



REPUBLIC OF KENYA



**Makau & another v Nzioka (Environment and Land Case E002 of 2022)
[2025] KEELC 7368 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E002 OF 2022
NA MATHEKA, J
OCTOBER 29, 2025**

BETWEEN

JANET MBOLI MAKAU 1ST PLAINTIFF

NZEMBI MAKAU 2ND PLAINTIFF

AND

JUDITH N'THENYA NZIOKA DEFENDANT

JUDGMENT

- 1 The 1st and the 2nd Plaintiffs aver that they are the legal administrators of the Estate of Peter Makau Ndonge (the deceased) thus the administrators of the suit property L.R. Machakos/Nguluni/2949 situate in Tala along Kangundo road. That the Defendant trespassed onto the Estate of Peter Makau Ndonge on land reference number L.R. Machakos/Nguluni/2949 and erected a permanent structure. The Defendant has unlawfully and illegally acquired part of the land on L.R. Machakos/Nguluni/2949 which forms part of the Estate of Peter Makau Ndonge (deceased).
- 2 The Plaintiffs pray for Judgment against the Defendant for;
 - a. A declaration that the land comprises in land parcel number L.R. Machakos/Nguluni/2949 situate in Tala forms party of the Estate of Peter Makau Ndonge (deceased).
 - b. A declaration that the land comprises parcel number L.R. Machakos/Nguluni/2949 belongs to the Estate of Peter Makau Ndonge and the Defendant has no proprietary interest over the said parcel of land L.R. Machakos/Nguluni/2949.
 - c. A declaration that the acquisition of the said parcel of land L.R. Machakos/Nguluni/2949 by the Defendant was illegal acquired or otherwise unlawfully thus invalid.
 - d. A declaration that the sale of said parcel of land Machakos/Nguluni/2949 was illegal and unlawful thus invalid.



- e. A declaration that the sale agreements between one of administrators (2nd Plaintiff) and the Defendant were and are illegal and unlawful thus invalid.
 - f. A declaration that an extra piece of land measuring 15ft by 150ft was illegally acquired through force.
 - g. A declaration that the Plaintiffs are the legal administrators of the Estate of Peter Makau Ndonye.
 - h. An eviction order to issue against the Defendant herein, her servants and/or anybody acting on her behalf from the land parcel number Machakos/Nguluni/2949.
 - i. The value of the said piece of land be reviewed per the current value market.
 - j. Compensation
 - k. Costs and interest
- 3 In the counter claim the Defendant states that she expressed interest to the 2nd Plaintiff of purchasing Land measuring Approximately 100 x 100 feet be exercised from Land Reference Number Machakos/ Nguluni/2949. At the time of the Defendant's offer the 2nd Plaintiff represented to the Defendant that she was the sole registered owner of the Land Reference Number Machakos/ Nguluni /2949. The Defendant then procured a Certificate of Search from the Land Registrar at Machakos which indeed indicated that the 2nd Plaintiff was the sole registered owner of Machakos/ Nguluni/2949. Based on the Certificate of Search, the 2nd Plaintiff together with the Defendant entered into a handwritten Sale Agreement dated 17th September 2018 which agreement had Six (6) Witnesses. That further to the above mentioned handwritten Sale Agreement, on the 26th September 2013, the Defendant made a second payment of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00) only which payment was received by the 2nd Plaintiff together with her two (2) Sons. On the 12th October 2018, the Defendant made a further payment of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00) only which payment was also received by the 2nd Plaintiff together with her two (2) Sons. Subsequently on the 24th of October 2018, the 2nd Plaintiff and the Defendant caused for a Sale Agreement to be prepared by the firm of Ndemo Mokaya & Co. Advocates with respect to the Sale and Purchase of Land measuring Approximately 100 x 100 feet to be exercised from MACHAKOS/ NGULUNI/2949, which agreement was signed by the two parties and witnessed by one Nzioka Mumo and Mourice Musyoki Munywoki.
- 4 On the 23rd of July 2021, the 2nd Plaintiff and the Defendant instructed the firm of Ndemo Mokaya & Co. Advocates to prepare a Sale Agreement with respect to the Sale and Purchase of Land measuring Approximately 50 x 100 feet to be exercised from L.R MACHAKOS/ NGULUNI/2949 which agreement was signed by the two parties and witnessed by Kioko Makau, Bernard Musyoki Makau and Nzioka Mumo. After the payment of the full purchase price, the Defendant entered the Suit Property and developed it. In order to access the Suit Property, the 2nd Plaintiff and the Defendant agreed that a 15 x 100 feet road be created on the remainder of the 2nd Plaintiff's Property to enable the Defendant access the 50 x 100 feet Property, which Property is situated behind the initial 100 x 100 plot. It was agreed by both parties in consideration for creation of the hereinabove mentioned easement, the Defendant would finance the cost of Sub-division of the resultant Three (3) pieces of land. Despite the Payment of the full purchase price to the 2nd Plaintiff, she has ignored and/or refused to transfer the Suit Property to the Defendant.
- 5 The Defendant requests for Judgement against the 2nd Plaintiff for; -



- a. A declaration that the Defendant is the legal and beneficial owner of Land measuring approximately 100 x 100 feet and 50 x 100 feet to be exercised from Land Reference Number Machakos/Nguluni/2949 as a bona fide purchaser.
 - b. An Order do issue compelling the 2nd Plaintiff to transfer land measuring approximately 100 x 100 feet and 50 x 100 feet to be exercised from Land Reference Number Machakos/Nguluni/2949 to the Defendant.
 - c. An Order do issue directing the County Surveyor Machakos County to exercise an access road on Land Reference Number Machakos/Nguluni/ 2949 to the Defendant’s land.
 - d. Cost of the Suit.
- 6 This court has considered the evidence and the submissions therein. It is not disputed that the 2nd Plaintiff is the registered proprietor of land parcel No. Machakos/Nguluni/2949. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;
- “Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
- 7 Section 26 (1) of the [Land Registration Act](#) states as follows;
- “The Certificate of Title issued by the Registrar upon registration ... 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.”
- 8 The Defendant stated that between 17th September 2018 and 23rd July 2021 she entered into three sale agreements with the 2nd Plaintiff for the sale and purchase of two pieces of land measuring 100 by 100 and 50 by 100 feet to be exercised from land parcel No. Machakos/Nguluni/2949 (PEx2,3&4). That at the time of the purchase the 2nd Plaintiff was the registered owner as per the official search dated 8th October 2018 (PEx 1). The Defendant was granted possession and proceeded to establish a mortuary business. Prior to setting up the same she carried out public participation and was issued with a license dated 27th June 2019 from NEMA. She also procured the business license and permit to run the business and produced all the approvals (PEx5, 6, 7, 8, 9 & 10).
- 9 The 1st Plaintiff stated that the Defendant was fraudulent for acquiring the land without consent of all legal administrators. That her father was the owner of the land and he had not sold it to anyone. That as one of the administrators she was not aware of the sale. That her mother the 2nd Plaintiff and her brothers are illiterate. That the Defendant used coercion, undue influence and force to the 2nd Plaintiff (co-administrator) to acquire the said land. That she acquiring part of Estate (land) without the knowledge of the 1st Plaintiff who is a co-administrator of the Estate of Peter Makau Ndonge. That she acquiring the Estate without valid documents from the vendor and under valuing the suit



property. The particulars of fraud where among others; Ignoring the law of succession; Acquiring the parcel of land without valid Land Board Consent; Acquiring the land without value consideration; Acquiring the land without valid sale agreement. Illegal acquisition of parcel of land measuring, 100ft by 100ft and 100ft by 50ft through coercion, undue influence. Forcefully and without any value consideration acquiring an extra parcel of land measuring 15ft by 150ft; Grabbing land measuring 15ft by 150ft; Taking advantage of illiteracy of old age of the 2nd Defendant to acquire the land. Not following the due legal process to acquire the land and trespassing into the land L.R. Machakos/ Nguluni/2949. That the Defendant has gone against permissible land use. That the Defendant erected a mortuary in a residential area. Not allowing public participation. Erecting a mortuary near main water points. Erecting mortuary near schools, churches and market. The Defendant did the acts aforesaid maliciously and out of site towards the Plaintiff with the intentions of trespassing, possessing to continue remaining in wrongful occupation of the said parcel of land known as L.R. Machakos/ Nguluni/2949 and trespass thereon. PW2 Bernard Musyoki Makau and PW3 Nzemi Makau admit selling the land to the Defendant and receiving the purchase price. That they did not know what was in the agreement.

- 10 The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

- 11 While Section 38 (1) of the *Land Act* states;

Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

- 12 In Harris JA in *Garvey vs Richards* (2011) JMCA 16 the court in considering the essential components of a contract reflected the following principles;

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter



must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

- 13 The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd vs Moikerei Alois Muller GMBH & Co K. G.* (2010) UKSC 14;

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

- 14 I find that the 2nd Plaintiff willingly entered into the sale agreement with the Defendant and had her family members as her witnesses. I find that she was the registered owner of the suit land and the Defendant did her due diligence. I find that the Defendant has established beneficial interest on a portion of the suit land as per the documentary evidence produced in court. No evidence has been adduced by the Plaintiffs to prove any fraud and/or coercion.

- 15 Section 109 of the *Evidence Act* Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

- 16 The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi* (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* 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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

- 17 In *James Muigai Thungu vs County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

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.



18 Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

19 The Supreme Court in Petition No. 18 (E020) OF 2022 Arvind Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others stated as follows;

“While Sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust. (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.

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.”

20. In *Archer & another vs. Archer & 2 others* (Civil Appeal 39 of 2020) (2023) KECA 298 (KLR) this Court stated as follows:

“A constructive trust is therefore generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. This Court upheld this view in *Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others* (supra) as follows:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black’s Law Dictionary*) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a



trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled."

21. The Defendant led detailed evidence that she bought the suit land and took possession in 2018. All the sale agreements were produced in evidence during the trial. I am satisfied that the Plaintiff has been in possession of the suit land from the year 2018. She has constructed permanent buildings and started a business. Looking at the totality of the evidence considered by the court and noting that both the Plaintiffs and the Defendant were in peaceful occupation in their respective portions for some years the court is persuaded that the Defendant lawfully purchased the said portion. I find that it was dishonest for the Plaintiffs to fail to transfer the suit plot to the Defendant knowing very well the Plaintiff was and/had been in possession.
22. I find that a constructive trust does exist and the Defendant holds an overriding interest over the suit land. Having found that the Defendant has discharged the evidentiary burden on a balance of probability, this Court holds and finds that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs. I find the Defendant has proved her counter claim on a balance of probabilities and I grant the following orders;
 1. An Order do issue compelling the 2nd Plaintiff to transfer land measuring approximately 100 x 100 feet and 50 x 100 feet to be exercised from Land Reference Number Machakos/Nguluni/ 2949 to the Defendant within 60 (sixty) days from the dated of service of this Order.
 2. An Order do issue directing the County Surveyor Machakos County to exercise an access road on Land Reference Number Machakos/Nguluni/ 2949 to the Defendant's land.
 3. Cost of the Suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE

