



**Njuki v Wandira (Environment and Land Appeal 16 of 2019)  
[2023] KEELC 18835 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 16 OF 2019**

**A KANIARU, J  
MAY 9, 2023**

**BETWEEN**

**EMILIO NYAGA NJUKI ..... APPELLANT**

**AND**

**PHILLIP WAMWEA WANDIRA ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. M. Gicheru, Chief  
Magistrate at Embu dated 17th June, 2019 in CMCC No. 63 of 2015)*

**JUDGMENT**

1. This appeal arose from the judgement of the lower court here in Embu (MN Gicheru, Chief Magistrate – as he then was) in Civil suit No 63 of 2015, Embu. The appellant – Emilio Nyaga Njuki – was the plaintiff while the respondent – Philip Wamwea Wandira– was the defendant. In the lower court the appellant had sued the respondent alleging breach of a land sale agreement. By that agreement, the appellant was purchasing some two acres of land from Land parcel No Kagaari/Weru/1106 which belonged to one Nimrod Wandira Gichuru, who was then deceased, and to which the respondent was entitled to own in part as a beneficiary.
2. The understanding was that the appellant would get his two acres from the respondent’s portion after the requisite succession process. It appears clear that succession was done and the respondent’s portion became land parcel No Kagaari/Weru/8760. The appellant was supposed to get his two acres from this portion but the respondent seems to have reneged on the agreement thus rendering the lower court suit necessary. In the lower court, the appellant wanted the court to order transfer of the land to him or order a refund of the purchase price plus 50% interest. He was also asking for costs of the suit and interests or any other relief the court may deem fit to grant.
3. But when the lower court heard the matter, the judgement that ensued did not grant the appellant all what he had asked for. Instead, the appellant was to get back only the money he had paid as purchase



price. The lower court found that the appellant was not deserving of interests as he had been utilizing the land. The court also declined to award costs because the appellant was found to have refused to accept back the money he had paid as purchase price. The refusal of the lower court to grant some of the reliefs asked for by the appellant is what provoked the filing of the appeal now under consideration.

4. The appeal came with ten (10) grounds as follows:

1. That the learned trial magistrate erred in law and fact by failing to appreciate that the respondent's action of receiving the purchase price and putting the appellant in possession created a constructive trust in favour of the respondent.
2. That the learned trial magistrate erred in law and fact in failing to note that the Land Control Board consent was not required where a trust is created over agricultural land.
3. That the learned trial magistrate erred in law in failing to interpret the provision of the *Land Control Act* in light of the *2010 Constitution* so as to ensure administration of substantive justice.
4. That the learned trial magistrate erred in law and fact in not finding that rules of equity are now contained in the *Constitution of Kenya* and therefore override the provisions of *Land Control Act*.
5. That the learned trial magistrate erred in law and fact in failing to appreciate that a constructive trust relating to land is enforceable.
6. That the learned trial magistrate failed to appreciate that even if void and unenforceable as a contract, the sale agreement was still enforceable on the basis of a constructive trust.
7. That the learned trial magistrate erred in upholding the provisions of the *Land Control Act* on procedural technicalities at the expense of substantive justice.
8. That the honourable court erred in failing to hold that the rights of the applicant who is in physical possession of the suit land cannot be defeated by the rights of the respondent who put him in possession as a bona fide purchaser for value.
9. That the honourable court misdirected itself in holding that the only remedy available to the appellant is the refund of the purchase price.
10. That the honourable court misdirect itself in holding that the appellant was not (sic) entitled to interest nor costs of the suit because he has been in use and occupation of land.

5. The appellant expressed his wish to have the lower court judgment set aside and substituted with a judgement that allows what was asked for in the plaint. He also wants this court to award him costs of this appeal and costs of the lower court suit.

6. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 17/8/2022. Reference was made to the prayers sought in the lower court suit and the necessary background and antecedents were highlighted. It was in particular stressed that the appellant was in possession of the land. The appellant then found fault with the lower court for failing to give effect to the terms of the sale agreement; failing to properly appreciate the legal import of the fact that



the appellant was in possession; and failing to imply or infer a constructive trust in favour of the appellant. The appellant sought succour in the decided cases of *Macharia Maina Mwangi & 87 others v Davidson Mwangi Kagiri* [2014] eKLR (Civil Appeal No 6 of 2011, Nyeri) and *Five Forty Aviation Ltd Vs Erwan Lanoë* [2019] eKLR in order to reinforce his position.

7. The respondents submissions were filed on 12/1/2023. According to the respondent the appellant can not claim entitlement through a constructive trust since he failed to take possession of the land identified for him and instead took possession of a different portion. The respondent submitted that there is no evidence proffered to show creation of a trust in favour of the appellant. He was also faulted for refusing refund of the money he had paid towards purchase of the land. It was also further submitted that the respondent placed a caution on the land thus frustrating specific performance.
8. I have considered the appeal as filed, the rival submissions, and the lower court record made available for the purpose of the appeal. This is a first appeal and, as by law required, this court needs to evaluate and assess the evidence on record and reach its own conclusion (see the cases of *Selle vs Associated Motor Boat Company Limited* [1968] EA 123, *Mbogo & Another v Shab* [1968] EA 93 and *Otieno Ragot & Company Advocates v Kenya Airports Authority*: CA No 34 of 2012, Kisumu (as consolidated with CA No 35 of 2012.)
9. It is common ground that the appellant and the respondents entered into a land sale agreement with the respondent as the vendor and the appellant as a purchaser. The vendor entered into the agreement as a beneficiary of the estate of one Nimrod Wandira Gachuru. The land being sold – some two acres from land parcel No Kagaari/Weru/1106 – was still subject to a succession process – via Succession Cause No 416 of 2008 – at the High Court here in Embu. The agreement is clear that the succession cause had not yet been finalized.
10. The appellant, or purchaser if you like, paid a substantial amount of money and also went into possession or occupation of the portion he was allegedly purchasing. I use the word “allegedly” here with some element of caution because the respondent is alleging that the purchaser went into possession and/or occupation of a portion different from what he had been shown.
11. It was a term of the agreement that if any party breached the agreement, he would pay the other party 50% of the purchase price as liquidated damages. The appellant was of the view that the respondent breached the agreement and was therefore liable to pay to him 50% of the purchase price. He specifically asked for this payment in the lower court matter. In its judgement, the lower court declined to grant the prayer. It also declined to grant costs and interests and, in so doing, expressed itself thus “I will not order for payment of interest because the plaintiff is said to be utilizing the land. I will not also order for costs because it is in evidence that the plaintiff has refused to accept the purchase price.” This is essentially what triggered the filing of the present appeal.
12. It is the appellant’s position also that the lower court should have inferred a constructive trust in the matter and this would have served to override the requirement that the consent of the Land Control Board should be obtained. The respondent on his part was satisfied with the lower court judgement and his view is that a constructive trust should not be implied into the matter as the appellant occupied a portion of land that he had not been shown. It was also said that the same respondent has been refusing refund of the purchase price.
13. The appeal before this court is largely hinged on the equitable concept of constructive trust. Constructive trust is a rather amorphous concept in so far as it embraces a vast array of situations with very little common criteria. As a result, the rights and duties of a constructive trustee differ so widely that it is always necessary to treat each case on its own merits or facts. The amorphous nature of the concept is even manifest in the submissions before me in this appeal. This is particularly so from the



respondent. In his submissions, the respondent first submitted that constructive trust “arises where the intention of the parties can not be ascertained.” He continued: “with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor”.

14. But in a rather contradictory aspect of the same submissions, the respondent cited the case of *Peter Ndung’u Njenga v Sophia Watiri Ndungu* [2000] eKLR where the court of appeal expressed itself as follows: “The intention of the parties to create a trust must be clearly determined before a trust is implied.”
15. In the *Macharia Mwangi’s* case (*supra*) cited and relied upon by the appellant, the court of relied on the original intention of the disputing parties before inferring a constructive trust.
16. I have no doubt in my mind that in an appropriate case, it is always necessary to infer a constructive trust. The court is always ready to use this device where the conduct of a party in a given case is offensive or a blot on equity or to the conscience of right thinking members of society.
17. I now turn to the issue of whether this is a suitable case where a constructive trust can be inferred. As I pointed out earlier, a constructive trust is essentially an equitable concept. But there is also a concept of equity which runs thus: “*Acquitas sequitur legem*,” which means equity follows the law. It is important to appreciate that even in the old times when the court of Chancery in England used to apply equity, it never claimed to override the courts of common law. This principle essentially means that decisions in legal disputes should be made based on the law, rather than on the principles of fairness and justice alone. Equity therefore does not derogate from the law. It supplements it.
18. In this matter, it is plain to me that the land belonged to a deceased party and succession had not yet been finalized when the parties in this dispute transacted in respect of it. The law is very protective of the estate of a deceased person and this is for a very good reason. It is easy to see how easily such estate can be dissipated by or through irresponsible actions of those left alive by the deceased.
19. To ensure the protection of the estate of a deceased person, section 82 (b)(ii) of the *Succession Act* (Cap 160) states as follows:

“No immovable property shall be sold before confirmation of grant.”

And section 45(1) of the same Act says:

“Except so far as expressly authorized by this Act, or by any written law or by a grant of representation under this Act no person shall for any person take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”
20. A proper appreciation of these provisions makes it clear that nobody is allowed to deal in or interfere with the property of a deceased person before the requisite legal process to appoint a personal or legal representative is fully completed. In this regard, when the appellant and the respondent entered into a land sale agreement in respect of land registered in the name of a deceased person, they were engaging in an illegal transaction and the subsequent possession or occupation of the land by the appellant pursuant to that transaction was equally illegal. The lower court never appreciated this aspect of the law and did not apply it.



21. It may be useful to make reference to decided cases in order to drive the point home. In *Daniel Gituma Marete Vs Frankline Mutwiri*: HCC Succession cause No 716 of 2011, Meru, F Gikonyo J expressed himself as follows:

“Acquisition of the land before confirmation of grant is unlawful and does not enjoy property rights under the constitution.”

And in *Kanini Kakua & Another v Kenneth Onsare Maina & Another*: HCC Succession Cause No 54 of 2010, Machakos, the court expressed itself as follows:

“The property of the deceased should not be distributed to non-beneficiaries especially when those persons had not purchased the land from the deceased himself and further had purported to have bought the land from beneficiaries before the grant was confirmed.”

In this matter the transaction relating to the land in dispute took place in the exact scenario depicted in the above two cases. It was a patently illegal transaction.

22. It is trite that equity does not aid an illegality. The transaction between the parties in the matter under consideration was devoid of legality. “*Exturpi causa non oritur actio*”, translated to mean that no action can arise from an illegal act, seems to me to be applicable here. Sections 45 and 82 of the *Succession Act (supra)* essentially ordain non-interference with the estate of a deceased person until the estate has a proper legal or personal representative. Constructive trust, being a concept rooted in equity, can not be used to aid an illegal transaction. It is therefore not applicable to the matter at hand.

23. The submissions of the respondent is “that the judgement delivered in Embu CMCC No 63/2015 be upheld with costs to the respondent.” I choose not to interfere with that judgment for the simple reason that the respondent seems to be comfortable with it. Let that judgement remain as it is. The respondent however is not entitled to any costs arising from that judgment and no costs therefore are granted. As for the appeal herein, the same is dismissed but with no order as to costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF MAY, 2023.**

In the presence of Mugane for M/s Beth Ndorongo for appellant and in the absence of Kahiga for respondent.

Court assistant: Muinde John

**A.K. KANIARU**

**JUDGE**

**09.05.2023**

