



REPUBLIC OF KENYA



**Kinyanjui v Mwaniki (Environment and Land Appeal E040 of 2024)
[2025] KEELC 4022 (KLR) (26 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E040 OF 2024**

JA MOGENI, J

MAY 26, 2025

BETWEEN

FRANCIS KAHURA KINYANJUI APPELLANT

AND

WILLIAM KINUTHIA MWANIKI RESPONDENT

*(Being an appeal arising from the Judgment of the Learned Honorable C.
Mburu Principal Magistrate delivered on 27th March, 2024 in Kikuyu
MCELC/E013/2020 Francis Kahura Kinyanjui vs William Kinuthia Mwaniki)*

JUDGMENT

1. By a Memorandum of Appeal dated the 26/04/2024 the Appellant’s appeal against the whole of the Judgment delivered by Hon. C. Mburu Principal Magistrate in Kikuyu on 27/03/2024. The genesis of this Appeal is the Judgment of the Principal Magistrate Hon. C Mburu in the Kikuyu MCELC/E013/2020 where he decided in favour of the Respondent and dismissed the Appellant’s suit in totality. In the said suit the Appellant had sought for the following orders as against the Respondent:
 - a. A declaration that the Defendant holds 0.1 Hectares out of Muguga/Kanyariri/1XX6 in trust for the Defendant.
 - b. In the alternative to prayer (a) above, a declaration that the Plaintiff is entitled to 0.1 Hectares out of Muguga/Kanyariri/1XX6 by way of adverse possession.
 - c. An order be and is hereby issued that 0.1 Hectares be excised out Muguga/Kanyariri/1XX6 and registered in the name of the Plaintiff.
 - d. The 0.1 Hectares portion be excised from the part of the land the Plaintiff is currently occupying.



- e. The Executive Officer of this Court be and is hereby authorized to sign all the requisite documents to give effect to the implementation of the orders above.
 - f. The Kiambu Land Registrar is to dispense with the production of any titles Consent of Land Control Board and any other document that may hinder the execution of this Judgment and Decree.
 - g. Costs of the suit.
 - h. Any further order as this Court may deem just to grant in the interest of justice.
2. The Appellant being dissatisfied by the whole Judgement filed an Appeal at the Environment and Land Court in Thika.
 3. The Memorandum of Appeal contained the following grounds;
 1. THAT the Learned Magistrate erred in law and in fact by allowing the Respondent to retain the entire Land Parcel Muguga Kany Ariri/1XX6 while he, the Respondent, acknowledged that he had sold part of the land to the Appellant.
 2. THAT the Learned Magistrate erred in law and fact by failing to find that the Respondent holds part of Land Parcel Muguga Kanyariri/1XX6 in trust for the Appellant.
 3. That the Learned Magistrate erred in law and in fact by failing to appreciate that from the pleadings filed by the parties and the proceedings in Court the issue for determination was how much of Land Parcel Muguga Kanyariri/1XX6 was due to the Appellant since the Respondent had already acknowledged that some land was due to the Appellant.
 4. That the Learned Magistrate erred in law and in fact by finding that the evidence produced by the Appellant did not prove that the Respondent held part of Land Parcel Muguga Kanyariri/1XX6 in constructive trust for the Appellant.
 5. That the Learned Magistrate erred in law and in fact by failing to correctly apply rules of contractual interpretation in interpreting the agreement for sale dated 12th June 2002.
 6. That the Learned Magistrate in law and fact in not finding that the Appellant is entitled to 0.1 Hectares out of Land Parcel Muguga Kanyariri/1XX6.
 7. The Appellant prays for:
 1. That the Honourable Court hereby allows this Appeal.
 2. That the Honourable Court sets aside the entire Judgment of the Learned Magistrate in Kikuyu MCELC/E013/2020 Francis Kahura Kinyanjui Vs William Kinuthia Mwaniki.
 3. That it is hereby declared that the Respondent holds 0.1 Hectares (100 feet x 100 feet) out of Land Parcel Muguga Kanyariri/1XX6 in trust for the Appellant. The Respondent is ordered to unconditionally transfer the said portion of land to the Appellant forthwith failing which the Deputy Registrar shall execute all relevant documents to enable transfer of the 0.1 Hectares to the Appellant.
 4. That In The Alternative To Prayer 3 Above it is hereby declared that the Respondent holds 0.07 Hectares out of Land Parcel Muguga KAnyariri/1XX6 in trust for the Appellant. The Respondent is ordered to unconditionally transfer the said portion of



land to the Appellant forthwith failing which the Deputy Registrar shall execute all relevant documents to enable transfer of the 0.07 Hectares to the Appellant.

5. Costs of the suit in the lower Court and the costs of this appeal are hereby awarded to the Appellant.
6. Any further or other orders as the Court may deem necessary to grant in the interest of justice.

Submissions

4. In his submissions dated 20/12/2024, the Appellant reiterated the six (6) Grounds of Appeal and submitted on each issue. In his submission he reiterated his claim and contended that the Respondent admitted the existence of the Agreement for Sale and that he was paid the agreed purchase price by the Appellant. He referred to paragraph 7 of the Defence. He also stated that the Defendant in his witness statement acknowledges receipt of Kshs 300,000/= from the Respondent and agreeing to allocate the Appellant a portion of land.
5. It is the Appellant's contention that following the Respondent's admissions that he had received money from the Appellant and that he agreed to allocate him a portion of land in return, then, the Court erred in allowing the Respondent retain the entire land Parcel Muguga/Kanyariri/1XX6.
6. On the second issue the Appellant submitted while referring to the Supreme Court decision in *Shah & 7 Others V Mombasa Bricks & Tiles Limited & 5 Others (Petition 18 (E020) Of 2022) [2023] Kesc 106 (KLR)* stated that in the above case the Supreme Court held that as much as the legal owner owns an indefeasible title according to Sections 24 and 25 of the *land Registration Act*, Section 28 of the Act provides for overriding interests which include constructive trusts.
7. It was his submission that the trial Court's holding that there was no existence of a constructive trust was erroneous.
8. The Appellant further avers that at the time of sale of the subject portion of land to the Appellant in the year 2002, the bigger parcel of land from which the Appellant's portion was to be excised, being the Respondent's family land, was registered in the joint names of the Respondent and his three brothers. That the brothers had divided up the land among themselves but had not processed title deeds in their respective names.
9. It is the Appellant's submission that after the processing of the individual titles, the Respondent got a title for his parcel of land Muguga/Kanyariri/1XX6 independent from his brothers on 14/01/2024. That since that time in 2014 when the Respondent got a title in his own name, he has never transferred to the Respondent the portion of land for which he acknowledges to have received the full purchase price for. This being the case the Appellant submits that immediately the Respondent received a title deed in his name he was under the obligation to transfer to the Appellant the portion of land he had paid for and which the Respondent had willingly given him possession of since he was in occupation of the suit property from the time they entered into a Sale Agreement.
10. It is the contention of the Appellant that having failed to fulfill the obligation, the Respondent cannot equitably claim that he is the absolute owner of the entire Muguga/Kanyariri/1XX6. This is because he has already received a consideration for a portion of the land and willingly given possession of the portion to the Appellant facts which the Respondent does not deny.
11. As such the Appellant submits that contrary to the finding of the Learned Magistrate, there is proof of unjust enrichment. It is the Appellant's submission that the Respondent received consideration from the Appellant for a portion of land. The land has not been transferred to the Appellant. Allowing



the Respondent to retain the land when he has already received monies for it is against the principle of equity and amounts to unjust enrichment. Thus the Appellant urges the Court to find that the refusal of the Respondent to transfer land to the Appellant is unconscionable conduct and that the circumstances of this case demand that equity treats the Respondent as a trustee holding, part of Muguga/Kanyariri/1XX6 in trust for the Appellant.

12. On the third Ground of Appeal the Appellant submits that the trial Court failed to appreciate that: the only issue the parties did not agree on is how much of Land Parcel Muguga/Kanyariri/1XX6 was due to the Appellant since the Respondent had acknowledged that some land was due to the Appellant. Further, that from the Plaintiff, the Defence, the witness statements and the Court proceedings that the parties agreed on all issues of the existence of the Agreement for Sale, the payment of the consideration and the Appellant taking possession of the portion sold to him. The only issue the parties cannot agree on is how much land is due for transfer to the Appellant.
13. From his submissions the Appellant observed that the Respondent had submitted that he was able to identify what portion of land the Defendant was to transfer to the Plaintiff and that this was the sole issue for determination in the trial Court and this is even identified on page 64 of the Record of Appeal. As such the trial Court, the Appellant submits ought to have resolved this sole issue and not delve into matters that were not in contention. The Appellant thus contends that by failing to proceed in that manner, the Court occasioned injustice to the Appellant and denied him his rightful entitlement to a portion of Muguga/Kanyariri/1XX6.
14. On the fourth Ground of Appeal, the Appellant submitted that he produced in evidence the Agreement for Sale and the payment of a total of Kshs 300,000/= as consideration.
15. Infact he submitted that in Court he produced a copy of the original title to the Respondent's family land registered in the name of the Respondent and his brothers. He also produced a Search to show that eventually the Respondent got a title independent from his brothers being Muguga/Kanyariri/1XX6. Likewise at the hearing he called oral evidence of his wife and a neighbor to prove that he is in occupation of a portion of Muguga/Kanyariri/1XX6 since the year 2002 and the portion is generally known as the Appellant's land.
16. Further that all the evidence he adduced at trial was not refuted by the Respondent.
17. Therefore the Appellant submits that the evidence he adduced in Court is sufficient proof, on a balance of probability that the Respondent holds part of Muuguga/Kanyariri/1XX6 in trust for the Appellant.
18. On the fifth Ground of Appeal which touched on the issue of the size of the portion that the two parties contracted about. The Appellant invited the Court in his submissions stated that he had invited the Court to apply the contra proferentem rule in interpreting what the word "plot" means and make a finding that plot as used in the agreement meant 100ft by 100ft parcel of land (0.1 Hectares). It is his submission that despite this the trial Court found that the Appellant was asking the Court to rewrite the contract for the parties, which as per the Appellant's submission was not a quest to rewrite the contract but that the Appellant wanted the contract interpreted so as to decipher the exact size of land under sale. The Appellant relied on the case of Geofrey Njeru Reuben Mukatha v Roselyne Dola Ouko (Administrator of Estate of Jason Atinda Ouko deceased), Aaron Tayari Ouko Administrator of the estate of Jason Atinda Ouko Deceased, Joseph C Wambugu, A W Mathenge & Registrar of Titles [2020] KEELC 1815 (KLR) to articulate the application of the contra proferentem rule.
19. He also submitted that in the Sale Agreement the Respondent stated that the sale of a "plot" was to the Appellant and his wife and that his wife Alice Nyakio and himself were the ones selling a piece of land



- (pot). It was his further submission that PW3 Dishone Kanae testified that the name plot whenever used it denotes land measuring 100ft by 100ft (0.1hectares).
20. On the sixth and last ground the Appellant submitted that the Appellant having occupied a portion of the contested suit property then he is entitled to the portion of 0.1 hectares.
 21. For the Respondent, he identified five issues for determination as follows:
 - i. Whether the trial Court allowed the Respondent to retain the entire land parcel Muguga/Kanyariri/1XX6 when he had sold part of the land to the Appellant?
 - ii. Whether the Respondent held part of Land parcel Muguga/Kanyariri/1XX6 in constructive trust for the Appellant?
 - iii. Whether the trial Court failed to determine that the issue for determination was how much of land parcel Muguga/Kanyariri/1XX6 was due to the Appellant
 - iv. Whether the Court correctly interpreted agreement for sale dated 13th April 2002?
 - v. Whether the Appellant is entitled to 0.1 Hectares out of Land Parcel Muguga/Kanyariri/1XX6
 22. In his submissions 24/01/2025 the Respondent submits that it is not in contention that the Appellant and the Respondent entered into an Agreement for Sale of land on 13/04/2002 for Kesh 300,000. However he takes the view and submits what was in contention was the size of the land that the Appellant purchased from the Respondent. He submitted that even the trial Court in its Judgment stated that at page 4 that the Sale Agreement did not support the Appellant's claim for purchase of 100ft by 100ft as claimed.
 23. Further that since the Appellant did not make any alternative prayers and having not indicated the size of land he was purchasing then the Court was right in holding that parties are bound by their pleadings and that the Court could not find for the Plaintiff.
 24. On the issue of constructive trust, placing reliance Twalib Hatayan Twalib Hatayan & Another vs Said Saggat Ahmed Al-Heidy & Others [2015]eKLR the Respondent was of the view that this is an equitable remedy where there has been unjust enrichment. That in the instant case there is no incidence of unjust enrichment since there was no survey done to identify boundaries that would show the size of land that would accrue to the Appellant after the Respondent received the purchase price, since it is not the entire parcel of Muguga/Kanyariri/1XX6. Thus he submits that there is no constructive trust.
 25. On the third issue he submits that the Judgment delivered by the trial Court was lawful.
 26. On the fourth issue placing reliance on the case of Mkala & Another vs Kingo [20124 KEEKC 5359 which quoted National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd (200) 2E.A 503, (2011) eKLR. It is the Respondent's submissions that the parties are bound by the pleadings which the Court cannot rewrite. That following the Sale Agreement the Appellant took possession of the portion upon which he is still cultivating today and the issue of 100ft by 100ft did not feature in the agreement.
 27. On the last issue the Respondent submits that the Appellant failed to lead evidence on the balance of probability in the trial Court that he is entitled to a plot measuring 100ft by 100ft and not what he is occupying yet in line with Section 107 of *Evidence Act* he was not able to prove his averments.

Analysis and Determination



28. Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:
- i. Whether the Appellant is entitled to 100ft by 100ft plot of the land owned by the Respondent by way of Constructive Trust.
 - ii. Whether the Appeal is merited.
29. I have considered the Appeal as filed, the parties submissions, and the entire Court record in general. My duty as the first Appellate Court is to re-evaluate and re-assess the evidence that was before the lower Court and make my own conclusions while bearing in mind that the lower Court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower Court unless I am completely convinced that the lower Court was wholly wrong in its appreciation of the evidence before it.
30. From the instant suit, it is evident that the Respondent actually showed the Appellant the land but claimed that the boundary demarcation was not done and so the Appellant occupied the suit property he occupies to date. The Respondent further admitted that he received Kshs. 300,000 from the Appellant for land. The Learned Magistrate in his Judgement did state that following payment of the deposit, the Appellant took possession of the land and started cultivating napier grass after being shown the boundaries.
31. That the Respondent assured the Appellant that he will effect transfer to him once he is issued with a title deed in his name but this did not happen since the Respondent became hostile to the Appellant sometime in 2013 and also trespassed onto his portion and started cultivating.
32. The Trial Magistrate further observed that the Appellant and Defendant agreed to engage a Surveyor to determine boundary but the Defendant/Respondent disowned the arrangement forcing the Surveyor to abandon the exercise. But later the Defendant was issued with a title after subdivision Muguga/Kanyariri/1XX6 measuring 0.292 Hectares.
33. The Court also observed that the Defendant identified a Surveyor who then determined that he occupied a portion of 0.222 hectares and the Plaintiff/Appellant occupied 0.07 hectares which evidence the Plaintiff faulted since he testified at trial that DW2 who tendered evidence on the measurement of land was not a Surveyor.
34. The Learned Magistrate erred in law and fact by failing to recognize in his decision the fact stated in the Judgment that "I ... although in the Sale Agreement, the size of the land sold is 100 feet by 100 feet."
35. Section 3(3) of the [Law of Contract Act](#) provides that:-
- “
- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

36. While Section 6 (1) (a) of the *Land Control Act* provides that:

“

“(1) Each of the following transactions that is to say—

- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

37. Further, Section 38 (2) of the *Land Act* provides that:’

“(2) Subsection (1) shall not apply to—

- (a) a contract made in the course of a public action;
- (b) the creation or operation of a resulting, implied or a constructive trust; or
- (c) any agreement or contract made or entered into before the commencement of this Act, provided that—
- (i) the verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and
- (ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.”

38. I note the Defendant entered into the Agreement while he had not obtained his Certificate of Title. Insofar as the Learned Magistrate insisted that the evidence does not show that Defendant held the land in trust for the Plaintiff, I opine that it was not his preserve to challenge this, yet the Respondent had admitted allocating the Appellant the portion to occupy. It is trite law that in instances where the Certificate of Title is not ready and parties enter into an agreement such as this then the Defendant would by all intends and purposes hold the suit property in trust.

39. Further, the Appellant was already on the suit land by the time the Respondent was acquiring the title as well as filing this suit. The Learned Magistrate found that there was no constructive trust since there was no evidence tendered that the Defendant acquired the suit property by way of wrong doing and therefore unjust enrichment can be inferred.



40. In Court of Appeal decision of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, it held that:

“The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the Court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the Courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

41. Further in the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR the Court of Appeal observed that:

“A constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The Respondent all along acted on the basis and represented that the Appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.” (Emphasis added)

42. In relying on the two Court of Appeal decisions, I find that since the Respondent had received the purchase price from the Appellant and allowed him to occupy a portion of the suit land that he had pointed out to him there was an element of part performance which the Respondent did not deny. It is my considered view that since the year 2002 when the Appellant entered the suit land to date, an element of trust was created, which became an overriding interest over the said land.

43. I therefore hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust which is a Constitutional principle and he is entitled to have the said portion of 0.1 hectare as they had discussed and payment was made for.

44. Based on the evidence analyzed above, I find that the Learned Magistrate erred in Law and Fact in failing to find and to enforce the Agreements between the parties and proceeded to hold there was indeed a constructive trust between the parties herein. I further find that the Learned Magistrate erred in law and in fact in failing to find that it is actually the Respondent who took the Appellant and pointed out to him land measuring 0.1 hectare portion of comprised in land title Muguga/Kanyariri/1XX6. I suffice to say that the Learned Magistrate by disregarding the set precedents from the Court of Appeal



on constructive trust which is an equitable remedy erred in law and in fact in failing to uphold the Appellant's occupation in the suit land.

45. It is against the foregoing that I find the Appeal merited and will allow it. I will proceed to set aside the Judgment of the Lower Court and make the following final orders:
- i. That the Judgement and Decree by Honourable Mr. C. Mburu Principal Magistrate delivered on 27th March, 2024 in Kikuyu Chief Magistrates Court MCECLC No. E013/2020 of 2020 be and is hereby set aside.
 - ii. That it is hereby declared that the Respondent holds 0.1 Hectares (100 feet x 100 feet) out of Land Parcel Muguga Kanyariri/1XX6 in trust for the Appellant, which the Respondent is ordered to unconditionally transfer to the Appellant forthwith failing which the Deputy Registrar of this Court shall execute all relevant documents to enable transfer of the 0.1 Hectares to the Appellant within thirty (30) days of this decision.
 - iii. Costs of the suit in the lower Court and the costs of this Appeal are hereby awarded to the Appellant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

**MOGENI J
JUDGE**

