



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 107 OF 2011

MUNYAKA KUNA COMPANY LIMITED.....PLAINTIFF

VERSUS

BERNADO VICEZO DE MASIDEFENDANT

(The Administrator of the Estate of DOMENICO DE MASI - Deceased)

JUDGMENT

Introduction

1. On 15/3/2011, Munyaka Kuna Company Limited (**the plaintiff**) took out an originating summons dated 14/3/2011 seeking determination of the following four questions:

a) Whether the plaintiff is entitled to be registered the proprietor of land parcel Nos LR No 42/21 & LR No 42/22 being subdivisions of LR No 42/11 for the reason that the plaintiff acquired title to the said property by way of purchase for value from the registered owner, the late Domenico De Masi?

b) In the alternative, whether the plaintiff is entitled to be registered the proprietor of land parcel Nos LR No 42/21 & LR No 42/22 being subdivisions of LR No 42/11, the plaintiff having been in possession and occupation of the property for a duration of over 12 years and having acquired title thereto by adverse possession.

c) Further in the alternative, whether the plaintiff is entitled to be registered the proprietor of LR 42/21 & LR No 42/22 being subdivisions of LR No 42/11 by virtue of the plaintiff having acquired rights thereto by prescription?

d) Who should meet the costs of this suit.

2. The originating summons is supported by an affidavit sworn by Karanja Macharia on 14/3/2011 in which he contends that he is a director of the plaintiff company, duly authorized to swear the affidavit on behalf of the plaintiff company.

Plaintiff's Case

3. The plaintiff's case is that **Bernado Vicezo De Masi (the defendant)** is the administrator of the estate of the late **Domenico De Masi (the deceased)** who died on 14/7/2000 and who is the registered proprietor of Land Reference Number 42/11 situated in Njiru, Nairobi City County. The plaintiff contends that prior to his demise, the deceased sold and gave the plaintiff vacant possession of six (6) acres out of LR No 42/11. The plaintiff contends that the sale was made through two agreements: (i) an agreement dated 20/12/1993 through which the deceased sold to the plaintiff five (5) acres at Kshs 750,000 which was fully paid by the plaintiff to the defendant; and (ii) an agreement dated 1/8/1994 through which the deceased sold to the plaintiff one (1) acre for Kshs 150,000 out of which the plaintiff paid the deceased Kshs 100,000 and the balance (Kshs 50,000) was to be paid to the deceased upon the deceased filling up disused quarries which were on the land, failure to which the plaintiff was to utilize the Kshs 50,000 to fill up the disused quarries.

4. The plaintiff further contends that pursuant to the said agreements, the deceased initiated subdivisions out of LR No 42/11 resulting into nine (9) subdivisions, among them Parcel Number LR No 42/21 (five acres) and Parcel Number LR No 42/22 (one Acre). It is contended that the deceased gave the plaintiff vacant possession of the two parcels. The deceased subsequently died before completing the process of conveyance.

5. The plaintiff also contends that in 2009, the defendant applied for a grant of letters of administration intestate over the estate of the deceased but failed to disclose to the court that six acres out of LR 42/11 belonged to the plaintiff. He adds that the defendant proceeded to obtain a confirmation of grant dispossessing the plaintiff the six acres it purchased from the deceased. It is contended that the above actions

on part of the defendant triggered the taking out of the originating summons by the plaintiff.

Defendant's Case

6. The defendant opposes the plaintiff's case through his replying affidavit sworn on 26/6/2013. The defendant's case is that the agreements which the plaintiff is purporting to enforce are long caught up by the Limitation of Actions Act and are therefore not enforceable. Secondly, the plaintiff contends that the alleged agreements were not executed by the deceased; the alleged purchase price was not received by the deceased, and the plaintiff cannot therefore be said to be a purchaser for value.

7. The defendant further contends that LR No 42/11 is still registered in the name of the deceased; has never been subdivided, and the purported subdivision was not done at the behest of the deceased. The defendant adds that the suit property measures twenty eight acres, and the prayers sought cannot be granted because grant of the prayers would unjustly and adversely affect a property that is not claimed by the plaintiff.

8. The defendant further contends that he is in possession of the entire suit property and that the plaintiff has never taken possession of the suit property or any portion thereof. The defendant adds that he is a stranger to any agreement to the effect that the disused quarries on the suit land would be filled up by the deceased failure to which the plaintiff would use an outstanding balance of Kshs 50,000 to fill them up. He further asserts that payment of survey fees by the plaintiff amount to intermeddling with the estate of the deceased. The defendant also contends that the suit property is agricultural land and no land control board consent has ever been issued for subdivision or transfer of the same. Lastly, the defendant contends that the prayers sought by the plaintiff are not capable of being granted by this court under the law on which the suit is founded, and that the suit herein is bad in law, misconceived, embarrassing and incompetent.

Evidence

9. At trial, the plaintiff called two witnesses: (i) Karanja Macharia – PW1; and (ii) John Macharia – PW2. PW1 testified that he was a director of the plaintiff company. He stated that in 1993 and 1994, the deceased entered into two sale agreements with the plaintiff; the first agreement was for sale/purchase of five acres at Kshs 750,000, and the second agreement was for sale/purchase of one acre at Kshs 150,000. The purchase price in respect of the first agreement was paid in full and Kshs 100,000 was paid in respect of the second agreement. He stated that the balance in respect of the second agreement (Kshs 50,000) was to be paid to the deceased after the deceased filled up the disused quarries which were on the sold portion of the suit land. He stated that the deceased had one title to the suit property, LR No 42/11, and the portion sold to the plaintiff was to be hived out of the parcel through subdivision of LR No 42/11.

10. PW 1 stated that pursuant to the sale agreements, the deceased commissioned a surveyor to subdivide LR No 42/11, resulting into among others subdivisions, LR No 41/21(five acres) and LR No 42/22 (one acre), and the defendant gave the plaintiff possession of the six acres. He added that the plaintiff paid survey fee in respect of the subdivision.

11. PW1 added that the deceased died before he completed the conveyance, and subsequent to the deceased's demise, the defendant petitioned the high court for a grant of letters of administration of the deceased's estate intestate without disclosing to the high court that six acres out of the suit land belonged to the plaintiff. The defendant obtained the grant and proceeded to apply for confirmation of the grant through distribution of the deceased's estate without taking into account the six acres that the deceased had sold to the plaintiff prior to his death.

12. PW 2 - John Macharia, adopted his affidavit sworn on 29/12/2014 and stated that in 1999, he was engaged by Mr J S Kigera of Metro Planning Consultants to carry out survey work and subdivision on LR No 42/11 for their client by the name Domenico De Masi (the deceased). He stated that while undertaking the exercise, he personally met and interacted with the said Domenico De Masi. He testified that among the parcels of land he surveyed and subdivided out of LR No 42/11 were Parcel Number LR No 42/21 and Parcel LR No 42/22 which had been sold to M/s Munyaka Kuna Company Limited. The said plaintiff's company paid him survey fee of Kshs 20,000. He pointed out the beacons for the two parcels subdivided out of LR No 42/11

13. PW 2 further stated that upon completion of survey and subdivision, the Department of Survey issued deed plans for the nine (9) parcels that had been carved out of the LR No 42/11, namely LR No 42/20 – LR No 42/28. Among the nine subdivisions were the two parcels, LR No 42/21 and LR No 42/22 which the deceased had sold to the plaintiff company. Also among the nine subdivisions were parcels sold by the deceased to the Catholic Archdiocese of Nairobi through a purchase financed by Hon S M Githunguri. Because of the fact that Hon Githunguri financed the purchase by the church, he was involved in the subdivision exercise.

14. PW 2 further testified that he was not able to finalize the registration of the deed plans at the Lands Registry because he did not get the original title document for LR 42/11 without which he could not procure registration of the deed plans. He subsequently got to learn that Mr Domenico De Masi, the registered proprietor who had commissioned M/s Metro Planning Consultants to carry out the survey and subdivision, had died. He reiterated that the survey and subdivision was commissioned by the deceased.

15. Lastly, PW 2 stated that he handed over the deed plans for the nine parcels to Hon S N Githunguri for safe custody but he retained the beacon certificates for the subdivisions for the reason that his professional fees had not been fully settled.

Defendant's Evidence

16. The defendant adopted his two affidavits sworn on 24/11/2011 and 21/6/2013 respectively as part of his sworn evidence in chief. He produced annexures to the affidavits as exhibits in this suit. He stated that Domenico De Masi was his father and he died in 2001. He could not recall the exact day and month when he died. He further stated that LR 42/11 measures over forty acres. He added that he did not know about his late father's sale of six acres to the plaintiff. Similarly, he did not have any information about any subdivision of the suit property

during his late father's life time. He also stated that he was not aware of any claim by the Catholic Archdiocese of Nairobi. The defendant stated that the person whom his late father gave a power of attorney was one Bruno Rusillo and the said attorney had not disclosed to him his late father's dealings with the plaintiff.

17. In cross examination, he stated that his father died in 2000. He confirmed that his late father was alive at the time the subdivision plans were approved. He stated that he needed time to verify if indeed his late father had sold the six acres to the plaintiff. He also testified that he did not know if Mr Khan was his late father's lawyer. He added that the deceased's "son" whom Mr Khan alluded to in his letter at page 39 of the plaintiff's bundle of documents was his brother. Asked by the court whether he knew Mr Mohamed Akram Khan Advocate, the defendant answered in the affirmative and added that he got to know Mr Khan through Hon Githunguri's office.

18. In re-examination, he stated that in 1993 he used to drive his mother while his brother Antonio Kenyatta De Masi ran family business. He added that he did not have any reason to look for Mr Khan after his father's demise.

Evidence by Mohamed Akram Khan - Advocate.

19. Noting that the name of Mr Mohamed Akram Khan had prominently featured in the proceedings as having been at the centre of the alleged and disputed transaction, and noting that neither part had called him as a witness, the court made the following order:

The name of M A Khan advocate has featured centrally in these proceedings. He holds information that would assist the court arrive at a decision that is just. In the interest of justice, I would invoke the inherent powers of the court and direct that he be summoned to testify and shade light on the sale agreements, correspondence and cheque before court. The plaintiff's advocate shall serve the summons. Further hearing on 21/8/2018 at 9.00am

20. Mr Mohamed Akram Khan advocate attended court and testified. He stated that he is a practicing advocate based at St Ellis House, 4th floor, Wabera Street, Nairobi. He has been in legal practice since 1961 (for 57 years).

21. He testified that the transaction giving rise to this suit related to a piece of land measuring five acres which was to be purchased for Ksh 750,000. The five acre piece of land was to be hived out of a bigger piece of land. All the expenses were to be borne by the purchasers. The transaction took place in 1993. He represented both the vendor and the purchaser in the transaction. He stated that the vendor was an Italian person called Domenico De Masi. The said Domenico De Masi was his client for many years and in many legal matters.

22. Mr Khan further testified that when the material agreement was done, Mr Domenico De Masi was in and out of Nairobi Hospital due to poor health. He would collect the purchase price to go and pay medical bills. He confirmed that he received the full purchase price for the five Acres and passed it over to the late Domenico De Masi. He further stated that he did not have his office file relating to the sale because the file was collected by the vendor's son, Benard De Masi (the defendant). He stated that the defendant collected the file about six or seven years ago. He further stated that Benard De Masi was the administrator of the Late Domenico De Masi's estate when he collected the file from his office.

23. Under examination by Ms Chege for the plaintiff, he confirmed that the agreement dated 201/12/1993 and produced as an exhibit is the one that was executed by Domenico De Masi as vendor and Munyaka Kuna Company Limited as purchaser. He also confirmed that he wrote to Mr Domenico De Masi a letter dated 30/11/1993 confirming receipt of the purchase price from the plaintiff and seeking instructions from the vendor. He also confirmed that he passed the money to the vendor, Domenico De Masi.

24. Under examination by Mr Oduor for the defendant, he stated that he acted for both the vendor and the purchaser. He stated that the parties viewed the property and that the five acres were to be surveyed out of the bigger piece of land. He added that the vendor was elderly and sickly at the time of sale.

25. Mr Khan further stated that the vendor was his good client and it is the vendor who introduced the purchaser to him. He added that the vendor was supposed to bring to him title documents after surveying out the 5 acres. Mr Khan added that under the agreement vendor was to avail completion documents. He further stated that the agreement was a valid contract. He stated that the vendor was not accompanied by family members when he signed the agreement and that spousal consent was not a requirement at that time.

Submissions

26. Ms R W Chege, counsel for the plaintiff submitted that the defendant had admitted that the signatures on the sale agreements were similar to that of the deceased. She added that the defendant had feigned ignorance of the payment that was made to the deceased. Counsel further submitted that Mr M A Khan the advocate, who handled the transaction, had confirmed that the sale took place and the purchase price was paid to the deceased by the plaintiff. She added that the defendant was not truthful because he had denied knowledge of Mr M A Khan advocate but the latter had confirmed to the court that upon the deceased's death, the defendant went to his office and took the material transaction file.

27. Counsel for the plaintiff further submitted that the plaintiff has been in possession of the suit property. She added that the destruction of the plaintiff's fence by the defendant had the ulterior motive of defeating the plaintiff's title to the suit property. Ms Chege added that the correspondence exhibited by the plaintiff involving City Council of Nairobi, Department of Survey, Mr A M Gathuru, Ms Metro Planning Consultants, M/s Sam Surveyors, Mr Khan, Hon S M Githunguri, Ministry of Lands & Settlement, Archdiocese of Nairobi, Mr Bruno Rosielo and the plaintiff confirmed that subdivision was commissioned by the deceased and properly finalized.

28. Counsel added that the acts of the deceased Vendor bind the administrator of his estate, contending that the deceased having sold part of his property, the administrator is estopped from disowning the agency engaged by the deceased to undertake subdivision. She contended that the approval for subdivision was granted on 18/2/2000 when the deceased was alive.

29. Ms Chege also submitted that the documents produced in evidence confirm that consent for subdivision was granted by the relevant authorities. She added that under Special Condition No 3 in the title to the land was to be used for light industrial purposes only. She further submitted that the subject land was not agricultural land within the meaning in Section 2 of the Land Control Act.

30. Lastly, counsel for the plaintiff submitted that as the administrator of the estate of the late Domenico De Masi, the defendant is bound by the contracts that had bound the deceased and it was his duty to ensure that the process of registration of the deed plans was completed. She added that the defendant was deliberately obstructing completion of the contract with the motive of defeating the rights of the plaintiff.

31. Mr Shem Oduor, counsel for the defendant submitted that the plaintiff's claim is statute barred under Section 4(2) of the Limitations of Actions Act. He added that the plaintiff's remedy lies against the advocate who was engaged by the parties to complete the sale because the advocate did not undertake his professional duties diligently. Counsel for the defendant further submitted that the consent of the land control board was mandatory but it was not obtained in the present matter, hence the transaction is null and void. Mr Oduor further submitted that the plaintiff had failed to establish the essential features of prescription and adverse possession and urged the court to reject the plaintiff's plea.

32. The court has considered the pleadings, evidence and parties' rival submissions. The court has also considered the applicable legal framework and the guiding jurisprudential principles on the key questions in this dispute. Parties did not frame a concise statement of agreed issues for determination. Nonetheless, the following key issues emerge for determination in this dispute.

a) Whether in 1993 and 1994 the late Domenico De Masi sold to the plaintiff six acres of land to be curved out of Land Reference Number 42/11

b) Whether the alleged sale contracts are unenforceable by dint of the provisions of the Limitation of Actions Act.

c) Whether the alleged sale contracts are unenforceable by dint of the provisions of the Land Control Act.

d) Whether the plaintiff has acquired title to the six acres under the doctrine of adverse possession.

e) Whether the plaintiff has acquired title to the said six acres under the doctrine of constructive trust.

f) Whether the plaintiff has acquired prescriptive rights to the said six acres under the doctrine of prescription

Determination

33. I will make pronouncements on the six issues in the order in which they appear. Before I make those pronouncements, I would make one general observation regarding the suit property, Land Reference Number 42/11. Grant No. IR 52951 in which the suit property is comprised was registered on 20/6/1991. The size of the land is captured in the Grant as 11.46 hectares. At the conversion scale of 2.47 acres to 1(one) hectare, this would translate to approximately 28.3 acres. I have taken the liberty to make this observation because the defendant who is the administrator of the estate of the late Domenico De Masi (registered proprietor) stated in his oral evidence in chief that the suit property is "40 acres plus".

34. The first issue for determination is whether in 1993 and 1994 the late Domenico De Masi sold to the plaintiff six acres of land to be curved out of Land Reference Number 42/11. PW 1 - Karanja Macharia testified that indeed the deceased executed the two agreements pursuant to which he sold to the plaintiff six acres of land. The six acres were to be curved out of the suit property. PW 2 - Mr John Macharia who handled the subdivision of Land Reference Number 42/11 testified that he personally interacted with the late Domenico De Masi during the survey and subdivision and confirmed that indeed the six acres were sold to the plaintiff. DW 2 - Mr Mohammed Akram Khan, the advocate who handled one of the sale contracts confirmed that indeed the agreement for sale of five acres was executed by the parties and full purchase price was paid by the purchaser to the vendor in respect of the five acres. The sale agreement dated 20/12/1993 for sale of five acres was produced as an exhibit. Cheques that remitted purchase price to the advocates and to the vendor were also produced.

35. Also produced was a memorandum of agreement dated 1/8/1994 duly signed by the deceased acknowledging receipt of Kshs 100,000 in respect of an additional one acre. Similarly produced was a receipt for Kshs 100,000 issued by the deceased acknowledging receipts of the Kshs 100,000 in respect of the additional one acre.

36. The defendant's evidence regarding the sale agreements was that he did not know about his late father's sale of six acres to the plaintiff. He further contended that the person whom his late father gave a power of attorney relating to dealings in the suit property was one Bruno Rosiello. He stated that the said attorney did not disclose to him his late father's dealings with the plaintiff. The defendant also contended that at the material time, he was preoccupied with driving his mother while his brother handled family business. Mr Khan, the advocate who handled the transaction confirmed that the defendant went to his office and took the transaction file relating to the sale of five acres.

37. From the above evidence, I am satisfied that indeed the late Domenico De Masi sold to the plaintiff a total of six acres on two different dates in 1993 and 1994 respectively. The defendant's contention that he is not aware of the sale is a dishonest ploy which should not be exhibited by a court appointed administrator.

38. The second issue is whether the alleged sale contract is unenforceable by dint of the provisions of the Limitation of Actions Act. The general legal framework on court enforcement of contracts is contained in Section 4 of the Limitation of Actions Act which provides for a limitation period of six years. When the court enforcement entails the recovery of land under a contract, the limitation period is stipulated under Section 7 of the Act at twelve years.

39. In the present suit, the first agreement was signed on 20/12/1993 and the completion period was agreed to be thirty days. The six year period during which the plaintiff was entitled to bring action for enforcement of the contract lapsed at the expiry of six years, that is, in 1999. The limitation period for the second contract which was executed in August 1994 lapsed in the year 2000. The present originating summons was taken out on 15/3/2011. Whether by design or not, as framed, the originating summons does not seek orders of specific performance of the contract. It makes plea for equitable reliefs under the doctrines of constructive trust, adverse possession and prescription. In my view, these equitable reliefs are not subject to the statutory timelines in the Limitations of Actions Act. They are similarly not subject to the statutory requirements in related statutory framework such as the Land Control Act. For these reasons, the limitation framework in the Limitation of Actions Act is not a bar to the affirmation or otherwise of the questions framed by the plaintiff in the originating summons.

40. The third issue is whether the sale contracts are void and unenforceable by dint of the provisions of the Land Control Act. The defendant contends that to the extent that there was no consent of the land control board, the sale contracts are void and unenforceable. I have observed that the equitable reliefs sought by the plaintiff are not subject to the statutory requirements under the Land Control Act. Even if I were to be wrong, under Section 6 of the Land Control Act, consent is necessary only if the subject sale relates to agricultural land. Section 2 of the Land Control Act defines “**agricultural land**” as

2. Interpretation

In this Act, unless the context otherwise requires

“agricultural land” means -

(i) Land that is not within-

municipality or a township; or

(ii) an area which was, on any time after the 1st July

1952, a township under the Townships Act (Cap,

133, 1948 now repealed); or

(iii) a market

a) Land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, Other than land which, by reason of any condition or covenant in the title hereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;

41. The suit property is situated in Njiru within what was previously known as Nairobi City Council, now known as Nairobi City County. Under the repealed Local Government Act, a municipality was defined to include a city. It therefore follows that the suit property was by dint of its location exempted from the provisions of the Land Control Act. Secondly, the defendant who alleged that the material transactions were controlled transactions within the meaning of the Land Control Act did not present any evidence to demonstrate that the minister, by notice in the gazette, declared the subject land to be agricultural land. Thirdly, special Condition Number 3 in the Grant specifies that the land is to be used for light industrial purposes only. The totality of the foregoing is that there is no evidence that the suit property is agricultural land within the meaning of Section 2 of the Land Control Act. Consequently, my finding on this issue is that the material contract cannot be said to be void by dint of lack of consent of the land control board. Even if the contracts were to be found to be void, the questions set out in the originating summons will still be determined because the reliefs sought are not subject to the statutory limitations in the Land Control Act.

42. The fourth issue is whether the plaintiff has acquired title to the six acres under the doctrine of adverse possession. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **Titus Kigaro Munyi v Peter Mburu Kimani, CA Civil Case No 28 of 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

43. The doctrine of adverse possession has its statutory underpinning in **Sections 7, 9, 13, 37 and 38** of the **Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in the case of **Mtama Lewa v Kahindi Ngala Mwagandi, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the present constitutional framework on protection of the right to property.

44. PW 1 testified that the plaintiff took possession and occupation of the suit property immediately after execution of the sale agreements. This was done through fencing of the suit property. The first agreement was dated 20/12/1993 while the second agreement was dated 1/8/1994. PW 1 further testified that after the plaintiff acquired and took possession of the six acres, it lost touch with the vendor and that despite diligent enquiries, the plaintiff did not know the administrator of the estate of the vendor. The position taken by the defendant in his oral testimony in court is that the person who was mandated by his father to deal with matters relating to the suit property was one Bruno Rosiello. The said Bruno Rosiello was not called as a witness. Consequently, the evidence of PW 1 on the plea for an order of adverse

possession remains unchallenged. The result is that the court is satisfied that the plaintiff has satisfied the court that pursuant to the sale agreements, the deceased Domenico De Masi was dispossessed of six acres out of Land Reference Number 42/11 and the plaintiffs have been in possession of the six acres from the respective dates of the two agreements (1993 and 1994 respectively). By the year 2011 when the plaintiff took out the originating summons, the plaintiff had been in possession of the six acre property for over 16 years.

45. The question which arises at this point is whether dispossession pursuant to a land sale contract can culminate into adverse possession. This question was answered by the Court of Appeal in **Sammy Likuyi Adiema v Charles Shamwati Shisikani (2014) eKLR**. In the said suit, the respondent purchased the suit property in 1984 and took possession in 1985. Subsequently, the seller (appellant's father) died leaving the respondent in possession. The family of the seller proceeded to undertake succession without involving the purchaser. The Court of Appeal upheld the adverse title of the purchaser who came into possession in 1985 pursuant to the sale contract. The scenario is precisely the same as in the present suit. Guided by this jurisprudence, I find that the plaintiff acquired title to the six acres upon expiry of the 12 year period from the respective dates when the deceased was dispossessed, that is 1993 and 1994 respectively.

46. Similarly, given that the plaintiff has proved that the deceased sold the six acres to it and full purchase price was paid for the first five acres while a substantial portion of the purchase price (Kshs 100,000 out of Kshs 150,000) was paid in respect of the additional one acre, and that the plaintiff has been in possession of the suit property for over 16 years, what has ensued in so far as the six acres is concerned is a constructive trust. That is to say, the deceased together with his estate continued to hold title to the six sold acres as constructive trustees of the purchaser. In **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal held that the appellants, who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent were protected under the doctrine of constructive trust. I entirely agree with the findings of the Court of Appeal in the comparative decision and find that the plaintiff has similarly acquired title to the six acres under the doctrine of constructive trust.

47. The last issue is whether the plaintiff has acquired prescriptive rights to the said six acres under the doctrine of prescription. Under the common law doctrine of prescription, one person may acquire rights, such as easements and profits, over the land of another through long and continuous enjoyment of those rights. In the present suit, evidence was tendered to the effect that the plaintiff has been in possession of the six acres for over 16 years. Details of any specific prescriptive rights were not presented to the court. Consequently, it would be presumptuous for the court to make pronouncements on prescriptive rights whose details have not been given through evidence.

Disposal Orders

48. Having come to the above findings on the key questions in this suit, the court makes the following disposal orders in tandem with the questions which were put forth in the originating summons dated 14/11/2011.

a) It is hereby confirmed and declared that the plaintiff, Munyaka Kuna Company Limited, has acquired title to six acres out of Land Reference Number 42/11 pursuant to the doctrines of constructive trust and adverse possession.

b) It is further confirmed and declared that the plaintiff, Munyaka Kuna Company Limited, is entitled to be registered the proprietor of six acres out of Land Reference Number 42/11 currently registered in the name of Domenico De Masi, now deceased.

c) The plaintiff shall meet the requisite costs of registration of deed plans and processing of title.

d) Each party shall bear own costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Wanjau holding brief for Ms Chege Advocate for the Plaintiff

No appearance for the Defendant

Ms Halim - Court clerk