

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLC NO. 82 OF 2019

KADZO KAHINDI KARISA & another.....
.....PLAINTIFFS

VERSUS

FURHA KATANA DYEKA AND 6 OTHERS
.....DEFENDANTS

RULING

THE CLAIM

1. The plaintiffs are widows of the late Kahindi Karisa. They obtained title to a parcel of land known as **Kilifi/Ngerenyi/19** (hereinafter also referred to as “*the suit land*”) by way of transmission from his estate.
2. They stated that in the year 2015, the defendant’s children of one Katana Dyeka, Kahindi Karisa's brother, trespassed onto the suit land. When Katana Dyeka died in 2017, his remains were interred on the suit land. Later on, the defendant became unruly and threatened to evict the plaintiffs from the suit property. They also prevented the plaintiffs from preparing the land for planting. The plaintiffs seek eviction of the defendants from the suit land and a permanent injunction against them, restraining them from interfering with the suit property.

DEFENCE

3. In their defence, the defendants stated that Kahindi Karisa and Katana Dyeka were brothers; that Kahindi Karisa held the land as trustee of the late Katana Dyeka and the defendants. Trespass is denied. The defendants also contend that there have been previous proceedings between the parties herein such as Malindi ELC number 161 of 2016 Dama Kahindi Karisa Versus Katana Dyeka.

EVIDENCE

4. **PW1 Furaha Kahindi Karisa**, the second plaintiff testified on 6th March 2025 and adopted her witness statement dated 18th May 2023. Her evidence is that plot number 19 Ngerenyi was bought for the plaintiffs by Kahindi Karisa. The first defendant is Katana Dyeka's widow while the 2nd defendant is their child. Her further evidence is that the defendants graze their animals on the plaintiffs' crops and there is a lot of enmity between the two sides. It is Kahindi Karisa who informed PW1 that he had bought the land using his own money. PW1 does not know when the defendants entered the land since she found them on the land when she joined the family.
5. On cross-examination by Mr. Hamid, PW1 stated that there was a dispute that was addressed by the chief in 2004, which was later taken to Mombasa and then there was an appeal in 2006. According to her another case was filed in 2011 at Malindi. There were contempt

proceedings in 2017. That they were also criminal proceedings against one Dickson in connection with the suit land before Katana Dyeka died.

6. **PW2 Kenga Kahindi Karisa** testified on the same day as PW1 and adopted his witness statement dated 18th May 2023. His evidence is that he was testifying in the case on behalf of Dama Kahindi Karisa. According to him Kahindi Karisa and Katana Dyeka do not share the same father but they are of the same mother. The defendants have no title to the land yet they graze animals on crops planted by the plaintiffs on the suit land. Kahindi Karisa and Katana Dyeka originated from Ganze and came to the suit land together. Kahindi Karisa met Nzovu and made an agreement with him to purchase the suit land. However, the title was not issued in the name of Kahindi Karisa but in the names of his widows.
7. Upon cross-examination by Mr Hamid for the defendants, he acknowledged that Juma Katana Mwalo is his aunt; that it is for the defendants to prove that the land was held in trust for them.
8. Upon re-examination by Mr Atiang, he maintained that his father had indicated that the land was his and that they had no dispute with it with Katana Dyeka over it.
9. **DW1 Dixon Charo Katana**, adopted his witness statement dated 10th February 2024 and produced a bundle of documents as defence exhibits one to six. He stated that he is son to Katana Dyeka; that the plaintiffs are his aunts; that he resides on the suit land.

10. His evidence was that Katana Dyeka, Kahindi Karisa, Jumwa Katana Mwaro, and Kanze left Bamba and came to the residence of Katana Karisa in Majaoni where they lived for 5 years. Later they came to meet Nzovu who had land in Maweni and Mikingilini. Nzovu was selling one of the parcels Kenya Shillings 5,000/-. Kahindi Karisa produced Kshs 1500. Katana Dyeka took Kenya Shillings 3,000 meant for his wedding and gave it for the purchase of the land. Kanze provided maize which she had grown for sale to pay the balance of Kenya Shillings 500/-. Nzovu left the task of getting a name to be recorded on the title to the family. Katana Dyeka was buried on the suit land. DW1 was once arraigned for wanting to injure the plaintiffs but the suit was dismissed. Before his case, there were criminal cases against his father. Kahindi Karisa was an elder brother to Katana Dyeka and his name was registered on the title. **Case Number 161 Of 2016** was eventually dismissed. When the dispute arose, the parties went to the Chief who advise them to find out whether the land title had been charged.

11. Upon cross-examination by Atiang, he stated that he was born in **1985** and that Kahindi Karisa died in **1995** while his father Katana Dyeka died in **2017**. He was given the history of the land by his father. His father was the first person to lodge a case regarding the suit land before the chief. He lodged the claim after Kahindi Karisa passed on. The land was registered in the names of Kadzo Furaha and Dama. Up

to 1995 Kahindi Karisa's name was on the register. The dispute began in the year 2002. His father never got his portion demarcated earlier because they had lived in peace with Kahindi Karisa; both his father and Karisa Kahindi were not literate.

12. **DW2 Furaha Katana** testified on 7th April 2025 and adopted her witness statement dated 10th February 2024. She is widow to Katana Dyeka who jointly purchased the land together with his brother Kahindi Karisa. She was not yet married as at the time of the purchase but she learned of the details of the purchase from her husband after she got married. She has no agreement showing that there was a joint purchase.

13. **DW3 Jumwa Karisa** testified on the same date as DW2 and adopted her witness statement dated 10th February 2024. Her evidence is that she is sister to Kahindi Karisa and Katana Dyeka; that Kahindi Karisa is the first born, and she is the second- born, followed by Katana Dyeka. The family first originated from Bamba. They migrated together with their mother and settled in the house of Katana Karisa. The three of them and their mother stayed there for about 5 years. They were looking for land and they were introduced to a person who was selling land in Mikingirini, one Matho Nzovu, who was offering to send the land at Kenya Shillings 5,000/-. Kahindi Karisa contributed 1500/- to the purchase of the land while Katana Dyeka contributed 3,000/-. The balance of 500/- was obtained by selling maize grown by

Kanze. After the purchase price was settled, the family sat and discussed and agreed that Kahindi Karisa being the first born be registered as the holder of the title. Upon cross-examination, he stated that there was an agreement for the sale of the land to the family but the one who had it died. At that juncture the defendants' case was marked as closed.

SUBMISSIONS

Plaintiffs' Submissions

14. The plaintiffs' submissions are dated 15th September 2025.
15. The plaintiff pointed out that there had been 2 earlier suits regarding this matter. Kilifi SPMCC 66 of 2015 and ELC Case Number 161 Of 2016. ELC Case No E161 of 2016 was withdrawn upon being transferred to this court and the present suit was filed.
16. Counsel for the plaintiff urged this court to consider all the facts as pertaining to the long litigation history of the matter. He pointed out that there were contempt proceedings ELC Case Number 161 Of 2016 after the burial of Katana Dyeka on the suit property. He stated that only two competing issues arise or determination: whether the plaintiffs have proved their case on a balance of probabilities and secondly, whether the defendants have established a case for trust against kahindi Karisa. He urged that the plaintiffs had given a history of the land, produced documents in support of their case. That the

property was obtained through a government settlement plan in August **1978**. He pointed out that the actual dispute regarding the land began in April **2004** one year after the death of Kahindi Karisa. He asked the rhetorical question as to why the defendants father Katana Dyeka waited until the plaintiff's husband died before he could claim entitlement in the land. He submitted that it was very difficult for the defendant to explain how their father Katana Dyeka acquired his interest; that it is a glaring fact that neither the defendant nor their father was party to the efforts at acquiring the property. He pointed out the fact that none of the documents presented before Court were contested.

17. Citing Isack Kiebia M'Inanga versus Isaaya Theuri M'Lintari & Another 2018 eKLR, Counsel urged that in order to prove that land is held in trust, a party must produce evidence to show that prior to its registration, the land was ancestral or conduct of the parties supporting the existence of trust. He then urged that in the present case, the land was not ancestral. Secondly, he pointed out a glaring illogicality in that if the land was purchased by several persons, then it was incomprehensible that it was registered in the name of the person who contributed the least amount as consideration, that is Kahindi Karisa. He urged that the timing of the dispute indicated an intent on the part of Katana Dyeka to disinherit a widows of Kahindi Karisa after his death.

Defendants' Submissions

18. The defendants' counsel urged that the defendant's submissions are pegged solely on the argument of there being a constructive trust in respect of the suit property. Citing the case of **Shah and 7 Others Versus Mombasa Bricks and Tiles Limited and Five Others 2023 K E S C 106 KLR**, counsel contended that there is a constructive trust in respect all the suit land. Counsel further relied on **Halsbury's Laws of England 4th Edition Volume 48** paragraph **69** on constructive trusts and urged that where another person has participated in acquisition, it would be inequitable to deny them a beneficial interest in the land.
19. Counsel conceded that no written agreement had been produced by the defendant. He urged that it was to the discretion of the court to decide upon the sharing of such property. Counsel emphasized that Jumwa Katana Mwaro was sister to both Katana Dyeka and Kahindi Karisa, and that she testified in favour of the defendant. That Kahindi Karisa's name was written on the title simply because he was the eldest and thus took precedence over the rest. He pointed out Kahindi Karisa never chased away the defendants and that is an indicator that he was just holding title in trust. He relied on the Supreme Court Case of Shah (supra) as pronouncing that constructive trust is an equitable instrument to prevent unjust enrichment. He also relied on the Canadian Supreme Court case of Soulos Versus Korkontnzilas for the

same proposition. He added that the Supreme Court Kenyan case of Shah also established that where constructive trust is not expressly provided, then the same can be established by operation of the law as should be the case in this matter. Citing Twalib Hatayan and Another Versus Said Saggar Ahmed Al-Heidy and 5 Others 2015 eKLR, he urged that constructive trust automatically arises where a person who is already takes advantage of his position for his own benefit. In this case, he stated that the process of succession and transfer of title the plaintiffs to the detriment of the defendants should be taken as the benefit on the part of the plaintiffs; that the doctrine of constructive trust is accepted in Kenyan law under Section 3(1) of the Judicature Act.

20. **Macharia Mwangi Maina and 87 Others Versus Davidson Mwangi Kagiri Civil Appeal Number 6 Of 2011 Consolidated With Number 26 And 27 Of 2011 2014 eKLR** and **Willy Kimutai Kitilit Versus Michael Kibet Number 51 Of 2015 2018 eKLR** also cited to support the doctrine of constructive trust in this case.

ANALYSIS AND DETERMINATION.

21. . I have examined the pleadings in this case as well as the submissions of counsel. Counsel for the defendants has identified the sole issue for determination as being that of whether the doctrine of constructive trust applies in this case in favour of the defendants with Kahindi Katana as the trustee (as well as his successors, the plaintiffs.)

22. In the **Black's Law Dictionary, 10th Edition** a constructive trust is defined as

“An equitable remedy by which a court recognizes that a claimant has a better title to certain property than the person who has a legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud or when property acquired by fraud or theft ... is exchanged for other property to which the wrongdoer gains title.”

23. It is clear then that for the court to make a positive finding as to constructive trust certain things must be proved. Specifically, in the present case, the task of the defendants was simply to establish that Katana Dyeka was involved in the payment of the consideration for the land and that they had a common intention of owning the land together or jointly.

24. It must be first noted that the defendants never pleaded “*constructive trust*” expressly. They only pleaded “*trust*” as follows at **paragraph 4** of their defence:

“Whereas the late Kahindi Karisa was registered as owner of the suit property herein, the late Kahindi Karisa held the same in trustee of the late Katana Dyeka and the defendants. The defendants are thus not trespassers nor was their late father Katana Dyeka.”

25. No particulars of purchase are pleaded including payment of consideration. Whereas the issue of payment by Katana Dyeka of part of the consideration arose in the evidence of the defendants and not in the statements in the pleading, the issue of constructive trust has emerged at the submissions stage.

26. It is the opinion of this court that where a person wishes to rely on the doctrine of trust, they must expressly indicate in the pleading the type of trust that they rely on. As the plaintiffs have not protested this default on the part of the defendants or urged any adverse orders based on it, this court will focus on whether the defendants have established constructive trust.

27. In their evidence the defendants never produced any agreement bearing the name of their patriarch to show that he was involved in the execution of the agreement as a purchaser. PW1 was born in **1985** and his evidence was quite inadmissible because he never witnessed what happened in the **1970s** when the land was being bought. Besides, no receipts were produced by the defendants to demonstrate that Katana Dyeka was involved in the purchase of the suit land. In the documents issued by the settlement Fund Trustees that is **P. Exh 1-4** only the name of the plaintiff's deceased husband appears. P. Exh 1 specifically identified Kahindi Karisa as the purchaser of all the cash crops on the land and having paid the land rent and been issued with a receipt therefor dated **16/2/1972**. **P. Exh 2** is an agreement dated **27/6/1970** between the Commissioner of Lands and Kahindi Karisa with the Commissioner agreeing to the occupation of Kahindi of all that plot identified as **Plot No 19. Ngerenyi Settlement Scheme**. **PExh 3** is a letter dated **8/8/1978** addressed to Kahindi Karisa by the Settlement Fund Trustees offering him freehold title to the land known as **plot no**

451 (but on the second leaf it is referred to as plot no 19.) Only the thumbprint of the said Kahindi Karisa has been affixed to that letter in acceptance of the offer. It would appear from the letter dated **18/12/2003** that a dispute regarding the suit land was taken to the Chief by Katana Dyeka against the plaintiffs and the findings of the Chief were not in Katana's favour. The verdict in that dispute was that Katana Dyeka should cease any long term developments on the suit land and that he should make arrangements to pay for the land. It is clear from the contents of that letter that even as at **2003** Katana had not paid anything for the suit land.

28. In **Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others [2019] KEELC 3605 (KLR)**, the plaintiff Peter Nyaga Kairu claimed that he had been involved in the purchase of certain parcels of land alongside his brother, one Joseph Njau Kairu who was deceased as at the time of the suit. evidence was given by the plaintiff that Njau had difficulties paying installments for the said 10 acres out of land No. 4148/13 and that the plaintiff remembers that on a few occasions, his late brother, Njau and another person would come to his shop and he would give that other person the money to pay the installments for the balance of the purchase price. He also claimed to have paid a deposit of Kshs. 300,000 through a banker's cheque. The court said:

"142. There is no evidence of such payment by plaintiff. The explanation given by plaintiff as to why he didn't sign the agreement (P Exhibit 1) is captured in paragraph 18 of his statement as follows;

“Later on my late brother informed me that when he paid the said bankers cheque to Mr. Stephen Kamithi in the presence of the broker, Mr. Stephen Kamithi insisted that an agreement be written out and signed to reflect that he was only selling 42.5 acres of land reference no.4148/12 whilst the balance of 5 acres was to be his. Since my late brother knew that I trusted him he proceeded to sign the agreement on my behalf”.

143. The explanation by Nyaga implies that he was caught off guard by Kamithi’s (the seller’s) demand. If Stephen Kamithi is the one who had insisted on an agreement being made without the knowledge of Nyaga, then what prevented Nyaga from having a proper agreement written thereafter? Njau lived on this earth for the next 14 or so years and there is no evidence to indicate that Nyaga ever took steps to have another agreement written especially to reflect the amount of contribution allegedly made by each of the brothers.

144. Kamithi apparently died in 1994, so he too lived many years, about 10 years from the time the agreement was made. During Njau’s life time, Nyaga had all the opportunity to ensure that the factual situation of joint proprietorship or tenant in common were captured. Again there is not the slightest evidence to indicate that Nyaga took steps to ensure that an agreement reflecting the alleged true state of affairs was ever written....

154. Thus it was not open to plaintiff to shift this burden of proof upon the defendant. Plaintiff had over 14 years to sort out all these issues during the life time of his brother (deceased). The Latin phrase “Mortui non mordent”, which means dead men don’t tell tales, dead men don’t bite is very much applicable in this case. Plaintiff cannot now turn to act like a victim of his sister in law’s machinations.”

29. The court in the Peter Nyaga Kairu dismissed the plaintiff’s suit.

In the instant case, there is not even a scrap of paper that the defendants have presented to this court as evidence of payment for the suit land by Katana Dyeka.

30. **Macharia Mwangi Maina (supra)** must be distinguished because in that case, the respondent sold **240** plots to the Appellants using a map between **1983** to **1990**. The Respondent maintained that

it was a term of the sale agreements between the Appellants and him that the Appellants would meet the costs of obtaining titles to their respective portions. The Respondent also gave the Appellants vacant possession of the respective portions each had purchased once the full purchase price was paid and the sale agreement executed. The Court of Appeal was of the view that the conduct of the parties must evince a common intention if a constructive trust is to be deemed as existing.

31. The Court of Appeal in that case stated as follows:

“In *Yaxley v Gotts & another*, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the Respondent who put the Appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The Respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the Respondent cannot renege. As Lord Bridge observed in *Lloyds Bank Plc v Rosset*, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the Claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevents the Claimants from relying upon the doctrine of constructive trust created by the facts of the case. The Respondent all along acted on the basis and represented that the Appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v Steadman* (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to

turn around and assert that the agreement is unenforceable”.

32. **Willy Kimutai Kitilit** (supra) bore the same circumstances similar to those in the **Macharia Maina Mwangi** in that the vendor had received the entire purchase price and put the purchaser in possession and all that remained was the securing of a Land Control Board consent for the transaction. All that the court dealt with was the issue as to whether the transaction could be upheld without the Land Control Board consent and it stated as follows:

“[26] For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

[27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2-acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”

33. Contrary to **Macharia Maina Mwangi** and **Willy Kimutai Kitilit** (supra), in the present case there was no purchase agreement presented by the defendants. The only purchase agreement is between the plaintiffs' predecessor and the Settlement Fund Trustees, the former owner of the land, of course entered into after Matho Nzovu, the original allottee had relinquished his right thereto by way of sale to Kahindi Karisa. Kahindi Karisa paid Nzovu, and also paid land rent to the SFT and obtained a receipt in his name as evidenced by P. Exh 1. Katana Dyeka's name does not feature in any of the documents produced by the plaintiffs.

34. In land cases, constructive trust required evidence of not just occupation but also payment of consideration for the acquisition of land and a common intention. As no evidence of payment was produced by the defendants, the doctrine of constructive trust does not apply in this case.

35. **Section 28** of the Registered Land Act (repealed) provided as follows:

"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

a).....

b).....unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register."

36. **Section 30** of the Registered Lands Act provides:

“30.Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

a)

b)

c)

d)

e)


f)

g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.”

37. This court finds that there are no rights under a constructive trust that the defendants can enjoy regarding the suit land. Kahindi Karisa did not hold the land in trust for Katana Dyeka and the defendants but for himself. He alone having been involved in its purchase, he held the title, by extension, for his heirs, and when he died his land was rightfully transmitted to the current plaintiffs in the year 2005 after succession. There is evidence from the plaintiffs to support that fact and it has no dispute. The plaintiffs have all the right to deal with the land as provided by law and without any interference by the defendants.

38. The end result is that the plaintiffs’ suit succeeds and I hereby grant prayers nos. (a), (b), (c) and (d) in the plaint dated 3/9/2019.

Dated, signed and delivered at Malindi on this 27th day of November 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi".

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**