



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 5 OF 2020

WANJIRU NJUGUNA.....APPELLANT

VERSUS

JOSEPH WANGONDU.....1ST RESPONDENT

FRANCIS NDUNGU NJUGUNA.....2ND RESPONDENT

(Being an appeal against the judgement and decree of Hon. T.K. Kwambai (S.R.M.) dated 22.07.2020 in Embu CM ELC No. 86 of 2018 (Formerly H.C. ELC No. 325 of 2015))

JUDGEMENT

1. This appeal is a contestation of the outcome of the lower court's suit (Hon. T.K. Kwambai, SRM, Embu) in Embu CM ELC No. 86 of 2018 (Formerly H.C. ELC No. 325 of 2015, Embu). The appellant – **WANJIRU NJUGUNA** – was the plaintiff in the suit while the respondents in this appeal – **JOSEPH KARIUKI WANGONDU** and **FRANCIS NDUNGU NJUGUNA** – were 1st and 2nd defendants respectively. The suit in the lower court related to ownership of land parcel **No. KAGAARI/WERU/396** ("suit land" hereafter) registered then, as now, in the name of the 2nd respondent.

2. Before registration of the 1st respondent as owner of the suit land, it was registered in the name of the 2nd respondent, who is the appellant's step-son. The suit land was said to have been initially meant to be owned by the appellant's late husband – **NJUGUNA KANJA** – but as the husband was dead at the time of adjudication, and with local customs not permitting women to be registered as owners at the time, and further with the appellant's own sons being minors at the time, the 2nd respondent became registered as owner in trust for the appellant and her family. But the two respondents were said to have connived or colluded to perpetrate fraud which led to breach of trust, with the suit land eventually changing hands from the 2nd respondent to 1st respondent.

3. According to the appellant, such fraud consisted in the two respondents causing the Land Registrar to register the suit land in the name of 1st respondent; the 2nd respondent transferring the suit to 1st respondent while he had no capacity to do so; causing the Land Registrar to believe that the property was transferred as a gift, yet the 1st respondent was not one of the beneficiaries; the 1st respondent obtaining registration through deceit and fraud; and failing to notify the appellant of the intended registration.

4. The appellant wanted the lower court to issue various orders including a declaration that the 2nd respondent held the suit land as trustee for her family; a declaration that the transfer of the suit land from 2nd respondent to 1st respondent was fraudulent, illegal, irregular, and null and void ab-initio; an order for cancellation of the 1st respondent as owner of the suit land and the said land to be registered in the name of the appellant to hold in trust for her children; an order of eviction of 1st respondent, his servants, relatives or anybody else claiming through him from the suit land; a permanent injunction restraining the respondents, by themselves, their agents, legal representatives or anybody else claiming on their behalf from invading, trespassing, occupying, cultivating, utilizing, remaining on, or in any way whatsoever interfering with the suit land; costs of the suit; and/or any other fit or just relief.

5. The 1st respondent denied the appellants claim. In an amended defence, he pleaded that he legally bought the suit land from 2nd respondent for valuable consideration and followed due process to become the owner. He pleaded also that he has been in lawful, uninterrupted occupation from the year 1994. The 2nd respondent responded to the suit as initially filed but didn't respond to the amended plaint. His defence was essentially an admission of the appellant's claim. He acknowledged that indeed, he had been registered as owner of the suit land in trust for the appellant and her family. He denied having sold the suit land and said that he had been approached by a Mr. Mukonyi who requested him to hand over the title to him to forward to the appellant, which he did. According to him, Mukonyi was a close friend and the said Mukonyi and the 1st respondent were always buying him beer.

6. The evidence before the lower court was much the same as the substance of the pleadings. The lower court heard the matter and dismissed the suit, with each side ordered to bear its own costs. It is the determination of the lower court that gave rise to this appeal. The lower court

felt it was called upon to determine whether the registration of the 2nd respondent as owner was fraudulent. It found that it was not. It also felt called upon to determine whether the 2nd respondent transferred the land to 1st respondent. It found that this was so. The lower court also addressed itself to the issue of trust and it found that trust had not been established.

7. The appeal before this court has nine (9) grounds, which are as follows:

- 1) *The learned magistrate erred in law and fact by failing to appreciate what constitutes trust.*
- 2) *The learned magistrate erred in making a finding that the 2nd respondent had filed an amended defence denying the plaintiffs claim.*
- 3) *The learned magistrate erred in law and fact in making a finding that there was an agreement between 1st and 2nd respondent, when there was not such document, and the implication of such in view of Section 3(3) of the Law of Contract Act.*
- 4) *The learned trial magistrate erred in law and in fact in that whereas he correctly analyzed the evidence particularly of PW2 and 2nd respondent that the suit land was given to the 2nd respondent by the clan during land consolidation and demarcation process to hold in trust for the plaintiff and her children, the magistrate made a wrong analysis that there was no evidence to establish trust.*
- 5) *The learned magistrate erred in law and fact in mis-applying and misinterpreting the correct authority of **ALICE WAIRIMU MACHARIA VS KIRIGO PHILIP MACHARIA [2019] EKL** and **ISACK M'INGARA KIEBIA VS ISAAYA M'LINTARI & ANOTHER: [2018] EKL**.*
- 6) *The learned trial magistrate erred in law and fact in making a finding that the suit land was not an ancestral/clan land because the 2nd respondent was the 1st registered owner, whereas the contrary is the correct position that having been the first person to be registered at the time of land consolidation and demarcation process, depicted that it was ancestral clan land, and more so considering the evidence of PW1, PW2 and the 2nd respondent.*
- 7) *The learned trial magistrate erred in law and fact in making a finding on the unclear manner in which the land was transferred from the 2nd respondent to 1st respondent as to whether it was a sale or a gift, and the contrasting evidence thereof.*
- 8) *The learned trial magistrate erred in law and fact in not making a finding that one can not pass a better title than he holds, and there being overwhelming evidence on trust, the 2nd respondent had no capacity to transfer absolute title to 1st respondent.*
- 9) *The judgement was against the pleadings, the weight of evidence adduced and the applicable legal principles.*

REASONS whereof the appellant prays for:

- a) *The appeal be allowed.*
- b) *The judgement of the learned trial magistrate be set aside and substituted with an order allowing the appellant's claim.*
- c) *Costs of this appeal and the suit to be paid by the respondent jointly and severally.*
- d) *Any other or further relief that the court may deem fit, proper and just to grant.*

8. The appeal was argued before the court on 8/6/2021 and 9/6/2021. On ground 2 of the appeal, the trial magistrate was faulted for finding that there was an amended defence on record filed by the 2nd respondent while, according to the appellant, none had been filed.

9. On grounds 1, 4, 5, 6 and 8, the appellants counsel submitted that the trial magistrate had erred by holding that though the 2nd respondent had been registered owner of the land, there was no member of this family, living on the land to bring out the issue of trust. It was argued that from the authorities cited by the trial magistrate he had held that no trust was established. It was pointed out that the intention of the parties and nature of the holding of the land was what is important.

10. According to the appellant, possession and occupation were not mandatory pre-requisites in establishment of trust. He cited the case of **ISACK M'INANGA KIEBIA VS ISAANYA THEURI M'LINTARI & ANOTHER [2018] eKL** to drive his point home. The trial magistrate was said to have further erred in holding that since the 2nd respondent was the first registered owner to the land, no trust could be inferred. The appellant averred that a trust is an overriding interest that need not be noted on the register.

11. The alleged sale to the 1st respondent was questioned because of manifest contradictions regarding the purchase price. It was said that it is not even clear whether the land was actually sold or gifted to the 1st respondent. Further, no sale agreement or written contract was produced as evidence of sale. The appellant argued that this is a clear case of trust. The court was urged to allow the appeal.

12. The 1st respondent on his part argued that there was collusion between the 2nd respondent and the appellant to deprive the 1st respondent of his ownership and title to the land. The 1st respondent attributed this to the fact that the suit was filed 53 years from the time of registration of the 2nd respondent as owner and 27 years from the time of sale. The 2nd respondent was said to have never filed a suit against

the 1st respondent. He is said to have admitted signing the relevant document and even acknowledged receiving Kshs. 90,000/- from Kimani Mutonyi. Kimani is the person who, according to 1st respondent, had been sent by the 2nd respondent to look for a buyer for the land. The 90,000/- given to the 2nd respondent is the same amount the 2nd respondent had committed to give or refund to the plaintiff's family.

13. The 1st respondent further said that the burden of proving trust is on the one alleging it. To reinforce his point, he cited the case of Gachanja Gitau & 2 others Vs Mwangi Gitau [2016] eKLR. It was further stated that the appellant had failed to show that the suit land was ancestral land in order to prove customary trust. According to the 1st respondent, it was not stated which clan the appellant's late husband belonged to. It was also not shown that he was awarded the suit land by the clan during adjudication; and further that no person from the clan was called to testify and no records relating to the clan were made available.

14. It was reiterated that there must be cogent evidence to show that the suit land was ancestral land as was done in the cases of Alice Wairimu and Gachanja (supra). Mere allegations were said not to be enough. It was also the 1st respondent's position that one needs to be settled on the land in order to infer trust. To the 1st respondent, the suit land was not ancestral land, and the appellant's late husband was not even buried there. It was further said that the appellant herself and her co-wife even relocated to go and live in Mwea and Nyadarua respectively.

15. On the issue of fraud, the 1st respondent called upon the court to ask itself why the 2nd respondent has not been a co-plaintiff if at all the suit land was acquired fraudulently. The 1st respondent was said to be a bonafide purchaser for value and the lack of sale agreement was due to the fact that his house had burnt down and the sale document was burnt as well. The 1st respondent further said that the discrepancies in the documents on the value of land and purchase price can be blamed on Kimani Mutonyi who was said to be the one who filled in all the documents and the counsel who drew them. The court was urged not to find the 1st respondent at fault. The 1st respondent asked the court to dismiss the appeal as no trust or fraud had been proved.

16. On the part of 2nd respondent, he denied knowledge of the 1st respondent and stated he knew only Kimani Mutonyi who used to buy him alcohol and while under its influence, he gave him the title deed to take to the appellant's children. Mukonyi is said to have told the 2nd respondent that the appellant was dead. He confirmed signing documents brought by Mukonyi. He said he did not sell the land. He also said that in 1996 he learnt that the appellant was still alive.

17. The appellant responded to the 1st respondent's arguments and averred that the issue of collusion between herself and 2nd respondent never arose in the lower court and that she had every right to sue any party whom she felt had wronged her. She also said whether the suit land changed hands through gifting or sale is of no consequence to her case as the said land was held in trust. She reiterated that the 2nd respondent had no land to pass to 1st respondent.

18. Further, the appellant argued that her own evidence and the evidence of Mbuku Kivuta, a clan elder, showed that the land was ancestral. She averred that the 1st respondent needed to show how the 2nd respondent had acquired the land. She further said that there was no denial that the 2nd respondent was the first born son of her late husband. The 2nd respondent was said to have testified that the suit land was ancestral land and conceded that he was a trustee. The appellant further said that she didn't purchase land in Mwea. She lives on government land. The court was asked to allow the appeal.

19. I have considered the appeal as filed, the lower court record, and the rival arguments proffered by both sides. As the first appellate court, my duty is to re-evaluate, re assess, and re analyze both matters of law and fact. By so doing, I will have to re-consider the evidence tendered. I bear in mind that the evidence was not taken before me and I therefore lack the advantage or benefit that comes from seeing and hearing the witness. The approach I am stating here was spelt out well in the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & others* [1968] EA 123 as well as in other decided appeals.

20. The appellant has raised nine (9) grounds of appeal and I find it necessary to deal with grounds 1 4 5 6 and 8 which deal with the issue of trust. The appellant called upon the court to interfere with the trial magistrate's finding that trust was not demonstrated. The trial magistrate observed that it was upon the appellant to prove trust. He observed that to prove it, evidence needed to be made available showing its existence.

21. The case of *Isack M'Inanga Kiebia Vs Isaaya Theuri M'Lintari & Another* [2018] eKLR set out what is necessary to consider in order to establish a trust. The necessary points for consideration were spelt out as follows:

- 1) *The land in question was before registration family, clan or group land*
- 2) *The claimant belongs to such family, clan or group*
- 3) *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous*
- 4) *The claimant could have been entitled to be registered as owner or other beneficiary but for intervening circumstances*
- 5) *The claim is directed against the registered proprietor who is a member of the family, clan or group*

22. In the lower court, the appellant claimed that the suit parcel of land belonged to her late husband who was allocated it by the clan. But adjudication later came to the area when the husband was already dead. The suit land was then registered in the name of the 2nd respondent to hold in trust for her and her family as she herself, being a woman, could not be registered as owner at the time and her own male children,

who could be so registered, were still minors. The appellant's witness – Mbuku Kivuta – said as much in his evidence. The 2nd respondent, who is the appellant's step-son, also said that the suit land was ancestral and that he was holding it in trust.

23. The 1st respondent however disputed the issue of trust. He maintained that the land was owned by 2nd respondent and that no evidence was made available to show that the suit land was ancestral or that it was held in trust.

24. A customary trust is one of the overriding interest under Section 28 of the Land Registration Act and such interest need not be noted on the register. The prove of such un-noted or unregistered trust is always a question of evidence and the burden of proof always lies on the person alleging its existence. This was so held in the case of **SUSAN MUMBI WAITITU Vs MUKURU NDATA & 4 OTHERS [2007] eKLR** where the court observed thus:

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land Trust can not be imputed. It must be proved.”

This position is again manifest in the case of *Juletabi African Adventure Limited & Another Vs Christopher Michael Lockley [2017] eKLR* where the court held:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the court never presumes, a trust, but in the case of absolute necessity. This will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

25. In this matter, the 2nd respondent, who was the registered owner of the suit land, admitted that he held it in trust. This is the same position espoused by the appellant and the witness that she called. The 1st respondent tried to say that there was no evidence to show trust but its clear that there are three witnesses – appellant, 2nd respondent, and appellant's witness – who gave evidence to the effect that the land was held in trust. By pre ponderance of evidence therefore, one can say that the 2nd respondent held the suit land in trust for the appellant and her family. My finding therefore is that there was trust.

26. This then leads us to the next question which is: Who was responsible for the breach of that trust? The appellants view is that the two respondents colluded or connived to breach the trust. The collusion or conniving was said to amount to fraud. Simply put, the position of the appellant is that there was fraudulent breach of trust by the respondents. The appellant even gave the particulars of fraud in her pleadings. She pleaded, inter alia, that both caused the land registrar to register the 1st respondent as owner of the suit land; that the 2nd respondent transferred the suit land while he had no capacity to do as he was a trustee; causing the land Register to issue title deed to 1st respondent while 1st respondent had knowledge of the status of the property; causing the land registrar to believe that the land was a gift to 1st respondent while the 1st respondent was not one of the beneficiaries; and failing to notify the appellant of the registration.

27. It was to be expected that during hearing in the lower court the appellant would show well that the two respondents were fraudulent as alleged. More crucially, the 1st respondent needed to have been shown to have been aware of the trust status of the suit property. The appellant's evidence in the lower court was brief and did not demonstrate fraud. The witness called by her gave evidence that focused more on the issue of trust than on prove of fraud. The 2nd respondent evidence was essentially an admission of the plaintiffs claim. But a look at the evidence shows more how one Kimani Mukonyi took advantage of the 2nd respondent by enticing him with alcohol in order to sell the land. Kimani Mutonyi comes out as a key player in the whole transaction but no side called him as a witness.

28. The evidence on record does not show the 1st respondent as a key or central player in the transaction. What transpired seems to be more of a matter between the 2nd respondent and Kimani Mutonyi. It is Kimani who is said to have represented to the 2nd respondent that the appellant was dead. It is him who asked the 2nd respondent to give him the title deed to take to appellant's children. This happened way back in 1994. The 2nd respondent however said that he discovered that the appellant was still alive in 1996. But even after discovering that Mukonyi had duped him, the 2nd respondent took no action at all.

29. The orders sought in this matter are all against the 1st respondent. He is the one who currently has the title to the land. It was therefore incumbent on the appellant to prove fraud well against the 1st respondent. He, and not the 2nd respondent, appears obviously to be the target. I say this because the 2nd respondent filed a defence, that was essentially an admission of the appellant's claim. In spite of that however, no judgement on admission was sought against him. One wonders why that was not done yet the 2nd respondent was clearly admitting liability.

30. The law requires that fraud be proved to a standard higher than on a balance of probabilities. In **RG PATEL Vs LALJI MAKANJI [1957] EA 314**, the court observed, inter alia:

“Allegations of fraud must be strictly proved; although the standard proof may not be so heavy as to require proof beyond reasonable doubt, some more than a mere balance of probabilities is required”

In **Jennifer Nyambura Kamau Vs Humphrey Nandi: Civil Appeal No. 342/2010, Nyeri (2013) eKLR**, the court of appeal emphasized that fraud must be proved as a fact by evidence; and, more importantly that the standard of prove is beyond a balance of probabilities.

31. It is a burdensome task to prove fraud. Evidence of especially high quality and strength is required to prove fraud in civil cases. My appreciation of the lower court record shows that fraud was not demonstrated against the 1st respondent. What the evidence shows more clearly is that the whole transaction revolved around the 2nd respondent himself and one Kimani Mukonyi, with the said Mukonyi seeming to have strategized take advantage of the 2nd respondent. But the second respondent can not escape blame. He is shown to have discovered in 1996 that the appellant was alive. Yet he took no action against Mukonyi. He is shown to have received 90,000/- He accepted the money and it is only much later – infact more than a decade later – that he expressed willingness to refund.

32. To me, it was crucial that the guilty or blameworthy involvement of the 1st respondent be sufficiently demonstrated. More specifically, it should have been shown that he worked in cahoots with the 2nd respondent to defeat the trust that existed in favour of the appellant and her family. But what the evidence shows is that it is second respondent and Kimani Mukonyi who colluded to defeat the trust. The involvement of the 1st respondent does not come out clearly or convincingly. To me, the alleged involvement seems more conjectural or speculative than real.

33. In accordance with the particulars of fraud spelt out in the amended plaint, one would expect the evidence made available during trial to clearly show that the 1st respondent had knowledge of the trust, yet, having such knowledge, he caused the transfer of the suit land to himself or at least teamed up with 2nd respondent to make it happen. It needed also to be shown that it is him, and not the 2nd respondent or Kimani Mukonyi, who represented to the Land Registrar that the land was being transferred as a gift and not as purchased property. Further, cogent evidence needed to be adduced demonstrating that the 1st respondent was involved in deceit, fraud or improper conduct in order to become the registered owner of the land.

34. The evidence in the lower court focused more on proof of trust and the fraudulent collusion of one Kimani Mukonyi and 2nd respondent to transfer the land to the 1st respondent. The 1st respondent is not shown as one who was actively involved in the collusion. His involvement is only imputed without any evidence being made available to justify the imputation. For these reasons, this court does not see the 1st respondent as a person involved in blameworthy conduct concerning the transaction that led to the transfer of the suit land to him. This court believes him when he says that he was simply a buyer who exercised due diligence.

35. According to the appellant, the 2nd respondent did not have capacity to transfer the suit land to the 1st respondent. To me, this is not an unequivocal legal position. Under the law of trust, a purchaser who shows that he is the one with the legal title and that he was not part of, or had no knowledge of the transaction that led to the breach of trust can still get a good title. The position here is that the beneficiaries of trust can seek remedies from the trustee.

36. And where, as in this case, fraud is alleged, and further noting that the prayers sought involve rectification, amendment or cancellation of the land register, the court is bound to bear in mind the content of Section 80 of the Land Registration Act, 2012 which is as follows:

80 (1) subject to subsection (2), the court may order the rectification of the register by directing that nay registration be cancelled, or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease, or charge for valuable consideration unless the proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by any act, neglect or default. (emphasis: mine)

37. Subsection 2 is particularly instructive in the circumstances of our case here. I realize that the position of the appellant is that the 1st respondent may not have exercised due diligence. Our land law regime is based on the torrens system. Under that system, the purchaser is not obligated to look beyond what is contained in the land register. The trust that attached to the suit land in this case was not noted on the land register. The land register therefore looked like any other register where trust did not attach. The 1st respondent can not therefore be faulted on this ground. It was enough that he looked at the land register and did not find trust. To this court therefore, the protection afforded by subsection (2) of Section 80 in the Land Registration Act, 2012, is available to the 1st respondent.

38. I also realize that ownership of the suit land by the 1st respondent is faulted for the reason that the 1st respondent has no sale agreement to show for his alleged purchase of the land. This was said to be contrary to Section 3(3) of the Law of Contract Act which provides as follows:

Section 3(3) “No suit shall be brought for the disposition of an interest in land unless:

a) The contract which the contract is founded:

i. is in writing

ii. is signed by all parties thereto and

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

This is the law now. It was not exactly the law in 1994 when the suit land was transferred to the 1st respondent.

39. The law at the time the suit land was transferred to the 1st respondent was as follows:

Section 3(3)

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract:-

i. Has in part performance of the contract taken possession of the property or any part thereof; or

ii. Being already in possession continues in possession in part performance of the contract and has done some other Act in furtherance of the contract.

40. It is necessary to appreciate that whether we are talking of Section 3(3) of the Law of Contract Act as it stands now or as it stood in 1994, the provision is simply prohibiting the filing of a suit claiming an interest in land if the contract for sale is not in writing or, as was the case in 1994, the party has not gone into possession. The provision is clearly directed at those who are suing, not those who are being sued. The 1st respondent did not sue anybody; he was sued. I am therefore not so sure that the appellant can use the provision against the respondent. But even if we agree that the provision can be used against the 1st respondent, the law applicable would be the one that existed in 1994. The 1st respondent explained that such sale agreement was available but got burnt in the house. It seems to me also that the 1st respondent went into possession of the land and the law applicable at the time therefore would come to his aid.

41. It can be seen that the court has already espoused the position that the transaction relating to the suit land was a sale. The appellant would like us to believe that it was a gift. I think I need to explain why the court has taken this position. First, the documents representing to the various offices that the transaction was a gift were not authored by the 1st respondent. The application to the Land Control Board showing it as a gift is by 2nd respondent, not the 1st respondent. The documents from the land office also showing the transaction as a gift do not feature the 1st respondent as the one making the representation. Infact, anyone familiar with the transaction in Land offices would readily tell you that at the time the property is changing hands, it is the word by the transferor, not the transferee, that counts. The 1st respondent was a transferee. It is the word of the transferor, in this case the 2nd respondent, that would count, and possibly counted.

42. There is also documentary evidence to the effect that the 2nd respondent received Kshs. 90,000/- during the transaction. He wanted to refund 90,000/-. Question is: If the land was a gift, why would Kshs. 90,000/- be given? And why would it be refunded? Isn't a gift something gratuitously given without anything given back in return? When one considers all this, it becomes clear that the position that the transaction was a sale is more credible than the allegation that it was a gift. But the stronger reason is that the 1st respondent is not shown as the one who represented the transaction as a gift.

43. Ultimately then, the court finds that the suit land was registered in the name of the 2nd respondent in trust for the appellant and her children. But the 2nd respondent breached that trust, possibly with a person who is not a party to the suit, and sold the land to the 1st respondent. The 1st respondent himself, though alleged by the appellant to have participated in breach, was never proved through evidence to have participated. That being the position, and bearing in mind that he is the one with the legal title currently, there is a presumption of innocence in his favour and that serves to protect the legal title that he holds. Section 80 (2) of the Land Registration Act, 2012, protects him. The law of trust also protects him because it was not proved that he knew that the transaction leading to the transfer of the suit land to him was in breach of trust.

44. There is, additionally, something curious about the favourable treatment given by the appellant to the 2nd respondent in the whole matter. I say this because it is the second respondent who was the trustee. He is the one who sold the suit land. He would like the court to believe that drunkenness induced by one Kimani Mukonyi made him do it, but this story comes across as less than credible. I am not able to understand well how the 2nd respondent made an application to Land Control Board while drunk, appeared before it for consent while drunk, then obtained the consent and went to the land's office while drunk, and in all these offices, he was seen drunk and still served while drunk by sober government officials in a serious matter involving sale of land.

45. In law, there is liability that arises for breach of trust. Although the 2nd respondent was sued, no orders were sought against him. All the orders sought are against the 1st respondent. Yet whatever happened in order that the appellant and her family lost the land could not have taken place without involvement and/or active participation of the 2nd respondent. But there are no orders sought against him. He said he lives in a place called Shamata. He has his land there. But the appellant apparently has no problem with that land remaining intact or untouched while that of an innocent purchaser like 1st respondent is interfered with. The conscience of equity would find this less than fair.

46. It is for all these reasons that the court finds this appeal unmeritorious. The same is dismissed with costs to the 1st respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF OCTOBER, 2021.

IN THE PRESENCE OF OKWARO FOR MAINA KAGIO FOR APPELLANT AND IN THE ABSENCE OF M/S WAIRIMU FOR 1ST RESPONDENT; 2ND RESPONDENT ABSENT.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

25/10/2021