



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 158 OF 2018**

**FORMELY ELC NO. 67 OF 2008**

**THE PRESBYTERIAN FOUNDATION.....1<sup>ST</sup> PLAINTIFF**

**MARGARET WANJIKU WARIUKI**

**GRACE WAHITO NGARI**

**OBADIAH KAIRU MAINA (suing as officials being session Clerk, Treasurer and**

**Finance Chairman respectively of PCEA DR. ARTHUR PARISH....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHARLES NDUNGU WAITHAKA.....DEFENDANT**

**J U D G M E N T**

1. The instant suit was commenced by the 1<sup>st</sup> plaintiff vide a plaint dated 8<sup>th</sup> April 2008 filed in court on 28<sup>th</sup> August 2008. The plaint was following the joinder of the 2<sup>nd</sup> plaintiff amended on 20<sup>th</sup> February 2018. The plaintiff as per the amended plaint prayed for the following orders :-

*1. A declaration that the plaintiff being the registered owner of the suit property is entitled to absolute possession thereof and the continued possession by the defendant of the suit property constitutes continued trespass.*

*2. An order of vacant possession of the suit property and or eviction of the defendant.*

*2A. Mandatory injunction to compel the defendant to vacate the suit property.*

*2B. Mesne profit,*

*3. Costs of this suit.*

*4. Interest on costs*

2. The defendant filed an amended defence and counterclaim dated 13<sup>th</sup> March 2018 and filed in court on 14<sup>th</sup> March 2018. By the counterclaim the defendant sought orders dismissing the plaintiff's case and prayed for judgment as follows:-

*(a) A declaration that the plaintiffs now defendants hold seven (7) acres of LR No.14242/2 in trust for the defendant now plaintiff.*

*(b) A mandatory injunction to compel the plaintiffs now the defendants to subdivide and transfer seven (7) acres of L.R No.14242/2 in occupation of the plaintiffs now the defendants to the defendant not plaintiff.*

*(c) Cost of the counter- claim.*

3. The plaintiffs case as pleaded in the plaint is that the 1<sup>st</sup> plaintiff is registered as the proprietor of land parcel comprised in LR No.14242/2 measuring 18.82 Hectares or thereabouts which it holds in trust for the 2<sup>nd</sup> plaintiff (herein after referred to as the “suit land”) The 2<sup>nd</sup> plaintiff avers that it purchased the suit land at a public auction and caused the same to be registered in the name of 1<sup>st</sup> plaintiff being the entity that has authority to hold and own all property belonging to the church, to hold the same in trust for the 2<sup>nd</sup> plaintiff for purposes of development of educational facilities thereon by the 2<sup>nd</sup> plaintiff. The plaintiffs further assert that the suit land was purchased by the 2<sup>nd</sup> plaintiff exclusively for use by the 2<sup>nd</sup> plaintiff and was not for subdivision amongst members of the 2<sup>nd</sup> plaintiffs church congregation.

4. The plaintiffs further averred that the defendant in or about the year 2005 without any lawful authority and/or consent of the plaintiffs unlawfully entered onto the suit land and took possession of a portion measuring 5 acres or thereabouts and has since continued in illegal possession of the same. The plaintiffs further averred that the defendant inappropriately used his wife who was serving as an official of the 2<sup>nd</sup> plaintiff, to cause the contributions the defendant had made as any other member of the church, receipted and treated as a contribution towards purchase of a share in the suit land. The plaintiffs contended there was never any intention to have the suit land subdivided and shared with the parishioners and that the defendant had no justification in laying a claim to a portion of the same.

5. The defendant in his amended defence and counter claim denied the plaintiffs averments in the amended plaint. The defendant in particular denied that the suit land was exclusively purchased by the 2<sup>nd</sup> plaintiff at the public auction. He asserted that he was the one who initially bid for the property at the auction on 23<sup>rd</sup> November 2004 but as he could not raise the full purchase price of Kshs.3.0 million he approached the 2<sup>nd</sup> plaintiff, who he knew were sourcing land to purchase, to partner with him to purchase the suit land. The defendant stated the 2<sup>nd</sup> plaintiff agreed to partner with him and that they jointly contributed Ksh.1,000,000/= as the initial deposit with the 2<sup>nd</sup> plaintiff raising Ksh790,000/= and him Kshs.210,000/= which was paid to the Auctioneer.

6. The defendant further averred that the auction sale of 23<sup>rd</sup> November, 2004 was rejected by the chargee and a second auction sale was scheduled on 11<sup>th</sup> March 2005 at which he participated and his bid of Kshs.3.4 million made in conjunction with the 2<sup>nd</sup> plaintiff was accepted necessitating him and the 2<sup>nd</sup> plaintiff to pay the balance of the purchase price of Kshs.2.4 million within 30 days of the sale date since the deposit of Kshs.1,000,000/= placed with the Auctioneer was taken account of. The defendant stated he made a further payment of Kshs.130,000/= towards the purchase price which the 2<sup>nd</sup> plaintiff duly acknowledged and that he was therefore entitled to a portion of 7 acres of the suit land having regard to the contribution he made towards the purchase price. He averred that he took possession and occupation of 7 acres of the suit land commensurate with the contribution he made of the purchase price. He denied he was a trespass on the suit land and by the counterclaim sought a declaration that the 2<sup>nd</sup> plaintiffs who were solely registered as the proprietors of the suit land held 7 acres of LR.No.14242/2 in trust for him.

7. The plaintiffs in the amended reply to the amended defence and defence to counterclaim dated 20<sup>th</sup> April 2018 joined issue with the defendant on his averments on the amended defence and the counter claim and invited proof of the same by the defendant.

8. The suit was part heard before Munyao, J before whom PW1, Margaret Wanjiku Wariuki and Pw2 Samuel Gatheru Kanyoro testified on behalf of the plaintiffs and the plaintiff case closed. The defence case was heard by myself and the defendant testified and called 3 witnesses in support of his case.

### **Evidence of the Parties**

9. PW1 testified that she was a congregant of PCEA Dr. Arthur parish church Nakuru. She stated she was an ordained elder of the Presbyterian Church and was in 2004 elected as Parish Treasurer of the Dr. Arthur Parish and served as such upto the year 2007. She stated the church purchased LR No.14242/2 situated along the Nakuru- Njoro Highway in a public auction. She explained the property was advertised in the Daily Nation Newspaper of 17<sup>th</sup> November 2004 and on 7<sup>th</sup> December 2004 in the Kenya Times Newspaper by Keysian Auctioneers. The witness stated that although the auction sale for the property was scheduled for 23<sup>rd</sup> November 2004 and 3<sup>rd</sup> January 2005, the church did not attend the auction and was not represented at the auction. She however stated the auctioneer wrote to the church on 25<sup>th</sup> February 2005 informing them the property would be sold through public auction on 11<sup>th</sup> March 2005. She stated the church was represented during the auction and that its bid of Kshs3.4 million was accepted as the highest bid. The witness stated she was among the representatives who represented the church at the auction sale. She stated the auctioneer after the conclusion of the auction prepared a memorandum of sale that she as the treasurer, one Grace Ndungu as the chairperson of the church, and Francis Kairu as the session Clerk of the parish executed on behalf of the church.

10. PW1 further testified that as per the memorandum of sale issued by the auctioneer the purchaser of the property was PCEA Dr. Arthur Parish Nakuru and that the name of the defendant was not included as a joint purchaser. She went on to explain that the application for the Land Control Board consent and the consequent Transfer of the property were made in the name of Presbyterian Foundation, which was the institution authorized to hold property on behalf of all the PCEA church in the country. She stated the transfer was effected and registered in the name of the Presbyterian Foundation and title issued as the defendant was not a Co-purchaser of the property.

11. The witness explained that as the church did not have sufficient funds to buy the property, the church organized fund raisers from amongst the parishioners and borrowed money from 4 church members to enable them to pay the purchase price. She stated the defendant was not one of the persons the church borrowed money from. It was her testimony that the purchase price was contributed by their 800 members of the church congregation. She stated the church initially paid Kshs.1,000,000/= deposited with the Auctioneers after the auction and the balance was payable within a period of 30 days. She stated the church borrowed to pay the balance and later organized a fund raiser and paid off what had been borrowed.

12. PW1 insisted the church was buying the land for exclusive use by the church and denied there was any agreement to buy the land

jointly with the defendant so that the land could be shared between the church and the defendant. She stated there was no written agreement to that effect and averred that all the documents relating to the transaction were in the name of the church and did not include the defendant's name. The witness admitted the defendant made a contribution of Kshs340,000/= but denied that the contribution was so that the defendant would get a share of the land. She maintained the contribution by the defendant was the same as the other contributions made by other church members. The witness testified that the defendant was adamant that he was entitled to a share of the land as a co-purchaser and that the defendant without the authority of the church entered the land and carved out for himself a portion of 7 acres claiming it was commensurate with the contribution he had made towards the purchase. The witness further testified that owing to the insistence of the defendant to get a portion of the land, the Kirk session met and decided to refund to the defendant the sum of Kshs.340,000/= that he had contributed but the defendant rejected the refund and paid the money back.

13. The witness in concluding her evidence in chief explained that there had been attempts to resolve the matter out of court and that at one time the 1<sup>st</sup> plaintiff had agreed to the defendant being given 5 acres out of the suit land but since the 2<sup>nd</sup> plaintiff was not involved in the discussions the agreement was vacated. The witness further stated Rev. Albert Marang'a was the parish minister of the 2<sup>nd</sup> plaintiff in 2004 but had been defrocked as from 1<sup>st</sup> November 2004 and he therefore was not authorized as from that date to represent the church in any transactions. She stated Rev. Murang'a had no authority to hold any meeting in the church office on 23<sup>rd</sup> November 2004.

14. In cross examination PW1 affirmed that in 2004 Dr. Arthur Parish was a one congregation church. She stated Francis Mbugua Kariu was the session clerk and that the functions of a session clerk included the administration of the parish which entailed making consultations with the parish minister and the elders of the church. The witness further explained in 2004 a committee of 10 persons was set up by the church to look for land to purchase and the land was to be not less than 10 acres. She admitted that under the church policies, it was only the PCEA Presbyterian Foundation that could hold property.

15. PW1 in further cross examination stated she attended the public auction held on 23<sup>rd</sup> November 2004 where the church offered a bid of Kshs3.2 million. She stated she did not see the defendant at that auction and she did not know if he had been there. PW1 stated the church paid a deposit of Kshs.1 million through their advocate Ms Beatrice Kamau not at the fall of the hammer but later. The witness stated she together with some other 3 elders delivered the cheque to Nairobi. She stated the defendant was not amongst the elders who delivered the cheque to Nairobi. The witness further stated the defendant on 24<sup>th</sup> November 2004 deposited Kshs.210,000/= in the bank account of the church and he was issued a receipts by the Treasurer of the Board account. The witness explained that the defendant only came after the church had bought the land to claim he had a share on the land. She stated it was only the defendant, of all the church members who claimed to have a share of the land. PW1 stated that the church refunded money to 4 persons who had given a loan to the church during the purchase of land. She further stated the church usually did not receipt donations. She stated further the Kirk session made a decision to refund the defendant his money and a refund was made to him on 21<sup>st</sup> December 2007 though the defendant had not sought a refund. She stated the refund money was deposited into the defendant's bank account but the defendant returned the money to the church.

17. PW1 under further cross examination stated she again attended the public auction on 11<sup>th</sup> March 2005 and Mr. Wanjohi placed a bid on behalf of the church of Kshs.3.4 million which was accepted. She stated since they had earlier paid a deposit of Kshs1.0 million they were not required to pay a deposit but to pay the balance within 30 days of the auction date. She agreed the defendant deposited with the Bank a further amount of Kshs.130,000/= since the refund the church made to him was Kshs.340,000/=.

18. The witness refuted that the church purchased the property together with the defendant and stated that Rev. Morang'a was lying when he stated that the church bought the property with the defendant. She maintained that the defendant's wife who was the chairlady of the church interfered with the church records to favour her husband. PW1 stated that the members of Dr. Arthur Parish did not agree with the decision of the Presbytery Commission that the defendant be given 5 acres out of the suit land because there was no justification for the same.

19. PW2 Samuel Gatheru Kanyoro, the property manager of the Presbyterian Foundation gave evidence that the suit land LR No.14242/2 was purchased by PCEA Dr. Arthur Parish through a public Auction. The property was registered in the name of the Presbyterian Foundation on 23<sup>rd</sup> August 2007. The witness explained the 1<sup>st</sup> plaintiff was holding the property in trust for the 2<sup>nd</sup> plaintiff Dr. Arthur Parish. He stated that the documents supporting the registration of the 1<sup>st</sup> plaintiff as the owner of the land did not show that the defendant had any interest in the land. He admitted that the Presbytery had consented to the defendant being given a portion of 5 acres of the land but the 2<sup>nd</sup> plaintiff objected and the consent was set aside by the court. The witness affirmed the property was purchased for the development of a church, school and/or hospital for the benefit of the community.

20. The defendant Charles Ndungu Waithaka testified as DW1. He adopted his witness statement recorded on 25<sup>th</sup> June 2018 as his evidence in chief. It was his evidence that he together with 2<sup>nd</sup> the plaintiff had agreed to buy the suit land together on the understanding that after the title was registered, the land would be subdivided so that he could get his portion. The defendant explained that the suit property was advertised for sale by public auction in the Daily Nation Newspaper on 17<sup>th</sup> November 2004. The sale was scheduled for 23<sup>rd</sup> November 2004. The defendant stated he went to view the property on the same date it was advertised and on 23<sup>rd</sup> November 2004 he attended the auction where he put a bid of Kshs.3.0 million which was accepted. He stated he requested the auctioneer to allow him 2 days to pay the deposit. He stated he approached the church who agreed to buy the land with him.

21. The defendant explained that he informed the parish Minister and the General secretary about the land and both were agreeable. He stated he took the members of the church to view the property. The defendant testified that the term of the parish minister Rev. Moranga was ending on 23<sup>rd</sup> November 2004 but the new minister Rev. Joram Wainaina who was taking over from him went with the defendant to see the land. The defendant explained that he initially contributed Kshs.210,000/= and the church contributed Kshs.790,000/= and that the aggregate sum of Kshs1.0 million was paid to the Auctioneer through Ms B N Kamau advocate. The defendant stated they delivered the cheque to the auctioneer together with PW1 and one Bernard Githaiga. The defendant further testified that the Auctioneer later notified them that the Bank did not ratify the auction sale of 23<sup>rd</sup> November 2004 which necessitated another auction to be held on

11<sup>th</sup> March 2005. Though PW1 had been nominated to represent the church at the auction of 11<sup>th</sup> March 2005 the defendant stated she arrived late after the auction had been concluded. The defendant stated he was the one who placed a bid of Kshs.3.4 million which was accepted. Since a deposit of Kshs 1.0 million had been paid to the Auctioneer earlier they were not required to pay any deposit but were required to pay the balance of Kshs.2.4 million within 1 month.

22. The defendant testified that after the auction of 11<sup>th</sup> March 2005 he paid towards the purchase price a further sum of Kshs.130,000/= making a total of Kshs.340,000/=. He stated that he entered onto the suit land and occupied a portion of 7 acres commensurate with the contribution he had made towards the purchase price. He stated that after he occupied his portion of land, the church unlawfully sought to refund the sum of Kshs.340,000/= that he had paid but he refused to accept the refund and returned the money the church had paid into his bank account without his authority to do so. The defendant stated that he lawfully took occupation of the portion of 7 acres, built a temporary house, fenced and planted trees and has been cultivating on the portion of land. He stated the plaintiffs filed the present suit claiming he was a trespasser which was untrue. The defendant further stated there have been attempts to settle the dispute but members of Dr. Arthur Parish refused to accept a determination made by the church commission that I be given 5 acres which I had accepted. The defendant explained that the church had not as yet effected any developments on the suit land.

23. The defendant cross examined by Mr. Matiri advocate for the plaintiffs maintained there was an agreement between him and the church to jointly purchase the suit land though the same was not made in writing. The defendant stated he was the only person who attended the auction on 23<sup>rd</sup> November 2004 and that nobody else from the church attended the auction. He stated he was not issued with a memorandum of sale as he requested the Auctioneer to allow him a few days to raise and pay the deposit. He affirmed that the Auctioneer was paid a deposit of Ksh.1.0 million and that he had contributed a sum of Kshs.210,000/=. He stated that since they had agreed with the church to buy the land together, the Auctioneer only wrote to the church notifying them of the repeat auction on 11<sup>th</sup> March 2005. The defendant stated at the repeat auction he was the one who gave the bid on behalf of the church and not Margaret Wariuko (PW1) who he stated came late after the auction had been concluded.

24. The defendant admitted the memorandum of sale was prepared in the name of the church and was signed by the Auctioneer and the officials of the church. The Transfer was also made in favour of the church. He stated he was allowed to occupy his portion of the land by the church. The defendant said the money he contributed was receipted and was intended for purchase of the land. He denied his wife played any role in getting his name into any documents relating to the land. He stated that she was not present when he met with the church committee that approved the purchase of the land jointly.

25. Rev. Joram Wainaina Mbugua testified as DW2. He testified that he was a retired PCEA Minister and that he retired in 2012. He stated that in 2004 he served two parishes, Kereta parish and Dr. Arthur parish as minister. He stated Albert Morang'a was the minister of Dr. Arthur parish before he took over from him. The witness confirmed he signed DEX1 which was an affirmation that the suit property was purchased jointly by Dr. Arthur church and that the 1<sup>st</sup> defendant was to be given his portion of the land after the initial transfer of the land to the church was completed. The witness stated that although DEX1 indicates it was executed in 2008, the property was purchased in 2004 and that it was in November 2004 that he reported at Dr. Arthur and it was then the issue of purchasing the suit land was discussed.

26. DW2 indeed affirmed that on 23<sup>rd</sup> November 2004 they held a meeting at Dr. Arthur Parish which was attended by Rev. Albert Morang'a and Mr. Francis Kariu, the session clerk, David Muchira, Church Treasurer and Mrs Grace Ndungu who was the chairperson of the church.

27. He stated at this meeting the participation of the church and Mr. Charles Ndugu (defendant) in the purchase of the suit land was discussed and agreed. He was clear that the defendant contributed towards the purchase of the land and his predecessor Rev. Albert Moranga briefed him about the purchase of the land and the involvement of the defendant.

28. Francis Mbugua Kariu testified as DW3. He testified that he was an elder at Lanet PCEA church. He affirmed that in 2004 he was the session clerk at Dr. Arthur Parish. He stated some of the duties of a session clerk was to take minutes of the Kirk session meetings and maintain records. He stated that in the year 2004 the church made a decision to buy some land on which to carry out some developments. In his evidence the witness stated it was the defendant who identified the suit land that was being sold through public auction. He said the defendant wanted to buy the land with other persons and when he approached the church, the church agreed to partner with the defendant to buy the land. He explained the church initially raised a deposit of Kshs790,000/= while the defendant raised Kshs210,000/=. He stated the initial cheques for Kshs.1,000,000/= towards the purchase price was delivered to the Auctioneer by the defendant and some members of the church. The witness testified that the initial auction held in November 2004 did not go through as the chargee raised issues and there was a repeat auction on 11<sup>th</sup> March 2005 at which the church was represented by two elders. He stated at the repeat auction the defendant's bid of Kshs.3.4 million was accepted. He testified that since a deposit of Kshs1.0 million had been placed with the auctioneer they were only required to pay the balance. He stated the defendant contributed an additional Kshs.130,000/= towards the purchase while the church paid the balance.

29. DW3 stated in his evidence that problems arose when it came to sharing the land. Initially it was assumed the land comprised 35 acres and the church was agreeable to the defendant being given 5 acres. As the church required only about 10 acres, the witness stated some elders wanted to have the land shared out. It however turned out the land was in fact 47 acres and that prompted the defendant to ask to be given 7 acres now that the land was bigger than 35 acres. The witness confirmed the defendant contributed to the purchase of the land. He stated the defendant took possession and occupation of a portion of 7 acres and started utilizing the same.

30. DW3 further testified that the suit property was wholly transferred to the Presbyterian Foundation, the body that holds all the assets owned by the church. He stated the dispute pitting the church and the defendant has been arbitrated by the church commission and that he was called to testify before the commission. He stated the commission recommended that the defendant be given a portion of 5 acres but Dr. Arthur Church was not agreeable to the recommendation. DW3 acknowledged he signed DEX1 and reiterated the contents were correct and represented what was discussed at the meeting held on 23<sup>rd</sup> November 2004.

31. Cross examined by Mr. Matiri advocate for the plaintiff DW3 admitted there was no written agreement authorizing the defendant to represent the church at the public auction. He stated that DEX1 was signed in 2008. He said the document was generated to confirm what had happened at the time of the handover. The witness stated he was the one who sent representatives of the church to attend the public auction but it was the defendant whose bid was accepted. The witness affirmed the defendant contributed towards the purchase and that he accompanied them when they delivered the cheque for Kshs 1 million to the Auctioneer. DW3 further affirmed that the defendant took possession of a portion of 7 acres commensurate with the contribution he had made. He further stated the persons who signed DEX1 were not members of the land committee but officials of the board.

32. The witness maintained that the receipts issued to the defendant were regularly issued and indicated for what purpose the payments were made. He stated the defendant was present when the initial deposit Kshs1 million was made and when the balance was paid. He stated that although no express written instructions had been given to the defendant there was an understanding that the church and the defendant were partnering in purchasing the land

33. DW4 Rev. Albert Rwanda Moranga testified that in 2004 he was the moderator of Dr. Arthur Church Nakuru when the church proposed to buy a parcel of land to undertake some developments. He stated the church needed about 10 acres and a committee of 10 persons was set up to scout for suitable land to purchase. He stated the defendant was a member of the committee. He said on 23<sup>rd</sup> November 2004, the defendant informed him he had identified a big parcel of land out of which he only needed 5 acres. The witness stated he agreed with the defendant that the church could partner with him to buy the land and as consequence the defendant contributed Kshs.210,000/= while the church contributed Kshs790,000/=. He stated as the land was being sold through public auction, he sent some church officials and the defendant. The witness stated that even though he had been requested to proceed on leave as from 1<sup>st</sup> November 2004, he remained in the church compound and only left on 28<sup>th</sup> December 2004 after he got a letter of transfer on 10<sup>th</sup> December 2004. He affirmed that he briefed the incoming Minister about the purchase of the land and the defendant's interest in the land.

34. In cross examination the witness affirmed that at the time he was handing over to Rev. Joram Wainaina, he explained to him that the defendant was to get 5 acres from the land the church and the defendant were buying together. He stated it was the defendant who found the land and not the committee set up to look for land. He said the defendant wanted 5 acres and to be also paid a commission.

35. He explained that it was the defendant who took him together with some other church members to see the land. He was emphatic that the defendant had an interest in the land and that the church had agreed to partner with him in the purchase of the land.

#### **Submissions, analysis and determination.**

36. The plaintiffs and the defendant filed written submissions following the conclusion of the trial. After reviewing the pleadings, the evidence and the submissions by the parties the following issues arise for determination

**(i) Whether the defendant and the 2<sup>nd</sup> plaintiff co-purchased the suit property?**

**(ii) Whether upon registration of the suit property infavour of the plaintiff, the 1<sup>st</sup> plaintiff held a portion of the land in favour of the defendant?**

**(iii) What relief and /or order should the court grant.**

37. The plaintiffs submitted that the defendant did not prove that he was a Co-purchaser of the suit property with the plaintiff arguing that it was the 2<sup>nd</sup> plaintiff who solely purchased the suit property before causing the same to be registered in the name of the 1<sup>st</sup> plaintiff. The plaintiffs contended that all the documentary evidence tendered pointed to the fact that it was the 2<sup>nd</sup> plaintiff who alone purchased the property. The plaintiffs pointed out that as per the documents adduced in evidence there was no document that indicated that indeed the defendant participated in the public auction in any manner. To the contrary the documents showed that it was the 2<sup>nd</sup> plaintiff who participated in the public auction resulting in the memorandum of sale being issued in its name. The plaintiffs contended the consent of the Land Control Board was applied for in the name of the 1<sup>st</sup> plaintiff and that title was issued in the 1<sup>st</sup> plaintiffs name and that the defendants name did not feature anywhere. The plaintiffs submitted that the documents tendered in evidence by the plaintiffs were clear and not ambiguous and did permit any oral evidence to be adduced to prove or disprove them and placed reliance on section 97 (1) of the Evidence Act, Cap 80 Laws of Kenya. The plaintiffs further placed reliance on the case of Nakuru ELC No.472 of 2013:- **Margaret Muthoni Wanyee -vs- Mukena Co-operative Society Ltd** where the court stated:-

*“—one cannot bring a suit to enforce an agreement for sale of land unless such agreement is in writing. We can only know that there is such agreement if the documents itself is produced as evidence in the case. In our instance no sale agreement was ever produced. The only evidence tendered was oral evidence by the defendant that there was a sale agreement. The existence of such sale agreement is denied and it was therefore incumbent on the defendant to produce documentary evidence of it”.*

38. The plaintiffs further relied on the case of **David Oteba Ooko -vs- Peter Joe Emongor - Kisumu C.A No.38 of 2015** where the court held that oral evidence could not be applied to contradict or override documentary evidence. The court stated:-

*“---It is a settled principle of law that documentary evidence is the best evidence. It is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except where fraud is pleaded”.*

39. The plaintiffs further cited the case of **Loise Wambua -vs- Kenyatta university & Another (2015) eKLR** to support their submission that the defendant had no written agreement for sale upon which he could found his claim. The plaintiff's contended there was no compliance with section 3 (3) of the Law of Contract Act (Cap 21) which required that any disposition of any interest in land be in

writing if an action was to be founded on the same section 3(3) of the Act provides :-

*3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless:-*

*(a) The contract upon which the suit is founded:-*

*(i) Is in writing;*

*(ii) Is signed by all the parties,*

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

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

40. The plaintiffs submitted that there was no evidence to support the defendant's assertion that he was a Co-purchaser of the suit property with the 2<sup>nd</sup> plaintiff and no organs of the 1<sup>st</sup> plaintiff were involved in sanctifying any such agreement.

41. On the issue whether or not there was a trust created in favour of the defendant in regard to the portion of land he lays claim to, the plaintiffs submitted that no trust was created in favour of the defendant taking into account all the circumstances and the evidence adduced. The plaintiffs argued that the defendant did not prove there was an agreement and/or any intention between the plaintiffs and the defendant to jointly purchase the suit property so that it could be held that a resulting trust had been created. In support of this submission the plaintiffs placed reliance on the cases of **Heartbeat Limited -vs- Ngambwa Heartbeat Community Children's Home Rescue Centre (2018) eKLR** and **Twalib Hatayan Twalib Hatayan & Another -vs- Said Saggat Ahmed Al-Heidy & others (2015) eKLR** where the courts held the onus rested on the party pleading the existence of a trust to prove the same through evidence. The plaintiffs contended that the mere fact that the defendant may have contributed some money was not enough to justify a finding that there was a resulting trust. The plaintiffs argued that it was usual and normal for congregants to make contributions towards church projects and/or as tithes.

42. The defendant in his submissions firstly submitted that the 2<sup>nd</sup> plaintiff lacked the locus standi to be enjoined in the suit as the 2<sup>nd</sup> plaintiff on the basis that it was only the 1<sup>st</sup> plaintiff under the manual and practice of Presbyterian church of East Africa who could lay claim to any immovable property belonging to the church. However, the record shows the 2<sup>nd</sup> plaintiff initially applied vide an application dated 22<sup>nd</sup> May 2013 to be enjoined as an interested party. This application was determined on 2<sup>nd</sup> December 2013 and the 2<sup>nd</sup> plaintiff was ordered to be enjoined as an interested party. Following a further application by the plaintiff to amend the plaint dated 6<sup>th</sup> September 2017, the court on 7<sup>th</sup> February 2018 allowed the plaintiff to amend the plaint and directed that the 2<sup>nd</sup> plaintiff who had hitherto been enjoined as an interested party, be enjoined in the suit as a Co-plaintiff. In case the defendant was aggrieved by the said court's ruling the option available was to appeal against the same. The defendant in the premises cannot properly challenge the locus of the 2<sup>nd</sup> plaintiff before the same court that affirmed the 2<sup>nd</sup> plaintiff had locus.

43. As regards the issue whether or not the defendant had an agreement with the plaintiffs (the church) respecting the purchase of the suit property, the defendant submitted he had an agreement with the officials of the church for the purchase of the property which was however not written. The defendant submitted that section 3(3) of the Law of Contract Act did not have any application by virtue of the proviso thereto and section 3(4) of the Act as the agreement was made pursuant to a public auction by an Auctioneer.

44. It is not disputed that the sale transaction arose from a public auction initially conducted on 23<sup>rd</sup> November 2004 and later on 11<sup>th</sup> March 2005. The defendant submitted that he participated in the public auction and his bid was accepted and it was thereafter that he approached the church whom he was aware were interested in buying land, to partner with him to buy the property since it was big and he only needed a portion of the same. He submitted the church agreed to the proposal and the mutual agreement was that both the church and himself would contribute towards the purchase of the land. The defendant submitted that he contributed Kshs.340,000/= in aggregate instalments which prorata entitled him to a portion of 7 acres of the suit property. The defendant submitted that it was agreed the land be registered in the 1<sup>st</sup> plaintiff's name and after that it would be subdivided so that he gets his portion of 7 acres. He submitted that on the basis of the understanding the church allowed him to take occupation and possession of 7 acres which he has fenced and has developed and has been utilizing.

45. The defendant submitted on the basis of the mutual agreement founded on trust that he had with the church, there was an implied contract whose terms were deducible from the conduct of the parties; the defendant made contribution that was duly receipted; attended the public auctions; and was allowed to take occupation and possession of a designated portion of land. The defendant placed reliance on the English case of **Lamb -vs- Evans (1893) 1Ch218** where the court stated:-

*“The common law, it is true, treats the matter from the point of view of an implied contract and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile”.*

46. The defendant also referred the court to the case of **KTS Flexible Systems Ltd -vs- Molkerei Alois Müller GMBH (2010) UKSC 14**

where the court observed thus:-

*“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations”.*

47. In regard to the issue of trust that the defendant submitted was created in his favour after he contributed to the purchase and the property was purchased, the defendant relied on the court of Appeal case of ***Twalib Halayan & Another -vs- Said Saggar Ahmed Al-Heidy & 5 others (2015) eKLR*** also cited by the plaintiff. In the case the court of appeal considered the instances where a constructive trust and/or a resulting trust would be held to be applicable. The court inter alia stated:-

*Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled. This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra*

48. I have carefully considered and evaluated the evidence and the submissions of the parties. There is no dispute that indeed the suit property was purchased from a public auction sale that initially was conducted on 23<sup>rd</sup> November 2004 but was rescinded and restaged on 11<sup>th</sup> March 2005. The issue however arises whether the defendant participated in these auctions and if so in what capacity. The defendant's evidence was that he was the one who came across the advertisement of the public auction on 17<sup>th</sup> November 2004, went to see the property and attended the public auction on 23<sup>rd</sup> November 2004 where he made a bid for the property that was accepted. However as the defendant only wanted a portion of the land he approached the administration of the church, since as a member of Dr. Arthur church he had been aware the church was looking for a property to purchase, to partner with him to buy the land. It was his evidence that the church agreed and the church made a contribution of Kshs.790,000/= while he contributed Kshs.210,000/= making an aggregate deposit of Kshs.1,000,000/= which was paid to the Auctioneer pending payment of the balance.

49. For reasons that were not made entirely clear the public auction of 23<sup>rd</sup> November 2004 was cancelled by the Bank and a fresh auction advertised for 11<sup>th</sup> March 2005. The defendant with some members of the church attended the second public auction and the defendant testified he was the one who again placed the bid of Kshs.3.4 million on behalf of the church and himself which was accepted by the Auctioneer and they were now required to pay the balance of Kshs.2.4 million since the Auctioneer was still holding the deposit of Kshs1.0 million paid to him.

50. The evidence by PW1 that the defendant did not attend and /or participate in the public auctions is in the face of all the evidence not believable. Both Rev. Albert Moranga (DW4) and Rev Joram Wainaina Mbugua (DW2) who served as Parish Minister at Dr. Arthur church in 2004 in their evidence confirmed the participation of the Defendant in the public auction and that he ( the defendant ) contributed towards the purchase of the land. DW3 Francis Mbugua Kariu who was the session clerk of Dr. Arthur Parish in 2004 and 2005 confirmed the evidence adduced by the defendant; that he approached the church to partner with him to purchase the suit property. DW3 further confirmed that indeed the defendant made contribution towards the purchase of the land and that his contributions were receipted. I am in the face of the evidence adduced by the defendant and his witnesses satisfied that there was in fact an agreement between the defendant and Dr. Arthur church to purchase the suit property jointly and that each of the participating parties was to get a portion commensurate with the contribution they each made towards the purchase.

53. The plaintiffs have contended that the defendant has sought to rely on an agreement that was unwritten and which did not comply with the provisions of section 3(3) of the Law of contract Act ( Cap 21) . I do not understand the defendant to be placing reliance on an agreement of sale. The defendant's case is that he partnered with the 2<sup>nd</sup> plaintiff to buy the land at a public auction. The real issue for determination was whether there was such a partnership. On the evidence I am satisfied that indeed the defendant and the 2<sup>nd</sup> plaintiff partnered in the purchase of the suit property. The defendant identified the land that had been put up for sale by public auction and invited the church to join him in the purchase with the objective that once the purchase was completed, the defendant would get a portion commensurate to the amount he had contributed. The defendant who had viewed the land before the initial sale by public auction on 23<sup>rd</sup> November 2004 took members of the church to see the land. This evidence was corroborated by DW2,DW3, and DW4, who were all officials of the church at the time of the purchase. I see no reason whatsoever why two church ministers and their session clerk would

combine to lie about the transaction.

54. There is evidence that indeed the defendant made a contribution of Kshs.340,000/= though the plaintiffs have argued that the defendant made a contribution just like all the other congregants and that the contribution he made was not so that he could get a share of the land. This argument however is unsustainable as the defendant was issued receipts for the payments he made which clearly indicated the payments were towards the purchase of the Njoro land. The further arguments by the plaintiffs that the defendant's wife who was then serving as the chairperson of the church may have manipulated and influenced the issue of the receipts in the manner they were issued was not supported by any evidence and there was no proof at all that the defendant's wife played any role.

55. The plaintiffs allowed and/or permitted the defendant to enter and take possession of a portion of the land that in his and their estimation was commensurate with the contribution he made towards the purchase price. It was only after the property was solely registered in the name of the 1<sup>st</sup> plaintiff that the plaintiffs sought to have the defendant vacate from the portion he was occupying perhaps because it was evident from the trail of the documents leading to registration, that the name of the defendant was excluded .

56. However, notwithstanding that the property was solely registered in the 1<sup>st</sup> plaintiff's name, there is as I have demonstrated credible evidence that the purchase of the property was joint with an understanding that the defendant would get a share corresponding to the contribution he had made towards the purchase. The 1<sup>st</sup> plaintiff upon registration held title to the defendant's portion in constructive trust.

57. The court is enjoined under Articles 10 (2) (b) of the constitution to apply equitable principles as a national value. The court of Appeal in the case of **Macharia Mwangi Maina & 87 others -vs- Davision Kagiri (2014) eKLR** held the doctrine of constructive trust was applicable even in instances where a land transaction had been rendered null and void for failure to obtain the consent of the Land Control Board as required under the Land Control Act (Cap 302) . The court in its judgment at paragraph 20 stated :-

*“ – 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 observed in **Lyolds Banks PLC -vs- Rosset (1991) 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 the act 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 claimant 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. 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”.*

58. A differently constituted bench of the court of Appeal in a later case **Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR** agreed with the decision in Macharia Mwangi (case) while disagreeing with yet another court of appeal bench in the case of **David Sironga Ole Tukai -vs- Francis Arap Muge & 2 others (2014) eKLR** which had held that equitable doctrines were inapplicable where express statutory provisions existed such as the Land Control Act ( Cap 302) Section 6 which made it mandatory to obtain the consent of the Land Control Board in all controlled land transactions. The court in the **Willy Kimutai Kitilit** case (supra) referring to Article 10 (2) of the constitution held that notwithstanding the express provisions of the law, equitable doctrines would be applicable having regard to the facts and circumstances of each case.

59. The court of appeal in the case stated:-

*There is another stronger reasons for applying the 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 which binds the courts in interpreting any law ( Article 10 (1) (b) ) . Further by Article 159 (2) ( e ), the court in exercising judicial authority are required to protest and promote the purpose and principles of the constitution. More over 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.”*

60. In the present matter having made a finding that the defendant and the 2<sup>nd</sup> plaintiff were co-purchasers of the suit property and the 1<sup>st</sup> plaintiff was registered as the sole owner of the property, I am fortified by the above Court of Appeal decisions in holding that the 1<sup>st</sup> plaintiff was so registered as a constructive trustee of the defendant for the portion that the defendant was entitled to as a co-purchaser. The defendant had initially stated he wanted to be given 5 acres but as he stated the land turned out to be bigger than they thought he adjusted his portion to 7 acres and that was the portion he was presently occupying.

61. The defendant in my view would only have been entitled to a portion of the land commensurate with the contribution that he made of Kshs.340,000/= and the plaintiffs would be entitled to a portion commensurate with their contribution of Kshs3,160,000/= Simple arithmetic shows that the land which is 18.82 hectares (approximately 46 acres). At the purchase price of Kshs.3.4 million, each acre went for approximately Kshs.73,913/=. The sum of Kshs340,000/= that the defendant contributed would therefore have entitled him to approximately 4.6 acres.

62. The defendant lays claim to a portion of 7 acres but as I have explained there is no rational basis for the claim of 7 acres. The defendant would only be entitled to approximately 4.6 acres which would be the equivalent of the contribution he made towards the purchase.

63. The net result after a careful evaluation and analysis of the evidence is that I find and hold that the plaintiffs have failed to prove their case on a balance of probabilities. The defendant however has proved his counter claim on a balance of probabilities and is entitled to judgment. I accordingly make the following final orders;-

- 1. That the plaintiffs case is dismissed.**
- 2. That the 1<sup>st</sup> plaintiff holds a portion of 4.6 acres (approx.) in LR No.14242/2 in trust for the defendant .**
- 3. The 1<sup>st</sup> plaintiff is ordered to subdivide LR No.14242/2 and to transfer a portion measuring 4.6 acres (approximately) therefrom to the 1<sup>st</sup> defendant within 90 days of this judgment.**
- 4. Each party to bear their own costs of the suit and the counterclaim.**

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF OCTOBER 2021.**

**J M MUTUNGI**

**JUDGE**