



Ndambiri v Peter (Suing as the Legal Administrator of the Estate of Peter Mitambo Kiarago) (Environment and Land Appeal 8 of 2020) [2023] KEELC 22586 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 8 OF 2020
A KANIARU, J
NOVEMBER 6, 2023**

BETWEEN

NELSON KATHURI NDAMBIRI APPELLANT

AND

LUCY WANJUKI PETER (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF PETER MITAMBO KIARAGO) RESPONDENT

(Being an appeal from the judgement and decree of the Senior Resident Magistrate at Embu Hon. V.O Nyakundi dated 30th July, 2018 in Embu Civil Case No. 17 of 2017)

JUDGMENT

1. The Respondent herein – Lucy Wanjuki Peter (suing as the legal administrator of the estate of Peter Mitambo Kiarago – had sued the Appellant – Nelson Kathuri Ndambi - in the lower court in a dispute relating to land parcel No. Gaturi/Kavutiri/T.194. In the said case, the Respondent was complaining that the Appellant had trespassed into the land parcel no. Gaturi/Kavutiri/T.194 and had started building structures on the land without any authority from the administrators of the deceased estate. She was praying for orders of permanent injunction restraining the Appellant from trespassing, constructing or committing any acts of waste upon the said land, costs of the suit, and any other relief that the court would find fit and just to grant.
2. The Appellant had filed a defence in the lower court case in which he pleaded, inter alia, that he was not a trespasser on land parcel Gaturi/Kavutiri/T.194 as he had bought the same for a valuable consideration from the deceased on 11.01.1989 through a written sale agreement. He also pleaded that after he bought the suit land, he immediately started utilizing the same with the knowledge of both the deceased and the Respondent and therefore intended to invoke the doctrine of constructive trust. He further pleaded that the Respondent had brought the suit in bad faith as he had taken possession of the said



land and fenced the same had put building materials on the ground during the lifetime of the deceased and with the full knowledge of the Respondent and she never raised questions at that time.

3. The Appellant in his defence raised a counterclaim where he pleaded that he was a bonafide purchaser for value of the suit land and that he had been utilizing the same since 1989 when he bought it. He averred that he was in good terms with the deceased and so he continued utilizing the land without pursuing the transfer of the same to him as he trusted the deceased who was his wife's relative. He stated further that the suit was incompetent and bad in law as he had been on the suit land for over twelve years without being evicted and that he was entitled to be registered as the proprietor of the same.
4. The Appellant in his counterclaim made the following prayers;
 - a. An order that the Defendant (referred to as the Appellant herein) is entitled to be registered as the absolute proprietor of land parcel No. Gaturi/Kavutiri/T.194 by way of constructive trust.

Or In The Alternative

The plaintiff herein be ordered to transfer Land Parcel No. Gaturi/Kavutir/T.194 to the Defendant pursuant to the sale between the Defendant and the Plaintiff's deceased husband.
 - b. Costs of the counterclaim.
5. The lower court at Embu (Hon. V.O Nyakundi SRM) heard the matter and in a judgement delivered on 30.07.2018 held that there was no sale of the suit land to the Appellant and dismissed the Appellant's Counterclaim. Among the reasons given for dismissal was the he found that the deceased did not own plot no Gaturi/Kavutiri/T.194 as at 1989 when the Appellant is said to have purchased the same and that the remedy of adverse possession would not apply. The other reason was that the remedy of specific performance would also not apply since there was no contract for sale of land.
6. The outcome of the lower court matter is what triggered the appeal now before me. The memorandum of appeal came with ten (10) grounds as follows:
 1. That the learned trial magistrate erred in law and fact when he made a finding on a claim of adverse possession when the same had not been pleaded by the Appellant.
 2. That the learned trial magistrate erred in law and fact when he failed to make any finding on the Appellant's counterclaim despite the same being undefended.
 3. That the learned trial magistrate erred in law and fact when he failed to find that the Plaintiff had not established ownership of the suit land.
 4. That the learned trial magistrate erred in law and fact when he relied on the letter dated 3rd June 1992 as proof of when the suit land was exchanged with land parcel No. Gaturi/KAVUTIR/206.
 5. That the learned trial magistrate erred in law and fact when he failed to consider the claim of constructive trust as pleaded by the Appellant.
 6. That the learned trial magistrate erred in law and fact when he held that the agreement for sale of land being relied on by the Appellant was not genuine.
 7. That the learned trial magistrate erred in law and fact when he failed to find that the Appellant had paid Kshs. 20,000/= for purchase of the suit land.
 8. The decision of the trial magistrate was against the weight of the evidence on record.



9. That the learned trial magistrate erred in law and fact when he failed to consider the fact that the suit land had been exchanged with plot no. Gaturi/Kavutiri/T.194 long before approval by the Ministry of Local Government.
10. That the learned trial magistrate erred in law and fact when he failed to find that the Appellant has been using the suit land and has constructed thereon.
7. The court was urged to allow the appeal and the decision by the trial court be set aside.
8. It was agreed that the Appeal be disposed of by way of written submissions. The appellant's submissions were filed on 02/02/2023. The submissions gave some background relating to the case. The appellant then analyzed the all the grounds raised in his Memorandum of Appeal and basically his argument was that the trial court made a finding on a legal principle that was neither pleaded nor argued by the parties. That legal principal is the issue of adverse possession. It was his case that his claim was on constructive trust and not adverse possession as determined by the court. He further argued that the court erred by failing to make a finding on the Counterclaim raised in his defence, yet the same was undefended. Instead the trial court merely dismissed the counter-claim without any proper basis.
9. He submitted that the Respondent did not prove that she was the owner of the suit land as she never produced any ownership documents. Therefore this did not warrant the suit being decided in her favour. That the trial magistrate erred when he relied on the letter dated 03.06.1992 as proof of when the Respondents land parcel no. KIARAGO MITAMBO Gaturi/Kavutiri/T.206 was transferred by way of exchange with the suit land herein - Gaturi/Kavutiri/T.194 - to Embu County Council as that on its own was not sufficient to prove transfer. He further submitted that the court erred when it found that the Agreement for sale of land relied on by the Appellant to prove that he had purchased the suit land from the Respondent was not genuine as there was no report from an expert to discredit the said Agreement.
10. That the court erred when it failed to find that the Appellant had paid a consideration of Kshs. 20,000/- for the suit land as there was evidence of the same. That therefore the court failed to consider evidence which was in favour of the Appellants case. It was his case that the court also failed to find that the Appellant had been using the suit land and that he had constructed thereon as this was his basis for the claim of constructive trust. He urged the court to allow the Appeal.
11. To reinforce his position he relied on the cases of Raila Amolo Odinga & Anor vs IEBC & 2 Others (2017) Eklr as cited in Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (2018) Eklr, Naftal Kerongo Ongweso vs Simon Mogere & Anor (2021) Eklr citing the case of Wreck Motors Enterprises vs The Commissioner of Lands & 4 others (1997) Eklr, Charles Kangayia vs Alfred Musavi & Anor (2020) Eklr, Robert Ouma Njoga vs Benjamin Osano Ondoro (2016)Eklr.
12. The Respondents submissions were filed on 21.06.2022. The submissions gave some brief background relating to the case. The Respondent then focused on three issues for determination. The first issue for determination was whether the Respondent has locus to bring legal representation on behalf of the estate of the deceased - Peter Mitambo Kiarago. On this issue, the Respondent submitted she had produced letters of administration before the trial court as proof that she was the administrator of the estate of the deceased. The letters were issued by the High Court on 02/03/2011. She submitted further that her intention in bringing the suit was to prove that the suit land belonged to her deceased husband and that the same had not been sold to the Appellant as alleged. To support this position, she quoted the provisions of section 82 of the *Law of Succession Act* Cap 160 which outlines the powers of personal representatives which include bringing a suit on behalf of the estate of the deceased to protect



- their assets. It was her submissions that the Appellant's claims on this issue were unfounded and ought to fail.
13. The second issue for determination according to the Respondent was whether there was sale and/or transfer of property registered as Gaturi/Kavutiri/T.194 to the Appellant. On this, she submitted that Appellant alleged to have entered into an agreement with the deceased around the year 1989, which Agreement she says was purposely left out of the Record of Appeal. That the Appellant during cross examination at trial admitted that the Agreement was not drawn by an advocate, that it is a sham, and that he had no proof to show he paid the Appellant a consideration of Kshs. 20,000/= for the sale of the suit land. That the Appellant during cross examination admitted to having failed to secure a Land Control Board Consent to transfer the property after completion of the sale, if there was any, and that without the Land Control Board Consent to transfer the land, the transaction fails.
 14. She submitted further that she gave evidence to the fact that the deceased –Peter Mitambo Kiarago - conducted the exchange of property and followed it up sometime in 1992 and 2002 respectively. That she produced an approval for Transfer and Exchange of property by the Ministry of Local Government approving the exchange of land parcel Gaturi/Kavutiri/T.206 with the suit land herein which commenced in the year 1992. It was her submission that the question that arises therefore was how the deceased would have entered into a transfer Agreement over property he did not own at the time. That while agreeing with the trial court, the deceased did not own the suit land herein when the Appellant alleges the Agreement for sale was entered into. It was her contention that since the Appellant was the one alleging the existence of the Agreement for sale, the burden was on him to prove that such an Agreement exists and that the same was enforceable, a fact which he failed to show the trial court.
 15. The Respondent submitted further that the signature as appears in the Agreement for sale did not belong to the deceased. That this evidence was corroborated by the Appellant's witness (Defendant's witness at trial) James Ndwiga who during cross examination confirmed that the handwriting in the Agreement as well as the signature did not match those of the of the deceased. That further, the Appellant did not prove that the amount of Kshs. 20,000/- paid to the Deceased was a consideration for property sold to him and that it was agreed to be a loan that would be refunded. She urged the court therefore to find that there was no Agreement for Sale between the Appellant and the deceased over the suit property and that the trial court's findings were just.
 16. Lastly, the Respondent submitted that the third issue for determination was whether the Appellant can acquire the suit property by way of adverse possession. She submitted that although the Appellant had averred in his Memorandum of Appeal that the trial court erred when it made a finding on adverse possession when the same was not pleaded, they directed the court to Paragraph 11 & 12 of the Appellants defence. The Appellant in those paragraphs had stated that he had utilized the suit property since 1989 without interruption or complaint and that he had been on the suit land for over 12 years, which aspects signified he was claiming his rights of adverse possession over the suit land. On this, she submitted that the Appellant could not have any claim on adverse possession of the suit property for an uninterrupted 12 year period, and that he was in the property without the knowledge and/or consent of the proprietor. That further, the Appellant did not dispute the fact that he put up a fence in 2014 and started construction in 2015-2016 during cross examination and therefore his claim for adverse possession must fail. She urged that the appeal be dismissed.
 17. The following cases were relied on to persuade the court; Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) Eklr, Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & Anor (2015) Eklr.



18. I have considered the appeal as filed, the parties submissions, and the entire court record in general. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
19. Based on the memorandum of appeal and the submissions by the parties herein, I find that the issues for determination are as follows;
 - i. Whether there was sale and/or transfer of land parcel No. Gaturi/Kavutiri/T.194 by the Respondent to the Appellant.
 - ii. Whether the Appellant is entitled to the suit land by way of constructive trust.
20. On the first issue, the Respondent testified that her late husband did not sell the suit land to the Appellant and that the Sale Agreement alleged to have been entered into between the Appellant and the deceased to sell the suit land to him was not authentic. The Appellant on the other hand testified that the Respondent's late husband sold the suit land to him and that the sale agreement was witnessed and entered into before a third party - DW1 referred to as JAMES NDWIGA and ESTHER W. MITAMBO - who is said to be the Appellant's wife. He produced a copy of a sale agreement dated 11/01/1989 in support of his evidence.
21. I have looked at the sale agreement dated 11.01.1989 between NELSON KATHURI NDAMBI and PETER MITAMBO (the deceased) and I see that it is said to be for the sale of plot no. 194. The agreement states that the seller was selling his land situated at Kavutiri Market though it does not state the size or acreage. The purchase price is Kshs. 20,000/-. Kshs.10,000/- was paid leaving a balance of Kshs. 10,000/- which was to be paid on 31.01.1989. The agreement also indicates acknowledgement of receipt of Kshs, 2000/- on 09.01.1990 and Kshs. 1,000/= on 06/02/1990. The agreement is then attested to by the parties and the witnesses.
22. It was the Appellant's testimony that the deceased signed the Agreement and that agreement was not fraudulent as there were witnesses. He called to the stand one of the witnesses - James Ndwiga as DW1 - who testified that on 11.01.1989, he was approached by the Appellant and the deceased - Peter Mitambo in his office, which was then situated at Emco House. That they revealed to him that they had agreed on a sale agreement of plot no. Gaturi/Kavutiri/T.194 at a price of Kshs. 20,000/-. That in his presence the Appellant paid Kshs. 10,000/- as a deposit of the purchase price leaving a balance of Kshs. 10,000/= which was to be paid on 31.01.1989. That they requested him to be a witness to both parties. That also present as a witness was Esther W. Mitambo who is the wife of the Appellant and a niece to the deceased. He further testified that the Respondent was not a party to the said sale agreement and therefore she should not be a claimant of the said property because it was sold in her absence. He admitted that he did not draw the said agreement but was only called to be a witness.
23. The law under Section 3(3) of the *Law of Contract Act* states as follows:-(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; And



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

This same requirement is to be found at section 38 of the Land act No 6 of 2012.

24. Again Section 71 of the Evidence Act provides that;

“If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence”

25. From the above it is clear that any instrument purporting to dispose any interest in land must meet certain conditions in order to be enforceable. It must be in writing, signed by all the parties and attested to. In order for it to be admissible as evidence, at least one of the attesting witnesses has to be called for the purpose of proving its execution if they are alive and capable of giving evidence. So the question one has to ask themselves is whether the Appellant's Sale Agreement purporting to have disposed of the suit land to him met the above requirements. The Respondents alleged that the handwriting and signature in the sale Agreement did not match those of the deceased.
26. In my opinion, this allegation was not proved as the document with which they sought to compare the handwriting and signatures of the deceased to was not proved or demonstrated to have been authored by the deceased. Anybody could have written and signed that letter. Therefore in the absence of any evidence that the Sale Agreement was forged and based on the strength of the evidence of one of the attesting witnesses that the Sale Agreement was executed by the deceased and the Appellant in his presence, I find without equivocating, that the Sale Agreement is valid and enforceable against the Respondent.
27. Further, the Respondent had also taken issue with the fact that the Appellant was seeking to rely on a copy of the Sale Agreement and not the original. The Appellant in this case said what he had was a photocopy as his house had burnt down and that the incident had been reported to the police who issued him with a copy of an OB. It is not clear whether that was produced as evidence in the lower court. Nevertheless, the law provides that the best evidence is ordinarily the Primary evidence. However, the Law is also very clear that at times Primary evidence may not be available due to loss, or destruction, and the party intending to produce the Primary evidence may not be in a position to do so. Due to the above fact, Section 68(1) of the Evidence Act was enacted. Section 68 (1) (C) provides that Secondary evidence may be given if the said Primary evidence is lost or destroyed out of no default of the party intending to produce it.
28. Again, according to the sale agreement which was entered into by the parties in 1989, the land said to be sold to the Appellant is properly described as Plot no. 194, which is the exact description of the suit land herein. The Respondent's on the other hand claim that the suit land only came into existence after being exchanged with a plot No.206, which exchange took place in the year 1992. It seems odd to me that the parties would have known the accurate description of the suit land herein in 1989 to have it reflected in the sale agreement if at all the same was not in existence at the time.
29. The document that the Respondent's are seeking to rely on is a copy of a letter from the Ministry of Local Government to the Commissioner of Lands dated 03.06.1992 with the title “Transfer Of Land By Way Of Exchange – Embu County Council”. The document bears a stamp from Embu County Council marking it as received on 11.06.1992. However, the said letter only indicates some land transfers by way of exchange of a number of some listed land parcels (which include that of deceased). It does not disclose when the approval was done. I find therefore that this cannot be conclusive evidence



that the transfer was made in 1992. I am not persuaded that at the time the parties entered into the sale agreement the suit land herein was not in existence.

30. Further, the Appellant testified that in the year 1988 in the month of October, the deceased approached him and informed him that he had problems of school fees for his children and that he had a plot he wanted to dispose of so as to raise the money. That also the deceased told him that he had found it wise to inform him, being a family member, because he never wanted to sell the land to another person as the Appellant was married to his brother's daughter. That the appellant had no money at hand and so he requested the deceased to give him time to look for money. He applied for a loan at his sacco as the deceased was selling the land to him at Kshs. 20,000/-. That the loan matured by the late same year 1988 and by January 1989 he came back to Embu so that they could agree on the sale.
31. That the deceased took him to the now defunct Embu County Council offices where they were shown documents showing that he owned a Plot No. 206 which he had exchanged with the plot No. Gaturi/Kavutiri/T.194 and that there were documents to that effect. That the deceased also took him physically to Kavutiri where he showed him the said plot and the boundaries. That he paid the deceased the agreed amount as per the sale agreement and the deceased promised him that he would transfer the suit land to his name but he unfortunately he died before doing so. That he fenced the said plot and started farming on it by planting napier grass and that he began construction on the land in 2015-2016.
32. The Respondents do not deny that the deceased received the sum of Kshs. 20,000/- from the Appellant. They however claim that the same was a loan and not the purchase price of the suit land herein. However the Agreement clearly indicates that the Appellant paid the deceased Kshs. 10,000/= at the time of the agreement and that the balance of Kshs. 10,000/= was agreed to be paid on 31/1/1989. The Appellant thereafter paid Kshs. 2,000/= and 1,000/= on 9/1/1990 and 6/2/1990 respectively to the deceased. This is clearly indicated in the Agreement and it appears to me to have been an ongoing transaction which ultimately resulted in the full payment of the agreed purchase price of Kshs. 20,000. The respondent admits that the amount was paid.
33. From the foregoing, I am inclined to disagree with the learned trial magistrate who held the view that the purported sale agreement was not genuine and that the deceased had borrowed Kshs. 20,000/ from the Appellant. It is my position that on a balance of probabilities, it is shown that there was a sale agreement entered into by the Appellant and the deceased herein for the sale of land parcel No. Gaturi/Kavutiri/T.194. I am also satisfied that the deceased was paid the purchase price of the suit land and that the Appellant was put into possession of the suit land by the deceased. The Respondent cannot be said to have entered into the suit land as a trespasser but as a bona fide purchaser for value. I am also inclined to disagree with the trial magistrate that the Appellant had made a claim for adverse possession. There was no such claim. The appellant's claim was based on constructive trust.
34. The court is guided by the findings of the court in the case of Baron Mathenge Munyoki v Dedan Mbangula Kithusi [2022] eKLR where it was faced with similar facts as herein where it cited the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR ;

“We take note that the judicial decisions cited by the respondent were all made prior to the promulgation of the 2010 Constitution of Kenya and before the Overriding Objective principles were enacted into the *Appellate Jurisdiction Act*, Chapter 8, Laws of Kenya. This Court is enjoined to dispense substantive justice. What is justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey – vs-*



Palmer (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

The court went on to say that the Court finds that the doctrines of proprietary estoppel and constructive trust are applicable since there was a common intention to sell on the part of the deceased and to purchase the suit land on the part of the Respondent. I wish to follow the findings of Lord Bridge in *Llyods Bank Plc – vs- Rosset*, (1991) 1 AC 107,132, where he observed that “a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant.”

The court is further persuaded by what was stated by Lord Reid in *Steadman – vs- Steadman* (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

80. In the instant case common intention to sell is evident, the seller received purchase price and the purchaser occupied and developed the land on the strength of the agreement of sale. The beneficiary of the sellers estate could not subsequently turn around and assert that the agreement was unenforceable. The deceased and subsequently his estate held the suit land subject to the rights of the Respondent. Consequently, the Appellant could only inherit the land herein subject to the same rights of others acquired as per the law.”

35. The Respondent also submitted that if at all there was any sale of the suit land the same was void for lack of mandatory consent of the Land Control Board for the sale of the land. She submitted that the suit property being agricultural land was subject to the [Land Control Act](#), Chapter 302, Laws of Kenya. She said that under Section 6 (1) of the Act, failure to obtain such consent made the said agreement void and unenforceable against the deceased.

In the case of *Mwangi & another – vs- Mwangi*, (1986) KLR 328 as cited in the case of *Baron Mathenge Munyoki supra*, it was held that the creation of a trust over agricultural land situated in a land control area, does not constitute any “other disposal or dealing” with the land within the meaning of Section 6 (1) (a) of the [Land Control Act](#) and therefore the consent of the local Land Control Board is not required. This position had earlier been applied in the case of *Gatimu Kinguru – vs- Muya Gathangi* (1976) KLR, 253 where it was stated:

“The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for the purpose of Section 6(1) of the [Land Control Act](#) and, therefore, does not require the consent of the local Land Control Board.”

36. Again in the case of *Eldoret Civil Appeal 51 of 2015 Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR as also cited therein the court pronounced itself as follows:

“The [Land Control Act](#) does not, unlike Section 3 (3) of the [Law of Contract Act](#) and Section 38 (2) of the [Land Act](#) save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions.As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine



of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

I agree with the above findings that that lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.

37. Further I note that the respondent would wish to fault the sale transaction for the reason that consent of the land control board was not obtained. It is easy to agree with this observation if one looks at the matter in a superficial manner. But if proper thinking is given to the issue, it can be appreciated that the appellant as a buyer could not take himself to Land Control Board to get the consent. He needed to be taken there and in this instance it is the deceased seller who was supposed to initiate the process. Naturally, the appellant would have been happy to get that consent as it represented one crucial step towards his titled ownership of the land. It would therefore be wrong to try and visit the omission or fault of someone else on the appellant.
38. Still further, I note that it is common ground that Kshs 20,000 was paid by the appellant to the deceased owner of the land. The respondent would like the court to view it as a loan. The appellant says he was buying the land. The respondent did not state how the amount was paid and in absence of any explanation from her, the court is inclined to go by what was shown by the appellant. The document available shows that the money was paid in staggered instalments. This seems to show that the appellant was struggling to pay. In the normal affairs of men, no one would struggle to lend money to another man. When money is paid in the manner shown here, it is so paid because the person paying has a benefit, an advantage, or some quid pro quo if you will, that will accrue or arise after paying the money. This in my view explains why the appellant was making efforts to pay the money in staggered bits. The benefit to him was the suit land itself. The story of the loan is a creation of the respondent.
39. The upshot, in light of the foregoing, is that the appeal herein is merited. I hereby set aside the judgement of the lower court and make a finding that the appellants counter-claim is well proved on a balance of probabilities. It is allowed on the basis of a constructive trust. As a corollary, the appellants suit in the lower court is found to be devoid of merits and is hereby dismissed. Each party to bear own costs of both this appeal and the lower court suit.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF NOVEMBER, 2023.

In the presence of;

Appellant – present

Respondent – present

Guantai for Respondent

A.K. KANIARU

JUDGE

06/11/2023

