



1. In this case, the plaintiff and the deceased second defendant (**“Tuto,”**) were husband and wife, having joyfully entered into a Kamba customary marriage in 1954. Later on, their loving union was officially solemnised on 17/12/1977, transforming what was initially a potentially polygamous marriage into a committed monogamous relationship through a Christian ceremony. The couple was blessed with several children, and some of them are the 2<sup>nd</sup> to 4<sup>th</sup> defendants.
2. However, over the years, their marriage encountered many challenges, prompting Tuto to move on and live with Damaris \*\*\* (**“Damaris”**) as husband and wife. Dissatisfied with this arrangement, the plaintiff filed for divorce in **Machakos CM Divorce Cause No. 13 of 2017** against Tuto and Damaris, and on 10/08/2018, the court issued a decree absolute officially dissolving her marriage to Tuto. Additionally, in **Machakos HCCC 169 of 2009**, she obtained injunctive relief over **L.R. No. Mavoko Town Block 3/1160 (“suit property”)** that she registered; however, this case was dismissed, and the injunctive orders were lifted.
3. As the divorce proceedings continued, the plaintiff filed proceedings in **Machakos HC Matrimonial Cause No. 10 of 2017 (O.S.) (“matrimonial property case”)** seeking the ascertainment and distribution of matrimonial properties. After hearing the parties on the merits, the court delivered a

decision on 26/09/2019 and issued several disposal orders, some of which directly affect the outcome of this case. We will revert to this later.

4. Armed with this judgment, the plaintiff sued the first defendant, who had purchased the suit property from Tuto. She also sued Tuto, but unfortunately, he died on 20/09/2021 and was substituted with his representatives, the second to fourth defendants. Having laid the background, we shall proceed to summarise each of the parties' cases. It was worth pointing out that the plaintiff withdrew her case against certain defendants.
5. In her further amended plaint, the plaintiff claimed that under the matrimonial property case, she was entitled to a 50% interest in the suit property, and at all material times, Tuto held it in trust for her. She maintained that she had an overriding, equitable interest in it. She argued that the sale and transfer were fraudulent and unlawful, and she detailed and specified the fraud and illegality committed by the defendants by stating that they:
  - a. *Failed to inform her of the purchase and disregarded her 50% interest.*
  - b. *Transferred her interests to the 1<sup>st</sup> defendant without her consent and authority.*

- c. Fraudulently carrying out the transaction during the pendency of the matrimonial property case and in disregard of a registered caution and injunctive orders.*
- d. Obtaining the certificate of title within a week.*

6. Reverting to her claim of trust, she stated that the first defendant knew that the suit property was held in trust for her by Tuto, and as a result, the registration in the first defendant's name amounted to a constructive trust. Thus, she pleaded and particularized breach of constructive trust against the defendants in the following manner: -

- a. Obtaining registration of the suit property in its sole name with actual or constructive notice of the plaintiff's 50% interests.*
- b. Selling the suit property in the course of the matrimonial property case.*
- c. Causing the suit property to be registered in disregard of the plaintiff's 50% interests and further, not obtaining her consent and/or authority.*
- d. Failing to conduct due diligence.*

7. Ultimately, she sought the following reliefs from this court: -

- a. A declaration that the first defendant acquired the suit property illegally and unprocedurally, thereby disenfranchising the plaintiff of her 50% share in the said property.***
- b. A declaration that the first defendant holds 50% of the suit property in trust for her.***
- c. A cancellation of the suit property's title and directing the land registrar, Machakos, to register her 50% interest in the suit property.***
- d. A permanent injunction restraining the first defendant, whether by itself or its directors, servants, or agents, from dealing with, subdividing, constructing, disposing of, trespassing on, interfering with, charging, or in any way dealing with 50% of the suit property.***
- e. An order directing the first defendant to give an account of the sum of Kshs. 23,000,000/-***
- f. Costs of the suit.***
- g. Any other relief that the honourable court may deem just and fit to grant.***

8. Upon service of the pleadings, the first defendant filed a defence dated 27/03/2020, referencing the matrimonial property case, which stated that Tuto held the purchase price in trust for the plaintiff. Additionally, it denied the plaintiff's assertions and challenged the plaintiff to provide strict proof.

Furthermore, it argued that it was an innocent purchaser for value without notice of the plaintiff's interests.

9. Moreover, it stated that an official search of the suit property revealed no pending court proceedings concerning it, and notably, an entry in the register on 17/12/2017 showed that the caution was lifted by a court order on 12/05/2017. According to it, spousal consent was obtained from Tuto's wife, and due to the outcome of the matrimonial property case, this matter was a source of embarrassment and could result in conflicting decisions. It maintained that it lawfully acquired the suit property and was entitled to protection. It urged the court to strike out or dismiss the case with costs.

**Issues for determination**

10. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and issues as outlined in the filed submissions, the following issues for determination arise: -

***a) Whether the determination of Machakos HC Matrimonial Cause No. 10 of 2017 (O.S.) renders a determination of the issues herein moot.***

***b) Whether the plaintiff pleaded and proved her claims of fraud and illegality to the required standards.***

***c) Whether the plaintiff proved her claim of constructive trust.***

***d) Whether the first defendant is an innocent purchaser for value.***

***e) Whether the first defendant should render an account.***

11. Having outlined the issues to be decided, this court will now summarise the parties' evidence related to these issues as identified.

### **Hearing and evidence**

12. The matter eventually proceeded to a hearing on 18/05/2023, during which the plaintiff testified as **PW1** and, at her behest, the Machakos Land Registrar, Nancy Mireri, was summoned and testified as **PW2**. Collectively, their evidence consisted of witness statements, oral testimonies, and several documents produced, which were marked as **PExh. 1-14**.

13. The plaintiff's testimony reaffirmed her further amended plaint. She also stated that at the time of the disputed sale agreement dated 16/12/2017 between the first and second defendants, she was Tuto's legal wife, and Damaris, who signed the agreement, could not purportedly give consent. Furthermore, under the matrimonial property case, her interests were protected by **Sections 28** and **98 (3) and (4)** of the **Land Registration Act**. On cross-examination, she testified that Tuto moved to the suit property in 1998, and she

used to visit him there, but she stopped visiting him when they disagreed.

14. **PW2**, who produced the green card of the suit property as **Pex.14**, provided a history of the suit property. Of particular interest, she testified that on 14/1/2009, a caution was registered in favour of the plaintiff claiming interest as a licensee, but on 7/12/2017, the caution was lifted by a court order. Afterwards, on 2/02/2018, the suit property was registered in the first defendant's name, with the title issued on 5/02/2018 and consideration reflected as Kshs. Ten million for stamp duty purposes. She also testified that the registration of a transfer ordinarily takes two weeks or longer or shorter, depending on the circumstances.
15. On the conclusion of the plaintiff's case, the matter continued with the defence hearing, during which only Theodorah Mwikali Maala Kilukumi, the first defendant's director, testified as **DW1**. Of significance is that on the defence hearing date of 26/03/2025, the second and fourth defendants informed the court that it was their collective position to leave it to the court to determine the suit on its merits. It is observed that the second to fifth defendants did not file any defences in opposition to the suit, and their cases were marked as closed.

16. During the hearing, **DW1's** evidence comprised of her witness statement, oral testimony, and several documents produced, which were marked as **DExh. 1-6**. Her evidence was a rendition of the defence. Most importantly, she stated that the first defendant and the plaintiff did not have a relationship and, upon transfer of the suit property to the first defendant, the second defendant ceased to have proprietary rights over the suit property. Further, she stated that she knew Damaris was Tuto's wife, and averred that none non-existence of a marriage certificate between this couple did not necessarily mean that they were not married.

### **Submissions**

17. After the hearing concluded, and at the request of the parties, the parties argued their respective cases through written submissions. The court sincerely appreciates the well-argued submissions received from the law firms of **Ms. Maingi & Musyimi Associates**, representing the plaintiff, dated 30/04/2025, and from **Ms. Kaluu & Co. Advocates** for the first defendant, dated 9/06/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents cited. The other parties did not file any submissions.

### **Analysis and determination**

18. The issues previously identified will be addressed shortly in a sequential manner.

**a) Whether the determination of Machakos HC Matrimonial Cause No. 10 of 2017 (O.S.) renders a determination of the issues herein moot.**

19. Concerning this matter, it is a well-established legal principle that the court possesses inherent jurisdiction to protect itself against abuse or to prevent its processes from being misused. An abuse of court process is any departure from established good order that significantly deviates from reasonable use of court process; such abuse occurs when an individual makes excessive, improper, or contradictory use of court procedures, contravening their natural legal principles. The persuasive decision of **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] KEHC 8431 (KLR)**, relied upon by the first defendant, outlined several examples of such instances of abuse of court process, thus: -

***“(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.***

***(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.***

***(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.***

***(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.***

***(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.***

***(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.***

***(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.***

***(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert***

***the course of justice or judicial process to the irritation or annoyance of an opponent.”***

20. Regarding this issue, the plaintiff asserted that the suit property was declared as marital property in the matrimonial property case and that she was entitled to 50% ownership. Turning to the first defendant's arguments, it stated that the matrimonial property case had already resolved the issues herein, since in the matrimonial property case, the High Court determined that a 50% share in the proceeds from the sale of the suit property paid out to the deceased by the first defendant was rightfully hers.
21. The first defendant further argued that the decision of the High Court, a court of equal standing to this court, had never been appealed against or set aside; furthermore, this court could not entertain an appeal against the decision of a court with concurrent jurisdiction. It was also argued that filing the current suit amounted to an abuse of court process. Having considered this argument, this court is inclined to agree with the first defendant because the matrimonial property case in **SNM v MMT [2019] KEHC 4181 (KLR)** settled the dispute between the parties conclusively. The relevant excerpt of this decision stated: -

**“There is also a sale agreement entered into between the Defendant and Dee Properties Limited in respect Mavoko Town Block xxxx in the sum of Kshs 23,500,000/=. According to the agreement, the total purchase price was to be paid upon transfer of the same which was effected on 2<sup>nd</sup> February, 2018. ...In the premises I adopt the presumption that each party contributed 50% towards their acquisition...In this case, there is uncontroverted evidence of acquisition of the said properties during the subsistence of the marriage...These properties are Mavoko Town Block xxxx, Mavoko Town Block xxxx, Mavoko Town Block xxxx which was registered in the name of the Defendant on 27<sup>th</sup> January, 2017, Kshs 4,700,000.00 being the proceeds of the sale of part of Mavoko Town Block 3/2117 to PKN, JGM and GK for the sum of Kshs 4,700,000/=, Kshs 23,500,000/= being the proceeds of the sale of Mavoko Town Block xxxx by the Defendant to Dee Properties Limited and Plot xxxx situated in Athi River Trading Centre...**

***In the premises I make the following orders:***

- a) A Declaration that the properties mentioned hereinabove are matrimonial property;***

- b) A Declaration that the Plaintiff is entitled to an equal interest in the said properties;**
- c) An Order do issue that the properties herein be shared equally and if incapable of being shared that the same be sold and the net proceeds be shared equally between the Plaintiff and the Defendant. Pursuant thereto, the said properties will be valued in order to determine their worth. The cost of the valuation to be shared between the Plaintiff and the Defendant equally.**
- d) It also follows that the sums which the Defendant received from the aforesaid dispositions of the matrimonial properties, the law deems him to be a trustee of the funds which ought to have been receivable by the Plaintiff. Accordingly, the Defendant holds a sum of Kshs 14,100,000.00 in trust for the Plaintiff.**
- e) Liberty to apply granted to the parties.**
- f) Each party will bear own costs. [Emphasis added]**

22. Essentially, this judgment was final and was made after a comprehensive hearing involving both the plaintiff in the current case and Tuto. The suit property was part of the

matrimonial assets, the judgment of which has neither been contested nor appealed in any court. Furthermore, the orders issued remain in force and are not stayed by any court with competent jurisdiction. In other words, the judgment settled all the issues in dispute.

23. Furthermore, it is observed that one of the orders issued in the matrimonial property case was that Tuto held the proceeds from the sale of various properties, including those of the first defendant, in trust for the plaintiff. Having received judgment in her favour, it was her duty to execute the decree in the matrimonial property case, yet she filed the present suit that has affected third parties. Besides, this court is aware that another suit she filed against other third-party purchasers, *to wit, Maingi v Makato & 2 others (All sued as Administrators of the Estate of the Late Maingi Mukeka Tuto & 4 others [2023] KEELC 16572 (KLR)*, was also dismissed by this court.

24. In the circumstances, this court concludes and finds the instant suit to be an abuse of legal procedure and an improper use of the legal process, warranting it to be struck out. This finding makes it unnecessary to determine the other issues. It is well established that costs follow the event. However, considering the special relationship between some of the parties herein, who are family members, and the fact that the

5th defendant only participated in these proceedings pursuant to court directions, the plaintiff shall only bear the costs of the first defendant, with the remaining parties bearing their respective costs of this suit. Ultimately, this court issues the following final disposal orders: -

***a) The plaintiff's suit is hereby struck out.***

***b) The plaintiff shall bear the first defendant's costs of this suit.***

***c) The 2nd to 5th defendants shall bear their respective costs of this suit.***

Judgment accordingly.

**Delivered and Dated at Machakos this 18<sup>th</sup> day of November, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
18.11.2025**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant.

Mr. Maingi for plaintiffs.

Mr. Kaluu for 1<sup>st</sup> defendant.

Miss Kuria holding brief for Ms. Momanyi for 3<sup>rd</sup> defendant.

ORIGINAL