



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC APPEAL CASE NO. E001 OF 2021**

**VIRGINIA CIAMATI MURAGE .....1<sup>ST</sup> APPELLANT**

**ELICASON MUTEMBEI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**STANLEY ADVANE KIRIMI .....RESPONDENT**

***(Being an appeal from the Judgment of the Chief Magistrate's Court at Chuka before Honourable J. M. Njoroge, (CM) delivered on 13.1.2021 at Chuka ELC. No.152 of 2015)***

**JUDGMENT**

1. The Memorandum of Appeal in this matter states as follows:

**MEMORANDUM OF APPEAL**

The appellant herein being dissatisfied and aggrieved by the finding, holding and judgment /decree of the trial magistrates JM NJOROGE CM in SENIOR PRINCIPAL MAGISTRATE COURT CIVIL SUIT NO.152 OF 2015 ,delivered on 13<sup>th</sup> January 2021 and set forth the following grounds of appeal .

1. That the trial magistrates erred in law and fact by failing to be guided by the clear provisions of section 6 (1) of the land control act regarding agreements for sale of agricultural land that have not been blessed with land control board consent .
2. That the trial magistrates erred in law and fact by applying equity to disregard a clear provisions of a statute when the clear position of the law is that equity cannot amend or repeal an express provision of a statute .
3. That the trial magistrate erred in law and fact by delivering a judgment that required specific performance of an agreement of sale of agricultural land that was not blessed with the land control board consent against the well established judicial decisions of the high court and the court of appeal.
4. That the trial magistrates erred in law and fact by making a finding that the respondent had the possession of the suit land there by making the trial magistrate to arrive to a wrong decision in his judgment by ordering the appellant to be enjoined through a permanent injunction from the respondent' quiet possession'' of the suit land.
5. The trial magistrate erred in law and fact by making a finding and holding that the respondent were in possession of 0.70 acres out of LR.MAGUMONI/MUKUUNI/2404 when there was no evidence adduced before court to that effect.
6. The trial magistrates erred in law and fact by failing or refusing to be guided by High court and court of appeal decision regarding the same subject matter of this appeal despite that the high court and court of appeal decision were binding on him.
7. That the trial magistrates erred in law and fact by failing to put into account the 2<sup>nd</sup> defendant submissions and defence .
8. The trial magistrates erred in law and fact by holding that the 2<sup>nd</sup> defendant was bound by the terms of the agreement between the respondent and one ELICASON MUTEMBEI (the 1<sup>st</sup> defendant before the trial magistrates ) despite that the 2<sup>nd</sup> defendant was not privy to the said agreement,
9. The evidence on record does not support the judgment of the trial magistrates.

**REASONS WHEREFORE** the appellant proposes to the honorable court that ;

- (a) The appeal be allowed
- (b) The judgment and decree in the lower court be set aside and the said judgment be substituted with an order dismissing the plaintiff suit.
- (c) Cost of this appeal and proceeding in the lower court be paid by the respondent.

DATED AT CHUKA THIS.....14<sup>th</sup> .....DAY OF ...January,...2021

**DRAWN AND FILED BY**

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I.C MUGO & CO ADVOCATES FOR THE APPELLANT

- 2. The appeal was canvassed by way of written submissions.
- 3. The appellant's written submissions are pasted in full herebelow without any alterations whatsoever:

**APPELLANT FINAL SUBMISSIONS**

**(A) INTRODUCTION.**

1. Your lordship these are the appellant final submissions in respect of instant appeal. The appellant will go an extra mile to demonstrate to this court that the judgment by the trial magistrates was erroneous, let alone being unlawful.

2. The appellant being dissatisfied with the finding judgment of JM NJOROGE CM in the CHIEF MAGISTRATE COURT ELC CASE NO.152 OF 2015 DELIVERED ON 18<sup>th</sup> January 2021 (see judgment item no .25 page 121 to 125 of the record of appeal) as come to this court with 9 clear grounds of appeal . we shall submit on each ground separately without splitting hairs.

3. The lower court suit was predicated on an agreement dated 26<sup>th</sup> august 2013. The agreement was between the respondent and one ELICASON MUTEMBEI the 1<sup>st</sup> defendant therein. The agreement was for sale of land to wit 0.70 acres out of LR.MAGUMONI/MUKUUNI/2404. This being an agreement relating to sale of agricultural land it was a controlled transaction. It was a special agreement as compared to others . IT was mandatory that the agreement should comply with the clear PROVISIONS OF THE LAND CONTROL ACT CAP 302 LAWS OF KENYA. in particular the imbued agreement (see item no.3 page 21 and 22 of the record of appeal) was subject to the provisions of the land control act.

4. The trial magistrates erred in law and facts by failing to be guided by the provisions of section 6 (1) of the land control act cap 302 laws of Kenya. Despite that the imbued agreement was not blessed with land control board consent within 6 months of its execution, the trial magistrates went on to order specific performance of the said agreement. This was an open error and unlawful. The trial magistrate ought to have resulted to section 7 of the act to give remedy to the respondent and not to order specific performance which was against the law. the trial magistrates judgment is an affront to the clear provisions of section 6 (1) of the land control act cap 302 which reads ‘.....

6(1) read as follows ‘‘Each of the following transactions-

- (a) The sale ,transfer, lease, mortgage, exchange ,partition or other disposal of or dealing with any agricultural land, which is situated within a land control area;
- (b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of land(planning) regulations, 1961 for the time being apply;
- (c) .....

5. The Court should be guided and obey the law , the trial magistrates was not exceptional. His judgment is in conflict with the law and the same should be vacated by this court. The court should allow the appeal on this one ground alone.

6. The famous court of appeal case sitting at Nairobi CIVIL APPEAL NO.76 OF 2014 DAVID SIRONGA OLE TUKAI VERSUS FRANCS ARAPE MUGE (see DAVUD OLE TUKAI CASE ITEM 22 page 82 to 99 of the record of appeal) , their lordship interrogated the issue of sale of agricultural land without the requisite land control board consent. The appeal was allowed and the judgment of the judge of the superior court was vacated on the ground that the trial judge had over looked the statutory provisions of section 6 (1) of the land control act cap 302 laws of Kenya.

7. The case of MACHARIA MAINA & 87 OTHERS VERSUS DAVISON MWANGI KAGIRI NYERI CA 6 OF 2011, was interrogated in the court of appeal case of DAVID OLE TUKAI and by this court in ELC APPEAL CASE NO.3 OF 2020. The major distinction between the two cases is that in OLE TUKAI CASE the entry into the suit land was illegal and in contravention of section 6 (1) and section 22 of the land control act, while in the case of MACHARIA MAINA & 87 OTHERS the entry was lawful and what was lacking was the land control board consent. The appellant has never been in the land and the respondent did not pray for constructive trust under the doctrine of tracing consequently the trial magistrates erred by awarding the respondent what he had not prayed for in the plaint. A litigant cannot be granted by the court what one has not prayed for.

8. Equity is not statute law. equity follows the law and not vice versa. the trial magistrates erred by invoking the doctrine of tracing to otherwise repeal or amend the clear provisions of section 6 (1) of the land control act. in DAVID OLE TUKAI CASE CA NO 76 of 2014 their lordship pronounced themselves that equity cannot be applied to amend or repeal a clear provision of the law. the trial magistrates applied the equitable remedy of tracing. This was an error granted that, the tracing was involving sanitizing of an otherwise null and void contract. If the respondent was on the suit land a fact that he denied and the (respondent did not prove) such entry was illegal, and unlawful and equally criminal vide section 22 of the land control act. The trial magistrates should have left the repealing and the amendment of the law to the other arm of the government to wait the legislature. This appeal should be allowed on ground two. The upshot of the trial magistrates judgment was to order specific performance of an agreement between the respondent and one ELICASON MUTEMBEI which was not blessed with the requisite land control board consent. This is the gist of ground 3 of appeal. The trial magistrates judgment see item no.25 page 121 to 125 of the record of appeal, the trial magistrates is clear that the entire prayers by the respondent were allowed consequently sanitizing otherwise an illegal agreement. See item no.2 page 4 and 5 to confirm the prayers presented by the respondent. The appeal should also be allowed on ground 3.

9. Your lordship ground 4 of appeal reads as follows'' that the trial magistrates erred in law by making finding that the respondent had the possession of the suit land there by making the trial magistrate to arrive to a wrong decision in his judgment by ordering the appellant to be enjoined through a permanent injunction from the respondent 'quiet possession' of the suit land. He who alleges must prove is a clear provision of section 107 of the evidence act. We call upon the court to interrogate the proceeding in the lower court and it will come out with a finding and holding that the respondent did not demonstrate to the court that he had occupied the suit land. It would have been easy for the respondent to exhibit photographs showing his alleged development in the land. The appellant denied that the respondent was in possession of the land. The trial magistrates finding that the respondent was on the land and he had expended a substantial amount of money on the land was nowhere in the record of proceeding. the respondent did not prove to the court that he has been in land for the last 8 years as pronounced by the trial magistrates, see item no.25 page 124- 125 of the record of appeal. The 2<sup>nd</sup> defendant resited the respondent entry into the suit land particularly when she noted that her name had been fraudulently removed from the register of the suit land. More over clause 4 of the imbedded agreement says '' the purchaser shall enter into occupation upon transfer'', going by the terms of the agreement the purchaser is deemed not to be on the suit land to date, granted that ELICASON MUTEMBEI as yet to transfer the suit land to the respondent. See item no.3 page 21 and 22 of the record of appeal. The trial magistrate was therefore wrong to hold that the respondent was in actual possession of the suit land and he therefore went on to issue an injunction against the APPELLANT and ELICASON MUTEMBEI 1<sup>st</sup> defendant therein enjoining them from interfering with the respondent ''quiet possession of the suit land''. We submit that this appeal should succeed on ground 4 and 5

10. The principle of stare decisis is well settled by the court of law decision. judgment in a higher court are binding to the lower court. A chief magistrates for example cannot dismiss a judgment of the high court and refuse to apply it. The high court is always guided by the judgment from the court of appeal and judgment of the supreme court are binding on all the court under supreme court. The trial magistrates despite the appellant, several court of appeal cases regarding the interpretation of section 6(1) of the land control act choose not to be bound by such judgment. One case in mind was DAVID OLE TUKAI court of appeal at Nairobi civil appeal no.76 of 2013. The trial magistrates judgment is in collision calls with high court and court of appeal judgment viz a viz the interpretation and application of section 6(1) of the land control act. The cases cited by the appellant in her submission see item no.22 page 75 to 99 of the record of appeal were binding on the trial magistrates but the trial magistrates ignored, neglected and or refused to be bound by the said authorities.. it is for the foregoing reasons that we propose to the court that this appeal should succeed on ground 6.

11. That the trial magistrates erred in law and fact by failing to make a finding and hold that the respondent suit was tainted with fraud and that the defendant was not a purchaser for valuable consideration without notice particularly noting that by the time the plaintiff and ELICASON MUTEMBEI entered into sale of land agreement on 26<sup>th</sup> august 2013 the appellant had already cautioned the suit land as of 13<sup>th</sup> april 2012. The respondent cannot be called a purchaser for valuable consideration without notice. By the time the respondent and one ELICASON MUTEMBEI the 1<sup>st</sup> defendant herein entered into sale of land agreement, there was a caution in favour of the appellant. The respondent ought to have warned himself after conducting due diligent. the respondent would have enquired from ELICASON MUTEMBEI why there was presence of a caution against the sale land.

The judgement of the trial magistrates orders and direct that the appellant and one ELICASON MUTEMBEI to transfer LR.MAGUMONI/MUKUUNI /2932 to the respondent. First it is important to ask oneself the following question. How was LR.MAGUMONI/MUKUUNI/2404 subdivided when it had a caution by the appellant. The respondent and ELICASON MUTEMBEI must have corrupted their way through the land control board to get a consent for subdivision of LR.MAGUMONI/MUKUUNI/2404 when the land was under caution. My lord if this is not a corrupt scheme fraud and dishonesty, then it will be very difficult to know what corruption fraud and dishonesty is. We submit that the agreement and the whole transaction of sale between the respondent and ELICASON MUTEMBEI was tainted with a corrupt scheme fraud and dishonesty. The trial magistrates was not quick in observing and making a finding over this fact despite the appellant clear submission on the issue. See green card of LR.magumoni/mukuuni/2404 item no.,,,,,,, at page 42 of the record of appeal.

That the trial magistrates in his argument completely ignored the import of civil suit no.129 of 2014 ELICASON MUTEMBEI and another had sued the appellant for the removal of caution against LR.MAGUMONI/MUKUUNI/2404. After the appellant filed and served a defence and county claim ELICASON MUTEMBEI discovered that his fraudulent scheme of removing the appellant from the register had been detected. He was quick at entering into consent so that both the appellant and ELICASON MUTEMBEI could

be registered together with LR.MAGUMONI/MUKUNI/2404 as it was right from the beginning. The trial magistrates ignored this issue despite the defendant list of documents as contained in item no.16 page 41 to 52 which include the consent between the appellant and ELICAN MUTEEMBEI. The trial magistrate participated in sanitizing , otherwise fraudulent ,dishonesty and corrupt scheme by the respondent and ELICASON MUTEEMBEI. The respondent and ELICASON WERE working in cahoot to defeat the appellants interest over LR.MAGUMONI/MUKUUNI/2404, this should not happen. We submit that this appeal be allowed on ground 7.

12. That the trial magistrates erred in law and fact by failing to put into account the 2<sup>nd</sup> defendant submissions and defence. Seemingly the trial magistrates did not put into account the 2<sup>nd</sup> defendant submissions. We submit that this submission are areplica of the 2<sup>nd</sup> defendant submission before the trial court. See item number 22 page 75 to 99. The appellant captured the law and the facts of her case, some facts were so clear that , one wonders why the trial magistrates deviated from the law and the fact as contained in the pleadings and the oral evidence adduced by the litigants and the witnesses. Our complaint against the trial magistrate judgment is that he opted not be guided by cases from the high court and the court of the appeal which were binding on him. The issue of section 6 (1) of the land control act . the issue of the fraudulent scheme , transation between the respondent and ELICASON MUTEEMBEI , the issue of the respondent not being on the land . the issue of subdividing MAGUMONI/MUKUUNI/2404 while the land was cautioned by the 2<sup>nd</sup> defendant and the issue of specific performance, were clearly set out in the 2<sup>nd</sup> defendant submissions. It is for this reason that we submit that the trial magistrates did not put into account the 2<sup>nd</sup> defendant submissions. We pray that the appeal be allowed on ground 8. see 2<sup>nd</sup> defendant submission item no.22 paragraph 3,4,7,8,9,10 and 13.

13. The trial magistrates erred in law and fact by holding that the 2<sup>nd</sup> defendant was bound by the terms of the agreement between the respondent and one ELICASON MUTEEMBEI (the 1<sup>st</sup> defendant before the trial magistrates) despite that the 2<sup>nd</sup> defendant was not privy to the said agreement. We have submitted that the respondent suit in the lower court was predicated on the agreement between the respondent (plaintiff therein and ELICASON MUTEEMBEI 1<sup>st</sup> defendant therein. The 2<sup>nd</sup> defendant was not privy to the said agreement. The trial magistrates erred by delivering a judgment that enjoined the 2<sup>nd</sup> defendant in the specific performance of the said agreement. LR.MAGUMONI/MUKUUNI/2932 was illegally subdivide from LR.MAGUMONI/MUKUUNI/2404. By the time of the subdivision ELICASON MUTEEMBEI had fraudulently caused the name of the 2<sup>nd</sup> defendant be removed from the register. The land was therefore in the name of ELICASON MUTEEMBEI alone. LR.MAGUMONI/MUKUUNI/2932 is in the name of ELICASON MUTEEMBEI. The trial magistrates judgment is therefore wrong by ordering the 2<sup>nd</sup> defendant to transfer a parcel of land which is not in her name. see copy of register 2<sup>nd</sup> defendant list of document item no.16 page 42 of the record of appeal. An agreement is and should be binding to those who were privy to it. The 2<sup>nd</sup> defendant had nothing to do with terms and condition of the agreement dated 26<sup>th</sup> august 2013 which was contracted between the respondent and one ELICASON MUTEEMBEI the 1<sup>st</sup> defendant therein. The 2<sup>nd</sup> defenadant was wrongly condemned by the judgment of the trial magistrates and for this reason we submit that ground 9 of appeal should also succeed.

14. We rest our submission and pray.

DATED AT CHUKA THIS.....29<sup>TH</sup> ....DAY OF ...APRIL,...2021

DRAWN AND FILED BY

M/S I.C MUGO & CO .....

ADVOCATE I.C MUGO & CO ADVOCATE FOR THE APPELLANT

4. The Respondent's written submissions are pasted in full herebelow without any alterations whatsoever.

**STANLEY ADVANE KIRIMI.....RESPONDENT**

**RESPONDENT'S SUBMISSIONS**

**Your Lordship**, in compliance with this Honourable Court's directions on the manner of determination of the appeal, the respondent wishes to submit as follows in opposition to the said Appeal:-

**Introduction**

1. The appeal emanates from a judgment of the Chief Magistrate's Court sitting at Chuka in Civil Suit No. 152 of 2015 delivered on the 13<sup>th</sup> January, 2021. The Respondent herein ably persuaded the court on a preponderance of evidence standard and final orders were granted in his favour.
2. The Appellant herein, who was the 2<sup>nd</sup> Defendant in Civil Suit No. 152 of 2015, was dissatisfied with the findings of the trial court and preferred an appeal to this superior court of record in an attempt to change her destiny. It was her right and in recognition of this constitutional duty, this court accepted her Memorandum of Appeal that now demarcates the battleground in this matter.
3. **Your Lordship**, a cursory look at the heading of this matter will reveal the name of **Elicason Mutembei**; his status in these proceedings is not described and is left blank for the imagination of the parties and the court. However, for clarity we wish to state that he is not a stranger to the dispute at hand. He was the 1<sup>st</sup> defendant in the trial court and the respondent's main antagonist, he

lost the case on facts and law and being satisfied with the outcome of the matter chose not to exercise his right of appeal. He has not participated in these proceedings in any capacity.

4. In these submissions we will strive to be brief, as Polonius in Hamlet quipped, 'brevity is the soul of wit.' While we will be guided by that Shakespearian wisdom, we shall not forsake thoroughness as an ideal for that is the only way we stand a chance to persuade this Honourable Court to uphold the findings of the trial court.

5. We confirm receipt of the appellant's final submissions.

### **Factual Background**

6. A brief summary of the parties' cases at the trial court and the findings of fact are important before we canvass the grounds of appeal.

7. The **Respondent's case** at the trial court was that he entered into a sale agreement with Elicason Mutembei on the 26<sup>th</sup> August, 2013 for a piece of land measuring 0.70 Acres that was to be exercised from Magumoni/Mukuuni/2404.

8. The purchase price for the portion of land was agreed as Kshs. 250,000 payable upon transfer of the land but the respondent opted to pay earlier and acknowledgement of receipt executed on the 1<sup>st</sup> September, 2014 was produced as evidence.

9. The 1<sup>st</sup> Defendant in the trial court, Elicason Mutembei, admitted in his defence at Paragraph 4 and 8 (At page 27 of the Record of Appeal) that there existed a valid sale agreement with respondent in this appeal, he also confirmed that he had executed all documents/instruments required to effect a transfer of the portion of land to the respondent and prayed that the court allows him to effect the transfer. He demanded for Specific performance.

10. **Your Lordship**, these are admissions in the defence and a party is bound by its pleadings.

11. Further, during his evidence in chief the 1<sup>st</sup> defendant, Elicason Mutembei testified that he entered into an agreement with the respondent herein, received full payments and caused the subdivision of his land into three portions, where one was to be transferred to the respondent. He reiterated his desire to transfer land to the respondent and has the court to allow him to do so. These material facts can be retraced to page 113 of the record of appeal.

12. **On the question of possession**, the respondent testified that he is in occupation of land and has built permanent structures thereon. While the initial intention was to take up possession after transfer, nothing stopped the respondent and Elicason Mutembei from agreeing that the respondent would take position after receipt of the sale price. It was his evidence that the 1<sup>st</sup> defendant, Elicason Mutembei put him in possession of the land. (See page 109 of the Record of appeal). Elicason Mutembei doesn't dispute this fact that he put the respondent herein actual and physical possession of the land.

13. Interestingly, in her witness statement (at page 33 of the record of appeal) the appellant herein admitted that she became aware of the sale of land after she saw the respondent herein cultivating the land. Bound by her pleadings, she is estopped from altering her testimony on the question of possession, something she did in her court testimony.

14. Ultimately, the court found that the respondent herein had been put in possession and was using the suit land. The court in its final destination found that the respondent had been in actual and physical possession and occupation of the suit land for 8 years. **These facts are Determinative of GROUND 4 AND 5 of the Memorandum of Appeal.**

15. **Your Lordship**, we have to bring to your attention to a **Chuka Civil Suit 129 of 2014** where the appellant herein, who is the mother to Elicason Mutembei the 1<sup>st</sup> Defendant in the trial court, was sued by his son. The appellant herein had apparently on the 13<sup>th</sup> April, 2012 registered a caution against his son's title in land title number Magumoni/Mukuuni/2404 claiming licensee interest. The case was compromised and a consent recorded in court to the effect that the appellant herein and his son Elicason Mutembei would be registered jointly as owners of the land. The caution on the land was removed.

16. **Of utmost importance**, is the finding by the trial court that respondent herein was never involved in this case despite being a buyer for value from the 1<sup>st</sup> defendant in the trial court and the only logical conclusion was that the appellant and his son by changing the character of the land and ignoring a purchaser's interest were out to perpetrate a fraud. **Your Lordship**, this position is further exacerbated by the 1<sup>st</sup> defendant's testimony in court that, I will quote from page 113 of the record of appeal. He said, "**we didn't record a consent, I only signed a blank paper and was told the case had ended**" (Making reference to civil suit 129 f 2014 that had been filed after the sale agreement had been executed)

17. It was the respondent's case that he wasn't aware of the caution on the suit land Magumoni/ Mukuuni/2404 when he bought a portion of the land. The caution registered by the appellant on a licensee interest could not lawfully affect the respondents proprietary interest acquired in the land as a purchaser.

18. **The Appellant's case** at the trial court was that she was not privy to the sale agreement between Elicason Mutembei and the respondent herein. She claimed that she could not be bound by he said agreement. **Your Lordship**, we will lead case law on this point to show that having changed the character of the suit land through the consent order in Civil Suit 129 of 2014 that allowed her to be a joint owner she is bound by the sale agreement as a trustee since there now existed a constructive trust.

19. The appellant claimed that the appropriate remedy in the trial court case was to refund the purchase price to the respondent herein but she still testified that she wasn't aware of any purchase price that had been paid to his son, Elicason Mutembei. Of course, this is a glaring inconsistency in evidence.

20. She made said that she had put a caution on the suit land claiming a licensee interest. **Your Lordship**, a license simply permits one to do what would otherwise be considered unlawful trespass and confers no proprietary interest in land. Yet, she was allowed to be a joint owner through a consent order that although unchallenged is severely limited in credibility after Elicason Mutembei cast doubts on its validity, see paragraph 16 above.

21. The appellant's main challenge is that there was no Land Control Board Consent and the sale agreement between Elicason Mutembei and the respondent herein cannot be given effect. **Your Lordship**, the reason that a transfer was not effected to give the respondent land that he had bought, paid for and was put in possession is because the appellant herein frustrated the process by invoking a caution registered by a licensee in the land and later securing a consent order to allow her to be a joint owner of the suit land. She is before this superior court of record seeking to benefit from the chaos she instigated.

22. The 1<sup>st</sup> Defendant's case in the trial court is that he sold a portion of land title Magumoni/Mukuuni/2404 to the respondent herein, received full payment for the same and allowed the respondent to occupy and use the land pending transfer.

23. It was his case that he subdivided the land into three portions namely parcels No. Magumoni/Mukuuni/2932, 2933 and 2934. It was parcel Magumoni/Mukuuni/2932 that ostensibly belonged to the respondent herein but the transfer was never effected because firstly the appellant claimed joint ownership of the land and secondly because a Land Control Board for the transfer could not be procured.

24. **Your Lordship**, from this summations of factual positions and findings of the court, a few things are indisputable and form the foundation of our legal challenge of this appeal.

- a. There was a valid sale of land agreement between Elicason Mutembei and the respondent herein;
- b. That the said sale agreement related a portion measuring 0.70 acres to be exercised from Magumoni/Mukuuni/2404;
- c. That at the time of the sale agreement the land belonged to Elicason Mutembei, the 1<sup>st</sup> defendant in the trial court case and but it had a caution registered against it by the appellant here who claimed licensee Interest, no proprietary interest.
- d. That the respondent herein was not aware of the caution in the land when he bought it but while that complicates or inconveniences the registration process it doesn't deny him proprietary interest.
- e. The respondent herein paid full consideration of Kshs. 250,000 for the portion of land he was buying that was later to be known as Magumoni/Mukuuni 2932.
- f. That the respondent herein took possession of the land before the transfer and has made developments therein including fencing and planting trees. He has permanent structure on the land and uses it for cultivation.
- g. That the 1<sup>st</sup> defendant in the trial court, Elicason Mutembei admitted in his pleadings that he was willing to transfer the land to the respondent herein, a statement that he repeated in open court testimony and asked the court to allow him to meet his obligations under the sale of land agreement and when the court allowed him, he didn't see the need to challenge those findings in this honourable Court.
- h. Finally, the respondent herein did not participate in the other civil suit 129 of 2014 that removed the caution on the suit land and allowed the appellant herein to become a joint owner of the property despite having concrete proprietary interest in the case. The surreptitious and clandestine manner in which the case was done in his absence and fundamentally affected his proprietary rights renders credence to the trial court's findings of fraud.

### **Grounds of Appeal**

25. **Your Lordship**, **GROUND 1, 2 AND 3** fault the trial court for failing to give effect to the provisions of Section 6 (1) of the Land Control Board Act, applying the doctrines of equity and ordering specific performance of the Sale of Land Agreement.

26. **GROUND 6** faults the court for ignoring precedents on the application of Section 6 (1) of the Land Control Board Act.

27. **GROUND 9** is based on the determinations of **grounds 1, 2, 3 and 6**. This ground faults the court for holding that the appellant who was not privy to the terms of the sale agreement between Elicason Mutembei and the Respondent was bound by its terms.

28. We will address these grounds together.

29. This is a case where a purchaser for value is in actual and physical occupation of land, is using the suit land, the person who sold the land to him has no contestation to this state of affairs and actively urged the court through his pleadings and court testimony to allow him to transfer land the land he sold to the respondent. However, there is a third party who claimed licensee interest at the time of execution of agreement but the interest has since metamorphosed into proprietary interests of ownership acquired through a

secretive and clandestine legal practice that the respondent was not allowed to participate in.

30. The transactions affecting agricultural land which are controlled are specified in **Section 6(1)** of the Land Control Act and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private company or co-operative society which owns land. **Section 6 (1)** further provides that such a transaction:

**“is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”**

31. **Section 6 (2)** of the Land Control Act provides:

**“For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.**

32. **Your Lordship**, it is the respondent’s case that the decision to order specific performance of the sale of land contract was the right one in the circumstances and it should be upheld. We shall be invoking the authority of two Court of Appeal decisions to buttress our position.

a. **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR;**

b. **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR;**

33. The respondent posits that there was a common intention in relation to the property between Elicason Mutembei and the respondent. The action of receiving the full purchase price, putting the respondent in possession and allowing him to utilize the land for 8 years even during the pendency of the suit in the trial court, created a constructive trust in favour of the respondent. This coupled with the 1<sup>st</sup> Defendant’s (Elicason Mutembei) unequivocal plea to the trial court to allow him to effect a transfer to the respondent make this case a perfect one for issuance of orders of specific performance.

34. We shall also be distinguishing the decision of **David Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR** which forms the foundation of the appellant’s case.

35. The Respondent will put heavy reliance in the decision of the Court of Appeal case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** that was decided much later in the year 2018 as compared to the two conflicting decisions of the Court of Appeal in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** which the **Willy Kitilit Case** agreed with and the **David Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR** which the **Willy Kitilit Case** distinguished and abandoned.

36. We will be urging this superior court to be bound by a later decision of the Court of Appeal that analysed two conflicting decisions of the Court of Appeal. That **Your Lordship** is the proper law today.

37. As was said in the **Willy Kitilit Case** in paragraph 15 therein;

**“In the case of Macharia Mwangi Maina, relied on by the learned Judge, the appellant (*vendor*) had sub-divided his land into 240 one acre plots, and by an agreement of sale sold some of those plots to the respondents and others (*purchasers*). Upon paying the full purchase price and survey fees, he put each purchaser in possession. The purchasers in the suit claimed to have developed his own portion by erecting permanent structures, built schools, churches and installed water and electricity. The vendor did not make an application for consent of the Land Control Board or obtain the consent. Later, the vendor filed a suit for injunctions and eviction. The purchasers filed a defence and counter-claim seeking an order to compel the vendor to transfer the land to them. The trial Judge entered judgment for the vendor and dismissed the counter-claim on the basis that the suit land being agricultural land the consent of the Land Control Board was required and in the absence of the consent, the agreements of sale were not enforceable. In the appeal before this Court, the purchasers’ counsel contended that the purchasers were entitled to the land by constructive trust and that the Land Control Act should be interpreted in the light of the 2010 Constitution to ensure that the purchasers received substantive justice. This Court sitting at Nyeri, held, *inter alia*, that the possession of the land by purchasers was an overriding interest in favour of the purchasers and further at paragraph 20 that:**

**“In instant case, there was common intention between the appellants and the respondent in relation to suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.”**

The Court stated later at paragraph 25 thus:

**“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice.” We are reminded and guided by the dicta of Madan, JA (as he then was) in *Chase International Investment Corporation and Another vs. Laxman Keshra and Others*, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:**

**“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”**

38. The Court of Appeal in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** at paragraph 20 said thus:-

**“In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc – vs- Rosset,(1991) 1 AC 107,132, 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. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property.”**

39. The court went further and held thus:-

**“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As 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”.**

40. The Court of Appeal in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** at paragraph 26 continued that:-

**“Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2)(a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”**

41. The Court of appeal constituted differently in the case of **David Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR** relied on by the appellant differed with the Court in **Macharia Mwangi Maina** Decision case (*supra*) for several reasons, the main one being on the application of the equitable principles to the Land Control Act. The Court of appeal in the **Willy Kitilit Case** justified the application of principles of equity in these matters by adopting several reasons. Firstly, under Paragraph 17 they said thus:-

**“We have extensively quoted the provisions of the Land Control Act, the Constitution and the current land laws in order to demonstrate that the Land Control Act is not a modern legislation although it has not been repealed. Some of the institutions created by the Land Control Act are no longer in existence, for instance, the office of District Commissioner, Provincial Commissioner and the Central Land Control Appeals Board. The President who had power under that Act to exempt transactions from the provisions of the Act has no longer power under the Constitution to deal with matters relating to land. The policy behind the Land Control Act, nevertheless, it is clear that some aspects of the policy may not be valid under the current Constitution. Some of the principles for granting or refusing consent stipulated in Section 9 may not pass muster under the current Constitution. The Constitution in Article 60 (1) spells the principles of land policy, provides for land holding by non-citizens in Article 65 and Section 159 of the Land Act, as amended by Land Laws (Amendment) Act, 2016, provides that the minimum land holding acreage and maximum land holding acreage shall be subject to provisions of Article 66 (1) and 60 (1) of the Constitution respectively.**

However, clause 7 (1) of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution of Kenya 2010, provides:

**“All law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution.”**

**The doctrines of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. Sections 3(3) of the Law of Contract Act and Section 38 (2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in Yaxley v. Gotts [2000] Ch. 162 (Yaxley’s case) on which the Court in Macharia Mwangi Maina Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with**



**equity's intervention to provide relief against unconscionable conduct.**

42. **Your Lordship**, the running theme in these court of appeal decisions that we implore you to adopt is that equity tempers the harshness of Section 6 (1) of the Land Control Board Act.

43. **Your Lordship**, I will demonstrate by citing the **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** case that address two conflicting earlier Court of Appeal decisions that the appellant in this case cannot succeed in his attempt to use the **David Ole Tukai Case**. On the onset of the **Willy Kitilit Case**, the era of playing judicial ping pong is over, we now have a decision that can stand the test of the earlier Court of appeal decisions on the issue in subject.

44. As per paragraph 20 of the **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** case. The Court of Appeal held thus in relation to the David Ole Tukai Cade:-

“One of the reasons the Court gave in **David Sironga ole Tukai decision** for differing with the decision in **Macharia Mwangi Maina (supra)** was that the Court in the latter case ignored the provisions of **Section 6 (2)** of the Land Control Act. However, in our view, the phrase “declaration of a trust of agricultural land” refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by Section 36 as read with Section 66 of the Land Registration Act or Section 126 of the repealed Registered Land Act, and not a constructive trust or trust created by operation of the law.

In **Public Trustee v. Wanduru Ndegwa [1984] eKLR, Madan, JA.**, as he then was said:

“**The provisions of Land Control Act have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land.**”

Similarly, equity is law and Section 6 (2) does not prohibit a court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity.

45. **Your Lordship**, the appellant has argued that by dint of Section 22 of the Land Control Board Act, the respondent herein cannot benefit for his illegal occupation of land. However, the Court of Appeal in the **Willy Kitilit Case** (Supra) said thus:-

“Another reason proffered by the Court in **David Sironga ole Tukai** decision, is that possession which is declared by **Section 22** of the Land Control Act to be illegal cannot constitute an overriding interest. By proviso to **Section 28** of the repealed Registered Land Act and by **Section 25 (2)** of Land Registration Act, the registration of a person as proprietor of land does not relieve him from any obligation to which he is subject to as a trustee. Further, by **Section 28** of the Land Registration Act, trusts are now overriding interests to which all registered land is subject to.”

46. **Your Lordship**, the Court of appeal in the **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** made very compelling reasons for the application of equitable doctrines in the mess that is Section 6(1) of the Land Control Board Act. The two reasons advanced below are fresh and had not been proposed in the earlier **Macharia Maina Mwangi case** and the **David Ole Tukai Case**.

47. Firstly, the court in the **Willy Kitilit Case** said thus under paragraph 23:-

“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. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.”

48. Secondly, the Court added as follows under **paragraph 24** of the judgment:-

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution...The word equity broadly means a branch of law denoting fundamental principles of justice.

Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to

**and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”**

49. **Your Lordship**, equity is now a constitutional principle and this status has elevated it above oppressive and draconian provisions of Section 6(1) of the Land Control Board Act that you have been invited to apply by the appellant.

50. **Your Lordship**, the appellants have invited you to consider a decision your court made in **Chuka ELC Appeal Case No. 3 of 2020**. The case forms a part of their bundle of authorities. As you rightly pointed out, and a position adopted in the now binding case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR (see paragraph 26)**, whether to issue specific performance or damages is a decision that is to be made on a case to case basis. In the case before you, the facts fit perfectly for an order of specific performance and this position is made more pronounced by the position taken by Elicason Mutembei who sold land to the Respondent herein, he specifically pleaded with the trial court to allow him to perform his obligations under the agreement. By his pleadings he demanded for specific performance.

51. **Your Lordship**, **GROUND 9** in the Memorandum of Appeal is closely attached to the issue of constructive trust. By holding that there had been created a constructive trust after the execution of the land sale agreement even without the consent for transfer by the Land Control Board, it follows that the this constructive trust is an overriding interest in land that is not diminished or lost on account of new ownership. **The overriding interest in his case, protected by Section 28 of the Land Registration Act**, the constructive trust is still alive.

52. The controversial consent that allegedly made the appellant herein a joint owner of the suit land Magumoni/Mukuuni/2404 enjoined her to the obligations created by the constructive trust. Even without privity of contract, she is bound by the trust obligations.

53. The appellant having engineered the change of the character of the land and the change in circumstances is estopped from coming back and denying the obligations created by events of her own creation. As was stated in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR at paragraph 28:-**

**“A party cannot change the nature and character of the suit property and then plead the change as a defence to an action in relation to the said property; this is more so when the party had actual knowledge of existing claims to the property.”**

54. **FOUNDATIONS 4 AND 5** of the Memorandum of Appeal deal with the issue of possession of the land. The appellant faults the trial court for holding that the respondent herein had taken possession and occupation of land and has done so for the last 8 years. This was a factual challenge in the appeal and was conclusively addressed under paragraph 12, 13 and 14 of these submissions.

55. **GROUND 7** of the Memorandum of Appeal faulted the trial Court for failing to hold that the respondent’s transaction to buy the suit land was tainted by fraud and that he was not a purchaser for value without notice.

56. Firstly, we reiterate that the respondent was a purchaser for value without notice. In any event, the encumbrance attached to the suit land at the time of the sale agreement was a claim for a licence interest, which is not a proprietary interest. The appellant gained proprietary interest after the sale agreement was executed in an opaque court process that ended with a questionable consent judgment between a mother and son in a case that was never disclosed to the respondent herein until after its conclusion.

57. Secondly, the respondent demonstrated to the trial court that there was no fraudulent action attached to his conduct and that the court found that it is the appellant and the seller, who did not appear for this appeal, who engaged in fraud long after the sale agreement had been executed.

58. **GROUND 8 and 10** in the Memorandum of appeal fail *in limine*. The judgement of the Court had all the ingredients of a judgment under Order 21 Rule 4 of the Civil Procedure Rules., 2010.

59. The cases of both parties were analysed and a judgment on evidence on record rendered. **Your Lordship**. The failure to mention everything that went around in the court room in a judgment doesn’t mean that the matters were ignored or were never considered. Our jurisprudence is replete with decisions that codify this well settled principle of law.

60. We pray that the appeal be dismissed for want of merit and costs be awarded to the respondent.

**DATED** at **NAIROBI** this **19<sup>th</sup>** Day of **MAY** 2021

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**MWITI & PARTNERS ADVOCATES, LLP**

**ADVOCATES FOR THE RESPONDENT**

5. I have considered the pleadings, the submissions and the authorities proffered by the parties to buttress their veritably incongruent submissions. The authorities proffered by the parties are all good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. All facts and circumstances must be taken into account

before a court of law arrives at its determination.

6. I do note that in the area of Land Control Board consent, the courts have apparently arrived at conflicting decisions. This is just on the face of it. On a closer examination, the courts are telling us to consider all the facts and circumstances of cases that come before them.

7. In the case of *Macharia Mwangi Maina & 87 Others versus Davidson Mwangi Kagiri [2014] eKLR* the Court of Appeal sitting at Nyeri held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent. The court dismissed the appellants claim and granted an order of specific performance in favour of the respondent.

8. In the case of *David Ole Tukai versus Francis Arap Mugo & 2 Others [2014] eKLR* the Court of Appeal sitting at Nairobi opined as follows:

***“First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import the doctrine of equity in the Act.”***

9. In the case of *Willy Kimutai Kitilit (Appellant) and Michael Kibet (Respondent) [2018] eKLR* also known as *Eldoret Civil Appeal No. 57 of 2015*, the Court of Appeal held as follows:

***“As we have held in essence that, lack of the consent of the 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.”***

10. In the Memorandum, the appellant prays that the appeal be allowed and the Judgment and the decree in the lower court be set aside and the said Judgment be substituted with an order dismissing the plaintiff's suit. The appellant also seeks costs. If the orders sought by the appellant are granted it means that the respondent would lose the land that the 2<sup>nd</sup> appellant had all along agreed to have sold to him.

11. Grounds 1, 2 and 3 attack the trial court's judgment principally based on the argument that Land Control Board consent had not been obtained with respect to the agreement between the 2<sup>nd</sup> appellant and the respondent. Ground 6 is also related to grounds 1, 2 and 3 because it says that the trial court ignored precedents by the high court and the court of Appeal in this area.

12. From the proceedings it is clear that the original suit land parcel No. Magumoni/Mukuuni/2404 was subdivided into 3 new parcel Nos. Magumoni/Mukuuni/2932, 2933 and 2934. The 2<sup>nd</sup> appellant in the proceedings averred that he had sold land to the respondent and that it was always his intention to transfer the land to the Respondent. However, before the sale could be completed his mother the 1<sup>st</sup> Appellant blocked the transaction. The 2<sup>nd</sup> Appellant was unequivocal that he had been paid full purchase price. Although the 2<sup>nd</sup> appellant and the respondent obtained Land Control Board Consent for the sub-division of the original land, they did not obtain Land Control Board for the portion that he had sold to the respondent because his mother the 1<sup>st</sup> appellant blocked the transaction. The 2<sup>nd</sup> Appellant was unequivocal that he was not supposed to share one portion of the three subdivisions with the 1<sup>st</sup> Appellant and testified that, therefore, he had the right to sell it to the Respondent.

13. As I have already said, my very careful reading of the cases delivered by the Court of Appeal in the area of constructive trust in cases where the parties have not obtained the consent of the Land Control Board, is that all facts and circumstances have to be taken into account in every case.

14. In the case of *Macharia Mwangi Maina* the Court of Appeal sitting at Nyeri, inter alia, held that the possession of the land by the purchasers was an overriding interest in favour of the purchasers and at paragraph 20 opined as follows:

***“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Board Act is enforceable.”***

15. I do recognize that under principles of land policy enshrined in Article 60 of the Constitution, the doctrine of equity is introduced. Article 60(1) (a) reads as follows:

***“60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient and managed in a manner that is equitable, efficient, productive and sustainable in accordance with the following principles:-***

- a) equitable access to land
- b) security of land rights
- c) sustainable and productive management of land resources;
- d) transparent and cost effective administration of land;
- e) sound conservation and protection of ecologically sensitive areas;

**f) elimination of gender discrimination in law, customs and practices related to land and property in land; and**

**g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.**

16. It seems to me that at least two elements are, inter alia, essential before a court finds the existence of constructive trust. These are:

- a) Payment of full purchase price
- b) Possession of the land by the purchasers.

These elements are not exhaustive as the facts and circumstances of each case have to be considered.

17. In the facts and circumstances of this case I find that the trial court considered all the facts and circumstances of this case and rightly came to the conclusion that there existed constructive trust in favour of the respondent. Therefore, grounds 1, 2, 3 and 6 are hereby dismissed.

18. Having found as above, I find that the order for specific performance was not improperly issued by the lower court.

19. Having carefully gone through the lower court's proceedings, I find that there was good basis for the magistrate in the lower court to have made a finding that the respondent was in possession. The Learned Chief Magistrate was, therefore, acting properly when he made the orders impugned in ground 4 of the Memorandum of Appeal. Ground 4 is hereby dismissed.

20. Regarding ground 5, the Learned Chief Magistrate found as a fact that the respondent was in possession. On findings of fact appellate courts are hesitant to interfere with those findings unless there are compelling reasons to do so. Having perused the lower courts proceedings and the judgment, I am unable to fault the lower court. This ground is dismissed.

21. Ground 7 is rather nebulous and omnibus. The appellant has not shown to the satisfaction of this court that the Learned Chief Magistrate did not take into account the submissions and defence of the 2<sup>nd</sup> defendant, who is the appellant in this case.

22. Regarding ground 8, it is clear that the 2<sup>nd</sup> appellant was only selling his portion of the suit land to the respondent. He was not selling the portion belonging to the 1<sup>st</sup> appellant or any other portion. The Appellants cannot be allowed to eat their cake and still have it. The 1<sup>st</sup> Appellant stands to lose nothing. Many cases of this nature have come to court where parties received money from purchasers and then at the instigation of one of them, they renege on their original position. The 2<sup>nd</sup> Appellant did not in any meaningful manner participate in these proceedings. I am therefore not inclined to condemn him to pay costs.

23. In the circumstances, judgment is issued for the respondent against the appellants in the following terms:

- a) This appeal is dismissed.
- b) Costs shall follow the event and are awarded to the respondent against the 1<sup>st</sup> appellant.

**Delivered in open Court at Chuka this 26<sup>th</sup> July, 2021 in the presence of:**

**CA: Ndegwa**

**Muthomi Gitari h/b Mwiti Kinyua for the Respondent**

**Appellants and their advocate absent**

**P. M. NJOROGI,**

**JUDGE.**