



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Magulu (Environment & Land Case E005 of 2022)
[2025] KEELC 4868 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E005 OF 2022**

AE DENA, J

JUNE 26, 2025

BETWEEN

SAMUEL MWANGI MBURU PLAINTIFF

AND

MWAKA TSIMBA MAGULU DEFENDANT

JUDGMENT

1. This suit was commenced by way of Plaint dated 19th January 2022. The plaintiff seeks orders of eviction against Mwaka Tsimba Magulu the Defendant herein and her agents, heirs and or dependents from the parcel Kwale/Mrima 849 and Kwale/Mrima 850 (herein suit properties), permanent injunction from trespassing therein, General and exemplary damages for trespass, general damages and costs of the suit.
2. The Plaintiff avers he is the registered and or beneficial owner of the suit properties which he bought from one Samuel Ohuru Nyamboye Charles who had also bought the land from Industrial Commercial Development Corporation (ICDC) as Kwale Mrima 714 in exercise of chargee power of sale. The parcels were vacant and with no encumbrance. That the defendant on diverse dates in the year 2021 illegally entered the suit properties and has refused to vacate from the properties despite demands and has continued to carry out illegal developments.
3. The defendant responded to the suit through Defence and Counterclaim dated 25th July 2022 wherein she denied all the allegations in the plaint. It is averred that she purchased the suit property in 1981 then Kwale Mrima 714 from its original owner one Yonga Tsuma. That she has been in occupation since then. That Yonga later sold the parcel to a 3rd party but she was ultimately declared the rightful owner through a decision of the Land Disputes Tribunal which was later adopted as a judgement of the court on 30/11/2000 in the Resident Magistrate Court at Kwale. That the said judgement has never been appealed against. That she remains the rightful owner of the land.



4. The defendant denies ever selling the land to anyone. It is averred that she only discovered subsequently that transactions adverse to her rights had taken place without her knowledge and consent which she terms illegal.
5. In the counterclaim the defendant claims various reliefs including a declaration that she is the rightful owner of the suit properties and wants the subdivisions and the plaintiffs registration to be declared illegal and she be registered as the owner thereof.

Evidence of the Parties.

6. The suit was heard on 20/2/2023, 31/05/2023 and 8/10/2024.

Plaintiffs Evidence

7. The plaintiff testified as PW1. He adopted his witness statement dated 19/01/2022 as his evidence in chief which rehashed the averments in the plaint. It was his evidence that by the time of the adoption of the tribunals decision as a judgement of the court the said Mr. Njoloji was deceased. Nobody put a caveat on the title despite all the happenings. That the title for the mother parcel was at all times in the name of Mr. Njoloji. Mr Nyamboye used the Power of Attorney of the chargee to transfer the suit to his name and followed all procedure. The defendant believed she had bought the land yet never regularized the parcel records. The witness produced the documents listed in the Plaintiffs list of documents as PEx 1-11. He asked the court to evict the defendant.
8. Cross examined on PEx10 (Transfer by chargee) which the witness termed as the evidence of an auction, the witness affirmed it did not refer to an auction though to him money was changing hands between ICDC and Mr. Nyamboye. He did not have proof that Njoloji had died at the time of the award. He had not brought evidence to confirm there was forgery in the green card.
9. PW2 was Charles Uhoru Nyamboye an advocate of this court practicing in Mombasa. Adopting his witness statement dated 19/01/2022 which reiterated the history of how he purchased the suit property from ICDC as Kwale/Kikoneni/Mrima/714 unencumbered and subdivided it into the two suit properties which he sold to the Plaintiff.
10. In cross examination the witness testified that the property had been charged to ICDC by Nelly Wakungu Mundu. The auction was by Makuli auctioneers. There was a lapse of time in registration into his name due to inadvertence which he later corrected by following up on LCB consent. He was not in a position to know if there were proceedings in the year 2000. That he visited the land and it was clean and clear, thus his participation at the auction. He could not confirm if ICDC had undertaken due diligence at the point of the auction.
11. The witness affirmed he did not know the defendant nor neighbors around the suit property. He could not recall if he met the area chief. He did not know who sold the property to Nelly Wakungu Mundu. Asked to comment on PEx 6 showing Yongo Joloi as proprietor the witness was hesitant to state its meaning. He affirmed that on issuance of new title the previous title has to be cancelled though he could not confirm that Njolois title was cancelled because he sold it to someone. On the sale agreement dated 30/3/2021 the witness could not confirm if the plaintiff conducted a physical search though he confirmed he never took the buyer to the site. He left it to the purchaser to do his own due diligence.
12. PW2 clarified in re-examination that from his experience ICDC could not have charged or sold the property without undertaking due diligence



13. PW3 was Mr. Steve Mokaya County Land Registrar Kwale. He highlighted the entries in the parcel that the land was first registered to Yonga Tsuma Joloi on 17/3/1987 and title issued on 7/08/1987, transferred to Mary Wakonyo Ndungu for Kshs.25,000/= on 18/11/1988, transferred to Ohuru Nyamboye Charles by chargee, title was closed on subdivision on 24/04/2018 resulting to titles 849 and 850 which were both transferred to Samuel Mwangi Mburu on 9/07/2021.
14. On cross examination by Ms. Ogoti for the defendant PW3 confirmed he had the original green card for 714. He confirmed entry No.5 prohibited dealings pursuant to Land award 13/2/2001 though he was not aware of the tribunal award as he had not seen anything about it.
15. The plaintiff's case was marked as closed with the above evidence.

Defendants Evidence

16. DW1 was the defendant Mwaka Simba Magulu. Her testimony is that she bought the land from Yonga Nzoloi Tsuma in 1980 and has lived therein to date. That her name is not in the green card because it was sold to Mary Wakungu. That they ligated and it was decided that the land belongs to the defendant though she could not remember the date of the case. She adopted her witness statement dated 25/07/22 as her evidence in chief and produced the documents in the defendants list of documents dated 25/7/2022 as DEx 1-10.
17. The witness also informed the court she had filed a counterclaim against the plaintiff. That she saw Samuel Mwangi for the first time in the suit property 3 years ago. When he claimed the property belongs to him. DW1 stated she had filed the counterclaim because the land belongs to her and not the plaintiff. That she could not give it away as she had stayed in it for many years. She urged the court to assist her as prayed in the counterclaim.
18. Cross examined the witness stated she bought the land for Ksh.2750/- from Yonga Joloi. That she had a receipt but the same was not before court. She has no title in her name. She admitted the witnesses in the sale agreement had not signed the same but reiterated the land is 10 acres. That she was not aware that the land had been sold to the plaintiff. She went to Kwale on the issue but was advised to come to court and was not given a search.
19. DW1 clarified in re-examination that the purchase price is given in the sale agreement dated 15/12/81. She did not have a title because she was denied one. The photos she had produced showed where she lives and also applied to the counterclaim. The shamba was sold to Mburu without her permission.
20. The Defendants case was marked as closed.

Submissions

21. Both parties filed and exchanged final written submissions in support of their respective cases. The plaintiff's submissions are filed by the firm of Matoke D. & Company Advocates dated 31/10/2024 and the defendants 27/11/2024 filed by the firm of Chimera Kamotho & Company Advocates.

Plaintiffs submissions

22. Rehashing the plaintiff's case the plaintiff identified four issues for determination 1) whether the plaintiff is the lawful registered owner of Kwale/Mrima 849 and Kwale/Mrima 850 2) whether the subdivision conducted on Kwale/Mrima 714 was illegally done 3) whether the plaintiff is entitled to the reliefs sought and 4) who bears the Costs of the suit.



23. The plaintiff relied on the provisions of section 26 (1) of the *Land Registration Act* and submitted that the certificate of title held by the plaintiff is adequate evidence of the plaintiff's legal ownership of title as it must be held by all courts as prima facie evidence of such ownership. That the defendant has not led any evidence that the same was acquired illegally and had not substantiated any allegations of fraudulent conduct associated thereto. Reliance is placed on the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna*, Eldoret ELC No. 609B of 2012 (2013) eKLR.
24. The case of *Mbuthia Macharia Vs. Annah Mutua & Another* (2017) eKLR was cited to buttress the argument that evidentiary burden of proof lay on the defendant to prove that the subdivision of the mother title was illegal and which the defendant had failed to do so. The court is also referred to the provisions of section 22(2) of the *Land Registration Act* on subdivision of a property upon application by a proprietor. That upon application by Mr Nyamboye for subdivision new titles were issued, all previous entries noted and mother file closed. That Mr Nyamboye was under no obligation to consult the defendant whose alleged interest featured nowhere in the register. That the defendant did not adduce any evidence that she reported the illegal subdivision to the relevant authority.
25. Citing the case of *Mrao Limited Vs. First American Bank of Kenya Limited & 2 Others* (20023)eKLR it is submitted that the plaintiff has proved a prima facie case and is entitled to the prayers sought.
26. As relates to costs it is submitted that the same follow the event to compensate the successful party.

Defendants Submissions

27. Rehashing the prayers sought by both parties and their cases the plaintiff also echoed the 1st issue as identified by the plaintiff. The other issue identified is whether the plaintiff is a trespasser on the suit properties.
28. On who is the rightful owner of the suit properties it is submitted the defendant is the rightful owner based on the decision of the tribunal adopted as the judgement of the court vide Land Case No. 6 of 2000 *Mwaka Tsimba Magulu Vs. Jonga Tsuma Njoloji Resident Magistrate Court at Kwale*. That the same affirms the defendant as the owner of the court and was still valid as it has never been set aside by appeal. That PW3 confirmed in cross examination that entry No. 5 of the green card relates to the award.
29. It is submitted that no one could pass title to Ohuru Nyamboye in 2010 in view of the judgement above and therefore he could also not pass good title to the plaintiff in 2021. That had the plaintiff conducted due diligence he would have realized the plaintiff was in occupation and also seen the entry 5 pertaining to the land award. That the defendant has been in occupation of the property for over 40 years and therefore the plaintiff cannot be the owner of the land. The court is referred to the case of *In re Estate of Raphael Ngugi (deceased)*(2022)eKLR where the court also cited *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna* (supra).
30. On the allegation of trespass against the defendant it is submitted that the defendant entered the suit property as an original owner after purchase even before the property was illegally registered in the name of Mary who charged it to ICDC. Her ownership having been confirmed by the Tribunal she cannot be deemed as a trespasser in her own land.
31. The court is also invited to pronounce the defendant as the true owner of the suit property by dint of the provisions of section 26(1) of the *Land Registration Act* which removes protection from an innocent purchaser or an innocent title holder.



Analysis and Determination

32. I have considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. This court identifies the main issue as being Who between the plaintiff and the defendant is the rightful owner of the suit properties, what orders should issue in the circumstances and who bears the costs of the suit and the counterclaim.
33. The plaintiff's case is that he purchased the suit properties from Ohuru Charles Nyamboye (herein Mr. Nyamboye). The suit properties are a subdivision of Kwale/Mrima /714 which I will refer to as the mother title. That Mr. Nyamboye bought the mother title from ICDC vide transfer by chargee in exercise of statutory power of sale which he subdivided to become Kwale/Mrima 849 and Kwale/Mrima 850. It is the plaintiff's case that he is the registered owner thereof to the exclusion of the defendant.
34. The defendants on the other hand claims ownership of the suit on the basis that she purchased it on 15/12/1981 from the original owner Yonga suma Joloi (herein joloi). That the said Joloi had without her knowledge also sold the property to one Mary Wakonyu but after lodging a complaint with the Land Dispute Tribunal, the defendant was found to be the owner of the property. That the tribunals decision was adopted as a judgement of the court which has never been set aside or appealed against. It is also her case that she was never consulted about the subdivision of the mother title.
35. It is now established that a certificate of title is held to be prima facie evidence of ownership of the stated land. This is provided for in Section 26(1) of the [Land Registration Act](#) which provides; -
- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
36. It is evident from the above provisions that while title is supposed to be taken by all courts as prima facie evidence of ownership of the person registered as proprietor, the same can be challenged and impeached on the basis of the above grounds namely fraud, misrepresentation and illegality.
37. It is long established that where the legality or existence of a title is being challenged then the holder of the title must show how he acquired the title. It is no longer enough to just dangle a title especially when it is being questioned. The Court of Appeal in [Munyu Maina Vs. Hiram Gathiba Maina civil Appeal No. 239 of 2009](#) reiterated that where the registered proprietor's title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
38. Section 107 of the [Evidence Act](#) Chapter 80 of the Laws of Kenya, provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. The burden of proof lay on the Plaintiff to prove his



acquisition was proper and legal. Further that the same was free from any encumbrance or interests which would not be noted in the register.

39. The plaintiff testified as PW1 and adduced a Copy of Sale Agreement dated 30/03/2021. This agreement is between Samuel Mwangi Mburu and Charles Ohuru Nyamboye (vendor). It was not in dispute that the plaintiff is the purchaser in the agreement and which was confirmed by Mr. Nyamboye who testified as PW2. I note that the same identifies the suit properties herein, has a consideration and is signed by both parties. Also adduced was a Copy of Cancelled title deed Kwale/Mrima/174 in the name of Ohuru Charles Nyamboye ; Copy of cancelled title deed Kwale/Mrima/174 in the name of Yonga suma Joloi; Copies of title deed for Kwale/Mrima 849 and Kwale/Mrima 850; Letter of Consent dated 28/02/2018; Transfer by Chargee in Exercise of Power for Sale; Search for Kwale/Mrima 849 and Kwale/Mrima 850. All these documents set out the history of how the plaintiff acquired title to the suit properties.
40. The evidence above was corroborated by PW2 Charles Ohuru Nyamboye who confirmed the plaintiff evidence and that he sold the suit properties to PW1 which he purchased from ICDC as Kwale/Mrima/174.
41. It is also important to note the land registrar who testified as PW3 also confirmed that the above entries were noted in the parcel file which he had carried to court. It is also confirmed by DW1 that transactions adverse to her interest were registered against the property albeit without her knowledge and consent. The above transaction indeed forms part of the alleged adverse transactions.
42. I will now proceed to analyse the defendant's evidence and documentation challenging Mr. Nyamboyes title which he transferred to the plaintiff.
43. The defendant testified as DW1 and reiterated that she is the owner of the suit property having bought it from one Joloi. It is not in dispute that the first registered owner of the suit property was Yonga Joloi as evidenced by a green card produced by the defendant. The green card is certified a true copy by the Kwale land registry. Entry No. 1 dated 17/3/1987 shows Yonga Suma Joloi was the 1st registered proprietor of the mother title . This was also confirmed by PW3.
44. DW1 also produced a copy of a sale agreement dated 15/12/1981. The court reviewed this agreement. The agreement refers to Tsimba Magulu who seems to be the purchaser. According to the DW1 witness statement which she adopted as her evidence in chief the said Tsimba Magulu is her husband who is deceased. Cross examined on this agreement DW1 admitted that while the agreement bears the names of the witnesses the said witnesses have not signed it. The court then inquired from the witness the whereabouts of the witnesses listed in the agreement. The witness informed the court they were all deceased. During cross examination by Ms. Matoke counsel for the plaintiff it emerged that the agreement was said to have no particulars of the suit property however the court noted the witness was illiterate and directed the issue be raised as part of the submissions. The witness in re-examination stated that they agreed with Njoloi on the size and she bought it.
45. My review of the agreement shows that indeed the witnesses are merely listed and have not signed the agreement. The agreement does not also identify the land that had been sold. Additionally, it is not signed by the said Njoloi the vendor. Clearly the agreement cannot pass the legal test of an agreement for purposes of Section 3 of the [Law of Contract Act](#). I will however revisit this issue later in this judgement for reasons that I will enumerate.
46. DW1 testified that Njoloi after the above agreement sold the land to a third party one Mary Wakonyo. The matter was heard by the Land disputes Tribunal who found in DW1 favor. DW1 presented to court copies of the proceedings in Land Case No. 6 of 2000 including the judgement of the



Tribunal. My perusal of this exhibit reveals that the Land Case No. 2000 was filed in the Senior Resident Magistrates Court at Kwale, pitting Mwaka Tsimba Magulu Vs Jonga Tsuma Njoi where on 30/11/2000 in the absence of the parties L.N.Mbatia R.M adopted the tribunals judgement as a judgement of the court. On 15/12/2000 in the presence of the plaintiff the judgement was read and explained. Thirty (30) days right of appeal was given. The extract is certified as a true copy.

47. DW1 clings to the above judgement in her claim on the suit property noting that it held she was the owner of the land. I have read the judgement of the tribunal which refers to the mother title Kwale/Mrima/174. The tribunal found that Njoi was a double dealer, rejected the idea to refund the money to DW1 and made a finding that the Land parcel be transferred back to the plaintiff. I note that the counsel for the plaintiff did not make any reference to the tribunal proceedings in his submissions. On the other hand, counsel for the defendant placed a lot of emphasis on the judgement of the Tribunal adopted by the Resident Magistrate Kwale.
48. From the proceedings the land was transferred to Mary Wakonyo Ndungu and this is not in dispute. It is corroborated by PW3 as confirmed in the green cards produced in court by both the plaintiff and the defendant. It is entry No. 3 thereof of 18/11/1988 and title deed issued on the same day. Title to Njoi at entry No. 2 is seen to have been duly struck through (cancelled). It would appear to me that the judgement was adopted after the title had already been transferred to Mary.
49. The Tribunal determined that the land be transferred back to Mwaka Tsimba Magulu. The question that arises then is, can a judgement of the tribunal defeat a registered title? It becomes pertinent to visit the jurisdiction of the Land Disputes Tribunal. The jurisdiction of the Land Disputes Tribunal is established under Section 3(1) of the Land Disputes Tribunal Act 1990 (CAP 303A (repealed) which states as follows:

“Subject to this Act, all cases of a civil nature involving a dispute as to—

- a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land shall be heard and determined by a Tribunal established under section 4.”

50. From the judgement the Tribunal made a determination with respect to title to land and which was well beyond their scope as outlined under Section 3[1] quoted above. It is clear that the proceedings prima facie violated the Land Disputes Tribunal Act (now repealed) to the extent of ordering transfer to the defendant. I am persuaded by the finding in the case of Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & Another, Nairobi, High Court, JR 370 of 2013 [2014] eKLR where Odunga J (as he then was) held as follows-

“In my view the view Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.

51. It is not enough to state the judgement was adopted by the Resident Magistrate. It is trite that the Magistrates court role is to merely adopt the judgement- See The Court of Appeal holding in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011 [2014] eKLR



52. Reference has been made to an entry made after entry No. 5 of the green card for the mother parcel (Dex 2) which it is contended by counsel for the defendant was confirmed by PW2 in cross examination. But I must respectfully correct this submission for the reason that while the same was read out by PW2 he denied knowledge of the tribunal proceedings. In this regard it is further submitted that this entry was ignored by the plaintiff who proceeded to purchase the property with the knowledge that the defendant was the owner.
53. Cross examined by Ms.Ogoti PW3 confirmed he had the green card for 714 and that he could see the insert and he read out the alleged entry thus 'Land Award....no dealings 13/2/2021'. PW3 was very clear that he had not seen anything about the land award. PW1 also raised reservations during cross examination on this entry except that he conceded he had no proof it was fraudulent.
54. I have seen the entry referred to above. The entry is not so clear but what the land registrar read is what I was able to see. But to me based on PW3 denial I also had my reservations about the entry. Comparing this entry with the other entries in the register, I noted it is not recorded in the normal manner. Infact PW3 called it an insert and rightly so. Unlike the other entries it does not bear an entry number and it does not bear the signature of the land registrar. I was not sure of its veracity and on what date it was inserted and by whom. I can only term it irregular.
55. But of utmost importance is the fact that the defendants name was never entered in the register as proprietor which DW1 clarified she tried but was not allowed to. We have already seen the legal implications of registration under section 26(1). The name appearing in the register is taken as prima facie proof of ownership subject to the provisos already explained hereinabove.
56. The court notes that the defendant statement of defence & counterclaim does not raise any allegations of fraud against the plaintiff. It is trite that fraud must be specifically pleaded, particularized and proved at a slightly higher threshold than the normal standard of a balance of probability - see the case of Galaxy Paints company Ltd Vs Falcon Guards Ltd (2000)E.A 885 and Raila amolo Odinga & another VS Independent Electoral Boundaries Commission & 2 Others (2017) eKLR.. It is not enough for DW1 to state that she learnt that different transactions adverse to her ownership of the mother title had happened without her knowledge and or consent. This consent in my view ought to have been between the defendant and Njoloi. I will therefore proceed on the basis of what has been pleaded.
57. It is trite that illegality is also a ground for impeaching title. The defendant pleads Mr. Nyamboye illegally subdivided the mother title, transferred to the plaintiff who was aware the defendant was the rightful owner. The plaintiff root of title springs from Mr. Nyamboyes title. The documents presented by PW1 supported Mr. Nyamboyes title. PW2 testified that he had no way of knowing about the land tribunal award and which is rightly so because he bought the mother title from ICDC and not Njoloi and ICDC exercised its chargee power of sale arising from Marys title. Mary's title was issued before the tribunal award. The property was charged in 1990 which was also before the Tribunals award. Infact even the impugned entry inserted after entry 5 in the Mother title is made after entry No. 5. Entry No. 5 is the transfer from ICDC to Mr. Nyamboye.
58. Based on the foregoing analysis the court has no basis upon which to impeach the plaintiffs title not on the basis of fraud, misrepresentation or illegality.
59. On the other hand, the Defendant also claims ownership by virtue of possession of the suit property for over 40 years and that by dint of this possession she is the owner of the property. To what extent can this assertion hold is the big question. Can such possession defeat the title of a registered proprietor? PW1 testified in his evidence in chief that after purchase he went to the suit property and found the defendant was in occupation which confirms the defendant's assertion that she is in occupation. PW1



did not confirm that he visited the property before sale. Mr. Nyamboye confirmed he never took the plaintiff vendor to the site.

60. Further while I have impugned the award of the Tribunal herein, the proceedings produced by DW1 remain part of the record. The same bear some crucial evidence that should assist the court to unravel some of the truths in this case to avoid a miscarriage of justice. It is also the only forum where the first registered owner of the mother title attended and admitted to the defendants claims. The evidence led before the tribunal also confirm the defendant had settled in a portion of the land and had made some developments thereon including crops and trees. The said Njoloji admitted during the said proceedings to have sold the suit property to three people including the defendant.
61. By dint of the agreement with Njoloji the defendant was put in possession thus creating a constructive trust which is deemed to be an overriding interest that need not be noted on the register. I will shortly cite case law that supports this position.
62. Having had the benefit of interacting with the witness during the court proceedings I found DW1 a very honest witness and I had no doubt about her evidence.
63. Based on the foregoing the solution in my view would be to import the principles of equity, by dint of the provisions of section 3 of the *Judicature Act*.
64. The word equity broadly means a branch of law denoting fundamental principles of justice. Black's Law Dictionary, Ninth Edition defines equity as,

‘The body of principles constituting what is fair and right; The recourse to principles of justice to correct or supplement the law as applied to particular circumstances; The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict’
65. Moreover *the Constitution* of Kenya 2010 has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others,
66. In the case of *Shah & 7 Others Vs Mombasa Bricks & Tiles Ltd Limited & 5 Others* (Petition 18 (E20) of 2022) (2023) KESC 106 KLR; *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR), the Supreme Court of Kenya pronounced itself thus:-

‘74. Vide Section 3(1) of the *Judicature Act*, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.’
67. The Apex court further stated; -

‘77. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* Civil Appeal No. 6 of 2011, consolidated with No.26 & 27 of 2011 [2014] eKLR and in *Willy Kimutai Kitilit v Michael Kibet*, Civil Appeal No. 51 of 2015 [2018] eKLR, the Court of Appeal, in matters involving the sale of land, held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case.



86. We have found that the doctrines of equity are part of our laws by virtue of Section 3 of the Judicature Act. And while the Constitution entitles every person to the right to property at Article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while Sections 25 and 26 of the Land Registration Act provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, Section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.
87. We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.’

Emphasis is mine.

68. Guided and applying the above to the circumstances of this suit the court finds that the defendant’s occupation herein must be recognized, to the extent that the sale agreement was confirmed in the tribunals proceedings where the Vendor participated and admitted the same and the defendant put into occupation. Further it was acted upon by the defendant. I’m inclined to impute a constructive trust into the land sale agreement produced herein.
69. Based on the decisions cited it is clear that a trust can be imported into a land sale agreement to defeat a registered title without offending the constitutional right to property under Article 40 of the Constitution and other statutory provisions.
70. However having noted the above, the plaintiffs title has also been supported by the history in the documentation and was also purchased after Mr. Nyamboye purchased under chargee powers of sale. It would be irregular for this court to impugn the transfer from ICDC for the reason that this would not be the proper forum to impeach the auction, as such impeachment is outside the jurisdiction of this court. Having chosen equity it is important that under the circumstances. this case should be a win win situation where the scales of justice must balance. I decline to declare the defendant a trespasser.
71. The following orders therefore issue to dispose of the plaintiffs suit and the counterclaim.
1. Judgement is entered in favour of both the plaintiff and the defendant on the counterclaim.
 2. The Plaintiff and the defendant shall within 60 days of this judgement, the land being already subdivided into two portions agree on which of the two subdivisions shall be transferred to the Defendant based on her current occupation and usage before the filing of these proceedings.
 3. That failure to agree on (2) above an order hereby issues that the District Land Surveyor Kwale and the Land Registrar Kwale do visit the ground and survey the land in order to come up with the exact boundary of the portion under the defendants occupation and use to open a title for the said portion in the Defendants name within 45 days of the expiry of the 60 days above
 4. That upon (3) above the register shall be rectified accordingly to reflect the plaintiff’s new title.
 5. That costs of any ensuing survey shall be borne by the plaintiff.
 6. Each party shall bear their own costs of the suit and the counterclaim.



JUDGEMENT DATED SIGNED AND DELIVERED THIS 26TH DAY OF JUNE 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

26/6/2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Ms Matoke for the Plaintiff

Ms Kimani for the Defendant

Ms Asmaa Maftah – Court Assistant

