



Ndambuki v Kivai (Sued as the Legal Administrator of the Estate of the Late Kivai Vonde) (Environmental and Land Originating Summons E002 of 2021) [2025] KEELC 5671 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5671 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
NA MATHEKA, J
JULY 30, 2025

BETWEEN

FRANCIS MUSAU NDAMBUKI PLAINTIFF

AND

PRISCILLA NGUSYA KIVAI (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KIVAI VONDE) DEFENDANT

JUDGMENT

1. That a declaration that by virtue of actual possession and use, the Applicant is entitled through the doctrine of adverse possession to ownership of the portion measuring 86ft by 70ft comprised in the land known as LR. Muputi/Kiima-Kimwe/2511.
2. That an order do issue in terms that the Applicant be registered as the proprietors and/or owners of portion measuring 86ft by 70ft comprised in the land known as LR Muputi/Kiima-Kimwe/2511 in place of the late Kivai Vonde.
3. That in the alternative a declaration that the Respondent is entitled through the doctrine of constructive trust to a portion of land measuring 86ft by 70ft comprised in the land known as LR Muputi/Kiima-Kimwe/2511
4. That such other or further orders as the court may deem fit for furthering the ends of justice.
5. That cost of this Application be borne by the Respondent.

It is premised on the following grounds that the Applicants and other family members have lived openly, peacefully on the portion measuring 86ft by 70ft comprised in the land known as LR. Muputi/Kiima-Kimwe/2511 for an uninterrupted period of more than 50 years. The Application is pursuant to the express provisions of the [Limitation of Actions Act](#) (Cap 22) and the doctrine of adverse possession.



It is in interest of justice that the Applicant seeks protection of the court in order to avert unlawful evictions and disruptions by the Respondent. That both the Applicant and the Respondent's husband were purchasers for value of LR. Muputi/Kiima-Kimwe/2511 whereas the late Isaac Kivai Vonde was entrusted in subdividing the land and issuing each purchaser with their portion. That the late Isaac Kivai Vonde renegaded on the trust bestowed upon him by Joseph Mendani Muiva.

6. It is not disputed that the suit land is registered in the name of the late Issac Kivai Vonde. 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.”
7. The Plaintiff testified that he bought the suit property in 1976 and has lived there ever since. In other words, the Plaintiff claims adverse possession and/or that a trust existed and he has an overriding interest on the suit land. That he bought a portion measuring 86ft by 70ft comprised in the land known as LR Muputi/Kiima-Kimwe/2511. That both the Applicant and the Respondent's husband were purchasers for value of LR. Muputi/Kiima-Kimwe/2511 whereas the late Isaac Kivai Vonde was entrusted in subdividing the land and issuing each purchaser with their portion. That the late Isaac Kivai Vonde renegaded on the trust bestowed upon him by Joseph Mendani Muiva. That they were other purchasers and the late Issac Kivai Vonde was entrusted with the title deed in order to subdivide and issue each of the bonafide purchasers with their portions. PW1 testified that he constructed two permanent houses with a stone wall. The Plaintiff produced the sale agreement, the green card, official search and photos of his construction. The Defendant did not defend the suit and the same remains uncontroverted.
8. The Supreme Court in Petition No.18 (E020) of 2022 Arvind Shah & 7 Others v 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.”

9. In *Archer & another v. 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 v. 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.”

10. The Plaintiff led detailed evidence that he bought the suit land and took possession in 1976. The survey report adduced in evidence confirmed the existence of two permanent buildings belonging to him. I am satisfied that the Plaintiff has been in possession of the suit land from the 1976. Looking at the totality of the evidence that was considered by the court and noting that both the Plaintiff and the Defendant were in peaceful occupation of their respective portions for 45 years before the Plaintiff filed the suit, we are persuaded that the Plaintiff lawfully purchased the said portion. I find that it was dishonest for the Defendant’s family fail to transfer the suit plot to the Plaintiff knowing very well the Plaintiff was and/had been in possession for decades and had constructed a houses thereon. If one was to believe the Defendant’s family for a moment that the suit land is theirs exclusively, why would they allow the Plaintiff/Appellant to occupy the parcel of land for 45 years without raising any question?
11. 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 his case on a balance of probabilities.



12. On the issue of costs, Section 27 of the *Civil Procedure Act* requires that costs to follow event, but the Court has the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others (2013) eKLR quoted the case of Levben Products v Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227M held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp v Gibbon & Co., 1913 ADD 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

13. This Court notes that the Defendants never participated in the trial and the suit was undefended. Consequently, the Court makes the following orders:-

1. An order do issue in terms that the Plaintiff Francis Musau Ndambuki, be registered as the proprietor and/or owner of portion measuring 86ft by 70ft comprised in the land known as LR Muputi/Kiima-Kimwe/2511 in place of the late Kivai Vonde.
2. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

