



REPUBLIC OF KENYA



**Kang'ethe v Ngeno; Cheruiyot (Third party) (Environment & Land  
Case 67 of 2014) [2022] KEELC 2319 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 67 OF 2014**

**MC OUNDO, J**

**JUNE 30, 2022**

**BETWEEN**

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

**AND**

**ROBERT NGENO ..... 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/285 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/285. And 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 his 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 in utter disregard of his overriding interest in the same.
4. The Third Party's defense on the other hand, 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 or 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/285.

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 while adopting his statement dated 18<sup>th</sup> December, 2014 as evidence in chief proceeded to testified as PW1 to the effect that he lived in Nairobi where he conducted business. That he filed a list of documents on 22<sup>nd</sup> December, 2014 together with a bundle of documents including the title deed and a green card in respect of No. Kericho/Kunyak S.S/285, as well as an official receipt for payment to the Settlement Fund Trustees and a Demand letter from Moturi Mbeche & Company Associates dated 19<sup>th</sup> November, 2014. He also stated that he had filed another list of documents dated 26<sup>th</sup> May, 2016 and filed on 27<sup>th</sup> May, 2016 which contained a Sale agreement dated 15<sup>th</sup> January 1993, transfer documents from the Department of Settlement with respect to No. Kericho/Kunyak S.S/285 and a Letter of clearance for issuance of title.
6. His evidence was that he did not sign the sale agreement dated 15<sup>th</sup> January, 1993 and that he was not paid the price indicated in the said sale agreement. That he never acknowledged any payment from the Defendant and neither did he sign any document. He stated that had also seen a letter dated 15<sup>th</sup> July 1993 from Kurgat & Ochieng Company Advocates which had been addressed to him although he had never received the said letter as the address belonged to Kunyak Society. That the said letter had requested him to go and sign the sale agreement as he had been paid the price in full. That he never went to see the advocates who wrote the letter.
7. His evidence was that he had seen another letter dated 20<sup>th</sup> August, 1993 but he had neither received it nor had he attended the Advocate's office and that he had only seen that letter much later in his file at the office of the Settlement Fund Trustees. That the said advocates had not sued him. He confirmed that he had only entered into an agreement in respect of No. Kericho/Kunyak S.S/286 with the Third Party in the year 1991 but the agreement had not been implemented.
8. On being cross-examined by the Defendant's Counsel, the Plaintiff acknowledged that in his statement he had stated that he returned to the suit land in the year 2008 and found his crops and trees destroyed after having left in the year 2006 before elections because the situation was tense.
9. That he had planted 1300 coffee bushes, sugar cane on 2 acres, potatoes and trees and had even constructed two timber houses on the suit land. That when he went back to the land in the year 2008, he did not find his houses and plantations which had been demolished and uprooted and so he had reported the matter to the Chief. He confirmed that he had found Robert Bore and Alexander Bore on his land. His evidence was that the Chief had held a meeting wherein it had been resolved in his favour. That he was the owner of the land.
10. He stated that Johana Ngeno had informed him that the coffee had been uprooted by Francis but that he had not reported the destruction of his house or property to the police. That he had filed suit in the year 2014 after he obtained a title deed in the year 2013. He confirmed that he bought the suit land in the 1970s but it took him long to pay for the land because the Settlement Fund Trustee had not given him an allotment letter.
11. He reiterated that he did not enter into a sale agreement with the Third Party in the year 1993, but that he had found the letter/agreement in his file at the Settlement Fund Trustee (SFT) office. He stated that the Third Party used to copy all the letters he would write to him to the SFT. He testified further



that he saw the letters after he had been to the suit property that he did not report the Third Party to the Police but had opted to file suit instead as he knew that it was a crime to forge a signature.

12. On being cross-examined by Counsel for the Third Party, the Plaintiff testified that the Third Party was not a member of Kunyak Settlement and that he did not know how the said Third Party has communicated with SFT.
13. In re-examination, he testified that when he discovered that his land had been taken away, he filed this suit. That he never sold his land to the Third Party. That he found Robert on land parcel No. 285 while David was on land parcel No. 286. The Plaintiff closed its case.

### **Defence case**

14. Robert Hamisi Ngeno, testified as DW1 to the effect that he was a farmer who lived at Kunyak in Kericho County and that he knew that he had been sued by the Plaintiff in respect of land parcel No. Kericho/Kunyak/285. His evidence was that he bought the said parcel of land from the Third Party wherein they entered into a written sale agreement dated 19<sup>th</sup> December, 2007. That he took possession of and had had lived on the said parcel of land since he bought it in the year 2007. He produced the said Sale Agreement as Df exh 1. The witness testified further that before he bought the said parcel of land, he had asked the Third Party whether the land was his whereby he had confirmed that he had bought the land from the Plaintiff where he had proceeded to show him a copy of the sale agreement dated 15<sup>th</sup> January, 1993 herein produced as Df exh 2. That the Third Party had also told him that he had paid for the land in full as per the acknowledgements dated 16<sup>th</sup> March 1993 and 30<sup>th</sup> June 1993 herein produced as Df exh 3 (a) and (b).
15. That the Third Party had informed him that he had not transferred the land to his name because it was still registered under the Settlement Fund Trustees and the process of discharging it was taking time. His evidence was that at the time of purchase, the Third Party had leased the land to Kunyak Society who had planted sugarcane and after the purchase, he had also planted sugarcane and constructed a house. That there had been a dispute regarding the period of lease between the Third Party and the Society. He proceeded to produce the Cane Harvesting agreement between Kunyak Farmers' Co-operative Society and Cane Harvesters dated 30<sup>th</sup> July, 2008 as Df exh 4. That thereafter the Third Party had written a letter to Kunyak Farmers' Co-operative Society through J.K. Kirui & Company Advocates asking them to vacate from the land.
16. That later the Plaintiff had visited the suit land claiming ownership whereby the matter had been referred to the District Officer but the Plaintiff did not show up. That the Plaintiff subsequently sent him a demand letter through his advocate after which this suit had been filed. The Defendant thus prayed that the Plaintiff's suit be dismissed as the land is his, that he was not willing to vacate the land but in case he was ordered to vacate, the Third Party refunds him the amount of money he had spent.
17. His testimony was that he had sued the Third Party so that were the case to be decided in favour of the Plaintiff, then the Third Party indemnifies him for any damages and costs he would have incurred.
18. On being cross-examined by the Plaintiff's Advocates, the Defendant responded that his Identity card No was 0446686 and reiterated that he had bought the land from the Third Party and not the Plaintiff. He also confirmed that he had not sought permission from the Plaintiff. He was categorical that in December, 2007 there were post-election skirmishes on the suit property but that he did not know whether the people from any specific community had been forced to vacate their land. He acknowledged that he did not conduct a search before he bought the land.



19. He also confirmed that at the time of the sale agreement, the Third Party had not shown him any title deed in his name as the land had not yet been transferred to his name. That he also had not been shown the discharge from the Settlement Fund Trustees. His evidence was that the discharge was to be issued to the owner of the land and that if the Plaintiff had been given the discharge, then he was the owner of the land.
20. When referred to the agreement dated 17<sup>th</sup> December 2007 produced as Df exh 1 at Paragraph 5 which stated that:

“That the vendor warrants that he is the only beneficial owner and covenants to keep the purchaser full indemnified from all losses, damages and liabilities that may arise due to the vendor’s defect and/or want of good title”.
21. He confirmed that according to the agreement dated 15<sup>th</sup> January, 1993 the completion date was 90 days from the date of the agreement and that the acknowledgements had been dated 16<sup>th</sup> March 1993 and 30<sup>th</sup> June 1993, that the second payment had been made outside the 90-day period.
22. He was further referred to Pf exh 1 for which he had confirmed that the same was a title deed, in the name of the Plaintiff which meant that the Plaintiff was the owner of the land. He acknowledged that he never went to the Land Control Board after he bought the land and neither did he have the title deed to the suit property. When referred to Df exh 4, he confirmed that his name did not appear on the agreement and that he had never entered into a sale agreement with the Plaintiff. That now that the Plaintiff wanted him to vacate from the suit property, he would be satisfied if the Third Party paid him the purchase price and the cost he had incurred.
23. On being cross- examined by the Third Party’s Counsel, the Defendant confirmed that he had bought the land in the year 2007 and that the said land had sugarcane plantations. He further confirmed that the sugarcane belonged to Kunyak Farmers’ Co-operative. His evidence was that he never saw the Plaintiff on the land and that he had first met him in the year 2014 when they were summoned by the Chief. He proceeded to testify that the Plaintiff had never raised any problem. That the letter from J.K. Kirui Advocates demanded that Kunyak Farmers’ Co-operative vacates the land and it had been written on behalf of the Third Party. He confirmed that the discharge was to be issued to the land owner.
24. When re- examined, the Defendant reiterated that before he bought the land, he did not know the Plaintiff and therefore there was no need for him to seek his permission. He testified further that at the time he bought the land, the same was still registered to the Settlement Fund Trustees. He stated that the Plaintiff got his title deed in 2014, the land was transferred to him by the Settlement Fund Trustees and that it was possible for one to sell his land and still retain the title deed. His testimony was that according to the sale agreement dated 17<sup>th</sup> December 2007, the Third Party was to indemnify him for any loss arising from the said agreement. That lack of Land Control Board consent did not bar him from getting a refund from the Third Party. He stated that he had paid Kshs. 720,000/= for the land and that at the said time, the Third Party had leased the said land to Kunyak Farmers’ Co-operative Society. The Defence closed their case.

### **Third party’s case**

25. Hezron Kimeli Cheruiyot, the Third Party testified that he was a farmer and also worked with Lotkari Baptist International as a Director. That he resided at Kunyak Kipkelion West. He acknowledged that he had been sued by the Defendant who was sued by the Plaintiff and that he knew both the Defendant and the Plaintiff. His testimony was that the Plaintiff was his neighbor in Kunyak and that the said



Plaintiff had sold to him land in Kunyak and then left the area. That he had moved to Kunyak in the year 1990 where he had and found the Plaintiff who was a resident there.

26. The Third Party adopted his statement dated the 7<sup>th</sup> March, 2016 as evidence in chief and reiterated that the Plaintiff had sold him the land. He explained further that the Plaintiff had sold him two pieces of land, being parcels No. Kericho/Kunyak/SS 285 and 286. He stated that the latter parcel was sold to him in the year 1991 wherein they had entered into a sale agreement which had been executed before an advocate.
27. He was referred to document No.2 in his list of documents wherein he had confirmed that the same was the sale agreement dated the 15<sup>th</sup> January, 1993 between the Plaintiff and himself. That the Plaintiff sold him 6 acres of land in plot No. 285 at a purchase price of Kshs. 14,000/= per acre though he could not remember the price very well wherein they had both signed the agreement. He produced the agreement dated 19<sup>th</sup> January, 1993 as Third Party Df exh. 1. His evidence was he took occupation of plot No. 285 in 1993 in the same month of January after he had paid the Plaintiff. That at the time when he got onto the land, the Plaintiff had planted coffee and because he did not need the coffee, he had uprooted the same and planted sugar cane. He proceeded to testify that he was the one who had transported the Plaintiff and his family to Zimmerman in Nairobi after the said Plaintiff asked him to ferry. This had been after the sale of the suit land. That the Plaintiff never went back on the land and the Third Party had occupied the same up to the year 2007.
28. That he had subsequently sold the plot No. 285 to the Defendant wherein they had entered into a sale agreement dated 17<sup>th</sup> December 2007. He proceeded to produce the said agreement as Third Party Df exh 2. He further testified that at the time the Plaintiff had sold to him the land, it had no title deed as the whole area was still under Settlement Fund Trustee. His evidence was that when he went to the land's office in the year 2017 and was told that the title deed had been taken by the Plaintiff, they had been advised by Counsel to place a caution because the Plaintiff had gone behind their backs to take the title.
29. That he had proceeded to place a caution on the land on the 3<sup>rd</sup> December, 2014. He produced a copy of the said green card as Third Party Df Exh.3. He proceeded to testify that after placing the caution they had reported to the Chief, the District Officer and District Commissioner wherein the Chief had written letters stating that the two plots had been sold by its proprietor. He also testified that they had had a meeting with the local residents.
30. He produced a letter dated 30<sup>th</sup> December, 2014 addressed to Deputy County Commissioner, Kericho by the District Officer as Third Party Df exh. 4. His further evidence was that there had been letters written by the Chief dated 8<sup>th</sup> December, 2014 and 4<sup>th</sup> September, 2014, in relation to the suit land, which letters he proceeded to produce as Third Party Df Exh 5 (a) (b)
31. That it had not been true that he had not bought the land and that he had not paid the Plaintiff. That had the Plaintiff had an issue, he would have reported him to the police. That he had paid the Plaintiff all the money and did not owe him even a cent. He was referred to Df exh 1 where he confirmed that he had paid the Plaintiff Ksh. 130,000/= wherein the said Plaintiff acknowledged to having received the money.
32. He concluded his evidence by stating that the Plaintiff's case had been filed after many years after he sold him land in the years 1993 and 1994. That he was 35 years old then and was now 66 years old (at the time of giving his testimony). He sought that the case be dismissed and the Plaintiff be compelled to give him the title as he did not owe him anything.



33. On being cross-examined by Counsel for the Defendant, he confirmed that he had sold plot No. 285 to the Defendant wherein they had entered into a sale agreement before Counsel. That the Defendant had completed all the issues they had agreed upon hence the said Defendant did not owe him anything. His evidence was that he sold to the Defendant the whole piece of land comprising of 8 acres as per the agreement he had produced as Third Party Df exh 2 wherein he had given the Defendant possession of the land in the same year after the said Defendant paid him the purchase price. That although he could not remember the month, he was certain that he had given the Defendant immediate possession and that the said Defendant was still in possession and occupation of the land and was utilizing it.
34. When referred to Third Party Df Exh 1, he had he stated that it had been long and therefor he could not remember how much the purchase price had been, but upon being reminded that the said purchase price had been Kshs. 130,000/=, he confirmed the same and proceeded to state that the said amount was paid in instalments and that the acknowledgment attached to the agreement was done in his presence on 30<sup>th</sup> June, 1993 as the final payment.
35. The witness further confirmed that the final payment had been made in Kunyak Shopping Center and that there were witnesses, one of them being Charles Maritim, although they did not append their signatures. That after the said payment, he had not received any demand from the Plaintiff who had moved out of the suit land in the year 1993. His testimony was that there was no election violence in the year 1993.
36. When cros-examined by the Plaintiff's Counsel, the Third Party reiterated that he knew the Plaintiff when he went to Kunyak in 1990's and that he had helped the Plaintiff to relocate after the said Plaintiff had asked him to help since he had children, chicken etc. That he (Third Party) had a pick up 504 which he used to transport the Plaintiff to Nairobi. He confirmed that the Plaintiff had sold him two pieces of land, being Nos. 285 and 286. He explained further that he bought one of the parcels, that is, parcel No. 286 in the year 1991 and that by the year 1993, he had all the documents from the Plaintiff. His evidence was that on 15<sup>th</sup> January, 1993 when they went to the advocate, they had recorded that he had paid all the money.
37. That sale agreement had been made in Nairobi, in his office on the 20<sup>th</sup> floor of Anniversary Towers. That the fees had been paid to the advocate although he did not have a receipt. He insisted that the signature on the document belonged to the Plaintiff sought for the examination of all the Plaintiffs other signatures as he was not an expert. His evidence was that by 15<sup>th</sup> January 1993, he had paid all the monies. That on 16<sup>th</sup> March, 1993 he had paid the Plaintiff Ksh. 50,000/= wherein he had remained with a balance of 70,000/=. That the Kshs. 130,000/= was not paid at one ago and that the agreement was not fake. He testified further that he had witnesses to the acknowledgments of 15<sup>th</sup> January 1993, 16<sup>th</sup> March, 1993 and 30<sup>th</sup> June, 1993. That Moses Kurgat witnessed the agreement of 15<sup>th</sup> January, 1993.
38. He stated that at the time the Plaintiff was selling the land, he had spoken to the Plaintiff's wife and his two daughters though they did not sign the agreement. That in the year 2007, the whole area was under settlement schemes and that there were pay cards as the title deeds had not come out. He testified that nobody summoned him to the Chief over the suit land, as the Plaintiff left the same in the year 1993. He stated further that he had no letter by the Chief and that he did not con the Defendant using another person's land.
39. When he was re-examined, he confirmed that the Plaintiff sold him the land and they had entered into an agreement. That he paid in instalments, and that what the advocate wrote onto the agreement could have been the sum total. He was referred to paragraph 3 of Third Party Df Exh 1 wherein he confirmed



that the same showed that it was part instalment and not full payment. His evidence was that after the sale, he had helped the Plaintiff move in the year 1993 and that since then, there had been no claim from the Plaintiff. That he had used the land to plant sugar cane up to the year 2007 when he had sold it. He was categorical that the signatures on the documents were appended by the Plaintiff. At the close of the Third Party's case the court directed that parties file and exchange their submissions.

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

40. 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 the authority and/or any agreement. That the land was an agricultural land and the Plaintiff had never signed any completion documents before the Land Control Board to transfer the land to the Defendant. That there was no sale agreement between the Plaintiff and the Third party.
41. 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/285 by virtue of having been allotted the same by the Kunyak Settlement Fund trustee in 1970. That he was subsequently registered as the proprietor wherein he had established his home and planted a sugar cane farm. He had made his last payment to the settlement fund in 1985.
42. Due to the post-election violence of 2008 he had fled from the suit land only to return and find 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.
43. That the sale agreements as well as the acknowledgement herein produced in court as evidence were all fraudulent the Third Party having faked the same to dupe his would be purchasers that he was in a position to sell land when he did not have capacity to do so. That the Third Party could not confirm as to whether he had actually met with the Plaintiff over the sale of the parcel of land nor attest to the difference in the Plaintiff's signatures both on the alleged sale agreement and the acknowledgement letter.
44. That there being no sale agreement with anyone over the suit parcel of land, and the action of the Defendant of taking occupation of the Plaintiff's land was criminal in nature as it amounted to the offense of forceful retainer.
45. That the Third Party had duped the Defendant into buying the suit land wherein 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 since entry in 2007 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.**

46. 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. That the same had been subsequently registered to the Plaintiff in the year 2014. That it was also not in contention that the Plaintiff and the Third Party had entered into a sale agreement wherein the Third Party had sold the suit land to the Defendant for a consideration.



47. 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.
48. The Defendant framed their 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 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.
49. 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 after acknowledging the purchase price. The Third Party then sold the suit land to the Defendant.
50. That had the Third Party breached the contract by failing to pay the full purchase price, the Plaintiff ought to have sought relief pursuant to the provisions of 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.
51. On the second issue for determination, the Defendant submitted that the Third Party having lawfully bought the suit land from the Plaintiff he was entitled to own property rights as is envisaged under Section 24(a) of the Land Registration. Act.
52. That the Third Party admitted to having sold the suit property to the Defendant at a consideration 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 had 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 v Yuda Komora & Another*, Nairobi HCCC No. 956 of 1991.
53. On the last issue for determination, it was the Defendant's submission, that the suit land had initially been registered to Kunyak Settlement Scheme up to the year 2014, wherein 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 v Saggat Ahmed Al-Heidy & Others* [2015] eKLR and in the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] e KLR. That the registration of the suit lands 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.
54. 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.**

55. The Third Party's submission was that, pursuant to a sale agreement of 15<sup>th</sup> January 1993 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 1993. 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.
56. 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, could not be in a legal position to sell the suit property to the Defendant. The third party's submission was that the sale agreement having been entered into by the parties on 15<sup>th</sup> January 1993, 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*.
57. 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 v 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 was a claim barred by the law and the court cannot grant the relief sought.
58. The Third Party also relied on the case of *Macharia Mwangi Maina* (supra) to submit that in part performance of the agreement he was in actual and constructive possession of the suit land since 1993 and therefore he had equitable rights which were binding.
59. 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.
60. That the purchaser in possession had an overriding interest under the provisions of the *land registration act* and the registered proprietor of the property they 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 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 1993 up to 2007 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.
61. 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*, came to the aid of the 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.

62. The Third Party submitted that the Plaintiff's suit was not merited and the same ought to be dismissed, the Third Party had sold the suit property to the Defendant who has been in occupation since the year 2007 and therefore the Plaintiff should effect transfer to the Defendant of the suit parcel of land.

### **Determination.**

63. I have considered the Plaintiffs 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 their written submissions and the authorizes herein submitted by counsel for the parties.
64. 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/285 the measuring 2.7 having been registered as such on the 25<sup>th</sup> August 2014.
65. It is further not contested that the suit land had been registered to the Kunyak Settlement Fund Trustees, on the 3<sup>rd</sup> June 1993, wherein on the 25<sup>th</sup> August 2014 the same was registered to the Plaintiff and a title deed issued on 25<sup>th</sup> September 2014. A caution was subsequently registered by the Third Party on the 3<sup>rd</sup> December 2014.
66. It is further not in contention that on 19<sup>th</sup> December 2007, the Third Party had entered into a sale agreement with the Defendant herein for the sale of the suit land at an agreed price of Ksh 720,000/= . The Defendant had been put into possession of the suit land after the sale agreement in 2007 wherein he has remained in occupation of the same as at the time the suit was filed on the 22<sup>nd</sup> December 2014, vide a Plaint dated 18<sup>th</sup> December 2014.
67. What is in contention however is whether or not the Plaintiff herein had sold the suit land to the Third Party who subsequently sold it to the Defendant, the Plaintiff having denied signing the sale agreement dated 15<sup>th</sup> January 1993, receiving the price indicated in the sale agreement or having knowledge of any payments from the Third Party or Defendant.
68. The Third Party's contention is that via the sale agreement of 15<sup>th</sup> January 1993 which had been produced as, Df Exh 1, he had purchased the suit land from the Plaintiff for Ksh 130,000/= wherein he had paid and the purchase price through installments which had been acknowledged by the Plaintiff. Initially (as per the agreement) he had first paid Ksh 10,000/=, on the 16<sup>th</sup> March 1993, he had added Ksh 50,000/= leaving a balance of 70,000/=. That after the sale, he had helped the Plaintiff move to Zimmerman in Nairobi 1993, wherein he had taken possession of the suit land uprooted the Plaintiff's coffee bushes and planted sugar cane up to 2007 when he sold it to the Defendant who then took possession.
69. 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/285 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/285, for orders of mesne profits as well as for costs and interest.
70. 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 had been obtained through fraud and in utter disregard of his overriding interest in the same.

71. 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 1993 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/285.
72. From the above to matters that arise for determination are as follows;
  - i. Whether there was a valid sale agreement between the Plaintiff and the Third Party on the 15<sup>th</sup> January 1993.
  - 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.
73. 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/285 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 25<sup>th</sup> August 2014 in the name of Plaintiff of Identity No. 7634151 wherein a title deed was issued on the 25<sup>th</sup> September 2014. On the 3<sup>rd</sup> December 2014, the Registrar entered a caution by the Third Party claiming purchaser's interest.
74. It is the Plaintiffs case that he bought the suit land in the 1970s, and completed the payment to the Settlement Fund Trustees in 1985, no agreement document was produced in evidence to support the said allegation, and further seeing from that the green card to the suit land that the same had been registered to the Kunyak Settlement Fund Trustees on the 3<sup>rd</sup> June 1993, it simply means that before the said registration, the land either belongs to the Government or the Community- no evidence has been led on this assumption. This land was therefore not available for disposal through private treaty. How and from where the Plaintiff acquired the same in the 1970's before it had been registered to the Kunyak Settlement Fund Trustees on the 3<sup>rd</sup> June 1993 and after which he acquired the title some 44 years later is a tough question to answer.
75. Indeed it goes without saying that pre-1993, the suit land had been unregistered land and therefore it belonged to the people of Kenya collectively either as public or community land and was therefore not available for disposal or otherwise used except in terms of legislation specifying the nature and extent of such right. Now had the land been private land (there is no evidence) it was incumbent for the Plaintiff to show the history of its ownership over the course of a minimum of 15 years immediately preceding the sale, by tracing an unbroken 'chain of ownership' from owner to owner and ending with him. This was not done and even after his registration as the proprietor, no letters of allotment had been produced as evidence that indeed the said land had been allotted to him.
76. The Third Party's case is that he came onto the suit land the 1993 after purchasing the same from the Plaintiff wherein he had taken possession and occupation up to 2007 when he sold the suit land to the Defendant. Subsequently the Plaintiff showed up in the year 2014 registered himself as proprietor and lay claim to the suit land. The Third Party's evidence was supported by documentary evidence which is cognate and believable. The Plaintiff's claim that the said agreement for sale and acknowledgement letters were fraudulently obtained was displaced there having been no evidence that he had reported



the matter to the police even upon his return to the suit land in 2008. Instead he had waited for six (6) years to file the current suit seeking for eviction of the Defendant from the land.

77. I find that indeed the Plaintiff in sold the suit land to the Third Party vide the sale agreement of 15<sup>th</sup> January 1993 herein produced as Df exh 1. This being the finding of the court, it 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 was subsequently registered to the Settlement Fund Trustees, after which it had been registered to the Plaintiff some 21 years after the sale agreement and 44 years after purchase of the same. The Plaintiff now seeks to recover land some 21 years later in contravention of the provisions of Section 7 of the *Limitation of Actions Act*.
78. 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.
79. 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
80. 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 pursuant to the Third Party taking possession and occupation of the suit land in 1993, the Plaintiff should have sued him to recover the land, but only if he did so within twelve years after the alleged breach.
81. Quite clearly the Plaintiff’s claim is for the recovery of land. There is no doubt that the period of about twenty one (21) years have lapsed since 1993 wherein the Third part took possession of the land and subsequently sold it to the Defendant in the year 2007.
82. 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.”
83. 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 21 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.



84. 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 of the suit 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.
85. I 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 1993 and therefore he had acquired equitable rights.
86. 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).”
87. 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.”
88. I therefore find that the Plaintiff to 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/285 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**

