



**Mutinda v Munee & another (Environment and Land Appeal  
E026 of 2024) [2025] KEELC 7366 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7366 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E026 OF 2024  
NA MATHEKA, J  
OCTOBER 28, 2025**

**BETWEEN**

**MOURINE N. MUTINDA ..... APPELLANT**

**AND**

**MUNGUTI MUNEE ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN OMANGA BOSIRE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant appealed to the Environment and Land Court of Machakos against the whole of the above mentioned Judgment on the following grounds, namely;
  1. That the learned Magistrate erred in law and fact in failing to appreciate the Appellant's evidence and her witnesses and thereby arriving at the wrong decision.
  2. That the learned Magistrate erred in law and fact in by holding that the Appellant had slept over her right for failing to obtain the Land Control Board consent and obtain her title despite admitting that she had legally purchased the same.
  3. That the learned Magistrate erred in law and fact in holding that the Appellant had not proved fraud on the part of the 2<sup>nd</sup> Respondent despite the overwhelming evidence tendered.
  4. That the learned Magistrate erred in law and fact in holding that the 2<sup>nd</sup> Respondent herein obtained a valid title despite the land not having being available for sale as it is already admitted that it had been sold to the Appellant.
  5. That the learned Magistrate erred in law and fact in failing to attach the due weight to the Appellant's evidence and submissions on the primary suit.



6. That the learned Magistrate erred in law and fact in finding that the Appellant failed to prove case and thereby dismissing the same.
  7. That the learned Magistrate erred in law and fact in holding that failure to substitute the 1<sup>st</sup> Defendant compromised her interests.
  8. That the learned Magistrate erred in law and in fact by considering extraneous facts that were not material to this case.
2. The Appellant prays for orders that;
- a. That this Appeal be allowed and the Judgment of the Hon. Ole Keiwua K.D, Chief Magistrate delivered on the 31<sup>st</sup> May, 2024 and all consequential orders be set aside.
  - b. That Judgment be entered for the Appellant as against the Respondents as prayed in the amended Complaint dated 20<sup>th</sup> July, 2021.
  - c. That the Appellant be awarded the costs for the Kangundo Chief Magistrate Environment and Land Case Number 90 of 2013 and this Appeal.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah (1968) EA 93* where it was held that;
- “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
4. In the trial court the Plaintiff/Appellant stated that on or about the 20<sup>th</sup> June 2008 2005 she purchased the portion of the suit property Donyo Sabuk/Komarock Block 1/20000 from Munguti Munee for Kshs. 200,000/= . She immediately took possession of the portion measuring 2.67acres. That on the 31<sup>st</sup> July 2013 she discovered that Munguti had sold the same parcel of land to the 2<sup>nd</sup> Respondent on the 16<sup>th</sup> June 2012. Munguti subdivided the mother title property Donyo Sabuk/Komarock Block 1/20000 and the portion belonging to the Appellant was registered as property Donyo Sabuk/Komarock Block 1/2289 in the name of the 2<sup>nd</sup> Respondent. The Appellant pleaded particulars of fraud in her further amended complaint dated 20<sup>th</sup> July 2021.
5. It is not disputed that the 2<sup>nd</sup> Respondent is the registered proprietor of land parcel No. Donyo Sabuk/Komarock Block 1/2289 after purchasing the same from through a sale agreement from the 1<sup>st</sup> Respondent. 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.”



6. 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.”

7. 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:

8. 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.

9. 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.”



10. 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.”
11. The 2<sup>nd</sup> Defendant/Respondent stated that suit property Donyo Sabuk/Komarock Block 1/22891 was originally part of Donyo Sabuk/Komarock Block 1/20000 which belonged to Munguti Mune. That he is a bona fide purchaser and produced a sale agreement dated 16<sup>th</sup> June 2012. He maintains he exercised due diligence before the purchase but has never used the land.
12. The definition of bona fide purchaser for value without notice is

“that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.”
13. Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9<sup>th</sup> Edn Page 199) A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9<sup>th</sup> Edn).
14. It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.
15. In the case of *Jones vs Smith* (1841) 1 Hare 43, the Chancery Court held;

“a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her”
16. In *Yakobo M. N Senkungu & Others vs Cresencio Mukasa Civil Appeal No 17 of 2014*. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that;

“...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”
17. And as in the Supreme Court decision in *Dina Management Limited vs County Government of Mombasa* (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser. I find that the suit land had already been sold to the Plaintiff/Appellant in 2008 who has taken possession and was not available for sale to the 2<sup>nd</sup> Defendant/Respondent in 2012.



18. The Plaintiff testified that on 20<sup>th</sup> June 2008 she entered into an agreement for the purchase of a portion of land parcel No. Donyo Sabuk/Komarock Block 1/20000. She produced the sale agreement. The Appellant maintains that the 2<sup>nd</sup> Respondent's title deed was obtained fraudulently as she had already purchased the said suit land and the same was not available for sale. I agree with the Appellant's submissions. Indeed, the 2<sup>nd</sup> Respondent testified that he has never used the land!
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 Plaintiff led detailed evidence that she bought the suit land and took possession in 2008. PW2 corroborated her evidence. I am satisfied that the Plaintiff has been in possession of the suit land from the 2008. Looking at the totality of the evidence that was considered by the court and noting that both the Plaintiff was in peaceful occupation in her respective portion for 4 years the court is persuaded that the Plaintiff lawfully purchased the said portion. I find that it was dishonest for the 1<sup>st</sup> Respondent to fail to transfer the suit plot to the Plaintiff knowing very well the Plaintiff was and/ had been in possession. 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.
22. I find that the Appellant has established beneficial interest to the suit land and the suit land belongs to her. I find that the learned Honourable Trial Magistrate erred in law and in fact in finding that the Plaintiff failed to prove her case on a balance of probabilities. I find that this appeal is merited and I grant the following orders;
  1. That this Appeal is allowed and the Judgment of the Hon. Ole Keiwua K.D, Chief Magistrate delivered on the 31<sup>st</sup> May, 2024 and all consequential orders be set aside.
  2. That Judgment be entered for the Appellant as against the Respondents as per the amended Plaint dated 20<sup>th</sup> July, 2021 in terms of prayer a, b and c only.
  3. That the Appellant is awarded the costs for the Kangundo Chief Magistrate Environment and Land Case Number 90 of 2013 and this Appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF OCTOBER 2025.**

**N.A. MATHEKA**

**JUDGE**

