



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. 397 OF 2017

KANTAFU COMPANY LIMITED.....
PLAINTIFF

-VERSUS-

MOSES MAINGI KILONZO.....1ST
DEFENDANT

PERCY MUSYOKA TITUS.....2ND
DEFENDANT

MSHAMBAMBA HOUSING CO-OPERATIVE SOCIETY
LIMITED.....3RD
DEFENDANT

JACKSON MWANGI MUNGAI.....4TH
DEFENDANT

SAMUEL MWAURA MUIRURI.....5TH
RESPONDENT

JUDGMENT

Background of the case

1. In a plaint filed on 18 September 2017, the plaintiff instituted legal proceedings against the defendants. Of particular interest, they sued the 1st and 2nd defendants in their capacity as the administrators of Titus Kilonzo Ndambuki's (**"deceased"**) estate. The plaintiff described its core business as acquiring large tracts of land, subdividing them, and allocating the parcels to its members. In pursuit of this endeavour, it allegedly purchased plot number 77 on 16 January 1995, measuring 50 acres, from the deceased, who was then a member of Komarock Ranching and Farming Co-operative ("Komarock"), and paid a substantial sum of the purchase price.
2. Upon the deceased's death on 11 March 2004, it allegedly continued to pay the remaining balance of the purchase price to the 1st and 2nd defendants. As of 27 September 2008, only a balance of Kshs. 7, 200 was outstanding, with the understanding that these defendants would succeed the deceased's estate and subsequently transfer the property to them.
3. However, these defendants proceeded with probate proceedings and transferred the property, previously plot number 77 and now known as **DONYO SABUK/KOMA ROCK BLOCK 1/43 ("suit property")**, to themselves. They

subdivided it into **DONYO SABUK/KOMA ROCK BLOCK 47822** (registered in the name of the 3rd defendant) and **47823** (registered in the names of the 4th and 5th defendants). These shall collectively be referred to as (“subdivisions”).

4. The plaintiff pleaded and particularised fraud against the 1st and 2nd defendants and maintained that the 3rd to 5th defendants held the subdivisions in trust for it. Thus, it sought the following orders: -

a) A declaration that the 1st and 2nd defendants' act of subdividing the title number DONYO SABUK/KOMA ROCK BLOCK 1/43 (formerly known as plot number 77) was fraudulent, as the said title was not available for subdivision or sale.

b) A declaration that the 3rd defendant holds title number DONYO SABUK/KOMA ROCK BLOCK 47822 in trust for the plaintiff.

c) A declaration that the 4th and 5th defendants hold title number DONYO SABUK/KOMA ROCK BLOCK 478223 in trust for the plaintiff.

d) An order directing the land registrar, Machakos, to cancel the registration of the 3rd to 5th defendants as proprietors of DONYO

SABUK/KOMA ROCK BLOCK 47822 and 47823, respectively.

e) An order directing the land registrar, Machakos, to merge title numbers DONYO SABUK/KOMA ROCK BLOCK 47822 and 47823 and revert them to the original title number DONYO SABUK/KOMA ROCK BLOCK 1/43 in the names of the 1st and 2nd defendants, the latter of whom should then transfer the said merged land to the plaintiff.

f) Costs of the suit.

g) Any other or further relief as this honourable court may deem just to grant.

5. Despite the service of pleadings and summonses, the 1st, 2nd, and 4th defendants did not file a defence. Regarding the 3rd defendant, in his defence dated 14 February 2019, he mainly denied the claims and required the plaintiff to prove its case strictly. He stated that he was unfamiliar with most of the allegations. Further, when he bought the land, he exercised due diligence and was unaware of any defects or prior claims, affirming he was an innocent purchaser for value. He denied any trusteeship and urged the court to dismiss the plaintiff's claim.

6. The 5th defendant, who acted in person, submitted a defence dated 2 July 2020, asserting that he and the 4th defendant serve as chairpersons of Kirigu Forward Welfare Association, an organisation dedicated to improving the welfare of its members, and it was in that capacity that they bought the land in dispute.
7. He stated that Paul Nyumu Nzuki (“uncle”), a relative of the deceased, approached them regarding the land, which they purchased from the 1st and 2nd defendants transparently, acting in good faith, and paid the agreed purchase price. The 5th defendant denied knowledge of certain allegations in the plaint, refuted others, and demanded strict proof from the plaintiff. He urged the court to dismiss the plaintiff’s claim.
8. In its reply to the 3rd defendant’s defence dated 7 March 2019, the plaintiff pointed out that the 1st and 2nd defendants did not have any title to transfer to the 3rd defendants, as the suit property had already been sold to it.

Issues for determination

9. Having considered the pleadings and the evidence presented by the parties at the hearing on the merits and issues, as framed in the filed submissions and the 3rd defendant’s list of issues dated 5 November 2019, the issues for determination are **whether (a) the plaintiff proved that the deceased held the suit property in constructive trust, (b) the**

plaintiff proved the particulars of fraud against the 1st and 2nd defendants, and (c) the 3rd and 5th defendants were innocent purchasers for value and without notice of any defect in title. Having outlined the issues to be decided, this court will now summarise the parties' evidence on these issues.

Hearing and evidence

10. The matter ultimately proceeded to a hearing on 22 October 2025, during which Peter Kigia Maina for the plaintiff (**PW1**), Andrew Waihiga Chege for the 3rd defendant (**DW1**), and the 5th defendant (**DW2**) testified. The testimonies of **PW1** and **DW1** comprised witness statements, oral testimonies, and various documents submitted as evidence.
11. The 5th defendant, who was acting in person, did not file a witness statement; however, the court directed that his defence be considered as a witness statement, which he adopted. He also presented documentary evidence. The cases of the 1st, 2nd, and 4th defendants were marked as closed after the court verified that they had been served with hearing notices but did not attend court. Significantly, the witnesses' testimonies in chief were consistent with their pleadings.
12. **PW1** produced an agreement for sale (**Pex. 1**) dated 16 January 1995, which outlined the sale of plot no. 77 by the deceased to the plaintiff. It involved fifty acres valued at Kshs.

1,500,000, with each acre priced at Kshs. 30,000. The final payment was due by 13 April 1995, and upon confirmation of the final payment, the deceased was to deliver vacant possession and issue a surrender notice to Komarock. **PW1** also provided the plaintiff's "land/plots payments statement" (**Pex. 2**), which showed alleged payments made over plot number 77 from 14 February 1995 to 27 September 2008, along with a letter dated 29 August 2005 from the Chief of Kivaani Location to the plaintiff. This letter introduced the 1st and 2nd defendants, along with their uncle, as authorised to receive the remaining balance of the purchase money (**Pex. 3**); documents related to the administration of the deceased's estate were tendered (**Pexs. 4-6**), and official search certificates for the properties in question (**Pexs. 7-9**) were produced.

13. During cross-examination, he explained that when the plaintiff purchased the suit property, it was divided into beacons plots measuring 50 x 58. He mentioned that the purchase price was paid between 1993 and 1994, and that the remaining balance was to be paid upon issuance of the title document. He assured that the plaintiff had fulfilled all the terms of the agreement. Additionally, he mentioned that the 3rd defendant might have bought the land without being aware of the plaintiff's claim.

14. **DWI** shared that the 3rd defendant is the registered owner of its land, supported by a title deed issued on 25 February 2014 and official search (**Dexs 1 and 9**). He explained that the 3rd defendant acquired this land under an agreement for sale dated 21 December 2012, entered into with the 1st and 2nd defendants, who were acting as administrators of the deceased's estate, with the beneficiaries' consent (**Dex 2**). The agreed purchase price was Kshs. 30,000,000/-, with a deposit of Kshs. 9,000,000/- paid upfront. The property was sold with vacant possession, with completion targeted for 31 December 2013. It was initially unclear whether the 3rd defendant was buying the entire suit property or just 40 acres, but this was clarified in a subsequent agreement on 17 June 2013 (**Dex 3**).
15. The agreement (**Dex 3**) confirmed the sale of 40 acres, extended the completion deadline by 90 days from 31 May 2013, and increased the purchase price by Kshs. 2,000,000. It also provided a variety of documents showing payments, including acknowledgements by the 1st and 2nd defendants, the beneficiaries, and their uncle, along with bankers' cheques and RTGS payments, all totalling Ksh 15,430,000 (**Dex 5-7**), and a proposed change of user (**Dex 4**). He told the court that before the purchase, the 3rd defendant obtained an official search of the suit property issued on 21 July 2015 (**Dex 8**). He

also availed photographs of the 3rd defendant's members conducting a site visit.

16. During cross-examination, he stated that neither the 1st nor the 2nd defendant signed **Dex 2**. Additionally, when the 3rd defendant bought the land in 2012, it was still registered in the deceased's name. At that time, the 1st and 2nd defendants lacked legal capacity because probate proceedings had not yet been completed.
17. The 5th defendant presented his title deed (**Dex 1**), showing it is registered in his name as well as that of the 4th defendant. He also produced a sale agreement dated 27 September 2012 between Kirigu Forward Welfare Association and the 1st and 2nd defendants (**Dex 12**), indicating that they were purchasing the suit property for Kshs 18,500,000. A deposit of Kshs 2,000,000 was paid to the 1st and 2nd defendants' uncle, and possession was to be handed over upon payment of the deposit. The agreement was later varied on 6 February 2013 (**Dex 13**), in which the 1st and 2nd defendants acknowledged receipt of Kshs 3,000,000, the area purchased was reduced to 10 acres, and the 1st and 2nd defendants were to pay Kshs 1,700,000 for breach of contract. He also produced an official search of the suit property dated 27 March 2013 (**Dex 16**), confirming it was still registered in

the name of the deceased, and documents showing payments totalling kshs 3,000,000/- (**Dex 14** and **15**).

18. During cross-examination, he explained that when he bought his land, the suit property was still officially in the deceased's name, and the 1st and 2nd defendants had told him they would handle the probate process over his estate. In re-examination, he shared that he took possession of his land once it was transferred into his name.

Submissions

19. After the hearing concluded, and at the request of the parties, they argued their respective cases through written submissions that were well received from the law firms of **Mss. Wanjohi & Wawuda Advocates** representing the plaintiff, dated 22 November 2025, from **Kabaiku & Co. Advocates** for the 3rd defendant, dated 23 December 2025 and lastly, undated submissions from the 5th defendant. 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 issue previously identified will be addressed shortly.

Analysis and determination

a) Whether the plaintiff proved that the deceased held the suit property in constructive trust

20. Concerning the relevant legal framework on constructive trust, our **Article 40** of the **Constitution** states that every individual or group has the right to acquire and own property anywhere in Kenya. However, this right is not absolute. While **Article 40** imposes an internal restriction on the property right, the broader limitation of rights outlined in **Article 24** of our **Constitution** requires that any restriction be established by law and be reasonable and justifiable.
21. As prescribed, any restriction on a fundamental right or freedom must be established through legislation. Therefore, we need to scrutinise the legislation governing title registration and the limitations on the property rights. Regarding the substance of the matter before us, the **Land Registration Act, No. 3 of 2012**, governs the registration of titles.
22. In this regard, the applicable provisions for this case are found in **Sections 25, 26, and 28** of the **Land Registration Act**, which state that a registered landowner's rights are absolute and indefeasible, except for rights and encumbrances recorded in the register or overriding interests. These overriding interests include trusts, and in the particular circumstances of this case, constructive trusts. Trusts are equitable remedies, and under **Section 3** of the **Judicature Act**, the doctrines of equity are incorporated into our laws.

23. In Kenya, the **Trustee Act** defines a “trust” and “trustee” to include implied and constructive trusts. Moreover, the **Black’s Law Dictionary, 9th edition**, describes a trust as:

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

24. It further defines a constructive trust at **page 1649** as:

“An equitable remedy that a court imposes against one who has obtained property by wrong doing.”

25. Further, **Halsbury’s Laws of England, 4th edition, volume 48**, at **paragraph 690**, defines constructive trusts thus: -

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property

acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared

beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property."

26. In elucidating on this principle, the apex court in **Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others**

[2023] KESC 106 (KLR), a binding decision, elucidated on this principle in the following manner: -

“8. The Trustee Act defined a trust and trustee as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law.

9. A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.”

See also Court of Appeal decision of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR

27. Further, this court adopts the holding in the Court of Appeal decision of **Kabui v Kabui [2024] KECA 1396 (KLR)**, which held: -

“Ultimately, we find that indeed upon settlement of the purchase price, the respondent held a constructive trust in favor of the appellant.”

28. Guided by **Shah (Supra)** and **Kabui (Supra)**, it can be stated that a constructive trust aims to prevent unjust enrichment. It arises in connection with legal ownership of property when a party acts in a way that denies the other party a beneficial interest in the acquired property. It will automatically arise if a trustee misuses her position for personal gain. There must be a settlement of consideration by the person asserting the trust, and it serves as a remedy against unconscionable conduct whenever justice and good conscience demand.

29. In this matter, the plaintiff contends that the foundation of the trust is rooted in the agreement for sale dated 16 January 1995, along with the alleged payments made towards the

purchase of the suit property, which was then known as plot number 77 within Komarock, whereby the deceased was a member no 215. This agreement for sale, which remains unchallenged and was duly signed by both the plaintiff and the deceased, is comprehensive.

30. It disclosed that the land sold comprised 50 acres, with a purchase price of Ksh. 1,500,000. The last date for payment was specified as 13 April 1995, payable either in cash or by bankers cheque. Time was of the essence. The plaintiff would only issue a plot surrender notice to Komarock and give vacant possession upon payment of the purchase price and clearance thereof.

31. Even though the 1st and 2nd defendants, who represented the deceased, did not contest the claim, the plaintiff, as the claimant, had the evidential burden as the party asserting the trust to establish its claim, in accordance with **Sections 107 and 109** of the **Evidence Act**. The plaintiff argued that it had fulfilled the terms of the agreement, thereby establishing an equitable interest in the subject property. It relied on the precedent set in **Mongare & Another v Lonehill Estate Limited & 2 Others, Commercial Case E747 of 2024 [2025] KEHC 17187 (KLR)**. However, this case is distinguishable, as it involved purchasers and the statutory

power of sale rather than a constructive trust. The 3rd and 5th defendants differ on this.

32. This court agrees with these defendants. It is a trite rule of law that the terms of their contract bind parties. In this case, the facts show that the plaintiff and the deceased, by executing the sale agreement, recognised they had entered into a sale agreement for the property in question. There are no allegations of fraud, coercion, or undue influence during the formation of this agreement. Since the contract was legally formed, it was binding on both the plaintiff and the deceased.

33. The plaintiff failed to adduce evidence demonstrating that it had paid the purchase price of Ksh. 1,500,000 to the deceased on or before the completion date of 13 April 1995. There is no evidence indicating that the agreement was varied. In support of its claimed payments, the plaintiff submitted a "plot payment statement" indicating that, as of the completion date, it had remitted a nominal sum of Ksh. 15,000 to the deceased, representing merely 1% of the purchase price. It is alleged that this amount was paid through receipt or cheque number "1735." However, these corresponding receipts were not adduced as evidence.

34. A comparable position pertains to the records of alleged payments made after the completion date of 29 April 1995,

extending to 27 September 2008. The plaintiff asserts that a substantial portion of the purchase price was paid; however, no records exist demonstrating the recipients of those payments (considering the deceased died on 11 March 2004), were demonstrated. Given that the company maintained meticulous "plot payment statements" that detailed payment dates, amounts, and corresponding receipt or cheque numbers, one would expect the plaintiff to produce supporting payment documents. However, such documents were not presented. Therefore, and in view of their absence, this court finds that the plaintiff did not settle the purchase price, and finds that it was in breach of the sale agreement.

35. Even if this court, for the sake of argument, were to accept that payments were made in accordance with the "plot payment statements" - a point on which this court previously found that consideration was never made - the sale agreement explicitly made time of the essence, and it is incontrovertible that the plaintiff was in breach. In the Court of Appeal decision of **Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR)**, it was held that contracts for the sale of land generally confer upon the vendor the right to rescind the agreement if the purchaser fails to make payment by the stipulated date. Having breached this contract, the plaintiff cannot now seek protection under it, and in this, guidance is sought in a

subsequent Court of Appeal decision, which this court associates itself with, the court held as follows: -

“The appellant was responsible for the delay hence she cannot claim that the balance was to be paid after registration...It is trite that the respondent could not wait for the appellant to register the suit property at her own pace and pleasure before paying the balance of the purchase price. In our view this amounted to breach of the sale agreement. As a consequence of the breach, the respondent was entitled to treat itself as discharged from further liability under the agreement.”

36. The witness for the plaintiff was also untruthful and contradicted the sale agreement and the “plot payment statements” when he testified that the purchase price was paid between 1993 and 1994, and that the remaining balance was to be paid upon the issuance of the title document. Accordingly, this court finds that PW1's testimony was not credible, contradictory, and unreliable. Furthermore, this Court finds that the plaintiff had never been in possession of the suit property. Based on the foregoing findings and in accordance with the relevant law and previously cited judicial precedents, the doctrine of constructive trust was never established between the plaintiff and the deceased. This court so finds.

b) Whether the plaintiff proved the particulars of fraud against the 1st and 2nd defendants.

37. It is a well-established principle of law that fraudulent conduct must be specifically pleaded as required by **Order 2 Rule 4** of the **CPR**. In the present case, the plaintiff's claim met the 1st threshold by alleging and particularising fraud against these defendants. Having particularised fraud, the onus was on the plaintiff to substantiate it on a standard of proof exceeding the balance of probabilities but falling short of proof beyond a reasonable doubt. **See the Court of Appeal decision in Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) 1 December 2000 (Judgment).**

38. In the particulars of fraud, the plaintiff alleged that the 1st and 2nd defendants, in the probate proceedings, failed to disclose the plaintiff's interest in the suit property or to involve it in the probate process. Furthermore, it was asserted that these defendants subdivided the suit property and sold and transferred portions thereof to the 3rd to 5th defendants without disclosing the plaintiff's interests. The determination of the first issue had a direct bearing on the resolution of this issue.

39. Having previously established that the deceased never held the suit property in trust for the plaintiff, these particulars are found to be without merit and dead on arrival. Given the breach concerning non-payment of the purchase price on the completion period, the deceased and his estate retained the right to deal with the suit property without the plaintiff's involvement.

c) Whether the 3rd and 5th defendants were innocent purchasers for value and without notice of any defect in title.

40. These defendants raised this defence, and the apex court elucidated it in **Sehmi & another v Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)**, affirming that it is a fundamental principle of the law that a purchase of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer.

41. Guided by the case of **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, **Sehmi (Supra)**, and an examination of the evidence, and in concurrence with the plaintiff while differing from the arguments presented by

these defendants, this court finds that these defendants did not satisfy the legal threshold. This is because they entered into agreements for the sale of the suit property, which remained registered in the deceased's name, with persons lacking the capacity to convey a valid title to them. This situation is further compounded by the fact that the grant issued is contrary to **Sections 45(1), 55 and 82** of the **Law of Succession Act**.

42. The 3rd defendant has sought protection under **Section 93(1)** of the **Law of Succession Act**; however, this provision cannot assist him, as no revocation of the grant had occurred concerning the deceased's estate. In this regard, this court concurs with the decision of **Njaimwe v Ngugi & 3 others [2025] KECA 1979 (KLR)**, upon which the plaintiff relied, which stated:

“The appellant’s argument that section 93 permitted disposal before confirmation was therefore totally flawed. It is worth pointing out that section 55 of the Law of Succession Act prohibits the distribution or division of the capital assets of the deceased before the grant is confirmed. We would also add that section 93(1) cannot override Article 40(6) of the Constitution which expressly provides that protection of the right to property does not

extend to any property that is found to have been illegally acquired.”

See also: Nairobi Civil Appeal No. 140 of 2017, between Beth Mueni v. John Kinyanjui Gakunga & Another and orris Mwiti Mburungu v. Denis Kimathi M'Mburungu (2016) (cited in re Estate of the late Epharus Nyambura Nduati (Deceased) (2021) eKLR).

43. In the present case, the defendants' title has not been impeached; nonetheless, they must contend with the determination that they cannot rely on the defence of an innocent purchaser for value without notice of any defect in the title.
44. Consequently, guided by the law and judicial precedents, and for the reasons and findings set out above, this court finds that the plaintiff failed to prove its case to the required standards. The plaintiff's case is therefore dismissed. It is trite law that costs follow the event. As the plaintiff was unsuccessful and, for reasons, the 3rd and 5th defendants defended the case while the rest did not, the plaintiff shall bear the 3rd and 5th defendants' costs. In the end, the following disposition is made:

a. The plaintiff's suit is dismissed, with the plaintiff bearing the costs of the 3rd and 5th defendants.

Judgment accordingly.

Delivered and Dated at Machakos this 14th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
14.04.2026**

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

In the presence of;

Ms. Kanja Court Assistant

Miss Wanjohi for plaintiff.

5th defendant acting in person present.