



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduti v Kuria & another (Environment and Land Appeal  
8 of 2021) [2022] KEELC 3656 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL 8 OF 2021**

**LN GACHERU, J**

**MAY 12, 2022**

**BETWEEN**

**JOSEPHAT MWANGI NDUTI ..... APPELLANT**

**AND**

**DAVID MWANGI KURIA ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET WANJIKU MWANGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement and Decree delivered on 5th March, 2021, by Hon. M W Kurumbu (S.R.M.) in Kandara Principal Magistrates Court ELC No. 9 of 2020)*

**JUDGMENT**

1. The appellant Joseph Mwangi Nduti, was the plaintiff in Kandara ELC Case No 9 of 2020, while the respondents David Kuria Mwangi and Margaret Wanjiku Mwangi were the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the said suit.
2. By a plaint dated July 16, 2020, the plaintiff (appellant) brought a suit against the defendants and sought for; -
  - a. An order directing cancellation of title number Loc 3/Gichagiini/1514, and the same to revert back to the plaintiff, Josephat Mwangi Nduti.
  - b. An order directing cancellation of title number Loc 3/Gichagiini/1584, and the same to revert back to the plaintiff, Josephat Mwangi Nduti.
  - c. An order directing cancellation of title number Loc 3/Gichagiini/1513, and the same to revert back to the plaintiff, Josephat Mwangi Nduti.
  - d. An eviction order against the 1<sup>st</sup> and 2<sup>nd</sup> defendants from parcel number Loc 3/Gichagiini/1513, Loc 3/Gichagiini/1514 & Loc 3/Gichagiini/1584.



- e. Costs of the suit and interest.
  - f. Any other relief that this honourable court may deem fit to grant.
3. The plaintiff (appellant) had averred that he is the registered owner of land parcel No Loc 3/ Gichagiini/571, until around March 2015, when it was subdivided into five portions being 1510 to 1514. That the 1<sup>st</sup> Defendant ended up registering himself to parcel number Loc 3/ Gichagiini/ 1514, while the 2<sup>nd</sup> Defendant registered herself to parcel number Loc 3/Gichagiini/1513, by taking advantage of the plaintiff, when he was unwell. That the plaintiff's house and compound is in land parcel Loc 3/Gichagiini/1513, registered in the name of the 2<sup>nd</sup> defendant, who was threatening to remove him from the said land.
  4. The plaintiff particularized misrepresentation, undue influence and coercion as follows;
    - a. Causing land parcel numbers Loc 3/Gichagiini/1513 & 1514 to be registered in their names by undue influence and coercion.
    - b. Causing land parcel numbers Loc 3/Gichagiini/1513 & 1514 to be registered in their names by blackmailing the plaintiff.
    - c. Causing land parcel numbers Loc 3/Gichagiini/1513 & 1514 to be registered in their names by use of threats.
    - d. Causing land parcel numbers Loc 3/Gichagiini/1513 & 1514 to be registered in their names without any consideration.
    - e. Causing land parcel numbers Loc 3/Gichagiini/1513 & 1514 to be registered in their names when the plaintiff was sick and bed ridden
    - f. Acquiring title by concealing facts.
  5. The plaintiff averred that the defendants acquired the land that he previously owned, without consideration thereby leaving him with a small portion. The plaintiff further averred that the 1<sup>st</sup> defendant was also registered as the owner of parcel number Loc 3/Gichagiini/1584, which land he was supposed to hold in trust for the plaintiff and transfer it back to him, but the 1<sup>st</sup> defendant has since declined to return the same. That as a result of the defendants actions; the plaintiff has suffered loss and damage.
  6. The suit was contested by both the defendants. The 1<sup>st</sup> defendant filed a memorandum of appearance and defence both dated August 6, 2020. In the Statement of defence, the 1<sup>st</sup> defendant averred that that the plaintiff was the original registered owner of land parcel No Loc 3/Gichagiini/571, which he freely and voluntarily subdivided into 5 portions being Loc 3/Gichagiini/1510, 1511, 1512, 1513, and 1514. That after the said subdivision, the plaintiff voluntarily transferred Loc 3/Gichagiini/1511 to Peter Murimi & Beth Muthoni, by way of sale. He also transferred LOC 3/Gichagiini/1513, to the 2<sup>nd</sup> defendant, by way of gift, further he transferred LOC 3/Gichagiini/1514, to 1<sup>st</sup> defendant by way of Gift and he was left with LOC 3/Gichagiini/1512.
  7. The 1<sup>st</sup> defendant denied mistreating the plaintiff and/or threatening to remove him from the area, since the plaintiff was always at liberty to stay in the house of his 1<sup>st</sup> marriage or in the house of his second marriage which was on Loc 3/Gichagiini/1095, and was registered in the name of the plaintiff.
  8. In response to the allegations of misrepresentation, undue influence and coercion the 1<sup>st</sup> defendant averred that he did not cause land parcel No Loc 3/Gichagiini/571, to be subdivided as alleged because



- the application for consent for subdivision was drawn and executed by the plaintiff who paid Kshs 88,000/= to Donac Surveys Consultants on June 9, 2015. That the plaintiff applied and obtained Land Control Board consent on March 24, 2015 and March 26, 2015 respectively to transfer Loc 3/Gichagiini/1514, to the 1<sup>st</sup> defendant as a gift absolutely.
9. The 1<sup>st</sup> defendant further denied allegations of blackmail and coercion and put the plaintiff to strict proof of the same. That the plaintiff transferred Loc 3/Gichagiini/1514, to the 1<sup>st</sup> defendant by way of gift, the same way he acquired Loc 3/Gichagiini/571, from the 1<sup>st</sup> defendant's grandfather, Daniel Nduti Karuga (deceased). That the plaintiff allegation that he was left with a small portion of land is false as after the subdivision, he was left with Loc 3/Gichagiini/1510 and 1511. Further that the plaintiff has many other pieces of land in the same area.
  10. The 1<sup>st</sup> defendant further averred that the plaintiff's suit was bad in law as it had not raised any known legal ground and/or reason to warrant cancellation of title under the relevant statute. That the plaintiff's plaint and verifying affidavit were defective in form and should be struck out and the suit dismissed.
  11. The 2<sup>nd</sup> defendant similarly contested the suit and filed a memorandum of appearance and defence both dated August 6, 2020. In her statement of defence, the 2<sup>nd</sup> defendant averred that that the plaintiff was the original registered owner of land parcel No Loc 3/Gichagiini/571, which he freely and voluntarily subdivided into 5 portions being Loc 3/Gichagiini/1510, 1511, 1512, 1513, and 1514. That after the said subdivision, the plaintiff voluntarily transferred Loc 3/Gichagiini/1511 to Peter Murimi & Beth Muthoni, by way of sale, and he also transferred Loc 3/Gichagiini/1513 to the 2<sup>nd</sup> defendant, by way of gift. Further he transferred Loc 3/Gichagiini/1514, the 1<sup>st</sup> defendant by way of gift and he was left with Loc 3/Gichagiini/1512.
  12. In addition, the 2<sup>nd</sup> defendant denied mistreating the plaintiff (appellant) and/or threatening to remove him from the area, since the plaintiff (appellant) was always at liberty to stay in the house of his 1<sup>st</sup> marriage or in the house of his second marriage, which was on Loc 3/Gichagiini/1095, and was registered in the name of the plaintiff.
  13. In response to the allegations of misrepresentation, undue influence and coercion, the 2<sup>nd</sup> defendant averred that she did not cause land parcel No Loc 3/Gichagiini/571, to be subdivided as alleged, because the application for consent for subdivision was drawn and executed by the plaintiff who paid Kshs 88,000/= to Donac Surveys Consultants, on June 9, 2015. That the plaintiff applied and obtained Land Control Board Consent on March 24, 2015 and March 26, 2015, respectively to transfer Loc 3/Gichagiini/1513, to the 2<sup>nd</sup> defendant as a gift absolutely. The 2<sup>nd</sup> defendant (respondent) further denied allegations of blackmail and coercion and put the plaintiff to strict proof of the same.
  14. That the plaintiff transferred loc 3/Gichagiini/1513 to the 2<sup>nd</sup> defendant, by way of gift, the same way he acquired Loc 3/Gichagiini/571, from the 2<sup>nd</sup> defendant's grandfather Daniel Nduti Karuga (deceased). That the plaintiff allegation that he was left with a small portion of land is false as after the subdivision, he was left with Loc 3/Gichagiini/1510 and 1511. Further that the plaintiff has many other pieces of land in the same area. The 2<sup>nd</sup> defendant put the plaintiff to strict proof of the damage and/or loss he had suffered as a result of the defendants actions. The 2<sup>nd</sup> defendant averred that the plaintiff's suit was bad in law as it had not raised any known legal ground and/or reason to warrant cancellation of title under the relevant statute. That the plaintiff's plaint and verifying affidavit were defective in form and should be struck out and the suit dismissed.
  15. In response to the defences, filed by 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff filed a reply to defence dated August 19, 2020, wherein he denied all the allegations set out in the defence and put the defendants



to strict proof. He prayed that the defences as filed should be dismissed with costs and judgment be entered in his favour as prayed in the plaint.

16. The matter proceeded by way of viva voce evidence, wherein the plaintiff testified for himself and called no witness. The defendants too testified for themselves and called no witnesses.

### **Plaintiff's (Appellant's) Case**

17. PW 1 Josphat Mwangi Nduti testified that the defendants are his son and daughter. He also adopted his witness statement dated July 16, 2020 and produced his list of documents dated July 16, 2020 as exhibits. He further stated that his problem with the two defendants started when he was unwell. That sometime in 2014-2015, he wanted to give his children land, and their cousin was given the subdivision works. That the defendants took bigger portions of land than he had intended to give them. That the land where he has built his house is now registered in name of Margaret Wanjiru, the 2<sup>nd</sup> defendant, and the defendants even wanted to evict him, but the OCS of Githumu Police Station came to his rescue. That he forgave them and wants the portions they allocated themselves to be returned to his name.
18. On cross examination, PW1(appellant) stated that Wanjiku Mwangi, Wambui Mwangi and Sofia Mwangi are all his wives. That the defendants are children of Wanjiku Mwangi, who died in 2017. That he started the subdivision in 2014, when Wanjiku was alive. That he signed mutation forms when he was sick, but he admitted that he went to the Land Control Board and signed the transfer forms. That he was not forced to sign the said documents, but subdivision was done against his wish. That the medical records were not in court, but he could avail them. That he was the one who decided to give the defendants the said land, but they took bigger portions than he allocated them. That he could not have given away his home. He further stated that the title deeds were stolen and his other wives did not force him to file the instant suit.
19. That he wanted the defendants to be evicted and was ready to give them land elsewhere. That he had tried to resolve the dispute internally but his efforts had failed. He urged the court to cancel the title deeds as he wished to share out his land according to his wishes, and to live in peace in his home.
20. On re-examination, PW 1 stated that his home was now on the land owned by Margaret, the 2<sup>nd</sup> defendant and there was a risk that he could be evicted.

### **Defendants' (Respondents') Case**

21. DW 1 David Kuria Mwangi stated that he lived on land given to him by his father and that his father took the title deed of the said land. That their father voluntarily gave them the land and they did not force him to give them the said land. That their father married another wife after the demise of their mother, and it that wife who wants them to be chased away and the land repossessed by their father. DW 1 adopted his witness statement and list of documents dated August 5, 2020. He also produced the documents therein as exhibits 1-7.
22. Further, he stated that his father signed the mutation forms attached, and he paid and was issued with receipts in his name. That his father sold some of the land and he has not shown them land elsewhere. That when titles were issued, the plaintiff(appellant) took them and has never given them back. That their father, the plaintiff was not sick when he transferred the land to them.
23. On cross examination, DW 1 stated that he was given land by his father, the plaintiff herein. Further that the plaintiff's house where it stays is on the land registered in the name of Margaret, the 2<sup>nd</sup> defendant herein. That their mother (now deceased) was alive when the subdivision was done.



24. DW 2: Margaret Wanjiku Mwangi, testified that the plaintiff was her father and the 1<sup>st</sup> defendant was her brother. That she was not married and she lived on land given to her by her father and it was Loc 3/ Gichagiini/1513. That she had land elsewhere, but her father requested her to sell it and in exchange he would give her land at home. That upon selling her land, the father gave her the suit land and a house adjacent to his home. That the plaintiff gave her the land freely when her mother was still alive. DW 2 adopted her witness statement and witness statement and list of documents dated August 6, 2020 as her evidence in chief. That after her mother died, the plaintiff remarried and it was his current wife who was the cause of all these issues.
25. On cross examination she stated that the plaintiff's home was on the land allocated to her. That the said land was ancestral land and even the plaintiff did not purchase it but he inherited it. That she didn't have the title deed of the said land. That she had not disturbed her father and neither had she evicted him. That the plaintiff is not a squatter as alleged and the subdivision was done after the mother (deceased) and the father agreed.
26. After viva voce evidence, the parties filed their written submissions and on March 5, 2021, the trial court entered judgment in favour of the defendants (respondents) and stated as follows;
- “The plaintiff has failed to discharge his burden of proof as required by the law. The suit is dismissed. Each party shall bear their own costs. ADR is encouraged.”
27. The appellant was aggrieved by the above determination of the court in favour of the respondents herein and has sought to challenge the said Judgment through the memorandum of appeal dated March 30, 2021, and sought for orders that;
1. The appeal by the appellant herein be allowed.
  2. The judgment and order of the Senior Resident Magistrate's delivered on March 5, 2021, by Hon M Kurumbu SRM, be set aside.
  3. The costs of this appeal and the costs of the proceedings before the Principal Magistrate's Court be awarded to the appellant.
28. The grounds in support of the appeal are: -
1. The learned magistrate failed to appreciate the appellant's claim as presented before the court and the provisions of the Land Act No 3 of 2012 and the Rules made thereunder and in particular the provisions of section 28 therein.
  2. That the learned magistrate erred in law and in fact in failing to find that the respondents held the land in question in trust for the appellant during his lifetime.
  3. That the learned magistrate erred in law and in fact in finding that the appellant did not prove that the title deeds in question were obtained through misrepresentation, undue influence, coercion and black mail without considering the appellant's case in its entirety though the appellant produced chief's letters dated July 23, 2019 (P EXB 2) and September 12, 2019 (P EXB 3) escalating the matter to OCS Gichumu Police Station.
  4. That the learned magistrate erred in law and in fact in failing to consider and evaluate the appellant's evidence where clearly from the record the appellant produced mutation forms dated 2015 (P EXB 4) with a comment “NB-Portion A is subject to be combined with parcel number 1511” while Portion ‘A’ is the home compound of the appellant where he lives with his wife as this exhibit which was not disputed nor explained by the respondents and which



clearly proved the appellant's averments in respect of the land occupied by the appellant as the matrimonial home.

5. That the learned magistrate erred in law and in fact in failing to consider the appellant's evidence that it is during the period when the appellant was reporting threats and harassment to the Chief Githumu Location as proved by production chief's letters dated July 23, 2019 (P EXB 2) and September 12, 2019 (P EXB 3) escalating the matter to OCS Gichumu Police Station were written ruling out the possibility of the applicant signing the mutation giving away his matrimonial home on November 19, 2019, when the title deeds were issued in 2015 where signatories clearly differ.
  6. That the learned magistrate erred in law and in fact in failing to consider the appellant's evidence that the title deeds in question were issued in 2015 on the basis of the mutation dated 11<sup>th</sup> while changes were done in 2019, causing the appellant to seek redress in court.
  7. That the learned magistrate erred in law and in fact in finding that the appellant did not discharge his burden of proof as required by the law and dismissing the suit entirely while it is clear from the record that the appellant acquired the land in 1987 proving that the land in question was not ancestral land as claimed by the defendants.
  8. That the learned magistrate erred in law and in fact in failing to appreciate and find that the appellant could not give away his matrimonial home where he lived with his wife, even during the whole period of the proceedings in the lower court and there was no evidence that he had an alternative accommodation.
  9. That the learned magistrate erred in law and in fact in finding that the appellant did not discharge his burden of proof as required by the law and dismissing the suit entirely.
  10. That the learned magistrate erred in law and in fact in finding that alternative dispute resolution is encouraged while such orders ought to have preceded the hearing of the case the subject of the appeal, whereby the learned magistrate was duty bound to advise the parties accordingly to go for alternative dispute resolution during the proceedings and not after delivery of judgment.
29. On September 20, 2021, the court directed that the appeal be canvassed by way of written submissions and the appellant through the law firm of CM Ngugi Rebiro & Co Advocates, filed his written submissions dated February 7, 2022. The appellant identified five(5) issues for determination by the court and submitted that the appellant was the registered owner of the suit land before the same changed hand after subdivision. He relied on the case of LN v SMM High Court at Malindi, Civil Case 21 of 2011 [2013] eKLR where it was held that the evidence pointed at the existence of a trust and the defendant was found to hold the suit land in trust for the appellant.
30. He further submitted that the suit property is registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to hold in trust for the appellant, but they got greedy and fraudulently gave themselves larger portions than allocated, leaving the appellant a destitute. He relied on the case of Rose Naswa Masinde v Lilian Nekesa Simiyu Mukopi [2014] eKLR, where it was held that a trust can and will be implied in order to give effect to the intention of parties"
31. The appellant further submitted that based on the evidence availed before the trial court, he had proved on a balance of probability that the respondents hold the suit land in trust for himself and he is entitled to the orders sought in the plaint. The appellant urged the court to allow the appeal and grant the orders sought thereon.



32. The respondents filed their written submissions on February 18, 2022 through the law firm of TM Njoroge Advocates. They submitted that the appellant was the original proprietor of the suit land which he willingly and voluntarily transferred to the respondents. That the appellant was a person of sound mind and he was fully conversant with his actions. That the appellant's allegation that he was sick at the time of effecting the transfer has not been substantiated and therefore cannot hold water. That the appellant is abusing the sanctity of title which must be upheld and respected at all times. That the ground of appeal do not raise any real issues to warrant this court to interfere with the Judgement of the lower court.
33. The respondents further submitted that the appellant had failed to prove fraud and his evidence is wanting of substance.
34. It was the respondents submissions that indeed the appellant had failed on a balance of probability to prove his case and therefore the appeal should be dismissed with costs.
35. The court has considered the evidence adduced in court as well as the rival written submissions thereafter by parties. The court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The court has also considered the findings of the trial court, and the submissions of counsels and finds as follows;-
36. This is a first appeal, and it is the court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by section 78 of the *Civil Procedure Act*. See the case of *Kenya Ports Authority v Kusthon (Kenya) Limited* [2009] 2 EA 212 where the Court of Appeal held *inter alia*, that:-
- “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
37. Therefore, the court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it as the trial court had the advantage of hearing the parties.
38. However, in *Ephantus Mwangi and another v Duncan Mwangi* Civil Appeal No 77 of 1982 [1982-1988] 1 KAR 278 the Court of Appeal held that:
- “A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
39. Further, this court will only interfere with the discretion of the trial court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that



on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo v Shah* (1968) EA at page 93, where the Court held that: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court, unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

40. Having now carefully read and considered the record of appeal, the grounds of appeal, the written submissions by the parties, and the judgment by the trial court, the court finds the issues for determination are:-
- a. Whether the respondents held the suit land in trust for the appellant
  - b. Whether the respondents acquired title through misrepresentation, coercion and/or undue influence.
  - c. Whether titles should be cancelled
  - d. Whether the appeal is merited.

**(i) Whether The Respondents Held The Suit Land In Trust For The Appellant**

41. It is not in dispute that the appellant was the original owner of Loc. 3/ Gichagiini/571. It is also not in dispute that Loc 3/ Gichagiini/571, was subdivided in 2015, into five parcels of land being Loc 3/ Gichagiini/1510, 1511, 1512, 1513 and 1514. Of the five parcels of land, the 1<sup>st</sup> respondent is the registered owner of Loc 3/ Gichagiini/1514, and Loc 3/ Gichagiini/1584, while the 2<sup>nd</sup> respondent is the registered owner of Loc 3/ Gichagiini/1513.
42. In relation to Loc 3/ Gichagiini/1584, the appellant contends that he gave it to the 1<sup>st</sup> respondent to hold it in trust for him. However, the 1<sup>st</sup> respondent breached their understanding and has refused to return the same to him. The 1<sup>st</sup> respondent on the other hand contends that he was the registered proprietor of Loc 3/ Gichagiini/740 and 741. That the appellant asked him to sell some of that land to Nduti Tea Factory, where he was the chairman. That after the tea factory excised the portions of land, they had bought, what remained is Loc 3/ Gichagiini/1584.
43. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:
- “24. Subject to this Act
- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
44. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the



Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the Land Registration Act as not requiring noting in the register.

Section 28 of the Land Registration Act provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) .....
- (b) trusts including customary trusts;”

45. The concept of trust must however be proved. In the case of Mumo v Makau [2002] 1 EA 170, the court held that;

“trust is a question of fact to be proved by evidence.....”

46. See also Gichuki v Gichuki CA Civil Appeal No 21 of 1981, where the Court of Appeal held that it is trite law that trust is a question of fact to be proved by evidence.

47. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, the court dealt with the issue of trust at length. The court made reference to Twalib Hatayan Twalib Hatayan & anor v Said Saggat Ahmed Al-Heidy & others [2015] eKLR and re-stated the law on trusts as follows: -

“According to the Black’s Law Dictionary, 9<sup>th</sup> edition; a trust is defined as

- “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England *supra* at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...



A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p 175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, Courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p 177) (*supra*)."

48. The argument by the appellant was that there was a trust which was breached by the 1<sup>st</sup> respondent. As earlier stated, the existence of a trust is a question of evidence. In the *Juletabi* case (*supra*), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

"The law never implies, the court never presumes a trust, but [only] in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

49. The onus to prove existence of a trust lay squarely on the appellant. Section 107 of the *Evidence Act* provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

Section 108 of the *Evidence Act* provides as follows:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 109 of the aforementioned Act again provides that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. From the above, it is clear that the onus was on the appellant to prove that there indeed existed a trust between the 1<sup>st</sup> respondent and himself in relation to parcel of land No Loc 3/Gichagiini/1584.

51. The appellant in paragraph 8 of his witness statement dated July 16, 2020 has stated in *verbatim* as follows;

"... There is a land parcel number Loc 3/Gichagiini/1584 which I had it registered in the name of the 1<sup>st</sup> defendant. There was an unwritten understanding that since he is my son he would return it to me but he has since refused."



52. This court notes that save for the appellant alleging the above, he did not substantiate or corroborate the said allegations. The *Law of Contract Act* cap 23 laws of Kenya in section 3(3) states that any transaction relating to land must be in writing and it must be signed by both parties and witnessed and attested by an advocate. It is evident that the appellant failed in this test and therefore his allegation of the existence of a verbal agreement in relation to Loc 3/Gichagiini/1584 is null and *void ab initio*.
53. In addition to this, the 1<sup>st</sup> respondent has rebutted the allegations made by the appellant and has alleged that he acquired Loc 3/Gichagiini/1584, after the appellant approached him to sell a portion of his parcel of land being Loc 3/Gichagiini/740 & 741 to Nduti Tea Factory where the appellant was the Chairman. The 1<sup>st</sup> respondent averred that Loc 3/Gichagiini/1584, is what remained after Nduti Tea Factory excised the agreed portion. It was the 1<sup>st</sup> respondents allegation that Loc 3/Gichagiini/1584, never at any time belonged to the appellant and there was no agreement written or unwritten in relation to it.
54. The 1<sup>st</sup> respondent in support of his claim attached mutation forms dated May 17, 2016. This court notes that the evidence of the 1<sup>st</sup> respondent was not contested and /or rebutted either via evidence and/or cross examination.
55. Based on the above, this court finds and holds that the appellant failed on a balance of probability to discharge the burden of proof. The appellant failed to tender any evidence showing that he transferred Loc 3/Gichagiini/1584, to the 1<sup>st</sup> respondent to hold the said land in trust and later transfer the said land to him. Therefore, it follows that parcel no Loc 3/Gichagiini/1584, belongs to the 1<sup>st</sup> respondent.

**ii. Whether The Respondents Acquired Title Through Misrepresentation, Coercion And/or Undue Influence.**

56. It is common ground that the parties to this appeal are all known to each other even prior to the suit leading to this appeal. The appellant is the father of the both the respondents herein. It is also common ground that sometime in the year 2005-2006, the suit property being Loc 3/Gichagiini/1513 and 1514, was transferred from the appellant to the 2<sup>nd</sup> and 1<sup>st</sup> respondents respectively. What is in dispute is the manner in which the transaction was executed.
57. The appellant claims that the transaction was null and void as he had no mental capacity to transact any dealings with regard to the suit property. In the alternative, he impugned the transaction on account of undue influence, coercion and misrepresentation exercised over him by the respondents. The appellant further contends of the five portions subdivided from Loc 3/ Gichagiini/571, he sold Loc 3/ Gichagiini/1510 and 1511 and gave 1513 and 1514 to the respondents herein. He contends further that in 2015, when Loc 3/ Gichagiini/571 was subdivided, he was unwell and the respondents took advantage of his sickness to allocate themselves larger portions than he had intended to give them.
58. The respondents on the other hand contended that they are children of the appellant and that he voluntarily and willingly gave them the portions of land, and more specifically Loc 3/ Gichagiini/1513 and 1514 respectively. That at the time of subdivision, the appellant was not unwell as he alleges and he voluntarily acquired and executed all the necessary documentations to effect the transfer into their respective names. The respondents therefore took the view that the appellant freely and voluntarily transferred the suit property to them. That the appellant was lucid mentally and no undue influence, coercion or misrepresentation was brought to bear on him during the transaction.
59. The law of contract recognizes and respects the freedom of parties to enter into agreements, setting out the parameters within which they are to be governed.



60. In the case of *Abdul Jalil Yafai v Farid Jalil Mohammed* [2015] eKLR, the Court of Appeal stated that the law equally places a high value on ensuring that parties have truly consented to the terms that bind them.
61. In the present case, it is not in dispute that the respondents acquired Loc 3/Gichagiini/1514 and 1513, from the appellant (their father) as gifts. The appellant (PW 1) in his statement stated that he wanted to give the respondents land, but when he was sick, the respondent subdivided Loc 3/ Gichagiini/571, and allocated themselves portions that were bigger than he had intended to give them. During the hearing, the appellant did not avail any documents to show that he was indeed unwell in 2015, when the subdivision was done.
62. In the case of *Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & 5 others* [2011] eKLR, the court observed as follows:
- “The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the Wiltshire case (*supra*), that the burden of proof lies on the person who asserts the incapacity. ... . The Supreme Court stated:
- “A person may be or become of sound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”
63. The court proceeded to hold that:
- “...it was not sufficient to establish the mental incapacity of Mbogo or the knowledge of such incapacity by the appellants when the power of attorney was executed. Both required proof but there was none. The presumption is therefore that Mbogo was in control of his faculties when he appeared before an advocate & commissioner for oaths, one Githiru NM on February 22, 2002 and executed the power of attorney”.
64. The appellant has implied that as a result of the sickness, he suffered, he lacked the mental capacity to transact and execute the mutation and transfer forms. That the respondents took advantage of his sickly condition then and allocated themselves bigger portions of land than he had intended to give them.
65. As above stated, the appellant had the onus of proving that at the time of the subdivision and transfer, he was mentally incapacitated as well. No such evidence was ever availed before the trial court and as such, the presumption is that appellant was in full control of his faculties when he signed the mutation forms, applied for Land Control Board’s consent and signed the transfer documents in relation to Loc 3/ Gichagiini/ 1513 and 1514.
66. Therefore, the court finds and holds that the appellant has failed to prove his mental incapacity at the time that he transferred the suit land to the respondents herein.



67. On undue influence, *Black's Law Dictionary*, defines undue influence as follows:
- “persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”
68. In the case of *Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others* [2019] eKLR, the court stated that;
- “Whether or not a transaction is the end result of undue influence is a matter of fact. The general rule is that he who asserts the wrong, bear the burden of proving the same.”
69. The appellant had pleaded in his claim in the alternative undue influence, coercion and misrepresentation against the respondents in their acquisition of the suit property. When a document containing contractual terms is signed, then, in the absence of undue influence, coercion, fraud, misrepresentation or non est factum, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.
70. There is no doubt that the appellant executed the mutation forms and transfer documents. Further, there is no dispute that he applied for Land Control Board consent, paid for the same and attended the Board meeting as provided by law. What is in contention is that the appellant argues that such execution was obtained by way of undue influence, coercion and/or misrepresentation.
71. The appellant testified and stated “I am the one who decided to give them land, but they took bigger portions than I gave. I could not give out my home. ... I want them evicted. I will give them land elsewhere.”
72. This court notes from the above that the appellant was fully aware of his actions of subdividing his land and sharing it out. His only contention appears to be the sizes given to the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein. The appellant has alluded to some sought of collusion between the respondents and the surveyor. However, he did not substantiated or corroborated the same. The appellant has also failed to substantiate and corroborate the allegations that the respondents allocated themselves bigger portions than he had intended to gift them.
73. This court has perused copies of a mutation forms for Loc 3/Gichagiini/571, dated 1March 1, 2015, as produced by both parties. It has also perused the copies of title deeds for Loc 3/ Gichagiini/1513 and 1514, respectively and the sizes of the portions of land tally in both documents. Further, this court has perused the Land Control Board application for consent for said parcels of land Loc 3/ Gichagiini/1513 and 1514 produced in court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The forms appear to be properly executed by the appellant and he did not in any way deny signing them, object to their production and /or cast doubt on their authenticity.
74. What then begs an answer is why the appellant would allege undue influence, coercion and/or misrepresentation in a process he was fully aware of and fully endorsed. It is trite that in instances where a fiduciary relationship exists between parties, as is the case herein, a presumption of undue influence and coercion arises, (See: *Trietel on the Law of Contracts* 13<sup>th</sup> edition, pg 450) and the burden of rebutting such a presumption lies with the applicant.
75. In the present case, this court has not found any evidence contrary to the finding of the trial court to suggest that the respondents placed any undue pressure on the appellant to transfer the suit land to them. Infact, it appears that the appellant voluntarily transferred the suit land in question to



his children being the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein. However, it seems like the relationship of the appellant and the respondents herein has become strained in the recent past and the appellant now wants to use this court to undo his earlier actions. This is evident from the complaint made to the chief in the year 2019, and the subsequent letters dated July 23, 2019 and September 12, 2019. It is curious that the appellant sat on an apparent injustice that threatened to disinherit him of his land since 2015, and only sought to complain of the same in 2019, and approached the court in 2020.

76. This court doubts the intention of the appellant and is inclined to conclude that the appellant is not coming to it with clean hands.

Order 2 rule 10(1) of the [Civil Procedure Rules](#) provides:

“Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
- (b) Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

77. From the foregoing it is trite that undue influence, coercion and misrepresentation has to be specifically pleaded. It also follows that such averments must be specifically proved by cogent evidence.

78. The appellant indeed specifically pleaded those allegations. However, did he specifically prove them? The court notes that the plaintiff made allegations of undue influence, coercion and misrepresentation. However, no evidence was called in support thereof. One would have expected that the appellant would lead evidence and call witnesses in support of the very serious allegations made by him against the respondents –his children. In the absence of such evidence, those pleadings merely remained mere statements with no probative value. See [Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi & another](#) [2014] eKLR.

79. It should also be appreciated that apart from specifically pleading undue influence, coercion and misrepresentation, the same has to be specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities, but slightly lower than prove beyond reasonable doubt. In the case of [Vijay Morjaria v Nansingh Madhusingh Darbar & another](#) [2000] eKLR, it was stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts\*.”

80. Regarding, the standard of proof, this court in the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See [Ndolo v Ndolo](#) [2008] 1 KLR (G & F) 742 wherein the court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to



prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

81. In the absence of the evidence by any of the witnesses with regard to the aforesaid causes of action, this court cannot hold that the appellant had proved his case as required.
82. In the penultimate, this court does not discern any element of undue influence, coercion or misrepresentation in the manner in which the respondents acquired Loc 3/ Gichagiini/ 1513 and 1514 respectively.
83. Having returned the verdict that the appellant was in good stead of mental health, and that no undue influence, coercion or misrepresentation was perpetrated upon him by the respondents herein at the time of subdivision and transfer of the suit property, then the said transaction cannot be voided on those grounds.
84. Based on the above, this court find and holds that the appellant failed on a balance of probability to discharge the burden of proof.

### iii. Whether Titles should be cancelled

85. Section 26 of the *Land Registration Act* which provides as follows :-

The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

86. It will be seen from the above that title is protected, but the protection is removed and a title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.
87. Having found as above that the appellant has failed to prove the existence of a trust in relation to Loc 3/ Gichagiini/1584, it follows that the said title is a property vested upon the 1<sup>st</sup> respondent herein and the same is deserving the protection by this court as per the Provisions of section 26 of *Land Registration Act*.
88. In addition, this court has found that the appellant has also failed to prove undue influence, coercion and/ or fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in relation to Loc 3/Gichagiini/1514 and 1513 respectively, and thus the court finds that the respondents are properly registered as the proprietors of the said parcels of land.



89. The upshot of the foregoing is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the right and legal registered owners of Loc 3/Gichagiini/1514 and 1513 respectively, and it matters not that the appellant has erected his house on Loc 3/Gichagiini/ 1513.
90. It is trite that the role of this court is to effect the intention of parties in a contract and it is evident from the evidence herein and the above analysis of the said evidence that the appellant intended to transfer the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. An order for cancellation of title's held by the respondents cannot therefore stand as prayed by the appellant.

**iv. Whether the Appeal is merited.**

91. The appellant had sought for the setting aside of the trial court's judgment and that judgment be entered in his favor as sought in the plaint. The trial court held that the appellant did not prove his case on the required standard of balance of probabilities. This court has also come to the same conclusion. Therefore, this court finds and holds that the trial court did not misapprehend neither the law nor facts and consequently the appeal herein is not merited.
92. Having now carefully re-evaluated and re-assessed the available evidence before the trial court, and the memorandum of appeal, together with the written submissions, the court finds that the trial magistrate arrived at a proper determination and this court finds no reason to upset the said determination.
93. The upshot of the foregoing is that the appellant's appeal is found not merited and thus, the said appeal is disallowed and dismissed entirely and the judgment and decree of the trial court is upheld. The respondents will have the costs of this appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

**L GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

**In the presence of;**

Alex Mugo - Court Assistant

Ms. Ngugi for the Appellant

No Appearance for the 1<sup>st</sup> Respondent

No Appearance for the 2<sup>nd</sup> Respondent

**L. GACHERU**

**JUDGE**

