu E.L.C. No. 12 of 2015.
99. The defendants submitted that the land being agricultural, consent must have been applied and obtained within six months after the Land Control Act. Therefore, from 7.1.2010, the agreement became null and void by 7.7.2010. Reliance was placed on Dorcas Idombi Wasike vs Benson Wamalwa Khisa & another Eldoret C.A No. 87 of 2004.
100. In addition the defendants submitted that trust is a matter of evidence to show the intention of the parties, which, in this case, the plaintiffs failed to discharge, and hence, the trust could not be presumed. Reliance was placed on Burugu vs Burugu (supra).
101. The defendants submitted that it was absurd and nothing could be further from the correct position in the plaintiffs subjecting the title deed on Sections 28(b) of the Land Registration Act, given that the deceased became the registered owner of the land on 16.4.1992, an alleged agreement in the year 2010 could not apply long after registration as envisaged by the law, otherwise, any envisaged trust under Sections 28 thereof, referred to such trust as that was ingrained in the title before registration.
102. Subsequently, it was submitted that constructive or a resultant trust can only apply pursuant to a valid sale of land as held in Arvind Shah (supra). In this case, since the deceased did not act unconscionably and it was, in fact, the plaintiffs who were acting unconscionably by trying to force a transfer via an alleged constructive trust that was never direct or implied, the same cannot be imposed in law.
103. Further, the defendants submitted that his case was one where a philanthropic gesture in the true African spirit and traditions of being there for one another was being turned on its head into a purported sale agreement through which a constructive trust is sought to be imposed, which will not do.
104. The defendants submitted that the offer of 2 acres on top of one acre given to all the children by the deceased was more than sufficient as the conservative value of 1 acre of land at the locality of the suit land was at Kshs.1,000,000/=. Alternatively, the defendants submitted that the plaintiff was at liberty to recover the money that they paid from Florence Gacheri who solely benefited from the loan that the title to the suit land had secured.
105. The court has carefully gone through the pleadings; evidence tendered, written submissions, and the law. The issues calling for the court's determination are:
  - i. If the plaintiffs have disclosed a cause of action against the 1<sup>st</sup> defendant



- ii. If the plaintiffs have the capacity to sue the 1<sup>st</sup> defendant.
  - iii. If there was a binding contract on land between the late Daniel Mubishi Mwamba and his late father concerning the transfer of the suit land on account of repayment of a loan.
  - iv. If the said contract is enforceable against the defendants.
  - v. If there was an intention arrangement and an undertaking between Julius and Daniel Mwamba to found a trust.
  - vi. If there was a breach of the said intention, arrangement and understanding.
  - vii. Whether the court can infer a trust.
  - viii. Whether the plaintiffs are entitled to the reliefs sought.
  - ix. What is the order as to costs?
106. It is trite law that parties are bound by their pleadings, and issues for the court determination arise therefrom. See *Stephen Mule Mutinda vs IEBC (2014) eKLR*. The Plaintiffs' primary pleading is the amended originating summons dated 20.4.2023, in which they pleaded that L.R No. Kibirichia/Ntumburi/375, measuring 5.10 ha, was held in trust for the estate of the late Daniel Mubishi Mwamba on account of an agreement that the registered owner, the late Julius Mwamba Nyange, amicably and after family meetings, consented to, that the late son does pay, which he did pay an outstanding loan to Capital Sacco, owed by her sister Florence Gacheri, and that was secured by a title deed for the suit land, in exchange of which the late son and his estate now represented by the plaintiffs, would take possession of and own the suit land.
107. The plaintiffs averred that after clearing the loan of Kshs.353,767.19/= and a discharge of charge being registered and vacant possession having been given in January 2010, the registered owner reneged on the agreement and instead declined to transfer the land as agreed or at all.
108. Based on these pleaded facts, the court is therefore asked to determine whether there was an intended trust, if the trust existed, if there was a breach, and proceed to declare it in favor of the plaintiffs and order the legal representatives of the estate of the registered owner to execute transfer documents for the suit land in favor of the plaintiffs and for a permanent injunction to issue stopping any interference by the defendants in quiet use and occupation of the suit land by the plaintiffs.
109. The plaintiffs seek the court to infer trust based on an agreement to transfer land allegedly signed on 7.1.2010. The land was said to have been surrendered on the same day to the plaintiffs. The repayment was said to have been made on 26.1.2013.
110. A discharge of charge was registered on 12.9.2013, and the title deed was surrendered to the deceased in September 2013. By demand letters produced as P. Exh No's. 10 & 11, the late Daniel Mubishi Mwamba was seeking to enforce the agreement by requiring that the deceased father executes land control board consents and transfer forms to effect the agreement.
111. A cause of action denotes a combination of facts that entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right. See *Black's Law Dictionary 9<sup>th</sup> Edition* and *D.T Dobie Co. Ltd vs Muchina (1982) KLR*. In *Kahl Webner Claasen vs Commissioner of Lands and others (2019) eKLR*, at issue in the High Court was whether the petitioner's rights had been ascertained upon his death and whether the right died with him. The court cited Section 2 (1) of the *Law Reform Act* that on the death of any person, all causes of action subsisting or vested in him shall survive as the case may be for the benefit of his estate. The court said



that causes of a personal nature do not survive for the benefit of a deceased person. The court said that a cause of action was not synonymous with a chose in action. The court said a chose in action includes a right to bring proceedings in court for recovery of a sum of money owed or pecuniary damages for infliction of a wrong or non-performance of a contract. The court observed that a right to institute court proceedings was a choice in action. The court further said that a right to own property under Article 40 (1) of *the Constitution* was a chose of action vested in the petitioner, which survived for the benefit of the estate by virtue of Section 2 (1) of the *Law Reform Act*.

112. In this suit, the plaintiffs seek to enforce a right to the suit land pursuant to an agreement dated 7.1.2010. The capacity to sue is based on a limited grant ad litem issued on 25.8.2020 by Meru CMCC Misc Succession Application No. 71 of 2010, to file a suit to recover L.R No. Kibirichia/Ntumburi/375. There is no dispute that the initial 1<sup>st</sup> defendant died on 2.11.2021. Order 24 Rule 4 (3) of the Civil Procedure Rules required that he be substituted by 2.11.2022; otherwise, the suit against him would abate. The limited grant used to replace the deceased 1<sup>st</sup> defendant with his legal representatives Zipporah Kiende Mutea, Florence Gacheri Murungi, Susan Kanorio Mututa, and Catherine Mwari Murithi was issued on 3.4.2023 in Meru CM Misc Succession Case No. 37 of 2023. The application to amend the originating summons was filed on 19.4.2023. It did not include a prayer for the enlargement and revival of the suit against the deceased 1<sup>st</sup> defendant that had already abated by operation of the law
113. As of the delivery of this judgment, there is no application for an extension of time or revival of the abated suit been filed or orders given. This court cannot act suo moto. It was up to the plaintiffs to be vigilant and diligent. In *Silas Njeru Njiru & others vs. Mugo Mukere Leonard Njeru Mukera & others* (2022) eKLR, the court said sufficient cause or reason must be shown for the delay and why an extension should be allowed. In this suit, though the plaintiffs prayed for an amendment of the originating summons, they did not invoke Order 24 Rule 7 Civil Procedure Rules. The substratum could not have been done until and unless under Order 24 Rule 7 (1) of the Civil Procedure Rules. My finding is that the cause of action by the plaintiffs, if any, against the 1<sup>st</sup> defendant abated by operation of law.
114. By the time they were joined as legal representatives of their late father on 20.4.2023, the suit had abated against the initial 1<sup>st</sup> defendant. In *Macfoy vs United Africa Co. Ltd* (1961) 3 ALL ER, the court said that a nullity is a nullity. Amending nothing, therefore, was an act in futility. In *Murithi Ngwenga vs Gikonyo Macharia Mwangi & others* (2018) eKLR, the court cited *Kenya Farmers Corp Union Ltd vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate* (2005) eKLR, that a court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law. Thus finding answers to issues number 1 & 2.
115. The next issue is whether there was a binding contract between the late Julius Mwamba Nyange and the late Daniel Mubishi Mwamba. The law of contract as of 7.1.2010 regarding, any disposition on interest to land was Section 3 (3) of the *Law of Contract Act*. A suit upon such a contract required a contract in writing signed by all the parties and attested by a witness who was present when the contract was signed. See also Section 38 of the *Land Act*.
116. It is trite law that courts do not re-write contracts and only enforce the terms and conditions set by the parties, unless vitiated by fraud, undue influence, coercion, and or illegality, which has been pleaded and proven. See *NBK Ltd vs Pipeplastick Samkolit (K) Ltd* (2011) eKLR. Parties are bound by their terms. See also *Pius Kimaiyo Langat vs Corporate Bank Ltd* (2017) eKLR.



117. A contract is to be interpreted within the four corners of the document without any parole evidence. Where a party signs a contract, it is evidence of his assent to the whole contract unless the signature is shown to be obtained through fraud or misrepresentation since contracts belong to the parties who are at liberty to negotiate and even vary them and must do so together and with the meeting of their minds.
118. In *Housing Finance Corporation of Kenya Ltd vs Gilbert Kibe Njuguna* NRB HCCC NO. 1061 of 1999, the court observed that if it appears to the court that one party varied the terms of the contract with another without the knowledge, consent, or otherwise of the other and that the other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract.
119. Order 2 Rule 4 of the Civil Procedure Rules provides that a party shall, in any pleading subsequent to a plaint, plead specifically any matter, for example, performance, release, payment, fraud, inevitable accident, an act of God, the statute of limitation, or any fact showing illegality. Paragraph (2) thereof says that in action for recovery of land, a defendant shall plead specifically every ground of defense, and a pleadings of possession by himself or the tenant shall not be sufficient.
120. The initial 1<sup>st</sup> defendant in this suit swore on oath an affidavit on 1.3.2021. He specifically denied the intention to transfer the land or entry into an agreement to transfer the land in paragraphs 8 – 12 thereof. The deceased similarly denied occupation of the land by the plaintiffs on account of the alleged agreement.
121. In paragraphs 16-19 thereof, the deceased raised issues of collusion, illegality, and irregularities in the manner the title deed was released to his late son, withheld from him, and denied the intention to surrender the land to the plaintiffs and the late son.
122. As held in *Raghibir Singh Chatte vs N.B.K. (1996) eKLR*, the primary purpose of pleadings is to narrow down issues to diminish expense and delay, especially on the evidence required by either side to support or deny every material allegation made.
123. The burden of proof is on he who wants the court to believe the existence or nonexistence of specific sets of facts. The plaintiffs rely on P. Exh No. (3) as the fulcrum of their claim. They want the court to find the exhibit binding in law and express an intention to found a trust. The exhibit was addressed to the manager of Meru Central Famers Cooperative Bank. It was written by the late Daniel Mubishi Mwamba. It did not refer to any family meeting or resolutions thereof. The issue of surrender of the land to absolute ownership by the maker of the letter was not included. The original agreement was not tendered before the court. What was brought before the court was not a certified copy of the original. The name of the bank manager who witnessed the agreement is not indicated. Save for the date and the signatures; the rest of the details are printed. The letter on top is dated 7.1.2010, while the date at the bottom is 16.1.2010. The only other party in existence who could vouch for the exhibit was PW3. Strangely, before this court, he remained mum about why he did not append his signature as the only available witness to the agreement in compliance with Section 3(3) of the *Law of Contract Act*.
124. PW3 did not clarify which of the two dates depict the date of execution of the agreement. Above all, the exhibit bears no receiving signatures, stamp and date on when it was deposited with the Sacco generally and in particular with PW3. Had PW3 been party to and the person who received, stamped, and worked on the document, he would have acknowledged receipt of it, initialed his particulars and dated the document as duly received by the Sacco.
125. An agreement ordinarily starts with an offer and an acceptance. PW3 was unable to produce any document that the Sacco wrote acknowledging the agreement, commitment fee, and agreeing to the



postponement of the public auction, as well as to the proposal to reschedule or to stop recalling the loan to be paid in four years proposed by the late Daniel Mubishi Mwamba in P. Exh No. (3).

126. The suit land, the subject matter of this suit, is not mentioned in detail in the said agreement. There is no documentary evidence that the deceased was notified of the acceptance of his request by the Sacco. Additionally, it is the plaintiffs who want the court to believe that the signature appearing on P. Exh No. (3) belonged to the late father. The burden of proof was on the plaintiffs to prove that the signature belonged to the late Julius Nyange by calling evidence to place him on the document. The plaintiffs' star witness, PW3, was scanty on details, appeared, evasive, casual and uncertain of the details of the transaction, such that his evidence left more doubts in the mind of the court as to whether, indeed, there was ever a meeting that took place in his office with the two parties.
127. I say so given that the registered owner of the land had on oath cast aspersions on both his late son and the bank manager on complicity, collusion and for denying him the title deed even after clearing fees for the discharge of charge with a view of assisting the late son. The late Julius Nyange, as alluded to above, vehemently denied signing the agreement or intending to surrender the title deed and the land to the late Daniel Mubishi. The signature of the bank manager who witnessed the agreement in line with Section 3 (3) of the Law of Contract Act is missing. I find the exhibit and the evidence of PW3 incapable of transmitting any disposition of interest to land. Legal relations can only be presumed once the existence of a valid agreement is established. There are too many factors raised against the intention of the parties in this suit.
128. The initial 1<sup>st</sup> defendant raised fundamental issues touching on the manner in which his late son handled the whole issue. Between 7.1.2010 and 18.7.2019, when the late son passed on, there is little evidence of what efforts the deceased son made to enforce the agreement save for the caution and the statutory declaration. The statutory declaration and the caution merely mentioned the deceased (son) as a beneficiary. It did not define the nature, status, time, or particulars of the benefit he had on the land and whether he was in occupation or not. The statutory declaration was equally silent on the nature of the agreement, transfer of the land, completion date of the agreement and or transfer, and above all, whether he had taken possession of the land and the nature of the developments therein.
129. Compared to the exhibits produced by DW 1, it is also clear that it was the deceased parent who paid for the discharge of charge through DW 1 & DW 2. It was also the deceased father who was following up on the original title deed. Looking at the documentation produced by the plaintiffs and DW 1, my finding is that there is a clear indication that there was no meeting of minds of the two main actors.
130. In *Percy Trentham Ltd vs Archital Luxifer Ltd (1993) 1 Lloyd's Rep 25*, Lord Steyn observed that the court adopts an objective theory of contract formation. The yardstick is the reasonable expectations of an honest man or a sensible one. The court said that the conscience of offer and acceptance, in most cases, represent the mechanism of contract formation. In *R.T.S. Flexible Systems Ltd vs Molkerei Alois Muller GmbH & Co. K.G. (U.K) Production (2010) UKSC 14 (45)*, the court observed that whether there was a binding contract between the parties and, if so, what terms, depended upon what they had agreed, the word and conduct.
131. The plaintiffs have submitted that the court makes a finding that there was probative value on the evidence and facts that were raised by PW 1 – PW 8. Unfortunately, none of the witnesses were party to the agreement, the meetings, visits to the Sacco, the transactions, save for PW3, whose evidence as indicated above was unreliable and unbelievable. These are the facts and the evidence used by the plaintiffs to seek to enforce or infer the intention to create a trust.
132. All these facts or material evidence offered by PW 1 – PW 8 were not pleaded during the lifetime of the makers of the agreement. PW3, for instance, did not swear on oath to counter the damning



- allegations made against Sacco during the lifetime of the registered owner. Similarly, the deceased vehemently refuted on oath any intention to surrender his land and transfer interests. The plaintiffs failed to provide a valuation report on the value of the land as of January 2010, to demonstrate that it was equivalent to the loan cleared.
133. Written submissions do not constitute evidence. The intention to create legal obligations and consideration must be derived from the document itself. Extrinsic evidence by parties who were never parties to the agreement or privy to it in this case PW1,2,4,5, and 6 may not be used to vary or contradict the document, which, in my view, were in unambiguous terms.
  134. Parole evidence as held in *Prudential Assurance Co. Ltd vs. Sukhwinder Singh Jutley & another* (2007) eKLR vs *Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd* Civil Appeal No. 61 of 2013, is not permissible to either show the intention or to contradict, vary, or add to the terms of the document. A court can only give effect to the expressed intentions of the parties when construing a contract. A court will not derive the meaning outside the document, such as the circumstances surrounding its writing or the history of the party or parties signing it if the document is clear and in unambiguous terms.
  135. In *Kukal Properties Development Ltd vs Tafazzal H Maloo and others* (1993) eKLR, the court observed that evidence of negotiations is never admissible to vary the terms of the contract in a written form though where there was latent ambiguity, extrinsic evidence may be given of the surrounding facts to explain the ambiguity for it is assumed the parties intention have been reduced into the final document.
  136. The next issue is whether there was an intention to create trust. The plaintiffs have pleaded that there was an intention, arrangement and agreement for the late Daniel Mubishi Mwamba to possess and own the suit land on account of payment of Kshs.353,667/= to save it from the auctioneer's hammer. The plaintiffs have submitted that the pleadings, facts set out, oral and documentary, evidence tendered, and in law constitute a constructive trust.
  137. In *Hussey vs Palmer* (1972) 3 All ER 344, Lord Denning defined constructive trust as one imposed by law whenever justice and good conscience require it. The court termed it as an equitable remedy by which the court can enable an aggrieved party to obtain restitution.
  138. In *Arumba vs Mbeya & another* (1988) KLR 121, the court held that a constructive trust was proportionate to the appellant's expenditure spent on building and improving on another person's land with the agreement but without the intention of a gift or loan.
  139. In *Shah & others vs. Mombasa Bricks & Tiles Ltd* (supra), the court held under Sections 25 (2) of the *Land Registration Act*, overriding interest includes trusts as defined under the *Trustee Act* Cap 176 Laws of Kenya. The court cited Halsbury Law of England 4<sup>th</sup> ed Vol 48 paragraph 690 that constructive trust arises on the property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired so long as there was a common intention that both parties should have a beneficial interest and the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest, the intention being manifested by word or conduct.
  140. The court observed that constructive trust aims at preventing unjust enrichment. The court further said that constructive trust will automatically arise when a party who is already a trustee takes advantage of his position for his benefit. The court cited *Twalib Hatayan & another vs Sagar Ahmed Allheidy and others* (2015) eKLR, that with constructive trust, proof of parties' intention was immaterial for the trust will nonetheless be imposed by the law for the benefit of the settlor.



141. Additionally, the court said the trust was an equitable remedy, which is an intervention against unconscionable conduct imposed whenever justice and good conscience require it, and in this case, it could be imported into a sale agreement.
142. Trust is a matter of fact. In Wily K. Kitilit vs Michael Kibet (2018) eKLR, the court said constructive trust and proprietary estoppel could apply to the *Land Control Act*.
143. In Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR, the court observed that equity should suffer no wrong without a remedy, no man shall benefit from his wrongdoing, and equity detests unjust enrichment and that generally, the courts should deliver substantive rather than technical and procedural justice.
144. In this suit, the plaintiffs have submitted that their evidence was credible, reliable, believable as to the existence of the intention, arrangement and agreement to found a trust. On the other hand, the defendants termed the plaintiff's evidence as verbose and devious and created evidence to fit the case.
145. In Stellenbosch Farmers Winery Group Ltd and another vs Mastell and others (2003) I.S.A. 11 (S.C.A.), the court held that the credibility of a witness depends on the impression about the veracity of the witness based on the candor and demeanor, internal contradictions in his evidence, external contradiction on what was pleaded and probability or improbability of particular aspects of his case, caliber and cogency of his performance, compared to that of others witnesses testifying on the same incident or events and the witness reliability, quality, integrity and independence of his recall.
146. As indicated above, both witnesses for the plaintiffs and the defendants were not parties to P. Exh No's. 1-8. None of the said witnesses visited together with the deceased persons the Sacco or, as witnessed by P. Exh No. (3), the caution and the statutory declaration. The evidence of PW 1 – PW 8 was extrinsic or parole in nature.
147. PW 1 & PW 2 were silent on whether there was an offer to compensate the deceased with 3 acres of land as alluded to by the defence witnesses and especially the deceased initial 1<sup>st</sup> defendant on oath. In Heartbeat Ltd vs Ngambwa (2018) eKLR, the court observed that, looking at the evidence on record, all there was before the court was the respondents' word against the appellants. The court said that more was needed to establish the clear intention to establish a trust.
148. In this suit in the absence of evidence of witnesses to the agreement dated 7.1.2010, it is clear it is based on the late son's word or conduct against that of the late father. The version by the initial deceased 1<sup>st</sup> defendant appears more credible, believable, logical and reliable as compared to that of PW 1 and PW 2.
149. I, therefore, agree with the submissions by the defendants that this was a clear case of philanthropy in the African sense. I find that the deceased son was not entitled to anything more than what was fair and commensurate to his efforts to save the land from the auctioneer's hammer. Had the plaintiffs lawfully applied to revive the suit after it abated, the court would have held them entitled to 3 acres out of the suit land. The suit is, however, found incompetent, bad in law, and lacking merits. This being a family dispute involving close relatives, I shall award no costs, guided by Jasbir Singh Rai & 7 others vs Tarlochan Singh Rai (2013) eKLR otherwise, the defendants should have known the suit had abated by operation of the law.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024**

In presence of

C.A Kananu



Plaintiffs

Defendants

Mawira for C.P Mbaabu for the plaintiffs

Kerubo for Arithi for the defendants

**HON. C K NZILI**

**JUDGE**

