



REPUBLIC OF KENYA



KENYA LAW
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**Wasi v Mosioma (Environment and Land Appeal E027 of 2023)
[2025] KEELC 3579 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

FO NYAGAKA, J

APRIL 23, 2025

BETWEEN

MICHAEL ORINDA WASI APPELLANT

AND

DAVID OCHENGE MOSIOMA RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate Hon. P.O. Omwansa delivered on 22nd December, 2021 in Oyugis CM ELC Case No. 34 of 2021)

JUDGMENT

Brief Facts

1. This is an appeal arising from the ruling of Hon. P.O. Omwansa Senior Principal Magistrate, delivered on 22nd December, 2021 in Oyugis CM ELC Case No. 34 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 8th May, 2023 appealing against the said judgement on the following grounds;
 - a. The Learned trial magistrate erred and misdirected himself by dismissing the Appellants case when it was very clear that the Respondent was in breach of the sale of land agreement entered into by the parties.
 - b. The Learned trial Magistrate decided the case against the weight of evidence.
 - c. The Learned trial Magistrate erred in law in ordering specific performance as pleaded in the counterclaim when there was no land control board obtained for the said transfer land in issue. (sic)
 - d. The Learned trial Magistrate erred in law in ordering specific performance by the mere fact of alleged possession of the suit land.



3. The Appellant seeks that the judgement of the trial Court be set aside, judgement be entered in his favour and the Respondent's Counterclaim be dismissed with costs.

Brief facts

4. The Appellant filed the suit against the Respondent vide a Complaint dated 6th July, 2020 where he sought the following prayers;
 - a. A declaration that agreement for sale of a portion of land parcel No. West Kasipul/Kodera Karabach/683 between the Plaintiff and the Defendant be declared null and void and the sums the Defendant paid to the Plaintiff be refunded.
 - b. An order of eviction against the Defendant himself, his agents, servants and/or any persons acting for and on his behalf from land parcel No. West Kasipul/Kodera Karabach/683.
 - c. Costs of this suit.
 - d. Any other order or relief this Honourable Court may deem fit and just to grant.
5. The Respondent denied the allegations in the Complaint vide his statement of Defence and Counterclaim dated 19th August, 2020. In his Counterclaim he sought the following orders;
 - a. A declaration that completion of sale and payments of the entire purchase price was to be effected upon transfer in favour of the Defendant/counter claimer.
 - b. An order for specific performance compelling the Plaintiff/Respondent to transfer to the Defendant/Counter claimer a portion measuring 530ft x 100ft x 88ft out of one of the subdivisions comprised in LR No. Kasipul/Kodera Karabach/1481, 1482, 1483 and 1484 in the alternative the executive officer of the Court be mandated to execute all the necessary forms to effect transfer.
 - c. Costs of the Counterclaim.
6. The matter was heard and the trial magistrate found that the Appellant had failed to prove his case against the Respondent. He entered judgement in favour of the Respondent as against the Appellant as prayed in the counterclaim.

Submissions.

7. Counsel for the Appellant filed his submissions dated 25th November, 2024. On ground one of the Memorandum of Appeal, he submitted that the learned trial magistrate erred in dismissing the Appellant's case when it was clear that it was the Respondent who was in breach of the sale of land agreement.
8. He submitted that from the sale agreements produced by the Respondent it was clear that the full consideration was KShs. 150,000/= which was not paid in full. He also submitted that the Appellant proved that the agreement was null and void and therefore the learned trial magistrate erred in dismissing the Appellant's case.
9. On ground two of the Memorandum of Appeal, he reiterated that since the Respondent did not pay the full consideration, the evidence tilted towards allowing the Appellant's case.
10. On grounds three and four of the Memorandum of Appeal, it was Counsel's submissions that the learned trial magistrate erred in ordering specific performance and yet no land control board consent had been sought for. He submitted that it is not disputed that the land in issue is agricultural land and



the failure to obtain the land control board consent renders any agreement unenforceable. Therefore, orders of specific performance cannot issue.

11. Counsel relied on the case of *Kahia vs Ng'ang'a* [2004] and the *Land Control Act* in support of his submissions.
12. Counsel concluded his submissions by urging the Court to allow the Appeal with costs.
13. Counsel for the Respondent on the other hand filed his submissions dated 28th November, 2024. He submitted that the Respondent did not breach the land sale agreement by failing to pay the balance. He also submitted that it was a term of the agreement that the balance of the purchase price was to be paid upon transfer and registration of the land in his name. Counsel submitted that the Appellant's failure to complete the transfer impeded the Respondent's ability to fulfill the final payment condition. Therefore, the breach of contract as alleged is not supported.
14. He submitted that the Respondent had been in occupation of the suit parcel since the year 2010 and that the Appellant has not made any effort to transfer the land after subdividing it in the year 2011. Counsel relied on the case of *Trans Mara Sugar Co. Ltd & another vs Ben Kangwaya Ayiamba & another* [2020]eKLR and submitted that the Appellant has not challenged the clause of the sale agreement which directed that the balance of the purchase price be paid upon transfer.
15. It was his submissions that the Appellant contended that the learned trial magistrate erred by ordering specific performance and yet the Land Control Board consent had not been obtained. He submitted that the Appellant secured the consent to subdivide the suit parcel and therefore the threshold provided for under Section 6 of the *Land Control Act* was met.
16. He also submitted that the Appellant waived his right to invoke the lack of the land control board consent as a defence by his conduct of retaining the purchase price and allowing the Respondent to be in possession.
17. Counsel submitted that the Appellant was stopped by the doctrine of estoppel as he did not demonstrate the steps he took to effect transfer. He submitted that the law acknowledges that possession and partial payment creates an equitable interest in property and therefore the Respondent had enforceable rights. He concluded his submissions by urging the Court to dismiss the appeal with costs.

Analysis and determination.

18. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:
 1. Whether the appeal is merited.
 2. Who should bear the cost of the appeal.
19. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some



point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

20. The role of a first appellate court was further discussed by the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR, which held as follows;

“We have carefully considered the judgment of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, as well as the authorities from different jurisdictions that were presented to us. We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”

21. This Court will then use the above principles and proceed to determine the appeal as though it conducted the trial although it did not see the witnesses as they testified.

22. It was the Appellant’s contention that he entered into a land sale agreement with the Respondent for the sale of a portion of land parcel No. West Kasipul/Kodera Karabach/653 measuring 530 feet by 100 feet by 85 feet. The agreed purchase price was kshs. 150,000/= but the Respondent only paid Kshs. 100,000/=. The Appellant contended that the Respondent did not pay the balance of the purchase price of Kshs. 50,000/= and he (Respondent) was therefore in breach of the sale agreement.

23. The Respondent conversely admitted that he entered into a land sale agreement on 8th January, 2010 with the Appellant for the purchase of a portion of land parcel No. West Kasipul/Kodera Karabach/653. He also admitted that the agreed purchase price was ksh. 150,000/=. Further, that he paid Kshs.100,000/=:, and the balance of Kshs.50,000/= was to be paid upon transfer as per the terms of their land sale agreement. He contended that despite the Appellant subdividing the land, he failed to transfer the portion he purchased to his name. He therefore contended that he was not in breach of the agreement as the Appellant was yet to transfer the land so that he could pay the balance.

24. The learned trial magistrate in his judgement delivered on 22nd December, 2021 held as follows;

“...Pw-1 avers that he sold the parcel of land to the defendant. The defendant paid kshs. 100000 as a consideration but he has not paid the balance of Kshs. 50000/-.

On the other hand, the Defendant avers that he has paid all the consideration and that it is the Plaintiff who has failed to transfer the portion of land to him. He therefrom asks the Court to compel the Plaintiff to a (sic) specific performance. In view of the evidence adduced in court by both parties, I find that this claim will fail. The Plaintiff has not demonstrated in court as required by the law that it is the defendant who has breached the terms of sale of land agreement.

From the agreement on the part sub headed as; It is hereby agreed as follows: at the third paragraph it is agreed as follows

“kshs. 50000/= shall be paid after the transfer and registration of the buyer as the proprietor of the purchased portion.”

This condition has not been demonstrated by the Plaintiff that it has been fulfilled. It is on this basis I dismiss this suit with costs.”

25. A perusal of the proceedings before the trial Court shows that the Appellant testified as PW1. Upon cross-examination he confirmed that the balance of the purchase price was to be paid upon transfer as



per the terms of their agreement for sale of land. He also confirmed in evidence that he had subdivided land parcel No. West Kasipul/Kodera Karabach/653 but he was yet to transfer to the Respondent the portion he had purchased.

26. This Court has carefully analysed the land sale agreement dated 8th January, 2010, which was produced by the Respondent as DEx-1. It was entered into between the Appellant and the Respondent for the purchase of a portion of land parcel No. Kasipul/Kader Kamidigo/653 measuring 530 feet by 100 feet by 88 feet for a consideration of Kshs. 150,000/= . Further terms of the agreement were that the payment of the purchase price were that the Respondent was to pay Kshs. 50,000/= on 8th January, 2010, Kshs. 50,000/= was to be paid on or before 8th February, 2010 and the balance of kshs. 50,000/= was to be paid after transfer and registration of the buyer as the proprietor of the purchased portion.
27. As observed by the learned trial Magistrate, the terms of the land sale agreement were to the effect that the balance of the purchase price was to be paid upon transfer.
28. The Appellant admitted that he was yet to transfer the land to the Respondent. It was a condition precedent that the transfer would be made and the payment of the balance follows. Parties make their own bed and lie on it however thorny it may be. Therefore, his contention that the Respondent was in breach of their land sale agreement cannot hold water as the payment of the balance of the purchase price was conditional on the transfer. The Respondent could not put the horse before the cart: he could not pay the final balance before the land was transferred to him as was supposed to be.
29. Thus, ground one of the Appeal therefore fails.
30. The Appellant contended that the learned trial Magistrate erred in issuing orders of specific performance on the basis of alleged possession of the land and yet the parties did not acquire the land control board consent.
31. In response, the Respondent submitted that as per the terms of the agreement, it was the Appellant who was to obtain the land control board consent to transfer which he did not obtain. The Respondent also submitted that since he had paid a substantial portion of the purchase price and had taken possession of the land, he had an equitable interest in the property.
32. Equitable interest would arise where the buyer is shown to have fulfilled all the term of the agreement and acted still wit
33. The learned trial magistrate in his judgement delivered on 22nd December, 2021 allowed the Respondent's counterclaim which had sought for orders of specific performance. Even though the issue of the land control board consent was raised by the parties, it was not addressed by the learned trial magistrate in his judgement.
34. Section 6 of the [Land Control Act](#) provides as follows;
 - “(1) Each of the following transactions that is to say—
 - (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
 - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;



(c) Deleted by [Act No. 22 of 1987](#), Sch.
is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”

35. In the case of *Koyumkei Multipurpose Co-operative Society Limited and 17 others v Rael Chepng'etich Koech* [2019] eKLR the Court while considering the provisions of Section 6 of the [Land Control Act](#) held as follows;

“22. The law above speaks for itself; consent of the Land Control Board is required for subdivisions and sales of agricultural land. In the instance of this case, there was to be a subdivision of the land, so as to carve out 6 acres. This needed the consent of the Land Control Board. There was also to be the sale of this 6 acres; this again needed the consent of the Land Control Board.”

36. In the present matter it is not disputed that the Appellant obtained the land control board consent to subdivide the suit parcel. It is equally not disputed that the Appellant did not obtain the land control board consent to transfer the purchased portion to the Respondent.

37. Section 8(1) of the [Land Control Act](#) provides as follows;

“(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

38. Section 8(1) of the [Land Control Act](#) provides that the application for consent of the land control board ought to be made within six months. The land sale agreement entered into by the parties is dated 8th January, 2010 and therefore the application for the consent of the land control board ought to have been made by 7th July 2010. As per the terms of the land sale agreement, it was the responsibility of the Appellant to obtain the said consent. It is evident that he failed to do so. He has not shown any evidence that he moved the Land Control Board as obligated by law and even by the terms of agreement only



for his efforts to be frustrated by the Respondent. In any event could the Respondent present himself to the Land Control Board absent of the seller, the Appellant? No.

39. In the circumstances above, can a party who breaches an agreement be permitted to reap from the breach by hiding under the law, that the agreement is void? Where is the justice of the party who, on the promise of another and believing that promise does his part of the bargain to the letter but is in turn frustrated by that promisor? Those are the questions that remain unanswered, and this Court being one of justice sets to answer them. The interests of justice do not permit someone to benefit from his unconscionable conduct or promises. This Court will give, below, the remedy it humbly thinks is just in the circumstances. But before that, it considers further the aspect that made the transaction void.

40. In the case of *Magdalene Nyokabi Guandai v Charles Maato Metiaki & another* [2018] eKLR the Court held as follows;

“Based on these legal provisions, and in relying on the facts above, I find that the agreement for the sale of a portion of 50 acres from the suit land, made in December, 1989 was void as no consent of the land control board was obtained within six (6) months from the date of the said agreement. In the circumstances, the Plaintiff’s claim for specific performance cannot stand.”

41. In the present matter, since no consent of the land control board was sought within six months of the date on the land sale agreement, the said agreement was void. Therefore, the learned trial Magistrate erred in issuing orders of specific performance absent of other considerations such as a constructive trust. But the issue of a such a trust only showed up indirectly on appeal when the Respondent submitted that he had an equitable interest in the suit property.

42. Upon perusal of the pleadings filed before the trial Court and the evidence adduced, it is clear that the issue of whether or not the Respondent had an equitable interest in the property was not raised. Could it be appropriately raised at the appellate stage?

43. In the case of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR the Court held as follows;

“As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).”

44. It is my view that the Respondent is precluded from raising the issue of whether he had acquired an equitable interest on the suit parcel on appeal. But as that turns against the Respondent the questions that were outstanding hereinabove now become relevant for answers.

45. Supposing the Respondent raised the issue of equitable interest or constructive trust in the trial court, could this Court have granted the remedy of specific performance as the trial court did? The answer is affirmative given the facts of the instant case. They are on all fours for such an inference: the Appellant by his conduct caused the Respondent to believe that the Appellant would sell to him the suit land and he thereby changed his position by paying for the land, taking occupation thereof and carrying out developments thereon. Thus, the Respondent changed his position to his detriment through the promise(s) of the Appellant. Can the appellant be permitted to resile from the promises and his conduct? Not without consequences.



46. In *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), the Supreme Court of Kenya held as follows;

“ 14. While sections 25, 26 and 28 of the *Land Registration Act* recognized that the rights of a registered proprietor of land were absolute and indefeasible, those were only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests included trusts. In the absence of any limitation as to the trusts, that included constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property was provided under law, and included a constructive trust. Section 28 of the *Land Registration Act* provided that the registration was subject to overriding interests. One of the overriding interests was a trust, which included constructive trust.

15. Constructive trusts could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it. A constructive trust could be imported into a land sale agreement to defeat a registered title.”

47. In *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR the Court of Appeal stated that,

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.

48. Guided by the above authorities, it is this Court’s view that the doctrine of constructive trust applies squarely in circumstances as the instant case. Even then, further, basing my reasoning on the above decisions, the Respondent’s counterclaim could have succeeded had he pleaded constructive trust. I wish it was pleaded, this appeal could have been simple! But given that a party who by his conduct should not be permitted to benefit from his wrongdoing and also gain unjustly from that conduct, the Appellant ought to refund the sum he was paid for the transaction he frustrated. He should therefore refund it with interest at 12% per annum from the date of receipt of each instalment. Further, before the Respondent vacates in one hundred and twenty (120) days, the Appellant should compensate the Respondent for the developments he has made on the land, and which still stand thereon, before he (the Respondent) vacates. In case it the value is not known, a valuer agreed upon or, if not agreed upon, a government valuer whose cost shall be shared by the parties, to value them and the sum be paid by the Appellant before, or as condition for, the Respondent vacating. In case the developments have to be



removed, the cost of removing the same should be included as part of the Respondent's compensation as ordered hereinabove.

49. That being the case, this appeal succeeds, and, the judgement of the learned trial magistrate delivered on 22nd December, 2021 is hereby set aside. The prayers sought by the Appellant in his Complaint dated 6th July, 2020 are allowed as prayed, and the Counterclaim is dismissed with no order as to costs. The Respondent is to be compensated in terms of the reliefs granted him in paragraph 48 above as a condition precedent.

50. The Respondent to bear the costs of the appeal.

JUDGMENT DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 23RD DAY OF APRIL 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE

