



REPUBLIC OF KENYA



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Naitore (Suing as the Legal Representative and Administratrix of the Estate of M'arimi M'aburi) v Muchai & another (Environment and Land Appeal 19 of 2023) [2025] KEELC 3146 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 19 OF 2023**

JO MBOYA, J

APRIL 2, 2025

BETWEEN

EVERLYN NAITORE (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF M'ARIMI M'ABURI) APPELLANT

AND

M'ITHINJI MUCHAI 1ST RESPONDENT

VERONICA KAJUJU 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Hon. S.K Ng'etich – SPM in Nkubu ELC case NO. 8 of 2019 delivered on 26th day of July 2023)

JUDGMENT

1. The Appellant [who was the Plaintiff in the subordinate court] filed the Plaintiff dated 1st February 2019; and wherein the Appellant sought the following reliefs;
 - a. A declaration that L.R No. abogeta/L. Kithangari/731 now L.R No's Abogeta/L. Kithangari/1911 and 1912 in trust and belongs to the estate of the deceased M'Arimi M'Aburi.
 - b. A declaration that the transfer of land Abogeta/L.Kithangari/1911 & 1912 to the defendant was in breach of trust and fraudulent and the same should be cancelled.
 - c. An order that the Defendant be ordered to transfer the parcel of land Abogeta/L. Kithangari/1911 & 1912 to the estate of M'Arimi M'Aburi (deceased) and in default the executive officer of the Hon. court be empowered to sign all the requisite transfer documents to give effect to the orders of the court herein.
 - d. Costs and interests at court rates.



2. The Defendant duly entered an appearance and thereafter filed a statement of defence dated 9th October 2019; and wherein the Defendant denied the allegations contained at the foot of the Plaintiff. Furthermore, the Defendant contended that the original property was indeed gifted to him by M'Arimi M'Aburi [now Deceased] and thus the registration of the original property in his [Defendant's] name was lawful and legitimate.
3. On the other hand, the Defendant also contended that the original property belonged to and was registered in the name of M'Arimi M'Aburi [now deceased] prior to the land in question being sold to and transferred in his [Defendant's] favour.
4. Subsequently, the Appellant herein amended the Plaintiff culminating into the amended Plaintiff dated the 1st April 2019; and wherein the 2nd Respondent was joined as a party. For good measure, the 2nd Respondent is the current registered owner of parcel No. Abogeta/L. Kithangari/1912.
5. Following the amendments of the Plaintiff the 1st and 2nd Respondents' proceeded to and filed their respective statement of defence. Instructively, the 1st Respondent filed a statement of defence to the amended Plaintiff dated 9th October 2019; while the 2nd Respondent filed a statement of defence dated 4th August 2020.
6. The suit by the Appellant was heard and disposed of vide Judgment rendered on the 26th July 2023; whereupon the learned trial magistrate found and held that the Appellant had neither proved trust nor fraud as against the Respondents. In this regard, the learned trial magistrate dismissed the Appellant's suit with costs to the Respondents.
7. Aggrieved by and dissatisfied with the Judgment and decree of the trial court, the Appellant filed the memorandum of appeal dated the 24th August 2023; and wherein the Appellant has highlighted the following grounds of appeal;
 - i. The learned trial magistrate erred in law and fact by failing to find that the 1st respondent did not buy any land the appellant's father, M'Arimi M'Aburi and the 1st Respondent did not tender any evidence to demonstrate how he acquired the Appellant's late father's land.
 - ii. The learned trial magistrate erred in law and he failed to find that the 1st respondent did not produce any documents to demonstrate how he acquired the land from the Appellant's late father.
 - iii. The learned trial magistrate further erred in law and fact that he failed to find that the 1st Respondents evidence was not in tandem with his pleadings to the effect that he bought any land from the appellant's father as there was no evidence to support his case as required by the law on the acquisition of land.
 - iv. The learned trial magistrate erred in law and fact in that he failed to find that he law on the fraud was correctly preferred against the 1st Respondent.
 - v. The learned trial magistrate erred in law and fact by finding that the 1st Respondent had good title to pass over to the 2nd Respondent as the resultant title held by the 2nd respondent was tainted with fraud since there was no evidence of the alleged purchase price by the 1st Respondent hence there was no basis or justification upon which the 1st Respondent could have been lawfully registered as the absolute owner of the parcel of land L.R No. Abogeta/ L.Kithangari/731 which he later subdivided into the resultant parcel NO's L.R No. abogeta/ L. Kithangari/1911 and L.R No. abogeta/L. Kithangari/1912.



- vi. The learned trial magistrate erred in law and fact in that he failed to find that the appellant having pleaded fraud it was upon the 1st respondent to demonstrate that the Appellant's father sold or gifted him the land.
 - vii. The learned trial magistrate erred in law and fact in that the appellant and her family discovered the 1st Respondent's fraudulent dealings in the year 2019.
 - viii. The learned trial magistrate erred in law and fact in that he found that the transfer of the parcel of land No. Abogeta/L. Kithangari/1912 to the 2nd respondent was done legally through the land control board when there was no evidence to support such a finding.
 - ix. The learned trial magistrate erred in law and fact that he failed to consider the Appellant's submissions and the judicial authorities thereof, despite the same having been relevant to the case.
 - x. The decision of the trial magistrate is against the weight of evidence and is bad in law.
8. The appeal beforehand came up for directions, whereupon the court ordered that the appeal be canvassed by way of written submissions. Furthermore, the court also circumscribed the timelines for the filing and exchange the written submissions.
 9. The Appellant proceeded to and filed written submissions dated 14th October 2022, whereas the Respondents do not appear to have filed any written submissions. I say the Respondents do not appear to have filed written submissions because none of the submissions are traceable on the court tracking system [CTS] of the Judiciary. In any event, I must underscore that I have cross-checked the case track system up to and including 2 o'clock of 1st of April 2025.
 10. The Appellant has raised and highlighted three [3] salient issues at the foot of the written submissions. The issues raised and canvassed by the appellant are namely; that the learned trial magistrate adopted a slanted and a skewed approach in evaluating the evidence tendered by the appellant and thereby arrived at an erroneous conclusion; the learned trial magistrate failed to consider and appreciate that the 1st Respondent was approbating and reprobating at the same time; thirdly, that the title in favour of the Respondents was procured in breach of trust and vide fraud.
 11. Regarding the first issue, learned counsel for the appellant has submitted that the appellant tendered and produced before the court plausible and cogent evidence to demonstrate that at the time the original parcel of land was being registered in the name of the 1st Respondent, the family of M'Arimi M'Aburi [now Deceased] comprising of the appellant and her two [2] sisters were residing on the original land parcel of land.
 12. Furthermore, learned counsel for the appellant has also submitted that in so far as the suit property was under the occupation and use of the family of M'Arimi M'Aburi [now deceased], the registration of the original parcel of land in the name of the 1st Respondent could not therefore extinguish the rights of the appellant and her two [2] sisters who were resident on the original parcel of land.
 13. Arising from the foregoing, learned counsel for the appellant has therefore submitted that the appellant properly established and proved that the original parcel of land was held on trust for the family of M'Arimi M'Aburi [now deceased] by the 1st Respondent. To this end, learned counsel for the appellant has cited and referenced the holding in the case of M'Inoti vs Naomi Karegi M'Imanyara (2014) eKLR and Felister Muthoni Nyaga vs Peter Kayo Mugo (2016) eKLR, respectively.



14. In respect of the second issue, learned counsel for the appellant has submitted that the 1st Respondent adopted a fluid position, which kept changing and alternating from one position to the other. In particular, it was submitted that on one hand the first Respondent contended that the original parcel of land was gifted to him [1st Respondent] by M'Arimi M'Aburi [now deceased] on the basis of having married Jane Nchugune {PW 4}, while on the other hand, it was contended that the 1st Respondent would adopt and convey a position that same bought the original parcel of land from M'Arimi M'Aburi [now deceased] and allegedly paid the consideration of Kshs.500,000/= only.
15. Despite the conflicting position adopted and taken by the 1st Respondent, learned counsel for the appellant has submitted that the learned trial magistrate failed to appraise and address the conflicting position[s]. In this regard, it has been submitted that the manner in which the learned trial magistrate evaluated evidence does not meet the statutory threshold of fairness and impartiality.
16. Thirdly, learned counsel for the appellant has submitted that in so far as the 1st Respondent's title to the original parcel of land and by extension the resultant sub-divisions were under challenge, it behooved the 1st Respondent and by extension the 2nd Respondent to account for the manner in which same acquired and became the registered owners of the suit property.
17. Further and at any rate, learned counsel for the appellant has submitted that the appellant duly tendered and provided evidence to demonstrate that the process attendant to and leading to the registration of the original parcel of land in the name of the 1st Respondent was vitiated and thus same ought to be nullified.
18. In support of the foregoing submissions, learned counsel for the appellant has cited and referenced inter alia the decision in the case of *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR and *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* (2015) eKLR.
19. I have indicated elsewhere hereinbefore that I cross-checked the CTS of the court and I was unable to trace any submissions by and on behalf of the Respondents. Nevertheless, there is no gainsaying that even in the absence of submissions by a party to the appeal, the court is still obligated to undertake its statutory mandate in accordance with the prescription of section 78 of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya.
20. Having reviewed the record of appeal, the evidence which was tendered before the court [both oral and documentary] and having taken into account the submissions on record, I come to the conclusion that the determination of the instant appeal turns on three [3] salient issues; namely; whether the appellant established and demonstrated trust and if so, whether the trust was breached; whether the transfer of the original parcel of land to and in favour of the 1st Respondent was vitiated by fraud; and whether the appellant is entitled to the reliefs that were sought at the foot of the amended *Plaint* or otherwise.
21. Before venturing to address and deal with the issues which have been highlighted in the preceding paragraphs, it is important to underscore that this being the 1st appellate court, the jurisdiction of the court while entertaining and adjudication upon the first appeal is legally circumscribed. [see Section 78 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].
22. Nevertheless, there is no gainsaying that in the course of entertaining and adjudicating upon the first appeal, the court is clothed with the mandate, authority and jurisdiction to undertake exhaustive review, appraisal, evaluation and scrutiny of the evidence that was tendered before the trial court and thereafter to arrive at an independent conclusion based on the evidence on record.
23. Be that as it may, the 1st appellate court is called upon to exercise caution and due circumspection so as to ensure that the court only departs from the factual findings and conclusions of the trial court,



where it is evident and apparent that the conclusions arrived at are contrary to the evidence on record; perverse to the evidence or better still where there is demonstrable error of principle.

24. Pertinently, unless the court is able to discern and /or establish the foregoing issues and or matters, the court is called upon to exercise deference to the findings of the trial court, taking into account that the court neither heard nor saw the witness[es] testify.
25. The jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

26. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus:-

“ Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sottos Shipping versus Sauviet Sohoid*, the Times, March 16,1983.

It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in *Peters versus Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429:

“ It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses.”



27. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the court of appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the court held as hereunder;

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“ Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

28. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, the Appellant [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.
29. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at, were perverse to the evidence on record.
30. Regarding the first issue, namely; whether the appellant established and proved that the registration of the original parcel of land in favour of the 1st Respondent was on trust, it is imperative to recall that the original parcel of land belonged to and was registered in the name of M’Arimu M’Aburi [now deceased]. Furthermore, it is also apparent that M’Arimu m’Aburi had erected and established his homestead on the suit property. To this end, it is apposite to take cognizance of the contents of paragraph 9 of the amended Plaint, as well as the witness statement of the appellant, which was adopted and deployed as the appellant’s evidence in chief.
31. Additionally, there is no contest on the question that M’Arimu M’Aburi [now Deceased] was the Father of the appellant and PW 4 respectively. Besides, evidence abound that both the appellant and PW 4 were [and are still] residing on the original parcel of land, prior to its sub-division by the 1st Respondent.
32. Other than the foregoing, it is also worth recalling that the 1st Respondent herein entered into a marital relationship with Jane Nchugune [PW 4], who is a daughter of M’Arimu M’Aburi [now deceased]. Besides, evidence was also tendered that as a result of the marital relationship between the 1st Respondent and PW 4, the 1st Respondent entered upon and commenced to reside on the original parcel of land.
33. At any rate, it was the testimony of the 1st Respondent that PW 4 is his wife and that same [1ST Respondent] has built for PW 4 a house on the original parcel of land. In addition, the 1st Respondent also testified that same still goes to the homestead which was built on the suit land.
34. On the other hand, it is also imperative to recall and reiterate that the appellant who testified as PW 1 averred that the original parcel of land and by extension the suit properties, were part of the ancestral land.



35. The entirety of the evidence that was tendered by the appellant and her witnesses; and more particularly, the fact that what comprises of the suit properties constitutes ancestral land and wherein M'Arimi M'Aburi [deceased] had established his homestead, was not controverted.
36. Additionally, the evidence that the appellant and her sister PW 4 were resident on the suit property was also not controverted. What comes to mind is whether M'Arimi M'Aburi [now Deceased] could have [sic] gifted the original parcel of land to the 1st Respondent in a manner to confer upon the 1st Respondent absolute title to and in respect of the suit property.
37. Quite clearly, even though the 1st Respondent acquired title to and became the registered owner of the original parcel of land, his acquisition and registration of the original parcel of land was subject to the occupation of the original parcel of land by the family of M'Arimi M'Aburi [now deceased].
38. In any event, there is no gainsaying that the registration of a particular person, the 1st respondent not excepted, as the owner of land [in this case the original parcel of land] does not extinguish trust, including customary trust, which has since been confirmed to be an overriding interest on land. [See the Decision of the Supreme Court in the case of Isaac Keebia versus M'Lintari Theuri [2018]eklr]
39. Furthermore, the provisions of sections 25 and 28 of the [Land Registration Act](#) 2012 (2016) are instructive. Suffice it to reproduce the provisions of sections 25 and 28 of the [Land Registration Act](#) [supra].
40. Same stipulates as hereunder:

Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently, for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

28. Overriding interests

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

- (a) deleted by [Act No. 28 of 2016](#), s. 11(a);
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;



- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) deleted by [Act No. 28 of 2016](#), s. 11(b);
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law, Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.

41. Flowing from the foregoing, I come to the conclusion that the manner in which the original parcel of land [now sub-divided] was transferred and registered in the name of the 1st Respondent did not extinguish the rights and interest of M'Arimi M'Aburi [now deceased] and his family, including the appellant and PW 4, respectively.

42. On the other hand, it is imperative to underscore that the mere registration of the 1st Respondent as the owner of the original parcel of land, despite the occupation by the family of M'Arimi M'Aburi [now deceased] did not confer the 1st Respondent with absolute and exclusive rights to the original parcel of land.

43. In the case of *M'Inoti Nthai vs Naomi Karegi M'Imanyara (2014)* eKLR the Court of Appeal stated as hereunder;

“However, since the same registration recognizes trust in general forms without specifically excluding trusts originating from customary land and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition by the Registered [Land Act](#), of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because according to the proviso to Section 28, such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee.

A trust arose from the possession and occupation of the land by Gerald which had the protection of Sections 28 and 30(g) of the Act”.[Emphasis supplied].

44. Other than the fact that the registration of the 1st respondent as the owner/proprietor of the suit property did not extinguish the rights of the appellant and PW 4, who were/are in occupation of the land, there is yet another perspective that merits due consideration and analysis. The perspective touches on and concerns whether indeed the transfer of the land in favour of the 1st Respondent was conscionable.



45. To start with, the 1st Respondent contended that the original parcel of land was transferred and registered in his name as a gift. Furthermore, the copy of the green card/register of the original parcel of land, which was tendered in evidence, shows that the transfer and registration of the original parcel of land in favour of the 1st Respondent was on the basis of [sic] gift.
46. Nevertheless, it is common ground that even transfers predicated and premised on [sic] gifts must be registered on the basis of a transfer instrument, which would show that the previous owner of the land indeed gifted the land to the subsequent owner in this case, the 1st Respondent. Suffice to underscore that the production of the transfer instrument by the 1st Respondent to vindicate the claim that the original parcel of land was indeed gifted unto him, would have gone a long way in proving [sic] the gift.
47. Nevertheless, there is no gainsaying that the 1st Respondent who has invoked/deployed gift as the basis of the transfer and registration of the original parcel of land in his favour, did not tender and or avail the said instrument of Transfer.
48. Moreover, it is also worthy to note that where an immovable property is being gifted, the giftor in this case M'Arimi M'Aburi [now Deceased] would be obligated to reduce the gift into writing [Deed] and thereafter the instrument would be registered. The law as pertains to gifts, whether same be inter vivos or gift mortis causa, was highlighted in the case of In re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015]eKLR where the court stated thus;

For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

49. In the absence of any deed and in the absence of the instrument of transfer [if any] signed by M'Arimi M'Aburi [now deceased] indicating that same was gifting the original parcel of land to the 1st Respondent, I hold serious doubts as to the veracity of [sic] the gift that has been adverted to by the 1st Respondent. In any event, it is not lost on the court that the moment the appellant impleaded trust and thereafter raised the critical evidence including occupation by the family of M'Arimi M'Aburi and the age of the said deceased, the evidential burden shifted to the 1st Respondent to establish and prove [sic] the gift.



50. To my mind, the circumstances underpinning the registration of the original parcel of land in favour of the 1st Respondent, bespeak an unconscionable transaction, which ought not to be sanctioned and countenanced by a conscientious court of law.
51. Simply put, the circumstances surrounding the impugned transaction call into aid the invocation and inference of trust.
52. In the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) the Supreme Court stated as hereunder;

The *Trustee Act*, cap 167 Laws of Kenya defines a “trust” and “trustee” as extending to implied and constructive trusts. The Black’s Law Dictionary, 9th edition defines a 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).”

“

“67. It further defines a constructive trust at pg 1649 as: “An equitable remedy that a court imposes against one who has obtained property by wrongdoing.

68. Halsbury’s Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts: “A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct, notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate. The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive. Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust. Exceptionally, the agreement, arrangement or understanding may be arrived at after the date of the original



acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust: “The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”
70. Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows: “As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”; and, again, at p. 3413, quoting Judge Cardozo “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”



The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) stated thus:

“Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same..”

72. As has been established, therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

53. Furthermore, the court stated ventured forward and stated thus;

From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

54. I have said enough to demonstrate that the totality of the evidence that was tendered by and on behalf of the appellant demonstrated that the registration of the original parcel of land to and in favour of the 1st Respondent did not extinguish the rights, claims and interests of the appellant and her sister, namely, PW 4.

55. Further and in any event, what becomes apparent is that the 1st Respondent procured the impugned registration under the guise/pretext of having married Jane Nchugune [PW 4] and upon accruing the registration same [First Respondent] left PW 4. Quite clearly, the conduct of the 1st Respondent must not be allowed to accrue the undue advantage of taking away what otherwise constitutes the ancestral land under the occupation of the appellant and her sister.

56. Arising from the foregoing, I am constrained to and do hereby depart from the findings of the learned trial magistrate, who on the contrary held that there was no evidence to underpin a claim for trust and breach thereof.

57. In respect of the second issue, namely; whether the appellant has also demonstrated fraud as against the 1st Respondent, it is worthy to recall that other than purporting that the original property was [sic] gifted to him, the 1st Respondent also purported to have bought [purchased] the original parcel of land.

58. Nevertheless, there is no gainsaying that no sale agreement was ever tendered and produced before the court. However, the appellant herein and her witnesses were categorical that the deceased never sold the original parcel of land to the 1st Respondent. Furthermore, it was posited that no sale agreement was ever executed. In addition, the appellant and witnesses also invoked the position that the impugned transfer was without due consideration.

59. The evidence which was tendered by the appellant and her witnesses other than proving trust, also demonstrated that the 1st Respondent deployed tricks and fraud in procuring the registration of the suit property in his name.



60. Sample this. On one hand, the 1st Respondent contends that the original parcel of land was [sic] gifted unto him. On the other hand, the same 1st respondent makes a 360^o turn and contends that the original parcel of land was sold and transferred to him. Furthermore, the 1st Respondent purports that same paid the consideration of Kshs.500,000/= only.
61. Three things do arise. If the land was indeed sold and transferred to the 1st Respondent, then the 1st Respondent should have availed and tendered before the Court a copy of the sale agreement [if any] to underpin his claim pertaining the purchase/sale of the land. Suffice it to observe that no such sale agreement was tendered.
62. Secondly, the contention by the 1st Respondent that the land was sold unto him and that same paid the agreed consideration, defeats the contents of the green card/register of land which was tendered as evidence before the court.
63. Thirdly, whichever way one looks at it, the transaction in favour of the 1st Respondent would not have been procured and or obtained in the absence of the land control board consent in accordance with section 6 of the [Land Control Act](#), cap 302 Laws of Kenya.
64. In view of the foregoing, I also come to the conclusion that the transaction touching on and concerning the registration of the original parcel of land in favour of the 1st Respondent was also [equally] vitiated by fraud.
65. I am aware that fraud must not only be pleaded, but must be strictly proved. However, it is not lost on me that the standard of proof does not go to the extent of beyond reasonable doubt. Pertinently, the standard of proof is on the intermediate standard, namely; the one that lies between a balance of probabilities and beyond a reasonable doubt.
66. The standard in question was highlighted in the case of *Kuria Kiarie & 2 others vs Sammy Magera* (2018) eKLR where the Court of Appeal stated thus;

“25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

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

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the



respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.

Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

67. As pertains to the last issue, namely; whether the appellant was entitled to the reliefs sought at the foot of the amended Plaintiff, it must have become crystal clear that the transactions impacting upon the original parcel of land and the subsequent sub-division thereof were vitiated by breach of trust as well as fraud.
68. I am afraid that had the learned trial magistrate adopted an objective and pragmatic approach in the evaluation and analysis of the evidence, the same would no doubt have come to the conclusion that the reliefs sought were merited.
69. I am aware that by dint of section 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, this court is clothed with the same mandate and jurisdiction to grant the orders which the trial court could have granted.
70. Consequently, and in the premises, I come to the conclusion that the appellant herein duly placed before the court plausible, credible and cogent evidence to demonstrate that same [appellant] was entitled to the reliefs that were sought.
71. Before venturing to proclaim the appropriate reliefs, there is one more issue that merits mention. The issue touches on whether the 2nd Respondent can invoke and propagate a claim based on bona-fide purchase for value without notice.
72. To my mind, the moment a court of law finds and holds that the title under reference was procured illegally, the provisions of section 26 (1) (b) of the *Land Registration Act*, 2012 [2016] springs into action. In this case, the 1st Respondent cannot partake of and benefit from the plea of bona-fide purchaser. In any event, due diligence [if any] would have shown the 2nd respondent that the land in question was under the occupation of the family of M'Arimi M'Aburi [now deceased].

Final Disposition:

73. Flowing from the analysis which has been highlighted in the body of the Judgment and taking into account the principles enumerated in *Selle & another vs Associated Motor Boat Ltd (1968) E.A*; *Peters vs Sunday Post Ltd (1958) E.A*; *Abok James Odera T/A A.J Odera & Associates Advocates vs J.P Machira (2013) eKLR* and *Gitobu Imanyara vs A.G (2016) eKLR*, I come to the conclusion that the appeal is meritorious.
74. Consequently, and in the premises, the final orders of the court are as hereunder;
 - i. The Appeal be and is hereby allowed.
 - ii. The Judgment and decree of the trial court dated and delivered on 26th of July 2023 be and is hereby set aside.



- iii. The Appellants' claims at the foot of the further amended Plaint dated 1st April 2019; be and are hereby granted.
- iv. Costs of the Appeal be and are hereby awarded to the Appellant to be borne by the Respondents jointly and or severally.
- v. The Appellant shall also have costs of the suit in the subordinate court.

75. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF APRIL 2025.

OGUTTU MBOYA

JUDGE.

In the presence of :

Mutuma- Court Assistant.

Miss Mugo for the Appellant.

No appearance for the Respondents.

