



REPUBLIC OF KENYA



Musyimi (Sued in his Own Capacity and also as the Administrator/Personal Representative of the Estate of Muoti Musyimi Ndolo (Deceased) & another v Kaumbulu (Environment and Land Appeal E040 of 2023) [2025] KEELC 4648 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E040 OF 2023**

AY KOROSS, J

JUNE 24, 2025

BETWEEN

DAVID MUSYIMI (SUED IN HIS OWN CAPACITY AND ALSO AS THE ADMINISTRATOR/PERSONAL REPRESENTATIVE OF THE ESTATE OF MUOTI MUSYIMI NDOLO (DECEASED) 1ST APPELLANT

PATRICK KINYOLO MBITHI 2ND APPELLANT

AND

ELIZABETH NGINA KAUMBULU RESPONDENT

(Appeal from the judgment of Hon. Daffline Nyaboke Sure PM, delivered on 27/11/2023 in Kangundo CM's Court ELC Case No. E030 OF 2021 (Elizabeth Ngina Kaumbulu versus Daudi Musyimi (Sued in his own capacity and also as the administrator/personal representative of the estate of Muoti Musyimi Ndolo (deceased) and Patrick Kinyolo Mbithi))

JUDGMENT

Background of the Appeal

1. The background of this appeal is that the respondent instituted suit against the appellants by way of a plaint dated 12/04/2021 over portions of land within Kangundo/Muisuni/2027 ("suit property").
2. It was her case that she was the beneficial owner of portions of the suit property, having purchased it for value from the deceased 1st appellant (deceased) and 1st appellant on diverse dates of 19/2/2008 and 12/1/2011. The former agreement shows she purchased 2 benches of the suit property, and the latter 1 bench. These portions shall jointly be referred to as "disputed portions". It is observed that the deceased and the 1st appellant are respectively mother and son.



3. Further, it was her case upon purchase, she took possession of the disputed portions and made developments therein and even planted fruits and vegetables on it. However, her peaceful occupation was disrupted when the 2nd appellant trespassed on it by invading the disputed portions, and he, in cahoots with the 1st appellant, deterred her from entering the suit property.
4. In consequence, she urged the court to compel the 1st appellant to transfer the disputed portion to her name and also sought orders of permanent injunction barring the appellants from interfering with the disputed portions and a declaration that she was the lawful owner of the disputed portions and costs of the suit and interests.
5. In opposing the claims made against them, the appellants filed a joint statement of defence dated 21/04/2021 and denied the claims and put the plaintiff to strict proof. Additionally, the 2nd appellant asserted that he purchased the suit property from Mutinda Kyule, also known as Nicholas Mutinda (Mutinda), who was the plaintiff's husband and maintained that the respondent had no right to claim ownership over the suit property.
6. It must be noted that, of significance, they pleaded that there had been citation proceedings between the parties in Kangundo SPM Citation Cause No. 8 of 2020, which had been determined, and Machakos High Court Civil Appeal No. 58 of 2020, which was awaiting determination. They urged the court to dismiss the appeal.
7. Afterwards, the matter was heard, parties called their respective witnesses and produced several documents. In the appellants' case, their evidence consisted of themselves and that of Paul Mwilu Musyimi and Musyoka Musyimi. As for the respondent's evidence, it was composed of herself and that of Isaac Wambua Matheka and Consolata Ndunge.
8. After hearing the parties, the matter was reserved for judgment and in the impugned judgment that the learned trial magistrate rendered, she made several observations and findings inter alia: -
 - a. Machakos High Court Civil Appeal No. 58 of 2020 acknowledged the existence of Kangundo Succession Cause No. 83 of 2020, and the 1st appellant had admitted he was the legal administrator of the deceased's estate and found the 1st appellant had been properly sued.
 - b. Found that pursuant to Order 15 Rule 1 (a) (b) and (c) of the Civil Procedure Rules (CPR), the appellants had been at liberty to join Mutinda as a 3rd party to the proceedings.
 - c. Under Section 55 (1) of the Law of Succession Act, the immovable property of the deceased could not be sold before a grant is confirmed,
 - d. Under the Limitation of Actions Act, time started to run from 24/02/2021 when the respondent was directed by the High Court to pursue her claim in the ELC.
 - e. The Land Control Act could not suffice as the deceased died before she completed the transaction, and the transaction fell within the Law of Succession Act, and beneficiaries could be compelled to complete transactions.
 - f. The respondent had proved her case.
9. In light of the above conclusions and findings, the learned trial magistrate entered judgment in the respondent's favour by granting the following orders: -
 - a. The respondent is entitled to enforce the agreement dated 19/02/2008 against the estate of Muoti Musyimi Ndolo in Kangundo Succession Cause Number 83 of 2020.



- b. For the agreements dated 12/01/2011 and 17/09/2011, the respondent is entitled to get the parcels of land from the 1st defendant's share, and after the grant is confirmed.
- c. The respondent will have the costs and interest of the suit.

Appeal to this court

10. This decision did not sit well with the appellants and aggrieved, and in exercise of their right to appeal, the appellants invoked this court's jurisdiction by filing a memorandum of appeal dated 13/12/2023 and filed on the instant date. They have raised the following grounds and have faulted the learned trial magistrate for: -
 - a. Failing to appreciate that the 1st respondent failed to furnish the court with evidence of the appointment of the 1st appellant as the deceased's legal administrator and/or ownership of the suit property.
 - b. Failing to appreciate that the respondent failed to plead the sizes/measurements of the disputed portions.
 - c. Failing to appreciate that the purchase agreement dated 19/02/2008 was unenforceable in law for want of consent of the Land Control Board.
 - d. Failing to appreciate that the purchase agreement dated 19/02/2008 was time-barred by operation of Section 7 of the *Limitation of Actions Act*.
 - e. Failing to appreciate by operation of section 55(1) of the *Law of Succession Act*, the purchase agreement dated 12/01/2011 was null and void as it was done before confirmation of a grant.
 - f. Failing to appreciate the respondent breached the purchase agreements dated 19/02/2008 and 12/01/2011 by failing to pay the full consideration as agreed.
 - g. Holding in the respondent's favour and granting her reliefs that were not sought.
11. The appellants thus pray that their appeal be allowed by setting aside the judgment of the trial court and substituting it with an order dismissing the respondent's suit with costs, and that the costs of the appeal be borne by the respondent.
12. As directed by the court, the appeal was canvassed by well-articulated written submissions that were received from the law firms of Ms. Nduva Kitonga & Company Advocates for the appellants and Ms. Nzuki Nzioka & Co. Advocates for the respondent, respectively, dated 14/06/2024 and 30/06/2024.

Issues for Determination, Analysis, and Determination

13. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
14. Therefore, this court has carefully considered the records, parties' rival submissions, provisions of law and authorities relied upon, and the issues that arise for determination are those contained in the grounds of appeal. For good order, these grounds shall be addressed shortly in a sequential manner.
15. But before proceeding further, this court deems it necessary to address itself to the preliminary issue of the introduction of a new ground on appeal. Having considered the entire record, it arises that ground



- (f) cannot stand as that ground was never pleaded, canvassed or made an issue before the trial court. This court finds this ground of appeal is misplaced. We will now proceed with the other grounds.
16. As regards ground (a), which was the issue of the capacity of the 1st appellant being sued as the legal representative of the deceased's estate, the legal framework thereof is found in our Section 2 of the Civil Procedure Act, which defines a 'legal representative' as: -
- “ a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”
17. Further, Section 82 of the Law of Succession Act provides as follows: -
- “Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-
- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b)
18. On matters of jurisprudence and as held in *Kipnetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021] KEELC 241 (KLR)*, the issue of locus standi is a primary point of law that goes into the jurisdiction of the court to entertain a dispute.
19. The appellants do not question the legal standing of the 1st appellant as the deceased's legal administrator, and their only bone of contention is that the grant was not produced before the court. However, in agreement with the respondent's arguments and findings of the trial court, it was not necessary for the grant to be produced as the 1st appellant admitted he was the legal administrator, which was corroborated in the decision of Machakos High Court Civil Appeal No. 58 of 2020.
20. As to the 2nd limb of this ground, the provisions of Order 4 Rule 3 of the Civil Procedure Rules (CPR) state that the plaint shall adequately describe the suit property. In this case, the appellants identified it and even admitted it was registered in the deceased's name. Furthermore, as required by Order 37 Rule 7 of the CPR, it is only in claims of adverse possession that a claimant is required to provide a certified extract of the title to the land in question. Ultimately, this court finds ground (a) fails.
21. Ground (b) also suffers a similar fate as the plaint in paragraph 5 pleads that the respondent is claiming portions that she purchased in the agreements dated 19/2/2008 and 12/01/2011. These agreements were produced, and the measurements therein are referred to as benches. The respondent testified that these benches were measured, and the 2 benches in the 1st agreement were 1 acre, and the 1 bench in the latter agreement was equivalent to ½ acre. This court need not say more. This ground fails.
22. Concerning ground (c) and as submitted by the appellant's counsel, Section 8(1) of the Land Control Act prohibits any dealing with agricultural land in a land-controlled area unless the consent of the land control board for the area is first obtained, and in default, the transaction is void for all purposes.
23. To support this argument on the error by the trial court, the appellant's counsel relied on the decision of *Hirani Ngaithe Githire v Wanjiku Munge (1979) eKLR*, which held that where the necessary consent of the land control board (LCB) has not been obtained within the stipulated time, it becomes an illegal contract for all purposes.



24. Nevertheless, and being guided by the legal doctrine of stare decisis, this decision is not binding on this court. In a more recent and binding decision of the Court of Appeal in Kiplagat Kotut v Rose Jebor Kipngok [2019] KECA 921 (KLR), which aligns with the reasoning of the learned trial magistrate, the court stated:-

“We hasten to state that the Land Control Act, Cap 302 of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.”

25. In this decision, the Court of Appeal also affirmed its decision in Willy Kimutai Kitilit v Michael Kibet [2018] KECA 573 (KLR), which was referenced by the learned trial magistrate. In this particular decision, the court held: -

“...Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

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

26. As rightfully observed by the trial magistrate, the deceased died before completing the transaction on the agreement dated 19/02/2008. The reading of this agreement shows there was a common intention between the deceased, the 1st appellant and the respondent that the respondent was purchasing 2 benches that belonged to the 1st appellant, albeit still registered in the name of the deceased. In other words, the deceased held this portion in trust for the 1st appellant.

27. In compliance with the terms, the respondent paid the deposit of the purchase price of kshs. 75,000/- leaving a balance of kshs. 475,000/-. It is observed that the learned trial magistrate did not address her mind on this balance. On analysis of the evidence, this court is not satisfied that this balance was ever paid, as no records of payments were ever tendered to substantiate payments. A reading of the



- agreement reveals that the balance could only be settled once a title was issued in the respondent's name, which has not happened to date.
28. In consequence and guided by precedence, this court finds that nothing in the *Land Control Act* prevented the respondent from seeking to enforce the agreement of 19/02/2008. This ground of appeal fails. Nevertheless, and for reasons that there is an outstanding balance of kshs. 425,000/=, this court finds this sum is due and owing to the 1st appellant.
 29. Turning to the next ground, the arguments by the appellants that the respondent's claim was statute-barred in ground (d) does not hold much weight since and as held in Kiplagat (Supra), the intention of the parties was made in the agreement, the deposit was paid, but before the completion period, the deceased died. Thus, it was incumbent upon her estate to complete the transaction as upheld in the Court of Appeal decision of Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor Of The Estate of Gulamhussein Ebrahimji Pothiwalla V Kidogo Basi Housing Corporative Society Limited & 31 Others [2009] Keca 400 (Klr).
 30. Accordingly, when the administrators were appointed, they held the 2 benches portion in trust for the respondent. Noteworthy, having received the deposit and put the respondent in possession, it arises by the doctrine of proprietary estoppel and constructive trust, which are applicable in this case, that the administrators could not renege from their contractual obligations as well as fiduciary duty imposed by law and equity. Moreover, as affirmed in Anne Murambi v John Munyao Nyamu & another [2018] KEELC 2375 (KLR), the respondent's right of action was preserved by Section 20 of the *Limitation of Actions Act*. Thus, this court finds this ground of appeal fails.
 31. In respect of ground (e) and as properly submitted by the appellants, Section 45(1) of the *Law of Succession Act* states that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person and in default, he is liable to a fine and be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled.
 32. It is worth observing that the 1st appellant is not only the legal administrator of the deceased's estate but also one of the persons who executed the agreement dated 12/01/2011. This 1 bench that was sold by him and his wife, Rose David Musyimi, specifically belonged to him and her, as it was their wedding gift. In other words, from the date of the gifting, the deceased held it in trust for them.
 33. In conducting this particular transaction, all the parties, namely the 1st appellant, his wife and the respondent, all breached Section 45(1) of the *Law of Succession Act*. However, it is trite law and as properly held by the trial magistrate that the court cannot allow a person to benefit from his own wrongdoing, as equity detests unjust enrichment. See Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR.
 34. So, what next in this illegal transaction? The answer is that the respondent cannot claim ownership in it directly from the estate of the deceased, as she is neither a creditor nor does she have any interest known in law against the deceased's estate in respect of this 1 bench that measures approximately ½ acre. Thus, this court finds her claim of ownership and transfer in respect of the ½ acre was premature, as it would have to await the probate court's decision on distribution. For now, and since she pleaded trespass, she is only protected on this ½ acre as a person in possession of it. Hence, this court finds that this ground of appeal is partly merited.
 35. On the last issue and in agreement with the appellants, it is trite law that parties are bound by their pleadings. Notwithstanding this settled law, the learned trial magistrate, despite properly appreciating



the evidence and law, fell into grave error in granting orders not sought and therefore, this court has no choice but to disturb the judgment.

36. Accordingly, this court hereby finds that the appeal is partly merited. Since it is trite law that costs follow the event and since the appellants were partly successful, they will pay ½ of the costs of the appeal to the respondent, while the lower court costs shall not be disturbed. To this end, this court hereby issues the following disposal orders: -

- a. A permanent injunction is hereby issued against the appellants restraining them, their agents, servants, employees or subjects from entering, dividing, constructing, trespassing, interfering, residing, dividing, selling, alienating, subletting, transferring, charging, or in any way dealing with portions of Kangundo/Muisuni/2027 as purchased by the respondent in the agreements dated 19/02/2008 and 12/1/2011 and as it exists on the ground and measures approximately 1.5 acres.
- b. A declaration is hereby made that the respondent is the lawful owner of a portion of Kangundo/Muisuni/2027 as purchased by the respondent on 19/02/2008 and as it exists on the ground and measures approximately 1 acre.
- c. At the respondent's costs, it is hereby ordered that within ninety (90) days from the date hereof, a subdivision and transfer be conducted by the relevant land registrar and/or surveyor or such other officer as shall be delegated by the land registrar, to survey, ascertain and excise a portion measuring approximately 1 acre within Kangundo/Muisuni/2027 as purchased by the respondent on 19/02/2008 and as it exists on the ground for purposes of registration in the respondent's name.
- d. In default of compliance with the orders, the deputy registrar or authorised officer shall execute all the necessary documents to confer a portion measuring approximately 1 acre within Kangundo/Muisuni/2027 as purchased in the agreement dated 19/02/2008 and as it exists on the ground to the respondent's name.
- e. Within 14 days following the registration of the 1 acre as purchased in the agreement dated 19/02/2008 and as it exists on the ground within Kangundo/Muisuni/2027 to the respondent's name, the balance of the purchase price in respect of the agreement dated 19/02/2008 of kshs. 425,000/- shall be released through the respondent's advocates on record herein to the estate of the deceased 1st appellant for the benefit of the 1st appellant.
- f. The respondent is awarded ½ of the costs of the appeal and the costs of the lower court suit with interest.

Judgment accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 24TH DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

24.06.2025

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
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In the presence of;

Mr. Otto Nduva holding brief for Mr Kitonga for appellant.



Mr Nzioka for respondent

Ms Kanja- Court Assistant.

