



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kang'ethe v Bore; Cheruiyot (Third party) (Environment & Land Case  
68 of 2014) [2022] KEELC 2637 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2637 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 68 OF 2014**

**MC OUNDO, J**

**JUNE 30, 2022**

**BETWEEN**

**PAUL MAINA KANG'ETHE ..... PLAINTIFF**

**AND**

**DANIEL VICTOR BORE ..... DEFENDANT**

**AND**

**HEZRON KIMELI CHERUIYOT ..... THIRD PARTY**

**JUDGMENT**

1. Vide a Complaint dated the 18<sup>th</sup> December 2014 and filed on 22<sup>nd</sup> December 2014, the Plaintiff herein seeks for orders of eviction against that the Defendant, his agents, servants and/or assigns from land parcel No. Kericho/Kunyak S.S/286 and thereafter there be a demolition of structures constructed herein. The Plaintiff further sought for orders of permanent injunction against the Defendant, his agents, servants and/or assigns from trespassing and/or interfering with his quiet possession of land parcel No. Kericho/Kunyak S.S/286. Lastly that there be orders of mesne profits, costs and interest.
2. In response to the Plaintiff's Complaint, the Defendant herein filed Third Party proceedings against the Third Party claiming against him contribution in full (or to such extent as the honorable court may deem fit) either directly or vicariously in respect of the Plaintiff's claim.
3. The Defendant's defense was that although he acknowledged the ownership of the Plaintiff to the suit land, yet the said registration was obtained through fraud and in utter disregard of his overriding interest in the same.
4. The Third Party's defense on the other hand, and while denying the Plaintiff's allegation was that he (Plaintiff) lost his right over the suit parcel of land after having sold the same to him. That the suit was therefore frivolous and vexatious the Plaintiff having not come to court with clean hands, He sought



for the same to be dismissed with costs. The Third Party's counterclaim in his defence was that there be an order of specific performance compelling the Plaintiff (now Defendant) to transfer to the Third Party (now Plaintiff) title of all that parcel of the suit land No. Kericho/Kunyak S.S/286.

5. Having complied with the provisions of Order 11 of the *Civil Procedure Rules*, the suit proceeded for hearing on the 27<sup>th</sup> June 2017 wherein the Plaintiff, Paul Maina Kang'ethe, who testified as PW1, gave his evidence to the effect that he was a farmer and lived in Kiambu. That he was the registered owner of land parcel No. Kericho/Kunyak S.S. /286 and had the original titled deed and copy of the Green Card which he produced as Pf exh 1. He proceeded to testify that he had bought the said parcel of land from one Ignatius Wamithi Waweru, wherein he had sold the same to one Hezron Kimeli Cheruiyot, the Third Party herein, but the said 3<sup>rd</sup> Party did not pay him the full purchase price. That in the said transaction that took place in the year 1991, the agreed price was kshs.190,000/= out of which the Third Party had only paid him Kshs.30,000/= and because the transaction was not completed, he did not transfer the title to the Third Party. That the third part had then placed a caution on the suit land vide entry No 5 claiming purchaser's interest. That in the year 2008 he had found the Defendant on his land and upon inquiring why he was cultivating his land, the Defendant had informed him that he had purchased the said land from someone. That that was when he (Plaintiff) had proceeded to the land's office and obtained a title deed because as he did not have one before.
6. His evidence was that the suit parcel initially belonged to the Settlement Fund Trustees which was a settlement scheme and was initially allocated to Ignatius Wamithi. He testified that after he had found the Defendant on his land, he had reported the matter to the Chief who had sided with him that the land was his. That later the Defendant had requested him to consider selling the said parcel of land to him should he decide to sell it but he (Plaintiff) wasn't willing to sell.
7. That he then instructed his advocates M/s Moturi Mbeche & Associates to issue a demand letter to the Defendant but the Defendant did not vacate the land even after he received the letter. Consequently, he had filed the current case in court.
8. His further evidence was that at the time he bought the land, he had constructed a 2 roomed house and planted 170 coffee trees. That the house was no longer on the land and that the coffee bushes had also been uprooted. That he used to get between 500–1000Kg of coffee wherein the coffee proceeds had sold at Kshs.40/= per kilo giving him an average of about Kshs.20,000/= per annum. His request to the court was that the Defendant be evicted from his land.
9. On cross-examination, by counsel for the Defendant, the Plaintiff confirmed that he bought the land from Ignatius in 1991 and paid the full purchase price but later sold the suit parcel to the Third Party herein. That they entered into a written sale agreement before an advocate known as M/s Karigo. That the Third Party had subsequently failed to pay the balance of Kshs.160,000/=.
10. He also stated that he did not know Samson Korir and that he had stayed in Kunyak for more than 20 years. That after Hezron had failed to pay him, he had called him by phone and inquired why he had failed to pay him in full. He also stated that Third Party never took possession of the suit land since he had obtained the title deed in 2014.
11. He explained that it had taken him long to have the title transferred to his name because he had not received a letter from the Settlement Fund Trustee. He acknowledged that he did not plant the coffee as the land had coffee trees on it when he bought it. He also confirmed that he had no records to show that he used to deliver the coffee to factory. That although he left the suit land in the year 2005, his leaving was involuntary as the same was occasioned by the land clashes.



12. That he had gone to the Chief then to the District Commissioner on 10<sup>th</sup> December, 2014 but not on the 30<sup>th</sup> December, 2014 as per the letter from the District Commissioner herein marked as PMFI 2. He acknowledged that he wrote a witness statement at his advocate's office and in the said statement he had stated that he had left the suit land in the year 2008.
13. On being cross-examined by counsel for the Third Party, he had confirmed that he entered into a sale agreement with Ignatius in February 1991 wherein he had paid Kshs.165,000/= but that he had later sold the suit land to the Third Party in September 1991 wherein the said third had only paid Kshs.30,000/= and had not completed the payment. That the Third Party did not pay him Kshs.60,000/= in the year 1993 as he was staying on the suit land during the said year. He explained that he left in the year 2005 when he sensed danger and that he had left before selling his land to the Third Party.
14. That he had gone back to the suit land in the year 2008 and that was when he had found the Defendant on his parcel of land. He stated that he stayed in Kunyak from the year 1991 to 2005. That he went to the Chief after he obtained a title deed in the year 2014. That when he sold the land to the Third Party, he had no intention of disposing it and that he never received the letter herein is marked as DMFI 3 from the Third Party though he found a copy of the said letter in the settlement scheme file. He acknowledged that he had been given a Discharge of Charge dated 13<sup>th</sup> August, 2014 although he had no idea that the suit land had been charged.
15. That he had visited the District Commissioner on the 10<sup>th</sup> December, 2014 where he had found out that the Defendant had occupied his land in 2006 on the claim that he had bought the land from the Third Party herein.
16. On re-examination, he had confirmed that the Third Party never paid him the balance of Kshs.160,000/= and that was why he never transferred the land to him. That the title deed took time to process but he got the same in the year 2014. The Plaintiff closed its case.

#### **The Defence case.**

17. Daniel Victor Bore testified as DW1 to the effect that he was a farmer who lived in Kunyak Settlement Scheme within Kericho County and that he came to know the Plaintiff after the suit was filed in the year 2014. He stated that he had known the Third Party Hezron Kimeli at the time he had sold to him the suit land being Kunyak Settlement Scheme Plot No. 286 on 6<sup>th</sup> June, 2006. He went on to testify that the Third Party and him had visited an advocate who had drawn the sale agreement dated 6<sup>th</sup> June, 2006 which he produced as Df Exh 1.
18. His evidence was that the Third Party sold him 2.7 hectares of land at a purchase price of Kshs. 630,000/= whereby he had paid him in installments. That the first instalment of Kshs. 330,000/= was paid on 6<sup>th</sup> June, 2006 as shown in the agreement, the second instalment of Ksh. 230,000/- was paid on the 28<sup>th</sup> September 2006 but had not been indicated in writing. There was an acknowledgement of Ksh. 63,000/= wherein the balance of Kshs. 7,000/= was paid 7<sup>th</sup> July 2007. That the monies had been paid through the Third Party's lawyer. He proceeded to produce the acknowledgment dated 30<sup>th</sup> June, 2007 and the receipt dated 7<sup>th</sup> July, 2007 as Df Exh 2 and 3 respectively.
19. He also testified that at the time of the purchase, there was no title deed to the suit land. That the Third Party had informed him that he had also bought the land wherein he had given him (Defendant) an agreement between him (Third party) and the vendor. He produced the said agreement dated 25<sup>th</sup> September, 1991 between the Third Party and Paul Maina Kangethe (the Plaintiff) as Df. Exh 4. That



from the agreement, the Third Party had bought land parcel No. 286 which had been the same plot he had sold to him (Defendant)

20. His evidence was that after he bought the land, he had asked the Third Party to carry out all the processes so that the land could be transferred to him wherein the said Third Party had informed him that he was still waiting for the Plaintiff to conduct a search so that he could transfer the suit land to the Third Party to enable the said Third Party to transfer the said land to the Defendant.
21. The witness proceeded to testify that they had been waiting for the transfer in vain as the title to the suit land was still in the name of Plaintiff. He proceeded to testify that after he had bought the land, he had taken possession/occupation of the same on 30<sup>th</sup> September, 2006 wherein he had proceeded to develop it by planting sugar cane, graveria, blue gum, and Cyprus trees as well as fruits like avocados, bananas and mangoes. That he had also built on that land a permanent house with eight (8) rooms, a semi-permanent house containing 4 rooms, another two roomed semi-permanent house with a kitchen for his son, a two roomed semi-permanent kitchen, a specious semi-permanent store made of corrugation iron roof, bamboo walls and a timber floor and that his entire family lived on the suit land.
22. That nobody had laid claim to the suit land up to the year 2014 when this suit was filed. That after the Plaintiff had sued him, he had inquired from him the reason wherein the Plaintiff had informed him that the Third Party had not completed the purchase price and that they could not continue engaging because the matter was already in court. His evidence was that the Third Party had no problem with him (Defendant) because he was awaiting the title so that he (Third Party) could transfer the land to him (Defendant).
23. In cross examination by Counsel for the Plaintiff, and in reference to Df exh 1, the Defendant had confirmed that the parties to that document had been himself and the Third Party and that the Plaintiff's name did not appear on the agreement. He further confirmed that it related to parcel of land No. 286 and that there was no title by then. He proceeded to testify that there was a number under Settlement Fund Trustee and that the Third Party himself had conducted the search in the year 2006. That he had relied on the Third Party's information as he was the one who had sold the land to him.
24. The witness testified further that he came to know that the Plaintiff was the registered owner of the suit land after the suit was filed in 2014. He also confirmed that he did not have any agreement with the Plaintiff and that the agreement between the Plaintiff and the Third Party was dated 25<sup>th</sup> September, 1991 for a purchase price of Ksh. 190,000/= and that the first payment he saw on that agreement was for Kshs. 30,000/=. He was referred to clause 8 of the agreement wherein he stated that he only saw the last agreement which was to the effect was that the last payment of Ksh. 60,000/= had been paid. That he was not aware that the Plaintiff had not been paid his money in full as the agreement had been between the said Plaintiff and the Third Party. He also confirmed not having looked for the Plaintiff when he entered into the agreement with the Third Party and proceeded to reiterate that he had bought the land from the Third Party.
25. He was referred to clause No. 4 of their agreement wherein he had confirmed that the Third Party had not gone to the Land Control Board for purposes of transfer of the land and neither had he seen any application forms to that effect. That at the time he was buying the land, there was only sugarcane plantation thereon, which cane belonged to the retired Chief one Mr. Kipchumba Chepkwony, who had leased the land from the Third Party. He confirmed that he had not calling the said Chief to testify as his witness. He also stated that if any money was owing to the title holder, then the Third Party was supposed to pay. That he had joined the Third Party to the suit because he was the one who had sold the land to him.



26. He was cross-examination by Counsel for the Third Party wherein he had confirmed that the Third Party had sold him parcel of land No. 286 in the year 2006. That at the time, there was nobody staying on the land wherein the Third Party had told him that he had also bought it from somebody else and showed him the agreement between him (the Third Party) and the Plaintiff. He proceeded to testify that the Third Party told him that the land was still registered to the Settlement Fund Trustees and that at the time for which nobody had the title. His evidence further was that when he was buying the land, he did not know the Plaintiff.
27. He was referred to the Green Card issued on 18<sup>th</sup> December, 2014 wherein he stated that the title was opened on 3<sup>rd</sup> June, 1993 but that the Plaintiff had registered himself as a proprietor on 14<sup>th</sup> November, 2014. That as at the time he was buying the land, the said land was still registered to SFT and that there was no complaint from Settlement Fund Trustees. That immediately he got onto the land in the year 2007, he had started developing the land and lived peacefully between the years 2006-2014 without disturbance from anybody.
28. That the Third Party to whom he had no issue with, had been encouraging him to do all sorts of developments on the land as he sought for the title so that the land could be transferred to him.
29. That the Plaintiff had asked him to vacate the land because he had not been paid the full purchase price. His evidence was that he could not tell how the Plaintiff and the Third Party had got into the agreement and that if there was any balance of the purchase price owed to the Plaintiff, then the Plaintiff ought to have sought the same from the Third Party since the agreement, was between them.
30. That he had neither been shown any document to show that the agreement between the Plaintiff and Third Party had been dissolved nor issued with any notice to vacate the suit land save for the affidavit that had been filed together with the Plaint. That when the Plaintiff asked him to vacate from the land, he had gone to the District Officer Kunyak wherein the Plaintiff had been summoned but he had not shown. Instead, he had filed suit. That the meeting convened by the District Officer had been attended to by more than 30 elders wherein the Plaintiff should have just availed himself to state that he had not been paid the full purchase price.
31. He reiterated that when the Third Party sold him the land, he had showed him the agreement dated 25<sup>th</sup> September, 1991. He confirmed that the period from 1991 to 2014 was about 23 years which was a long time. That had the Plaintiff had issues on the land, he should have brought them out earlier. The Defence closed its case.

### **Third Party's case**

32. Hezron Kimeli Cheruiyot testified as the Third Party and stated that he was a farmer who worked with Lotkari Baptist International Church as a Director/Co-ordinator and lived at Kunyak Kipkelion West. That he knew the Defendant herein as he was a friend and a neighbor. He also testified that he knew the Plaintiff. His evidence was that he had sold to the Defendant land parcel No. Kericho/Kunyak / SS 286 measuring 7 acres or thereabout which he had bought from the Plaintiff and went on to adopt his statement dated 7<sup>th</sup> March, 2016.
33. He testified that he had bought two parcels of land being No. 285 and 286 but that the land in question was No. 286. That they had entered into a sale agreement with the Plaintiff on 25<sup>th</sup> September, 1991 before Thuo Karigo advocate wherein the agreed purchase price had been Kshs. 190,000/= which was to be paid in instalments. He proceeded to produce the Agreement dated 25<sup>th</sup> September, 1991 as Third Party Df exh 1.



34. He testified further that he had made several instalments the last one being on 30<sup>th</sup> March, 1993 wherein he had made a payment of Kshs. 60,000/= whereby the Plaintiff had acknowledged receipt after which he had stated that he had no further claim and was awaiting to transfer the land. The witness proceeded to produce the acknowledgment dated 30<sup>th</sup> September, 1993 as Third Party Df exh 2.
35. He testified that after the Plaintiff had sold him the land, he had taken occupation of the same after the first payment but in the year 2006, he had subsequently sold the land to the Defendant via a sale agreement dated 6<sup>th</sup> June 2006, which he produced as Third Party Df exh 3. The Defendant had taken immediate possession and occupation and had proceeded to develop the same and that the Plaintiff had never gone back to the land. That the Defendant did not owe him anything and the Plaintiff had not made any claim against him. His evidence was that the land was under Kunyak Settlement Scheme and that there were receipts which he used to be given by the SFT upon payment. He confirmed that he did not get a title after the land was sold to him but that in the year 2014, when he tried looking for the title, that he had found out that the Plaintiff had taken it and that was why he had placed a caution on the suit land on 3<sup>rd</sup> September, 2014. He produced the Green Card as Third Party Df exh 4.
36. That besides the payments made in March 1993, he had made many other payments for example on the 16<sup>th</sup> March, 1993 he had paid Kshs. 50,000/= wherein the Plaintiff had acknowledged receipt of the same and signed the acknowledgement in the presence of the late Lorna Laboso who was his witness. He produced the said acknowledgment dated 16<sup>th</sup> March, 1993 as Third Party Df exh 5.
37. He proceeded to testify that after noting that the Plaintiff had taken the title deed, they had registered a caution, visited elders, the Chief and the District Commissioner wherein many letters had been written. He proceeded to produce a letter by the District Officer to the District Commissioner dated 30<sup>th</sup> December, 2014 as Third Party Df Exh 6 and concluded his evidence by requesting the court to dismiss the case since the Plaintiff had never complained that he had trespassed on his land. He sought for the Plaintiff to be ordered to transfer the land to him as he did not owe the Plaintiff. He also prayed that the Plaintiff pays the cost of the suit.
38. On being cross-examined by the Defendant's Counsel, the witness confirmed that the Defendant had completed the obligation pursuant to their agreement of 6<sup>th</sup> June, 2006. That he took possession of the land immediately he purchased it and that prior to the filing of this case, the Plaintiff had never made any claim on the land. He confirmed that Daniel had been in occupation of the land from the year 2006 to the time of his testimony.
39. When cross-examined by Counsel for the Plaintiff, he confirmed that he bought the land in the year 1991 as per the agreement of 25<sup>th</sup> September, 1991 and that the purchase price was Ksh. 190,000/=. He confirmed that the balance was to be paid within 90 days through banker's cheque. He acknowledged that they did not make any other agreement to change the terms of the agreement dated 25<sup>th</sup> September, 1991. His evidence was that signatures appearing on the documents therein were made by the Plaintiff and that if there was a different signature in the acknowledgment, he wouldn't tell as he was not a forensic expert. He also acknowledged that they did not go before an advocate for the payments of the instalments and that the money was paid according to the need at the time.
40. When referred to paragraph 8 of the agreement, he confirmed that he understood the default clause but stated that the Plaintiff took all the money. He confirmed that acreage of parcel No. 286 was 2.7 hectares and that parcels No. 286 and 255 were adjacent to each other. When examined on appreciation of land, he had stated that the acknowledgments of the payments had been his evidence.
41. During re-examination, he reiterated that the Plaintiff had received all the money. He was referred to his Df exh 2 wherein he confirmed that there was an acknowledgment that the Plaintiff had received



all the money and that he had a witness called Samson to confirm. He wondered why the Plaintiff had never sought for the balance from him if he owed him any money because there was no case pending between him and Plaintiff despite knowledge that he was using the land. That there had no case filed by the Plaintiff accusing him of forging the signatures on the acknowledgement letters.

42. He explained that although both parcels of land showed that they measured 2.7 hectares, on the ground the acreage were different in that some lands are larger than others and the acreage shown on the title deed was an approximate. He confirmed that there was a proper boundary between both parcels of land. The Third Party closed its case and parties filed their written submissions to which I shall summarize as herein under ;

#### **Plaintiff's submissions.**

43. The Plaintiff's submission was to the effect that whereas the suit land was registered to his name, the Defendant was in occupation and utilization of the same without his authority and/or any agreement. That the land was an agricultural land wherein the Plaintiff had never signed any completion documents before the Land Control Board to transfer the land to the Defendant. That indeed there was a sale agreement between the Plaintiff and the Third Party dated 25<sup>th</sup> September 1991 which the Third Party had breached.
44. That the Plaintiff's case while adopting his recorded statements, was to the effect that he was the registered proprietor of the suit land herein being No. Kericho/Kunyak S.S/286 having purchased the same from one Ignatius Wamiti who was its original allottee. That the Plaintiff and the Third Party had subsequently entered into a sale agreement for the sale and purchase of the suit land on express terms of an agreed sale price of Ksh 190,000/=. That there had been a deposit of Ksh. 30,000/= made leaving a balance of Ksh.160,000/= which was payable by bankers cheque within three months. That the Third Party had defaulted in the payments and therefore did not take possession of the land.
45. That in the year 2014 after the Plaintiff had received title to the suit land, he had paid a visit on the same wherein he had found the Defendant in occupation. It was the Plaintiff's submission that the Defendant had trespassed on his land there having been no sale agreement between him and the Defendant.
46. That indeed the Third Party's evidence was to the effect that he had breached the sale agreement between him and the Plaintiff, and therefore he could not enter into an agreement for sale of the same parcel of land to the Defendant. That there was no evidence that the Plaintiff and the Defendant had entered into any sale agreement and the action of the Defendant of taking occupation of the Plaintiff's land was therefore criminal in nature as it amounted to the offense of forceful retainer.
47. That the Third Party had duped the Defendant into buying the suit land knowing that he had no power of sale and therefore, he should compensate the Defendant who has continued to utilize the suit land despite demand to vacate. That the Plaintiff was entitled for compensation from the Defendant of Ksh 50,000/= from the year of entry in 2006 until the filing of the suit in the year 2014 which totaled to Ksh. 700,000/=, with the interest. It was further the Plaintiff's submission that the period of limitation did not apply in the present circumstance and that his suit be allowed as prayed.

#### **The Defendant's submissions.**

48. The Defendant's submissions on the other hand was to the effect that there was no contention that the parcel of land was initially registered to the Settlement Fund Trustee and none of the parties had title to it, but that the same was registered in the year 2014 to the Plaintiff. It was also not in contention that the Plaintiff and the Third Party had entered into a sale agreement on 25<sup>th</sup> September 1991 for the



- purchase of the same at Ksh 190,000/=. That it was further not in contention that the Third Party had sold the said parcel of land to the Defendant for a consideration of Ksh. 630,000/=
49. That the controverted facts were whether the Plaintiff had given vacant possession of the suit land to the Third Party, and whether the Third Party had finalized the payment of the sale agreement between him and the Plaintiff.
50. The Defendant framed his issues for determination as follows ;
- i. Whether there was a valid sale agreement between the Plaintiff and the Third Party.
  - ii. Whether the sale agreement as between the Third Party and the Defendant was valid.
  - iii. Whether the Plaintiff held the suit parcel of land in trust on behalf of the Third Party when it was still registered to the Settlement Fund Trustee after the sale agreement between them.
51. On the first issue for determination, it was the Defendant's submission that indeed there was a valid sale agreement between the Plaintiff and the Third Party wherein the Plaintiff gave vacant possession of the suit land to the Third Party who subsequently sold it to the Defendant at a consideration of Ksh 720,000/=(sic) That had the Third Party breached the contract by failing to pay the full purchase price, the Plaintiff ought to have sought relief under Sections 39, 40 and 41 of the *Land Act*. That the Third Party had not been issued with any notice showing breach of contract of sale of land, and therefore he had been right to sell the land to anyone he so ever wished to sell to. That the Plaintiff had failed to establish a reasonable basis of vitiating or invalidating the sale agreement entered between him and the Third Party.
52. On the second issue for determination, the Defendant submitted that the Third Party having lawfully bought the land from the Plaintiff, he was entitled to own property rights as is envisaged under Section 24(a) of the Land Registration. Act.
53. That the Third Party admitted to having sold the suit property to the Defendant at a consideration of Ksh 720,000/= wherein he had put him into possession and occupation of the same. That the Defendant had bought the suit land in good faith and had expected the Third Party to effect transfer in his name. That the sale agreement between the Third Party and the Defendant had complied with the requirements of Section 3(3) of the Contract Act. That the sale agreement confirmed that the Defendant and the Third Party had the intention to create a legal relation which validated the sale agreement which was enforceable by the parties. Reliance was placed on the decided case in *Nelson Kivuvani vs Yuda Komora & Another*, Nairobi HCCC No. 956 of 1991.
54. On the last issue for determination, it was the Defendant's submission, that the suit land had initially been registered to Kuniyak Settlement Scheme. That the Third Party had made payments to the Settlement Scheme wherein receipts had been issued, but the third party was not issued with a title deed. That upon being paid the full purchase price by the Third Party, the Plaintiff who was out to enrich himself, took advantage of the non-registration of the suit parcel of land and having known its history, registered himself as proprietor, before the Third Party could do so. That the Plaintiff therefore held the suit property in constructive trust on behalf of the purchaser, as was held in the case of *Twalib Hatayan & Another vs Saggat Ahmed Al-Heidy & Others* [2015] eKLR and in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR. That the registration of the suit land to the Plaintiff was in illegal and the same ought to be registered in the name of the Defendant since he had finalized the payments to the Third Party.
55. That should the court find the Plaintiff's case merited, that the Third Party should bear the cost of the suit and accordingly indemnify the Defendant for the purchase price paid as well as other attendant



consequence to the finding in favor of the Plaintiff, in view of the admission by the Third Party that he had presented himself to the Defendant that he had beneficial interest in the suit land whereupon he had proceeded to sell it to him.

### **The Third Party's submissions.**

56. The Third Party's submission was that, pursuant to a sale agreement of 25<sup>th</sup> September 1991 between him and the Plaintiff wherein he had paid the full purchase price, and as part performance of the contract, he had taken immediate possession of the suit land in that same year of 1991. That later he had sold the said land to the Defendant who took possession and continued being in occupation up to 2014 when the Plaintiff instituted the present suit claiming ownership and seeking eviction orders against the Defendant.
57. That indeed the Plaintiff had not disputed to having sold the suit property to the Third Party but had put up a defence that that the Third Party having breached the sale agreement, he could not be in a legal position to sell the suit property to the Defendant. The Third Party's submission is that the sale agreement having been entered into by the parties on 25<sup>th</sup> September 1991, and the suit having been filed on 18<sup>th</sup> December 2014, the Plaintiff's claim on a breach of contract could not be entertained by the court as the said claim was not brought within the period of six years as is stipulated under the provisions of Section 4 (1) of the *Limitation of Actions Act*.
58. That Section 7 of the *Limitation of Actions Act*, stipulated a period of 12 years after which one was barred from recovering land on any ground including on grounds that a sale agreement had been breached. Reliance was placed on the decided case in *Dickson Ngige Ngugi vs Consolidated Bank Limited (Formerly Jimba Credit Corporation Limited & Another* (2020) eKLR to submit that the time of enforcing the cause of action lapsed 12 years from the date when the Plaintiff and the Third Party entered into the sale agreement, which was before filing of the suit. That the Plaintiff could only seek to reclaim the land from the Defendant within 12 years of the sale agreement with the Third Party. That a suit barred by limitation, is a claim barred by the law and the court cannot grant the relief sought.
59. The Third Party also relied on the case of Macharia Mwangi Maina (supra) to submit that the Third Party in part performance of the agreement was in actual and constructive possession of the suit land since 1991 and therefore he had equitable rights which were binding.
60. That by the sale agreement between the Third Party and the Plaintiff there, had been a common intention of the parties to the agreement in respect of the suit land in which the Third Party had a desire to buy and take possession of the land whereas the Plaintiff had the intention of selling the land for a consideration which had been paid. That the lack of consent of the Land Control Board did not preclude the court from giving effect to equitable principles to the doctrine of constructive trusts.
61. That the purchaser in possession had an overriding interest under the provisions of the *Land Registration Act* and the registered proprietor of the property thus retained the title in trust for the person who had gained the title under the *Limitation of Actions Act*. That at the time the Plaintiff was the registered proprietor of the suit property, the Third Party had an equitable beneficial interest arising from the occupation and possessory rights binding on the land. The Third Party was in possession of the land from 1991 up to 2006 wherein the Defendant entered onto the land and continued to be in occupation which constructively was an extended possessory right of the Third Party being the person with an equitable beneficial interest. The registration of the Plaintiff therefore was in trust for the Third Party who had contractually transferred his interest to the Defendant.
62. That the Plaintiff having known that he had sold the suit land to the Third Party proceeded to fraudulently register the same to his name instead of effecting the transfer to the Third Party. That the



provisions of Section 26 of the [Land Registration Act](#), comes to the aid of a Third Party who was an innocent purchaser and whose property had been fraudulently registered to the Plaintiff's name. That the Plaintiff cannot be allowed to keep both the money and the land as this would equate to reaping the benefits of his deception.

63. The Third Party submitted that the Plaintiff's suit was not merited and the same ought to be dismissed, that the Third Party had sold the suit property to the Defendant who had been in occupation since the year 2006 and therefore the Plaintiff should effect transfer to the Defendant of the suit parcel of land.

#### **Determination.**

64. I have considered the Plaintiff's suit herein, the Defendant's defence and counterclaim as well as the Third Party's pleadings, and the overall evidence adduced in court as well as the written submissions and the authorities herein submitted by Counsel for the parties.
65. I have also considered the uncontested facts of the matter as well as the controversial facts. To begin with, I find the uncontested facts of the matter being that the Plaintiff herein is the registered proprietor of land parcel No. Kericho/Kunyak S.S/286 the measuring 2.7 hectares having been registered as such on the 14<sup>th</sup> November 2014.
66. There is further no doubt that the suit land had been registered to the Kunyak Settlement Fund Trustees, on the 3<sup>rd</sup> June 1993, wherein on the 28<sup>th</sup> October 2014, the same was registered to one Ignatius Wamithi Waweru from whom the Plaintiff had allegedly purchased the same (no evidence was adduced on this allegation).
67. It is further not in dispute, that vide a sale agreement of the 25<sup>th</sup> September 1991, the Plaintiff herein agreed to sell to the Third Party the suit land for a sum of Ksh 190,000/= wherein a down payment of the sum Ksh 30, 000/= had been paid at the execution of the agreement. That the balance of Ksh. 160,000/= was to be paid by a bankers Cheque on or before the 30<sup>th</sup> November 1991. That the Third Party had taken possession of the suit land immediately after the sale agreement in the year 1991.
68. It is further not in contention that on 6<sup>th</sup> June 2006, the Third Party had entered into a sale agreement with the Defendant herein for the sale of the same land at an agreed price of Ksh 630,000/=. The Defendant had then been put into possession of the suit land on the 30<sup>th</sup> September 2006 wherein he has remained in occupation of the same.
69. Further it is also not in contention that pursuant to the sale agreement of the 25<sup>th</sup> September 1991, the Plaintiff had left Kunyak in 2005 and had returned in 2008 wherein he had filed suit on the 22<sup>nd</sup> December 2014, vide a Plaint dated 18<sup>th</sup> December 2014.
70. The contentious matters herein and that pursuant to the sale agreement between the Plaintiff and a Third Party on the 25<sup>th</sup> September 1991, the Third Party herein had breached the said agreements when he failed to pay the balance of Ksh 160,000/=. That by breaching the terms of contract, the Third Party had no title to pass to the Defendant as the Plaintiff had reposed the land, wherein he had registered himself as its proprietor on 14<sup>th</sup> November 2014.
71. The Third Party's contention is that pursuant to the payments of the purchase price of the suit property in full through installments, and the acknowledgement of the same by the Plaintiff as part performance of the contract, he had taken immediate possession of the suit land the suit property where he had been in actual and constructive possession from 1991. That he had therefore acquired equitable rights which were binding. That the subsequent registration by the Plaintiff meant that



he had held the suit property in constructive trust on behalf of the 3<sup>rd</sup> party, who had contractually transferred his interest to the Defendant.

72. The Plaintiff has now filed suit seeking for eviction orders against the Defendant, his agents, servants and/or assigns from land parcel No. Kericho/Kunyak S.S/286 and thereafter there be a demolition of structures constructed herein. He also seeks for orders of permanent injunction against the Defendant, his agents, servants and/or assigns from trespassing and/or interfering with his quiet possession of land parcel No. Kericho/Kunyak S.S/286. The Plaintiff also sought for orders of mesne profits as well as for costs and interest.
73. Whereas the Defendant herein filed Third Party proceedings against the Third Party claiming against him his contribution in full either directly or vicariously in respect of the Plaintiff's claim, in his defense, he acknowledged the ownership of the Plaintiff to the suit land but averred that the said registration was obtained through fraud and in utter disregard of his overriding interest in the same.
74. The Third Party's defence and counter claim on the other hand was that the suit was frivolous and vexatious. That the Third Party in part performance of the agreement was in actual and constructive possession of the suit land since 1991 and therefore he had equitable rights which were binding. That the suit was barred by the Statute of Limitations and the court cannot grant the relief sought. The Third Party sought for an order of specific performance compelling the Plaintiff (now Defendant) to transfer to the Third Party (now Plaintiff) title of all that parcel of the suit land No. Kericho/Kunyak S.S/286.
75. From the above, I find the matters arising for determination as being;
- i. Whether there was a valid sale agreement between the Plaintiff and the Third Party on the 25<sup>th</sup> September 1991.
  - ii. Whether the suit is time barred.
  - iii. Whether the Plaintiff held the suit parcel of land in trust on behalf of the Third Party.
76. On the first issue for determination, I find that, according to the 1<sup>st</sup> entry on the Green Card to parcel No. Kericho/Kunyak S.S/286 that the land was registered to the Kunyak Settlement Fund Trustees on the 3<sup>rd</sup> June 1993. The second entry was entered on the 28<sup>th</sup> October 2014 in the name of Ignatius Wamithi Waweru of Identity No. xxxx no address is shown and neither was a title deed issued. The 3<sup>rd</sup> entry was entered on the 14<sup>th</sup> November 2014 in the Plaintiff's name of Identity No. xxxx wherein a title deed was issued on the same date. On the 3<sup>rd</sup> December 2014, the Registrar entered a caution by the Third Party claiming purchaser's interest.
77. From both the oral and documentary the evidence, there is no doubt therefore that since the said parcel of land No. Kericho/Kunyak S.S/286 was not registered to the Settlement Fund Trustee as at the 25<sup>th</sup> September 1991 when the Plaintiff and the Third Party entered into a sale agreement, the same must have been either public land or community land- no evidence has been led on this assumption. However after the same became registered to the Settlement Fund Trustee on the 3<sup>rd</sup> June 1993, in essence therefore it was not available for disposal through private treaty and therefore the sale agreement of the 25<sup>th</sup> September 1991 between the Plaintiff and the Third Party was null and void ab initio, the land was never the Plaintiff's land and therefore he had no title to pass as the suit land was still government land.
78. Of interest to note in this matter is that whereas there had been an alleged sale agreement between the Plaintiff and the Third Party on the 25<sup>th</sup> September 1991, wherein vide an acknowledgment dated



30<sup>th</sup> March 1993 herein produced as Third Party Df Exh 2, the Plaintiff had acknowledged receipt of Ksh 60,000/= as the last installment of the purchase of land stating that he had no further claim, the said sale agreement had been entered into before the land had even been registered to the Settlement Fund Trustee. I note that after the registration of the same to the Settlement Fund Trustee, on 28<sup>th</sup> October 2014, the said suit land had been registered to one Ignatius Wamithi Waweru, after which it had been registered to the Plaintiff on 14<sup>th</sup> November 2014. I find that this sequence of events not adding up which leads me to conclude that the Plaintiff herein with the collusion of persons in the lands Registry connived to have the suit land registered to his name, otherwise how could he explain the scenario where he sold land to the Third Party prior to its registration, wherein after the land had been subsequently registered to the Settlement Fund Trustees, after which it had been registered to Ignatius Wamithi Waweru and then to the Plaintiff some 23 years after the sale agreement.

79. On the second issue for determination, it is clear that whereas the Plaintiff's cause of action arose in 1991 when the Third Party allegedly breached the sale contract of 25<sup>th</sup> September 1991, this suit had been instituted vide a Plaint dated the 18<sup>th</sup> December 2014 and filed on 22<sup>nd</sup> December 2014, which was more than 23 years after the time of the alleged breach of contract and which was in contravention of the provisions of Section 7 of the *Limitation of Actions Act*.
80. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit.
81. Section 7 of the *Limitation of Actions Act* provides:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person
82. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that had the Third Party breached the contact of 25<sup>th</sup> September 1991, the Plaintiff should have sued him to recover the land, but only if he did so within twelve years after the alleged breach.
83. Quite clearly the Plaintiff's claim is for the recovery of land. There is no doubt that the period of about twenty three (23) years have lapsed since 1991 wherein the Third part subsequently sold the land to the Defendant.
84. The Court of Appeal in *Mukuru Munge v Florence Shingi Mwawana & 2 others* [2016] eKLR held that:
- “The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”
85. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the Plaintiff filed this suit, the claim was



already statute barred. I find the Plaintiff's suit is not only barred by the *limitation of actions act*, but that the said registration was shrouded with fraud. It is despicable for the Plaintiff, whom I find was involved in the fraud, to waste precious judicial time by seeking to file a claim to recover land that he had sold 23 years ago, land which I believe he had acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme in cohorts with the personnel in the land's registry.

86. Indeed I do agree with the Defendant's submission that the Plaintiff who was out to enrich himself, took advantage of the non-registration of the suit parcel of land and having known its history, registered himself as proprietor knowing very well that he had disposed it of to the Third Party who had taken occupation and possession of the same, and before the Third Party could do so. I find that the Defendant's defence that the registration of the suit land in the Plaintiff's name was fraudulent, has been sufficiently discharged.

87. I further find that the Third Party in part performance of the agreement with the Plaintiff had been put into possession of the suit land, thereby creating a constructive possession of the land since 1991 and therefore he had acquired equitable rights.

88. The Black's Law Dictionary, 9<sup>th</sup> Edition; had defined trust as

“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).”

89. The Court of Appeal in the case of Twalib Hatayan & Another (Supra ) held as follows:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). 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 para1453). 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. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the Third Party. Therefore, there is no unjust enrichment to be forestalled.”

90. The Plaintiff having received the full purchase price and having put the Third Party into possession of the suit land created a constructive trust in favour of the Third Party. The Plaintiff's case lacks merit and I proceed to dismiss it with costs. I further direct, that the Plaintiff shall transfer to the Third Party title to the suit land No. Kericho/Kunyak S.S/286 within 30 days and in default the Deputy Registrar of the Honorable Court do execute the necessary documents in favour of the Third Party.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

