



**Musekenya v Kortom (Environment and Land Appeal  
E006 of 2023) [2025] KEELC 3709 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3709 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

**MN MWANYALE, J**

**MAY 8, 2025**

**BETWEEN**

**SAKANA OLE MUSEKENYA ..... APPELLANT**

**AND**

**KORTOM OLE KORTOM ..... RESPONDENT**

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 11<sup>th</sup> December 2023, the Appellant raised 6 grounds of Appeal against the judgment of Hon. W.C Waswa SRM delivered on 30<sup>th</sup> November 2023 in Kilgoris CMELC No. 20/2020.
2. The grounds of Appeal are interalia,
  - i. That the learned trial magistrate erred in law by striking out the suit on the ground that it was time barred.
  - ii. That the learned trial magistrate erred in law by not making a finding that the suit property had legally existed for only three (3) years up to the time of filing of the suit.
  - iii. The learned trial magistrate grossly misdirected himself in law by not making a finding that time begun to run from the date the suit property was registered and a tile deed issued.
  - iv. The learned trial magistrate erred in law and fact by not appreciating that unregistered land under the Group Ranch could not be subject of the provisions of the Limitations of Actions Act and *Land Control Act*.
  - v. The trial magistrate after making a finding that the Appellant had purchased nine (9) acres in 2000 out of what came to be registered as land parcel Transmara/Enaenyeny/802 in 2017, then he should have declared that the Respondent was holding the nine (9) acres in trust for the appellant.



- vi. The Learned trial magistrate erred in law and fact by not declaring that Respondent was estopped in law from claiming the Appellant's nine (9) acres as he had put him in possession and hence a constructive Trust was created in favour of the Appellant.
3. On the strength of the above grounds the Appellant sought for the following orders: -
  - a. That the order of striking out of the appellant's case be quashed and be substituted with one allowing the appellant's claim with costs.
  - b. That this Honourable court further order and/or infer that a constructive Trust existed in favour of the appellant.
  - c. That the appellant be ordered to transfer nine (9) acres out of land parcel Transmara/Enaenyeny/802 to the Appellant.
  - d. That the Respondent do bear the costs of this appeal and the court below.
4. Upon admission of the Appeal, the court ordered that the same be canvassed by way of written submissions.
5. Both parties filed their submissions.
6. It is the Appellant's submissions in brief, that the trial court magistrate struck out the case on a technicality, in that the property bought by the Appellant had not been registered at the time of the purchase hence the provisions of the land control Act were inapplicable.
7. In further submissions the Applicant submits that under Section 6 of the Land Act, the limitation period is 12 years and that the right accrued at the time of registration of the title deed which was only 3 years since the land had been unregistered hitherto.
8. The Appellant in support of this limb of submissions placed reliance on the decision in the case of Mwaura and 2 Others Vs. Thuo and 5 Others.
9. On his part, the Respondent has submitted on the court's duty as a first appellate court as laid down in the decision in the case of Selle and Another Vs. Associated Motor Boat Limited and Another and has framed and submitted on additional issues as herefollows: -
10. The Respondent submits that the Agreements for sale were unclear did not bear the parcel number nor the Respondents identity card number and their existence were denied by the Respondent, the Respondent submits that in view of lack of land control Board consent required under Section 6(1) of the land control Act, the Agreement was invalid and not enforceable. Reliance was placed on the decision in the cases of Daniel Sironga Ole Tuku Vs. Francis Arap Muge, Mucheru Vs. Mucheru to buttress this point.
11. On issue number 2, the Respondent submits that the Appellants claim having been based on the Agreement for sale made in 2000 was statute barred by virtue of Section 7 of the Limitation of Action Act.
12. On issue number 3, the Respondent submits that the Appellant could not lay a claim in adverse possession as he had commenced the suit through a Plaint as opposed to an O.S under Order 37 Rule 7 of the Civil Procedure Rules.
13. That since the Respondent was registered in 2017, no claim of Adverse possession could be sustained as in 2000 only 3 years had lapsed.



14. On issued number 4, whether the Appellant can claim constructive Trust, the Respondent submits the Appellant never took possession of the suit property pursuant to any valid agreement hence no constructive Trust could arise.
15. The Respondent further submits that the issue of Trust was not pleaded and the same could not be picked up at the Appeal. In support of this proposition, the Respondent placed reliance on the decision in *Okoth Vs. Nyabari and Another KECA 427 (KLR)* as well as the decision in *Ben Munyifwa Songoi Vs. Richard Lefwafwa*.
16. The Respondent on issue number 5 submitted that overallly the Appeal is not merited and ought to be dismissed.

### **Issues for Determination**

17. Having analysed the Record of Appeal the rival submissions and considered the law, the court frames the following as issue for determination: -
  - i. Whether or not the suit before the trial court was time barred?
  - ii. Whether or not the Appeal is merited?
  - iii. What orders ought to issue?
  - iv. Who bears the costs of the Appeal and the case?

### **Analysis and Determination**

18. The Respondent has rightly submitted on the duty of this court as a first Appellate Court which duties were summed up in the decision in the case of *Selle and Another Vs. Associated Motor Boats Limited and Another*.
19. In exercise of the said duty the court shall re-examine the plaint so as to determine the nature of the cause of action before the trial court.
20. The Respondent has submitted that the issue of constructive Trust was not pleaded by the Appellant and that the same was only brought in this Appeal. Is that the case?
21. The Plaintiff's claim before the trial court vide the Amended Plaint is a claim for specific performance requiring transfer of 9 acres out of land parcel Transmara/Enaenyeny/802 as pleaded at paragraph 9 of the Amended Plaint.
22. Vide paragraphs 3, 5 and 8 (a) of the Amended Plaint, the plaintiff had pleaded the existence of an Agreement for sale between himself and the Defendant and occupation of the parcel measuring 9 acres pursuant to the Agreement of Sale. In the list of documents and testimony of witnesses, the Agreement for Sale was produced as an exhibit and the testimony of PW1, PW2, PW3 and PW4 all alluded to having witnessed the Agreement. PW2 and PW3 confirmed occupation by the Appellant.
23. From the pleadings in the matter as well as the evidence presented before court, the issue of constructive Trust though not pleaded expressly was an issue that had been left to the court to decide, as was held in the decision in the case of *Odd Jobs Vs. Mubia (1974) EA 476* where the court held inter alia, "with respect to the learned Judge, the issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where as here, it appears from the course followed at the trial, that the issue has been left for the court for decision".



24. On constructive Trust, the Court of Appeal in its decision in the case of Twalib Hatayan and Another Vs. Said Saggar Ahmed Al Heidy and 5 Others (2015) (eKLR) described the constructive Trust as follows “A constructive Trust is an equitable remedy imposed by the court against ne who has acquired property by wrong doing. It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a Trustee, the law will impose a trust. A constructive Trust will automatically arise where a person who is already a trustee takes advantage of his position for his own benefit....”
25. Having found that the pleadings and evidence in the matter pointed on a prima facie basis to the creation of constructive Trust, it follows that the cause of action by the Plaintiff, is an action by a beneficiary under a Trust (herein a constructive trust) to recover Trust property from a trustee and the same is excepted under Section 20(1) (b) of the *Limitation of Actions Act*.
26. It follows therefrom that the suit was not time barred under Section 7 of the *Limitation of Actions Act* as it was excepted under Section 20 (1) (b) of the said Act, and the Learned Magistrate fell in error to strike out the same.
27. On issue number 1, the court finds that the suit was not time barred.
28. On issue number 2, the Appeal in so far as it relates to the striking out of the suit based on Limitation of Actions is thus merited.
29. On issue number 3, since the trial court did not determine the matter on its merits but it struck it out, and having found that the suit was not time barred, as it is an action claiming constructive Trust, felling squarely under Section 20(1) (b) of the *Limitation of Actions Act*.
30. The matter is thus remitted to the trial court to consider it on its merit as it was not statute barred; The trial court shall consider the following issues for determination: -
  - i. Whether or not constructive Trust was established, from the evidence.
  - ii. Whether the Plaintiff's case is merited.
  - iii. What reliefs ought to issue.

### **Disposition**

31. The Appeal is hereby allowed in terms that the suit is remitted back to the trial court under Section 78 (1) (c) of the *Civil Procedure Act* and to consider the issues framed above.
32. The cost of this Appeal shall abide by the outcome before the trial court.

**DATED AT KILGORIS THIS 8<sup>TH</sup> DAY OF MAY, 2025.**

**HON. M.N MWANYALE**

**JUDGE**

In the presence of

CA – Emmanuel/Sylvia

Mr. Nyambati for the Respondent

Mr. Aminga h/b for Mr. Nyariki for the Appellant

