



The Plaintiff avers that Flora Itumbi Ngei has been in active possession of the land since 1986 where she rears animals and plants crops. She has also constructed permanent structures on the land and has her servants and/or agents who live in it. In the near past, the Defendant has been trespassing and encroaching into the land by grazing his animals, cutting trees and destroying Plaintiff's crops planted by Flora Itumbi Ngei. He has also been threatening the Flora Itumbi Ngei's servants and planting sisals in the middle of the parcel as if he wants to sub-divide and sell it.

Due to this Flora Itumbi Ngei became suspicious and conducted an official search at the Machakos Land Registry. She found that the Defendant had illegally and fraudulently registered the whole of Mitaboni/Mitaboni/2596 in his name without regard to Flora Itumbi Ngei's lawful interest thereon. The Plaintiff states that Flora Itumbi Ngei has been living in this land since 1986 and legitimately expected that when surveying starts, the Defendant will be honest enough to transfer to her 11.8 acres she bought.

The Plaintiff prays for Judgment against the Defendant for;

- a. An order that the Defendant transfers 11.8 acre to Flora Itumbi Ngei from Plot No. Mitaboni/Mitaboni/2596.

- b. An order restraining the Defendant order his servants, agents and/or anybody whatsoever from interfering with the parcel of land known as Mitaboni/Mitaboni/2596 until this matter is heard and determined.
- c. Costs of this suit.

In the alternative and without prudence to the foregoing, the Plaintiff prays for:-

- a. The court to award Flora Itumbi Ngei 11.8 acres from Plot No. Mitaboni/Mitaboni/2596 under the doctrine of adverse possessions.

This court has considered the evidence and the submissions therein. PW1 Sarah Kalekye Muya stated that Flora Itumbi Ngei donated a power of attorney to her vide the power of attorney registered as P/A 69477/1 and vide a court order given on April 2021 and hence she was substituted as the Plaintiff in this matter. I find that the Plaintiff has the locus standi to bring this claim against the Defendant. It is the Plaintiff's case that Flora Itumbi Ngei entered into several written contracts with the Defendant in which the Defendant sold part of his un-surveyed land Mitaboni/Mitaboni/2596 to Flora Itumbi Ngei. The same was witnessed by several witnesses. The agreements were entered on 11<sup>th</sup> June, 1986, 21<sup>st</sup> June, 1986, 30<sup>th</sup> June, 1986 and 4<sup>th</sup> April, 1989 of considerations Kshs. 41,000/=, Kshs. 41,000/=, Kshs. 90,000/= and Kshs. 60,000/= respectively. By the end of 1989, Flora Itumbi Ngei had bought a total of 11.8 acres from the Defendant, land that was surveyed and sisals planted by elders to demarcate Flora Itumbi Ngei's parcel from the

mother block parcel of Mitaboni/Mitaboni/2596. PW2, Johnson Nzomo corroborated the Plaintiff's evidence. He stated that the Plaintiff has been in possession ever since she purchased the same and that they once had a boundary dispute over the same.

It is not disputed that the Defendant is the registered proprietor of land parcel No. Mitaboni/Mitaboni/2596 after purchasing the same from through a sale agreement. 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.”*

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.”*

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:*

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.*

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.”*

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.”*

The Defendant stated that he did not sell the land to the Plaintiff but sold it to Alice. That Alice lives that in the house in the photos produced in court. He admits that there was a boundary dispute and the elders put the sisal demarcating the same. That he does not live there but his children do. That the sale agreement in court is a forgery as it was amended to put Flora's name. he admits signing the agreement but does not have the original. That the Plaintiff no longer stays there though she used to cultivate the land before. DW2, Pius Mutua corroborated the Defendants evidence and stated that the Defendant sold the land to Alice and not Flora. That the Defendant wrote the agreements himself. That he witnessed the agreement with Alice. That Alice is the Plaintiff's sister.

The Plaintiff produced the various sale agreements of which it is not disputed were in the Defendant's handwriting. The original agreements were produced during the hearing. The Defendant maintains that the Plaintiff's agreements were fraudulently obtained as he entered the sale agreements with Alice and not Flora. I find no fraud as the Defendant admits signing the same. The Defendant confirms that the Plaintiff took possession and has constructed a house on the suit land.

I find that the Plaintiff has established beneficial interest to the suit land. The suit land belongs to the Plaintiff as per the documentary evidence produced in court. No evidence has been adduced by the Defendant to prove any fraud.

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.”*

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.”*

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.*

*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.”*

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.<sup>(86)</sup> 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.”*

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 Saggat 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."*

The Plaintiff led detailed evidence that she bought the suit land and took possession in 1986. PW2 corroborated her evidence. All the sale agreements were produced in evidence and the original ones produced during the trial. I am satisfied that the Plaintiff has been in possession of the suit land from the year 1986. She has cultivated the land and constructed permanent buildings. Looking at the totality of the evidence considered by the court and noting that both the Plaintiff and the Defendant were in peaceful occupation in their respective portions for some years the court is persuaded that the Plaintiff lawfully purchased the said portion. I find that it was dishonest for the Defendant to fail to transfer the suit plot to the Plaintiff knowing very well the Plaintiff was and/had been in possession. Also, in concealing material facts to the Land Adjudication Officer and the Lands Surveyor

that he had sold part of the land to Flora Itumbi Ngei. Registering all of Mitaboni/Mitaboni/2596 in his name yet he knew he had sold 11.8 acres to Flora Itumbi Ngei. Obtaining the title deed secretly in his name without informing Flora Itumbi Ngei of the process.

I find that a constructive trust does exist and the Plaintiff holds an overriding interest over the suit land. Having found that the Plaintiff has discharged the evidentiary burden on a balance of probability, this Court holds and finds that the Plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order that the Defendant transfers 11.8 acre to Flora Itumbi Ngei from Plot No. Mitaboni/Mitaboni/2596 within the next 60 (sixty) days from the date of service of this order.
2. Costs of this suit to be borne by the Defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF OCTOBER 2025.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL