



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC APPEAL NO.24 OF 2021

BARON MATHENGE MUNYOKI.....APPELLANT

VERSUS

DEDAN MBANGULA KITHUSI.....RESPONDENT

JUDGEMENT

1. The appeal herein is from the judgment of the Chief Magistrate's Court at Kitui CMCC No.197 of 2013 the Hon. M. Murage delivered on 14th August 2018 and sets forth the following Grounds of Appeal:

- 1. THAT the Learned trial Magistrate erred and misdirected herself both in fact and in law by determining the case in favour of the Respondent contrary to and in diversion from the Respondent's pleadings.**
- 2. THAT the Learned Trial Magistrate erred and misdirected herself both in fact and in law by basing her determination on a void and invalid sale agreement contrary to the law.**
- 3. THAT the Learned trial Magistrate erred and misdirected herself both in fact and in law by failing to find as a fact that the Defendant had failed to sustain his counter-claim as pleaded.**
- 4. THAT the Learned trial Magistrate erred and misdirected herself both in fact and in law by failing to find as a fact that the plaintiff had established his case on a balance of probabilities.**

2. The Appellant prays:

- a) That the judgment dated 14th August 2018 be quashed and set aside with costs.**
- b) That judgment be entered in favour of the Appellant as prayed for in the lower court with costs.**
- c) That the Respondent's counter-claim in the lower court be dismissed with costs to the Appellant.**

Summary of evidence in the Trial Court

3. The Appellant was the Plaintiff before the Trial Court where he sought the following orders: -

- (a) A declaration that the Plaintiff is the absolute owner of land parcel Kyamgwithya/Mulundi/2003 with all rights and privileges belonging or appurtenant thereto.
- (b) A permanent injunction restraining the Defendant either by himself or by his agents, servants, employees, relatives, proxies and/or whomsoever else as the case may be, from entering into, digging, farming, cultivating, planting and/or grazing and/or in any other way interfering with land parcel Kyamgwithya/Mulundi/2003.
- (c) Costs of the suit.

4. The Respondent filed a Defence and Counterclaim where he denied the Appellants claim and prayed that the suit be dismissed with costs and the counterclaim be allowed. The counterclaim sought the following orders: -

A) A declaration that the Plaintiff holds title no. Kyangwithya/Mulundi/2003 on his behalf and IN TRUST for the Defendant to the extent of 0.18 Ha and that a 6 metre access road exists to serve the portions aforesaid and the said portion be transferred to the Defendant.

B) Costs of the counterclaim.

5. The trial court delivered judgment on 4th August 2018 finding that on a balance of probability, the Appellant had failed to prove the Respondent was occupying his land and dismissed his claim. On the other hand, she found that the Defendant had been in occupation of the suit premises and had produced an Agreement of Sale and called witnesses to support his case. She therefore allowed the counter-claim of **0.18 Ha and 6 meters** access road from title no. **Kyangwithya/Mulundi/2003** and ordered each party to bear its own costs for both claims.

6. During the trial, the Appellant, Baron Mathenge Munyoki, gave evidence that he was a Catholic Minister (Priest) and knew Ndunga Maingi (deceased) who passed on leaving his widow Kithei Ndunga the sole survivor. Kithei Ndunga applied for Letters of Administration to his estate and a Certificate of Confirmation of Grant was obtained. He stated that there was no objection to the issuance of the Letters of Administration and mode of distribution of the estate which only comprised land parcel Kyangwithya/Mulundi/552. The said land was given to him in whole and a Title Deed was issued in his name.

7. The Appellant later sub-divided the land into two being land parcels Kyangwithya/Mulundi/2003 which remained in his name and on instructions from Kithei Ndunga, transferred Kyangwithya/Mulundi/2004 to one Dominic Kithua Kimanzi who had bought the land. He stated that he was not made aware that the Respondent herein had at any time sought a portion of the deceased's land. He produced the Mutation form and sketch of proposed development plan.

8. He also stated that the exhibits produced by the defendant were not filed in the Lands Registry and that he did not know the author of the said subdivision of the land into three portions and states the portion that the Respondent claims belongs to him.

9. Upon cross-examination, the Appellant admitted that the Respondent was cultivating a portion of the suit land since 2000 and that he had planted trees therein. He further claimed that he attended a meeting before Kitui Lands Registrar and the Respondent was ordered to go to court and seek orders. He also stated that he did not involve the Respondent in the succession case.

10. The Respondent called four witnesses. In his evidence the Respondent stated that one part of Land Parcel Kyangwithya/Mulundi/2003 measuring 0.18 Ha plus a six-meter road belonged to him while the rest of the land belonged to the Appellant. He stated that he bought the land from Ndunga Maingi when it was then registered as Parcel No. 552 Mulundi Adjudication section which later became Kyangwithya/Mulundi/552. That he took possession of the land and started cultivating and planting trees. He stated that he did not know how the Appellant obtained the title to the suit land and that he discovered that the land was registered in the Appellant's name in 2013 when he (the Appellant) sent a headman to stop him from using the land.

11. The Respondent said that he took the matter to the chief who wrote a letter summoning the Appellant to his office but he declined to attend. He stated that he took the matter to the Land Registrar where the Appellant was summoned and they had a meeting. The Appellant was told to sub divide the land between him and the Respondent but declined. The Land Registrar visited the site and made findings and advised the Respondent to go to court to get his portion. He called a surveyor and identified his parcel. He produced the Agreement for sale dated October 1984 as an exhibit and a copy translated from Kikamba into English.

12. The Respondent also produced a Sketch plan from the surveyor as an exhibit. He produced the Consent from the Land Control Board showing that he was left out and the Mutation forms were also produced. He stated that his portion was included in portion Kyangwithya/Mulundi/2003 and that the Appellant holds the land in trust.

13. On cross-examination the Respondent stated that he bought the land from Kithei Ndunga who was the wife of Ndunga who died in November 1984. He stated that Kithei Ndunga received the money and was alive at the time of the agreement. He stated that he did not know that the Appellant filed the succession cause and that he did not recognize his claim to the land and refused subdivision. When the land was sub-divided between the Plaintiff and Dominic the Respondent was left out. He also stated upon re-examination that the balance of the purchase price was paid to the deceased's wife. He further stated that the document subdividing the land into three portions was drawn by a senior surveyor and all parties signed it including the Appellant and the deceased.

14. Julius Kithitu was called as Defence witness 2 and stated that he is a peasant farmer and that he knew the parties to the suit. He said that he was Ndunga's (Deceased) cousin and that he knew about the dispute. He confirmed that the Respondent had bought land from Ndunga's wife and that he had planted trees and crops on the land. In his written statement he confirmed that the Respondent had been in possession of the land since 1985.

15. Mwanza Kituu testified as Defence witness 3 and stated that he knew the parties and the history of the land in dispute. He stated that he knew that the land was bought by the Respondent in 1986 from Kithei Ndunga the Deceased's wife. That there was a dispute over a portion of the land sold and the same was settled during a clan meeting. He confirmed that the portion owned by the Respondent did not have a dispute at the time of the clan meeting.

16. Defence witness number 4, Anna Kavinya, the Respondent's wife, confirmed that the land Kyangwithya/Mulundi/552 was adjudicated in the name of Ndunga Maingi (deceased) She stated that the boundaries of the portion that she occupies together with the Respondent are clearly marked and their land borders that of the Appellant. That she has been occupying her portion since 1984 since it was bought by her husband. She has planted food crops -maize, beans etc as well as fruit trees.

17. Defence witness 4, Stephen Kimanzi stated that he knew both the Appellant and the Respondent and he knew that they had a land dispute. He stated that in 1985 he was contracted by the Respondent to mould bricks on a portion of Kyangwithya/Mulundi/552 and he was

informed that the Respondent had bought the land. He confirmed that the portion of the said lane is occupied by the Respondent and he has planted food crops as well as trees. He has known the land to belong to the Respondent for close to thirty years.

18. The Respondent closed his case and both parties filed written submissions.

19. In his submissions in the Trial Court, the Appellant submitted that the Respondents wrongful acts of digging on the land were in violation of the Appellants constitutional right to land as well as the Land Act No.6 of 2012.

20. The Appellant submitted that the sale transaction relied on by the Respondent did not follow through and that the Defendant has never applied to revoke the grant of letters of Administration or Certificate of Confirmation of Grant as per Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules. He stated that since the Respondent paid the remainder of the money for the sale transaction to the Deceased's wife, he should claim from her as the Appellant was not privy to the Sale Agreement. He therefore submitted that the Appellant could not be declared to hold a portion of the suit land in trust for the Respondent based on the purported illegal contract. He also submitted that the claim of adverse possession since it was only 7 years after the Appellant obtained title.

21. The Respondent submitted that he was a genuine owner by way of purchase and that he had been in continuous, peaceful and uninterrupted occupation of the same. He submitted that a trust was created in his favour as stated in his counter-claim. He submitted that the Appellant had not made a case against the Respondent on a balance of probability and the same ought to be dismissed in costs.

22. The trial Court considered all the evidence before her and found that the Respondent had a genuine claim and upheld the counter-claim in favour of the Respondent while dismissing the Appellant's claim.

The Appellant's Submissions in the Appeal

23. The Appellant submitted that the Trial Court disregarded the matters pleaded and the facts adduced at the hearing and founded her determination solely on the basis of the void sale agreement and purported occupation of the disputed land by the Respondent. This was despite the overwhelming evidence in support of the Appellant's title.

24. The Appellant submitted on the **Grounds of Appeal 1 and 2** together. He dealt with the contentious Agreement for Sale of Land that was produced before the Trial Court. The appellants Counsel submitted with regard to the agreement that the same was not signed by the seller, the signatures on the agreement were not attested by a witness who was present when the contract was signed by the parties to it, the land parcel number was not stated in the Kikamba version of the agreement. The Appellant further stated that the purchase price was not paid in full to the deceased during his lifetime but the last payment was made to the seller's wife who was also deceased and she could not confirm the payments. Further that the Deceased was not a party to the agreement and the terms of the contract (e.g. size of land, LR number) were not contained in the agreement. The Appellant relied on the case of **Majola V. Nyoni (2014) ZEBHC, Zimbabwe**.

25. According to the Appellant, the Respondent's counter-claim was about an interest in land and thus the contract was subject to the Law of Contract Act. Further, that the agreement produced in court contravened the provisions of the Section 3 of the Law of Contract Act. They therefore submit that the trial court erred in failing to make a finding on whether there existed a valid and genuine sale agreement and also in awarding a size of land not contained in the purported agreement.

26. The Appellant submitted that the entire suit land was adjudicated and registered in the name of the seller (the Deceased) during the adjudication process and the Respondent did not object to registration of the deceased as owner of the entire land and to have his alleged portion registered to him. As a result of the adjudication process, which according to the Appellants submissions, was almost completed by 1984.

27. He Appellant further submitted that Consent for sub-division and sale of land under the Land Control Act was not obtained and therefore the transaction of a sale of a portion of the agricultural land became void for all purposes. He relied on **Hirani Ngaithe Githire V Wanjiku Munge (1979) KLR 50**.

28. The Appellant contended that the land had mutated from Kyangwithya/Mulundi/552. He also raised the issue that he had not been privy to the purported sale transaction since the Respondent had dealt with the Deceased's wife and his claim to a portion of the land was not tenable as the Appellant was an innocent beneficiary.

29. On the Respondent's allegation of fraud on the Appellant's part in effecting the sub-division of the original title, the Appellant submitted that the Respondent did not prove any fraud and the Court left this issue undecided.

30. In the trial court, the Respondent raised the issue of being omitted from the succession proceedings and the Appellant submitted that he should not be roped into the issue as it is not clear why the Respondent did not apply to revoke the Grant. The Appellant claims that the trial court erred in failing to address this issue.

31. On **Ground Number 3**, the Appellant submitted that the Respondent's counter-claim was founded on the purported sale agreement dated October 1984 which in the Appellant's submission, is void. The seller died on 3.11.1984 while payments of the purchase price went on up to 1986. The Appellant contends that a consent to subdivide land is mandatory under the Land Control Act and that the Trial Court overlooked this fact.

32. According to the Appellant, the Respondent had the burden of adducing evidence to establish that there was a legal connection between him and the Appellant pertaining to the suit land to establish elements of a trust, which he failed to do. The Appellant relied text from **Snell Equity, Property and Conveyancing Library, 29th Edition London Sweet & Maxwell (1980) page 89 to 90, Blacks Law Dictionary,**

8th Edition, Bryan A, Garner, Thomson West on definitions and ingredients of trust.

33. The Appellant further submitted that the Respondent did not plead constructive, implied or resulting trust or any nature of trust implied in law from a set of facts or circumstances that favour the presumption of trust in the present case.

34. The Appellant further submitted on the confusion in the date or time when the Respondent entered or took possession of the suit land. According to the defence and counterclaim it was immediately after the sale transaction started. However, the Court found that the date was the year 2000. At that time the deceased had been dead for sixteen years. The Appellant submits that at that point the Respondent was a trespasser or an intermeddler as per section 45(1) of the Law of Succession Act and Section 22 Land Control Act

35. The Appellant also submitted that as per the land control board consent, the land was to be sub-divided into 2 portions and not 3. The Appellant contends that the Respondent was trespassing on the property and that he was at best, an intermeddler, and that he did nothing to challenge the Grant. The Appellant relied on **HC, ELCA NO 3 OF 2019 Dominic Nthangathi & Another V Pauline Kathini Mulwa Machakos**.

36. Regarding **Ground number 4**, the Appellant submitted that it was a deliberate misdirection by the trial magistrate in failing to enter judgment as prayed in the Complaint and it was an error of law and fact to dismiss prayer No. 1 since his ownership of the Title was never disputed. As to prayer No. 2 on the Injunction, the Appellant submits that the time the purported seller and his wife the administrator of his estate were deceased, it was apparent that the respondent was a trespasser and an intermeddler of the Estate of the Deceased.

37. Finally, the Appellant submitted that at the Trial Court, the Respondent admitted that the Kikamba version of the purported sale agreement did not have the deceased seller's signature and that he bought the land from the Deceased's wife. The Appellant submits that the Respondent's claim is unsustainable against the Appellant and as such a permanent injunction ought to have been granted. The Appellant has annexed the cited authorities to the submissions.

The Respondent's Submissions on the Appeal.

38. The Respondent first submitted that the Appeal is not properly before the court as it was filed before the High Court, which does not have jurisdiction on land matters. He stated that this was contrary to the mandatory provisions of Section 16 A of the Environment and Land Court Act 2011. The Appellant contends that the power of the court to transfer a case from one court to another is limited to matters pending before the subordinate courts only and that the Environment and Land Court is not subordinate to the High Court but they have the same status (see the case of **Lilian 'S' vs Caltex Oil (Kenya) Ltd 1989 KLR p.p 14-15**)

39. The Respondent submitted that in **Kagenya vs Musranio & Another 1968 E.A 48** the court held, regarding Section 18 of the Ugandan Civil Procedure Act, which is in para materia with section 18 of our own, that an order for transfer of a suit from one court to another cannot be made, unless the suit has been in the first place brought to a court that has jurisdiction to try it. The Respondent also cited similar cases being:

Ndykak Investment Ltd vs Joseph Itunga (2006) eKLR, Benjamin Gichana Mayieko T/A Benjamin Enterprises & 2 others vs Kenya Breweries Ltd (2013) eKLR, Wycliffe Mwangazi Kihungwa vs Grainbulk Handlers Ltd (2014) eKLR and Rob Delong & Another vs Charles Mureithi Wachira (2012) eKLR where the courts held that before exercising Section 18 of the Civil Procedure Act it must be satisfied that the suit was filed in a court that had jurisdiction.

40. The Respondent therefore submits that since the Appeal was filed in the High Court at Machakos, the file ought to have been transferred to the High Court at Kitui and be dealt with in whichever way.

41. On **Ground Number 1** of Appeal, the Respondent submits that this allegation is not supported by the record because the Court ordered exactly what was in the counter-claim.

42. Regarding **Ground Number 2** in the Appeal, the Respondent submits that the Agreement met all the essentials of an agreement for the sale of land contained in the Law of Contract Act as it was written, signed by the parties and attested by witnesses who were present when the contract was signed. Counsel submitted that he was a creditor to the estate of the Deceased by virtue of purchasing land from him. The Appellant was therefore required by law to effect the same.

43. The Respondent submitted regarding **Ground Number 3** in the Appeal, that he had called evidence to support his counter-claim which were all admitted by consent and that the court rightly found for the Respondent. The Respondent stated that there was overwhelming evidence that the Respondent had occupied the land in 1984 and not 2013 as the Appellant claimed. He quoted Section 7 of the Limitation of Actions Act CAP 22 which provides that no person may lay claim to land after 12 years if the right of action accrued to him. He submitted that the cause of action had accrued against the owner in 1984 when the Respondent entered the land and since under Section 2(1) of the Law Reform Act all causes of action subsisting in a dead person survived and the Appellant was bound by the 12-year rule.

44. The Respondent also submitted that the sub-division plan adduced in evidence showed that the title number **Kyangwithya/Mulundi/522** was to be subdivided in 2006 into three portions A, B and C with an access road. The map indicated that the Respondent was to get portion B of 0.18 ha. The Land Registrar had also found that the Respondent had been in the land for the last 20 years but the Appellant secretly consolidated portion A and B to form **Kyangwithya/Mulundi/2003** of 0.40 ha.

45. When the parties' counsels highlighted submissions on the 18th of November 2021, Counsel for the Appellant submitted on the issue of whether the High Court had the jurisdiction to transfer this Appeal to the Environment and Land Court that it was already raised and dealt with where the judge had decided in his ruling dated 15th November 2019 therefore the issue is already spent. (I've been unable to find where

in the ruling this issue has been addressed).

46. The Respondent therefore submits that the Appeal herein is not merited and ought to be dismissed with costs.

Analysis and determination

I have considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. This duty of the appellate court was succinctly stated by the In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect”

47. The issue of jurisdiction has been raised by the Respondent and it is necessary that the said issue be dealt with and determined from the outset. The Court is guided by the case of ***Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1***, which bears the following passage (*Nyarangi, JA at p.14*):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

48. The challenge to jurisdiction is based on the ground that the Memorandum of Appeal herein was filed on 24th August 2018 as Kitui High Court Civil Appeal No 75 of 2018. On 27th May 2019 the appeal was placed before the High Court Judge the Hon L. Mutende who made an order stating as follows;

“This Court has no jurisdiction to deal with land matter. In the premises, the case is transferred to Machakos Environment and Land Court for disposal.

49. Pursuant to the above order the appeal was transferred to the Environment and Land Court at Machakos and became Appeal No. 19 of 2019. The Respondent claims that the High Court did not have jurisdiction over Environment and Land matters and filing the appeal before the High Court was in contravention of Section 16 A of the Environment and Land Court Act. He further claims that the appeal was wrongly transferred to the Environment and Land Court in Machakos for hearing and states that the High Court did not have powers to transfer the Appeal as it did. Subsequently, the court to which the appeal was transferred lacks jurisdiction to hear and determine the appeal so transferred.

50. **Section 18** of the Civil procedure Act bestows upon the High Court the powers to transfer suits of a civil nature. It provides;

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

53. The Court has considered the submissions made on this issue and is in agreement with the position taken in the cases cited beginning with the case of ***Kagenya vs Musramo & Another 1968 E.A 48*** where the court held, regarding Section 18 of the Ugandan Civil Procedure Act, which is in para materia with section 18 of our own, that an order for transfer of a suit from one court to another cannot be made, unless the suit has been in the first place brought to a court that has jurisdiction to try it. It has also been variously held that before exercising Section 18 of the Civil Procedure Act the Court must be satisfied that the suit was filed in a court that had jurisdiction.

51. I am of the view that if the Court were faced with an application to transfer a suit which this court was convinced it has no jurisdiction to hear and determine, it would be bound by the authorities cited by the Respondent. It is however noted that this appeal relates to land and it is this court that has jurisdiction to hear matters relating to environment and land as provided under Article 162(2) of the Constitution of Kenya 2010 and Section 13 and 16 (A) of the Environment and Land Court Act. It is the Courts view that what the Respondent is asking the Court to do is to abdicate its duty to hear a matter before it where it has the requisite jurisdiction.

52. The Court further finds that the proper forum where the Respondent ought to have raised the objection to power to transfer a suit filed in a court without jurisdiction was before the High Court. The Respondent failed to appeal, set aside and/or review or in any way object to the order of transfer made by the High Court. The order remains a valid court order unless and until it is set aside by a competent Court. The submissions by the Respondent requires this court to sit on appeal on the orders issued and it is my view that this court has no powers to do so.

53. Further the said issue was raised in the course of hearing the application dated 16th May 2019 and the Court found that ***“to the extent that the claim in the lower court was in respect to land, it is this court, and not the High court, that has the requisite jurisdiction to entertain the appeal”***

54. The Court thus finds that it has jurisdiction to hear this Appeal and the Respondents objection is thus not sustainable.

55. The Appellant has set out four grounds of appeal in his Memorandum of Appeal dated 23rd August 2018. I will proceed to list the Grounds of Appeal and deal with them in the order in which the Appellant dealt with them in submissions;

1) Whether the Learned Magistrate erred and misdirected herself both in fact and in law by determining the case in favour of the Respondent contrary and in diversion from the Respondent's pleadings.

2) Whether the Learned Magistrate erred and misdirected herself both in fact and in law by basing her determination on a void and invalid sale agreement contrary to the law.

56. The Respondent herein had filed a counter-claim against the Appellant herein seeking the following orders: ***"A declaration that the Plaintiff holds title no. Kyangwithya/Mulundi/2003 on his behalf and in trust for the defendant to the extent of 0.18 Ha and that a 6 meter access road exists to serve the portions aforesaid, and the said portion be transferred to the defendant."***

57. It is the Court's view that the trial court properly identified the issue for determination as ***"Whether the Plaintiff is the absolute owner of the land Kyangwithya/Mulundi/2003 or the Defendant has a share in it"***

58. The Trial Court considered the Plaintiff's claim to absolute ownership of the suit land and claim of encroachment by the Defendant. The Trial Court further considered the claims of sale/purchase transaction of the suit land between the Defendant and the original owner of the land Ndunga Maingi and his widow Kithei Ndunga and claim of possession thereof. Further the court considered the claim that the Plaintiff held the suit land in trust for the Defendant.

59. In the final analysis the Court found that on a balance of probability the Plaintiff failed to prove that the Defendant was occupying his land and dismissed his claim. The Court went further and ordered: ***"That it is hereby declared that the Plaintiff holds Title No. Kyangwithya/Mulundi/2003 on his behalf and in trust for the Defendant to the extent of 0.18ha and that a 6 metre road of access exists to serve the portion occupied by the defendant and the said portion be transferred to the defendant."***

60. The Trial Court was very clear that the counterclaim was allowed on the grounds that the Defendant had proved that he had been in occupation of the suit premises and had produced an agreement of sale and called witnesses to prove his case.

61. It is trite law that parties are bound by their own pleadings and therefore the court cannot divert from what has been specifically pleaded as it was held in the case of **The Court of Appeal at Nairobi Civil Appeal 76 of 2014 David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** where the court observed that:

It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded."

62. This Court finds that the Trial Court made its findings based on matters pleaded by the parties and proved during trial and that there was no diversion from the pleadings. The first ground of appeal is found to be lacking in merit.

63. In support of the Second Ground of Appeal the Appellant challenged the Agreement for the sale of land claiming that it was void and invalid under the law. The Appellant relies on the provisions of Section 3 of the Law of Contract Act which provide as follows;

"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."

64. However, it is the Courts understanding that the Respondents counterclaim was based on the agreement for sale, on possession given by the deceased seller and his widow and on the fact that after the death of the seller, the transaction was completed by his widow who received the balance of the purchase price. The said widow later took out Letters of Administration to his estate. The Respondent further claimed that his possession continued even to the time of hearing of the suit. The Respondent further claimed that the Appellant had the suit land subdivided into two portions instead of the three portions agreed upon. The Respondent thus claimed that the Appellant holds a portion of the suit land in trust for him to the extent of 0.18 HA and a 6-meter access road. He further claimed that the subdivision of the land into two portions instead of three was fraudulent.

65. On the strength of the proviso to Section 3 of the Law of Contract Act the Court finds that the requirement that an action involving a contract for the disposition of an interest in land cannot be maintained unless it is in writing as per the said section is not absolute. There are situations in which the requirements do not apply. The said proviso states that:

“ Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust. (emphasis added)

66. In the English case of Yaxley v. Gotts [2000] Ch. 162 where the court was dealing with the validity of an Oral Agreement for the sale of land

It was held that:

“an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ...”

On his part *Beldam L. J.* said at p. 193 para D

“In my view the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trusts effectively excludes from operation of the cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.”

67. The doctrine of constructive trust was further expounded upon in the case of Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR

“Dealing with the first issue, according to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. 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.”

68. In the present case it is the Courts view that the if the Respondent proved the presence of a trust then the requirements of section 3 of the Law of Contract Act were not applicable to him.

69. The Court is satisfied, as was the trial court, by the evidence adduced by the Respondent and his witnesses that the transaction for sale and purchase of the suit land commenced between the Respondent and the deceased Ndunga Maingi and was completed by Kithei Ndunga, the widow of the Deceased by receiving the balance of the purchase price. In furtherance of the intention to sell the land, the Respondent was given possession of the land and commenced development. On the record, there were conflicting claims as to when the Respondent took possession of the suit land with the Appellant claiming that he did so on 4th July 2013, the Respondent claimed that he took possession “in or about 21st October 1984”. Although the Trial Court did not make any specific finding on when the Respondent commenced possession, the court seems to have been satisfied from the evidence on record that the Respondents possession started before the year 2013. Indeed, the court found that the Appellant conceded that the Respondent had planted trees from the year 2000 and had been cultivating the suit land. Independent witnesses who testified on behalf of the Respondent placed commencement of possession of the land between the years 1984 and 1985. It is clear from the evidence on record that at the time of commencement of the Succession Cause, the Respondent was already in possession of the suit land and was carrying on various farming activities. The Administrator of Ndunga Maingis estate did not interfere with the Respondents possession and neither did she start any process of his removal from the land. I find that this was for the reason that she was aware of the Respondents right to the land and had participated in creation of such right.

70. The process of administration of the estate of Ndungi Maingi (deceased) commenced and resulted in a grant of Letters of Administration issued on 6th January 1999 to the deceased widow Kithei Maingi through Principal Magistrates court at Kitui Succession Cause No. 26 of 1998. The grant was confirmed and a Certificate of Confirmation of grant issued. By virtue of the Certificate of Confirmation of grant issued, land parcel No Kyangwithya/Mulundi/552 was awarded to the Appellant. Later, the Appellant subdivided the said land to create the suit land Kyangwithya/Mulundi/2003. He thus claims to enjoy absolute ownership of the said land together with privileges belonging or appurtenant to the land to the exclusion of all others. Such absolute ownership of land is conferred by Section 24 of the Land Registration Act. It is in the process of protecting the rights conferred by the title deed acquired that the Appellant filed the suit herein claiming that the Respondent had trespassed on his land and was carrying out acts that violated his rights of ownership and security of his title. Section 25 of the Land Registration Act protects a proprietor of land and provides the nature of such protection and the manner in which the rights are to be held as hereunder: -

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

71. However, the same section also provides that the said rights are held subject to other rights which are specified and of relevance to the present case is the proviso which states as follows: - *“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”*

72. The Respondents possession of the suit land further amounts to an overriding interest as provided under Section 28 of the Land Registration Act 2012 which provides as follows:

“Unless the contrary is expressed in the Register all registered land shall be subject to the overriding interest without being noted in the register-...

b) trusts including customary trusts

h) rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or Prescriptions.”

73. The Court is persuaded that at the time when the Appellant was bequeathed land parcel No Kyangwithya/ Mulundi/552 and he went on to obtain the title deed, the Respondent was in possession of a portion of the same. The Administrator was aware of the Respondents possession and of his right to the land. It is further noted that on the Appellants own admission in his evidence that the land parcel Kyangwithya/ Mulundi/552 was not bequeathed to him absolutely but he states that he was instructed by Kithei Ndunga to subdivide the land and transfer a portion thereof to one Dominic Kithua Kimanzi who had purchased the land. He claimed that he had not been instructed to transfer any portion to the Respondent as a purchaser. It is the Courts view that with regard to the entire parcel of land transferred to the appellant by virtue of the succession Cause, he did not acquire absolute ownership of the same but the same was acquired subject to the rights of others being Dominic Kithua Kimanzi and the Respondent herein. The Respondents assertion makes more sense since he was already in possession and was utilizing the portion of land that he was claiming.

74. It is further the courts view that the Defendant ought to have carried out due diligence and determined the rights and claims of the person in possession of the land that was bequeathed to him prior to subdivision. The Appellant took up the land subject to the rights of others who had acquired or were in the process of acquiring rights to portions of the land.

75. In the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR**, the Court of Appeal dealt with a case where the Appellants were in actual physical possession and occupation of the suit land as *bona fide* purchasers for value. The issue for the Courts consideration in that suit was **whether the rights of the appellants who are in possession can be defeated by the rights of the registered proprietor who actually put them in possession as bona fide purchasers for value**. The Court considered the rights of a registered proprietor of land who considered his title to be indefeasible. The Court found that Sections 27, 28 and 30 of the repealed **Registered Land Act, Chapter 300, Laws of Kenya** (repealed) provide exceptions to indefeasibility of title The Court found that: -

“The evidence on record reveals that the appellants are in possession of plots in L.R No. 6324/10 and as such they come within the protection in Section 30 (g) of the Registered Land Act. We find that the respondent having put the appellants in possession of the suit property created an overriding interest in favour of the appellants in relation to L.R No. 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the appellants were in possession and occupation of L.R No. 6324/10 prior to the title being issued and registered in the name of the respondent.

76. The facts in the above case are quite similar to the facts in the present case. Evidence on record shows that the Respondent was put into possession of the suit land either by the deceased Ndunga Maingi or his widow Kithei Ndunga. Possession given was a result of an agreement for sale that was commenced during the lifetime of the initial owner Ndunga Maingi and a deposit of the purchase price paid while the balance was paid to the widow and Administrator of the deceased’s estate. The Respondent cannot be said to have entered into the suit land as a licensee or a trespasser but as a *bona fide* purchaser for value. The initial owners of the land did not commence any proceedings to remove the Respondent from the land. It is the Courts view that the Respondents continued uninterrupted possession of the suit land was indicative of the deceased and the Administrator of his estate’s intention to complete the sale transaction and only legal formalities remained. It is the Courts view that his rights are protected under the law and are overriding interests as provided under Section 28 of the Land Registration Act 2012.

77. The court further held in the same case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** and which was cited with approval in the Macharia Mwangi Maina & 87 Others case (supra);

“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.

78. The Court further 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.”

79. 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.

81. I am therefore of the opinion that since the Appellant is registered as owner of the suit land, he holds part of the land in trust for the Respondent and the Learned Magistrate in the Trial Court did not make an incorrect determination in this regard.

Ground 3: Whether the Learned Magistrate erred and misdirected herself both in fact and in law by failing to find as a fact that the Defendant had failed to sustain his counter-claim as pleaded.

82. In support of Ground Number 3, the Appellant submitted that sale agreement relied on by the Respondent was void for lack of mandatory consent of the Land Control Board for the sale and subdivision of the land. The Appellant submitted that the suit property being agricultural land was subject to the *Land Control Act, Chapter 302, Laws of Kenya; Section 6 (1)* the failure to obtain such consent made the said agreements void and unenforceable against the Appellant.

83. The issue of the consent of the Land Control Board was considered in *Mwangi & another – vs- Mwangi*, (1986) KLR 328, where 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 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.”

89. The Court agrees and is guided by the above authority. Further the court held in *Mwangi & another – vs- Mwangi*, (1986) KLR 328 that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under *Section 126 (1)* of the *Registered Land Act* is merely permissive and not mandatory.

84. A similar issue arose in the Court of Appeal at *Eldoret Civil Appeal 51 of 2015 Willy Kimutai Kitilit v Michael Kibet [2018] eKLR*: where the consent from the Land Control Board was not obtained in good time over land where the court held had a trust and 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.”

85. I agree with the above holding of the Court of Appeal 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. I am therefore of the opinion that this ground of appeal fails.

3) Whether the Learned Magistrate erred and misdirected herself both in fact and in law by failing to find as a fact that the plaintiff had established his case on a balance of probabilities

86. The Learned Magistrate in the Trial Court held that the Appellant herein holds a portion of the suit land in trust for the Respondent as per the decree issued by the said court. This Court finds that on a balance of probability this issue was proved and judgement entered accordingly.

87. The other issue raised by the Appellant was that the Respondent did not file an objection in the Succession Cause to enforce his claim. It is noted that the Respondent stated that he was not aware of the existence of the Succession Court. I further find that the fact that the Respondent could have filed an objection in the Succession Cause did not preclude him from filing the present suit challenging the title obtained by the Appellant through the Succession Cause.

Final Orders

For the foregoing reasons this court finds that this Appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RDDAY OF FEBRUARY, 2022

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

IN THE PRESENCE OF:

C/A C NZIOKA

KILONZI FOR THE APPELLANT.

MUTISYA HOLDING BRIEF KALILI FOR RESPONDENT.