



REPUBLIC OF KENYA



John Gicheru t/a Ruiru Green Estate v Gakuu (Environment and Land Appeal E019 of 2024) [2025] KEELC 2990 (KLR) (1 April 2025) (Judgment)

Neutral citation: [2025] KEELC 2990 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E019 OF 2024**

JA MOGENI, J

APRIL 1, 2025

BETWEEN

JOHN GICHERU T/A RUIRU GREEN ESTATE APPELLANT

AND

CHARLES GITONGA GAKUU RESPONDENT

*(Being an Appeal from the Judgment/Decree of Hon. CK Kisiangani,
Principal Magistrate dated and delivered on 21st December 2023
in Ruiru Chief Magistrate Court MCELC No. E182 of 2022)*

JUDGMENT

1. This is a Judgement in respect of an appeal brought by way of a Memorandum of Appeal dated 9/02/2024 against the Judgement and Decree of Hon. C.K Kisiangani Principal Magistrate delivered on 21/12/2023 in Ruiru Chief Magistrates Court MCELC No. E182 of 2022. The Appellant sought that the appeal be allowed and the Judgement in favour of the Respondent be set aside together with the order for costs.
2. The Respondent who was the Plaintiff in the Chief Magistrate's Court at Ruiru in MCELC No. 182 of 2022 filed a Plaint dated 31/10/2022 against Appellant who was the Defendant therein in which suit he sought the following orders:-
 - a. An order of Specific Performance of the sale agreement entered on or around the 15th November 2019 compelling the Defendant to produce ownership documents for the 10th title already paid for but not issued to the Plaintiff.
 - b. Refund of the purchase price for the 10th title at the current market price of the subject parcel of land.
 - c. General and punitive Damages for breach of contract.



- d. Costs of this suit and interest thereof.
- e. Any other relief.
3. The Respondent's/Plaintiff's claim in the trial Court was that he entered into a sale agreement with the Appellant/Defendant on or about 15/11/2019 over the sale of land being plot numbers 11-21 which was to be hived off LR No. 11262/1086 within Ruiru town. The Plaintiff paid the full purchase price and it was the term of the lease that the Defendant would hand over leases to the ten plots.
4. The Respondent/Plaintiff avers that the Defendant/Appellant handed over leases of only nine out of the ten plots and despite demand, the Defendant/Appellant did not hand over the lease documents for the tenth plot necessitating the filing of this suit.
5. The Defendant/Appellant filed his defence to the Plaint dated 25/05/2023 and denied all the averments in the Plaint. It was his contention that the Defendant and Plaintiff had agreed that the Plaintiff would pursuant to booking of the said plots, bear the expenses to be incurred in subdivision of the land parcel into plots and all other related expenses.
6. That the Plaintiff subsequently requested the Defendant to assist in selling one of the plots since the Plaintiff was in urgent need of money as at that time. That the two never entered into any written sale agreement but engaged in oral contracts and mutual understanding to the effect that the Plaintiff was to cater for the sub-division and all related costs.
7. That the Plaintiff was unable and/or unwilling to cater for the costs in paragraph 6 above prompting the Defendant to hold the 10th plot as lien since the Plaintiff has refused to settle the costs of Kesh 3,500,000 owing to the Defendant.
8. Upon conclusion of trial, and upon filing and exchange of submissions, the trial Magistrate rendered the impugned Judgment in which it made findings in favour of the Plaintiff. The trial Court granted the Plaintiff's plea for an order of specific performance together with costs of the suit. The trial Court, however, declined to award the Plaintiff the plea for damages for breach of contract.
9. The Appellant being dissatisfied with the impugned Judgment lodged this appeal in this Court.
10. The Appellant has raised fourteen (14) grounds in support of his Appeal as follows:
 1. That the trial Court erred in law and fact by issuing an order of specific performance when there was uncontroverted evidence that there existed no written sale agreement between the Appellant and the Respondent.
 2. That the trial Court erred in law and fact by failing to appreciate the evidence and admission by the Respondent that he allegedly purchased the plots from the Defendant's company and not the Defendant in person.
 3. That the trial Court erred in law and fact by failing to arrive at the conclusion that the Appellant was improperly before the Court as he is a director of a company which allegedly dealt with the Respondent.
 4. That the trial Court erred in law by failing to appreciate and address the mandatory requirements of section 3(3) of the Law of Contract Act, CAP 23, Laws of Kenya despite the issue being raised by the Appellant through his submissions.
 5. That the trial Court erred in law and fact by failing to arrive at the conclusion that the suit before the Court was barred by Section 3(3) of the Law of contract Act, CAP 23, Laws of



Kenya, having held that there existed no written sale agreement between the Appellant and the Respondent.

6. That the trial Court erred in law by holding that part performance was sufficient to save a non-compliant contract contrary to binding case law from the Court of appeal on the effect of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya
 7. That the trial Court erred in law by failing to hold that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act, CAP 23, is nullity ab initio.
 8. That trial Court erred in law and fact by departing from her cited case law on the threshold of granting an order of specific performance and specifically the requirement that the equitable remedy is only available where the subject matter contract does not suffer any defect such as failure to comply with statutory formal requirements.
 9. That the trial Court erred in law and fact by holding that an oral contract for disposition of an interest in land is binding and enforceable contrary to clear provisions of the Law of Contract Act, Cap 23, Laws of Kenya.
 10. That the trial Court erred in law and fact by holding that the letter dated 15th November 2019 was proof of purchase of 11 plots by the Respondent when there was clear evidence that the said letter was an internal memo that confirmed the purchase of the plots by the Appellant company.
 11. That the trial Court erred in law and fact by holding that an oral contract for disposition of an interest in land was capable of specific performance by the Court contrary to binding case law on the threshold for grant of an order of specific performance.
 12. That the trial Court erred in law and fact by failing to appreciate the doctrine of separate legal personality between a company and their directors or shareholders.
 13. That the trial Court erred in law and fact by failing to consider the submissions by the Appellant thus failing to address the issue of separate legal personality and the incapability of performance of an order of specific performance against the Appellant who is one of the directors of the Company that dealt with the Respondent
 14. That the trial Court erred in law and fact by issuing an order of specific performance when the same is incapable of being performed by the Defendant as it needs a resolution of the Appellant's company whose directors are three and when the said company was not sued but one of the directors, the Appellant herein.
11. The Appellant sought the following orders:
 - a. The appeal be allowed.
 - b. The Judgment of the Honorable Trial Court dated 21st December 2023 be set aside.
 - c. The Respondent be ordered to bear the costs of this Appeal.
 - d. Any other Orders the Honorable Court may deem just to grant.
 12. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 30/1/2025 and the Respondent filed his submissions dated 24/01/2025.



Analysis and Determination

13. I have perused the original record of the trial Court together with the Record of Appeal. I have considered the parties' respective submissions, the legal frameworks applicable to the issues falling for determination, and the relevant jurisprudence on those issues. The Appellant advanced fourteen (14) grounds of appeal in the Memorandum of Appeal dated 9/02/2024. In its subsequent written submissions dated 30/01/2025, it condensed the eight (8) grounds of appeal into three (3) grounds and submitted on the three (3) grounds.
14. It is my duty in this appeal, being a first appeal, to evaluate afresh the evidence on record in order to draw our own independent conclusions on the matters in controversy while at the same time I bear in mind that I have not seen or heard the witnesses. See *Selle vs. Associated Motor Boat Co. Ltd* [1968] EA 123. It is common ground that the parties entered into an oral arrangement over the sale of ten (10) parcels of land from the Appellant to the Respondent. It is equally conceded that the Respondent remitted Kshs. 27,794,000 to the Appellant for this purpose. The Appellant does not deny having received the funds but asserts that he withheld the processing of the 10th plot as fees in lien to cover costs amounting to Kesh 3,500,000.
15. In the Complaint, the Respondent's claim against the Appellant was for an order of transfer of the suit land. The Appellant's evidence was that the Respondent simply failed to pay up for the cost of the transfer of the eleven plots and therefore he was claiming Kesh 3,500,000 from the Respondent. That the 10th plot was being held as lien since the Respondent refused to pay for the cost of the transfer and subdivisions totaling Kesh 3,500,000. The Respondent on his part stated that it was the Appellant who failed to honour the terms of the oral agreement for sale by refusing to transfer the 10th plot.
16. From the evidence on record, it is clear that the Respondent handed over 9 out of the 10 leases and thus the Respondent according to the Plaintiff was in breach of the particulars of the contract. The Appellant does not deny receiving Kesh. 27,794,000 in respect of the 10 plots. What however he contends is that the learned Magistrate erred by finding that there was a valid contract yet the contract between the Respondent and the Appellant was not written. Therefore according to the Appellant it breached Section 3(3) of the *Law of Contract Act*.
17. That the decision by the Magistrate was tantamount to re-writing the contract between the parties only in the circumstances of this case there was no such contract, it was oral.
18. A contract being a voluntary obligation the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the Courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment. Where there is an obvious gap, Courts typically imply terms to fill those gaps without, of course re-writing the agreement for the parties. It is a misnomer to describe this filling of the gaps as "re-writing" the agreement. Where there is evidence of fraud, misrepresentation or mistake, the contract will be set aside as was explained by the Court of Appeal in *National Bank of Kenya Ltd. v. Pipleplastic Samkolit (K) Ltd & Another* [2002] EA 503 as follows:-

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."
19. In the instant appeal the Appellant has approached this Court because he believes that the Learned Magistrate erred by finding for the Respondent on the issue of specific performance.



20. In the recent Court of Appeal decision of Willy Kimutai Kitilit vs. 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.”

21. In the same manner and in the same way the equitable doctrines of constructive trust and proprietary estoppel can be applied to and potentially supersede the Land Control Act in certain cases, particularly where a transaction relating to land is void due to an oral contract, though this is subject to the specific circumstances of the case.

22. The application of these equitable doctrines is not automatic; it depends on the specific facts of each case, including the conduct of the parties, the nature of the reliance, and the equities involved.

23. Furthermore, 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 Appellant 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.”

24. The Appellant did not produce before the trial Court any demand letter sent to the Respondent for payment of processing fees which he has placed at Kesh 3,500,000 and averred that it is the reasons he has withheld the 10th plot. He did not also tell the Court why he received Kesh Kes. 27,794,000 from the Respondent for sale of ten (10) plots if he did not intend to sell the same to the Respondent.

25. At the same time, the Appellant in his evidence attempted to give the circumstances that led him not to transfer the suit land to the Respondent. The Appellant stated that he could not transfer the suit land



because there was no contract between the parties. He however did not explain how he transferred the other nine (9) parcels as rightly observed by the Learned Magistrate.

26. The Appellant blamed the Respondent for failing to honour his obligation for paying for costs although he did not present any documents during the trial to support this claim. This therefore leaves the claim unsupported and as the law states Section 106 and 107 of the *Evidence Act* he who alleges must prove. The onus was on the Appellant to show how he arrived at the figure he has stated and the agreement they had about payment of costs if it was different from the total amount paid to him by the Respondent.
27. It is my understanding that Sections 3(3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in *Yaxley v. Gotts* [2000] Ch. 162 (Yaxley's case) on which the Court in *Macharia Mwangi Maina* (supra) Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.
28. In the Yaxley's case, the English Court of Appeal was dealing with the validity of an oral agreement by purchasers of a house to grant a long lease on the ground floor to a builder in exchange for labour, materials and services supplied. Section 2 of the English Law of Property (miscellaneous provisions) Act, 1989 provided in part:-
 - “(1) A contract for sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document...
 - (5) This section does not apply to ... and nothing in this section affects the creation or operation of resulting, implied or constructive trusts ...”
29. It was contended in that case that the oral agreement was void and that the doctrine of proprietary estoppel could not operate to give effect to such an agreement.
30. It was held in part that:

“An oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ...”
31. On his part Beldam L. J. said at p. 193 para D

“In my view the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trusts effectively excludes from operation of the cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.”
32. The decision in Yaxley's case was confined to the validity of oral contracts in the sale of land and dealt with a similar provision of the law to Section 3 (3) of the *Law of Contract Act* as now modified by Section 38 (2) of the *Land Act*.



33. The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black’s Law Dictionary, Ninth Edition will suffice for our purpose:

- “ 1. ...
2. The body of principles constituting what is fair and right.
3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---
4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

34. 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.

35. Upon the application of the equitable doctrines, the Court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

36. Turning to the present appeal, the learned Magistrate made the findings of fact and also made a finding of law that the Respondent was entitled to specific performance. It was not in dispute that the Appellant sold ten (10) parcels of land to the Respondent in 2019. He gave possession of the nine (9) parcels and retained one parcel. The Respondent had paid the full purchase price of the ten (10) parcels. However, the Appellant did not transfer one parcel to the Respondent and instead stated that he was holding it in lien for the fees and cost of transfer of the parcels. By the time the Appellant caused himself to be registered as the proprietor of the one parcel being the 10th parcel of land he was a constructive trustee for the Respondent and it would be unjust and inequitable to allow the Appellant to retain the one parcel that he had sold to the Respondent in the circumstances of the case.

37. As I have already stated, the lack of a written sale agreement does not preclude the Court from giving effect to equitable principles, in particular the doctrine of constructive trust, and I find that the trial Court reached the correct decision and therefore the appeal has no merit.

38. For the foregoing reasons, the appeal is dismissed with costs to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA LAW COURTS THROUGH MICROSOFT TEAMS ON THIS 1ST DAY OF APRIL, 2025.

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MOGENI J.

JUDGE

In the presence of:

Mr. Kitila for Appellant

Mr. Kerio for the Respondent

Mr. Melita - Court Assistant



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MOGENI J.

JUDGE

