



**Githae v Kinga & 9 others (Environment & Land Case 56 of 2021)
[2023] KEELC 19227 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 56 OF 2021**

AK BOR, J

JULY 3, 2023

BETWEEN

JACK KAGUU GITHAE PLAINTIFF

AND

JAMES MUGO KINGA 1ST DEFENDANT

DANIEL NGATIA KINGA 2ND DEFENDANT

HENRY WAITHAKA KINGA 3RD DEFENDANT

CRISPIN MUCHERU KINGA 4TH DEFENDANT

MICHAEL MAINA KINGA 5TH DEFENDANT

STANLEY KINGA MWENDIA 6TH DEFENDANT

MOSES KANYUTU MWENDIA 7TH DEFENDANT

JOSEPH MWENDIA KINGA 8TH DEFENDANT

DIASPROPERTY LIMITED 9TH DEFENDANT

SAMUEL THUITA MWANGI 10TH DEFENDANT

JUDGMENT

1. On 3/7/1986, the Plaintiff entered into an agreement with Kinga Wamwendia for the purchase of 200 acres out of the land known as land reference number (L.R No.) 11306 situated West of Rumuruti town in Laikipia District, at the agreed consideration of Kshs. 600,000/=. Kinga Wamwendia agreed to transfer to the Plaintiff the area containing 200 acres together with the main house and other permanent improvements on the land. An initial deposit of Kshs. 100,000/= was to be paid on the signing of the agreement while the balance of Kshs. 500,000/= would be paid in installments of Kshs.



- 100,000/= per month until payment in full. The agreement went further to provide that the first instalment of Kshs. 100,000/= would be paid less the monies due to the Settlement Fund Trustees (SFT).
2. The agreement provided that the transaction was subject to the Laikipia Land Control Board (LCB) consent being granted and the parties undertook to apply for consent within three months of execution of the agreement. On receipt of the purchase money, the vendor was to pay the balance of the charge registered in favour of SFT in order to have the title over the land released free of encumbrances. Clause 6 stipulated that on receipt of the first instalment, the vendor would allow the purchaser to take full possession and use of the premises. However, the premises would only be transferred to his name upon payment of the final installment. Lastly, costs of the transaction were to be paid by the purchaser.
 3. The Plaintiff's claim is that he paid the full purchase price to Kinga Wamwendia but the land was not transferred to his name. He filed suit seeking a declaration that there exists a constructive trust between him and the Estate of the late Kinga Wamwendia and the 1st to 8th Defendants in respect of 200 acres comprised in L.R No. 11306 Ex-Moller Farm, situated South West of Rumuruti Township, Grant no. IR No. 20579 ("the suit property") by virtue of the late Kinga Wamwendia having sold and placed him in possession of the suit property and having continued to receive payments from him on account of the purchase price and also having made representations to the Plaintiff that he would convey the suit property to him as agreed.
 4. The Plaintiff challenged the Assent registered on 15/7/2008 vesting and transferring the land known as L.R No. 11306 to the 1st to 8th Defendants which was endorsed as entry no. 8 on Grant no. 2079 and all subsequent entries made on the grant. He sought to have the 1st, 9th and 10th Defendants ordered to deliver up and surrender to the court the original grant for L.R No. 11306 for purposes of cancellation and transfer of the Plaintiff's interest in 200 acres of that land. Further, he sought to have the Deputy Registrar of the court authorised to execute the instruments necessary to convey and transfer the 200 acres to his name.
 5. The Plaintiff went further to seek that in the event that the court found that the LCB consent which the late Kinga Wamwendia applied for on 21/11/1995 and which the board issued on 20/8/1997 was not valid, then the court was urged to direct the 1st Defendant as Administrator of the Estate of the late Kinga Wamwendia, to apply to extend the time to obtain a valid LCB consent to transfer the 200 acres to the Plaintiff.
 6. The 1st, 5th 6th and 7th Defendants filed their Defence in which they averred that the 2nd, 3rd, 4th and 8th Defendants died before this suit was filed. They denied that the Plaintiff was the legal owner of 200 acres out of L.R No. 11306 but admitted that through the sale agreement dated 3/7/1986 the late Kinga Wamwendia agreed to sell the land to the Plaintiff. They argued that the sale agreement was not effected and therefore became frustrated due to the expiry of time and operation of the law. They added that the only recourse for the Plaintiff was to seek a refund of the purchase price he paid from the Administrator of the Estate of the late Kinga Wamwendia. They conceded that part of the purchase price was paid to SFT to offset a loan balance but maintained that the total purchase price of Kshs. 600,000/= was never paid and that a balance of Kshs. 61,450.90 remained unpaid. They denied that the Plaintiff took possession of the land or that he had ever run a clinic on the land.
 7. The 1st, 5th 6th and 7th Defendants admitted that the late Kinga Wamwendia initiated the process of subdivision of the land and obtained consent to subdivide it but that as late as 18/3/2000, the subdivision had not been completed. They denied that the late Kinga Wamwendia executed the application for transfer of land dated 21/12/1995 and the application for LCB consent. They also denied that a land board meeting of the Laikipia land control board took place on 20/8/1997. They



- relied on the report from the Directorate of Criminal Investigations (DCI) regarding the signatures in the consent and the transfer of land.
8. The 1st, 5th 6th and 7th Defendants averred that Kinga Wamwendia died on 13/10/1999 and that any attempts made to subdivide the land in 2000 was illegal and unlawful because it amounted to interference with the Estate of a deceased person without the authority by the court. They denied that the Plaintiff had been in possession of the suit land.
 9. They averred that the grant of letters of administration and confirmation of the grant vide Nairobi High Court Succession Cause No. 1711 of 2006 was done lawfully and procedurally. They went further to assert that the 1st Defendant and the other beneficiaries had the right to sell the suit land to any purchaser because they held title to it after following due process. They urged that if the Plaintiff had any right or interest over the land he would have registered it against the title yet for 32 years he did not register a caveat or file suit and that the doctrine of laches had therefore come into play. They denied that the Plaintiff had any overriding interest over the suit land while urging that the agreement between him and the late Kinga Wamwendia became void by operation of law. They denied that there was any conspiracy between the Defendants.
 10. The 9th and 10th Defendants in the Amended Defence and Counterclaim denied the Plaintiff's claim and averred that they were the legal owners of the suit land having bought the land vide the sale agreement dated 22/9/2011. They maintained that the Plaintiff did not take possession or occupy the suit property. They averred that they purchased L.R No. 11306 measuring 264 acres from the 1st Defendant after conducting due diligence and that they paid valuable consideration to the beneficiaries of the deceased. They claimed that the suit was time barred under the Limitation of Actions Act because the agreement was entered into in 1986 while the suit was filed 26 years later and urged the court to dismiss the suit.
 11. The hearing of the suit commenced on 13/3/2023, when the Plaintiff gave evidence and adopted his witness statement. He stated that sometime in 1986, he acquired a piece of land measuring 200 acres from the late Kinga Wamwendia for the sum of Kshs. 600,000/=, which was to be excised from L.R No. 11306 measuring 264 acres. Under the agreement, he was to pay a substantial part of the purchase price to SFT towards offsetting the loan balance of Kshs. 315,539.10 which the late Kinga Wamwendia owed. He stated that he cleared that loan on 1/9/1986 and paid the balance of the purchase price which the late vendor acknowledged receipt of. He produced a copy of the sale agreement and the documents acknowledging payment.
 12. That upon the expiry of the completion period indicated in the agreement, the parties through their conduct extended the completion period indefinitely while waiting for the subdivision exercise to be completed. He stated that he took actual occupation, exclusive and lawful control of the land with the full knowledge and acquiescence of the late vendor upon payment of the deposit and was shown the land in line with clause 6 of the agreement of sale dated 3/7/1986. That after that, he dealt with the land as his own by setting up and operating a satellite herbal medical clinic known as the School of Alternative Medicine & Technology (SAMTECH). He maintained that he acquired a beneficial interest in the land. Based on mutual trust, he waited patiently for the conclusion of the titling and transfer of the suit land to his name based on the words, representations and overall conduct of the late vendor.
 13. The Plaintiff relied on the procedural steps which the late Kinga Wamwendia needed to initiate before he could transfer the suit property to him. He pointed out that he took steps to have the entire land subdivided into two portions and submitted the prints for the proposed subdivision on 12/1/1987. Various offices dealing with the subdivision of land were requested to give comments on the proposed



subdivision including the Commissioner of Lands and the Director of Surveys. He concluded that the only issue that was pending in relation to the subdivision of the land was the demarcation of the access road.

14. The Plaintiff maintained that a presumptive and or implied trust was created in his favour and that the constructive trust was not subject to the *Limitation of Actions Act* and is enforceable by law. That in any event, his occupation of the suit property upon acquisition constituted an overriding interest and burden against the land held by the 1st to 8th Defendants. He stated that all that time the deceased vendor kept him fully apprised and updated on the milestones he was pursuing towards conveying the suit property to his name. That on 21/12/1995 the deceased vendor executed the application for LCB consent to transfer the suit land to his name and that he obtained consent to transfer the property on 20/8/1997 which was captured as entry no. 487/97. He produced copies of the LCB consent and the application for the consent.
15. He went on to add that on 4/6/1994 he instructed Lucy Mwai and Co. Advocates to request John Miano to resurvey the entire parcel of land and confirm that the access road was provided and that the same Lucy Mwai Advocate executed the transfer instrument over the suit property.

Unfortunately, Kinga Wamwendia who had been ailing for some time died on 16/12/2004 before the transfer process was concluded to the Plaintiff's name. He maintained that the transaction pertaining to the suit property survived the death of the deceased vendor because he had performed all his contractual obligations to the letter.
16. The Plaintiff stated that all that while he continued to be in occupation of the suit land and produced telephone bills to confirm that he was in actual lawful occupation. He explained that his possession was only intermittently interrupted by the tribal clashes that broke out in Rumuruti in 1992, 1997 and 2007 and produced documents confirming that he reported the incidents to the police authorities.
17. He stated that it was left to the Estate of the late vendor to facilitate the completion of the transfer of the suit property to his name on the basis of the constructive trust or proprietary estoppel created by the dead vendor in his favour over the suit property. That based on that understanding, he approached the administrator of the estate of late Kinga Wamwendia with a view to working on modalities for completion of the transfer process but over the years there was little cooperation from the 1st Defendant who then ignored his plea to facilitate the transfer of the suit property to his name but was rather eager to perpetuate illegalities with respect to the suit land while ignoring the long lasting friendship and mutual respect which existed between his late father and the Plaintiff.
18. The Plaintiff claimed that it was not until 2011 that he was shocked to learn that the 1st to 8th Defendants were staking a claim to the suit property in their capacity as administrator and beneficiaries of the Estate of Kinga Wamwendia. He added that they made several attempts at illegally wresting its possession and ultimately forcefully occupying the land and in the process vandalized and destroyed his private property while knowing that he was the bona fide owner of the suit land. Without his knowledge, the administrator of the Estate of the late Kinga Wamwendia proceeded to convey L.R. 11306 to the 1st to 8th Defendants through the Assent registered on 15/7/2008. He maintained that the registration of the Assent was procured by the 1st to 8th Defendants through concealment of vital material information to the court which heard the succession case by failing to disclose to the court that the Estate of the late Kinga was only entitled to the remainder of 64 acres after excising the 200 acres over which he had a beneficial interest.
19. He averred that the 1st to 8th Defendants again without his knowledge proceeded to sell L.R No. 11306 to the 9th and 10th Defendants vide the sale agreement dated 22/9/2011. He contended that the sale



- was illegal, fraudulent and void because the 1st to 8th Defendants could not sell the 200 acres which belonged to him.
20. The Plaintiff produced copies of the letters he wrote on 28/7/2011 to the DCI, Kenya Anti-Corruption Commission, the Chief Land Registrar and the Truth Justice and Reconciliation Commission bringing to their attention his fears that the suit property could be illegally sold and alienated to the 10th Defendant while seeking the intervention of those offices.
 21. The Plaintiff stated that he notified the 10th Defendant through his friend Dr. Mugo to desist from purchasing or attempting to take possession of the suit land but he nevertheless proceeded with the sale. He termed the sale of the suit land comprising 264 acres to the 10th Defendant for Kshs. 9.5 million as illegal. The Plaintiff claimed that at the time the prevailing market value of the land was Kshs. 150,000/= per acre.
 22. The Plaintiff maintained that the suit land remained dear and sentimental to him because it is a unique and valuable agricultural property located in Rumuruti Division within the great Laikipia county which is the new headquarters of the Laikipia County Government. He also mentioned that he had invested colossal sums of money in an eco-tourism center and had undertaken extensive agroforestry related activities within the botanical forest which he initiated way back in 1987. He added that the land holds a unique biodiversity habitat which is the primary source of herbal plants for his herbal medicinal practice. He relied on his letter dated 25/11/2009 appealing for a grant through SAMTECH which he copied to various ministries dealing with eco-tourism and the World Health Organisation (WHO).
 23. He stated that his peaceful ownership and use of the suit land was interrupted when the 1st to 8th Defendants purported to forcefully take possession and occupation of the land following which he made complaints to the police and provincial administration regarding the Defendants' trespass and malicious damage to his private property. He maintained that the Assent registered on 15/7/2008 in favour of the 1st to 8th Defendant was registered when those Defendants were aware that a constructive trust existed been their late father's estate and him in respect of the suit property.
 24. He added that that registration was intended to defeat the existing constructive trust and would amount to arbitrary deprivation and expropriation of private property which is an infringement on his right to own property protected in *the Constitution*. He stated that he managed to register a restriction against the L.R No. 11306 on 12/3/2012 to safeguard his interest after the administrators of the Estate of the late Kinga Wamwendia became evasive, unresponsive and showed open hostility by refusing to cooperate with him to have his land registered in his name. He maintained that he did not have any dispute with the 1st Defendant's father regarding any outstanding payment of the purchase price and added that had he breached any terms of the sale, then the late Kinga Wamwendia would have issued a rescission notice pursuant to the Law Society Conditions of Sale.
 25. He added that on 15/3/2012, the court issued orders restraining the 1st to 8th Defendants from trespassing or interfering with his ownership or possession the suit land but the Defendants defied the court order and forcefully put the 9th and 10th Defendants in possession of the suit property. He maintained that he did not breach any terms of the contract and that the Defendants were manipulating a binding transaction to obtain an unfair gain. He contended that the continued occupation of the land by the 9th and 10th Defendants had occasioned him loss and damage since he could not undertake any economically viable activities on the land because the 9th and 10th Defendants had forcefully removed him from the actual physical possession of the land despite the orders issued on 15/3/2012. He maintained that he was a bona fide purchaser for value and urged the court to grant the orders sought in his Further Amended Plaint.



26. On cross examination, the Plaintiff was emphatic that he completed payment of the purchase money and that the seller acknowledged that fact. When he was referred to the letter indicating that there was a balance of Kshs. 61460.90 he stated that that sum was subsequently paid in full. He relied on the payments which he made which were noted in a diary. He emphasised that there was no balance outstanding when they signed the transfer. He reconciled accounts with the late Kinga Wamwendia but had lost some of the documents. He was emphatic that the land was subdivided into two portions being L.R No. 11306/1 and 11306/2 and that the only thing that was outstanding was the access road before the process could be completed. He denied that the transfer was signed after Mr. Wamwendia's death. He explained that he had many problems and was an internally displaced person in 1992, 1997 and 2007.
27. The Plaintiff confirmed that he knew Mr. Wamwendia before entering into that transaction and became aware later that Mr. Wamwendia had died. He stated that they were family friends. He told the court that he became aware of the succession cause when they started evicting his people from the land. At the time he had 18 cases and could not handle all of them at the same time. He added that the neighboring land measuring 600 acres had issues relating to the access road and was the one that was to provide access to the suit land. He maintained that the survey was concluded save that the issue of access road was no completed.
28. He told the court that between 1999 and the time he filed suit he was pursuing the family of the late Kinga Wamwendia on a friendly basis because Mr. Wamwendia was his friend. He added that when Kinga Wamwendia was alive they wrote letters and engaged lawyers but were informed that there were delays. He maintained that he paid the full purchase price and that the transfer was done in the presence of Mr. Wamwendia in the office of Lucy Mwai Advocate. He reiterated that the late Wamwendia never demanded any balance of the purchase price from him. He added that there was no justification for him to forge documents yet he was living on the land.
29. Emmanuel Karisa Kenga, a Forensic Document Examiner gave evidence and produced the report dated 20/9/2022 regarding the signatures which were forwarded to him for analysis. The conclusion he drew was that there were similarities on the signatures indicating that they were from a common origin. He indicated that signatures are affected by old age, drugs and intoxication because these affect the hand movement when the author makes the signatures. He explained the methodology he used in examining the questioned signatures and gave the basis for his opinion and observations which he stated were based on the peculiar characteristics of the style of signatures, alignment, pen movement, pen list, pen speed, pen strokes and full flow of ink. He did not know the age of the author but concluded that age could have affected the signatures he examined.
30. On cross-examination, Mr. Kenga clarified that he was given 13 signatures without the date when they were made. He explained that in the course of examination they follow the movement of the pen from initial to the end. He clarified that he only compared signatures and not the handwriting since his task was to examine the disputed signatures. He looked at the LCB consent and the transfer since he was required to compare the questioned signatures with the known signatures of the late Kinga Wamwendia.
31. Jacob Oduor a forensic document examiner was called as a witness by the 1st, 5th 6th and 7th Defendants and produced his forensic document report dated 8/8/2012. His conclusion was that he could not find any agreement between the signatures and the questioned signatures which he found were different in style and formation compared to the known signatures. He concluded that the disputed signatures were forged. He explained the methodology he used to arrive at his conclusion and added that he had considered all the possibilities of natural variations resulting from the time span when



- the signatures were made as well as sickness, age, poor eyesight, voluntary intoxication by alcohol, writing instruments, pen failures and the changing writing habits. He maintained that he had given a professional report. He became a document examiner in 2010.
32. James Mugo Kinga, the 1st Defendant in this case gave evidence and adopted his witness statement with some alterations. He explained that he was the administrator of the Estate of the late Kinga Wamwendia and that he was aware of the transaction between his late father and the Plaintiff. His late father entered into an agreement for the sale of 200 acres on 3/7/1986. He took the court through the terms of the agreement and contended that the Plaintiff ought to have paid the total purchase price by 3/12/1986 and the consent of the LCB should have been obtained by 19/9/1986.
 33. He relied on the Plaintiff's statement that as at 11/5/1988 the sum of Kshs. 61450.90 was still outstanding and added that the acknowledgment in the account provided by the Plaintiff added up to Kshs. 22,500/= leaving a balance of Kshs. 38,980.90. He pointed out that the application for LCB consent was made on 21/12/1995 while the consent to transfer was granted two years later on 20/8/1997. He maintained that the Plaintiff failed to adhere to the terms and conditions of the sale. He argued that even though his late father applied for consent to subdivide the land the subdivision was never completed and no new parcel numbers were created and therefore concluded that the letter of consent related to non-existent land.
 34. The 1st Defendant denied that the Plaintiff had taken possession of the 200 acres of land based on the fact that there was no demarcation on the ground separating the two parcels of land. He relied on the letters dated 4/6/1994 and 18/3/2000 written by Lucy Mwai Advocate in support of his contention that the survey work was not completed and argued that as at 18/3/2000 the parcel of land was still undivided.
 35. He maintained that the sale transaction between his late father and the Plaintiff was not completed and was frustrated by non-payment of the balance of the purchase price by the Plaintiff as well as the passage of time. It was his position that the application for LCB dated 20/8/1997 and the undated transfer of land were not valid because of the difference in the signatures of his father and the fact that it took two years for the consent to be granted. He also took issue with the fact that the land fell under the Registration of Titles Act while the transfer was made under the Registered *Land Act*. He added that there was no record of the LCB consent being granted and that the lack of consent meant that the transfer was frustrated by operation of law and that the Plaintiff did not have any valid claim to the suit land.
 36. Mr. Mugo wrote in his witness statement that there was no concealment of material fact in High Court Succession Cause No. 1711 of 2006 because they considered the sale agreement as having abrogated by law due to non-completion and compliance by the Plaintiff. He added that they have always been ready to refund the part of the purchase price paid by the Plaintiff. He maintained that they were properly registered as proprietors of the land which they could legally pass to any third party. He maintained that there was not subdivision done on the land and that they legally sold the whole land to the 9th and 10th Defendants. He urged that title over the suit land had passed to the 9th Defendant. He added that the Plaintiff had never erected a building on the suit property and that the house which his father originally owned was burned down during the 1992 ethnic clashes. He stated that thereafter the land was desolate until the 9th Defendant took possession.
 37. He produced a copy of the sale agreement dated 22/9/2011 which the Defendants entered into for the sale of the land to the 9th Defendant at the agreed consideration of Kshs. 9,500,000/=. He also produced a copy of the title over the suit land confirming the transfer to the 1st to 8th Defendants and the caveat registered by the Plaintiff on 12/4/2012. He produced copies of the Certificate of Confirmation



of Grant together with the Grant. He also produced the transfer by Assent which was registered on 15/7/2008. He produced a copy of the letter of consent dated 30/11/2011 for the transfer of the land from the 1st Defendant to the 9th Defendant.

38. On cross examination, Mr. Mugo stated that he knew the Plaintiff and that he was his late father's herbal doctor. He knew him since his father started ailing in the 1990s. He claimed that he was not aware that his father had sold the land to the Plaintiff. He was in Form 6 in 1986 in Highway Secondary School in Nairobi. His family home was in Kamakwa, Nyeri and the farm in Rumuruti. He stated that he saw the documents after he was taken to court. He was not aware of any transactions his father had entered into. When his father died on 13/10/1999 his mother was still alive but they did not follow up on anything. After his mother died in 2004, he was appointed an administrator and asked file the succession case. He confirmed that the 6th and 7th Defendants were his nephews.
39. He conceded that he undertook to administer his late father's estate faithfully. He claimed he was not aware if there were any claims to the estate by third parties. Further, that the Plaintiff did not approach him to conclude the transaction. He stated that his late brother's family (the 8th Defendant) was living on the farm.
40. He claimed that between 1994 and 1997 he was a Manager at the Cooperative Bank in Nyahururu and was farming on 5 acres of the suit land along the river. Initially, the land was 623 acres but his father sold another piece which was next to the suit property. He stated that his brother was keeping animals on the ranch. He asserted that when he administered the estate there was no issue about the Plaintiff. When they were taken to court they started finding out and discovered that the balance of the purchase price was not paid.
41. He stated that his father kept records which showed that there was an outstanding balance of Kshs. 61,405/= and that based on the calculations on the documents from the Plaintiff's advocate the balance owed was Kshs. 38,000/=. They did not demand the balance from the Plaintiff. His father did not also demand any balance from the Plaintiff. He claimed that it was after they sold the land to the 9th and 10th Defendants and were taken to court that they learnt of the Plaintiff's claim to the land. That at the time he was appointed administrator there was no confrontation with the Plaintiff. He was not aware about the sale agreement which his late father entered into with the Plaintiff because at that time he was in high school. To his knowledge, the Plaintiff had never taken possession of the land. He did not find any other documents apart from the letter dated 11/5/1988. He stated that his father's estate was ready to refund the amounts paid to his late father.
42. Samuel Thuita Mwangi, the 10th Defendant gave evidence and adopted his witness statement. He is the director of the 9th Defendant. Sometime in July 2011, he learned that the administrator and beneficiaries of the Estate of the late Kinga Wamwendia were offering for sale L.R No. 11306 in Laikipia County comprising 264 acres through their advocates Jessee Kariuki and Co. Advocates. He was authorised by the other directors to negotiate the purchase of the property and instructed Kagwe Kamau and Karanja Advocates to conduct an official search which showed that grant of letters of administration of the estate of Kinga Wamwendia were issued to the 1st Defendant.
43. He commenced the negotiations and the administrator took him to the land where the agents identified the boundaries. He established that one of the relatives of the beneficiaries was cultivating vegetables on a small portion of the land while the rest was undeveloped, bushy and vacant. He contacted the retired Chief of Salama Location, Francis Kiprono Arap Chepkwony who confirmed that there were no other claimants to the land. They entered into the agreement for sale dated 22/9/2011 at the agreed consideration of Kshs. 9,500,000/=. The full consideration was paid to the vendor's advocate, Jessee Kariuki and Co. Advocates in two installments on 17/1/2012 and 26/3/2012. They jointly applied



for consent of the Rumuruti LCB on 18/7/2011 which was granted on 30/11/2011. Upon payment of the entire purchase price, the vendors allowed the 9th Defendant to take actual possession. The land was in the same position that it was in when he first inspected it. He erected an electric perimeter fence around the entire land to secure it.

44. His advocate acknowledged receipt of the completion documents from the vendor's advocate on 9/2/2012 and upon payment of the purchase price they were at liberty to develop the land. On 10/4/2012 the vendors executed the instrument of transfer in favor of the 9th Defendant after payment of the purchase price. The purchaser paid the stamp duty on 19/4/2012 and when they lodged the transfer documents they discovered that a caveat had been registered against the land in April 2012. He maintained that the 9th Defendant had been in possession of the land for over 9 years and that upon taking possession, the 9th Defendant commenced development, cleared bushes, constructed two semi-permanent buildings, laid out irrigation pipes, sunk a dam and put 18 acres under agriculture. He gave the value of the land and the development at Kshs. 230 million as at October 2020.
45. He produced a copy of the title over the land, the sale agreement, the documents relating to the succession cause, the application for LCB consent dated 16/11/2011 as well as the consent, the instrument of transfer dated 10/4/2012, the correspondence exchanged between the advocates and the valuation reports.
46. On cross-examination, he stated that he learned from the neighbours that the administrators were offering the land for sale and added that he does not live far from the land. His parents settled in Marmanet which is about 7 kilometers away. He stated that he did not come across any information that the Plaintiff was on the land doing herbal medicine. He was not aware of tribal clashes in the area because in 1992 he was abroad. He learnt in 2012 after executing the documents that a caveat had been placed against the land. He confirmed that the Plaintiff's documents showed that the Land Registrar had requested the Chief Land Registrar vide the later dated 6/2/2012 to place a restriction on L.R No. 11306/2. He concluded that the Plaintiff's interest in the land did not appear anywhere when he did a search.
47. Francis Kiprono Chepkwony gave evidence. He stated that he was a retired Chief of Salama Location in Laikipia County, having been appointed on 19/8/1991. He knew the late Kinga Wamwendia who owned a big piece of land in that location. He stated that his daughter in law Wanjiru Mwendia was living on the farmhouse with her children. In the course of his duties, he noticed that certain varieties of trees in Kinga Wamwendia's land were being uprooted and leaves taken away while others were cut down. He directed Wanjiru Mwendia that no trees should be cut without a permit. On further visits to the land, he found a lot of cut roots spread to dry. He claimed that Wanjiru Mwendia informed him that Kinga Wamwendia had let part of the land to one Githae who he did not know, to harvest roots for preparation of herbal medicine. He claimed that he ordered the Plaintiff's workers to stop destroying the trees on the suit land. He told Wanjiru Mwendia to inform Githae to report to his office but he never did. On further visits to the land he found the uprooting and cutting of trees had stopped. Later Wanjiru Mwendia relocated and the land was left unoccupied. He claimed that the farm house was vandalised and the local community was grazing livestock on the land. He retired in July 2005. He was aware that the 10th Defendant purchased Mr. Kinga's land from his children and developed it by constructing a road, erecting an electric fence, building a dwelling house and a dam, and was farming crops on the land.
48. On cross-examination, Mr. Chepkwony confirmed that he used to see the Plaintiff on the farm and knew that he was a herbalist. He used to see him going to the land for herbs. He denied that there were any tribal instigated clashes and also denied that the Plaintiff's house burnt down. He maintained that



Kinga Wamwendia was not living on the land. He stated that he was a member of the Rumuruti LCB but never saw the transaction for the subdivision of the land.

49. On conclusion of the hearing of the suit the court directed parties to file and exchange submissions. The Plaintiff submitted that it was not in dispute that the late Kinga Wamwendia agreed to sell him land measuring 200 acres. He referred to the payment made and that by 13/4/1988 the late Kinga had received a total of Kshs. 538,539.10 from him. He referred the court to the other payments he made, copies of which he had produced. He contended that he took immediate possession of the land upon purchase and continued to pay the balance of the purchase price in installments in line with the agreement. He maintained that his occupation of the suit land was with the knowledge and consent of the late Kinga and that he remained on the land during the lifetime of Kinga without any interruption save for the tribal clashes which he was a victim of. The Plaintiff pointed out that the 1st Defendant admitted in his witness statement that the main house that was originally owned by his father was burned down during the ethnic clashes. He referred to the evidence of the Retired Chief who admitted in his evidence that he saw the Plaintiff harvesting herbal plants on the suit land even though he was no aware of the dealings between the Plaintiff and Kinga.
50. The Plaintiff relied on the steps which the late Kinga initiated towards the subdivision of the land for purposes of curving out the 200 acres which were crucial formalities and antecedent to obtaining the LCB consent to transfer the land to him. He referred to the letter dated 26/11/1987 which the late Kinga wrote to SFT through his advocate Kariuki Mwangi seeking a duly executed discharge of charge, after the Plaintiff had settled debt of Kshs. 315539.10 which the late Kinga owed to SFT. Further, the late Kinga wrote to Kariuki Mwangi advocate on 16/2/1989 informing him that the parties had attended the LCB meeting at Nanyuki and obtained consent to subdivide while seeking to know the steps left for the finalisation of the division of transfer. The Plaintiff submitted that at that point the completion period for the transaction stipulated in clause 4 of the sale agreement and the 6-month limitation period under Section 6 of the *Land Control Act* had been arrested and waived by the parties through their conduct while awaiting conclusion of the formalities for the transfer of the land.
51. The Plaintiff submitted that there was ample proof that the subdivision exercise had commenced culminating in the allocation of parcel numbers 11306/1 and 11306/2 based on the letter dated 7/2/1990 vide which the Director of Surveys approved the subdivision subject to clarification by the survey on the position of the road accessing the Plaintiff's 200 acres and the other 64 acres. The Plaintiff contended that upon the conclusion of the subdivision exercise the late Kinga sought the LCB consent to transfer by signing and lodging the application dated 21/12/1995 and obtained the consent on 20/8/1997 after he had fully paid the purchase price. The Plaintiff stated that the retired secretary of the Laikipia LCB in his letter of 17/7/2012 claimed that he could not find the record of the minutes confirming that the meeting took place without availing a copy of the register. He added that that conclusion was misleading since on 28.7.2012 Beatrice Mwai, the retired Laikipia Land Registrar traced the missing record and issued a certified extract of minutes of the meeting showing that the subject transaction was endorsed as entry no. 487/97. Further that the Deputy County Commissioner Laikipia East Sub-County wrote to the Director of Kenya National Archives on 30/12/2022 indicating that they had transferred the records containing the minutes of 20/8/1997 to that office for archiving. In the Plaintiff's view, this confirmed that the LCB meeting was held on 20/8/1997.
52. The Plaintiff relied on the evidence of Emmanuel Karisa Kenga, the forensic evidence examiner with over 30 years' experience whose opinion was that the questioned signatures were made by the deceased vendor. The Plaintiff argued that Mr. Kenga's opinion was of more probative value and illuminated many issues compared to the opinion of the handwriting expert called to give evidence by the 1st Defendant who implied forgery without any exhaustive evidence that would lead to that conclusion.



53. The Plaintiff submitted that his occupation of the suit property once the late Kinga put him in possession constituted an overriding interest on L.R No. 11306. He relied on a decision of the Privy Council which unfortunately he did not supply to the court. The Plaintiff maintained that the LCB consent to transfer the suit land dated 20/8/1997 was valid. In the event that the court found that it was not valid, he urged the court to enlarge time for parties to apply for a fresh consent in light of the conflicting reports of the two handwriting experts on the questioned signature, the fact that Beatrice Mwai certified the extract of the minutes from Laikipia LCB and Paul Mbogo, a former secretary had retired and this court would not benefit from their evidence. This was also based on the fact that Lucy Mwai Advocate who interacted with both parties and attested the documents declined to appear in court to shed light claiming that she was conflicted; and the fact that the Plaintiff was only able to adduce evidence demonstrating payment of Kshs. 566,039.10 which in his view was equivalent to land measuring 188.7 acres.
54. The Plaintiff urged the court to appreciate that the undated transfer instrument was a clear manifest intention to transfer the suit land to the Plaintiff after he had paid the full purchase price and that it could not be submitted for registration because the completion documents including the original title were not availed to the Plaintiff. He urged that it was the responsibility of the late Kinga to avail the completion documents which could effectively transfer the land and that that obligation survived his estate.
55. The Plaintiff argued that the Defendants failed to prove the allegations of forgery to the required standard and that they merely discredited the transfer instrument as being forged. That Blackstone defined forgery as the fraudulent making or altering of a writing to the prejudice of another man's rights. He added that no investigations were undertaken by the DCI on the validity and propriety of the application for LCB consent to transfer dated 21/12/1995. He maintained that the Defendants did not tender evidence to prove that he forged the signature of the late Kinga with the intention of defrauding them of the suit land. He relied on Section 70 of the *Evidence Act* to the effect that if a document is alleged to be signed or written by any person, the signature on the document alleged to be in that person's handwriting must be proved to be in his handwriting. This is achieved by reliance on the opinion of a handwriting expert. He urged that the court may accept the fact only when it is satisfied that it is safe to accept the opinion of an expert or other witness. Further, that the mere suspicion or doubt could not take the place of proof.
56. The Plaintiff pointed out that after the demise of the late Kinga before the transfer process was concluded, it was the responsibility of the 1st Defendant as administrator of his late father's estate to execute a valid transfer of the suit land to the Plaintiff through a lawful manner. Unfortunately, the 1st Defendant did not cooperate forcing the Plaintiff to seek this court's intervention after it became clear that the Defendants were keen to disenfranchise him of the suit land by selling and transferring it to the 9th and 10th Defendants. He urged that the Assent vesting the entire land in the 1st to 8th Defendants was illegal because they concealed material information regarding the Plaintiff's interest in the land.
57. The Plaintiff invoked the doctrines of equity and natural justice in urging this court to come to his aid on the basis of a constructive trust. In addition, he urged that the late Kinga not having taken steps during his lifetime to recover the suit land from him and having not rescinded the sale or demanded any balance of the purchase price, and based on his inquiry of Mwangi Kariuki Advocate of the remaining steps and if he had applied for LCB consent then these must show that a constructive trust was created in his favour.
58. The Plaintiff relied on *Rutongot Farm Ltd v Kenya Forest Service & 3 Others* (2018) eKLR where the Supreme Court stated that once proprietary interest had been lawfully acquired, the guarantee to



protection of the right to property under Article 40 of *the Constitution* was expressed in the terms that no person should be arbitrarily deprived of property.

59. The Plaintiff submitted that he had met the minimum threshold for the grant of injunctive orders and that the 9th and 10th Defendants could not be heard to claim that they would suffer loss having extensively developed the suit land since their possession of the land stemmed from an illegality. That any developments which were undertaken during the pendency of this suit were undertaken at their own risk after they interfered with the Plaintiff's possession hence losses should lie where they fall.
60. The Plaintiff urged that he was invoking the doctrines of equity and natural justice for this court to come to his aid because the 1st to 8th Defendants did not have any valid reasons for failing or refusing to transfer the suit land to him yet a constructive trust was created in his favor in respect of the suit land as can be distilled from the facts of this case including the deceased vendor selling and placing him in full occupation of the land for more than 18 years which created an element of trust that became an overriding interest; continuing to receive payments from the Plaintiff on account of the purchase price; making representations to the Plaintiff that he would transfer the land to his name including the letter dated 16/2/1989 which showed that he was ready to complete the sale; not taking any steps during his lifetime to recover the land from the Plaintiff, rescind the contract or demand any outstanding balance; and writing to Kariuki Mwangi Advocate on 16/2/1989 enquiring on the steps left towards the finalization of the subdivision of the land and transfer.
61. The Plaintiff maintained that there was a common intention between the late Kinga and him relating to the land demonstrated through the parties adhering to certain formalities governing the disposition of the land which had the effect of protecting the Plaintiff. In essence, that the late Kinga by his overall conduct created a presumptive and implied trust in favour of the Plaintiff regarding the suit land which is not subject to the *Limitation of Actions Act*. Further, that the fact that he took possession constituted an overriding interest and burden against the title held by the 1st to 8th Defendants which is the basis for the Plaintiff to be declared as being entitled to a declaration of a constructive trust as presumptive owner of the suit land. He urged the court to enforce the constructive trust and proprietary estoppel against the 1st to 8th Defendants to prevent them from becoming unjustly enriched by renegeing or acting in an unconscionable manner through the oppressive interpretation of the *Land Control Act* to defeat the conscience and common intention of their late father who during his lifetime acted and represented to the Plaintiff that he had obtained proprietary interest in the suit land.
62. The Plaintiff relied on the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR in which the Court of Appeal affirmed the application of the principles of equity and natural justice in scenarios such as this one in determining what is fair and right. He also relied on *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* (2014) eKLR where the court held that the rights of a person in possession of land are equitable rights which are binding on the land and that the land is subject to those rights. Further, that the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable to land which was subject to the *Land Control Act* depending on the circumstances of the particular case. He also cited *Hussey v Palmer* (1972) 3 ALL ER 744 where Lord Denning held that a constructive trust was a trust imposed by law whenever justice and good conscience require it. He added that this was an equitable remedy through which the court can enable a party obtain restitution in the spirit of Article 10 (2) (b) of *the Constitution* which upholds equity as a principle of justice.
63. In conclusion, the Plaintiff urged the court to find that he had established a prima facie case and discharged his legal burden of proof under Section 107 of the *Evidence Act* and the evidentiary burden



- of proof under Sections 109 and 112 of the Act having established that there was a legal connection between him and the late Kinga in relation to the suit property which establishes the elements of a trust.
64. The 1st, 5th, 6th and 7th Defendants filed their submissions in which they adverted to the judgment of the Court of Appeal which reversed the dismissal of the suit and remitted the case for hearing on merit. They argued that the Court of Appeal did not deal with the merits of the issue under the *Limitation of Actions Act* and the objection regarding the nullity of transaction based on the *Land Control Act*. They submitted that in his evidence and documents, the 1st Defendant did not deny that his late father Kinga had the intention of selling part of the subject land to the Plaintiff and that they only learnt of the transaction after filing Nairobi Succession Cause No. 1711 of 2006 in respect of his late father's estate where he was made administrator. The grant was confirmed, the estate distributed and the suit property sold to the 9th Defendant. That by the time the Plaintiff filed suit on 12/3/2012, the 1st Defendant had already sold the suit land to the 9th Defendant vide the agreement dated 22/9/2011 and had signed the transfer for the land. They added that from the time their father died on 13/10/1999 until 31/7/2007 when the Certificate of Confirmation of Grant was issued, the Plaintiff had not raised any claim against the Estate of their late father. They maintained that the Plaintiff had never been in possession of the suit land because this fact could have been known at the time of filing the succession cause. They added that the 1st Defendant was farming on the land between 1994 and 1997 when he was a manager at the Cooperative Bank, Nyahururu. They added that the evidence of the area Chief corroborated the fact that Wanjiru Mwendia was permanently living on the land during that period.
 65. They added that they discovered from the analysis of the document presented by the Plaintiff that he had not paid the full purchase price leaving a balance of Kshs. 22,500/=; that LCB consent was not granted and there is a dispute regarding the signature appearing on the transfer forms. They urged that the transaction was incomplete because the full purchase price was not paid in full and the transaction was caught up by the *Limitation of Actions Act* and the provisions of the *Land Control Act* and that by the time they became aware of the transaction they had already sold the property to the 9th Defendant.
 66. They relied on Section 4 of the *Limitation of Actions Act* which requires suits founded on contract to be filed within 6 years of the date when the cause of action accrued. They also relied on clause 4 of the agreement date 3/7/1986 which made the transaction subject to the Laikipia LCB consent being granted and an application being made within 3 months of the execution of the agreement. They maintained that the LCB consent to transfer the land should have been sought by 3/10 1986 which was not done. They contended that time therefore started to run from 3/10/1986 and expired on 3/10/1992. They emphasised that there was no evidence to show that the agreement was extended.
 67. They urged that even if the late Kinga undertook some actions pursuant to the sale, those actions did not regularize or invalidate the provisions of the sale agreement. That whether or not the late Kinga proceeded to receive money did not vary the sale agreement and that an express agreement should have been entered into to vary the terms of the sale agreement. They added that the purpose of the law of limitation was to prevent a plaintiff from prosecuting stale claims while protecting a defendant after they had lost evidence from being disturbed after a long lapse of time. They argued that the law expected a claimant to act diligently to recover property and that the Plaintiff has waited for over 33 years to file the suit for recovery of the land.
 68. They argued that whatever assets the late Kinga left were to be administered in accordance with the *Law of Succession Act* pursuant to Section 2 of that Act. That upon Kinga Wamwendia's death, the remainder of his assets including the suit property fell under the *Law of Succession Act*, Section 45 of which prohibits any person from taking possession or disposing of the free property of a deceased person unless authorised by that Act, other law or a grant of representation under that Act. They went



on to argue that if the Plaintiff continued to be in possession of the land from 13/10/1999 then he was contravening the law. Further, that as a creditor to the estate he could have initiated a probate and administration cause to secure his rights which he did not do and was therefore guilty of laches. They urged that they were registered as proprietors of the suit land through the probate court sitting in Nairobi High Court Succession Cause No. 1711 of 2006.

69. They argued that Section 76 of the *Law of Succession Act* gave one of the grounds for seeking revocation of grants as concealment of vital information from the probate court. They went further to argue that this issue cannot be taken up before any other court other than the probate and administration court and that the net effect of this suit was to invite this court to make an order countermanding an earlier order of a superior court sitting as the probate and administration court. They urged that the lamentations of the Plaintiff should be brought before the court that dealt with the succession matter and not this court. They maintained that the probate cause proceeded regularly, was gazetted and registered against the title on 15/7/2008. That the Plaintiff did not file any objection to the succession cause and came to court 4 years after the 1st to 7th Defendants were registered as co-proprietors of the suit land. They urged that this suit was an afterthought.
70. They relied on Section 8 of the *Land Control Act* and clause 4 of the sale agreement and urged that since the consent to transfer the land was not obtained by 3/10/1986, the sale became void and that the six months within which a party could obtain consent lapsed on 3/1/1987 because none of the parties applied to the High Court to have the period extended in line with Section 8 of the Act.
71. They stretched the argument further that the purported occupation of the suit land by the Plaintiff on 1/1/1987 was an offence punishable through a fine and that the payment of further sums of money to the late Kinga were done contrary to the law. They invited the court to be guided by the decision in *Joseph Boro Ngera v Wanjiru Kamau Kaime & Another* [2010] eKLR.
72. The Defendants argued that the chairman and secretary of the LCB disowned the consent vide the letters dated 17th and 18 July 2012. They also relied on the forensic report of the handwriting expert on the authenticity of the signatures appearing and the application for LCB consent and the transfer documents said to have been signed by the late Kinga. They also pointed out the discrepancy in the land regime under which the transfer of land fell yet the title was held under the Registered Titles Act. They urged the court to dismiss the suit.
73. The 9th and 10th Defendants submitted that they were bona fide purchasers for value without notice of any adverse claims having bought the suit land from the registered owners after conducting a search at the lands office. That they paid the full purchase price of Kshs. 9,500,000/= and the stamp duty on 19/4/2012. They relied on *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* (2017) eKLR on the ingredients necessary to prove that one was a bona fide purchaser. They went on to state that the rights of third persons who are purchasers for valuable consideration without notice could not be disregarded. That upon taking vacant possession they developed the suit land and that it would not be fair for a party who had been guilty of laches and inordinate delay to expect a respondent to part with its property when its value had materially appreciated. They relied on the evidence of the retired Chief to support their assertion that the Plaintiff had never occupied the suit property. Further, they pointed out that the Chief had denied that there were any forceful evictions in 1992, 1997 and 2007 as the Plaintiff alleged. They maintained that at the time they purchased the suit property, the Plaintiff was not in possession and they took possession in 2011 and had remained on the land.
74. They maintained that the Plaintiff did not have any legal or equitable rights or interest in the suit property and that they should be allowed to complete the transfer at the lands registry so that a title



- could be issued in their favour. They urged the court to issue an order restraining the Plaintiff from interfering with or dealing with the suit property.
75. Regarding the agreement between the Plaintiff and the late Kinga, they urged that the Plaintiff breached the sale agreement when he failed to pay the full purchase price and that the property could not be transferred to him because he was in breach of the contract. They submitted that this court could not enforce that agreement because the Plaintiff failed to perform his part of the contract. They argued that the court cannot rewrite a contract for parties. They also relied on [Land Control Act](#) and made submissions similar to those of the other Defendants as well as on the application of the Limitations of Actions Act to this suit.
 76. On the prayer for the declaration of a constructive trust, the 9th and 10th Defendants submitted that the Defendants were not parties to the sale agreement and that there was no evidence to connect the Defendants and the late Kinga which would suggest the existence of a common intention to create a trust between the Plaintiff and the Defendants. They urged that the court can never presume a trust unless there was absolute necessity in order to give effect to the intention of parties. They went on to argue that a contract can only confer rights or impose obligations on the contracting parties and that the Plaintiff could not be said to impose an existing trust between him and the Defendant based on the sale agreement which the Defendants were not party to.
 77. They argued that the decisions in the Mwangi & Another case and Willy Kimutai Kitilit were distinguishable from the facts of this case in that the purchasers in those disputes had paid the full purchase price and satisfied the court that they had taken up full possession of the land, yet in this case the Plaintiff conceded that he did not complete payment of the purchase price and had failed to avail evidence to establish possession. They cited [William Kipsoi Sigei v Kipkoech Aruse and John Tunge \(2019\) eKLR](#) in which the court affirmed the Mwangi Macharia case and the Willy Kitilit case.
 78. They argued that the equitable remedy of specific performance was not available to the Plaintiff because he failed to pay the purchase price in full and breached the sale agreement. They pointed out that that was an equitable remedy which the court had the discretion to grant based on well settled principles. They concluded that the Plaintiff had failed to prove his case on a balance of probabilities to entitle him to the orders sought in the plaint. They urged that they had proved their claim and that they had demonstrated that the order should not be granted.
 79. They went further to argue that even if this court were to nullify the grant the result would be to vest the title in the Estate of the late Kinga and fresh letters of administration would have to be sought in which the Plaintiff would file an objection as a beneficiary. They pointed out that after the death of Kinga the Plaintiff ought to have applied under Section 68 of the [Law of Succession Act](#) to be an objector so that his claim could be considered. That even if he learnt of the succession cause in 2012 he should have applied under Section 76 of the [Law of Succession Act](#) to revoke the grant so that he could pursue his claim. They urged that this court lacked jurisdiction to give the Plaintiff the result he desires.
 80. Further, they argued that the Plaintiff submitted forged documents in support of his case and that he confirmed in his evidence that the signatures in the consent letter and the transfer forms were different from the signature in the sale agreement, which in their view corroborated the evidence of the government forensic document examiner contained in the report dated 8/8/2012 to the effect that there were no similarities in the documents and that the signatures were a result of forgery.
 81. The 9th and 10th Defendants supported the argument by the other Defendants regarding the absence of minutes of the meeting said to have given rise to the consent dated 20/8/1997. They submitted that that was corroborated by the retired Chief who was a member of the LCB. The 9th and 10th Defendant argued that once a party failed to complete the terms of an agreement any claims based on it must fail.



- They pointed out that the undated transfer form gave the consideration as Kshs. 400,000/= yet the sale agreement mentioned Kshs. 600,000/= which they submitted was calculated to cheat the government out of stamp duty by under declaring the purchase price.
82. The 9th and 10th Defendant concluded that equity favoured the diligent and that the Plaintiff had been indolent for 26 years. That after the death of Kinga, any documents of transfer which he had signed became a nullity and his property went to his estate. They urged the court to allow their counterclaim and dismiss the suit with costs.
83. The main issues for determination are:
- a. whether a constructive trust exists between the Plaintiff and the administrator and beneficiaries of the Estate of the late Kinga Wamwendia in respect of 200 acres of land comprised in L.R No. 11306 Ex-Moller Farm situated South West of Rumuruti Township Grant I.R 2059 by virtue of the late Kinga having sold the land to the Plaintiff and placed him in possession, and having continued to receive payments from the Plaintiff on account of the purchase price and having made representations that he would transfer the 200 acres of land to the Plaintiff;
 - b. whether the Assent registered on 15/7/2008 vesting and transferring L.R No. 11306 to the 1st to 8th Defendants and endorsed as entry number 8 on the grant is illegal and ought to be cancelled and if the Land Registrar should be directed to cancel it and restore the register to reflect the position that existed prior to the registration of the Assent;
 - c. whether the 9th Defendant is an innocent purchaser for value of L.R No. 11306 without notice of any irregularity;
 - d. whether the 1st, 9th and 10th Defendants should be directed to surrender and deliver up the title over L.R No. 11306 to the court and the Chief Registrar for cancellation of the entries against the land and the subsequent transfer of 200 acres comprised in L.R. No. 11306 to the Plaintiff;
 - e. whether the 1st Defendant should be directed to seek and obtain LCB consent as administrator of the Estate of the late Kinga Wamwendia to transfer 200 acres comprised in L.R No. 11306 to the Plaintiff;
 - f. should a permanent injunction be issued restraining the Defendants or their agents from dealing with the 200 acres to be excised from L.R No. 11306 and from evicting the Plaintiff from that land?
 - g. what is the effect of the Confirmation of Grant in Nairobi High Court Succession Cause No. 1711 of 2006 on the Plaintiff's claim to 200 acres of the land comprised in L.R No. 11306; and
 - h. who should pay the costs of this suit?
84. It is not in dispute that the Plaintiff entered into an agreement with the late Kinga Wamwendia vide which he purchased 200 acres out of the 264 acres comprised in L.R No. 11306 on 3/7/1986 and that the Plaintiff had paid the sum of Kshs. 538,539.10 to the late Kinga as at 11/5/1988 when the late Kinga wrote to the Plaintiff confirming that the balance due was Kshs. 61,460.90. Of this sum, the Plaintiff remitted Kshs. 315,539.10 to SFT on 1/9/1986 to settle the loan which the late Kinga owed to SFT. The letter dated 26/11/1987 written by Mr. Kariuki Mwangi Advocate to SFT requesting the discharge of the land supports this fact.
85. What is in contention is whether the Plaintiff paid the full purchase price to the late Kinga. The Defendants contend that the purchase price was not paid in full to the late Kinga. The Plaintiff produced pages of his diary for 1991 in support of the claim that he paid further sums amounting to



- Kshs. 29,500/= on diverse dated between 30/12/1987 and 11/9/1991. The Plaintiff submitted that in the worst case scenario, the court should at the very least find that he paid Kshs. 566, 039.10 which would be equivalent to 188.7 acres of the 200 acres of land he purchased from the late Kinga.
86. Apart from the letter dated 11/5/1988 vide which the late Kinga confirmed the balance of the outstanding purchase price from the Plaintiff as Kshs. 61, 460.90, there is no evidence to show that the late Kinga demanded any further sums from the Plaintiff subsequent to that letter. If indeed the purchase price had not been paid in full by February 1989, then the late Kinga would have demanded the balance of the purchase price or mentioned that matter in his letter dated 16/2/1989 when he sought to know from Mr. Mwangi Kariuki Advocate what steps were outstanding for the finalisation of the subdivision and transfer.
 87. When the Plaintiff entered into the agreement with the late Kinga for the purchase of 200 acres comprised in L.R No. 11306 measuring 264 acres, the land had not been subdivided. The Plaintiff produced a copy of the letter dated 18/1/1987 which Mr. Kinga wrote to the Central Authority submitting 10 prints of the proposed subdivision of L.R No. 11306. The Commissioner of Lands wrote to the Laikipia County Council on 27/11/1987 inviting comments on the application made by Kinga for subdivision of L.R No. 11306 into two agricultural portions. Mr. Kinga paid rates and obtained a rates clearance certificate from Laikipia County Council on 30/11/ 1987, which are steps towards the completion of the transaction.
 88. It is doubtful that the late Kinga could have taken steps to subdivide his land for purposes of excising the 200 acres and transferring it to the Plaintiff if the entire purchase agreed upon had not been paid to him. At the very least the late Kinga would have written to the Plaintiff just as he did on 11/5/1988 or mentioned this in the letters he wrote. The inference to be drawn from the steps the late Kinga took towards the excision of the 200 acres and transfer to the Plaintiff is that the late Kinga must have received the full purchase price from the Plaintiff.
 89. It is not in dispute that the suit land was not subdivided to create the two portions, that is, the 200 acres which the Plaintiff was purchasing from the late Kinga and the 64 acres Mr. Kinga was to retain. It is apparent that the late Kinga commenced the subdivision process but did not complete it. The letter dated 30/11/1987 from the Clerk of the Laikipia Council confirmed that the Council had no objection to the subdivision of L.R No. 11306 into two portions. Kariuki Mwangi Advocate wrote to the Nyahururu District Settlement Officer on 4/3/1988 requesting him to forward the documents relating to L.R No. 11306 sought by the Chief Accountant in the Ministry of Lands and Settlement. The letter was copied to both Kinga and the Plaintiff.
 90. On 16/2/1989, the late Kinga wrote to Mr. Kariuki Mwangi Advocate seeking to know if he had made up his mind as to the steps necessary for the finalisation of the sub-division and transfer of L.R No. 11306. The indent dated 7/2/1990 prepared on behalf of the Director of Surveys requested Mr. Omondi, a licensed Surveyor to clarify the position of the access road to the two plots so that the survey could be approved in relation to L.R No. 11306/1-2. It indicated that plan number F/R 209/62 representing the survey had been approved. The Plaintiff produced the sketch plans representing the subdivision. Lucy Mwai Advocate wrote to John Miano on 4/6/1994 expressing concerns over the manner in which he had conducted the survey of L.R No. 11306 in 1989 by failing to provide an access road and reducing the land by 2 acres.
 91. What is apparent is that by the time Kinga died, he had not procured the discharge of charge from SFT to enable him conclude the transaction with the Plaintiff. The copy of title over L.R No. 11306 which the 1st, 5th to 7th Defendants produced shows that the charge to SFT was noted on the title as entry number 5 on 2/7/1974. Entry number 6 made on 15/7/2008 discharged the charge at entry number 5



- and was registered long after Kinga had died. The next entries relate to the registration of the Grant of letters of administration of Kinga's Estate issued to the 1st Defendant as administrator. Entry number 8 is the registration of the transfer or Assent to the 2nd to 7th Defendants to represent Kinga's family.
92. The Defendants contend that the Plaintiff failed to honour his obligations under the sale agreement he entered into with the late Kinga and that the failure to obtain LCB consent made the transaction void and unenforceable under the *Land Control Act*. Parties placed the validity of the LCB consent dated 20/8/1997 at the centre of this dispute with the Defendants urging that the Plaintiff failed to comply with the terms of the agreement. The responsibility of carrying out the subdivision of L.R No. 11306 to create two portions of land measuring 200 acres and 64 acres which were to be held by the Plaintiff and Kinga respectively fell squarely within the hands of the late Kinga as the registered proprietor of the land at the time. It is only the registered proprietor of land who can subdivide or deal with the land as he deems fit by law. There is no evidence to confirm that the late Kinga played his part and obtained LCB consent to subdivide the land which process had to precede pursuit of the LCB consent to transfer the 200 acres to the Plaintiff. The evidence adduced by the Plaintiff shows that the late Kinga took certain steps towards the subdivision of L.R No. 11306 into two portions but the survey exercise was never concluded.
93. In this court's view, the late Kinga was also required to follow up the preparation of the discharge of charge by SFT relating to L.R No. 11306 after the Plaintiff had paid off the outstanding loan sum in 1987. He would have had to get the discharge of charge registered against the suit land before he could subdivide the land and transfer the 200 acres to the Plaintiff. Neither being the registered owner of the land, nor the chargor who enjoyed privity of contract with SFT under the charge, SFT would not have released the title and discharge of charge to the Plaintiff even if he was the one who paid off the debt owed by the late Kinga.
94. The fact that the discharge of charge was registered on 15/7/2008 by the administrator of the Estate of the late Kinga confirms that even if the Plaintiff had paid the full purchase price to Kinga it would not have been possible for Kinga to transfer the 200 acres to the Plaintiff until the charge registered against L.R No. 11306 was discharged and the land was subdivided to hive off the 200 acres that the Plaintiff was purchasing from Kinga. In short, the late Kinga did not fulfil his obligations under the sale agreement and was not ready to complete the transaction by the time he died. That being the case, the Plaintiff cannot be faulted for non-performance of his obligations under the sale agreement.
95. The conduct of the late Kinga during his lifetime regarding the transaction and the steps he took towards the subdivision of the land confirm that he was keen to complete the sale of the 200 acres to the Plaintiff. The court is persuaded that had the Plaintiff failed to pay the full purchase to Kinga, he would not have taken the steps he took to have the land subdivided or applied for LCB consent to transfer the land. The evidence adduced shows that the Plaintiff and the late Kinga maintained their association over time and continued to perform their obligations under the transaction beyond the timelines stipulated in the sale agreement. By their conduct, they extended those timelines.
96. One of the contested facts is whether the Plaintiff was in possession of the suit land. The Defendants denied that the Plaintiff ever took possession of the land he had purchased from Kinga. The 1st Defendant conceded that he used to see the Plaintiff in the 1990's when his father started ailing and that he was his herbalist. The retired Chief also conceded in his evidence that he was informed that the Plaintiff used to go to the suit land to collect roots and herbs for his herbal medicine practice and that he even directed the Plaintiff's workers that the felling of trees on the suit land had to stop.
97. The 1st Defendant claimed that he used to farm on 5 acres of the land and that his sister in law lived on the suit land. It may well be that they were on the portion measuring 64 acres which the late Kinga



- still owned. The evidence of the Retired Chief which the Defendants placed a lot of weight on was not convincing. Mr. Chepkwony denied that there were any tribal clashes that affected the area yet the 1st Defendant's evidence was that the house on the suit land was burned down during the tribal clashes in 1992. This corroborates the Plaintiff's evidence.
98. The 9th Defendant claimed that it was an innocent purchaser for value without notice having conducted due diligence by doing a search on the land. The Plaintiff gave evidence to the effect that he approached the administrator of the Estate of the late Kinga with a view to working on modalities for the completion of the transfer of the suit land to his name but got little cooperation. The Plaintiff stated that he was shocked to learn in 2011 that the administrators and beneficiaries of the Estate of the late Kinga were laying claim to his land and had caused the Assent to be registered transferring the whole land to the beneficiaries of the Estate of the late Kinga.
 99. The 1st Defendant, who is the administrator of the Estate of the late Kinga did not rebut these facts and that evidence remains uncontroverted. The 1st Defendant must have known of the Plaintiff's claim to a portion of L.R No. 11306 but chose to conceal this fact when he applied for grant of letters of administration of the Estate of the late Kinga in the High Court in Nairobi and gave L.R No. 11306 as the free property of the late Kinga. The 1st Defendant did not inform the Plaintiff that he had applied for letters of administration over the Estate of the late Kinga yet he was aware of the Plaintiff's claim to a portion of L.R No. 11306. The Plaintiff caused a caveat to be registered against the land on 12/4/2012.
 100. It was the Plaintiff's evidence that he notified the 10th Defendant through his friend Dr. Mugo to desist from purchasing or taking possession of the suit land but that he went ahead and purchased the land from the 1st to 8th Defendants. This evidence was not controverted, the 10th Defendant maintained that they relied on a search done at the Lands Office. That kind of information is what a prospective purchaser of land ought to take seriously and not solely rely on the search done at the lands registry. The court is not persuaded that the 9th Defendant is an innocent purchaser for value without notice.
 101. The facts of this case show that the Plaintiff paid the purchase price to the late Kinga and he put him in possession of the 200 acres from 3/7/1986 in accordance with clause 6 of the sale agreement until 2004 when he died. The Plaintiff remained on the suit property and conducted his herbal medicine trade on the suit land undisturbed save for the tribal clashes in 1992. A constructive trust was created in favour of the Plaintiff over the 200 acres.
 102. In *Macharia Mwangi Maina and 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, it was stated that the court was a court of both law and equity and that equity detested unjust enrichment. The 1st to 8th Defendants were seeking to unjustly enrich themselves by attempting to sell and transfer the 200 acres belonging to the Plaintiff to the 9th Defendant.
 103. In *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the court observed that Article 10 (2) (b) of *the Constitution* elevated equity as a principle of justice to a constitutional principle and required courts to promote and protect that principle when exercising judicial authority. The court went further to add that it followed that the equitable doctrines of constructive trust and proprietary estoppel were applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land was void and enforceable for lack of LCB consent. As the court stated in the Willy Kitilit case, the lack of LCB consent does not preclude this court from giving effect to the doctrine of constructive trust.
 104. The Defendants urged that the transaction between the Plaintiff and the late Kinga became void and unenforceable for want of LCB consent. As the court stated in *William Kipsoi Sigei v Kipkoech Arusei & Another* [2019] eKLR, the equitable doctrines of constructive trust and proprietary estoppel are applicable to land which was subject to the *Land Control Act* despite the fact that no LCB consent was



- granted for the transaction as envisaged under that Act. It would seem from these decisions that it is not necessary for the Plaintiff to obtain the LCB consent to give effect to the constructive trust.
105. By the time the 1st to 8th Defendants caused the transfer by Assent to be registered against the whole suit land on 15/7/2008 as administrator and beneficiaries of the Estate of the late Kinga Wamwendia respectively, they were constructive trustees of the Plaintiff and it would be unjust and inequitable to allow the 1st to 8th Defendants to retain and distribute or sell the 200 acres of land belonging to the Plaintiff. Article 10 of the Constitution binds this court to apply equity as one of the values and principles of governance when applying or interpreting the Constitution or any law.
 106. In George Chaguya Aliaza v Zephania Khisa Saul [2022] KECA 583 (KLR) whose facts are somewhat similar to this case where the live issue was the lack of LCB consent, Mumbi Ngugi JA observed that a constructive trust was created in favour of the purchaser in respect of the land from the time he entered the land after purchasing it. Her ladyship added that it became an overriding interest over the land and that the failure by the vendor to obtain the necessary LCB consent within the period stipulated under the Land Control Act to enable the purchaser transfer the land to his name did not render the transaction void. Applying that reasoning here, the failure by the late Kinga to obtain LCB consent to subdivide the suit land and excise the 200 acres as well as the failure to obtain LCB consent to transfer the 200 acres comprised in L.R. No. 11306 to the Plaintiff does not render the transaction between the Plaintiff and the late Kinga unenforceable.
 107. The Law of Succession Act consolidates the law relating to intestate and testamentary succession and the administration of estates of deceased persons and connected matters. Section 47 of the Law of Succession Act confers upon the High Court the jurisdiction to entertain applications, determine any dispute under that Act and pronounce decrees and make expedient orders.
 108. The Law of Succession Act came into force in 1981 and has to be construed in the context of Article 162 of the Constitution of Kenya of 2010 and Section 4 of the Environment and Land Court Act which established the Environment and Land Court (ELC) and clothed it with the mandate to hear and determine disputes relating to the environment as well as the use and occupation of, and title to land. The disputes the High Court is to determine are those relating to succession and administration of estates of deceased persons but not those touching on the occupation of, and title to land which is the preserve of the ELC.
 109. The determination as to whether the Plaintiff is the owner or was put in possession of the 200 acres comprised in L.R No. 11306 by the late Kinga falls within the jurisdiction of the ELC and not the High Court where the grant and confirmation of the letters of administration over the Estate of the late Kinga Wamwendia were issued. Only 64 acres comprised in L.R No. 11306 should have been included as the free property or assets of the Estate of the late Kinga Wamwendia and not the entire parcel of land.
 110. Part V of the Law of Succession Act deals with intestacy and Section 66 gives the preference or ranking of those who may apply to court to administer the estate of a deceased person who dies intestate. As a general rule, the order would be the surviving spouse or spouses with or without other beneficiaries; other beneficiaries entitled on intestacy according to their respective beneficial interest as provided in Part V of the Act; or the Public Trustee. Part V gives the ranking as: spouse or spouses, children, parents, siblings and other relatives in relation to the estate of the deceased person and the factors to be taken into account in dealing with the distribution of the free assets of the deceased. A purchaser of land is not among those listed in Part V and Section 66 of the Act.
 111. The objections contemplated by Section 68 of the Law of Succession Act would be to the applications for grant under Section 67. In this court's view these would not include persons claiming purchaser's interest in land held by the deceased such as the Plaintiff. The probate cause could only be prosecuted



- by the administrator of the Estate of the late Kinga Wamwendia on behalf of the beneficiaries of his estate.
112. Going by the definition of free property under Section 2 of the [Law of Succession Act](#), L.R No. 11306 did not constitute the free property of the late Kinga because having sold 200 acres out of that land to the Plaintiff and having given the Plaintiff possession of the land, the late Kinga was not legally competent to dispose of the 200 acres during his lifetime. The practice adopted currently is that where a person dies having sold land but before he transferred it, the purchaser files his claim in the probate cause to safeguard his interest and this is taken into consideration when the assets of the deceased are distributed where there is no controversy. What the law requires of the person making the application for a grant of representation under Section 51 (1) (h) of the Act is to disclose the liabilities of the deceased person when they give the full inventory of the assets of the deceased.
 113. The Plaintiff was not and could not be a beneficiary of the Estate of the late Kinga Wamwendia. The 1st Defendant applied for grant of letters of administration in the High Court in Nairobi. The Plaintiff could only have objected to the inclusion of the 200 acres as part of the assets of the Estate of the late Kinga to be distributed among his beneficiaries if he was aware of the grant of representation to the 1st Defendant. Subsection 2 stipulates that the notice is to be exhibited conspicuously in the courthouse and also published in the manner directed by the court.
 114. The probate matter was filed at the High Court in Nairobi. The decision of the High Court regarding the distribution of the suit land as part of the free property of the late Kinga was made without the participation of the Plaintiff. The High Court which dealt with the succession matter did not have the benefit of hearing the Plaintiff's evidence regarding his beneficial ownership of 200 acres of the suit land. The Assent registered on 15/7/2008 vesting and transferring the entire L.R No. 11306 to the 1st to 8th Defendants and endorsed as entry number 8 on the grant was done illegally.
 115. Where a grant has been confirmed, the court may revoke or annul a grant under Section 76 of the [Law of Succession Act](#) if it was obtained fraudulently by the making of a false statement or concealment from the court of something material to the case. When the facts of this case are looked at in the context of the 1st Defendant having had knowledge of the Plaintiff's claim to a portion of L.R No. 11306, one can only conclude that the 1st Defendant concealed this fact from the High Court when he applied for grant of letters of administration for the Estate of the late Kinga Wamwendia and included the suit land in the schedule of the assets of the Estate of the late Kinga Wamwendia for distribution among the beneficiaries of his estate. The import of Section 76 of the [Law of Succession Act](#) is that there is no time limit for the revocation as this would depend on when an aggrieved party learns of the making of the false statement or concealment of the material information and the distribution of the assets.
 116. The 9th and 10th Defendants contended that the Plaintiff's claim was time-barred under the [Limitation of Actions Act](#). Section 9(1) of that Act stipulates that where a person bringing an action to recover land has been in possession of the land and while entitled to the land is dispossessed or his possession is discontinued, the right of action accrues on the date of dispossession. The Plaintiff took possession of the 200 acres in 1986 when he executed the agreement and paid the first instalment. It was the evidence of the Plaintiff that he continued to carry out his practice of herbal medicine on the suit land and was disrupted by the tribal clashes. He produced copies of the letters he wrote to various government agencies including the criminal investigations department, the Kenya Anti-Corruption Commission and the Chief Land Registrar as well as non-governmental organisations complaining about the interference with his land and invasion of his farm which was the source of herbal plants for his herbal medicine practice. The Plaintiff's testimony was that the 1st to 8th Defendants began staking claim to his land in 2011 and ultimately forcefully occupied the land.



117. The court is satisfied that the Plaintiff has proved his case on a balance of probabilities and makes the following orders:

- a. A declaration is issued that a constructive trust exists between the Plaintiff and the Estate of the late Kinga Wamwendia and the administrator and beneficiaries of that Estate in respect of 200 acres comprised in L.R No. 11306 by virtue of the late Kinga Wamwendia having sold the 200 acres to the Plaintiff and placed him in possession and having received payments from the Plaintiff and represented that he would convey the 200 acres to the Plaintiff.
- b. The Plaintiff is the legal owner of the 200 acres comprised in L.R No. 11306.
- c. The Assent registered on 15/7/2008 vesting and transferring L.R No. 11306 to the 1st to 8th Defendants endorsed as entry number 8 on Grant No. IR 20579 and all subsequent entries will be cancelled so that the land is restored to the prior position.
- d. The sale of L.R No. 11306 including the 200 acres belonging to the Plaintiff by the 1st to 8th Defendants was illegal. The 1st, 9th and 10th Defendants are directed to surrender and deliver up to the Deputy Registrar of this Court the original Grant No. I.R 20579 for L.R No. 11306 for onward transmission to the Chief Land Registrar for cancellation of entry number 8 registered against the Grant No. I.R 20579. Thereafter, L.R No. 11306 will be subdivided at the Plaintiff's expense for purposes of excision of the 200 acres belonging to the Plaintiff and a title processed for the 200 acres in the Plaintiff's name. The Deputy Registrar of the Court will execute all deeds and instruments to subdivide and transfer the 200 acres to be excised from L.R no. 11306 to the Plaintiff's name.
- e. A permanent injunction is issued to restrain the Defendants, their agents or servants from encumbering, trespassing, damaging, wasting, alienating, selling, transferring or in any other manner dealing with the 200 acres comprised in L.R No. 11306 belonging to the Plaintiff.
- f. The Plaintiff will take steps under Section 76 of the *Law of Succession Act* to have the grant issued to the 1st Defendant and the subsequent confirmation of the grant annulled to give effect to the orders made by this court regarding the excision and transfer of the 200 acres comprised in L.R No. 11306 belonging to the Plaintiff.
- g. The Plaintiff is awarded the costs of the suit to be borne by the Defendants.
- h. The 9th and 10th Defendants counterclaim is dismissed with costs to the Plaintiff.

DELIVERED VIRTUALLY AT NANYUKI THIS 3RD DAY OF JULY 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Anthony Gikaria the Plaintiff

Mr. Jesse Kariuki for the 1st, 5th, 6th and 7th Defendants

Mr. B. Siganga & Ms. E. Mwangi for the 9th and 10th Defendants

Ms. Stella Gakii- Court Assistant

No appearance for the other Defendants

