



**Gichunge v MMM (Suing as the Administrator of the Estate of LKM) & another (Environment and Land Appeal E004 of 2022) [2023] KEELC 21905 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**CK YANO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ALEX KINYUA GICHUNGE ..... APPELLANT**

**AND**

**MMM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF  
LKM) ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK NTHIGA NABEA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> respondent in this appeal moved the trial court vide a plaint dated 24<sup>th</sup> May, 2019 which was amended on 16<sup>th</sup> September 2019 seeking orders of a declaration that the Appellant holds the land Reference No. Karingani/Ndagani/6836 in trust for the 1<sup>st</sup> respondent, an injunction restraining the Appellant from selling, alienating, transferring the property or in any other manner interfering with the 1<sup>st</sup> respondent use, enjoyment, occupation and possession of L.R Karingani/Ndagani/6836, a declaration that the 1<sup>st</sup> respondent is the legal owner of the land known as Karingani/Ndagani/2634 – 6836, an order directing the Appellant to execute all relevant instruments and the Meru District Land Registrar to register all such instruments to effect registration of the 1<sup>st</sup> respondent as the proprietor of L.R Karingani/Ndagani/6836 and in the alternative, the 2<sup>nd</sup> respondent be ordered to refund the purchase price with interest at bank rate from 4<sup>th</sup> September 2004 until payment in full, general damages and costs.
2. It was the 1<sup>st</sup> respondent's case that on or about 4<sup>th</sup> September 2004, her deceased mother bought a piece of land original LR. Karingani/Ndagani/2634 measuring 25 points at a purchase price of Kshs.160,000/=. That pursuant to the said agreement and at the execution of the said agreement, the 1<sup>st</sup> respondent's deceased mother paid Kshs.100,000/= and later Kshs.29,000/= and before she could clear the balance of Kshs.29,000/=, she passed away.



3. The 1<sup>st</sup> respondent further averred that her grandmother, one Mary Ciambaka gave the Appellant who is her son Kshs.29,000/= to go and clear the balance on behalf of the 1<sup>st</sup> respondent's deceased mother and that when the Appellant went to pay the said balance, he colluded with the 2<sup>nd</sup> respondent and caused the property to be registered in the name of the Appellant and further failed to disclose that he was so registered to hold the property in trust for the 1<sup>st</sup> respondent who was a minor then.
4. The 1<sup>st</sup> respondent averred that the said original land was subdivided giving rise to L.R Karingani/Ndagani/6836-6838 and the appellant had registered L.R Karingani/Ndagani/6836 in his name. It was the 1<sup>st</sup> respondent's contention that the appellant was registered as trustee to hold LR. No. Karingani/Ndagani/6836 on behalf of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent pleaded that she had attained the age of majority and wanted the land to be transferred and registered in her name to own and manage it as her deceased mother's property.
5. The Appellant filed his statement of defence dated 11<sup>th</sup> June 2019 and an amended defence dated 16<sup>th</sup> October 2019, wherein he denied the 1<sup>st</sup> respondent's claim. The Appellant averred that he bought ¼ acre out of land parcel No. Karingani/Ndagani/2634 on 22<sup>nd</sup> August 2006 for Kshs.300,000/= from the 2<sup>nd</sup> respondent. That the 2<sup>nd</sup> respondent subdivided his land parcel No. Karingani/Ndagani/2634 and transferred 0.10 ha being land parcel No. Karingani/Ndagani/6836 to the appellant. The appellant averred that he was aware that the 1<sup>st</sup> respondent's mother Lily Karoki Mwamba had begun to purchase the land but was informed by the 2<sup>nd</sup> respondent that there was a dispute over the said sale prompting the 2<sup>nd</sup> respondent to put the land up for sale again. The Appellant denied being registered as the owner of land parcel No. Karingani/Ndagani/6836 in trust for the 1<sup>st</sup> respondent and put the 1<sup>st</sup> respondent to strict proof of her allegation. The Appellant also denied that he was given money by Mary Ciambaka or at all and put the 1<sup>st</sup> respondent to strict proof thereof.
6. The appellant contended that the 1<sup>st</sup> respondent's suit had no merit and averred that if the 1<sup>st</sup> respondent had any claim for refund of the purchase price, she ought to claim it from the 2<sup>nd</sup> respondent who was said to be mentally disabled and had no capacity to be sued.
7. Upon considering the matter, the trial court found that the 1<sup>st</sup> respondent had proved her case on a balance of probability against the appellant and the 2<sup>nd</sup> respondent and issued the prayers sought as follows:
  1. "A declaration be and is hereby issued that the 1<sup>st</sup> defendant holds land reference No. Karingani/Ndagani/6836 in trust for the plaintiff.
  2. An injunction be and is hereby issued restraining the 1<sup>st</sup> defendant from selling, alienating, transferring the property or in any other manner interfering with the plaintiff's use, enjoyment, occupation and possession of land reference No.Karingani/Ndagani/6836.
  3. A declaration be and is hereby issued that the plaintiff is the legal owner on the land known as land reference No. Karingani/Ndagani/6836.
  4. An order be and is hereby issued directing the 1<sup>st</sup> defendant to execute all relevant instruments to the Land Registrar to register all instruments to effect registration of the plaintiff as the proprietor of Karingani/Ndagani/6836.
  5. In the alternative the 2<sup>nd</sup> defendant be and is hereby ordered to refund the purchase price with interest from 4<sup>th</sup> September 2004 until payment in full.



6. I will not give general damages since the plaintiff is the one who is in occupation of the land.
  7. The plaintiff shall have costs of the suit.”
8. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-
1. The learned trial magistrate erred in law and in fact when she believed the evidence of PW2 that she completed paying the purchase price on behalf of her daughter and 1<sup>st</sup> respondent’s late mother to the 2<sup>nd</sup> respondent herein and that is why the 2<sup>nd</sup> respondent allowed the said Lily Karoki Mwamba to be buried on the subject land parcel which finding was erroneous in that it was the appellant who buried her late sister on that land and he adduced evidence to that effect in court.
  2. The learned trial magistrate erred in law and fact when she found that the appellant was lying in his evidence that he didn’t know that the 1<sup>st</sup> respondent’s mother was buying land whereas the appellant in his evidence to the honourable court stated that he knew that the 1<sup>st</sup> respondent’s mother was buying a portion of land out of land parcel No. Karingani/Ndagani/2634 and which land was a big land.
  3. The learned trial magistrate erred in both law and in fact by finding that the 2<sup>nd</sup> respondent had no right to put up his land for sale even if the 1<sup>st</sup> respondent’s mother had not finalized the payment of the purchase price as per their agreement whereas there is no evidence that was adduced to indicate that the specific portion the appellant bought out of land parcel Karingani/Ndagani/2634 was the same portion that was being bought by the 1<sup>st</sup> respondent’s mother out of the subject land parcel and finding the 2<sup>nd</sup> respondent’s actions amounted to fraud.
  4. The learned trial magistrate erred in law and fact by making a finding that the appellant had a duty to inform his sister that he was purchasing land from the 2<sup>nd</sup> respondent whereas there was no evidence that was adduced that the appellant purchased the specific portion his sister was buying from the 2<sup>nd</sup> respondent.
  5. The learned trial magistrate erred in-law and in fact by finding that the land the appellant bought from the 2<sup>nd</sup> respondent was not available for sale as the sister had bought it whereas it is clear that land parcel No. Karingani/Ndagani/2634 was bigger than what the appellant and her sister bought combined and the 2<sup>nd</sup> respondent had capacity to transfer land to both of them.
  6. The learned trial magistrate erred in law and in fact by finding tha the 2<sup>nd</sup> respondent did not pass a good title to the appellant and went ahead to declare the appellant’s agreement null and void although the 1<sup>st</sup> respondent did not challenge validity of the appellant’s agreement in her evidence in court.
  7. The learned trial magistrate erred in both law and in fact by finding that there was a constructive trust created between the 1<sup>st</sup> respondent’s mother and the 2<sup>nd</sup> respondent whereas the sale agreement between the two parties had not been completed before the 1<sup>st</sup> respondent’s mother died.
  8. The learned magistrate erred in both law and in fact by finding that the 1<sup>st</sup> respondent had proved her case on a balance of probabilities and entered judgment in her favour without



considering that the 1<sup>st</sup> respondent's claim was time barred under the provisions of the Limitations of Action Act.

9. The learned trial magistrate erred in both law and in fact by failing to find that the appellant's title to land parcel No. Karingani/Ndagani/6836 could only be defeated under grounds of fraud, misrepresentation or where the title was acquired illegally, un-procedurally, or through a corrupt scheme under the provisions of the [Land Registration Act](#) and none of those grounds were proved by the 1<sup>st</sup> respondent.
9. The appellant prayed for orders that the judgment in Chuka CMCC ELC Case No.20 of 2019 be set aside, that the appeal be allowed and the costs of the appeal and costs of the lower court be awarded to the Appellant.
10. The appeal was canvassed by way of written submissions. The appellant filed his submissions on 18<sup>th</sup> September 2023 through the firm of Muthoni Ndeke & Co. while the 1<sup>st</sup> respondent filed hers on 12<sup>th</sup> October 2023 through the firm of Ojwang Sombe & Co. Advocates.

### **Appellant's Submissions**

11. The appellant's counsel gave a background of the appeal and while submitting on ground 1 of the appeal argued that the learned magistrate erred in believing the evidence of PW2 that she completed the purchase price on her daughter's behalf. The appellant submitted that there was no evidence adduced to prove that the 1<sup>st</sup> respondent gave the appellant Kshs.29,000/= to go and complete the sale transaction and to allow the deceased to be buried on the suit land. That although the appellant's mother claimed that she borrowed money from her brother Munene, the said Munene was not called as a witness and therefore it was erroneous for the trial court to believe such a claim. That even at the time Karoki died on 5.3.2007, the appellant had already entered into a sale agreement with the 2<sup>nd</sup> respondent on 22.8.2006 which agreement was not challenged at the trial. The appellant further contended that the learned trial magistrate erred in disregarding the appellant's evidence which was not challenged by the 1<sup>st</sup> respondent that he was the one who buried his sister on the suit land and also gave his mother permission to settle thereon.
12. Regarding grounds 2 and 4 of the appeal, the appellant submitted that he did not have a duty to inform his sister that he was buying land from the 2<sup>nd</sup> respondent. It is the appellant's contention that land parcel No. Karingani/Ndagani/2634 measures 0.81 Ha and that even if what Lily Karoki and the appellant were buying are added, it would only total 0.2 Ha. It is the appellant's contention that the 2<sup>nd</sup> respondent's land parcel No. Karingani/Ndagani/2634 was big enough for both of them and there was no evidence adduced that the appellant bought the same portion that Lily Karoki was buying. On the trial court's finding that the appellant lied in evidence by stating that he did not know that her deceased sister was buying land, the appellant submitted that he had admitted at paragraph 6 of the amended defence of knowing the sale transaction between his sister and the 2<sup>nd</sup> respondent, but was told by the 2<sup>nd</sup> respondent that there was a dispute on that sale. The appellant contended that in his evidence, he denied knowledge of any sale of land parcel No. Karingani/Ndagani/6836 and that he clearly testified that the deceased was buying land from parcel No. Karingani/Ndagani/2634 and therefore was not lying.
13. Regarding grounds 3,5,6, 7, 8 and 9, the appellant reiterated that land parcel No. Karingani/Ndagani/2634 measures 0.81 hectares and that he bought only 0.10 hectares therefore leaving 0.71 hectares unsold and which still belonged to the 2<sup>nd</sup> respondent. The appellant further submitted that the agreement dated 4.9.2004 ought to have been completed even by the time Lily Karoki died in March 2007. The appellant contended that the transfer of the said land was to happen on or before 30.3.2005



and therefore, by the time Lily Karoki died, the agreement was already overtaken by events. That it is clear from the evidence that Lily Karoki had defaulted in performing her part of the agreement and that it is that agreement that the 1<sup>st</sup> respondent was trying to put life to. The appellant argued that by the time Lily Karoki died, the agreement had been overtaken by events as the completion period had already lapsed even by the time the appellant and the 2<sup>nd</sup> respondent entered into their agreement and that the parties had not obtained Land Control Board consent.

14. The appellant also cited Section 4 of the *Limitation of Actions Act* and submitted that the claim by the 1<sup>st</sup> respondent regarding the agreement dated 4.9.2004 was time barred, adding that the cause of action was an action founded on contract which was instituted after the statutory period of 6 years.

On whether the cause of action was founded on fraud or trust, it was the appellant's submission that a close look at the 1<sup>st</sup> respondent's amended statement stated that the appellant colluded with the 2<sup>nd</sup> respondent and that that meant that the registration was fraudulent but framed a cause of action based on trust. That in fact the evidence of PW2 was on fraud yet the claim was that of trust.

15. The appellant submitted that the validity of his agreement was not challenged and that there were two agreements by the parties which had no connection at all, and that the only way the 1<sup>st</sup> respondent ought to have followed was enforcement of any breach on the party of the 2<sup>nd</sup> respondent if she felt that he breached the sale agreement. The appellant submitted that his title could not be defeated under Section 26 of the *Land Registration Act* since it was not proved that he had acquired it through fraud or misrepresentation or that the title was acquired illegally, un procedurally or through a corrupt scheme. The appellant faulted the trial court for failing to dismiss the 1<sup>st</sup> respondent's case with costs, and urged the court to allow the appeal, set aside the judgment of the lower court and award the appellant costs.

### **1<sup>st</sup> Respondent's Submissions**

16. The 1<sup>st</sup> respondent also narrated the background of the case and cited the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters vs Sunday Post Ltd* [1958] EA 424 which contain the principles that guide a first appellate court in a first appeal.
17. The 1<sup>st</sup> respondent concurred with the reasoning of the trial magistrate on the evidence that was adduced by PW2 and the 1<sup>st</sup> respondent to the effect that had they not completed paying the purchase price, the 2<sup>nd</sup> respondent could not have allowed them to inter the remains of the deceased on the suit land. The 1<sup>st</sup> respondent further submitted that there was no need to call Munene to prove a fact that had been proved by other witnesses who had already testified. That a fact may be proved by the testimony of a single witness. The 1<sup>st</sup> respondent cited Section 143 of the *Evidence Act* Cap 80 and submitted that it is not the quantity of evidence, but the quality that matters.
18. With regard to grounds 2 and 4 of the appeal, the 1<sup>st</sup> respondent argued that the appellant was well aware that the 1<sup>st</sup> respondent's mother, Lily Karoki, had begun to purchase the suit land, but was informed by the 2<sup>nd</sup> respondent that there was a dispute on the same, prompting the 2<sup>nd</sup> respondent to put up the said land up for sale. That the appellant gave contradictory evidence and was therefore lying to the trial magistrate and that his evidence was unreliable.
19. With regard to grounds 3, 5, 6, 7, 8 and 9 of the appeal, the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> respondent had already entered into a sale agreement with the 1<sup>st</sup> respondent's mother for the sale of the whole of parcel L.R No. Karingani/Ndagani/2634 hence he could not have passed a good title to the appellant as he had already sold the land and received part of the purchase price. The 1<sup>st</sup> respondent wondered why the appellant alleged that he only purchased 0.10 Ha from the 2<sup>nd</sup> respondent yet he acquired the exact portion that had been purchased by his late sister who had constructed a house



thereon and was residing in with the mother. The 1<sup>st</sup> respondent questioned why the appellant did not institute a claim against the 2<sup>nd</sup> respondent to recover the said land before his sister passed on.

20. On the appellant's argument that the agreement dated 4.9.2004 ought to have been completed by the time Lily Karoki died in March, 2007, the 1<sup>st</sup> respondent submitted that it was not in dispute that there existed a land sale agreement between the 2<sup>nd</sup> respondent and Lily Karoki which agreement was considered by the learned trial magistrate before she passed judgment, and that there has been no evidence adduced by the appellant to prove that either of the parties instituted a suit to rescind the agreement. That the evidence that was adduced during the trial was that the deceased passed on before completion of payment of the purchase price which was done by her mother. The 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> respondent only allowed the family to inter the remains of the deceased on the land upon completion of the purchase price and that the appellant only took advantage of the situation and had the land transferred to his name which prompted the 1<sup>st</sup> respondent to file suit before the trial court. The 1<sup>st</sup> respondent concurred with the learned trial magistrate that it was only logical that the 2<sup>nd</sup> respondent would not have allowed the remains of the deceased to be interred on his parcel of land if the buyer had not completed payment of the purchase price. The 1<sup>st</sup> respondent further questioned why the appellant did not evict them for over 14 years. The 1<sup>st</sup> respondent submitted that by dint of Section 7 of the [Limitation of Actions Act](#), the doctrine of adverse possession and constructive trust, the appellant's time had lapsed to remove PW2 from the suit land. It is the 1<sup>st</sup> respondent's submission that they could not have obtained consent of the Land<sup>st</sup> respondent yet it was her mother who had purchased the land. The 1<sup>st</sup> respondent further submitted that the entry of PW2 into the land as well as the burial of the late Lily Karoki was not through the authority and permission by the appellant, but by virtue of their rights since the deceased had already purchased the land.

Control Board since the deceased had not completed payment of the purchase price which was paid later after the demise of the deceased only for the land to be transferred to the appellant without the knowledge of the 1

21. On the appellant's argument that the 1<sup>st</sup> respondent's claim could not stand since it was filed in the year 2019 yet the agreement was entered into in September 2004, the 1<sup>st</sup> respondent submitted that a claim for trust is not subject to time limitation and cited Section 20(1) (b) of the [Limitation of Actions Act](#). The respondent argued that she was not claiming for enforcement of the sale agreement dated 4.9.2004, but a claim for trust. The 1<sup>st</sup> respondent relied on the case of *Macharia Kihari vs Ngigi Kihari* C.A Civil Appeal No. 170 of 1993, and *Stephens & 6 Others Vs Stephens & Another* Civil Appeal No. 18 of 1987. The 1<sup>st</sup> respondent submitted that her evidence and that of her witnesses stated that the appellant was given the balance of the purchase price which he was to take to the 2<sup>nd</sup> respondent, but instead had the title deed issued in his name. The 1<sup>st</sup> respondent also relied on the case of *Elijah Makeri Nyangw'ara vs Stephen Mungai Njuguna & Another* [2013] eKLR.
22. The 1<sup>st</sup> respondent concurred with the trial magistrate that the parcel of land that the appellant was purchasing from the 2<sup>nd</sup> respondent was not available for sale since his deceased sister had already purchased it, and therefore the title deed that the appellant acquired was not legally acquired since the 2<sup>nd</sup> respondent could not have passed a good title. The 1<sup>st</sup> respondent referred to Section 26 of the [Land Registration Act](#) and submitted that in this case, it was proved that the appellant and the 2<sup>nd</sup> respondent fraudulently transferred the land to the appellant which denied the 1<sup>st</sup> respondent the right to inherit her mother's property.



23. The 1<sup>st</sup> respondent also cited Section 27 of the *Civil Procedure Act* and submitted that the trial court was right in awarding her costs of the suit. The 1<sup>st</sup> respondent relied on the case of Fazar Dhirami vs Mohaamed Ibrahim [1946] 13 EACA 69 and Sheikh Juma vs Dubat Farah [1959]EA 789.
24. The 1<sup>st</sup> respondent contended that an appellant court should not interfere with the exercise of judicial discretion by the lower court unless such discretion has been exercised unjudicially or on wrong principles and urged the court to find no merit on the appeal that the judgment and findings of the learned trial magistrate were fair and the evidence adduced during the trial fully supported the findings and judgment and invited the court to uphold the decision of the trial court and dismiss the appeal with costs to the 1<sup>st</sup> respondent.

### **Analysis And Determination**

25. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusions, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect. Having considered the grounds of appeal as they appear in the memorandum of appeal, the issues I find for my consideration are:
  - i. Whether the existence of trust over land parcel No. Karingani/Ndagani/6836 had been proved.
  - ii. Whether the findings and decision of the learned trial magistrate is against the weight of the evidence on record and the law.
26. It is clear from the amended plaint filed in the subordinate court that the 1<sup>st</sup> respondent's claim was that the appellant was registered as a trustee to hold the suit land L.R No. Karingani/Ndagani/6836 in trust for the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent's case was that by a written agreement date 4.9.2004, her mother bought a piece of land L.R Karingani/Ndagani/2634 from Patrick Nthiga Nabea, the 2<sup>nd</sup> respondent at a consideration of Kshs.160,000/=. That on various dates between 4.9.2004 and 2007, the 1<sup>st</sup> respondent's mother made payments towards the purchase price amounting to Kshs.131,000/= to the 2<sup>nd</sup> respondent before the 1<sup>st</sup> respondent's mother passed on on 5.3.2007 leaving an outstanding balance of the purchase price of Kshs.29,000/=. The 1<sup>st</sup> respondent testified that around that time, her grandmother one Mary Ciambaka who was aware of the transaction between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent's mother gave the appellant, who is her son, the said balance of Kshs.29,000/= to clear the outstanding purchase price. That however, the appellant went and paid the said amount and colluded with the 2<sup>nd</sup> respondent and got the land registered in the name of the appellant. That the original land L.R Karingani/Ndagani/2634 was subdivided into L.R Nos. Karingani/Ndagani/6836-6838 and the appellant registered LR Karingani/Ndagani/6836 in his name.
27. The Appellant on his part testified that he also bought land from the 2<sup>nd</sup> respondent and is now the registered owner of LR Karingani/Ndagani/6836. He stated that he was not even aware of the specific portion his deceased sister was buying.
28. From the material on record, it is not in dispute that the appellant is related to 1<sup>st</sup> respondent by virtue of being her uncle. The 2<sup>nd</sup> respondent is their neighbor who sold a portion of land parcel No. Karingani/Ndagani/2634 to the 1<sup>st</sup> respondent's mother who is now deceased. The sale agreement between the 2<sup>nd</sup> respondent and the deceased is dated 4.9.2004. The deceased passed on on 5.3.2007 before clearing the outstanding balance of the purchase price of Kshs.29,000/= and before the land she bought had been transferred to her. I have perused the sale agreement dated 4.9.2004 between the



- 2<sup>nd</sup> respondent and Lily Karoki Mwamba (now deceased). The agreement expressly stipulated that the plot sold was measuring 25 points at a total consideration of Kshs. 160,000/= . The deceased paid and the 2<sup>nd</sup> respondent acknowledged receipt of Ksh.121,000/= being the first installment. The second installment of Kshs.10,000/= was to be paid on 7.9.2004 while the balance of Kshs. 29,000/= was to be paid on or before March, 2005. The 2<sup>nd</sup> respondent was to transfer the land to the deceased on or before 30.3.2005.
29. As already observed, the deceased is said to have died on 7.3.2007. By then, the deceased had not paid the outstanding balance of Kshs.29,000/= which was supposed to have been paid on or before 30.3.2005. From the evidence on record, it is clear that by the time Lily Karoki Mwamba died on 7.3.2007, she had defaulted in making payment of the outstanding balance of Kshs.29,000/= on or before 30.3.2005 which was a period of about two years before her demise.
30. On the other hand, the evidence on record indicates that the Appellant purchase land from the 2<sup>nd</sup> respondent vide an agreement dated 22.8.2006 at a consideration of Kshs 300,000/= which was paid in full at the execution of the agreement, and the land was subsequently transferred to the appellant and title deed issued in his name. The appellant produced the title deed as an exhibit. It is worth noting that by the time the appellant was purchasing land from the 2<sup>nd</sup> respondent on 22.8.2006, Lily Karoki Mwamba was still alive and died much later on 7.3.2007.
31. This case is based on a claim of trust. The party alleging the existence of trust bears the burden of proof. It is not enough for one to make general allegations of trust whether constructive or customary or otherwise. For one to succeed in a claim of trust, the court must be convinced that sufficient evidence has been tendered to prove that the suit land is held in trust. It is only in case of absolute necessity that the court may presume a trust, which presumption is not arrived at easily. A court will not imply a trust, save in order to give effect to the intention of the parties to create a trust which must be clearly determined before a trust is implied. In other words, a claim of trust must always be supported by solid evidence and it is not enough to plead trust and offer insufficient evidence to prove it. The burden of proving that the suit land is held in trust by the appellant is on the part of the 1<sup>st</sup> respondent.
32. In this case, the trial court found that once the 2<sup>nd</sup> respondent had entered into a sale agreement with Lily Karoki (deceased), a constructive trust was created. That the 2<sup>nd</sup> respondent had no right whatsoever to enter into another sale agreement with the appellant just because the deceased had not finalized payments. That in fact, the 2<sup>nd</sup> respondent could not in law pass a good title to the 1<sup>st</sup> respondent at all on the basis of having sold him the same portion of land the deceased had bought. In arriving at these conclusions, the learned trial magistrate heavily relied on the evidence of PW2 who alleged that she had given the appellant the sum of Kshs.29,000/= to give to the 2<sup>nd</sup> respondent since the 2<sup>nd</sup> respondent had refused for her mother to be buried on the land before completing payment of the purchase price. The appellant on his part denied being paid Kshs.29,000/= by PW2 for onward transmission to the 2<sup>nd</sup> respondent or at all. In this case therefore, it was the Appellant's word against that of PW2. It is not clear why the trial court believed the evidence of PW2 and not the evidence of the appellant. It is worth noting that the 1<sup>st</sup> respondent's evidence was that it was the 2<sup>nd</sup> respondent who had refused to have the 1<sup>st</sup> respondent's deceased mother buried on the land before the outstanding balance of the purchase price was paid. The question then that arises is, why payment was not made to the 2<sup>nd</sup> respondent in person and not the appellant? In any case, by 22.8.2006 when the appellant entered into a sale agreement with the 2<sup>nd</sup> respondent, Lily Karoki Mwamba (deceased) had long defaulted on the agreement between her and the 2<sup>nd</sup> respondent. In my considered view, the appellant had a right to enter into another agreement with the 2<sup>nd</sup> respondent over the land and I do not think that the appellant was under any obligation to inform his sister while buying the land. Having perused



at the sale agreement dated 4.9.2004 between the 2<sup>nd</sup> respondent herein and Lily Karoki Mwamba (now deceased), it is not shown that the appellant herein was a party or even a witness. In my humble opinion therefore, the learned trial magistrate misdirected herself by concluding that the appellant was lying and that he had a duty to inform his sister while buying the land or that the 2<sup>nd</sup> respondent would not allow the remains of the deceased to be interred on his parcel of land if the buyer had not completed payment of the purchase price.

33. Consequently, it is my finding that the 1<sup>st</sup> respondent failed to discharge her burden of proof and the conclusion by the trial court that trust had been established over the suit property was erroneous. The evidence on record indicates that the appellant purchased the suit land from the 2<sup>nd</sup> respondent and was duly registered as proprietor of the land and obtained good title from the 2<sup>nd</sup> respondent following due process. I am not persuaded that the appellant's title was obtained illegally, un procedurally or through corrupt scheme. Further, the evidence on record indicates that the sale agreement between Lily Karoko Mwamba (deceased) and the 2<sup>nd</sup> respondent was never concluded since the purchaser did not pay the outstanding balance of Kshs.29,000/= within the stipulated time or at all. It is my finding that the decision of the trial court was not justified in the circumstances of this case. In my view, the learned magistrate never fully addressed her mind to the issues raised in the suit and arrived at a wrong decision. I note that in the plaint, the 1<sup>st</sup> respondent had an alternative prayer seeking to have the 2<sup>nd</sup> respondent to refund the purchase price with interest at bank rates from 4<sup>th</sup> September, 2004 until payment in full. In my considered view, that was the only appropriate relief that the 1<sup>st</sup> respondent could be granted.
34. In the result, I find that this appeal has merit and the same is allowed. The judgment and decree of the lower court is set aside and I substitute it with an order that the 2<sup>nd</sup> respondent do refund the 1<sup>st</sup> respondent the purchase price of Kshs. 131,000/= with interest at court rates from 4.9.2004 until payment in full.
35. Costs of this appeal and of the lower court are awarded to the appellant against the 1<sup>st</sup> respondent.
36. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30<sup>TH</sup> NOVEMBER, 2023**

**In the presence of:**

Muriithi holding brief for Ms. Muthoni for the Appellant

Ms. Musyimi for the 1<sup>st</sup> Respondent

In the absence of:

2<sup>nd</sup> Respondent who never participated in the proceedings.

**C.K YANO,**

**JUDGE**

