



**Laban & another v Francis (Environment and Land Appeal E020 of 2024)  
[2024] KEELC 13769 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13769 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E020 OF 2024  
CK NZILI, J  
DECEMBER 4, 2024**

**BETWEEN**

**OBADIAH MWITI LABAN ..... 1<sup>ST</sup> APPELLANT**

**MARY RIMAA M'MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CAROLINE NDUMBA FRANCIS ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. S.K Ngetich –  
SPM in Nkubu ELC case No. 33 of 2014 delivered on 21.2.2024)*

**JUDGMENT**

1. The respondent, who was the plaintiff at the lower court, had sued the appellants by a further amended plaint dated 29.3.2023, initially filed as Meru High. Court ELC No. 25 of 2014 before the suit was transferred to the lower court by an order issued on 24.2.2014.
2. The complaint was that by an agreement dated 13.5.2003, entered between the 1<sup>st</sup> appellant, she bought 0.82 acres of LR No. Abogeta/Lower Chure/401, which, after excision and registration, in her name became LR No. Abogeta/Lower Chure/1088.
3. It was averred that when the respondent went to take possession only for the 1<sup>st</sup> appellant's mother objected and she filed a claim against her at the defunct Land Disputes Tribunal, whose award was that the 1<sup>st</sup> appellant to transfer the portion out of his remaining land so that the respondent could re-transfer LR No. Abogeta/Lower Chure/1089 to the 1<sup>st</sup> appellant's mother.
4. The respondent averred that parties entered into another sale agreement dated 11.10.2004, and she re-transferred the land as it had been agreed or ordered, to which the 1<sup>st</sup> appellant subdivided his LR No. Abogeta/Lower Chure/1089 into LR No. Abogeta/Lower Chure/1139 and 1140, following which



- they attended a land control board meeting, where a consent to transfer was issued and parties executed transfer forms for registration of parcel L.R No 1139 in her favor.
5. The respondent averred that instead of effecting the registration, the 1<sup>st</sup> appellant fraudulently colluded with the person entrusted to register the same and substituted her name with that of the 2<sup>nd</sup> appellant, while fully aware that she was in possession of the land since purchasing it and had developed it extensively by constructing a house, which discovery came to her knowledge in 2014.
  6. The respondent prayed for:
    - i. Cancellation of the 2<sup>nd</sup> appellant's name from the register for LR No. Abogeta/lower Chure/1139 and an order that the 2<sup>nd</sup> appellant re-transfer the land to her.
  7. The respondent averred that she had been in possession of LR No. Abogeta/Lower Chure/1139, measuring about 0.33 ha from 2008 since buying the other hand, has a water system, two semi-permanent timber houses, a pit latrine, assorted trees, food crops and nappier grass.
  8. Further, the respondent averred that the 1<sup>st</sup> appellant has never refunded her Kshs.8,000/= as agreed in the agreement dated 11.10.2004, which he claims with interest. The respondent averred that the only property remaining for the 1<sup>st</sup> appellant was LR No. Abogeta/Lower Chure/1140, which ought to be preserved until LR No. Abogeta/Lower Chure/1139, 0.32 ha is effectively transferred to her name as earlier agreed. Further, the respondent averred that the 1<sup>st</sup> agreement obliged the first appellant to pay her liquidated damages for any breach, twice the mutually agreed considerations or purchase price.
  9. The respondent averred that on 28.3.2015, the appellants stormed into the suit land, causing damage to her property, and proceeded on 4<sup>th</sup> & 13<sup>th</sup> April 2015 to harvest foodstuffs valued at Kshs.120,000/= .The respondent averred that her claim was also based on constructive, resulting trust and proprietary estoppel, for she had paid all the purchase price to the 1<sup>st</sup> appellant, who surrendered vacant possession of the land to her and has extensively occupied and developed it and that the sale and transfer to the 2<sup>nd</sup> appellant were subject to her accrued right by virtue of trust and also pray for a permanent injunction.
  10. From the court, the appellants entered an appearance on 18.3.2014, following the transfer of the suit and issuance of temporary orders of injunction and inhibition by this court on 24.2.2014 and filed separate statements of the defense and counterclaim dated 2.4.2014, later amended on 5.5.2015 and further amended on 12.4.2023.
  11. The 1<sup>st</sup> appellant denied selling LR No. Abogeta/L. Chure (1139 or having transacted with the respondent over LR No. Abogeta/Lower Chure/1139, as pleaded or at all or having been aware of any proceedings at the land dispute tribunal over the suit land. Without prejudice to the preceding, the 1<sup>st</sup> appellant termed any award from the land Dispute Tribunal as uncalled for in the suit. The 1<sup>st</sup> appellant denied entering into a sale agreement dated 11.10.2004 whose result was to exchange LR No. Abogeta/Lower Chure/1088 with LR No. Abogeta/Lower Chure/1139.
  12. The 1<sup>st</sup> appellant admitted that the respondent was indeed in possession of LR No. Abogeta/Lower Chure/1088 that she had bought from him in 2003 and not LR N'so. Abogeta/Lower Chure/1139 or 1140 as alleged in her pleadings.
  13. Again, the 1<sup>st</sup> appellant admitted that he lawfully sold LR No. Abogeta/Lower Chure/1139 to the 2<sup>nd</sup> appellant. Equally, the 1<sup>st</sup> appellant denied putting the respondent into vacant possession of LR No. Abogeta/Lower Chure/1139 or any portion thereof after obtaining or signing any land control board consent or transfer documents in favor of the respondent as alleged or at all otherwise he termed any



- alleged instruments of transfer in existence thereof as forgeries or fraudulently executed or obtained without his knowledge.
14. Additionally, the 1<sup>st</sup> appellant denied being party to Meru LDT No. 6 of 2008, or being bound by its decree if any or at all, or having been bidding or subject to LR No's. Abogeta/Lower Chure/1139 and 1140. The 1<sup>st</sup> appellant termed the suit by the respondent as bad in law, fatally defective, and an abuse of the court process since if at all there was any sale transaction between him and the respondent, the same had already become null and void to found a claim by the respondent.
  15. By way of a counterclaim, the 1<sup>st</sup> appellant averred that he was the sole proprietor of LR No. Abogeta/Lower Chure/1140 measuring 0.33 ha and LR No. Abogeta/Lower Chure/1139 before he sold, transferred, and gave vacant possession to the 2<sup>nd</sup> appellant in. He stated further that sometime in January 2014, the respondent proceeded to the lands office at Meru and registered a caution over LR No. Abogeta/Lower Chure/1140 and 1139 without a justifiable reason or cause hence a counterclaim for the lifting of the caution on LR No. Abogeta/Lower Chure/1140.
  16. The 2<sup>nd</sup> appellant opposed the claim by a further amended statement of defense and counterclaim dated 12.4.2023. She termed the suit as raising no cause of action against her, for she was a stranger to the respondent, since she had never transacted on the suit land with them as alleged or at all. The 2<sup>nd</sup> appellant averred that she was a sole bonafide innocent purchaser and registered owner of LR No. Abogeta/Lower Chure/1139, hence with nothing to do with LR No. Abogeta/Lower Chure/1140; therefore, the claim was bad in law, defective, an abuse misplaced, oppressive, and irrelevant. Equally, the 2<sup>nd</sup> appellant averred that she knew nothing about LR No. Abogeta/Lower Chure/1140, she was lawfully registered as the owner of LR No. Abogeta/Lower Chure/1139 and in its exclusive possession hence denied the alleged damage. The 2<sup>nd</sup> appellant further denied the alleged trust or breach thereby and that the alleged occupation on her land came up after the respondent misled the court to issue an order dated 13.5.2015.
  17. By way of a counterclaim, the 2<sup>nd</sup> appellant averred that she was the sole owner of LR No. Abogeta/Lower Chure/1139, which the respondent had, without any color of right, justification, or lawful cause, trespassed into and commenced illegal development therein in addition to lodging a caution over her title. The 2<sup>nd</sup> appellant counterclaimed for lifting the caution and an order of eviction of the respondent from her land with the assistance of OCS Nkubu Police Station.
  18. The respondent opposed the appellants' amended defense and counterclaim through replies to the defense and defense to counterclaim dated 3.5.2023 and 19.4.2023, respectively. Regarding the 1<sup>st</sup> appellant's further defense, the respondent insisted she has been in possession of the suit land, which she has extensively developed by erecting two semi-permanent houses, a pit latrine, assorted fruit and exotic trees, food crops and a piped water system. The respondent denied the alleged forged transfer instruments, for consent to do so had been obtained from the owner. She termed the defense as frivolous, vexation, scandalous and an abuse of the court process.
  19. Regarding the further counterclaim, the respondent reiterated the contents of her further defense that she was a genuine purchaser and owner of the suit land, which she took possession of and lawfully registered a caution over the title, in order to protect her interests therein. Further, the respondent averred that any transfer of the title by the 1<sup>st</sup> appellant was fraudulent, and thus, neither the 1<sup>st</sup> nor the 2<sup>nd</sup> appellant were in possession or utilization of the suit land.
  20. The respondent, regarding the 2<sup>nd</sup> appellant's further defense and counterclaim, averred that she bought, took possession, and developed parcel L.R No. 1139, with the knowledge of the 2<sup>nd</sup> appellant;



hence, any purported sale and transfer of the same between the 1<sup>st</sup> and 2<sup>nd</sup> appellants was fraudulent, hence the reason that she lodged a caution against the title to protect her interest.

21. At the trial, Caroline Ndumba Francis testified as PW 1. She relied on a witness statement dated 29.4.2015 as her evidence in chief. Her testimony was that on 13.5.2023, she entered into a sale agreement with the 1<sup>st</sup> appellant to buy 0.82 acres out of LR No. Abogeta/Lower Chure/401 for Kshs.420,000/=, which she paid in full. PW 1 told the court that the land was subdivided into two portions, her portion being LR No. Abogeta/Lower Chure/1088, and while taking vacant possession, the mother of the 1<sup>st</sup> appellant protested, leading to the execution of another agreement dated 11.10.2004 for the 1<sup>st</sup> appellant to transfer another portion of the remaining LR No.1089 to her, in exchange for her portion together with Kshs.8,000/=.
22. PW 1 told the court that the 1<sup>st</sup> appellant caused the survey and subdivision of LR No. Abogeta/ Lower Chure 1089 into LR No's. 1139 and 1140 through mutation form dated 8.12.2004, and her portion became LR No. Abogeta/Lower Chure/1139 measuring 0.82 acres, but unfortunately, the 1<sup>st</sup> appellant failed or neglected to surrender it to her since his mother, Julia Kathiru Laban, had allegedly lodged a caution over the mother title. She was, therefore, forced to facilitate its lifting upon her death in 2012/2013.
23. According to PW 1 the effect of the Land Dispute Tribunal award was that the 1<sup>st</sup> appellant subdivided L.R. No. Abogeta/Lower Chure/1089 into two portions, one for him measuring 0.82 acres to be transferred to and in exchange for which she was to and actually did surrender her title deed for LR No. Abogeta Lower Chure/1088 to Julia Laban.
24. PW 1 told the court that since LR No. Abogeta/Lower Chure/1089 had already been subdivided; she and the 1<sup>st</sup> appellant sought and obtained a land control board consent to transfer LR No. Abogeta/ Lower chure/1139 to her hence they executed a transfer form in her favour after each of the parties had availed the requisite documents.
25. PW 1 said that after honestly executing the transfer documents, she took possession of the L.R No.1139 in August 2008 and left her farm work one Nicholas Mutugi, followed by a caretaker and farm manager Martim Gitonga Nyamu, who has since May 2009, to the filing of the suit been exclusively on the land on her behalf.
26. Consequently, PW 1 said that unknown to her, the 1<sup>st</sup> appellant, instead of effecting the transfer of the land to her, secretly colluded with the 2<sup>nd</sup> appellant to fraudulently transfer the same to the 2<sup>nd</sup> appellant. Further, PW 1 told the court that since she did not come from or reside near the same locality, the 1<sup>st</sup> appellant took advantage of her busy schedule as a teacher, to transfer the land while aware of her exclusive and absolute use and occupation of the land, with visible developments such as a piped water system, two semi-permanent houses, a fence, pit latrine, assorted food crops, and trees, and nappier grass.
27. PW 1 told the court that on 28.3.2015, her farm worker called her to report that the appellants, accompanied by about 12 youths armed with assorted weapons, confronted him with a view of forcibly taking possession.
28. PW 1 said that she made a report at Nkubu police station only to be told to go and reconcile. After visiting the suit land in the presence of the area manager, PW 1 told the court that the appellants became adamant, and at 2.00 pm, they allegedly stormed into her farm and committed acts of destruction, prompting her to file a formal police report OB NO. 38/28/3/2015 at 15:31 hours. PW1 told the court that the police visited the land at 5 pm and noted the destruction, only for the appellants to resist the intended arrest. PW 1 added that she recorded a statement to the police.



29. PW 1 told the court that on 4.4.2015 and 13.4.2015, the appellants re-visited the land and caused more destruction, all valued at Kshs.120,300/=.
30. In addition, PW 1 relied on copies of the agreement dated 13.5.2003, an acknowledgment receipt dated 9.7.2003, a green card for L.R No. Abogeta/Lower Chure/1139 agreement dated 11.10.2004 and official search certificates for LR No. Abogeta/Lower Chure/1139 and 1140, green card for LR No. Abogeta/Lower Chure/1140, field diagram for LR No. 1139 and 1140, LDT proceedings, caution over LR no. 1139 and 1140, copy of OB No. 38/28/3/2015, photographs showing the damage and a crop damage assessment report dated 20.4.2015 as P. Exh No. 1-14 respectively.
31. In cross-examination, PW 1 told the court that she was dispensing with the initial witness statement dated 19.4.2014. PW 1 said that her claim was over parcel No. 1139, though the parcel of land had not been mentioned in the second sale agreement dated 2004 since it was not in existence then and only came into being after LR No. 1089 was subdivided into LR NO. 1139 and 1140.
32. PW 1 said that since she had become the registered owner of LR No. Abogeta/Lower Chure/1088, it was agreed that LR No. 1089 be subdivided into two equal portions, one of which would be equivalent to what she had paid for in 2003, in which case the 1<sup>st</sup> appellant would get half of it, and she transfers it back LR No. 1088, to his mother in exchange.
33. PW 1 said that from the sale agreement dated 11.10.2004, she was to cater for survey fees. PW 1 told the trial court that she was actually in possession of the suit land on the ground, which an order of the court had inhibited. Equally, PW 1 insisted that until she obtained her land, she was not willing to lift an inhibition or injunction on the two parcels of land, which were the resultant subdivisions of LR NO. 1089, which, as per the land control board consent and transfer forms, was to be transferred to her. PW 1 said that after she executed the transfer, she handed them over to Nyamu, who unfortunately did not lodge them.
34. Again, PW 1 stated that after the Land Dispute Tribunal case, she agreed to re-transfer LR No. 1088 to the 1<sup>st</sup> appellant's mother on condition that LR No. 1089 be subdivided to enable her to acquire a portion which she was occupying on the ground, while the 1<sup>st</sup> appellant remained with LR No. 1140 where he was living together with his nuclear family.
35. PW 1 said that instead of Nyamu transferring the land to her as agreed after the Land Dispute Tribunal award, he instead fraudulently transferred it to the 2<sup>nd</sup> appellant despite paying Kshs.13,200/= as the survey fees.
36. Additionally, PW 1 said that if LR No. 1139 is transferred to her, she would be willing to lift the caution that she had registered against parcel L.R No. 1140. She said that it was the 1<sup>st</sup> appellant to put her into possession of parcel L.R no 1139 in August 2008, while awaiting the formal transfer process to her name after re-transferring parcel L.R No 1089.
37. Gilbert Kithinji Mutua, Magaju Nkanata, Martin Gitonga Nyamu, Francis Kidrima, Peter John Kariuki Muthamia, Festus Kiogora M'Arimi, and Cpt Abdikadir Dibo testified as PW 2 – 8, respectively. PW 2 confirmed that the respondent has been in occupation of the suit land since August 2008, which neighbors his parcel L.R No. 322. Further, PW 1 confirmed that the appellant destroyed the respondent's items on parcel L.R No. 2239 in 2015. PW 3, a neighbor, also aligned his evidence with that of PW 2.
38. PW 4, on his part told the court that PW 1 employed him as a caretaker to her land measuring 0.33 ha, with effect from May 2009 to the present. He confirmed that the appellants invaded the suit land on 28.3.2015 and caused damage to the developments, leading to a police report.



39. On his part, PW 5, a private land surveyor assistant, told the court that the respondent contracted him to prepare a survey report regarding parcel L.R No. 1089. He said that he was called to witness to the sale agreement between the respondent and the 1<sup>st</sup> appellant over parcel L.R No 1139, following instructions from the two of them to survey and subdivide parcel No. 1089 into LR No's. 1139 and 1140, measuring 0.33ha and 1.04 ha, respectively.
40. PW 6, on the other hand produced the crop damage assessment report as exhibit 14, which he said that he prepared after visiting the land on 17.4.2014. PW 7, a chairman of the Kajugone water project, confirmed that the respondent's land was connected with water on 24.4.2011, following approval of an application for water connectivity made by the respondent to his committee.
41. PW 8, on his part, confirmed visiting the land following the respondent's police report vide OB No. 38/28/3/2015, alongside the agriculture officer. He said that observed that the respondent had effected some developments in terms of food crops and fruit trees on the suit land. Equally, PW 8 said that though he visited the land registry to make inquiries, he was unable to charge the appellants or any person for any crime regarding OB No. 38/20/1/2015, since the respondent had no title to the land. Otherwise he advised her to pursue a civil case. PW 8 said that after interrogating some neighbors, they confirmed to him that the land belonged to the respondent.
42. Obadiah Mwititi testified as DW 1. He relied on witness statement dated 2.4.2014 and 8.5.2015 as his evidence in chief. DW 1 told the court that he sold LR No. Abogeta/Lower Chure/1088 measuring 0.33 ha to the respondent in 2003 who took possession and LR No. Abogeta/Lower Chure/11139 measuring 0.133 ha to the 2<sup>nd</sup> appellant on 17.1.2014. He denied selling, transferring, or putting into possession, LR No. Abogeta/Lower Chure/1139 to the respondent. DW1 wondered why the respondent was laying a claim on the 2<sup>nd</sup> appellant's land. DW 1 told the court that he lawfully sold LR No. 1089 to the 2<sup>nd</sup> appellant on 17.1.2015, who took vacant possession.
43. He denied that LR No. Abogeta/Lower Chure/1139 or 1140 were subject to any sale agreement between the respondent and himself; otherwise, he had not breached any sale agreement with her. DW 1 relied on the sale agreement dated 17.1.2014 and 13.5.2003, a copy of the green card for LR No. 1088, an official search certificate for LR No. 1139, proceedings in LDT No. 6Y 2008 copies of caution on LR No's. 1139 and 1140 and photographs showing the 2<sup>nd</sup> appellants' developments as D. Exh No. 1-7, respectively.
44. DW 1 admitted selling some portion of land out of LR No. 401 to the respondent for Kshs.420,000/= who was to take full possession as per the sale agreement and acknowledgment of payment before court. DW 1 admitted that LR No. 1139 was approximately 3 acres, which was equivalent to what the sale agreement between the respondent and himself referred to.
45. Equally, he said that the sale agreement with the respondent in 2003 had no reference to either parcel No. 1139 or 1140. Similarly, DW 1 admitted knowledge of the second agreement dated 11.10.2004 with the respondent, where he undertook to transfer 0.83 acres out of a subdivision of LR No's. 1089 upon the respondent re-transferring Parcel L.R No. 1089 to him.
46. As to D. Exh No. (2) DW 2 said that the 2<sup>nd</sup> appellant was to pay him Kshs.1.25 million as per D. Exh No. (1). However, DW 1 told the court that the 2<sup>nd</sup> appellant had not completed the payment as of 17.1.2014. again, DW 1 told the court that there was no encumbrance against LR No. 1089 when he entered into a sale agreement with the 2<sup>nd</sup> appellant. DW1 confirmed, therefore, that the 2<sup>nd</sup> appellant was not made aware of his earlier transaction with the respondent as indicated in P. Exh No. (6), over the same land.



47. DW 1 denied knowledge of any inhibition order or a default clause to the sale agreement with the respondent, in reference to specific performance or payment of double the consideration as liquidated damages. DW 1 urged the court to dismiss the respondent's suit and lift the caution she had registered on the title deeds, for he was willing to refund her the purchase price.
48. Further, DW 1 confirmed that the initial parcel of land was L.R No. 401, as captured in the sale agreement he had entered with the respondent on 13.5.2003, which gave rise to LR No's. 1088 and 1089. DW 1 told the court that parcel No. 1088, which he initially sold to the respondent, was re-transferred to the name of Julia Kathiru Laban and was currently leased out to Senator Hon. Kathuri Murungi for Meru County. He admitted that he was in occupation of Parcel No. 1140 after he sold parcel LR No. 1139 to the 2<sup>nd</sup> appellant, currently occupied by the respondent, who owned the fence and pit latrine with two semi-permanent houses and was undertaking farming activities on the land. Equally, he admitted that the respondent has been in continuous occupation and utilization of parcel No. 1139.
49. DW 1 admitted that P. Exh No. (4) was signed between him and the respondent, out of which he gave consent to the respondent to take up possession as the owner of the parcel L.R No. 1139. DW 1 confirmed that D. Exh No. (1) was signed on 17.1.2014. He similarly admitted that the 2<sup>nd</sup> appellant did not take vacant possession of parcel L.R No. 1139.
50. The court noted that the 1<sup>st</sup> appellant was not willing to answer the question as to whether he had disclosed to the 2<sup>nd</sup> appellant that there was a previous sale agreement over the said land with the respondent in 2004. He insisted that nothing was barring him from transacting with the 2<sup>nd</sup> appellant. Equally, DW 1 was emphatic that he was not at liberty to disclose to the 2<sup>nd</sup> appellant the previous sale of land between himself and the respondent in 2004, over parcel L.R No. 1088, as shown in P. Exh No. (1).
51. Mary Roman M'Mugambi testified as DW 2. She relied on witness statements dated 2.4.2014 and 5.5.2014 as her evidence in chief. DW 2 told the court that on 17.1.2014, she entered into a sale agreement with the 1<sup>st</sup> appellant to purchase LR No. Abogeta/Lower Chure/1139 measuring 0.33 ha for Kshs.1.25 million to which she paid the money and took vacant possession of the land now illegally encroached by the respondent DW 2 said that she had conducted an official search at the land office showing the 1<sup>st</sup> appellant as the registered owner of the land before executing the land control board consents, the transfer documents and subsequently paying stamp duty, registration and transfer fees.
52. DW 2 denied the existence of caution against the title or knowledge of any existing disputes over the title at the time. She termed the respondent as a total stranger to her; otherwise, she was the only person who has been in exclusive occupation of the land with development therein.
53. DW 2 wondered why the respondent had not transferred the land to her name since 2003, if at all she had bought it. DW 2 denied the alleged particulars of fraud since she was an innocent purchaser of the land for value devoid of any illegalities. DW 2 told the court that since 2000, she has been a resident of Mombasa County. She said that at the signing of the sale agreement on 17.1.2014 she paid a deposit of Kshs.500,000/= before Mr. Ndubi Advocate. She said that later on, she paid the balance in cash on a date she could not recall.
54. Moreso, DW 2 said that other than the official search, she had not inspected the land to verify if the respondent was in actual possession of the same; otherwise, she could not tell how the respondent came into possession of the same, and she was ordered to vacate it. She confirmed that her sale agreement was silent on when the payments were done and on whether it was prepared and executed before Ndubi advocate. DW 2 denied knowing Wamache Amos advocate on having paid Kshs.1.25 million at once.



55. Similarly, DW 2 refuted the contents of clause No. 2 of the sale agreement, since she had after the sale, occupied the land for only three months between January – April 2015. DW 2 told the court that she was not aware of the previous transaction between the respondent and DW 1; otherwise, she bought the land when it had only assorted fruit trees.
56. The appellants have faulted the lower court judgment delivered on 21.2.2024 for:
- i. Holding that the 1<sup>st</sup> appellant changed his mind to resale the land for a higher amount, yet the same had not been pleaded or canvassed at the hearing, more so when there was no bar on the right to dispose of his interest on the suit land on a willing buyer – willing seller basis, since he had a valid title.
  - ii. Holding that the 2<sup>nd</sup> sale agreement was in breach of earlier sale agreements with the respondent, which in any event were obsolete, unenforceable and had expired through effluxion of time.
  - iii. Holding that there was collusion with the 2<sup>nd</sup> appellant to push out the respondent from the land, yet the 2<sup>nd</sup> appellant's title remained unchallenged on account of illegality, fraud, or being obtained through corrupt means.
  - iv. Holding that the 2<sup>nd</sup> appellant's title was fraudulently obtained, yet she had proved it was legally and formally obtained, free of any encumbrances.
  - v. Holding that the 2<sup>nd</sup> appellant was not an innocent purchaser for value without notice.
  - vi. Holding that the suit land was held by the 2<sup>nd</sup> appellant in trust while ignoring that there was no privity of contract between the 2<sup>nd</sup> appellant and the respondent, in the absence of evidence to that effect.
  - vii. Holding that the respondent was entitled to compensation, yet no evidence was tendered to that effect.
  - viii. For dismissing the counterclaim, disregarding their evidence and ordering the cancellation of the title while rendering a per-incurring judgment.
57. The appeal was directed to be canvassed by way of written submissions due for filing on 7.11.2024. The primary role of an appellate court is to reconsider, re-examine and re-assess the records of the lower court and come up with independent findings on facts and the law, while giving credit to the court that saw and heard the witnesses testify. See *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) E.A 123.
58. Having gone through the record of the lower court grounds of appeal and the law, the issues calling for my determination are:
- a. If the respondent pleaded and proved entry into a sale agreement with the 1<sup>st</sup> appellant concerning and relating to 0.82 ha out of LR No. Abogeta/Lower Chure/401, and resultant subdivisions LR No. Abogeta/Lower Chure/1088.
  - b. If the respondent pleaded and proved the existence of any trust and proprietary estoppel against the 1<sup>st</sup> appellant in the manner, the latter dwelt with the resultant suit parcels of land.
  - c. If there was any fraud, illegality and or breach of the trust and proprietary estoppel in the manner that the 1<sup>st</sup> appellant sold and transferred LR No. Abogeta/Lower Chure/1089 and its resultant subdivisions to the 2<sup>nd</sup> appellant.



- d. If the sale and transfer between the 1<sup>st</sup> and 2<sup>nd</sup> appellants were subject to overriding interests in favor of the respondent.
  - e. If the 2<sup>nd</sup> appellant was an innocent purchaser for value.
  - f. Whether the appeal has merits.
  - g. What is the order as to costs?
59. The primary pleadings before the trial court were the further amended plaint dated 29.3.2023, further amended defense and counterclaim dated 12.4.2023 and replies to the further amended defense and counterclaim dated 3.5.2023.
  60. The respondent had complained that she bought and paid Kshs.420,000/= of 0.82 ha of the 1<sup>st</sup> respondent's land on 13.5.2003, which was to be excised from LR No. Abogeta/Lower Chure/401, which was excised as LR No. Abogeta/Lower Chure/1088. It was averred that when the respondent went to take possession, the mother of the 1<sup>st</sup> appellant raised an objection to which the sale agreement was amended so as to re-transfer LR No. 1088 to the said mother in exchange for an equivalent portion out of LR No. Abogeta/Lower Chure/1089 as reflected in an agreement dated 11.10.2004.
  61. The respondent averred that she attended a land control board meeting with the 1<sup>st</sup> appellant, obtained and executed the requisite transfer form only for the 1<sup>st</sup> appellant to shortchange her and transfer the resultant subdivision namely LR No. Abogeta/Lower Chure/1139 to the 2<sup>nd</sup> respondent. The respondent invoked the doctrine of constructive trust and proprietary estoppel and urged the court to invalidate the transfer and registration of LR No. 1139.
  62. In support of her claim, the respondent relied on sale agreements dated 13.5.2003, acknowledgment receipt dated 9.7.2003, and an official search certificate dated 9.10.2007, against title to LR No. Abogeta/Lower Chure/1088, copy of the records for LR No. Abogeta/Lower Chure/1088 and an agreement dated 11.10.2004, all of which the 1<sup>st</sup> appellant did not object to.
  63. In the sale agreement dated 11.10.2004, the 1<sup>st</sup> appellant acknowledged that his LR No. Abogeta/Lower Chure/1089 was to be subdivided to excise and transfer 0.83 acres to the respondent in exchange for the latter to re-transfer LR No. Abogeta/Lower Chure/1088 to him.
  64. In the caution registered on 14.2.2014 over the title register for LR No. Abogeta/Lower Chure/1139, the respondent swore on oath that the 1<sup>st</sup> appellant had acted contrary to the sale agreement dated 11.10.2004 and instead transferred and registered the land in the name of the 2<sup>nd</sup> appellant.
  65. In his defense and counterclaim, the 1<sup>st</sup> appellant did not describe the sale agreement dated 11.10.2004 as forged. He did not deny or dispute that there was an agreement to re-transfer the land he had initially sold and transferred to the respondent in 2003 as LR No. Abogeta/Lower Chure/1089, after his mother objected to the sale and occupation by the respondent. The 1<sup>st</sup> appellant did not deny in his defense and counterclaim making a binding promise in writing to the respondent, as well as refute the fact that the respondent acted to her detriment on his promise by re-transferring the LR No. Abogeta/Lower Chure/1089 as per the said promise.
  66. DW 1, in his evidence, made an admission to the fact that there were in existence two sale agreements with the respondent over the suit land. He equally admitted knowledge of the existence as well as the implications of the Land Dispute Tribunal award where his mother had objected to the sale of LR No. 1088 to the respondent, and whose outcome was that his mother be re-transferred LR No. 1088 on condition that the respondent acquires from him a portion of LR No. Abogeta/Lower Chure/1089



- measuring 0.82 ha. DW 1 admitted causing subdivisions to LR No. 1089 into LR No's. 1139 and 1140, with the former measuring 0.33 ha, as opposed to the latter, which was 1.0.4 ha.
67. DW 1 confirmed that the respondent was in occupation of parcel L.R No. 1139, which has her developments, including two semi-permanent houses, a fence, a pit latrine, piped water and assorted fruit trees. DW 1 admitted that he was the author of P. Exh No. (4), that was made as a follow-up of the initial agreement of sale dated 13.5.2003.
  68. Similarly, DW 1 admitted that he actually proceeded to subdivide his land as per the agreement dated 11.10.2004, to which the respondent now occupied LR No. 1139. DW 1 admitted receiving, selling, and transferring the same parcel of land on 17.1.2014 to the 2<sup>nd</sup> appellant without disclosing the initial sale, occupation, and or interests of the respondent to the 2<sup>nd</sup> appellant.
  69. Asked about the non-disclosure, DW 1 remained silent. In re-examination, DW 1 said that he was not at liberty to disclose to the 2<sup>nd</sup> appellant the previous history of the suit land. On her part, DW 2 admitted that other than the official search, she did not visit the suit land to confirm its status, including to verify or ascertain who was in occupation or the developments on the suit land.
  70. Fraud, under Black's Law Dictionary 11<sup>th</sup> Edition, page 802, is defined as knowing misrepresentation or concealment of a material fact made to induce another to act to their detriment. Trust on page 1817 thereof refers to a right enforceable in equity to the beneficial enjoyment of property to which another person holds the legal title. It is defined as a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party, (beneficiary).
  71. Constructive trust on page 1819 thereof refers to a remedy by which a court requires that a claimant has a better right to a specific property than the person who has legal title to it and is a remedy commonly used when the legal title is obtained by fraud or theft. It is further defined as declared by the court in favour of a victim of the wrong by turning over the property to the claimant instead of an award of damages. On page 1819 of Black Law Dictionary 11<sup>th</sup> edition, it states that "A constructive trust is a formula through which the conscience of equity finds expression. When the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interests and equity, it converts him into a trustee. See also *Twalib Hatayan Twalib Hatayan & another vs. Said Saggat Ahmed Alheidy & others* (2015) eKLR and *Macharia Mwangi Maina & others vs Mwangi Kagiri* (2014) eKLR.
  72. Constructive trust, therefore, arises whenever a party has conducted himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired. See *Peter Kyalo Mutinda vs Elizabeth Katele Mutinda* (2018) eKLR as cited with approval in *John Gitiba & another vs. Jackson Rioba Buruna in Kisumu Civil Appeal No. 89 of 2003*.
  73. In *Arvind Shah & others vs. Mombasa Bricks & Tiles Ltd & another* S.C Petition E020 of 2022, the court said that constructive trust would automatically arise where a person who is already a trustee takes advantage of his position for his benefit and that Section 25 (2) of the *Land Registration Act* does not relieve any proprietor of his duty or obligation to which the person is subject and as a trustee.
  74. Proprietary estoppel, on the other hand, as held in *Aliaza vs Saul (Civil Appeal 134 of 2017)* (2022) KECA 583 (KLR) (24<sup>th</sup> June 2022) (Judgment) cited *Macharia Mwangi & others* (supra) that as held in *Mwangi and another vs Mwangi* (1986) KLR 328, the rights of a person in possession or occupation of land are equitable rights binding on the land. The court cited *Mutsonga vs. Nyati* (1984) KLR 425 and *Kanyi vs Muthiora* (1984) KLR 712 that equitable doctrines of trust or proprietary estoppel are applicable to oral or written agreements even though void and unenforceable as a contract, especially where respondent had been put into possession of the suit land by the appellants not as licensees but



with the intention that they would transfer individual plots purchased by them after receiving the purchase price to stop the respondent from renegeing on the promise. See also David Ole Tunkai vs Francis Arap Muga and others (2014) eKLR, Willy Kimutai Kitilit vs Michel Kibet (2018) eKLR, Wiliam Kipsoi Sigei vs Kipkoech Arusei & another (2019) eKLR and Kiplagat Kotut vs Rose Jebor Kipngok (2019) eKLR.

75. In this appeal, there is evidence that the 1<sup>st</sup> appellant received Kshs.420,000/=as purchase price for 0.82 acres of land from the respondent in 2003, which he never refunded or pleaded to refund to the respondent. Parties are bound by their pleadings, and issues for court determination arise from the pleading as held in Stephen Mutinda Mule vs IEBC & others (2014) eKLR and Raila Odinga & others vs IEBC (2017).
76. The 1<sup>st</sup> appellant was privy to the previous two sale agreements with the respondent over the suit land, which he had obtained consideration for in 2003 and which he had undertaken to actualize in the second agreement dated 11.10.2004. On top of that, the 1<sup>st</sup> appellant proceeded to cause the respondent to re-transfer LR No. 1089 to his mother on the understanding that he would subdivide LR No. 1089 and transfer a portion of it as a consideration or exchange to what the respondent had re-transferred to his mother.
77. A copy of the records for LR No. Abogeta/Lower Chure/1088 shows entry No. 2 of 8.7.2003, where the respondent became the owner after the land was transferred to her by the 1<sup>st</sup> appellant only for his mother to effect a caution by entry number 4 dated 2.9.2003. The 1<sup>st</sup> appellant obtained title for his land on 24.10.2013 while aware of the sale agreement dated 10.5.2003 and 11.10.2004. He then sold and transferred the land to the 2<sup>nd</sup> appellant on 11.2.2014 without terminating the earlier agreements with the respondent. Equally, there is no evidence that the 1<sup>st</sup> appellant put on notice the respondent to vacate the land that she had possessed pursuant to the initial agreements by 2014. Parties are bound by the terms and conditions of contracts which they enter into for they have the freedom to contract. It is not the duty of courts to vary but enforce contracts unless vitiated by fraud, illegality, or undue influence. See NBK of Kenya vs Pipeplastic Samkolit (K) Ltd & another (2001) eKLR.
78. The intention of the parties in a contract is to be construed with reference to the object and terms of their agreements in the four corners of the contract.
79. The 1<sup>st</sup> appellant did not plead ambiguity, fraud, illegality, undue influence, or misrepresentation in the two agreements between him and the respondent. Clause 6 of the sale agreement dated 17.1.2014 defined the land sold as on as it is basis. There is no clarity on what that meant to the parties in view of the history of the suit land, going by documentary evidence in existence by the time which the 1<sup>st</sup> appellant deliberately, willfully and knowingly withheld full disclosure of the details on the substratum and the status of the subject land from the 2<sup>nd</sup> appellant.
80. Non-disclosure of material facts in a sale agreement by a party disentitles him from the favor in a court of equity. It amounts to a misrepresentation of facts. It shows bad faith and dishonesty on the part of a party. A party may not seek to obtain orders so as to perpetuate illegality out of its wrongdoing by being a culprit of non-disclosure of fundamental facts in a sale agreement. The 1<sup>st</sup> appellant falls under that category. He wants to enrich himself unjustly. He who comes to equity must come with clean hands and be prepared to do equity. See Thathy vs Middle East Bank (K) Ltd & another HCC No 302 Of 2002.
81. It has been submitted that the 2<sup>nd</sup> appellant was an innocent purchaser for value without notice of the overriding or occupation rights of the respondent in 2014. The 2<sup>nd</sup> appellant made admissions that she never visited the suit land before the sale to confirm or verify its status. In Said vs. Shume and others



(Civil Appeal) E050 of 2023) (2024) KECA 866 (KLR) (26<sup>th</sup> July 2024) (Judgment), the court cited Dina Management Ltd vs County Government of Mombasa (2023) KESC 30 (KLR), that one has to prove there was due diligence carried out with no defects or infirmities against the seller's title, as held in Uganda Supreme Court case of Lwanga vs Mubiru & others Civil Appeal No. 18 of 2022 (2024) UASC 7.

82. In this appeal, there was no evidence of a prior visit to the land by the 2<sup>nd</sup> appellant, followed by the production of the requisite paper trail until she obtained registration of title in her favor. The law is that when a title is under challenge, it is not enough to dangle the instrument of ownership without availing all the documents to show that the acquisition of title was regular, formal procedural, and free of any corrupt scheme. See Dr. Ngok vs Moijjo Ole Keuiwa & 4 others (1997) eKLR. Had the 2<sup>nd</sup> appellant conducted such a scene visit to the Suitland before the sale as held in Torino Enterprises vs Attorney General (2023) KESC 79 (KLR), she would probably have established that the respondent was in occupation of the land since 2003. The evidence of the respondent's witnesses were consistent, credible and reliable as to the longevity of the occupation and developments on the suit land.
83. The 1<sup>st</sup> appellant, as indicated above, knew that the suit land was not available for resale to the 2<sup>nd</sup> appellant by virtue of former agreements and promises to effect the transfer in favor of the respondent. While aware of all these facts, he withheld them from the 2<sup>nd</sup> appellant and proceeded to sell and transfer the land to her without disclosing the facts.
84. The 1<sup>st</sup> appellant was out to mislead and conceal material facts over the status of the land he was selling and transferring to the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant knew that he could not guarantee a clean title to the land and or give vacant possession of the land to the 2<sup>nd</sup> appellant, which by then was occupied by the respondent out of previous agreements.
85. The 1<sup>st</sup> appellant cannot, therefore, be heard to allege that he was at liberty to deal with the land and have a second bite of the cherry, oblivious of the overriding rights held by the respondent for over ten years since the 2<sup>nd</sup> agreement was entered dated 11.10.2004. The 1<sup>st</sup> appellant cannot feign ignorance of the same. Similarly, in the absence of establishing the basis of being termed an innocent purchaser for value without notice, the 2<sup>nd</sup> appellant cannot equally be termed as an innocent purchaser.
86. The upshot is that I find that the appellants were unable to prove their defenses and counterclaims. The trial court was justified in reaching the verdict it made. The appeal lacks merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4<sup>TH</sup> DECEMBER, 2024**

In presence of

C.A Kananu

**HON. C K NZILI**

**JUDGE**

