Koech & another v Ruto (Civil Appeal 2 of 2019)
[2023] KEELC 18354 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18354 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL APPEAL 2 OF 2019

MC OUNDO, J

JUNE 15, 2023

BETWEEN

DANIEL KOECH ..... 1ST APPELLANT

HENRY KIRUI ..... 2ND APPELLANT

AND

SAMWEL RUTO ..... RESPONDENT

(Being an Appeal from the Judgment of Honorable B. Omwansa Principal Magistrate delivered and dated 27th December 2018 at Sotik in Sotik Civil Suit No. 147 of 2012)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard by Hon. B. Omwansa, Principal Magistrate in the Principal Magistrate's Court at Sotik in Civil Suit No 147 of 2012 where the learned Magistrate, upon considering the evidence of both parties, entered judgment on the 27th December 2018 in favour of the Respondent's counterclaim that indeed he had demonstrated that he had purchased the parcel of land measuring two acres and needed to be given the title wherein he should pay the balance of Ksh.20,000/= at the transfer of the said title.

1. The Appellants, being dissatisfied with the judgment of the trial Magistrate filed the present Appeal based on the following grounds in their Memorandum of Appeal:

    i. That that the learned trial Magistrate misdirected himself in law in failing to find that the agreement was null and void for lack of Land Control Board consent.

    ii. That the learned trial Magistrate erred in ordering specific performance in support of an agreement that was void for non-compliance within the provision of *Land Control Act*.

iii. That the learned trial Magistrate erred in law and in fact in holding that there was a valid agreement for sale thereby arriving at an erroneous finding.

iv. That the learned trial Magistrate erred in law and fact by failing to consider and analyze the entire evidence of the Appellant and his witness and thereby arrived at the wrong finding on the issue before the court.

v. That the learned Magistrate erred in law and in fact in failing to consider that succession had not been done hence the Plaintiffs lacked capacity to sell the land.

vi. That the learned trial Magistrate erred in law and in fact in ordering the Respondent to pay the remaining sum found due on the agreed purchase price.

3. The Appellants thus sought that the appeal be allowed and the decision of the trial court and the judgment of the lower court be set aside and the prayers in the plaint be granted.

4. The Appeal, which was to be disposed of by way of written submissions was admitted on 15th November 2022.

Appellants' submission

5. The Appellants gave a background of the matter in issue to the effect that the dispute was precipitated by sale agreements entered into by the Appellants and the Respondent in respect of the parcel originally comprised in LR No. Kericho/Chemagel/941, then registered in the name of Kipkurui Mateket (Deceased), and now comprised in LR No. Kericho/Chemagel/4383 and 4382 registered in the names of the 1st and 2nd Appellants respectively.

6. That the Appellants had sold two (2) Acres of the parcel comprised in LR No. Kericho/Chemagel/941 then registered in their fathers name to the Respondent for a consideration of Ksh. 266,000/=.

7. That at the trial, it had been the evidence of PW1 that he had sold to the Respondent 1 acre of land comprised in LR No. Kericho/Chemagel/941 on the 11th October 1998 for consideration of Ksh 140,000/= where he had been paid a total of Kshs. 120,000/= with the balance of Kshs.20,000/= which was still pending to date. That at the time they had not obtained the Land Control Board consent in respect of the transaction but both parties had been aware of the fact that PW1 had no capacity to deal with intestate property as he was not the administrator in respect of the estate of the deceased.

8. That PW2 had also testified that he entered into a sale agreement on 7th February 1998 with DW1 where he sold 1 Acre of the land comprised in LR No. Kericho/Chemagel/941 for a consideration of Kshs. 146,000/= and that at the time, again both parties were aware that he had no capacity to transact in intestate property and that Land Control Board consent was never sought in respect of the transaction.

9. That the Respondent's case had been that he had purchased 2 Acres of the land comprised in LR No. Kericho/Chemagel/941 when it was still registered in the name of Kipkurui Mateket (Deceased), from the Appellants. He had also confirmed that he had not completed payment of Kshs. 20,000/= in respect of the transaction and that the parties to the sale agreement had not sought the Land Control Board consent in respect of the transaction.

10. The Appellants then framed their issues for determination in support of their appeal as follows;

i. Whether the learned trial Magistrate erred in not finding that the sale agreement was rendered void by lack of Land Control Board consent.

ii. Whether the learned trial Magistrate erred in finding that specific performance can be ordered in respect of a sale agreement rendered void by lack of Land Control Board consent.

iii. Whether the learned trial Magistrate erred in not finding that the sale agreement was tainted with illegality for lack of capacity to contract.

iv. Whether the doctrines of constructive trust and proprietary estoppel apply to a sale agreement rendered void by lack of Land Control Board consent.

11. On the first issue for determination, the Appellants relied on the provisions of Section 6(1) of the *Land Control Act* to submit that it was clear from the same that any party to the agreement could apply for consent of the Land Control Board. Notably, that it was not indicated that the application should necessarily be made by the person seeking to sub-divide or sale land. That in cases of sub-division as was in their case, the application for consent ought to have been accompanied by a plan in addition to other requirements. That the Respondent was capable of meeting these conditions and therefore it was not correct for him to claim that he was waiting for the Appellants to make an application for the consent

12. That further, the provisions of Section 8(1) of the *Land Control Act* provided that the High Court could extend an expired period for the application of a consent where it considered that there is sufficient reason do so. That the Respondent had not made any such application seeking to extend time.

13. That it was thus apparent that the sale agreement between the Appellants and Respondent had been voided by failure of the parties to seek the consent of the Land Control Board within six months as prescribed by law. That the transaction was void and the Respondent could therefore not seek specific performance based on the voided transaction. That the transaction having become void, the court should find that the trial Magistrate erred in not finding that the sale agreement was rendered void by lack of Land Control Board consent.

14. On the second issue as to whether the learned trial Magistrate erred in finding that specific performance could be ordered in respect of a sale agreement that had been rendered void for lack of Land Control Board consent, it was the Appellants' submission that it was trite law that the jurisdiction to order specific performance was based on the existence of a valid, enforceable contract and it would not be ordered if the contract suffered from some defect, such as failure to comply with formal requirements or mistake or illegality. That the current contract was therefore invalid or unenforceable as no valid Land Control Board consent had been obtained in relation to the two agreements for sale that the Respondent claims to have entered into with the Appellants. That his situation could only be salvaged by importing the equitable principal of constructive trust where the circumstances permitted but in the instant case, equity could not come to the aid of the Respondent as he had not fully performed his obligations under the contract, being payment of the last instalment of Kshs. 20,000/=.

15. On the third issue as to whether the learned trial Magistrate erred in not finding that the sale agreement was tainted with illegality for lack of capacity to contract, the Appellants relied on the provisions of Section 55 of the *Law of Succession Act* to submit that it had been clear from the evidence tendered as well as the exhibits produced during the entirety of the trial that at the time of the agreements, the parcel comprised in LR No. Kericho/Chemagel/941 was still registered in the name of Kipkirui Mateket (Deceased) and therefore that the Appellants lacked the capacity to contract.

16. The Appellants' submissions as to whether the doctrine of constructive trust and proprietary estoppel could apply to a sale agreement rendered void by lack of Land Control Board consent was in the negative to the effect that it was not in dispute that the doctrine of constructive trust and proprietary estoppel were both concerned with equity's intervention to provide relief against unconscionable

conduct. That the Respondent was yet to pay the balance of Ksh. 20,000/= which clearly demonstrated that he had failed to perform his obligations under the contract. Reliance was placed on the decision in the case of David Ole Tukai vs. Francis Arap Muge & 2 others (2014) eKLR.

17. Reliance was also placed on the Court of Appeal decision in the case of Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR to submit that the doctrines of constructive trust and proprietary estoppel were applicable to and superseded the *Land Control Act* in a situation where the party had fully performed his obligations under the contract. The Appellants implored the court to set aside the entire judgment of the Learned Trial Magistrate delivered on 27th December, 2018 and enter judgment in their favour as per the Plaint dated 1st October 2012.

Respondent's submissions.

18. In response to the Appellant's appeal and in opposition thereto, the Respondent submitted that the appeal was unmerited, that being a first appeal, the court ought to reconsider the evidence adduced in the trial court, which evidence once re-evaluated and analyzed on merit would demonstrate the pertinent facts for independent conclusions in favour of the Respondent.

19. That in their Plaint, dated 1st October 2012, the Appellants had sought orders against the Respondent (Defendant) in respect of property which was "to be curved out of land parcel" from the main Title Number Kericho/Chemagei/941 owned by one Kipkirui Mateket (Deceased),inter alia:

    i. A declaration that the agreement of sale of 2 acres from the Plaintiff to the Defendant is null and void and eviction order.

    ii. Costs of the suit.

20. That the Appellants' suit was anchored on the allegation that pursuant to land sale transactions between them and the Respondent for a consideration of a sum of Kshs.266,000/=, being the purchase price, the Respondent had paid installments and only remained with a balance of Kshs.20,000/=

21. That although the Appellants conceded that they did not receive the stipulated consent from the Land Control Board and neither had succession proceedings been filed, they had later contradicted themselves when PW1 had testified that they had gone to the Land Control Board but had been denied the chance to sell because they had not filed the Succession Cause. No evidence had however been provided before the trial court to support that statement, and PW2 then testified that they did not go to the Land Control Board.

22. That the Respondent's/Defendant's statement of defence and counterclaim dated 31st March 2015 admitted that there had been sale transactions entered into on 7th February 1998 and 11th October 1998 respectively, upon which via a subdivision and transfer, the transacted parcels of land were to be demarcated from LR No. Kericho/Chemagei/941 owned by Appellants' late father Kipkirui Mateket (Deceased). His testimony had been corroborated by the evidence of his witnesses, namely Paul Towet (DW2), Rogers Kipngetich (DW3), and Joseph Towet (DW4.

23. That the Respondent's pleadings in the Trial Court had demonstrated the following';

    i. All parties were aware that the respective land purchase transactions were conditional upon succession being undertaken; as such, the contents of the Sale Agreements were not in dispute. The Appellants also gave the Respondent possession of the parcels of land, wherein he had fenced the same, planted trees, built a house therein and improved the land generally.

ii. That it had been the Respondent's expectation that upon the Appellants obtaining title deeds to their respective portions of land, they would initiate the process of sub-division and transfer their respective portions measuring one (1) acre each to the Respondent.

24. That it had been upon this expectation that the Respondent had sought the reliefs in his counterclaim to wit;

i. A declaration that the Respondent is entitled to one (1) acre to be excised from title number: Kericho/Chemagei/4382.

ii. A declaration that the Respondent is entitled to one (1) acre to be excised from title number: Kericho/Chemagei/4383.

iii. A permanent injunction be issued against the Appellants in favor of the Respondent in respect of portion of land measuring two (2) acres forming part of title number: Kericho/Chemagei/4382 & 4383 respectively.

iv. An Order of Specific Performance be issued against the Appellants to perform their obligations under the contract and to compel them to render vacant possession of two (2) acres and occupied by the Respondent from title number: Kericho/Chemagei/4382 & 4383 respectively and in default, to be forcefully evicted therefrom.

v. An Order that one (I) acre be excised from title number: Kericho/Chemagei/4382 & 4383 respectively and the same be registered in the name of the Respondent and the Deputy Registrar be ordered to execute all the relevant transfer forms to facilitate issuance of title to the Respondent in default by the Appellants.

25. That being apprehensive of the Appellants' conduct of running away from their sale agreements in this matter, the Respondent in his Counterclaim elaborately pleaded the particulars of illegality, misrepresentation and bad faith of the Appellants thereby making it necessary to seek the above reliefs.

26. That during the trial, the Appellants had conceded to having obtained titles to LR Kericho/Chemagei/4382 and 4383 and that although the agreements were made on diverse dates, they had a common intention of buying a piece of land jointly at Teret in Nakuru.

27. That the sub-division of Kericho/Chemagei/941 and issuance of the titles herein aforementioned had informed the Respondent's defence and counterclaim as he had paid the full purchase price of amount of Kshs.146,000/= (Kshs.6,000/= being for development therein) in respect of Sale Agreement dated 7th February 1998 for LR No. Kericho/Chemagei/4382.

28. That in the second sale agreement dated 1st October 1998, he had paid the purchase price of Kshs.120,000/= for Kericho/Chemagei/4383 leaving a balance of Kshs.20,000/=.

29. That despite Appellants' admissions that the new Land Titles (4382 and 4383) had been subdivided as expected upon which the Respondent made his counterclaim, the Appellants did not amend their Plaint so as to reflect the new land changes occasioned with the subdivision or to capture a relief for refund of funds to the Respondent.

30. That it was not only extremely mischievous for the Appellants to run away from the transaction on the sale agreements that they themselves had prepared and executed before the succession and sub-division processes, but it also amounted to an abuse of court process for them to seek eviction orders against the Respondent after the 2nd Appellant (PW1) had declined to receive Purchase price balance of Kshs.20,000/= for reasons that it had been brought late.

31. The Respondent sought that the court rejects the Appellants' submissions on the issues they had raised for determination in support of their Appeal for reasons that pursuant to the Appellants' pleadings in their Plaint, the subject sale agreements were obviously subject to succession process and subsequent land subdivision upon which the required portions of land were to be acquired by the Respondent. That it then followed that the Sale Agreements were not in any way rendered void by lack of Land Control Board consent or at all.

32. That in cross examination, the Appellants had conceded that they were the proprietors of Kericho/Chemagel/4382 and 4383 respectively in the circumstances there was no evidence adduced in the trial court to demonstrate that the Appellants ever sought the Land Control Board consent in liaison with the Respondent wherein they had failed to obtain the same, but they had gone on to deliberately contradict themselves.

33. The Respondent then sought to rely on the decision in the case of Jackson Kamau Kanyuru –vs. Stephen Githinji Waweru [2018] eKLR where this Court had found that the Plaintiff therein had performed all his obligations under the agreement and therefore an order for specific performance was a remedy available to him.

34. The Respondent also considered the point for determination raised by the Appellants as to whether the learned trial Magistrate erred in finding that specific performance could not be ordered in respect of a sale agreement rendered void by lack of Land Control Board consent to which the Respondent submitted that specific performance as a remedy was available to him in this case as it was well supported by the cogent evidence he had led. That the Court should uphold the trial court's decision in favour of specific performance by both Appellants as was held in the Jackson case supra wherein the court had cited the case of Gurdev Singh Birdi & Anor –vs. Abubakar Mmadhbuti C.A. NO.165 of 1996 in which the Court of Appeal had held that a Plaintiff seeking equitable remedy of specific performance of a contract must show that he had performed all the terms of the contract which he had undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.

35. That in the present case, the Appellants herein had disappeared and failed to fulfill their end of bargain. That although the Respondent completed payment of the Purchase price to the 1st Appellant for the sum of Kshs. 146,000/= which relate to one (1) acre forming part of LR Kericho/Chemagel/4382 (formerly in LR No. Kericho/Chemagel/941), the unpaid balance of Kshs.20,000/= was meant for the 2nd Appellant (PWI) in respect of one (1) acre forming part of LR No. Kericho/Chemagel/4383 (also formerly in LR No. Kericho/Chemagel/941) of which the outstanding balance payable to the 2 Appellant (PW1) had always been available on presentation of titles capable of transfer.

36. That the said balance of Kshs.20,000/= was to be paid on 5th November 1999, he looked for money but when he went to the site alongside other village elders so as to hand over the money through the elders, the 2nd Appellant (PW1) declined to take the money and gave conditions requiring the Respondent to pay a delay charges of Kshs.60,000/= or to be relocated to separate site of the land belonging to his brother. To this end and through the mischief perpetrated by the 2nd Appellant, the Respondent sought that specific performance was a remedy available to him.

37. On third issue as to whether the learned trial Magistrate erred in not finding that the sale agreement was tainted with illegality for lack of capacity to contract, the Respondent submitted that the alleged illegality was anchored on the succession process that was carried on for their late father yet in the same proceedings the 2nd Appellant's (PW 1) had testified that he had sold another portion of the same land

to another buyer who was "a good neighbor as he had "paid all the money". The Respondent was best left to wonder on what basis the Appellant was submitting that he lacked capacity to contract?

38. Again reference was made to the Jackson case (supra) where this court had found the Defendant's conduct inequitable if not rightly fraudulent after he had put the Plaintiff in possession of the said suit land, but had refused and/or failed to execute the transfer and registration of the said suit land into the Plaintiff name. The Respondent herein sought that the court finds, based on the oral testimonies herein that the Appellants had dishonestly, and evasively acted illegally with misrepresentation, bad faith and by false pretense against the Respondent for the purpose of unjust enrichment.

39. The Respondent, on the fourth issue for determination as posed by the Appellants, responded that the doctrine of constructive trust and proprietary estoppel was not affected by lack of Land Control Board consent as was held by the Court of Appeal in the case of Willy Kimutai. (supra)

40. That further, the Supreme Court in its decision in the case of Rose Jebor Kipngok vs. Kiplagat Kotut [2020] eKLR had held that the *Land Control Act* was not intended to be an instrument for unjust enrichment and that the equity doctrines of constructive trust and proprietary estoppel were applicable.

41. The Respondent then submitted that the Appellants' Appeal had been bolstered purely on the Court of Appeal's decision in the case of David Sironga ole Tukai vs. Francis arap Muge & 2 Others [2014] eKLR which decision was contrary to the current legal position taken by the Supreme Court decision as cited above. That the Appellants had failed to prove their claim to the standard required of a balance of probabilities. Their Appeal was an abuse of the court process and taking a cue from the above case law decisions by which our Courts had progressively pronounced themselves regarding land transactions related to succession matters, Land Control Board and the doctrines of constructive trust and proprietary estoppel, the court should find and hold that the Appeal has no merit and should be dismissed and uphold the prayers granted in the Judgment of the Honourable B. Omwansa (PM) delivered and dated 27th December 2018.

42. The Respondent also sought for costs of this Appeal, and the costs of the suit before the trial court as ordered by that court be borne by the Appellants in favour of the Respondent.

Analyses and determination.

43. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See Seascapes Ltd vs. Development Finance Company of Kenya Ltd [2009] KLR, 384. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu [1982-88] 1 KAR 278.

44. According to the trial proceedings, the Plaintiffs/Appellants herein had instituted suit against the Defendant/Respondent vide a plaint dated 1st October 2012 where they had sought for judgment against the Defendant for;-

    i. A declaration that the agreement of sale of two acres from the Plaintiffs to the Defendant is null and void and eviction order.

    ii. Cost of the suit.

iii. Any other relief deemed fit to grant by this court.

45. The Respondent then filed his statement of defence and counterclaim dated 31st March 2015 wherein he had generally denied all the allegations set forward by the Appellants stating that they were in breach of the contract by refusing to sign the transfer forms and purporting to sale the parcel of land to third parties. That since filing the suit, the Appellants had finalized the succession cause and obtained titles to their respective portions of land wherein instead of obtaining consent to transfer the same they had threatened to evict him.

46. That he had been on the suit premises from 1998 and therefore he would be seeking for orders of adverse possession. In his counterclaim, the Respondent herein had sought that that the Appellants' suit be dismissed with costs and the Counterclaim be allowed as prayed with costs against them jointly and severally for;

i. A declaration that the Plaintiff is entitled to one (1) acre to be excised from LR No. Kericho Chemagel/4382.

ii. A declaration that the Plaintiff is entitled to one (1) acre to be excised from LR No. Kericho Chemagel/4383.

iii. A Permanent injunction against the Defendants compelling them, their employees, servants and/or agents from evicting the Plaintiff from portion of land measuring two (2) acres forming part of LR No. Kericho Chemagel/4382 and LR No. Kericho Chemagel/4383

iv. An order of Specific Performance be issued against the Defendants to perform their obligations under the contract and to compel the Defendants to render vacant Possession of two (2) acres fenced and occupied by the Plaintiff from LR No. Kericho Chemagel/4382 and LR No. Kericho Chemagel/4383 and, in default, to be the forcefully evicted therefrom.

v. An Order that one (1) acre be excised respectively from LR No. Kericho Chemagel/4382 and LR No. Kericho Chemagel/4383 and the same be registered in the name of the Plaintiff and the Deputy Registrar Ordered to execute all the relevant transfer forms to facilitate issuance of title to the Plaintiff in default by the Defendants.

vi. In the alternative an order of restitution be granted requiring the refund of the monies paid to the Defendants at the current market rates value subject to a valuation report by a reputable valuer and the Plaintiff to yield possession within fourteen (14) days of Payment in full.

vii. Costs of this suit.

viii. Any other order or relief that this Honorable Court may deem fit to grant.

47. The matter had then proceeded for hearing on the 6th December 2018. In summary the 2nd Appellant testified as PW1 to the effect that in 1998 he had talked to his brother the 1st Appellant herein to sell a portion of 1 acre of land comprised in LR No. Kericho Chemagel/941 land which was registered to their father Kipkurui Mateket who had passed away on 25th May 1992. That via an agreement dated the 7th February 1998 the 1st Appellant had sold to the Respondent 1 acre of land for a consideration of Ksh. 140,000/=. That he himself had also sold 1 acre to the Respondent via an agreement of 11th October 1998 wherein the Respondent had paid him Ksh. 70,000/= and the balance was to be paid before the end of December 1998. This did not happen and the Respondent instead paid him Ksh. 50,000/- in October of the following year wherein he had promised to pay him the balance of Ksh. 20,000/-in the month of December of 1999 which did not happen.

48. That they had intended to use the money from the sale of the two acres of land to buy another land in Nakuru which did not happen and they lost the land because they had not received the balance of Ksh. 20,000/=. That he had reported the matter to the Chief. That since the land they had wanted to buy had appreciated, he had asked the Respondent to pay an extra Kshs 60,000/= but he had refused. That was when he had informed him that he would refund him his money and even wrote a Demand Notice to him dated 25th August 2006 and a reminder dated 6th June 2018.

49. That they had gone to the Land Board, but were denied a chance to sell because they had not done the Succession Cause. That they could not give him the land because he did not give them the money to enable them purchase the parcel of land they had gone to look for in Nakuru. He sought for the court to assist him to compel the Defendant to move out of the parcel of land and take back the refund from them.

50. PW1 had confirmed that the Respondent had paid the full consideration to the 2nd Appellant who was not demanding anything from him, that he was aware that it was not legal for them to dispose the land before succession and that they had sold the same in "Kienyeji" style, but that they had assured the Respondent that they would include him as one of the beneficiaries when they filed the Succession Cause. That the Respondent was aware that they had not conducted the succession yet he had willingly purchased it in the "kienyeji" style.

51. The 2nd Appellant had confirmed that he did not have the original title for they had not done the succession. He further confirmed that he had not given the Respondent a title deed. He also confirmed that the Respondent had built a permanent house, kept livestock and planted vegetables and had developed the portion which had been sold to him by his brother the 1st Appellant herein.

52. That he had refused to take the Ksh 20,000/= when the Respondent brought it because he had brought it late. He confirmed to having received the title deed to LR No. Kericho Chemagel/4382 but that neither he nor his brother the 1st Appellant had given the title deeds to the Respondent. He also confirmed to having sold another portion of land, to another buyer who was a good neighbor as he had paid all the money. He further confirmed that he had been with the Respondent's money totaling Kshs. 120,000/= since 1999 which money had accrued interest for that period.

53. That the Respondent had been utilizing the whole 1 acre for over 20 years without paying for it and that he had fenced it together with his brother's portion despite knowing that he had breached the terms of their agreement.

54. The 1st Appellant then testified as PW2 confirming that he was PW1's younger brother and had entered into a sale agreement with the Respondent on 7th February 1998 wherein he had sold to him one acre of land comprised in LR Kericho/Chemagel/941, which land was registered in to his deceased father, for a consideration of Kshs 140,000/=, money which he had been paid in full. That he has also paid KSh 6,000/= for the bananas and 1,000/= for the trees on the suit land.

55. That at the time, the land had not been demarcated but he knew the portion he was to take as his step brother had showed him and they had all measured the one acre. He also confirmed that at the time, they had not done the succession. Like PW1, he confirmed that he gave the money to his brother as the same was meant to pay for another portion of land in Nakuru they had sought to buy jointly. That since the money was not enough his brother had also sold his potion of land to the Respondent.

56. He also confirmed that they did not go to the Land Control Board, but that they had filed a succession Cause and had acquired title deeds.

57. That the Respondent had built his homestead on his land and also owned cattle. He sought that since they were not in a good relation with the Respondent, that he be allowed to refund him the money he had given him.

58. He had confirmed that together with his brother, they had sold 2 acres to the Respondent but that he was not present when money was given to his brother however, he had been informed that his brother had been given a deposit and the Respondent was to pay him the balance later.

59. He confirmed that after the sale, the Respondent had taken possession of the land, and although he had no claim against the Respondent, their relationship was not cordial as the Respondent looked down upon him.

60. His evidence had been that he had refused to give the Respondent the title deed because he had refused to assist him to 'do the succession'. That secondly the Respondent did not give him the Kshs 100,000/= he had demanded from him for having sent him to prison where he had been sodomised, after he had demolished the fence which the Respondent had erected that had barred him from accessing the road, and lastly that the Respondent had added 0.1 acres of land which they had not sold to him.

61. The Plaintiffs closed their case wherein the Respondent herein testified as DW1 to the effect that the 1st Appellant Daniel Koech had sold him 1 acre of land via a sale agreement dated 7th February 1998 which land was comprised in Parcel No. Kericho/Chemagel/941 which was registered to their late father. That at the time, they had promised to include him in the succession cause to enable them transfer the land to him.

62. He confirmed to having paid Daniel Koech Ksh.146,000/= inclusive of Ksh 6,000/- for the bananas and trees which were on the portion of land. At the time of executing the agreement they were together with the family members and 12 village elders who witnessed the agreement. Before the agreement was done, they had demarcated the portion of land he was to acquire and beacons were placed wherein he had taken possession. He had made a down payment of Ksh. 20,000/= and a second installment of Kshs.116,000/= wherein the balance of Kshs 10,000/= was to be paid once he got the transfer but which money was paid after Daniel had approached him asking for the same as he was facing some challenges.

63. Later the Appellants had initiated the succession cause and excluded him wherein subsequently they had been issued with title deeds to their respective parcels of land but had refused to transfer to him titles to the portion he had bought from them.

64. That later in the year 2004, Daniel had obtained an access road to the river promising to compensate him for it but in the year 2007, he had trespassed into his land by demolishing the fence and the crops. The assistant chief had then advised him to report to police wherein Daniel had been arrested and charged. He testified that the prayer for a declaration that the agreement was null and void when he had fully paid them was not genuine.

65. That Henry (2nd Appellant) who was a brother to Daniel had also sold to him one acre for Ksh. 140,000/= via an agreement of 11th October 1998 which had been witnessed by the village elders and the Assistant Chief. That he had shown him the one acre wherein the beacons had been put by the village elders. That he had made a down payment of Ksh.70,000/= and a second payment for Ksh. 50,000/= The balance of kshs 20,000/= was not given wherein he had received a demand notice through the Chief, stating that he was to pay 60,000/= as delay charges.

66. That on the 5th November 1999, he had got the balance of Ksh 20,000/= wherein he had gone to the site alongside other village elders to give it to the 2nd Appellant who refused to take it insisting on the

Ksh. 60,000/= despite there having been no default clause on the agreement. That the 2nd Appellant had given him conditions that he either paid the delay charges of Ksh. 60,000/= or be relocated to another land on the other side. He had declined the condition. That he had become apprehensive as to why the 2nd Appellant had wanted him to take the portion belonging to his other brother yet he was already in occupation of the land they had sold him and that he had not breached any agreement, on the contrary it had been the 2nd Appellant who had breached the contract.

67. That the agreement was not null and void as the 2nd Appellant had taken money from him, but had not transferred the land to him despite having the title to LR No. Kericho/Chemagel/4383. That he had been in peaceful occupation since 1999 apart from that one incident which he had reported to the police.

68. That he had filed a counterclaim to the Plaint seeking that the same be dismissed with costs and since the Appellants had failed to transfer 2 acres of land to him, that the court should compel them to do so.

69. He confirmed that at the time of the sale agreement, he was aware that the land was family land and had been subdivided although they had not taken out tittle deeds and thus he was aware that the Appellants were not the registered owners and he did not force himself to the land as the agreement had been on a willing seller, willing buyer basis.

70. The evidence of the Defendant's witnesses DW2 was to the effect that the Respondent was his relative. That on the 7th February 1998, he had been a witness to the sale agreement wherein the 1st Appellant had sold 1 acre of land to the Respondent for Ksh. 140,000/= and Ksh. 6,000/= for the development therein.

71. That he had subsequently drafted the 1st sale agreement and was also a witness to the transaction. That the Respondent had paid Kshs. 20,000/= as down payment, the balance of Kshs.126,000/= was to be paid later. That he had been informed that the balance had been paid. That the Respondent had been promised the title once the succession cause had been conducted. He confirmed that the Respondent had been staying on the land from the year 1998. He also confirmed that the land had belonged to the 1st Appellant's deceased father

72. DW3 testified that he only knew the 2nd Appellant/Plaintiff and the Defendant but had come to know the 1st Appellant/Plaintiff later. That in 1998 he had been approached by the 1st Appellant who wanted to sell his land and since he was not able to buy the same he had connected him to the Respondent/Defendant. They negotiated and entered into a sale agreement for land measuring one acre at a consideration of Kshs. 140,000/= and Ksh. 6000/= for the development. That they had demarcated the land using temporarily beacons in the presence of the village elder and the villagers from around the area. That on that day, some amount of money which he could not remember was paid, wherein the Respondent had taken possession of the land where he had been to date. That he was not aware of any monies owed to the Appellant.

73. He confirmed that at the time of the agreement, the land was still registered to the Appellants' deceased father's name, however, each Appellant had been given their portions of land although they had no title. That they had agreed that the succession was to be done later.

74. That the seller had indicated that he wanted to purchase a parcel of land elsewhere and that he had given his brother Ksh. 8000/= and was to use Ksh. 10,000/= to get 10 acres. The Appellant/Plaintiff had promised to transfer the portion of land on succession. That since that time, the Respondent had fenced the parcel of land and also planted many trees.

75. Dw4, the village elder had confirmed that indeed the Respondent had bought one acre piece of land from the 1st Appellant on 2nd February 1998 for a consideration of Ksh, 140,000/= and Ksh 6,000/= for the banana plants therein. That they had measured the land and the Respondent had paid 20,000/= as a down payment and Ksh 116,000/= as a second installment wherein they had agreed that the final balance would be given upon the transfer of the title deed. At the time the land was in the Appellants' deceased's father's name and they had promised to adopt the Respondent as one of his son's in the succession cause. That the Respondent took possession of the land and had built a house and developed the land. That there had been a problem between the Respondent and the 1st Appellant in relation to an access road which issue had been solved. That he was not present during the second sale agreement but was only present when the 2nd Appellant had declined to receive the balance of Ksh. 20,000/= from the Respondent.

76. At the close of the hearing, parties had filed their written submissions wherein the impugned judgment had been delivered.

77. From the evidence herein adduced, there is no dispute that the Appellants herein who were brothers, via sale agreements dated the 7th February 1998 and 11th October 1998 respectively had sold to the Respondent one (1) acre of land each making it two (2) acres of land comprised in LR No. Kericho/Chemagel/941 for a total consideration of Khs. 266,000/=

78. It is also not in dispute that the Respondent herein had made part payment and had remained with a balance of Ksh 20,000/= but the Appellants had put him in possession and occupation of the two acres where he proceeded to establish his homestead and developed the land.

79. It is also not in dispute that at the time of the sale agreements all the parties herein had knowledge that the said land parcel LR No. Kericho/Chemagel/941 measuring 7.0 hectares was registered to the Appellants' deceased father Kipkirui Arap Mateket and that although each of the Appellants had been given their own share of land, they had not instituted succession proceedings to the estate of their deceased father and neither had they obtained consents from the Land Control Board for transfer after the sale agreements.

80. It is further on record that when the Respondent had got the balance of Ksh 20,000/=, on the 5th November 1999, he had gone to the site alongside some village elders to give it to the 2nd Appellant who refused to take it insisting on Ksh. 60,000/= as delay charges.

81. Indeed it was the 1st Appellant's evidence that when they sought for consent from the Land Control Board, they had been denied the same for reasons that they had not conducted succession proceedings.

82. After a period of 14 years, the Appellants herein filed suit against the Respondent via their plaint dated 1st October 2012 seeking declaratory orders that the agreement of the sale of the 2 acres from the Plaintiff to the Defendant was null and void and therefore an eviction order be issued against the Respondent.

83. It is not disputed further that during the pendency of the suit in the trial court, the Appellants conducted the succession cause to the estate of their deceased father in the principle Magistrate's court at Sotik in Succession Cause No. 68 of 2011 wherein after they had proceeded to subdivide LR No. Kericho/Chemagle/941, and whereas the 1st Appellant had obtained title to LR No. Kericho/Chemagei/4382 measuring 0.97 hectares on the 4th of August 2014, the 2nd Appellant had obtained title to LR No. Kericho/Chemagei/4382 measuring 1.28 hectares on the 14th of August 2014.

84. That despite them having obtained title to their respective parcels of land, the Appellants had refused to transfer the two acres they had sold to the Respondent herein who filed his counterclaim dated 31st March 2015 seeking specific performance of the contract. That one (1) acre be excised respectively from LR No. Kericho Chemagel/4382 and LR No. Kericho Chemagel/4383 and the same be registered in his name failure to which the Deputy Registrar be ordered to execute all the relevant transfer forms to facilitate issuance of title to the Respondent.

85. Having said that, the bone of contention raised by the Appellants herein was to the effect that since the agreement was null and void for lack of Land Control Board consent, and lack of capacity to sell the land, there could neither be ordered specific performance in support of the same or an order for payment of the remaining sum found due on the agreed purchase price.

86. I find the issues for determination as being;

i. Whether the sale agreement between the Appellants and the Respondent were rendered void due to lack of the Land Control Board consent.

ii. Whether specific performance can be ordered in respect of the said sale agreement.

iii. Whether the sale agreement was rendered null and void for lack of capacity to contract.

87. On the first issue for determination as to whether the sale agreement between the Appellant and the Respondents were rendered void due to lack of the Land Control Board consent, I have considered;

88. Section 3(3) of the *Law of Contract Act* which is clear to the effect that:

> No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

89. It is not in dispute that the parties herein had an agreement dated 7th August 1998, through which the 1st Appellant sold and the Plaintiff purchased, the suit property. For full effect, I shall reproduce the agreement as herein under;

> 7th Feb, 1998
>
> Land purchase agreement Ksh 140,000/=
>
> Agreement this day 7th February, 1998
>
> for the purchase of land measuring
>
> one (01) acre with the dimensions fifty
>
> one (51) yards along the access road
>
> and ninety five (95) yards downwards along
>
> the length of the farm.
>
> This agreement is drawn between

Mr. Daniel Arap Koech I/D No. 4747659

as the seller

and

Mr Samwel Kipngeno Rutto I/d No. 10771282

as the buyer and witnessed as under

(There were names of the seller, buyer and their nine (9) witnesses plus their identity card numbers and signatures included)

The agreement also covers for

the bananas Ksh. 5,000 and Ksh 1,000 for

the trees around the perimeter of the

farm.

The first day deposit of Ksh 20,000/= paid

this 7th February 1998 with all witnesses

in attendance.

The second deposit of 60,000 in

12/2/98, 5,000 in 23/12/99

5,000 in 30/6/99

*first deposit 7/2/1998

90. The second Agreement was framed as follows:

Land sale agreement on 11-10-1998 between

Mr. henry kiplangat kirui-seller

I/D No, 0330199 and Mr

Ruttoh kipngeno samwel;buyer

I/D No 10771282

The seller Mr. Henry Kiplangat

Kirui has agreed to sell a

one acre piece of land to

Mr. Ruttoh Kipngeno Samwel

at a price of one hundred

and forty thousand shillings

(Ksh,140,000)

Amount paid today

is Ksh 70,000(seventy thousand

Shillings) The balance of

Ksh. 70,000 to be paid on

or before the month of

December 1998.

The above mentioned by

agreement was witnessed

22 people (twenty two persons)

The first ten persons are:

(the name of ten witnesses and their I/D No. were indicated

(The seller and buyer's names, I/D No and signatures were appended)

The above agreement

is correct to the best

of my knowledge

signed Paul Cheruiyot their

secretary

91. A look at the above captioned agreements, it is clear that save for the second agreement of 11th October 1998 that had a time frame for the payment of the balance of Ksh 70,000/ which was on or before the month of December 1998, and which monies were paid save for the balance of Ksh 20,000/= these agreements did not specify and/or contain the description of the parcels of land that were to be sold and more specifically whether the two acres were to be excised from LR Kericho/Chemagei/941 after the succession process and neither did they contain the terms and conditions or a default clause.

92. This notwithstanding, the parties executed the said agreement wherein the Respondent was put in possession and the Appellants are now estopped from attempting to renege from the agreement which was not pleaded to have been entered into fraudulently.

93. It emerged from the evidence adduced that the land in issue related to a controlled transaction in agricultural land which transaction is governed under Section 6(1) of the *Land Control Act* and which stipulates that such a transaction:

> " is void for all purposes unless the Land Control Board for the Land Control Board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

94. Section 6 (2) of the *Land Control Act* provides:

> " For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)".

95. Section 8 (1) requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

96. Under Section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 which provides:

> Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –
>
> (a) pays or receives any money; or
>
> (b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment

97. It was in evidence that when the Appellants went to procure the consent of the Land Control Board for the sale and transfer of the suit property, they had been denied the same since the land belonged to their deceased father and they had not instituted Succession proceedings. Upon filing of the succession cause it is not in contention that there had been no application made to the High Court to extend time to obtain the consent from the Land Control Board.

98. The terms of the Agreement to sale are clear to the effect that there was common intention between the Appellants and the Respondent in relation to the suit property. While it is not in dispute that the transaction did not have the consent of the Land Control Board as required in law, the facts show that the Respondent had paid the amount of the purchase price and as a result, had been allowed occupation of the suit property with the intention that the Appellants would transfer the properties he had purchased to him and therefore it went without saying that the Respondent had acquired rights over the suit land under the agreement as the transaction had created a constructive trust in his favor which trust was enforceable and the Appellants could not renege

99. The court of Appeal in the case of Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR had held as follows :

> ‘’The *Land Control Act* does not, unlike Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the *Land Control Act* have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.
>
> There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of *the Constitution* of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)).Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles

of *the Constitution*. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to *the Constitution*, the *Land Control Act* should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with *the Constitution*.....

.....Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.''

100. In addition, in Willy Kimutai Kitilit (supra), the Court had noted that equity was one of the national values that the Courts must apply in interpreting *the Constitution* wherein it had been held follows:

> " Thus since the current Constitution has by virtue of Article 10(2(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board."

101. Indeed the court of Appeal in the case of William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR had held as follows:

> ''We are of the view that the fact that the Appellant herein, received the full purchase price for the property, allowed the 1st Respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created.....
>
> We come to the conclusion that the in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the Appellant and the 1st Respondent.''

102. In this regard therefore and based on the Court of Appeal decisions herein above which decisions are binding to this Court, I find that the lack of the consent of Land Control Board did not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust and therefore the sale agreements between the Appellants and the Respondent were not rendered void due to lack of the Land Control Board consent.

103. On the issue as to whether specific performance can be ordered in respect of the said sale agreement, it was on evidence that after the signing of the agreements, the Respondent herein had been put in occupation and possession of 2 acres of the land he had bought. There is therefore no doubt that the Respondent herein had expected the Appellants to perform their part of the agreement and transfer the parcels of land to him after he had completed paying the purchase price. This was not the case for as soon as the Appellants obtained titles to their respective parcels of land, and after the Respondent had invested heavily on the land wherein he had put up his homestead and developed the land, the Appellants, due to greed and need to unjustly enrich themselves renegaded on their agreement seeking

more money from the Respondent whilst threatening to move him to another parcel of land. They had even compared him to another person they had sold land to at a higher cost and which person had promptly paid them.

104. The principles of granting the equitable remedy of specific performance were set out in the case of Reliable Electrical Engineers Ltd. vs. Mantrac Kenya Limited (2006) eKLR, wherein Justice Maraga (as he then was) stated that:-

> " Specific Performance like any other equitable remedy is discretionary and the Court will only grant it on well principles"... 'The Jurisdiction of specific Performance is based on the existence of a valid enforceable contract. It will not be ordered the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific Performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant. "

105. In the case of Thrift Homes ltd vs. Kays Investment Ltd[2015] eKLR, the court held that;

> " a Plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the wit in action"

106. Further in the case of Manzoor v. Baram(2003) 2 EA, the Court of Appeal held that

> " Specific Performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court, The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the Plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the Respondent to complete the contract. On the contrary, it seems to me that to deny the Appellant that relief would be to give unfair advantage to a Respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the Appellant. I would hold that the Appellant is entitled to specific Performance...

107. The Appellants breached the agreement by failing to include the Respondent in the succession proceedings and/or transfer the suit land to him. A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into as the court cannot rewrite the party's agreements. I find that since the Respondent had performed all his obligations under the agreement, an order for specific performance is therefore a remedy that is available to him.

108. On the last issue as to whether the sale agreement was rendered null and void for lack of capacity to contract, it is in evidence that the Appellants herein sold the 2 acres of land to the Respondent in what

they termed as ''Kienyeji'' style wherein they took his money and utilized it knowing very well that the land was still registered to their deceased father, that they had not processed the succession cause and therefore had no capacity to transact the same, yet they had promised to include the Respondent as a beneficiary to the estate upon filing the succession Cause . They then let the Respondent take possession and occupation of the suit land for 14 years wherein he had proceeded to develop the same, on a promise they knew they would not keep because they had proceeded to exclude him from the succession proceedings wherein immediately they had procured titles to their respective parcels of land, they filed suit to have him evicted from therein.

109. The Respondent was put into occupation and allowed possession as a purchaser, pending the filing of the succession cause at which point it could be said that the Appellants had no title to pass and therefore the Respondent was on the said land as trespasser wherein he had been in open and exclusive possession of that piece of land in excess of twelve years. His possession thus became adverse the moment the proceedings were not filed to recover the land within the 12 years span and he continued being on the suit land.

110. Indeed it had been held in Douglas Mbugua Mungai vs. Harrison Munyi [2019] eKLR the Court of Appeal held that;

> ''The issue in the Githu case was whether the mere change of ownership of land that is occupied by another person under Adverse Possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under Section 7 of the *Limitation of Actions Act*, those rights are overriding interests by virtue of section 30(f) of the RLA, to which the new registered purchaser's title will be subject. ''

111. The same view was followed by the Court in the case of Kairu v. Gacheru [1986-1989] E.A where it was held that:

> " The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 *Limitation of Actions Act*)."

112. In the case of Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR it had been observed that:

> " It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors".

113. It is therefore clear from the foregoing provisions of the law and case law that a claim for Adverse Possession shall not only be sustained against the proprietor of the suit land but against his/her predecessors.

114. In the end this court frowns at the Appellants conduct and other persons of their kind who are out to enrich themselves in the manner and style deployed by the Appellants herein. The law and courts should not be used as an instruments to perpetrate fraud and unjust enrichment. The Appellants received the money from the Respondent on the purchase of land and allowed him to develop and settle on the land wherein they had utilized his money on a promise to transfer land upon transmission after succession but declined to do so. The Appellants in this matter are no different from the fake gold dealers who galvanize iron bars in chocolate and pass them off as 24 carat gold!

115. In the end, I find the Appeal herein is unmerited and is hereby dismissed. The Judgment of the Honorable B. Omwansa (PM) delivered and dated 27th December 2018 is herein upheld with costs to the Respondents both on Appeal and the suit before the trial court.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE