



**Wambua & another (Suing as the Legal Administrators of the Estate of John Kituku Wambua - Deceased) v Mukii (Environmental and Land Originating Summons 165 of 2017) [2024] KEELC 6273 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6273 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS 165 OF 2017**  
**A NYUKURI, J**  
**SEPTEMBER 25, 2024**

**BETWEEN**

**RICHARD MBITHI WAMBUA ..... 1<sup>ST</sup> APPLICANT**

**EMMANUEL WAMBUA KITUKU ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF JOHN  
KITUKU WAMBUA - DECEASED**

**AND**

**JOSHUA MBONDO MUKII ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In 1995, John Kituku Wambua, now deceased, filed Originating Summons dated 10<sup>th</sup> November 1995 against Joshua Mbondo Mukii at the High Court at Nairobi vide HCC No. 3316 of 1995 (OS) which suit was later transferred to this court in 2017, being the case herein. The summons was amended twice, upon the applicant's demise which had occurred in 17<sup>th</sup> January 2019, by the current applicants Richard Mbithi Wambua and Emmanuel Wambua Kituku, the deceased's sons and administrators of his estate. In the amended originating summons dated 12<sup>th</sup> October 2022, the applicants sought the following orders;
  - a. That a declaration that by virtue of actual possession and use, the applicants are entitled through the doctrine of adverse possession to ownership of all that land known as Machakos/ Mua Hills/349 formerly Machakos/Mua Hills/296 measuring approximately 5.2 Hectares.



- b. That an order do issue in terms that the applicants be registered as the proprietors and/or owners of all that land known as Machakos/Mua Hills/349 formerly Machakos/Mua Hills/296 measuring approximately 5.2 Hectares in place of Joshua Mbondo Mukii.
  - c. That in the alternative and without prejudice a declaration that the applicants are entitled through the doctrine of constructive trust to all that land known as Machakos/Mua Hills/349 formerly Machakos/Mua Hills/296 measuring approximately 5.2 Hectares.
  - d. That such other or further orders as the court may deem fit for furthering the ends of justice.
  - e. That cost of this application be borne by the respondent.
2. The amended originating summons was supported by the affidavit sworn by the applicants on 12<sup>th</sup> October 2022. They deposed that they were the administrators of the estate of the deceased. Further that the deceased entered into a sale of land agreement with the respondent in 1968 for the purchase of land known as Machakos/Mua Hills/349 (formerly Machakos/Mua Hills/296) measuring approximately 5.2 Hectares. They averred that the deceased paid the entire purchase price and the respondent executed transfer forms and other requisite documents.
  3. They further stated that their family had been in occupation of the suit property from 1968 and has constructed permanent houses thereon and carried out farming activities and buried their relatives on the suit property. They alleged that the deceased was expressly allowed by the respondent to start working on the suit property in 1968 and that in 1971, the deceased charged the suit property with no objections from the respondent. They stated that in 1995, the respondent having refused to transfer the suit property to the deceased, the latter filed this suit as Nairobi HCC No. 3316 of 1995 (OS). He stated that before conclusion of the suit, the deceased and the respondent entered into a consent dated 24<sup>th</sup> June 2011 for sale and transfer of the suit property to the deceased for a sum of Kshs. 1,250,000/-.
  4. They averred that the deceased paid Kshs. 250,000/- being 20% of the purchase price and that it was agreed that the balance was to be paid upon completion, whereof the respondent was obligated to take action towards transferring the property to the deceased including applying for the Land Control Board consent; but failed to do so. They accused the respondent of trying to defeat the consent by secretly changing parcel known as Machakos/Mua Hills/296 to Machakos/Mua Hills/349. They averred that parcel Machakos/Mua Hills/296 is now registered in the name of Mua Farm Primary School while parcel Machakos/Mua Hills/349 is the name of the respondent.
  5. They stated that the applicant purchased the suit property in 1968 for valuable consideration but which was later registered in the respondent's name when he knew the deceased had legal interest in the suit property. They stated that the family had been on the suit property for over 50 years. They also averred that the registration of the suit property in the respondent's name when the deceased had legal interest therein created a constructive trust which the respondent has breached.
  6. They attached the grant of letters of administration; agreement dated 3<sup>rd</sup> April 1970; transfer documents from the Ministry of Lands and Settlement; application for consent of Land Control Board; the deceased's letter dated 13<sup>th</sup> July 1973; letter from Walia Advocate dated 30<sup>th</sup> June 1973; minutes of the Land Control Board of 11<sup>th</sup> October 1971 for Plot No. 296 Mua Hills from the respondent to the deceased; photographs; an agreement dated 25<sup>th</sup> November 1968 between the respondent and the deceased; a charge by the deceased on Plot No. 296 Mua Hills Scheme dated 12<sup>th</sup> June 1972; receipt for payment of stamp duty dated 8<sup>th</sup> June 1972 and loan repayment receipt dated 8<sup>th</sup> June 1972; executed consent to settle out of court dated 24<sup>th</sup> June 2011; and payment receipt for membership fee for Mua Farmers Cooperative Society dated 17<sup>th</sup> July 1974.



7. They further attached bank statement for joint bank account at K-Rep Bank from 1<sup>st</sup> July 2013 to 31<sup>st</sup> July 2013; certificate of official search for Machakos Mua Hills/296 dated 16<sup>th</sup> February 2018; search certificate for Machakos Mua Hills/349 dated 16<sup>th</sup> February 2018; Green cards for parcel Machakos/Mua Hills/296 showing the initial title being in the name of the respondent as at 5<sup>th</sup> October 1992 and surrender of title and charge of title and registration in the title in the name of Mua Farm Secondary School on 7<sup>th</sup> November 2016; Green card for Machakos Mua Hills/349 registered in the respondent's name on 7<sup>th</sup> November 2016; official search for Machakos/Mua Hills/296.
8. The summons was opposed. Joshua Mbondo Mukii filed a replying affidavit dated 2<sup>nd</sup> January 1996. A similar replying affidavit dated 25<sup>th</sup> April 2023 was filed on 28<sup>th</sup> April 2023. The respondent stated that he was the lawful registered proprietor of Machakos/Mua Hills/296 which he was offered by the Commissioner of Lands and the Settlement Fund Trustees on 16<sup>th</sup> March 1965. That the plot had a mature coffee crop in two acres but that he planted more coffee.
9. He further stated that on 25<sup>th</sup> November 1968, he entered into a conditional agreement with the deceased applicant whereof he received a loan of Kshs. 3,160/- from him on condition that he shall transfer his plot to him after getting Plot No. 93 within Mua Hills Settlement Scheme which one Maingi Nzula had promised to sell to him. He stated that they also agreed that if the respondent fails to purchase Plot 93, the proposed agreement would be deemed terminated and he would repay the deceased Kshs. 3,160/-. He also stated that he failed to purchase Plot 93 and personally refunded the deceased Kshs. 3,160/- which the latter refused. He stated that on 19<sup>th</sup> June 1973, he paid him by sending registered postal orders worth Kshs. 4,000/- which the deceased received and cashed as per his letter of 13<sup>th</sup> July 1973.
10. According to the respondent, together with his family, they have objected to the sale of the suit property to the deceased and that the applicants were trying to grab his land by claiming adverse possession.
11. He stated that on 23<sup>rd</sup> August 1971, the applicant secretly and without his knowledge applied to Machakos Land Control Board to have the land transferred to him, and was granted the consent although he lacked supporting documents, but that the consent was rejected and nullified by the Senior Settlement Committee held at Nairobi vide their letter dated 11<sup>th</sup> September 1973. He further averred that on 21<sup>st</sup> September 1973, the Machakos Settlement Officer gave him an official document for the plot upon his completion of instalments payments of Kshs. 17,276/- which included the lands purchase price, development loan, legal fees, funding expenses and interest. He stated that in 1975, he instructed Kakuli & Company advocates to sue the deceased whereof they filed Nairobi HCC No. 172 of 1975, but that the said advocates closed down their offices before the matter was finalized.
12. The respondent stated that the applicant's occupation of the suit property had not been continuous and undisturbed as alleged as the respondent has made several serious attempts to evict the applicant from the suit property. He stated that on 4<sup>th</sup> November he filed a Criminal Case No. 3457 against the deceased for trespass on the suit property whereof he was served with summons on 25<sup>th</sup> February 1981. He stated that the matter was partly heard at Machakos Law Courts but the court file got lost on 30<sup>th</sup> November 1983.
13. He further stated that in 1983, he reported the deceased to Machakos Police Station because he uprooted his crops from the suit property and that he got a letter from the Permanent Secretary for the Ministry of Lands and Settlement confirming that the plot was his. He stated that he was arrested because of another case in 1985 whereof he was jailed upto 1992 and that it was when he was in prison that the deceased took advantage and constructed his house on the suit property. He stated that it was during the same period that the deceased demolished his house on the suit property.



14. He averred that he was issued with a fully filled Discharge of Charge and transfer forms which legally transferred the suit property from the Settlement Fund Trustees to him on 5<sup>th</sup> October 1992 and he was registered as proprietor thereof on 6<sup>th</sup> October 1992. That in 1995, he obtained an official search. He denied executing transfer forms in favour of the applicants. He denied the applicants' claim that the suit property was charged, and that receipts did not prove a charge.
15. Concerning the consent, he denied instructing his advocates to enter into the same which he says he withdrew from and the money refunded. He stated that there was no evidence to show that the deceased was a member of Mua Farmers Cooperative Society and that in any event, that could not give him any right over the suit property. He stated that the applicant had caused serious, damage to the suit property by cutting down and uprooting trees thereon hence causing land degradation.
16. He averred that he was member number 325 of Mua Farmers Cooperative Society Limited and that the applicant was an illegal member who wanted to sell coffee beans from the suit property. He stated that the applicants unlawfully forcefully evicted his family from the suit property who are now living as squatters. He denied holding the suit property in trust for the applicant and stated that the applicants claim for adverse possession was untenable.
17. He attached allotment documents; agreement between him and the deceased; letter dated 13<sup>th</sup> July 1973; alleged illegal transfer forms; letter dated 11<sup>th</sup> September 1973; letter for fixing hearing dates; letter regarding loss of court file; letter from the Permanent Secretary Ministry of Lands and Settlement; a letter by the respondent when in prison; letter from Senior Land Adjudication; copy of Title deed; official search; affidavit of 28<sup>th</sup> April 2023.
18. The suit was heard by way of viva voce evidence. The applicants presented one witness. The respondent did not present any witness.

### **Applicants' evidence**

19. PW1 was Emmanuel Wambua Kituku, the son of the late John Kituku Wambua and also one of the administrators of his estate. He adopted the contents of his supporting affidavit dated 12<sup>th</sup> October 2022 as his evidence in chief. It was his testimony that his late father purchased the suit property from the respondent in 1968 at a consideration of Kshs. 3,460/- and also settled a development loan on the suit property in the sum of Kshs. 2,040/- which was a charge thereon by the Settlement Funds Trustees. He stated that in the agreement, it was agreed that if the respondent was unable to acquire another parcel of land, he would refund the money paid by the deceased in 7 days, but that this did not happen and the deceased continued to pay the respondent upto 1970. That he also fully settled the loan. That the deceased initiated the process of obtaining consent from the Land Control Board which was granted in October 1971.
20. The witness also informed court that the deceased sought transfer, paid all the relevant fees and got approvals from the Settlement Officer, only for the respondent to raise objections on the transfer when the application was sent to Nairobi. According to PW1, the deceased obtained loan facilities in the sum of Kshs. 2,500/- offering the suit property as security. He stated that the deceased took possession of the suit property and developed it since 1968. That he planted coffee and even joined the Coffee Farmers Cooperative Society where he was a member till his death in 2019. He maintained that the deceased was in possession of the suit property for over 50 years. Further that while two of his brothers are buried on the suit property.
21. PW1 stated that between 1973 and 1992, the deceased made various attempts to finalize the transaction but the respondent was not available as he had been jailed for dealing in wildlife trophy. Regarding the



respondent's allegation that the latter refunded the purchase price, he stated that the postal orders for Kshs. 4,000/- sent by the respondent's advocates were not encashed but the respondent was asked to pick them from the deceased's advocate as they were sent five years after the agreement and after the deceased had developed the suit property.

22. It was PW1's assertion that this suit was filed in 1995 but the court file disappeared severally and was reconstructed. He stated that at some point the respondent approached the deceased with an offer to settle the matter, culminating in a consent that the deceased pays the respondent Kshs. 1,250,000/-. That parties agreed that upon payment of deposit of Kshs. 250,000/- the respondent was to obtain consent from the Land Control Board and transfer the title to the deceased. He stated that the said deposit of Kshs. 250,000/- was duly paid into an agreed joint bank account in the names of counsel for the parties but the respondent failed to sign the requisite forms to frustrate the deceased. He stated that at the time of filing suit, the suit property was known as parcel No. 296, but in the course of time, they realized that the same had been changed to Parcel No. 349, for purposes of defeating the proceedings herein.
23. He produced documents attached to his supporting affidavit particularized hereinabove. Upon being invited by court to cross examine PW1, Mr. Kimanzi, counsel acting for the respondent did not cross examine the witness and also informed court that he was not participating in the proceedings but he sat in court as the applicants' witness testified so as to inform the respondent what transferred in court. At that juncture, the plaintiff's case was marked as closed. Counsel for the applicant sought to have the defence case closed. However, the court adjourned the matter and gave the respondent opportunity to be heard for the ends of justice to be met, however on the next hearing, there was no appearance by both parties and therefore the court marked the defence case as closed, and directed parties to file written submissions. Therefore on record are the applicants' submission filed on 31<sup>st</sup> May 2023 and the respondent's submissions filed on 19<sup>th</sup> October 2023.

### **Applicants' submissions**

24. Counsel for the applicant submitted that the suit was centred on two doctrines namely adverse possession and constructive trust. Counsel argued that the sale agreement dated 25<sup>th</sup> November 1968 clearly stated that if the respondent failed to get another parcel he would refund the deceased the full amount in one week. It was argued for the applicants that the respondent's purported refund in June 1973 which was five years later was untenable and that the same was not accepted by the deceased. Counsel also submitted that the applicant produced photographic and documentary evidence to demonstrate active possession of the suit property since 1968.
25. Counsel argued that as the respondent failed to turn up in court to give his evidence, his replying affidavit should be disregarded as the court had directed that hearing of the suit was to be by viva voce evidence.
26. The court was invited to consider the respondent's antecedent conduct alleged to be frustrating a voluntary and mutually contracted transaction and counsel pointed out that although parties attempted to settle the matter, the respondent frustrated the process and proceeded to get title for parcel 296 which he later swapped with parcel number 349 but failed to explain to court what transpired.
27. Reliance was placed on Sections 7, 9, 13, 37 and 38 of the *Limitation of Actions Act* and the cases of Wangari Waithanje & 2 Others v. Thathi Francis Muruarua [2017] eKLR and Ruth Wangari Kanyaga v. Josephine Muthoni Kinyanjui [2017] eKLR. Counsel argued that to prove adverse possession, there must be evidence of uninterrupted possession of the land for 12 years, which possession must be open,



notorious and with the registered owner's knowledge, and that the occupation should be without the owner's permission. Counsel argued that the applicant had met the conditions of adverse possession as PW1 testified that occupation of the applicant began in 1968 hence he had been on the land for 30 years.

28. Regarding constructive trust, counsel referred the court to an excerpt in the book "Equity and Trusts" by Alastair Hudson and the case of *Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri* [2014] eKLR to argue that constructive trust is based on common intention of the parties.

### **Respondent's submissions**

29. Counsel for the respondent submitted that the search dated 18<sup>th</sup> October 1995 shows that the respondent is the registered proprietor of the suit property. Counsel argued that the sale agreement between the parties herein was voidable if the vendor failed to get another farm and that the respondent decided to refund the purchase price of Kshs. 4,000/- to the deceased which he refunded by vis letter dated 30<sup>th</sup> June 1973 but that the refund amount was never returned.
30. Regarding the doctrine of adverse possession, counsel relied on the case of *Ruth Wangari* (Supra) and Section 7 of the *Limitation of Actions Act* and argued that the deceased has never had peaceful and continuous occupation of the suit property for a statutory period of 12 years as the property has been subject of dispute since 1973 when the deceased declined to receive the purchase price. Counsel argued that the deceased was aware of the respondent's protests even as he buried his loved ones on the suit property and therefore the applicants failed to prove adverse possession.
31. Regarding constructive trust, counsel referred the court to the case of *Twalib Hatayan & Another v. Said Saggah Ahmed Alheigh & 5 Others* [2015] eKLR and argued that the sale agreement was to be enforceable only if the respondent managed to get another parcel of land and that the respondent having refunded Kshs. 4,000/-, did not seek to enrich himself as he is now aged 94 years with a mental illness.

### **Analysis and determination**

32. This court has carefully considered the pleadings, evidence and rival submissions filed by parties. The only party that presented evidence was the applicant as the respondent failed to attend court at the hearing for purposes of presenting his evidence despite being given sufficient opportunity to do so. It is trite that the burden of proof in a case rests on the claimant and that burden remains static and does not shift to the defendant, whether or not the suit is opposed.
33. Section 107 of the *Evidence Act* provides as follows;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
34. In this case one issue arises for determination namely, whether the applicant is entitled to the suit property under the doctrine of adverse possession and or constructive trust.
35. The doctrine of adverse possession is anchored on the Law of Limitation Act. Where a person openly, and notoriously takes possession of land belonging to another person, without the real owner's permission and occupies the land continuously for a period of 12 years, then the trespasser can apply to court to have the land transferred to him or her.



36. Sections 7, 13, 37 and 38 of the Law of Limitation Act Cap 22 Laws of Kenya provides for doctrine of Adverse Possession as follows;

Section 7 provides as follows;

Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Section 13 provides;

Right of action not to accrue or continue unless adverse possession

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

Section 37 provides;

Application of Act to registered land

This Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered [Land Act](#) (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—

- a. where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;
- b. an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.

Section 38 provides;

Registration of title to land or easement acquired under Act

1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under



any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
  3. A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
  4. The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
  5. The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.
37. In the case of *Mtana Lewa v. Kahindi Ngala*, the court held as follows;
- Adverse possession is essentially a situation where a person takes possession of land, asserts right over it and the person having title to it omits or neglects to take action of his title for a certain period, in Kenya, 12 years.
38. To prove adverse possession, the claimant must demonstrate that he disposed the disputed land from the title holder, for a period of 12 years.
39. In this case, the applicant's evidence that he took possession in 1968 was not rebutted. The respondent argues that having offered to refund Kshs. 4,000/- in 1973 which was rejected by the deceased that was an objection and protest on the part of the respondent. The fact that postal stamps for Kshs. 4,000/- were sent to the deceased and he rejected the refund is not disputed. Apart from the fact that objection was raised in 1973, there was no evidence from the respondent of any other intervention on his part. The respondent did not present evidence of asserting his ownership rights between 1973 and 1995 when this suit was filed. Between 1973 and 1995 it is a period of 22 years.
40. Even as the respondent got title on 5<sup>th</sup> October 1992 for parcel 296 and changed the same on 7<sup>th</sup> November 2016 to parcel 349, he was aware that the applicant was in possession and did not institute suit against the deceased. I am therefore satisfied that the applicants demonstrated having been in occupation of the suit property openly notoriously, without the respondent's permission for a continuous period of over 12 years and therefore I find and hold that the applicants have proved their claim of the suit property under the doctrine of adverse possession.
41. The Black's Law Dictionary defines constructive trust as;
- An equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrong doer gains title. The court declares a constructive trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary.
42. Therefore a constructive trust is anchored on equity where a victim of a wrong gets remedy against a wrong doer to protect the former and deny the wrong doer from unjust enrichment. In the case of



Twalib Hatayan & Another v. Said Saggat Ahmed Al Heidy & Others [2015] eKLR the court stated as follows;

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing.....imposition of a constructive trust is thus meant to guard against unjust enrichment.

43. The Canadian Supreme Court in the case of *Soulos v. Korkoritziks* [1997] 2 SCR 217 aptly captured the purpose of constructive trust as follows;

The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

44. In the instant case, it is clear that the deceased and the respondent entered into a land sale agreement on 25<sup>th</sup> November 1968 where the deceased bought the suit property on condition that the respondent was to purchase another parcel and if that did not happen, the respondent was to refund the paid amount to the deceased in 7 days, meaning that if the refund was to happen, it ought to have been done not later than the 2<sup>nd</sup> December 1968. The record shows that there was no refund by 2<sup>nd</sup> December 1968.

45. The agreement of 25<sup>th</sup> November 1968 stated that the purchase price was Kshs. 3,460/- and that the deceased purchaser was obligated to pay the cattle loan of Kshs. 2,040/-. Further that he was permitted to work on the land. The applicants stated that they indeed proceeded to develop the land upon which they have constructed permanent structures and planted coffee as demonstrated by the photographs produced. The respondent’s submissions that the sale was subject to him getting another parcel, without conceding to the fact that the refund was to be made by 2<sup>nd</sup> December 1968, does not hold water as the rejected refund in June 1973 was not in compliance with the agreement and the deceased had already developed the suit property.

46. For the above reasons, it is my view that it would not be in good conscience and equity would frown at the respondent’s retention of the suit property in view of the promises made in the agreement and the fact that the deceased had complied with the terms of the agreement and expended more money in developing the suit property. In these circumstances, it is clear that if the suit property is not given to the applicants, that would amount to unjust enrichment on the part of the respondent.

47. There is no dispute that parcel number 296 was changed to parcel number 349 as seen from the searches and green cards produced by the applicants. In the premises, I am satisfied that there exists a constructive trust on the part of the respondent so that the applicants are constructive beneficiaries of the suit property.

48. The upshot is that the applicants have proved their claim on the required standard and I hereby enter judgment for the applicants as against the respondent as follows;

- a. A declaration be and is hereby made that by virtue of actual possession, and use, the applicants are entitled through the doctrine of adverse possession to the ownership of all that land known



as Machakos/Mua Hills/349 formerly Machakos/Mua Hills/296 measuring approximately 5.2 Hectares.

- b. A declaration be and is hereby made that the applicants are entitled through the doctrine of constructive trust to all that land known as Machakos/Mua Hills/349 formerly Machakos/Mua Hills/296 measuring approximately 5.2 Hectares.
- c. The respondent is ordered to transfer to the applicants the parcel of land known as Mua Hills/349 formerly Machakos/Mua Hills/296) measuring approximately 5.2 Hectares, within 60 days of this judgment and in default, the Deputy Registrar of this court shall execute all requisite and relevant documents and transfer the suit property to Richard Mbithi Wambua and Emmanuel Wambua Kituku, the applicants herein.
- d. The costs of this suit shall be borne by the respondent.

49. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Maingi for plaintiff

No appearance for defendant

Court assistant – Abdisalam

