



REPUBLIC OF KENYA



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**Maiyebei v Chesebe (Environment and Land Appeal E022 of 2023)
[2025] KEELC 5294 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

EC CHERONO, J

JULY 10, 2025

BETWEEN

FRANCIS KINEI MAIYEBEI APPELLANT

AND

FRED KAPONDI CHESEBE RESPONDENT

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 14/11/2023, the Appellant who was the Plaintiff in the former suit before the trial Magistrate court at Sirisia PM-ELC NO. 17 of 2021 appeals to this court challenging the judgment delivered by Hon. R.K. Langat on 08/11/2023 in which the court dismissed the Plaintiff/Appellant's case with costs to the Defendant/Respondent and allowed the Defendant/Respondent's counter-claim thereby issuing an order for specific performance plus costs of the counter-claim.

Background.

2. The Appellant instituted this suit by way of a plaint dated 28/09/2021 wherein he averred that he was the beneficial and/or legitimate owner of Land Parcel No. North Malakasi/West Sasuri/241 (hereinafter referred to as "the suit land"). He further averred that the Defendant/Respondent without any consent or colour of right trespassed into the suit land and begun farming thereon for gain. He set out particulars of trespass against the Respondent and averred that he lodged a complaint against the Respondent with the police to no avail. His prayed for Judgment against the Defendant/Respondent as follows;
 - a. An order of permanent injunction as particularized in paragraph 7 above.-The Plaintiff's claim against the Defendant thereof is for an order permanently restraining the defendant either by himself, servants, agents, assigns or employees from unlawfully, illegally or in any other



manner whatsoever entering into and/or interfering with the Plaintiff's quiet use, occupation and possession of the suit land as provided for under the relevant Kenyan Land Laws respecting the rights as a lawful proprietor of land.

- b. Costs of the suit plus interests at court rates.
 - c. Any further relief that this honourable court may deem just and fit to grant.
3. Upon being served with the Summons to Enter Appearance and the Plaint, the Defendant/Respondent filed an amended statement of defence dated 19/02/2022 wherein he denied the Plaintiff/Appellant's claim and averred that he entered the suit land after purchasing the same for value from the Plaintiff/Appellant and with his consent to occupy as he awaits transfer. He further averred that the suit was time barred. In his counter-claim, the Defendant/Respondent averred that he was in occupation of the suit land and has made substantial developments for the past 7 years. That despite having paid the full consideration for the purchase of the suit land, the Plaintiff/Appellant was yet to transfer the land to him and he therefore sought for the following prayers against the plaintiff/Appellant;
- a. Specific performance to the effect that the Plaintiff transfers Land Parcel no. North Malakasi/West Sasuri/241 to the Defendant's name.
 - b. Costs.
 - c. Any other order this honourable court may deem fit to grant in the circumstances.
4. The Appellant filed a Reply to defence and defence to counter-claim dated 12/04/2022 denying the Defendant/Respondent's counterclaim and averred that the developments on the suit land have not been undertaken by the Defendant/Respondent but by him. He denied having any contractual obligations towards the Respondent as alleged. He sought to have the counter-claim dismissed.
5. When the former suit came before the trial Magistrate for directions, the parties agreed that the suit do proceed by way of viva voce evidence. During the hearing, the Plaintiff/Appellant called two witnesses while the Defendant/Respondent called four witnesses.
6. PW1 Francis Kinei Manyebei Testified on oath and adopted his witness statement dated 14/04/2022 as his evidence-in-chief. He also produced documents contained in his list of documents in support of his case. He stated that he did not sell the suit land to the Respondent. In cross-examination, he stated that he allowed the Respondent into the suit land on the understanding that he would employ his children. He confirmed that a bank statement from AFC shows that the Respondent paid a loan owed by the Appellant to AFC. He testified that the Respondent cut down his coffee stems and that he has a report of the Agricultural Officer to that effect. He confirmed that the Respondent entered into the suit land with his permission.
7. PW2 Nathan Wasamaa adopted his witness statement dated 12/07/2023 As his evidence-in-chief. He produced 2 agreements as P-Exhibit 6 & 8. He stated that the said agreements do not relate to the suit land. He confirmed that there was a sale transaction between the parties herein and he was present as the Respondent's witness. He confirmed that the Respondent was allowed to proceed with developments in the suit land.
8. DW1 Fred Kapondi Chesebe adopted his witness statements dated 18/02/2022 and 18/09/2023 as his evidence-in-chief. He produced into evidence a list of documents dated 27/09/2023 and 18/09/2023 as DMF 1 to 4. He testified that he purchased 1 ½ acres out of 2 ½ acres of the suit land from the Plaintiff/Appellant and completed payment of the consideration thereof. That he paid for the coffee stems in the said portion at a costs of Kshs.500/= and that he paid the outstanding AFC loan through



a proxy namely Kikai whose telephone number is 0726056830 and 0711453162. That he paid a total of Kshs 203,000/= being a loan repayment and Kshs. 3,000/= as a discharge fee. He denied working with PW2 and described their relationship as hostile.

9. In cross-examination, he testified that he purchased the suit land from three people i.e 1 ½ acre from the plaintiff/Appellant, one (1) acre from one Fred and Evans to make 2 ½ acres. That the said purchases are supported by oral agreements.
10. DW2 Joan Sitati Was sworn and stated that he works with AFC Bungoma Branch as a Credit Officer. He testified that the Plaintiff/Appellant informed the credit facility that he had sold the suit land to the Defendant/Respondent who was going to clear the outstanding loan. That the Respondent paid Kshs.203,000/= inclusive of interests. That one Kikai paid the amount on behalf of the Respondent through M-pesa. That they released the title to the Appellant so he could transfer the same to the Defendant/Respondent.
11. DW3 Fred Elian Kisero adopted his witness statement dated 01/11/2021 as his evidence-in-chief. He testified that together with the Plaintiff/Appellant and one Evans, they sold land to the Defendant/Respondent herein. That he and Evans purchased their share in the year 2013 and sold to the Respondent in 2017 and were paid in full. That thereafter, the Defendant/Respondent took possession and occupation and even planted coffee stems. He confirmed that together with Evans, they bought 1acres from the Appellant and did not know that the title of the land had been used as collateral to secure a loan.
12. DW4 Evans Okino Waliula adopted his witness statement dated 18/02/2022 as his evidence-in-chief. He testified that together with Fred Elian Kisero (DW3), they purchased 1 acre from the Appellant in 2013 at Kshs.130,000/= and later sold it to the Defendant/Respondent.
13. Upon analysing the evidence and the materials placed before him, the trial magistrate delivered a judgment dismissing the Plaintiff/Appellant's case and allowed the Respondent counter-claim with costs.
14. Aggrieved with the said judgment, the Appellant preferred the current appeal on the following grounds;
 - a. The learned trial magistrate erred in law and in fact in dismissing the Plaintiff's suit without considering the evidence of the Plaintiff on a balance of probability.
 - b. The learned trial magistrate erred in law and in fact in allowing the Defendant's counter-claim when there was insufficient evidence in support of the same.
 - c. The learned trial magistrate erred in law and in fact by rejecting the evidence of the plaintiff without any valid reason.
 - d. The learned trial magistrate erred in law and in fact by finding that the oral agreement is enforceable in land transactions hence allowing the counter-claim.
 - e. The learned trial magistrate erred in law and in fact by issuing an order of specific performance to the effect that the Plaintiff transfers land parcel no. N. Malakasi/W. Sasuri/241 to the Defendant based on an oral agreement that was not sufficiently proved.
 - f. That the learned trial magistrate misdirected himself in finding that the evidence of the defendant and his witnesses was direct, consistent and overwhelming while that of the Plaintiff and his witness was weak and not persuasive without explaining how.



- g. The learned trial magistrate erred in law and in fact by relying on non-applicable authorities to dismiss the Plaintiff's case and allowing the Defendant's counter-claim.
15. The Appellant sought to have his appeal allowed, the judgment of the trial court set aside and substituted with an order allowing his claim in the former suit.
16. When this Appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.
17. At the time of preparing this judgment, only the Respondent had filed his submissions dated 10/05/2025
18. In his written submissions, the Respondent submitted on one issue namely, whether the agreement was enforceable and submitted that he has demonstrated the existence of and terms of the oral Sale Agreement between him and Appellant and also called DW II, III & IV who confirmed the existence of the said oral agreement. That the Appellant confirmed that he had an Agreement with the Respondent and ended up putting him in possession and occupation of the suit land where he has constructed huge developments done with the blessings of the Appellant. He argued that whereas oral sale agreements are unenforceable under Section 3 (3) of land contract Act, he submitted that oral Agreements for sale supported by credible evidence can and are enforceable in law. He cited the case of Patrick Njuguna Kimondo=VS= Geoffrey Vamba Mbuti (2019) eKLR.
19. The Respondent further submitted that the provisions of Article 10 2(b) of *the Constitution* 2010 incorporates the doctrines of proprietary estoppel and constructive trust, taking into account that the Respondent did fully comply with the terms of the oral Sale Agreement. He relied in the case of Maina & 87 Others (Civil Appeal 6, 26 & 27 of 2011 (consolidated) 2014 KECA 880(KLR)-22-January -2014 (Judgment), Willy Kimutai Kililit =VS= Michael Kibet (2018) eKLR and Kiplagat Kotut =VS= Rose Jebor Kipngok (2019) eKLR. On the issue of costs, the Respondent urged the Court to award him the same.

Analysis and determination

20. I have considered the grounds in the memorandum of appeal, the record of appeal, written submissions filed and the court record generally and identify the following issues for determination:
- a. Whether the evidence by the Appellant supported the allegation of trespass by the Respondent?
 - b. whether an order of permanent injunction should have issued?
 - c. Whether the Respondent was entitled to the order of specific performance?
 - d. Who shall bears the costs of this appeal?
21. In determining whether or not the learned trial magistrate was justified in arriving at the impugned decision, this court is under a duty and indeed obligated to re-evaluate the evidence and materials that was placed before the subordinate court to determine whether the learned magistrate made the correct decision. As an appellate court of first instance, this court is not bound by the findings of fact and law made by the trial court and may, on re-evaluation, reach its own conclusion and findings. This



principle was aptly enunciated in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the court of Appeal stated as follows:-

“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 or heard the witnesses and should make due allowance in this respect”.

22. I shall now proceed to consider the first two issues concurrently. It was the Appellants case that he was the beneficial owner of the suit land and that the Respondent had, without his consent, entered therein and was now utilizing it for his benefit to his detriment. His prayer was for a permanent injunction against the Respondent. In support of his case, the Appellant produced an agreement dated 17/06/2016 as P-Exhibit 1, an agreement dated 07/03/2016 as P-Exhibit 2, his National identity card as P-Exhibit 3, letter from Cheptais Forest station dated 24/09/2013 as P-Exhibit 4, A copy of a certificate of search for the suit land as P-Exhibit 5, a letter dated 22/07/2021 from Cheptais Forest Station as P-Exhibit 6 and a letter dated 27/09/2021 by the area chief as P-Exhibit 7.
23. The Respondent’s case on the other hand was that he purchased the suit land from the Appellant and others in the year 2014 and has been in possession, occupation and use of the said land by virtue of being a purchaser for value. He stated that he has developed the land over the 7 year period. In his counter-claim, he sought for an order of specific performance to compel the Appellant to transfer the suit land to him. In support of his case, the Respondent produced a loan account statement as D-Exhibit 1, a sale agreement dated 02/07/2014 as D-Exhibit 2, a letter dated 07/09/2023 from the Agricultural Finance Corporation (AFC) as D-Exhibit 3, bundle of loan servicing statement as D-Exhibit 4, a Kenya Gazette notice no. 15762 dated 31/12/2013 as D-Exhibit5.
24. In his defence to counter-claim, the Appellant denied entering into any Sale agreement for the suit land with the Respondent and that they only agreed that the Respondent would help in paying school fees for his 3 children and secure employment for them. It was only after the forgoing that he would cede part of the suit land. He further denied that the Respondent had occupied or developed the suit land.
25. The Appellants case was based on the tort of trespass. Trespass is defined in the 10th Edition of Black’s Law Dictionary as; “an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.” Therefore, to prove trespass, the Appellant was required to prove possession or ownership of the suit land. The Appellant produced a copy of search issued on 23/08/2021 showing that he is the registered owner of the suit land, having been so registered on 14/08/1998. A letter from the Sassur area chief indicates that the Appellant reported the Respondent’s alleged trespass where the chief stated that he sought to settle the issue amicably in his office. He also produced letters from the forest department showing the cutting of his coffee stems and their value.
26. Upon consideration of the Appellants evidence, I find it unusual that a copy of the title was not produced in support of the Appellants ownership of the land but instead, a certificate of official search was produced. It is important to note that whereas a certificate of official search a certificate is an indication of the current status of land as reflected in the land register, the same does not in itself constitute conclusive proof of ownership. A certificate of official search is merely a prima facie evidence of the entries in the register as at the date of the search, and must be read alongside the actual title document and any other relevant instruments or encumbrances that may affect the land. Section 26 (1) of the [Land Registration Act](#) provides that a copy of title is prima facie proof of ownership of land and not a certificate of search.



27. The Respondent on his part denied the Appellant’s claim and averred that he purchased the suit land from the Appellant and other persons who had shares and testified in the former suit as DW3 and DW4 and that they sold their respective share of the suit land being one (1) acre which they had purchased from the Appellant. He produced an agreement dated 02/07/2014 between the Appellant and DW3 and DW4 confirming the sale. The Appellant did not deny that he sold them the said portions. DW3 and DW4 in their testimonies confirmed having sold their respective portions of the suit land to the Respondent and in the absence of evidence to the contrary, this court finds their evidence more probable than not.
28. With regard to the remaining portion measuring 1 ½ acres, the Respondent stated that he entered into an oral agreement with the Appellant in the year 2014 at a consideration of Kshs.480,000/= which he paid in two instalments of Kshs.300,000/= and Kshs.180,000/=. He also averred that he paid a total of Kshs. 450,000/= for the coffee stems in the suit land and further settled a loan taken out by the Appellant with AFC using the title to the suit land as security. He produced a letter from AFC which shows that the Appellant was advanced a sum of Kshs.200,000/= and used the title to the suit land as security and that the Respondent paid Kshs. 203,000/= to settle the outstanding loan amount between the periods of 20/08/2014 and 27/07/2017 through M-Pesa. The said bank statement shows that the said loan balance was settled by the Respondent and his agent, one Kigai Kipror through their M-Pesa accounts +25471145162 and +254726056830.
29. The agreement for the sale of the Appellants share alluded to by the Respondent is not in writing. This is contrary to the provisions of Section 3(3) of the Law of Contract Act which provides that contracts for disposition of interest in land shall be in writing. The said section provides as follows;
- “No suit shall be brought upon a contract for the disposition of an interest in land unless — the contract upon which the suit is founded—is in writing; is signed by all the parties thereto; and 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.”
30. The above Section is replicated in almost identical terms in Section 38 of the Land Act, 2012. Pursuant to the above provisions of the Law of Contract, oral agreements, though void and unenforceable in specific instances, may nonetheless be construed to give rise to the disposition of proprietary interest in land under the doctrines of constructive trust or promissory estoppel.
31. This position was affirmed by the Court of Appeal in *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR where it was held;
- “In *Yaxley – vs- Gotts & Another*, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Llyods Bank Plc – vs- Rosset*, (1991) 1 AC 107,132, 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.”

32. Notably, the Respondent did not specifically plead the issue of trust. Nevertheless, I take judicial notice that in exceptional cases, trust can be inferred based on the prevailing circumstances and considering the evidence presented. In the instant case, the Appellant who is clearly talking at cross purposes just as the trial court noted in its judgement stated that he allowed the Respondent to use the suit land and utilize the same only for purposes of educating his 3 children and employing them. Moreover, this Court is also left wondering how the Respondent repaid the outstanding bank loan secured using title to the suit land as security. If his use of the land was merely permissive, the payment of such a significant financial obligation suggests a more substantial interest in the property than the Appellant acknowledges. The Appellant’s failure to offer a cogent explanation for the Respondent’s financial contributions towards the land in question further undermines his credibility and strengthens the inference that the Respondent’s involvement was more than casual or permissive in nature.
33. While discussing the standard of proof in civil liability, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
34. From the totality of my evaluation of the evidence on record and guided by the applicable principles of law, it is my finding that the learned trial magistrate arrived at a reasoned and informed decision and I find no reason to upset his finding.
35. In view of the foregoing, I find no merit in the Appellant’s appeal and the same is hereby dismissed with costs.
36. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF JULY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Olonyi for the Appellant.
2. M/S Wesonga for the Respondent.
3. Bett C/A

