



**Nthenge v Mwasaru & 7 others (Environment & Land Case  
148 of 2018) [2024] KEELC 3980 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 148 OF 2018**

**A NYUKURI, J  
APRIL 29, 2024**

**BETWEEN**

**JONAH KISESE NTHENGE ..... PLAINTIFF**

**AND**

**TEODA MWASARU ..... 1<sup>ST</sup> DEFENDANT**

**NYONGESA WAFULA, ROSEMARY WANJIRU & AMOS MUSYOKA (SUED IN  
THEIR CAPACITIES AS OFFICE BEARERS OF USHIRIKA BOMA WELFARE  
SOCIETY) ..... 2<sup>ND</sup> DEFENDANT**

**MBUKONI HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THOMAS WAMBUA ..... 4<sup>TH</sup> DEFENDANT**

**RUTH NZULA ..... 5<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 6<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 7<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, MACHAKOS ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> February 2013, Jonah Kisese Nthenge, the plaintiff in this matter sought the following orders;
  - a. Possession of the land title number Mavoko Town Block 3/2101 and eviction of the defendants and the members of Ushirika Boma Society from the plaintiff's land.
  - b. Permanent injunction to restrain the defendants whether by themselves, their fellow members or through their relatives, their servants and/or agents or others whomsoever from continuing



with their wrongful occupation and use of the plaintiff's said land or in any other manner howsoever from interfering with the plaintiff's peaceful possession of his land.

- c. General damages for trespass.
  - d. Costs of this suit and interest on the decretal amount at court rates.
2. The plaintiff averred that at all material times he was and still is the registered proprietor of all that parcel of land known as Mavoko Town Block 3/2101 (suit property), having been registered as such on 9<sup>th</sup> December 2004 and obtaining title thereto on 8<sup>th</sup> February 2005. That thereafter on a routine visit to the suit property, he found out that the defendants had without his knowledge and consent unlawfully entered the suit property and occupied the same. That the defendants have failed to desist from continuing in the wrongful occupation despite demand from the plaintiff.
  3. The suit was opposed. The defendants filed a statement of defence and counterclaim dated 11<sup>th</sup> March 2013 and filed on 18<sup>th</sup> March 2013, which was subsequently amended on 6<sup>th</sup> March 2019. In their amended defense and counterclaim, wherein they counterclaimed against the plaintiff and 6 other defendants, they denied the plaintiff's claim and stated that they purchased the suit property from Mbukoni Holdings Limited (hereinafter referred to as Mbukoni) and were issued with a share certificate, beacon certificate, and passbook to facilitate transfer and were also shown the suit property and took actual possession thereof from 2003 as they awaited processing of titles. They claimed that the plaintiff had lost right over the suit property by having been dispossessed of the same by Mbukoni.
  4. The defendants stated further that they were purchasers for value without notice and were not aware of any disagreements relating to conclusion of the sale transaction in respect of the suit property between the plaintiff and Mbukoni. They maintained that having purchased the same, they took possession and have been in open possession without objection from any party. They stated that the title held by the plaintiff was illegally and unprocedurally held as the interest in the suit property had passed to the defendants. They contended that the plaintiff's continued hold on the suit property's title was a mistake and an act of fraud and his remedy lied in making a demand of Kshs. 750,000/= from Mbukoni.
  5. The defendants further stated that any dispute between the plaintiff and Mbukoni is a dispute between the two and should not involve the defendants. They insisted that the acquisition of the land was legal and regular for value without notice of defect in title and therefore they should be allowed to enjoy the Constitutional right to the property. They claimed that they approached the plaintiff who confirmed to have sold the suit property to Mbukoni but claimed that there is a balance of Kenya shilling 750,000/= and therefore the plaintiff is estopped from denying existence of the sale agreement under the doctrine of equitable estoppel. Further that the plaintiff's silence for over 10 years since the defendants took possession of the suit property shows that the plaintiff encouraged the defendants' actions and therefore the defendant's interests in the suit property is capable of being protected in law.
  6. The defendants asserted that their possession was within section 30 (g) of the Registered *Land Act* as they have an overriding interest in the suit property and that their possession was not as licensees or trespassers but as bona fide purchasers for value from Mbukoni. They averred that they have now gotten their individual titles and therefore the suit is now caught up by the estoppel and constructive trust doctrines.
  7. The defendants' counterclaim was raised against seven defendants including, the plaintiff, Mbukoni, Thomas Wambua, Ruth Nzula, Commissioner of Lands, Registrar of Titles, and the District Land Registrar Machakos. They claimed that they have equitable rights in the suit property which right



binds the 1<sup>st</sup> to 4<sup>th</sup> defendants in the counterclaim in accordance with the overriding interest. They sought the following orders;

- a. A declaratory order that in terms of the sale transaction aforesaid and the plaintiff having acquired the parcel of title number Mavoko Town Block 3/2101 for value as bonafide purchasers and without notice to the defect of the title and having taken possession, having laid out money on the suit land, then the proprietorship, the interest in the suit land title number Mavoko Town Block 3/2101 has since passed to the plaintiffs and deserving the Constitutional and legal protection in law.
  - b. That in the alternative a declaratory order do issue to the effect that the 1<sup>st</sup> defendant in the counterclaim total silence for over a period of 10 years from the year 2003 when the plaintiffs membership in the counterclaim took possession of the suit land title Mavoko Town Block 3/2101, carried out the developments thereon, settled thereon with their families numbering over 300, allowed the defendants membership the plaintiff in the counterclaim to lay out money on the land, then the first defendant in the counterclaim created or encouraged the plaintiffs acts above and thus the plaintiffs have acquired interest in land capable of protection in law and is protected in law.
  - c. A declaratory order that the plaintiffs in the counterclaim being in occupation and possession of the land as purchasers who paid for individual plots from the 2<sup>nd</sup> defendant in the counterclaim a land purchaser from the 1<sup>st</sup> defendant in the counterclaim, then whole situation has created a proprietary estoppel and constructive trust in favour of the plaintiffs in the counterclaim which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the counterclaim cannot renege. That justice and good conscience demands that the plaintiffs in the counterclaim being in possession of land as bonafide land purchasers do obtain title documents to the individual portions purchased and occupied.
  - d. That an order do issue on the rectification of the register by directing the Registrar of titles and the District Land Registrar, Machakos to cancel the registration in favour of the 1<sup>st</sup> defendant as the proprietor of the title number Mavoko Town Block 3/2101 and in its place the plaintiffs as the proprietor to the suit land aforesaid.
  - e. That in the alternative an order of specific performance do issue compelling the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants and more specifically the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the counterclaim to forthwith issue and execute a transfer of title to the title number Mavoko Town Block 3/2101 in favour of the Ushirika Boma Welfare Society, the plaintiff membership within a period of 30 days from the date of the order and in default of compliance, the Deputy Registrar of this court do execute the conveyances, transfer, e.t.c in favor of the plaintiff membership.
  - f. Costs of the suit.
  - g. Any other remedy or relief that this court may deem fit to grant.
8. On 29<sup>th</sup> April 2013, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed memorandum of appearance, but did not file any defence.
  9. The plaintiff filed reply to defence and defence to counterclaim dated 1<sup>st</sup> February 2017. He stated that Mbukoni had no authority or consent of the plaintiff to sell the suit property to the defendants and cannot pass good title to the defendants. Further the plaintiff denied the particulars of fraud and stated that the doctrine of estoppel does not apply in the circumstances of this case. He took the position that a mere possession of land for 10 years does not confer ownership of the land to the defendants.



On the prayer for specific performance, he stated that as there is no contract between the plaintiff and defendants, that prayer cannot be granted.

10. The suit proceeded by way of viva voce evidence. Both the plaintiff and the defendant presented one witness each.

### **Plaintiffs evidence**

11. PW1 was Jonah Kisese Nthenge, the plaintiff in this case. He adopted the contents of his witness statement dated 13<sup>th</sup> February 2013 as his evidence in chief and produced documents listed in his list of documents of even date as exhibit number 1 to 6. It was his testimony that he is the registered proprietor of the suit property measuring 16 hectares and that in 2004, he was desirous of selling that land to Mbukoni but that the intended sale did not materialize because the purchasers were unable to complete the sale. Further that as the intended sale, was a controlled transaction, there was no consent of the land control board applied for or issued and that he did not put the intended purchasers into possession, neither did he release the title deed to them. He stated that no valid agreement was ever made between Mbukoni and himself over the suit property.
12. He further stated that sometimes in 2009, on a routine visit to the suit property, he discovered that several persons had invaded the said property and settled thereon without his knowledge and consent and were carrying on certain activities to his detriment. That he served notice of trespass on the persons on the land requiring them to vacate but they responded that they purchased the land from Mbukoni. According to him, the defendants knew or with minimum prudence ought to have known that Mbokoni had not acquired any right over the suit property capable of being passed to them and that therefore that the defendants are trespassers.
13. The witness produced a certificate of official search of the suit property; copy of the title deed; copy of defendants return to the registrar of societies dated 5<sup>th</sup> December 2011; letter to the defendant dated 5<sup>th</sup> January 2013; letter from the defendants' advocates dated 23<sup>rd</sup> January 2013 and letter to the defendants' letter 28<sup>th</sup> February 2013.
14. On cross examination, he said that he got title to the suit property in February 2005 and that he never sold the property. He however confirmed that he sold the property to Mbokoni but that they did not pay for it to completion and therefore that he did not sell the property. He stated that although he had agreed to sell the suit property to Mbukoni, they disagreed and that is why he still holds the title. He stated that he could not remember when he dealt with Mbukoni and that he has never lived on the suit property. He stated that Mbukoni closed their offices after they sold his land. He stated that he knew that the defendants were on the land when they came to him seeking to obtain title which he refused to give them because according to him, he did not sell the land to Mbokoni. He stated that he could not remember when he found the defendants on the land and that it took him long to file suit because the land is far from where he stays. He confirmed that he did not produce his agreement with Mbukoni. He denied asking the defendants to pay Kenya shillings 750,000/= and also denied allegations that he filed suit to get double payment from the same land.
15. In reexamination he stated that he has never entered into an agreement with the defendants and that he has no agreement with Mbukoni. That marked the close of the plaintiff's case.

### **Defendants' evidence**

16. DW1 was Nyongesa Wafula who adopted his witness statement dated 18<sup>th</sup> March 2013 and a further witness statement dated 2<sup>nd</sup> July 2020 and filed on 20<sup>th</sup> July 2020 as is evidence in chief and produced documents attached on the list of documents dated 11<sup>th</sup> March 2013 as exhibit 1 to 11. He also



produced documents attached to his supplementary list of documents filed on 6<sup>th</sup> March 2019 as exhibits 12 to 21. His testimony was that he is the Secretary of Ushirika Boma Welfare Society and that in 2003 they purchased the suit property from Mbukoni who issued them with share certificates, beacon certificates and passbooks to facilitate transfer of the land to individual members. Further that Mbukoni promised them that the title deed would be issued later at a fee to be announced to them. According to the witness, the membership of their society moved into the suit property and occupied it from December 2003. That they have sought for transfer of the property to their name in vain. He listed 10 committee members of the society and stated that they had to come together because of the delay in obtaining title by Mbukoni and therefore they sought to deal directly with the plaintiff because the register at the lands office indicated his names.

17. According to the witness, when they approached the plaintiff he told them verbally that he was not willing to sign the transfer documents as he was still owed Kshs. 750,000/= and that he was willing to receive that money from the defendants to transfer the land to them. That this led to the meeting of the members of the defendant who resolved to meet the plaintiff on 16<sup>th</sup> January 2013 to confirm that indeed he needed to be paid Kshs. 750,000/=. That on that date having visited him, the plaintiff directed the defendants to contact his advocate one Francis Mulwa in Machakos town. He stated that the advocate served them with an eviction letter dated 5<sup>th</sup> January 2013 and refused any attempts to negotiate and threatened to have them evicted. They stated that the plaintiff denied recognizing Mbukoni and that the advocate confirmed that he had not served termination of contract on Mbukoni.
18. The witness maintained that members of Ushirika Boma Welfare Society which are in excess of 50 families had put up their homes on the suit property since 2003 as they were purchasers for value without notice and were not aware that the title had an issue. He stated that they have reared cattle and chicken, dug boreholes and built private schools and tarmacked roads thereon. That power was installed in their houses and that there is a local chief and ex village elder within the suit premises. He also averred that when Mbukoni sold the land he had displayed a post on the property indicating “subdivision Block 437” at the location. He stated that members were given beacon certificates, share certificates and passbooks and that on 13<sup>th</sup> October 2012 the defendants engaged a surveyor to survey their land who prepared mutation. He maintained that the defendants were purchasers for value without notice to defect in title and questions of non-completion of sale between the plaintiff and Mbukoni is a matter that is between the two as the plaintiff has not denied that there was a sale between them and that having been purchasers, they have obtained interest in the suit property. They sought for the orders in the plaint.
19. The witness stated that the plaintiff having sold his interest in the suit property to Mbukoni, have been caught up by the constructive trust doctrine in favor of the purchasers who are the defendants and it would be unjust and unconscionable for the plaintiff who sold his interest in the land to still claim ownership and retain title. His position was that the suit property had passed to the defendants and that this court has power to effect the equitable doctrine of constructive trust. Further that the plaintiff did not protest Mbukoni being in occupation and hence he is estopped from denying existence of a sale of land between him and Mbukoni and equity compels him to effect the sale.
20. DW1 produced copy of the defendant’s registration certificate; letter from Registrar of Societies; defendants constitution and rules; membership beacon certificates; passbooks; copy of title deeds for the suit property; subdivision plan Block 437 Lukenya; photographs showing persons on the property; plaintiff’s letters of 5<sup>th</sup> January 2013 and 28<sup>th</sup> January 2013; defendants’ letter of 23<sup>rd</sup> January 2013 and defendants’ membership resolution.



21. In cross examination, he stated that when he was purchasing the suit property, he went to Mbukoni's offices where they had displayed a subdivided map on the wall. That he asked them where the suit property was and they took him to the property where he was able to see the beacons. He stated that Mbukoni did not show him the mother title but told him that they must occupy the land before they get title. He stated that they entered into a contract with Mbukoni but did not meet the plaintiff. That they obtained search in 2007 and that they don't have a contract with the plaintiff. He stated that he talked to the plaintiff before 2013 and visited him in January 2013 when the plaintiff agreed being the owner of the suit property and alleged that Mbukoni failed to pay him a sum of Kshs. 750,000/=. He stated that the plaintiff was willing to receive Kshs. 750,000/= and members wanted an agreement with him but he reneged his earlier position. He stated that he received the plaintiff's demand letter from his advocate when they went to visit him. According to the witness, Mbukoni's version was different stating that he only owed Kshs. 150,000/= and not Kshs. 750,000/=. Further that the document that Mbukoni gave them to show that he had ability to sell the suit property was the passbook, the share certificate, and beacon certificate which he had produced in evidence.
22. In reexamination he stated that at the time of purchase Mbukoni were the vendor and that in their meeting with the plaintiff he admitted that he had an agreement with Mbukoni. According to the witness, he believed that the agreement between the plaintiff and Mbukoni had given Mbukoni permission to sell the suit property. According to him, in 2003, the suit property had already been subdivided into several plots measuring 50 feet by 100 feet with roads of access and that there were beacons on the land which were in accordance with the map in possession of Mbukoni. He stated that the surveyor was available to show the purchasers the plots. He maintained that he was not a trespasser because he purchased the plot he is living on. He informed court that in the plaintiff's witness statement of 13<sup>th</sup> February 2013 paragraph 2 thereof the plaintiff confirmed that he entered into a sale agreement with Mbukoni and that this witness was not aware if the agreement was rescinded. He states that the due diligence he did was to visit Mbukoni's office, seeing the map in that office and visiting the land where he saw beacons. He stated that the question of title was raised but Mbukoni said that they must first be in occupation before they can get title. He stated that they visited the lands office in Machakos after the entire land was occupied and all he sought for was that his group gets the land in dispute.
23. Parties filed submissions in support of their respective cases and on record as submissions filed by the plaintiff on 14<sup>th</sup> November 2023 and those filed by the defendant on 29<sup>th</sup> November 2023.

### **Plaintiff's submissions**

24. Counsel for the plaintiff submitted that there were two issues for determination, being whether Mbukoni could pass a valid title to the defendants and whether the defendants are entitled to the suit property. On the first issue, counsel submitted that the plaintiff had entered into a sale agreement over the suit property with Mbukoni however he did not complete the agreed purchase price and as such their claim over the suit property did not crystallize. Counsel argued that in paragraph 11 of the amended statement of defence the defendants admitted having knowledge of the incomplete sale agreement but they proceeded to purchase the suit property from Mbukoni. Counsel argued that as Mbukoni did not clear the purchase price, the ownership over the suit property did not materialize and they had no valid interest on the land. Counsel held the position that Mbukoni could not pass title to the defendants as they had no legitimate claim on the suit property for failure to complete the purchase price.
25. Reliance was placed on the cases of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim [2019] eKLR and Cornelius Kato v Peter John Mwanthi [2022] eKLR for the proposition that a person cannot pass title that they do not possess.



26. It was further submitted that the sale between the plaintiff and Mbukoni was a controlled transaction pursuant to provisions of the *Land Control Act* and that it was mandatory that consent of the Land Control Board be obtained in six months failure which would make the agreement null and void. Reliance was placed on section 8 of the *Land Control Act* and the case of *MacFoy v United Africa Company Limited* [1961] 3 ALL ER 1169.
27. On whether the defendants are entitled to the suit property, counsel argued that the defendants averred to have taken possession of the suit property in 2003, while the instant suit was filed in 2013 and therefore a period of 10 years cannot entitle them to the suit property by virtue of adverse possession. Counsel relied on the case of *Ngumbi Muasya v Monica Tulu Ndulu* [2018] eKLR and *Samuel Kamere v Land Registrar Kajiado* [2015] eKLR for the proposition that a bona fide purchaser for value must prove that he acquired a valid and legal title upon carrying out due diligence to determine the lawful owner of the property. Counsel submitted that the defendants having confirmed that they did not conduct due diligence as per paragraph 11 of the amended statement of defence, that they went ahead to enter into a sale agreement with Mbukoni knowing that Mbukoni had no ownership to the suit property and that therefore the defendants knew of the defects in title before entering into the sale agreement. Counsel also faulted the defendants for not providing receipts to show that they acquired the suit property for valuable consideration. Reference was made to the case of *Koyumkei Multipurpose Cooperative Society Limited & 17 Others v Rael Chepngetich Koech* [2019] eKLR.

#### **Defendants' submissions**

28. Counsel for the defendant stated four issues, being; what was the import of the agreement for sale between the plaintiff and Mbukoni over the suit property; whether the defendants were bonafide purchasers for value; whether constructive trust and proprietary estoppel was established in favour of the descendants; whether the Land Control Board consent was necessary and what appropriate orders should issue in this suit.
29. It was argued for the defendants that from the evidence on record, it is clear that there was an agreement for sale between the plaintiff and Mbukoni which terms were not disclosed to the defendants. Counsel argued that there was no evidence to show that the agreement with Mbukoni was rescinded and therefore the case of *Macfoy v United Africa* (supra) is not applicable. Counsel contended that the plaintiff ought to have demonstrated that he had complied with the terms of the agreement with Mbukoni and that it was Mbukoni that was in breach of the terms. Counsel pointed out that it was curious that the plaintiff did not present any evidence to demonstrate demand for payment of balance of the purchase price or a completion notice or a notice to rescind the agreement. Counsel also argued that even when the plaintiff had knowledge that Mbukoni had sold the suit property, he did not sue them. Counsel wondered why the plaintiff did not raise issues after realizing that Mbukoni has sold the land and wondered whether the conscience of justice would allow him to plead otherwise.
30. Reliance was placed on the case of *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* [2014] eKLR for the proposition that the concepts of humanity cannot allow an individual to receive purchase price and later plead that their agreement is void. Counsel argued that the plaintiff had put Mbukoni into possession of the suit property and that is why they went ahead to subdivide it into plots and sold the same to the defendants. They faulted the plaintiff for not raising a case against Mbukoni and argued that he either concedes or acquiesced to what Mbukoni were doing on the suit property and when Mbukoni was sued in the counterclaim, he only entered appearance and did not defend the case and therefore left the counterclaim unchallenged. Counsel argued that if the plaintiff was not happy with the status quo he could have evicted Mbukoni whom he put in possession of the suit property



and that is why the defendants claim is based on overriding interest protected under section 30 (g) of the Registered Land Act on the basis that there is a trust imposed on the plaintiff.

31. On the doctrine of Nemo dat quod non habet, counsel argued that that doctrine is intended to protect the title of the true owner, but that there are exceptions to that rule for example where a person buys property in good faith believing that it was sold by the owner or an authorized agent. They referred the court to the case of *Katana Kalume v Municipal Council of Mombasa* [2019] eKLR to buttress their argument.
32. Counsel argued that this litigation is not a “straight jacket” litigation and that the case of *Cornelius Kato v Peter John Mwanthi* (supra) does not apply and that it should be distinguished from this case; as in that case, the vendor sold property he had already sold earlier, while in the present case, the defendants purchased the property from Mbukoni who had purchased it from the plaintiff and therefore that property was available for sale. That there was no evidence that the property had been unlawfully acquired and therefore Article 40 (6) of *the Constitution* does not apply in this matter. Counsel argued that the agreement between the plaintiff and Mbukoni has never been rescinded and the same remains valid and that the plaintiff acquiesced to the sale between Mbukoni and the defendants as he did not object to the sale and the subdivision of the land and the entry and beaconing and possession of the same by the defendants.
33. On the question of bonafide purchaser, counsel relied on the case of *Weston Gitonga and 10 others v Peter Rugu Gikanga & another* [2017] eKLR. Counsel argued that the defendants qualify as bona fide purchasers for value because there is an agreement for sale between the plaintiff and Mbukoni and the plaintiff admitted the existence of that agreement even though he did not avail it to the court, and did not provide any evidence to demonstrate that that agreement was terminated. Counsel submitted that production of share certificates and receipts from Mbukoni has demonstrated that they are bona fide purchasers of the suit property. On whether fraud was proved, counsel argued that fraud must not only be pleaded but must be proved and no proof was provided by the plaintiff. The court was referred to the case of *Katende v Haridar and company limited* (2008) 2 E A 173.
34. Counsel submitted that as Mbukoni purchased the suit property from the plaintiff and sold it to the defendants, the suit property passed to the defendants and therefore the title document held by the plaintiff is held in trust. On the question of consent from the Land Control Board, counsel relied on the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR for the proposition that possession of land by a purchaser is an overriding interest in favor of the purchaser and the intention of the party to sell property cannot be overridden by provisions of the Land Control Act. Counsel argued that the Land Control Act was never intended to be an instrument for unjust enrichment.
35. On the question of privity of contract, reliance was placed on the decision in the case of *Hussey v Palma* 1972 for the proposition that a constructive trust is imposed by law whenever justice and good conscience require it as it is an equitable remedy available to an aggrieved party.
36. Counsel also submitted that the plaintiff’s advocates never filed or served a notice of change of advocates from the firm of F. M. Mulwa & Company Advocates to R. K. Mutua and Company Advocates and that therefore the plaintiff’s pleadings ought to be struck out. Reliance was placed on the case of *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2015] eKLR for the proposition that delayed filing of notice of change and failure to serve is fatal to the pleadings filed by the advocate.



## Analysis and determination

37. The court has carefully considered the proceedings, evidence and rival submissions and the following issues arise for determination;
- a. Whether documents filed by the firm of R. K. Mutua and Company Advocates are properly on record.
  - b. Whether the doctrine of equitable estoppel is applicable in this matter.
  - c. Whether the plaintiff is holding title of the suit property in trust for the defendants.
  - d. Who between the plaintiff and the defendants should legally be granted ownership of the suit property.
38. On the issue as to the legality of documents filed by R. K. Mutua & Company Advocates, the record shows that the plaintiff's pleadings and representation was done by the firm of F. M. Mulwa & Company Advocates and it is only the submissions that were filed by the firm of R. K. Mutua and Company Advocates. Therefore, the only document that was filed by the said firm are submissions. As there is no notice of change of advocates on record which is a requirement under Order 9 from 5 of the Civil Procedure Rules, it is clear that the plaintiff's submissions were filed by a stranger and therefore the same are expunged from the court record.
39. It is not in dispute that the plaintiff is the registered proprietor of the suit property. Section 26 of the [Land Registration Act](#) provides as follows;
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.
  2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
40. The plaintiff's case is based on assertions that the plaintiff intended to sell the suit property to Mbukoni in 2004 but the sale was not completed and therefore Mbukoni had no authority to sell the same to the defendants. He faults the sale to the defendants also on the basis that his transaction with Mbukoni was a controlled transaction subject to the provisions of the [Land Control Act](#), and that it ought to have been blessed with a consent from the land control board, which did not happen.
41. Section 107 of the [Evidence Act](#) places the burden of proof on the plaintiff. In this case, the plaintiff referred to an intended sale between him and Mbukoni, but also referred to a controlled transaction. In cross examination he admitted to have sold the suit property to Mbukoni, but stated that the same was not completed by the latter. In the premises, I find and hold that the plaintiff sold the suit property to Mbukoni, and therefore the transaction between the plaintiff and Mbukoni was not an intended sale but a sale. Since it was the plaintiff's evidence that Mbukoni breached the agreement between them by failing to complete payment of the purchase price, he was obligated in law to produce the agreement



- between him and Mbukoni, show the court the terms of the agreement and demonstrate the extent of the breach, which he failed to do. The plaintiff failed to state the purchase price of the suit property which is 16 hectares, how much was paid to him, what were the timelines for compliance and the balance of the purchase price if any, his obligations under the agreement and whether he complied with the same.
42. In addition, the plaintiff did not challenge the fact that the defendants have been in occupation of the suit property for 10 years before he filed this suit, that is since 2003; on the basis of the sale by Mbukoni. Although he denied placing Mbukoni in possession of the suit property, he has not produced their agreement for the court to know what the two parties agreed regarding possession. Mbukoni did not file defence. Basically, the plaintiff is blowing hot and cold. The court does not know to what extent the plaintiff's controlled transaction was not completed by Mbukoni. And whether or not the transaction between Mbukoni and the plaintiff was invalid as alleged by the plaintiff, could only be determined by producing before court the said agreement. In short, the plaintiff's pleadings and evidence have for reasons best known to the plaintiff failed to disclose material facts and I find and hold that the plaintiff was not candid in his case thereby failing to provide the very foundation upon which his case is premised.
  43. From the evidence, it is clear that the plaintiff concedes that the defendants came on the suit property by virtue of the agreement between them and Mbukoni. Although the plaintiff blames Mbukoni for selling the suit property to the defendants without his authority and consent, it is strange that he did not sue them and even when they were dragged to the suit by the defendants, he had no pleading or claim against them. Since the plaintiff admits an agreement between him and Mbukoni, which agreement he refused to present before court, there is no evidence to show the following; that his agreement with Mbukoni was breached, the extent of the breach, that the plaintiff made a demand for rectification of the breach as against Mbukoni or that Mbukoni breached that agreement.
  44. The plaintiff cannot build his case on an alleged breached controlled transaction which he fails to disclose to the court the terms thereof, without any justification, and hope to benefit from such material non-disclosure.
  45. The argument that the controlled transaction was not blessed with consent from the Land Control Board is now no longer a valid argument where the intention of the parties was to sell the suit property. I agree with the submissions made by the defendants that the intention of the *Land Control Act* was not to enable parties to unjustly enrich themselves (See the Court of Appeal decisions in *William Kipsoi Ngetich v Kipkoech Arusei & another* [2019] eKLR; *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR) Indeed, equity has now been elevated to a national value and principle of governance under Article 10 of *the Constitution* and therefore a party cannot sell their property as the plaintiff has done, allege that there was breach, refuse to disclose the terms of their sale agreement or the extent of the alleged breach and when that property is sold under their watch, they look the other way for a period of 10 years, wait for the new purchasers to develop the property and only wake up to claim the property after it has been developed, and without any justification for not raising any objection for 10 years. In my view, equity would not allow the plaintiff herein to benefit from his mischievous actions. Equity is that which is fair and right. Therefore where the intention of the parties is to sell the suit property, as is the case herein, a constructive trust is created.
  46. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the court of appeal cited with approval the case of *Macharia Mwangi Maina* (supra) where it was stated as follows;



In the instant case, there was common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.

...the transaction between the parties is to the effect that the respondent created a constructive trust in favour of all the persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable.

47. The defendants have stated that the plaintiff put Mbukoni into possession and that is why the suit property was subdivided and beaoned at the point they were purchasing the same. The plaintiff did not produce the agreement between him and Mbukoni to show that possession was not granted to the latter in their transaction and since the burden of proof is on him, which he has failed to demonstrate that he had not put Mbukoni into possession, it is my finding that the plaintiff has failed to prove that he denied Mbukoni possession. Because the evidence on record shows that it is Mbukoni that placed the defendants into possession of the suit property, it is my finding that that could not have been done if Mbukoni were not in possession, in view of the fact that for 10 years the plaintiff did not object to Mbukoni's sale to the defendants.
48. Where a party watches the opposing party engage in acts to their detriment, equity will not allow such party to subsequently try to renege on their earlier position. The Black's Law Dictionary 11<sup>th</sup> Edition defines equitable estoppel as follows;
- A defensive doctrine preventing one party from taking unfair advantage of another when, true false language or conduct the person to be stopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. this doctrine is founded on principles of fraud. the five essential elements of this type of estoppel are 1 that was a false representation or concealment of material facts 2 the representation was known to be false by the party making it or the party was negligent in not knowing its full city 3 it was believed to be true by the person to whom it was made 4 the party making the representation intended that it be acted on, or the person acting on it was justified in assuming this intent, and five the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds.
49. In the case of *Titus Muiruri Doge v Kenya Cannery Limited* [1988] eKLR, the court held as follows;
- If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand.
50. In the instant case, the plaintiff having confirmed to have sold the suit property to Mbukoni and not having rescinded that transaction and watching Mbukoni subdivide, beacon and sell the suit property to the defendants for a long period of 10 years, before filing the suit herein, is estopped from claiming the suit property and holds the title thereof in trust for the defendants.
51. In the premises, I find and hold that the plaintiff has failed to prove his claim on the required standard and the same is dismissed. On the other hand, I find and hold that the defendants have proved their counterclaim and demonstrated that they are entitled to the suit property under the doctrine of equitable estoppel and therefore the title held by the plaintiff is held in trust for the defendants. Ultimately, I allow the defendants' counterclaim and make the following orders;
- a. A declaration is hereby made that the defendants are entitled to the parcel of land known as Mavoko Town Block 3/2101 under the doctrine of equitable estoppel.



- b. A declaration is hereby made that the plaintiff holds the title for the parcel of land known as Mavoko Town Block 3/2101 in trust for the defendants.
- c. An order is hereby issued compelling the plaintiff to execute all the relevant transfer documents to transfer the suit property being the parcel of land known as Mavoko Town Block 3/2101 to the defendants within 30 days of the delivery of this judgment, and in default, the Deputy Registrar of this court to execute the said transfer documents.
- d. Each party shall bear its own costs.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms. Mutua for plaintiff

Ms. Kiget holding brief for Mr. Arusei for defendants

Court assistant – Abdisalam

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