



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 340 OF 2011**

**RICHARD KYALO MAKAU.....PLAINTIFF**

**VERSUS**

**PETERSON MBUVA KIOKO.....1<sup>ST</sup> DEFENDANT**

**OLIVER NDETI KIOKO.....2<sup>ND</sup> DEFENDANT**

**JUSTUS MUIA KIOKO.....3<sup>RD</sup> DEFENDANT**

**AND**

**EASTERN PROPERTIES LIMITED.....INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. In his Plaint dated 17<sup>th</sup> November, 2011 and filed in this court on the same day, the Plaintiff averred that he purchased for valuable consideration a parcel of land known as Mavoko Town Block 3/2241 measuring 35 acres from one Godfrey K. Makau (*deceased*), the Defendants' father.
2. According to the Plaintiff's Plaint, the suit land initially formed part of an existing parcel of land known as Mavoko Town Block 3/2241; that in June, 2010, the Defendants' unlawfully entered the suit land and that when he conducted an official search, he realized that the suit land had been registered in the Defendants' names.
3. It is the Plaintiff's case that the registration of the suit land in favour of the Defendants constitutes a constructive trust and that in the alternative, the registration of the suit land in favour of the Defendants was procured fraudulently. The Plaintiff is seeking for an order declaring that the Defendants hold the portion of 35 acres in parcel number 3/2241 in trust for him and for *mesne* profits.
4. In their Defence, the Defendants averred that any purported sale in respect to the suit land between the Plaintiff and their late father is void for lack of the statutory requirements of the Land Control Regulations; that they are the owners of the suit property and that they are the ones in occupation of the suit land.

**The Plaintiff's case:**

5. The Plaintiff, PW1, adopted the statements that were filed in this court on 5<sup>th</sup> February, 2015 and 17<sup>th</sup> November, 2011. In his testimony, PW1 informed the court that in the year 1994-1996, his late brother, Godfrey K. Makau, who is the Defendants' father, was under a lot of stress, which stress was occasioned by his sick wife and the many children he had in school.
6. It was the evidence of PW1 that due to the financial problems that the Defendants' father was in, he reached out to him for money for his daily upkeep and to pay for his children school fees; that the Defendants' father was also in need of money to pay the hospital bills for his sick wife and that he (PW1) agreed to purchase the suit land to enable the Defendants' father raise the much needed money.
7. PW1 informed the court that after numerous communication he had with the Defendants' father, he sold to him 10 acres of the suit land. It was the evidence of PW1 that while in the USA, where he lives and works, he sent to the Defendants' father, and his wife money for the said land and that he made additional payments to his late brother when he visited Kenya in 1996, 1997 and 1999. According to the Plaintiff he was shown the suit land by the Defendants' father in the year 1996.

8. PW1 informed the court that in 1997, while in Kenya, the Defendants' father sold to him an additional five (5) acres to enable him to pay school fees for his children; that the Defendants' father instructed his sister, Florence, to receive some of the payments for the land and pay school fees for his children at Makutano Secondary School. PW1 informed the court that the proceeds from the suit land was used by his late brother to pay school fees for his children between 1997-2000 and that between 1996-2003, the Defendants' late father had sold to him a total of 35 acres of the suit land.
9. It was the evidence of PW1 that he bought the suit land for a total of Kshs. 625,000; that by the time of the said sale, the Defendants' father was the owner of Plot No. 618 Lukenya Ranching and Farming Co-operative Society Limited and that he bought the suit land in the presence of witnesses.
10. It was the evidence of PW1 that after the purchase of the suit land, he took possession of the same and developed it by building houses and that his late brother had no problems when he developed the land until the year 2003 when he passed on.
11. It was the evidence of PW1 that in the year 2010, he was informed that his nephews (*the Defendants*) had obtained a Title Deed for the entire land at Lukenya and had the intention of selling it; that his sister, Florence, rushed to the Athi River Land Control Board and found the Defendants and their wives waiting to process the sale of the entire land measuring 40 acres and that she showed the District Officer the Agreements evidencing the sale of the land by the deceased to the Plaintiff.
12. PW1 informed the court that the first Agreement he entered into with the deceased was in 1996 when his wife was sick and the last Agreement was made on 12<sup>th</sup> April, 2003; that no Letters of Administration have ever been issued to the Defendants and that the 1<sup>st</sup> Defendant witnessed some of the Sale Agreements between him (*the Plaintiff*) and the deceased.
13. PW1 produced in evidence several documents in support of his case including the Agreements of 15<sup>th</sup> June, 1996; 23<sup>rd</sup> August, 2000, 19<sup>th</sup> February, 2002; 2<sup>nd</sup> February, 2003 and 12<sup>th</sup> April, 2003.
14. In cross-examination, PW1 informed the court that the Defendants' father was his elder brother; that he (*the deceased*) was an employee of the Government for many years and that his late brother was working in the Armed Forces as a Warrant Officer II. It was the evidence of PW1 that the Defendants' father retired from the Military around 1997/1998.
15. PW1 informed the court that some of the family members who witnessed the signing of the Agreements are deceased; that he never sought the consent of the Land Control Board and that the suit land was the only land his brother had in 1996.
16. On the issue of the purchase price, PW1 stated that he used to pay the Defendants' father as and when need arose; that the Agreements of Sale shows how the purchase price was paid and that the Defendants' father is the one who gave directions on how the money for the land was to be disbursed. PW1 stated that as at the time of the Defendants' father's death, the land was in his sole name.
17. PW1 finally informed the court that it is either the deceased or his sister Florence who used to receive the purchase price from him; that he bought 35 acres of the land which was then known as Plot 618 and that he filed a caution against the title immediately he learnt that the title had been issued in favour of the Defendants.
18. The Plaintiff's brother, PW2, informed the court that the Defendants' father, who was his elder brother, requested the Plaintiff to relieve him of his financial burden; that the deceased offered the Plaintiff the suit land and that the Plaintiff who was living in the USA then requested his wife, Florence, to be his agent in the land transaction. It was the evidence of PW2 that the Plaintiff would send money to him (PW2) and his Florence and they would pay their late brother.
19. It was the evidence of PW2 that he signed the Agreement of June, 1996 and 2002 and that his wife Florence witnessed the signing of the 1996, 2000 and 2003 Agreements between the Plaintiff and the deceased. It was the evidence of PW2 that the deceased's daughter, Caroline (*also deceased*) witnessed the signing of the Agreements of 1996 and 9<sup>th</sup> February, 2003. PW2 informed the court that all the monies due were paid to the Defendants' father by the Plaintiff.
20. According to PW2, the Defendants' father's life took a turn when he started drinking heavily. PW2 informed the court that other than drinking heavily, the deceased also had a large family which he had to take care of. PW2 stated that the deceased used to ask him to call the Plaintiff to send money every time he was in need of the same.
21. The wife to PW2, PW3, informed the court that she lives in the USA; that she is a retired civil servant; that her role in the transaction between the Plaintiff and the Defendants' father in respect to the suit land was to get money from the Plaintiff and pay school fees for her nephews (*the Defendants included*) and that she did that in 1997, 1998, 1999 and 2000.
22. PW3 stated that the deceased sold the suit land to the Plaintiff and that she collected approximately Kshs. 70,000 from the Plaintiff for the purpose of paying the school fees for the deceased's children; that the money for the fees was part of the purchase price of the land and that the deceased's children were in Makutano Secondary School. According to PW3, one of the children of the deceased proceeded to Kisumu Polytechnic after completing his Secondary Education at Makutano Secondary School. It was the evidence of PW3 that he received money from the Plaintiff and paid the fees for Leslie Kioko in Kisumu Polytechnic between 2000-2001.
23. According to PW3, the 1<sup>st</sup> Defendant was a signatory to the Agreements that were done in 1996, 2000 and 2002 and that the effort by the Eombe clan to resolve the dispute has been fruitless. According to PW3, she witnessed the signing of all the four Sale Agreements that the Plaintiff entered into with the deceased.
24. The other brother of the Plaintiff and the deceased, PW4, informed the court that the deceased (*the Defendants' father*) sold 35 acres of

the suit land to the Plaintiff; that the sale commenced in 1996 through the year 2003 and that he was a witness in some of the Agreements. It was the evidence of PW4 that most of the payments to the deceased were made to the deceased through PW2 and his wife, PW3.

25. PW4 informed the court that the entire extended family knew that the deceased sold to the Plaintiff the suit land and that the Defendants were educated from the proceeds of the suit land.

26. PW5 is also a brother of the Plaintiff and the Defendants' father (*deceased*). According to PW5, the deceased started selling a portion of the suit land in 1996 to the Plaintiff when his wife was hospitalized. PW5 stated that the deceased was paid the purchase price in form of school fees for his children who included Leslie, Oliver and Justus. It was the evidence of PW5 that the 35 acres of the suit land belongs to the Plaintiff.

27. The Secretary of Eombe Nthoka Katemi clan, PW6, stated that the complaint in respect of the suit land was filed before the clan on 12<sup>th</sup> December, 2010 and that the District Chairman of the clan called for several meetings to investigate the truth. According to PW6, after investigations, the clan came to the conclusion that the Plaintiff purchased the suit land from his late brother Godfrey Kioko Makau.

28. In cross-examination, PW6 informed the court that the Defendants demolished the houses that were built by the Plaintiff on the suit land.

#### **The Defence case:**

29. The 3<sup>rd</sup> Defendant, DW1, informed the court that the Plaintiff is his uncle; that the 1<sup>st</sup> Defendant is his brother who has since died and that the 2<sup>nd</sup> Defendant is his brother too.

30. According to DW1, his late father was working with the Military and was financially stable during his life time. DW1 informed the court that his deceased's father was a Warrant Officer II in the Kenya Defence Force and was not a drunkard as claimed by the Plaintiff and his witnesses.

31. DW1 denied that his late father sold the suit land to the Plaintiff so as to enable his mother to get treatment. According to DW1, all members of the Kenya Defence Force and their families have medical covers and medical facilities. The evidence of DW1 was that when his father died in the year 2003, the Plaintiff never raised the issue of having purchased the suit land from his father and that they buried their father and mother on a portion of the suit land.

32. DW1 informed the court that they are the registered proprietors of the suit land; that it is their father who paid for their school fees and that their father had a pension and gratuity after retiring from the Kenya Defence Force. According to DW1, they have since distributed the Estate of their father and have sold some portions of the suit land to third parties; that they were issued with the Title Deed for the suit land on 30<sup>th</sup> June, 2010 and that their late father never informed them that he had sold the suit land to his brother, the Plaintiff.

#### **Submissions:**

33. In his submissions, the Plaintiff's advocate submitted that the Plaintiff produced the Agreements of 15<sup>th</sup> June, 1996, 25<sup>th</sup> October, 1997, 23<sup>rd</sup> August, 2000, 9<sup>th</sup> February, 2002 and 12<sup>th</sup> April, 2003 between himself and the Defendants' father (*deceased*); that the deceased acknowledged receiving the purchase price from the Plaintiff and that the said sale of the suit land by the deceased was a common knowledge in the larger Makau family.

34. Counsel submitted that although DW1 alleged that the land was bequeathed to them by their father, he did not produce any Will in court to that effect; that the contracts that the Plaintiff entered into with the deceased were all in conformity with Section 3(3) of the Law of Contract and that a court of law should endeavour to give effect to the intentions of parties to contract.

35. The Plaintiff's counsel submitted that since there was a sale between the Plaintiff and the deceased, a constructive trust was created and that the deceased and the Defendants became trustees over the suit land. Counsel relied on several authorities on the doctrine of constructive trust including: *Equity & Trusts, by Alastair Hudson; The Law of Trusts and Equitable Obligations; Willy Kimutai Kitilit vs. Michael Kibet (2018) eKLR* amongst others.

36. The Plaintiff's counsel finally submitted that the lack of consent of the Land Control Board cannot vitiate or extinguish a claim for constructive trust and that an Application for the consent of the Board was not possible since the title was in the name of the Government.

37. The Defendants' counsel submitted that no transaction involving the suit premises could be conducted without the consent of the Land Control Board; that if the Plaintiff entered into any transaction over the suit land with the deceased, then the transaction was void and that it is not true that the transaction involves the Government.

38. Counsel submitted that there is no evidence showing that the Plaintiff took possession of the suit land and that the Defendants' title can only be revoked on the ground of fraud which the Plaintiff has failed to prove.

39. The Defendants' advocate submitted that the Plaintiff failed to prove the alleged school fees that he paid for the deceased's children; that the deceased was a man of means and was working as a Warrant Officer II with the Kenya Defence Force and that the issue of the deceased having sold the suit land to the Plaintiff due to his inability to pay school fees for his children is untrue. Counsel submitted that there is no evidence showing the existence of a trust between the Plaintiff and the Defendants and that the Defendants have not been enriched by the Plaintiff in any way since they did not receive any money from the Plaintiff.

40. The Interested Parties' advocate submitted that any claim by the Plaintiff based on a Letter of Allotment was extinguished once a Certificate of Title was issued in favour of the Defendants and that the Plaintiff's suit against the Defendants should be dismissed with costs.

**Analysis and findings:**

41. The Plaintiff's case is that between the years 1996 to 2003, he entered into various Sale Agreements in respect of land known as Plot No. 618 with his late brother, Godfrey Kioko Makau, who is the father to the Defendants. In this Judgment, I shall refer to the Defendants' late father as "*the deceased*".

42. According to the Plaintiff, by the time he was purchasing a portion of Plot No. 618 from the deceased, the title in respect of the land had not been processed. The only document that showed the deceased's proprietorship rights over the land was a Letter of Allotment from the Lukenya Ranching & Farming Co-operative Limited (*the Society*). The said Letter of Allotment was produced in evidence by the Plaintiff.

43. The Defendants have refuted the claim by their uncle, the Plaintiff, that the deceased sold the land to him. Although the Defendants admitted that it's their father who owned Plot No. 618, it is their case that they are the first registered proprietors of the said land.

44. The Defendants produced in evidence the copy of the register showing that they were registered as the proprietors of land known as Mavoko Town Block 3/2241 measuring approximately 16.02 Ha (*40.05 acres*) on 30<sup>th</sup> June, 2010. This is the same land that had been allocated as Plot No. 618 to the deceased vide a Letter of Allotment dated 6<sup>th</sup> November, 1991.

45. Arising from the pleadings and the adduced evidence, the issues for determination are as follows:

**a. Whether the Plaintiff purchased parcel of land known as Mavoko Town Block 3/2241 from the late Godfrey Kioko Makau (the deceased)?**

**b. Whether the sale of the suit land required the consent of the Land Control Board consent?**

**c. Whether a constructive trust resulted from the sale of the suit?**

**d. Who is entitled to the suit land?**

46. The evidence by the Plaintiff and PW2-PW6 is that on 15<sup>th</sup> June, 1996 the deceased, Godfrey Kioko Makau, entered into a contract with the Plaintiff to sell to him a portion of Plot No. 618 measuring 10 acres. The Agreement dated 15<sup>th</sup> June, 1996 between the Plaintiff and the deceased was produced in evidence.

47. The Agreement of 15<sup>th</sup> June, 1996 shows that the deceased, together with his wife and some children agreed to sell to the Plaintiff a piece of land measuring ten (10) acres which was to be excised from the deceased's land measuring 40 acres. The agreement shows that the agreed purchase price for the 10 acres was Kshs. 175,000, with the deceased acknowledging the receipt of Kshs. 20,000 on the date the Agreement was signed.

48. The Agreement shows that the 1<sup>st</sup> Defendant (*also deceased*) was one of the people who attested to the execution of the Agreement of 15<sup>th</sup> June, 1996, together with his sister Caroline (*also deceased*). The other witnesses who witnessed the signing of the Agreement were the deceased's wife, PW3 and PW5. PW3 is the Plaintiff's sister-in-law while PW5 is his brother.

49. Between 15<sup>th</sup> June, 1996 and 1997, the deceased acknowledged in writing having received the purchase price in instalments. On 14<sup>th</sup> May, 1997, the deceased acknowledged in writing having received the balance of the purchase price of Kshs. 50,000.

50. The other Agreement that the deceased is said to have entered into with the Plaintiff is dated 25<sup>th</sup> October, 1997 for a portion of land measuring 5 acres. According to the said Agreement, the purchase price for the five (5) acres was Kshs. 15,000 per acre. The Agreement was duly witnessed by PW5, PW2 and R. Kyalo.

51. The third Agreement that the Plaintiff is relying on is dated 23<sup>rd</sup> August, 2000. In the said Agreement, the deceased is said to have sold 5 acres of the suit land to the Plaintiff for Kshs. 15,000 per acre. The signing of the Agreement was witnessed by the 1<sup>st</sup> Defendant, PW3 and PW2. The Agreement shows that the entire purchase price of Kshs. 75,000 was paid to the deceased.

52. In the fourth Agreement of 9<sup>th</sup> February, 2002, the deceased agreed to "*add*" the Plaintiff another five (5) acres of the suit land for Kshs. 20,000 per acre. The signing of the Agreement was witnessed by the 1<sup>st</sup> Defendant (*deceased*) and the deceased's daughter Caroline. The mode of payment of the purchase price is indicated in the said Agreement. On 2<sup>nd</sup> February, 2003, the deceased is said to have acknowledged payment of the entire purchase price in writing.

53. The last portion of the suit land that the Plaintiff is purported to have purchased was 10 acres vide an Agreement dated 12<sup>th</sup> April, 2003. According to the said Agreement, the execution of the same was attested by PW4, PW5 and Grace Justus Makau. The Agreement shows that the deceased received Kshs. 200,000 in cash from the Plaintiff.

54. Except the 1<sup>st</sup> Defendant and his sister Caroline who are dead, all the people who witnessed the Plaintiff and the deceased sign the Agreements of 15<sup>th</sup> June, 1996; 25<sup>th</sup> October, 1997; 23<sup>rd</sup> August, 2000; 9<sup>th</sup> February, 2002 and 12<sup>th</sup> April, 2003 gave evidence in this matter.

Indeed, the Secretary of Eombe Nthoka Katemi clan, PW6, informed the court that after investigating the issue of the sale of the suit land between the two brothers, the clan was satisfied that the Plaintiff purchased land measuring 35 acres from the deceased.

55. Considering that no evidence was placed before the court to show that the signature of Defendants' father was forged in all the five Agreements that he is said to have signed, and in view of the fact that the Defendants did not call any member of the family or clan to dispute the said Agreements, I am convinced that the Defendants' father sold 35 acres of the suit land to the Plaintiff.

56. Considering that the Agreements that the Plaintiff is relying on were duly executed and attested, the same complied with the requirements of Section 3(3) of the Law of Contract Act and Section 38(1) of the Land Act. Section 38(1) of the Land Act provides as follows:

***“(1) 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 to by a witness who was present when the contract was signed by such party.”***

57. Indeed, the Defendants' father did not only sign the five Agreements of Sale, but acknowledged having received the full purchase price for the land he sold to the Plaintiff. Having acknowledged receipt of the purchase price, it does not matter if the proceeds of the land went into educating the deceased's children, settling his wife's medical bill or otherwise. The bottom line is that there was a disposition of an interest of 35 acres of the suit land. The manner in which the purchase price was utilized by the deceased is irrelevant.

58. It is not in dispute that after the Agreement of 12<sup>th</sup> April, 2003 was entered into, the deceased died on 20<sup>th</sup> June, 2003. The period from the date that the deceased signed the last Agreement and when he died was only two months.

59. Although it is true that under Section 6(1) of the Land Control Act, the sale of Agricultural land requires the consent of the Land Control Board within six (6) months of the Agreement, the evidence before this court shows that the deceased died before the lapse of six (6) months from the date he signed the last Agreement. Having died, the issue of obtaining the consent of the Land Control Board for the transfer of 35 acres to the Plaintiff could only have arisen after the Letters of Administration have been issued in respect of the Estate of the deceased.

60. The Defendants did not produce any evidence to show that they obtained the Letters of Administration in respect of the Estate of their father. Indeed, DW1 admitted that the suit land was registered in their favour on 30<sup>th</sup> June, 2010 before they obtained the Letters of Administration.

61. Considering that the suit land has always belonged to the Defendants' late father, and the Letter of Allotment that was issued by Lukenya Farming and Ranching Society Limited in respect to the suit land was in favour of the Defendants' father, it is not clear to this court how the deceased's children were registered as the co-owners of the suit land on 30<sup>th</sup> June, 2010 before obtaining the Letters of Administration.

62. The admission by DW1 that the suit land belonged to their late father conforms with the Plaintiff's testimony that the suit land was registered in favour of the Defendants with a view of defeating his claim as against the deceased. Indeed, the registration of the suit land in the name of the Defendants amounts to intermeddling in the Estate of a deceased person.

63. Section 5 of the Law of Succession Act provides as follows:

***“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

***(2) Any person who contravenes the provisions of this section shall—***

***(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and***

***(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”***

64. The intervening period between the death of the deceased, and the time the Defendants were registered as proprietors of the suit land, which belonged to the deceased, and then purporting to transfer the portions thereof to the Interested Parties, was contrary to the provisions of Section 45 of the Law of Succession Act.

65. Having found that upto date, the Estate of the deceased person has never been administered, I find and hold that the Plaintiff cannot be faulted for having not obtained the consent of the Land Control Board. The contention by the Defendants that the Agreements that the Plaintiff entered into with their late father are null and void for want of the consent of the Board cannot therefore stand.

66. Having found that the Plaintiff purchased a portion of the suit land from the Defendants' father, a constructive trust was created as between the deceased and the Plaintiff. A constructive trust is a doctrine of equity imposed by courts to benefit a person who has been wrongfully deprived and ask a person who would be unjustly enriched to transfer the property to the intended party (See Simon Gardner, 'An introduction to the Law of Trusts; Gbolahan Elias, 'Explaining Constructive Trusts).

67. The rationale of the doctrine of constructive trust was explained by the learned authors in the text 'The Law of Trusts and Equitable Obligations' at page 263 as follows:

***“From the very moment that a vendor enters a specifically enforceable contract to sell property, he holds it on constructive trust for the purchaser. The reason for the imposition of the trust in these circumstances is that the contract of sale renders the vendor subject to an obligation to transfer the property to the purchaser which will be enforced in equity by means of the remedy of specific performance. By applying the maxim that ‘equity treats as done that which ought to be done’, the constructive trust ensures that the purchaser is entitled to the equitable interest immediately, even though he will not become the full absolute owner until the vendor transfers the legal title in fulfillment of the contract.”***

68. The Plaintiff having purchased the portion of the suit land from the deceased, he became the full absolute owner of the same pending the transfer of the legal title of the land to him. While the Plaintiff was awaiting for the appointment of the legal representatives of the deceased before enforcing the constructive trust that existed between him and the deceased, the Defendants unlawfully had the suit land registered in their favour.

69. The above analysis of the evidence before me shows that the Plaintiff has proved his case on a balance of probability. The Plaintiff is entitled to 35 acres of the land that was initially known as Plot No. 618, which upon survey was registered as Mavoko Town Block 3/2241.

70. For those reasons, I allow the Plaintiff's Complaint dated 17<sup>th</sup> November, 2011 as follows:

***a. A declaration be and is hereby issued that the Defendants hold the portion of 35 acres of land in land parcel number Mavoko Town Block 3/2241 in trust for the Plaintiff.***

***b. A declaration be and is hereby issued that the Defendants are under a duty by reason of the trust to transfer the 35 acres of the suit property to the Plaintiff and in default the Deputy Registrar of this court do sign transfer documents in respect of 35 acres of parcel number Mavoko Town Block 3/2241 upon sub-division of the land.***

***c. The Defendants to pay the costs of the suit.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**