



**Muthengi (As personal representative of the Estate of William Mukwekwe (Deceased) v Kavili & another (Environment and Land Appeal E12 of 2021) [2023] KEELC 20743 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20743 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E12 OF 2021**

**LG KIMANI, J  
OCTOBER 12, 2023**

**BETWEEN**

**JULIUS KAVILI MUTHENGI (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM MUKWEKWE (DECEASED)) ..... APPELLANT**

**AND**

**IRENE SUSAN KAVILI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTEMA KAVILI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Chief Magistrate Honourable S. Mbungi delivered on 30th November 2021 in Kitui Land Case Number 175 of 2016)*

**JUDGMENT**

1. Before the court is an appeal against the judgment of the Chief Magistrate Honourable S. Mbungi, in Kitui Chief Magistrate's land case Number 175 of 2016 delivered on 30<sup>th</sup> November 2021. The Memorandum of Appeal sets forth the following grounds:
  1. That the Learned trial Magistrate erred and misdirected himself both in law and in facts by deciding the case based on strict application of law and overlooked the applicable doctrines of equity underlying the circumstances of the case.
  2. That the Learned trial Magistrate erred and misdirected himself both in law and in facts by failing to find that the respondent had already sold the land to the Applicant and contracted with him to transfer the same upon obtaining the title to the same, and so, they were liable to fulfil their contractual obligation.



3. That the Learned trial Magistrate erred and misdirected himself both in law and in facts by failing to find that the respondents could not justifiably seek remedy for their own choice to renege from fulfilling their obligations in the agreement.
4. That the Learned trial Magistrate erred and misdirected himself both in law and in facts by failing to find that the counter-claim has been established on a balance of probabilities and as such, the Appellant deserved judgment as prayed for.
2. The Appellant prays that the judgment of the lower court be quashed and/or set aside and the same be substituted with an order dismissing the plaintiff's case and judgment be entered for the appellant on the counter-claim.
3. The suit before the trial court was instituted by the respondents herein as plaintiffs by way of the plaint dated 6<sup>th</sup> March 2016. The plaintiffs claimed that land parcel Matinyani/Kalindilo/1042 was registered in their joint names as administrators of the estate of Kakuku Kavili (Deceased), having obtained a grant of letters of administration in Machakos High Court Probate and Administration Cause No.667 of 2009.
4. According to the plaintiffs the defendant entered and trespassed into the suit land without any cause and started working on it without the plaintiffs' consent and authority. He stated that the defendant is neither a creditor, nor a beneficiary to the estate of the deceased Kakuku Kavili.
5. The plaintiffs' prayed for a declaration that the suit land parcel Matinyani/Kalindilo/1042 belongs to them and also prayed for an eviction order against the defendant together with costs of the suit.
6. In response thereof, the defendant filed a defence and counter-claim dated 6<sup>th</sup> November 2017 denying the plaintiffs' claim and stated that the plaintiffs, in their capacities as the administrators of the estate of Kakuku Kavili (Deceased) offered for sale to him land parcel Matinyani/Kalindilo/1042 at a consideration of Ksh.340,000/=. He stated that they entered into a written agreement dated 9<sup>th</sup> August 2009 and he fully paid the sale price.
7. The defendant claimed that his occupation, use and possession of the suit land was pursuant to the sale agreement and that he had made tremendous developments on the land.
8. The defendant prayed for a declaration be made that the plaintiffs held title to land parcel Matinyani/Kalindilo/1042 in trust to for him and a declaration that the plaintiffs were obligated under the sale contract to transfer land parcel Matinyani/Kalindilo/1042 to him.

### **Summary of the proceedings before the trial court**

9. PW 1, Irene Susan Kavili testified that she is from Matinyani and that the 2<sup>nd</sup> Plaintiff, Joseph Mutema was her brother and she was testifying on his behalf. She adopted the witness statement dated 10<sup>th</sup> May 2016 and produced as exhibits the four documents listed in the Plaintiff's List of Documents dated 10<sup>th</sup> May 2016. The documents included the certificate of official search for Matinyani/Kalindilo/1042, grant of letters of administration in Machakos High Court Probate and Administration Cause No. 667 of 2009 dated 17<sup>th</sup> July 2009 and certificate of confirmation of grant dated 30<sup>th</sup> December 2009.
10. She stated that the land parcel Matinyani/Kalindilo/1042 is in their names as a result of being appointed administrators of the estate in Machakos High Court Cause 667 of 2007 and that the Defendant had entered their land and started working on it.
11. Upon cross-examination, the Plaintiff admitted to having sold a portion of the suit land to the Defendant for Ksh340,000/= and that the defendant still used the land for farming. She stated that



- they had a dispute before the area chief and the D.O where they wanted to refund the sale money and have their land back but the defendant refused and the DO advised that the defendant should continue using the land until the court determines the case. According to her, the Defendant had not finished paying the purchase price.
12. DW 1, Willy Mukwekwe, a pastor from Matinyani sub-location in Kitui County testified that he knew both the plaintiffs. He adopted his witness statement dated 13<sup>th</sup> March 2018 as his evidence in chief. He stated that he is related to the Plaintiffs. He claimed that he had purchased the suit land from them but they are yet to transfer it to him.
  13. Upon cross-examination, the defendant confirmed that the sale agreement does not indicate the registration number of the portion of the suit land he had bought. He also stated that he paid part of the purchase price in cash but gave building materials equivalent of the rest of the money.
  14. Judgment was delivered by the trial court on 30<sup>th</sup> November 2021, where the learned Chief Magistrate held that the alleged sale agreement was null, void and invalid because at the time of sale, the suit land was still in the name of Kakuku Kavili (Deceased). He found that the sale offends Section 45(1) of the Law of Succession Act. The trial court further found that the section prohibits intermeddling with the estate of a deceased person. The trial court also found that agreement went against the provisions of Section 82(b)(ii) of the Law of Succession Act which prohibits selling the immovable property of a deceased person before confirmation of grant.
  15. Further, the trial court held that the suit land is agricultural land and under Section 6 of the Land Control Act such sale must have the consent of the Land Control Board. He entered judgment in favour of the plaintiffs, declaring that land parcel number Matinyani/Kalindilo/1042 to be the property of the plaintiffs and an order directing the defendant to vacate the land within 45 days from the date of judgment. The trial court dismissed the claim for general damages and ordered each party to bear its own costs of the suit. The defendant's counterclaim was also dismissed for the reason that the land transaction, the basis of the counterclaim is null and void and was done in breach of the law.

### **Appellant's Written Submissions**

16. Counsel for the Appellant submitted that the Appellant paid Kshs.340,000 as full purchase price for the suit land. He highlighted that the Respondents had been willing to refund the money as admitted during the hearing before the trial court, but the Appellant had refused and wanted to keep the suit land instead. Counsel submitted that it was not disputed that pursuant to the aforesaid transaction, the Appellant together with his family had taken over the use, occupation, possession of the land sold to him.
17. The appellant urged the court not to criminalize a mutually agreed transaction and relied on the doctrine of *Exturpi Causa non oritur actio* "no one can benefit from his own wrong."
18. It is the appellant submission that the Respondents had promised him that they would transfer the land to him after obtaining the certificate of confirmation of grant, and so urged the court to apply the principles of equity and not allow the respondents to disentitle, deprive and dispossess the appellant yet they had used his money for their own good and benefit. They relied on the holding in the cases of *Dillwyn-vs-Llewelyn* (1961-73)ALL ER349 and *Geoffrey Mwirigi M'mutungu v Henry Kiome Mutunga* (2019) eKLR, *Titus Muriruri V. Kenya Cannery Ltd* (1988) eKLR among many other cited authorities.
19. The appellant stated that the Respondents had an equitable, promissory and contractual obligation to transfer the land to him and urged the court to dispense substantive justice.



20. Submitting on ground two of the Memorandum of Appeal, counsel stated that the respondents made the representation of facts to the appellant that they had the capacity to sell the suit as administrators and the Appellant believed and relied on that representation while purchasing the land, that he changed his position by developing the land therefore the respondents are compellable to make good the promise. He relied on this court's holding in the case of Baron Mathenge Munyoki v. Dedan Mbangula Kithusi (2022) eKLR and *Jorden v Money* (1854) 5 HL Cas 185.
21. The Appellant submitted on grounds three and four of appeal on the doctrine of constructive trust where there are oral agreements as was noted in the case of *Baron Mathenge v Dedan Mbangula Kithusi* (supra), *Yaxley-v-Gotts* (2000) Ch 162 and the case of *Twalib Hatayan & Another v. Said Saggat Ahmed Al-Heidy & 5 others* (2015) eKLR among many other authorities and stated that the circumstances of this case allow the court to impose a trust against the respondents who were all along aware of his presence on the land. He urged the court to enforce the intention of the parties to sell the land.

### **The Respondent's written submissions**

22. Counsel for the Respondent submitted that the sale agreement in question was not enforceable and does not meet the requirements of the law because the land being sold and the size of the same was not described in the agreement. Further the signatures of the Respondents were not attested by a witness as is required under Section 3(b) of the *Law of Contract Act*.
23. Counsel submitted that the time of the sale the suit land was registered in the name of Kakuku Kavili (Deceased) hence the agreement was void and it offends the provisions of Sections 45(1) and Section 82(b)(ii) of the *Law of Succession Act* and Section 6(1) of the *Land Control Act* and the respondent could not pass title to it.
24. Further, counsel for the respondents stated that the appellant's counter-claim did not comply with Order 7 Rule 5(a) of the Civil Procedure Rules (2010) which compels that a counter-claim ought to be accompanied by a verifying affidavit.
25. Regarding the appellant's reliance on the doctrine of equity, their position is that equity follows the law as provided under the *Judicature Act* Cap 3 Laws of Kenya that written law takes precedence over doctrines of equity.
26. Counsel for the respondents relied on the following cases to support the argument that the sale agreement was void for lack of consent from the Land Control Board and a trust cannot be created without this consent: *David Sironga ole Tukai-vs- Francis Arap Muge & 2 others* (2014) eKLR, *Karuri -vs-Gitura*(1981) KLR 247, *Wamukota-vs-Donat*(1987)KLR 280, *Mucheru-vs- Mucheru*(2000) 2EA 456, *Hiran Ngaithe Githire-vs- Wanjiku Munge*(1979)eKLR 50.
27. It is the Respondents' submission that the appeal has no merit on both law and facts and ought to be dismissed with costs to the Respondents.

### **Analysis and Determination**

28. This being the first appeal this court's duty was summarized by the Court of Appeal in *Selle & Another V Associated Motor Boat Company & Others*, [1968] EA 123 that the duty:

“... is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”



29. On the mandate of an appellate court, the court proceeded to state as follows:

“... in particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

30. Before the trial court the Respondents accused the Appellant of trespassing and entering onto the suit land parcel Matinyani/Kalindilo/1042 which was registered in their joint names as administrators of the estate of Kakuku Kavili (Deceased).

31. According to the plaintiffs the defendant entered onto and trespassed the suit land without any probable or reasonable cause and started working on it without the Plaintiffs’ consent and authority.

32. The Plaintiffs’ prayed for a declaration that the suit land parcel Matinyani/Kalindilo/1042 is their property and for an eviction order against the Defendant together with costs of the suit.

33. On the other hand, the Appellant stated that the Plaintiffs offered for sale Land Parcel Matinyani/Kalindilo/1042 in their capacities as the administrators of the estate of Kakuku Kavili (Deceased) to the Defendant for value and consideration of Ksh. 340,000/= which was fully paid vide a written agreement dated 9<sup>th</sup> August 2009.

34. The Appellant has set forth four grounds of appeal and the court proposes to combine grounds 3 and 4 since they deal with the same issue.

**Ground 1: Did the Learned trial Magistrate err and misdirect himself both in law and in facts by deciding the case based on strict application of law and overlooked the applicable doctrines of equity underlying the circumstances of the case?**

35. The trial court is accused of strict application of the law for holding that the agreement for sale in question was null and void as it offended the provisions of Sections 45(1) and Section 82(b)(ii) of the Law of Succession Act since and finding that the Plaintiffs had no capacity to sell the suit land before confirmation of the grant. The court further found that the agreement offends Section 6(1) of the Land Control Act for lacking the consent of the relevant Land Control Board.

36. Section 45(1) of the Law of Succession Act CAP 160 makes intermeddling with property of a deceased a criminal offence and provides that:

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person..
2. Any person who contravenes the provisions of this section shall-
  - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment
  - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.ent; and



37. Further, section 82 of the same Act provides for the powers of personal representatives but under 82(b) (ii) limits the powers by providing states that they shall, subject only to any limitation imposed by their grant, have the following power
- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
  - b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
- Provided that-
- I. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; an
  - II. no immovable property shall be sold before confirmation of the grant.
38. In Machakos HCC 256 OF 2007 in re estate of John Gakunga Njoroge (deceased) [2015] eKLR, the court dealt with similar facts in which property was claimed by persons who had bought land from the deceased prior to his death and by persons who had bought land from beneficiaries to the estate of the deceased. The court declared contracts made with beneficiaries to be void and stated as follows;
- “ 15. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. “
39. It is an agreed fact that the suit land was registered in the name of the respondents as administrators on 29<sup>th</sup> June 2010. It has not been shown when the deceased was registered as the owner but the parties in their evidence agree that the deceased was the owner of the suit land. Further the certificate of confirmation of grant issued on 14<sup>th</sup> December 2009 and dated 30<sup>th</sup> December 2009 shows that said land was the property of the deceased and had been distributed in accordance with the said certificate.
40. It is thus clear that on the date that the appellant and the respondents entered into an agreement for the sale of land on 9<sup>th</sup> August 2009, the said land did not belong to the respondents. This court agrees with the trial court on the finding that the respondents did not have any capacity to enter into a contract for the sale of the land of the deceased due to the above cited statutory provisions of the Law of Succession Act Cap 160.
41. The Court in the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] eKLR took note that:
- “The ‘nemo dat’ principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”
42. A claim for specific performance arising from such a void transaction as was claimed by the appellant in his counterclaim was not available to him since a Court of Law will not enforce an illegality. In Mistry



Amar Singh v Kulubya 1963 E.A. 408, the Court cited the following passage from Scott V Brown Doering MC NAB & CO(3) 1892 2QB 724:

“Ex turpi Causa non oritur action. ... No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him.”

43. In the present case even if the sale transaction was entered into by the administrators, dealings with immovable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) where Proviso (ii), provides that no immovable property shall be sold before confirmation of the grant.
44. It is further, according to the certificate of confirmation of grant issued by the court, the suit parcel of land was awarded to other persons and not to the respondents and the said respondents only hold the land as administrators pending transfer of the same to the persons to whom the court distributed the land.
45. The Appellant filed a counterclaim seeking that the plaintiff's suit be dismissed, a declaration that the respondents hold title to land parcel Matinyani/Kalindilo/1042 in trust to him and a declaration that the respondents are obligated under the sale contract to transfer suit land to the appellant.
46. In their submissions, the Appellants relied on the doctrine of constructive trust and relied on this court's holding in the case of Baron Mathenge Munyoki v. Dedan Mbangula Kithusie(2022)eKLR. However, the circumstances in that case were different since the case involved a transaction for sale and purchase of land commenced by the deceased Ndunga Maingi himself and not by the administrator of his estate but was completed by Kithei Ndunga, the widow of the Deceased when she received the balance of the purchase price. The administrator did not sell the land in her own capacity but was merely receiving the money on behalf of her deceased husband.
47. In the present case, the respondents were not the legal owners of the land and indeed they were at the time of selling the land to the appellant acting in a fiduciary capacity as administrators of the estate of the deceased. In the Baron Mathenge case (Supra) this court relied on the definition of constructive trust as was elaborated in the case of: Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others [2015] eKLR

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, 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. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

48. In the present case the question of constructive trust cannot apply since the Respondents do not hold title to the suit land for themselves but in a fiduciary capacity on behalf of the beneficiaries of the estate



of the deceased. Further the court has found that the agreement of sale was illegal, null and void and thus none of the parties can benefit from the same and the court cannot enforce the same.

49. On the issue of application of doctrines of equity to a transaction subject to land control board consent, the respondents Counsel relied on a line of court decisions that have held that Section 6 of the Land Control Act is an express provision of statute and that it is a mandatory provision and no principle of equity can soften it. The authorities include Karuri Vs Gitura (1981) KLR, Mucheru Vs Mucheru (2000) 2 EA 456 culminating with David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR where the court quoted Section 3 (1) (c) of the Judicature Act and stated

“The Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrine of equity.”

50. The court went on to state that;

“Fourthly, we are not convinced that there can be an estoppel against the provisions of a statute. The Land Control Act requires consent to be obtained from the relevant land control board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such a void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppel can arise under the Land Control Act to render valid and lawful conduct, which is otherwise declared by the Act to be void for all purposes and also a criminal offence.”

51. The court agrees with the trial court’s finding that the sale agreement herein was illegal, null and void for having contravened the provisions of Sections 45 (1) and (2) and 82 (b) (ii) of the Law of Succession Act as well as Section 6 of the Land Control Act section is rendered in a Criminal Act under Section 22.

**GROUND 2 and 3: Did the Learned trial Magistrate err and misdirect himself both in law and in facts by failing to find that the respondents had sold the land to the Appellant and contracted with him to transfer upon obtaining the title and that they could not justifiably seek remedy of their own choice to renege from fulfilling their contractual obligations in the agreement?**

52. The Appellant contends that the respondents have an obligation to perform their contractual obligation under the agreement for the sale of the suit land Parcel Matinyani/Kalindilo/1042 dated 9<sup>th</sup> August 2009. It is trite in law that court of law cannot rewrite a contract on behalf of parties unless coercion, fraud or undue influence are pleaded and proved.

53. The agreement for sale was entered into on 9<sup>th</sup> August 2009 while the certificate for confirmation of grant was issued on 30<sup>th</sup> December 2009. According to the said certificate the suit property was granted to the beneficiaries and not to the respondents herein. A certificate of official search shows that the respondents were issued with the title deed in their capacities as administrators on 29<sup>th</sup> June 2010. The Court in the case of Joseck Ikai Mukuha v James Irungu Kanyuga [2021] eKLR quoted the following case as follows while making a determination:

“The Court in Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991, opined that an agreement for sale of land

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”



54. In the present case the trial court set out the legal requirements for a valid sale agreement as set out in the case of Nelson Kivuvani Vs Yuda Komora & Another cited above (supra). The Respondents have been found not to have had capacity to sell the suit land and indeed they cannot transfer the same to the Appellant for the reason that to date they still do not own the land but hold the same as administrators.
55. On this ground of appeal, the court is of the view that the Respondents had no power to transfer the suit land to the appellant since distribution of the properties in an estate of a deceased person is carried out by the court at the time of confirmation of the grant. As has been noted earlier the court confirmed the grant in succession cause number 667 of 2008 on 14<sup>th</sup> December 2009 soon after the sale between the parties and awarded to beneficiaries who did not to include either the appellant or the respondents. The expectation by the appellant was thus unfounded and not supported by the acts of the respondents who confirmed the grant soon after the sale agreement and did not include him in the said confirmed grant.

**Ground 4 Did the Learned trial Magistrate err and misdirect himself both in law and in facts by failing to find that the counter-claim has been established on a balance of probabilities and should be allowed as prayed?**

56. The Appellant filed a Defence and Counter-Claim where he stated that by a written agreement for sale dated 9<sup>th</sup> August 2009 the respondents sold to him the suit land at a consideration of Kshs.340,000/= which he fully paid.
57. That he took possession of the land and his occupation, use and possession of the suit land and made tremendous developments.
58. It was the appellant's contention that the respondents hold title to the suit land in trust on his behalf and are contractually obligated to transfer the same to him.
59. It is the court's view that the validity of the sale agreement entered into between the Appellant and the respondent has been dealt with in the course of this judgement. The said agreement was illegal, null and void as it contravened the provisions of Section 45 (1) (2) and Section 82 (b) (ii) of the *Law of Succession Act* and Sections 6(1) and 22 of the *Land Control Act*. The said agreement was unenforceable and doctrines of equity could not be applied to save the said transaction.
60. The court thus agrees with the decision of the trial court and finds no reason to depart from it. The appeal herein is thus dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**Judgement read virtually in the presence of;**

Musyoki: Court Assistant

Amhanda holding brief for Kilonzi for Appellant

Mutisya for Kalili for the Respondent

