Cherutich v Kebut (Environment and Land Appeal 10 of 2023)
[2025] KEELC 179 (KLR) (22 January 2025) (Judgment)

Neutral citation: [2025] KEELC 179 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ENVIRONMENT AND LAND APPEAL 10 OF 2023

L WAITHAKA, J

JANUARY 22, 2025

BETWEEN

WILLIAM KIPCHIRCHIR CHERUTICH ..... APPELLANT

AND

JOSEPH KIPROTICH KEBUT ..... RESPONDENT

(Hon. R. Koech of Eldama Ravine SPM in ELC 11 of 2020 delivered on 30 th November, 2023)

JUDGMENT

Introduction

1. By a plaint dated 30th June 2023, the plaintiff (now appellant), instituted a suit in the lower court to wit Eldama Ravine RMC ELC Case No.11 of 2020 against defendant, Joseph Kebut (now respondent) seeking judgment against the defendant for:-

    a. An order of permanent injunction to restrain the defendant by himself, his servants from entering, disposing, transferring, leasing out, excavating, charging, erecting structures, building thereon or committing acts of waste on the parcel of land known as Lembus/Kisokon/681 (suit property) or any portion thereof and/or from having any dealings whatsoever with the suit property;

    b. An order that the suit property being agricultural land and the provisions of section 6 of the *Land Control Act* having not been fulfilled that is the consent of the Land Control Board not having been obtained then the entire transaction was void for all purposes and of no legal effect;

    c. A declaration that arising from order (b) above, the acts of the defendant on the suit property or any portion thereof is an act of trespass to the suit property and a trespasser has no protection in law;

d. An order be issued ordering the defendant by himself, his servants and/or agents to vacate the suit property within 30 days of the order failing which the defendant, his agents and/or servants be evicted by court bailiffs from the suit property;

e. The OCS Mogotio Police Station do supervise the enforcement of the order and ensure that peace and order prevails on the suit property;

f. An order of mesne profits in favour of the plaintiff and against the defendant for sum as shall be assessed by the court;

g. Costs of the suit together with interest at court rates;

h. Any other or further relief that the court may deem fit and necessary to grant.

2. The plaintiff/appellant's suit was premised on the grounds that he is the registered proprietor of the suit property and that he inherited the suit property from his father.

3. The plaintiff/appellant pleaded/acknowledged that between the years 2000 and 2003, the defendant and he entered into a sale agreement for sale of two acres of land to be hived off the suit property; that the agreed purchase price for the two acres was Kshs.74,000/ and that the defendant paid him Kshs. 60,000/- and left a balance of Kshs.14,000/- which he was to pay later.

4. The plaintiff/appellant further pleaded that the defendant declined to pay the balance of the purchase price claiming that he would use it to pay a surveyor for subdivision of the suit property.

5. It was the plaintiff/appellant's case that after it became clear that the defendant had no intention of paying the balance of the purchase price he, the plaintiff/appellant, terminated the contract and offered to refund the purchase price to the defendant/respondent.

6. Contending that there was no valid agreement between him and the defendant, on account of lack of the consent of the Land Control Board and because the agreement was terminated, the plaintiff pleaded that the defendant has no right in the suit property. The plaintiff termed the defendant's possession of a portion of the suit property trespass to land.

7. Lamenting that attempts to remove the defendant from the suit property were futile, the plaintiff filed a suit in the lower court seeking the reliefs listed herein above.

8. The defendant filed a statement of defence and counterclaim in which he denied the allegations levelled against him and contended that the agreed purchase price for the portion of the suit property he bought (two acres) from the plaintiff was 60,000/- and not Kshs.74,000/- as claimed by the plaintiff; that upon paying the agreed purchase price of Kshs.60,000/-, he took possession of the portion he bought, effected development thereon and that he had enjoyed peaceful occupation of the portion he bought for more than 20 years.

9. The defendant acknowledged that no consent of the Land Control Board was obtained in respect of the transaction he entered into with the plaintiff concerning the suit property but contended that he had acquired rights in the suit property on account of having been in adverse possession thereof.

10. By way of counterclaim, the defendant sought judgment against the plaintiff for:-

a. A declaration that he, the defendant, is the lawful owner of the two (2) acres of land comprised in the suit property through purchase and by dint of the law of adverse possession;

b. A declaration that he, the defendant, has acquired rights of ownership to the two (2) acres comprised in the suit property by dint of adverse possession;

c. An order for subdivision of the suit property and an order directing the plaintiff to sign transfer documents in default the executive officer of the court to sign the transfer documents in his favour;

d. In the alternative an order directing the plaintiff in the main suit to pay him (the defendant) the market value of the two acres together with all the developments at the current market value as determined by a qualified valuer;

e. The costs of the suit;

f. Any other relief the court may deem fit to grant.

Evidence

11. When the case came up for hearing, the appellant who testified as P.W 1, relied on his witness statement recorded on 30th June 2020 after it was adopted as his evidence in chief. He informed the court that he sold 2 acres to the respondent for Kshs. 74,000/. He was given advance payment of Kshs. 60,000/-.

12. The plaintiff claimed that they did not reduce their agreement into writing (a position he resiled from during cross examination). He was paid the 60,000/- between 2000 and 2002 but was not paid the balance of the purchase price amounting to Kshs. 14,000/-. When he demanded the balance of the purchase price, the respondent told him he was going to use it for land subdivision. He did not agree with the respondent's suggestion. Because of their disagreement, they did not go to the land control board. As a result, no transfer was effected. Three months after the defendant failed to pay the balance of the purchase price, he told the respondent to vacate the suit property but he refused to vacate.

13. He informed the court that the land has neither been subdivided nor surveyed.

14. He further informed the court that the defendant had lived in the suit property for more than 20 years and had constructed structures thereon without paying the balance of the purchase price. He did not tell the defendant to vacate the suit property before he commenced construction thereon. He produced the documents contained in his list of documents namely; his Identity card, copy of the caution lodged restraining dealings with the suit property; copy of the title deed for the suit property and demand letter before action as Pexbt 1 to 4 respectively.

15. In cross examination, he informed the court that he sold two acres of land to the defendant, Joseph Kebut. He sold the land voluntarily. Their agreement was recorded by the area Chief, Chemurgei. Both the defendant and he signed the agreement. He was paid Kshs.60,000/- in the presence of the chief and his brother in law, Kipkurui Sambu. It is his mother in law who brought the purchaser and she was present when he was paid.

16. The plaintiff informed the court that he had no agreement showing he was to be paid Kshs.74,000/-. The defendant took possession and started construction in 2000. He did not write any demand notice for the balance. His brother in law knows that he is owed Kshs. 14,000/-. He could not tell whether he subdivided the suit property into two portions.

17. He could not agree that the land be subdivided and the defendant be given the two acres. He admitted that he had not refunded the 60,000/- he received to the defendant. He claimed that the defendant refused the money. He acknowledged that the defendant buried a relative in the suit property but stated he did it without his consent.

18. In re-examination, the plaintiff informed the court that he filed the suit over parcel number 681, which parcel is the one being claimed by the defendant. He is willing to refund the defendant's money.

19. They went to the chief and signed an agreement. He was not given a copy of the agreement. He sold an acre of the suit property to the defendant for kshs. 37,000/-. He sold two acres to the defendant but was not paid the entire amount. They did not go to the land control board.

20. The plaintiff's wife, Priscilla Chirchir, who testified as P.W.2 relied on her witness statement dated 30th June 2020 after it was adopted in evidence. She acknowledged that her husband, the plaintiff, sold the suit property to the defendant but stated that neither her nor her children were informed about the transaction. She objected to the sale because the land is very small and inadequate for their children. Because of her objection, the defendant and her husband differed.

21. In cross examination, she told the court that she does not know why her husband sold the land; that it is the defendant and one of her sons who live in the suit property; that both the defendant and her son have constructed houses in the suit property. She further informed the court that the defendant had lived in the suit property for more than 21 years; that the defendant constructed a house when he entered the farm and was farming on the land.

22. In re-examination, she asserted that she was not informed of the sale agreement. She complained to the area chief but could not remember when. The defendant had lived in the suit property for a long period of time.

23. Upon considering the cases of the respective parties, the learned trial magistrate inter alia held/stated:-

> "...Both parties do not dispute that the defendant has been occupying two (2) acres that he bought for over 21 years and that he has extensively developed the land. I do find that the plaintiff sold two (2) acres to the defendant which he paid for in full on 8/8/2000. Instead of fulfilling his part of the sale agreement by executing a transfer in favour of the defendant, the plaintiff has embarked on an ill-advised mission to disinherit the defendant purpotedly for none payment of Kshs.14,000/- which did not feature in the sale agreement of 8/8/2000.
>
> I do not find any merit in the plaintiff's suit which I hereby dismiss with costs to the defendant. I do find that the defendant has proved his counterclaim on a balance of probabilities and I do allow the counterclaim in terms of prayer (a), (b), (c), (d) and (e). To give effect to prayer (c) I do direct the plaintiff who is the defendant in the counterclaim to put in place measures to have Lembus/Kisokon/681 subdivided and two (2) acres transferred to the defendant who is the plaintiff in the counterclaim within sixty days from the date of the judgment".

24. Aggrieved by the decision of the trial magistrate, the plaintiff appealed to this court on the grounds that the learned trial magistrate erred by:-

    a. Allowing the respondent's counterclaim to land when the respondent did not furnish the court with the evidence of payment of purchase price hence his claim to land was not protected under the doctrine of constructive trust and proprietary estoppel;

    b. Entering judgment allowing the respondent's counterclaim for 2 acres of LR No. Lembus/Kisokon/681 on the basis of purchase and adverse possession when the respondent did not annex to his counterclaim a certified extract of the title to the parcel of land out of which the suit property was claimed and without which no order on adverse possession under section 38(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya could lawfully be made;

c. Failing to find that adverse possession and possession with sale cannot co-exist and therefore no lawful order could have been made in terms of prayer (a), (b), (c), (d) and (e) of the respondent's counterclaim dated 23rd July 2020;

d. Allowing the respondent's counterclaim to land when the agreement relied on was ambiguous and did not specify land reference that was to be bought or was allegedly bought yet it is trite law that courts of law do not and cannot re-write a contract for the parties. The entire judgment amounted to re-writing of the "agreement" for the parties;

e. Gravely misdirecting himself in holding that the appellant had not proved his case on the facts and evidence tendered to the court when such proof on a balance of probability had been reached and in the result the judgment rendered on 30th November 2023 was perverse and wholly wrong in law;

f. Failing to consider the appellant's evidence and submissions by failing to have a full and clear circumspection of the entire matter and had circumspection been exercised, he would perhaps have rendered a different judgment.

25. Pursuant to directions given on 16th September 2024, the appeal was disposed off by way of written submissions.

Submissions

Appellant's submissions

26. In his submissions filed on 16th November 2024, the appellant has identified five issues for the court's determination. These are:-

a. Whether adverse possession and permission/possession with sale can co-exist as adjudged by the trial court in the judgment rendered on 30th November 2023?

b. Whether the respondent's claim to land is protected under the Doctrine of Constructive trust and Proprietary Estoppel;

c. Whether the sale agreement dated 8th August 2000 is valid?

d. Whether the respondent supplied to court a certified extract of title annexed to his counterclaim to the parcel of land out of which the suit propety was claimed from?

e. Whether the respondent's counterclaim to land reached the balance of probability in order to succeed?

27. On Whether adverse possession and permission /possession with sale can co-exist as adjudged by the trial court in the judgment rendered on 30th November 2023, the appellant submits that occupation by permission, arising out of sale and/or purchase cannot form the basis of a claim for adverse possession. Based on the decision in the case of Sisto Wambugu v. Kamau Njuguna (1983)e KLR and Wambo v. Njuguna (1983) KLR 172 the appellant faults the learned trial magistrate for granting the respondent prayers grounded on purchase and adverse possession at the same time. The appellant terms the entire judgment wrong and a misdirection.

28. The appellant further submits that the respondent's claim of a portion of the suit property on account of having been in adverse possession thereof ought not to have succeeded because his occupation of the suit property was on account of a void transaction hence illegal. The appellant further argued that the counterclaim under which the claim for adverse possession was hinged, was not made by way of

originating summons and supported by an affidavit to which a certified extract of the title of the land in question had been annexed as required by law, Order 37 rule 7(1) and (2) of the Civil Procedure Rules. In support of the argument, that the suit for adverse possession ought to have been instituted by way of originating summons.

29. The appellant made reference to the cases of Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshirein & another (2015)e KLR and Golf Range Limited v. Registered Trustees of National Olympics Committee & 3 others (2018)e KLR.

30. Terming the respondent's counterclaim based on adverse possession totally defective for failure to comply with the provisions of Order 37 Rule 1 of the Civil Procedure Rules, the appellant maintains that the counterclaim ought to have failed for the above cited reasons.

31. On whether the respondent's claim to land is protected under the doctrine of constructive trust and proprietary estoppel, the appellant submits that it is not because;

    i. The evidence adduced in the case shows that it is not the appellant who put the respondent in the suit property;

    ii) The respondent did not pay the balance of the purchase price;

    iii) The suit property was not surveyed and the respondent put in a specific portion thereof;

    iv) There was no common intention between the parties to the agreement.

    v) The parties did not act on the agreement and alter their respective positions.

32. According to the appellant, the decisions in the cases of Kiplagat Kotut v Rose Kipngok (2019)e KLR; Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri (2014)e KLR and Willy Kimutai Kitilit v. Michael Kibet Civil Appeal No 51 of 2015 are distinguishable and inapplicable in the circumstances of the instance case.

33. As to whether the sale agreement dated the 8th August 2000 is valid, the appellant submits that the agreement was not valid of the following reasons:-

    a. The land in question is not explicitly mentioned in the agreement hence lacking substratum.

    b. Narration of the purchase price is vague;

    c. The credibility of the sale agreement is doubtful because it has erasures and talks about advance cash payment of Kshs. 60,000/- with no balance.

34. Maintaining that the respondent did not make up a case for being granted the orders he was granted by the trial magistrate, the appellant urges this court to set aside the judgment of the lower court in its entirety and substitute it with an order allowing his claim dated 30th June 2020. The appellant also urges the court to award him costs of the appeal.

The respondent's submissions

35. In his submissions filed on 9th December 2024, the respondent has listed the 6 grounds of appeal taken up by the appellant.

36. With regard to ground 1 of the appeal, it is submitted that the appellant, through his evidence in chief and through cross examination, unequivocably admitted having been paid by the respondent a sum of Kshs. 60,000/- as purchase price for the two acres he sold to the respondent; That the respondent

tendered in evidence a sale agreement which he signed with the appellant for purchase of the two acres of land.

37. The respondent points out that in the sale agreement, the price per acre was stated as Kshs. 30,000/- and the total purchase price was indicated as Kshs. 60,000/-. The respondent submits that by signing the sale agreement, the appellant acknowledged receipt of Kshs. 60,000/- in cash. The respondent further points out that he called his witnesses Kipkurui Arap Sambu (D.W.2) a brother-in-law to the appellant and the chief of the area Kangogo (D.W.3) who helped the parties in writing the sale agreement. They confirmed that the appellant was paid the full purchase price in the sum of Kshs. 60,000/- upon signing the sale agreement.

38. Arising from the foregoing, the respondent submits that the appellant's contention that the purchase price for the two acres that he sold to him was Kshs. 74,000/- is untenable and not truthful.

39. Terming the appellant's claim that the purchase price was Kshs. 74,000/- when he did not produce any sale agreement showing that the agreement he signed was for that amount a violation of the rule on parol evidence, the respondent submits that there is ample evidence that the appellant received full purchase price for the two acres, gave possession of the two acres to him and that he had been in possession of the two acres for a period of over 20 years.

40. On the basis of the foregoing facts, the respondent submits that the appellant has no proprietary rights to the two acres and that the appellant is holding the two acres comprised in the suit property in trust for him.

41. With regard to ground 2 of the appeal, the respondent submits that he was not under any legal obligation to comply with the requirements of Order 37 Rule 1 of the Civil Procedure Rules regarding the mode of institution of a suit based on adverse possession because his claim for adverse possession arose from a suit instituted by the appellant for his eviction from the suit property. Based on the decisions in the cases of Chepkwony vs. *Malenya (Civil Appeal 90 of 2018)*(2021)KECA 47 (KLR); Kiptum Kosgei vs. Samson Kiplagat Mursoy & another (2022) e KLR, the respondent terms the ground moot.

42. With regard to ground 3 of the appeal, the respondent acknowledges that the consent of the Land Control Board was required in respect of the transaction he entered into with the appellant and that it was not obtained rendering the transaction void. The foregoing notwithstanding, he submits that the appellant's contention that adverse possession and possession with permission and for possession with sale cannot co-exist is not well founded.

43. Regarding ground 4, the respondent submits that from the plaint, there is no dispute as to the identity of the suit property. The identity of the two acres sold is also not in contestation as per the evidence tendered before the trial court.

44. On grounds 5 and 6, the respondent points out that the appellant has not addressed the two grounds in his submissions and submits that he has a right to presume that the appellant abandoned them. Nevertheless, regarding those grounds, the respondent submits that the appellant has not demonstrated how the learned magistrate's finding of fact was based on no evidence or on a misapprehension of fact or the decision was plainly wrong to warrant inteference by this court.

Analysis and determination

45. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court

unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see Selle & another vs. Associated Motor Boat Co. Ltd (1968)E.A 123 and Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR and Kiruga vs. Kiruga & Another (1988)KLR 348.

46. From the grounds of appeal taken up by the appellant and the submissions filed by the respective parties, four broad issues arise for the court's determination. These are:-

    1. Whether in the circumstances of the case hereto, the respondent was required to satisfy the requirements of Order 37 Rule 1 of the Civil Procedure Rules regarding institution of a suit based on adverse possession;

    2. Departure from pleadings

    3. Whether the learned trial magistrate erred by dismissing the appellant suit and allowing the respondent's counterclaim.

    4. What order should the court make?

47. On whether in the circumstances of the case hereto, the respondent was required to satisfy the requirements of Order 37 Rule 1 of the Civil Procedure Rules regarding institution of a suit based on adverse possession, it is noteworthy that the respondent's claim for adverse possession is raised in his response to the appellants suit, where the appellant inter alia sought eviction orders against him.

48. In the case of Chepkwony v. Malenya supra, the Court of Appeal, in considering the issue as to whether a claim based on adverse possession must be initiated only by way of originating summons stated/held:-

> " In departing from the above position, the court in Gulam Miriam Noordin (supra) expressed itself as follows: "that position is no longer tenable where a party like respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or defence and counterclaim..."

49. A similar holding was made in the case of Kiptum Kosgei vs. Samson Kiplagat Mursoy & Another supra where the court held:-

> " ...The courts have since this decision, held that a claim by adverse possession can be brought by a plaint..."

50. Arising from the foregoing, I find and hold that in the circumstances of this case, where the respondent was responding to the appellant's suit seeking to evict him from the suit property, he was not under any legal obligation to comply with the provisions of order 37 Rule 7 of the Civil Procedure Rules regarding his claim that he had acquired proprietary rights to the suit property on account of having been in adverse possession of the suit property. In any event, from the pleadings and evidence adduced in the suit hereto, there is no dispute as to what the subject matter of the suit is or was.

51. On departure of pleadings, a review of the appellant's pleadings (plaint), reveals that the plaintiff had in his pleadings either expressly or by implication raised the issues raised in ground 4 of his memorandum of appeal that is to say; "agreement relied on was ambiguous and did not specify land reference that was to be bought or was allegedly bought yet it is trite law that courts of law do not and cannot re-write a contract for the parties. The entire judgment amounted to re-writing of the "agreement" for the parties".

52. That being the case, the ground or assertion amounts to a departure from the appellant's pleadings. As such, it cannot lawfully be argued as a ground against the judgment of the lower. This is so because parties are bound by their pleadings. In any event, the plaintiff, in his pleadings (plaint) acknowledged that he had entered into the impugned contract with the respondent. His complaint was that he was not paid the balance of the purchase price, being Kshs. 14,000/-. He, however, failed to prove that the agreed purchase price was Kshs. 74,000/- and that he was paid Kshs. 60,000/- leaving a balance of Kshs.14,000/-. The respondent on the other hand, through oral and documentary evidence proved that the agreed purchase price was Kshs.60,000/- and not Kshs.74,000/-.

53. As to whether failure to obtain the consent of the land control board rendered the transaction entered between the appellant invalid, null and void for all purposes, I adopt the decision of the Court of Appeal in the case of Aliaza *v Saul (Civil Appeal 134 of 2017)* (2022) KECA 583 (KLR) 24 June 2022 (Judgment), where it was inter alia held/stated:-

> "I have considered the judgment and record of the trial court and the submissions of the parties. I note that the essential facts leading to the present appeal are not in dispute. The appellant and the respondent entered into agreements for sale of 1.3 acres of land out of Kakamega/Mabusi/416 by the respondent to the appellant, and the appellant paid the full purchase price. There is also no dispute that the appellant was given possession of the suit land. Indeed, the respondent stated in his evidence in chief and confirmed in cross-examination that he had put the appellant in possession. Further, the fact that the respondent had asked for possession of the suit land and an order had been made for eviction of the appellant puts the issue beyond dispute. Nonetheless, the trial court found that the sale transaction between the appellant and the respondent in respect of the suit land was void for lack of Land Control Board consent and issued orders for eviction of the appellant and refund to him of the purchase price.
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> 20. The core issue before us, then, is whether the trial court was correct in finding that the transaction between the parties was void for lack of consent from the Land Control Board. Section 6 of the *Land Control Act* provides that:Transactions affecting agricultural land(1)Each of the following transactions that is to say—(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)...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
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> 21. Under section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to section 22 of the Act. An application for consent is made under section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement. The proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.
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> 22. Section 9 (2) stipulates that where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void:(a)on the expiry of the time limited for appeal under section 11; or(b)where an appeal is entered under section 11 and dismissed, on the

expiry of the time limited for appeal under section 13; or(c)where a further appeal is entered under section 13 and dismissed, on that dismissal.

23. This Court has, in a number of cases, considered the effect of a failure to obtain Land Control Board consent on a transaction. There has, however, been no consensus on the issue, and in a sense, the question is still unsettled. In Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri (2014) eKLR the Court of Appeal sitting in Nyeri held, inter alia, that the possession of the land by purchasers was an overriding interest in favour of the purchasers. It stated further at paragraph 18 et seq that:18.The other critical issue for our consideration is the lack of consent of the Land Control Board. The trial court held that the suit property being agricultural land was subject to the *Land Control Act*, Chapter 302, Laws of Kenya; Section 6 (1) of the said *Land Control Act* required the Land Control Board consent to be obtained in respect of the sale transactions; the failure of such consent made the said agreements void and unenforceable against the respondent. It is our considered view that the Honourable Judge erred in failing to appreciate the evidence given by the respondent as to how he intended to complete the sale transaction. The respondent testified that he did not obtain the Land Control Board consent for the sale transactions because he preferred obtaining the consent once he had sold all the 240 plots.19.Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots."

24. The Court went on to cite the decision in Mwangi & another v Mwangi (1986) KLR 328 in which it had been held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under section 126 (1) of the Registered *Land Act* (now repealed) is merely permissive and not mandatory.

25. The Court also cited the case of Mutsonga v Nyati (1984) KLR 425 and Kanyi v Muthiora (1984) KLR 712 in which it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of section 163 of the Registered *Land Act*, then in force, which provided for the application of the common law of England as modified by equity.

26. At paragraph 20 and 25 of its decision, the Court stated as follows:20.In Yaxley v 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.25.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 the *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 v 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...."

27. The Court of Appeal sitting in Nairobi took a totally different approach to the question in David Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR. After a detailed analysis of the provisions of the *Land Control Act* and previous decisions on the failure to obtain consent from the Board, it differed with the Court in Macharia Mwangi Maina for several reasons, the main one being on the application of equitable principles to the *Land Control Act*. The Court held 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 doctrine of equity in the Act. This is one simple message of Section 3 of the *Judicature Act*. The said Court allowed the appeal from the decision of the High Court which had held that in the situation before the court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as Section 6 of the *Land Control Act*.

28. In Willy Kimutai Kitilit v Michael Kibet (supra) the Court of Appeal sitting in Eldoret, in agreeing with the reasoning in Macharia Mwangi Maina stated that:"(20) 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.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.A court's decision being final and binding subject to appeal, it would be illogical to hold that such a decision of a court requires the consent of the Land Control Board before it becomes final and valid."

29. In William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR this Court, in upholding the decision of the trial court, stated that:"We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*. We therefore agree with the

learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent".

30. Finally, in Kiplagat Kotut v Rose Jebor Kipngok [2019] eKLR this Court cited with approval the holdings in Macharia Mwangi Maina and William Kipsoi Sigei v Kipkoech Arusei & another and held that the trial judge had erred in failing to apply the concept of constructive trust and the doctrine of equitable estoppel in the matter before it. In addressing its mind to the purposes of the *Land Control Act*, the Court observed as follows:24.We hasten to state that the *Land Control Act*... was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another."

31. I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v Rose Jebor Kipngok best capture the spirit of the *Land Control Act* when interpreted through the prism of *the Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of *the Constitution*. I should observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the Ole Tukai decision.

32. As was recognized by this Court in the Macharia Mwangi Maina case, the *Land Control Act* is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the Ole Tukai decision where this Court observed as follows:"What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase

price; and whether subdivision of the land in question would reduce the productivity of the land." (Emphasis added).

33. However, a distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where a seller fails or refuses to apply for such consent. The provisions of the *Land Control Act* cannot continue to be read as though the circumstances prevailing at its enactment are still in place.

34. There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, Form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been 'refused' within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act.

35. In Gabriel Makokha Wamukota v Sylvester Nyongesa Donati [1987] eKLR, an obviously unhappy Apaloo JA captured the injustice visited on purchasers in interpreting situations such as presently before us as voiding the contract of sale of land on the basis that Land Control Board consent has not been obtained. In that case, the original owner of the land, one Ismael Machio, had sold it to the respondent, then he reneged on the sale on the basis that Land Control Board consent had not been obtained. He then sold it to the appellant and, together, they applied and obtained consent, and the land was transferred to the appellant. The High Court ruled in favour of the initial purchaser, and the appellant, the subsequent purchaser in whose name the land had been registered appealed. In his decision, Apaloo JA observed as follows:"In a contest of title between Machio and the respondent, if the latter sought to rely on the *Land Control Act* to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of parliament as a vehicle for fraud. If that argument could properly be made against Machio, it can, in like manner be made against the appellant, who as the judge found colluded with Machio to purchase the land."

36. While acknowledging that he was bound by the decision of the East African Court of Appeal in Rioki Estate Co (1970) Ltd v K Njoroge [1977] KLR 146, Apaloo JA succinctly summarized the scenario resulting from the said decision as being the following:""A" sold agricultural land to "B". The former was uncooperative in getting "B" to obtain the consent of the Land Control Board. "A" however obtained full payment of the purchase price and duly put "B" into possession. On the faith of this sale, "B" spent a large sum of money in developing and improving the land. Ten years afterwards, "A", motivated by the prospect of obtaining higher price for the land, sells the self-same land to

"C", then with A's active co-operation, hurriedly obtained the consent of the Land Control Board, (it is possible to obtain this in one day) and thereafter registered his title. "C" then proceeds to seek B's eviction from the land. Without the aid of section 6(2) of the Act, "C" cannot obtain title to the land superior to "B"s". Yet as the law stands at present, "C" will be held entitled to evict "B". Indeed "A" would be entitled to say to "B" "yes, I accept that I sold the land to you, obtained full payment of the consideration money and put you in possession for 10 years and you may well have developed the land. But I say that an Act of parliament entitled me to resell to "C" and you must be content with the return of the purchase price you paid me ten years ago."

37. While the Learned Judge of Appeal felt constrained to agree with the decision of his brother judges upholding the appeal and setting aside the decision of the High Court in favour of the initial purchaser, the respondent in the appeal, he nonetheless felt that the decision, based on the provisions of the Act and the interpretation in Rioki Estate Co. Ltd, did not accord with equity, fairness or justice:"To think such a thing could be possible offends against one's idea of propriety and fairness. I believe that sound reasons of public policy motivated the parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be "void for all purposes". Strong words indeed! But one may be permitted to doubt whether the Act as judicially construed and applied, meets the ends of justice or is a true reflection of the legislative will."

38. The views expressed by Apaloo JA thirty-five years ago encapsulate, in my view, the proper interpretation of the provisions of the *Land Control Act*, its harshness ameliorated by considerations of equity and fairness. Unhappily for the Learned Judge of Appeal then, statute and binding judicial precedent hobbled his ability to deal fairly and render justice to a party who had clearly been taken advantage of by the seller, using legislation as his shield in an unfair situation. Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with *the Constitution* null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to *the Constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser.

39. In the present case, the respondent readily conceded that he sold the suit land to the appellant, and that he received the full purchase price for the land. He further conceded that he placed the appellant in possession of the suit land, a fact that is confirmed by the evidence before the trial court and the orders for possession that he sought. He further conceded that the appellant had carried out developments on the suit land. Even when the issue of the expansion of the access road to the suit land parcels came up before the Land Disputes Tribunal and a decision was made in favour of the appellant, the respondent complied with the orders and brought a surveyor who rectified the access road.

40. In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of Macharia Mwangi Maina, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.

41. Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust. Moreover, in his written submissions dated 30th August 2016, the appellant raised the issue of an implied or constructive trust having arisen in his favour. The respondent did not address this issue in his submissions dated 26th September 2016. I take the view, on the authority of the decisions in Odd Jobs v Mubia [1970] EA 476 and, among other decisions, Ann Wairimu Wanjohi v James Wambiru Mukabi [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court. The trial court did in fact address itself to the issue in its decision in which it stated as follows:10.The defendant's counsel submitted that the plaintiff put the defendant in possession of the purchased portion and that this court should find that there was an implied or constructive trust created. In this respect, counsel cited a Court of Appeal decision in Nyeri Civil Appeal No. 26 and 27 of 2011 between Macharia Mwangi Maina & 87 Others & Davidson Mwangi Kagiri where the issue of consent of the land control board arose and the Court of Appeal Judges held that the existed constructive or implied trust in that the respondent had put the appellants in possession even though no consent of the land control board had been obtained.11.Counsel also quoted from a number of decisions which dealt with the issue of equity and estoppel some of which were cited in the Macharia mwangi Maina Case (supra). I sympathize with the predicament of the defendant herein. 1 have also had occasion to go with the decision of the Machria Mwangi Maina case (supra) in other cases depending on the circumstances of each ease but in the present case, the defendant did not adduce credible evidence that would have led me to go with the Court of Appeal decision in the above case. This is because, the defendant had testified that he bought his 1.3 acres out of LR, No Kakamega/Mabusi/416. The pleadings in this ease relate to L.R. No. Kamega/Mabusi /416.12.The defendant premised his counter-claim on L. R. No.Kairamega/Mabusi/416. It is therefore not clear as to whether the buildings are lying on the land in contention or on the land which he had purchased earlier on and which is not in dispute. The valuation report was based on a portion of LR. No Kakamega / Mabusi/416 measuring 1.3 acres. The two agreement did not refer to the plot number from where the defendant bought his contested 1.3 acres and as such

it will be difficult to make a finding on where the improvements are based as the defendant's evidence is contradictory."

42. I note that the trial court, in declining to find that a constructive trust had been created in favour of the appellant, did so on the basis that it was not clear which parcel of land was in contention. He further found that he could not make an order for payment of special damages as it was not clear on which parcel of land the developments in respect of which the appellant was claiming special damages were on. I agree with his findings on this latter question.

43. However, the evidence on record showed that there was no dispute that the appellant had purchased land from the respondent, or the identity of the suit property. On the evidence before it, the trial court ought to have found, in line with the decision in Macharia Mwangi Maina, that the respondent held the suit land in trust for the appellant. That it did not do so was an error of law and fact.

44. I am accordingly satisfied that the present appeal has merit and I would allow it. I would set aside the orders of the trial court and substitute the said orders with an order for specific performance of the agreements for sale of the suit land between the appellant and the respondent dated 16th September 2002 and 4th October 2004 as prayed in the appellant's counterclaim. I would further make an order for transfer of the suit land to the appellant. Finally, I would grant the costs of the suit in this Court and in the trial court to the appellant " Per Mumbi JA.

54. In agreeing with the decision by Mumbi JA, Kiage JA stated;

" I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.

47. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.

48. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the appellant should succeed."

55. In applying the principles expoused in that case in the circumstances of this case where the appellant voluntarily entered into an agreement for sale of the suit property, received the entire purchase price agreed on and voluntarily handed over possession of the suit property to the respondent, he cannot whether on equitable grounds or on the principle of unjust entitlement be heard to claim that he is entitled to avoid the contract on the mere ground that the consent of the Land Control Board was not sought and obtained by the parties to the sale agreement within the time stipulated in law for obtaining the contract. In the circumstances of this case, the plaintiff/appellant would only be able to avoid the sale agreement if and if only the consent of the land control board was sought and refused as contemplated under section 9(2) of the *Land Control Act*, Cap 302 Laws of Kenya.

56. In view of the foregoing and the facts of the instant case/appeal being similar to those in the appeal cited herein above, Aliaza v Saul supra, the appellant could not sustain his pleaded case that the contract he entered into with the respondent became void/illegal for failure to obtain the consent of the Land Control Board within the time stipulated by law.

57. The alleged gaps or inconsistencies in the sale agreement signed and executed by the parties can also not avail the appellant the reliefs sought because firstly, it was not in dispute that the suit property was the subject matter of the sale agreement. Secondly, the appellant and his wife, P.W.2 admitted and/or acknowledged that upon entering into the impugned sale agreement, the respondent took possession of the portion of the suit property he purchased, effected massive development on it and that he had enjoyed peaceful possession of the property for over 20 years before the appellant instituted the suit hereto.

58. In view of the foregoing, I do find the appeal to be lacking in merits and I dismiss it with costs to the respondent.

59. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 22ND DAY OF JANUARY, 2025.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Martin holding brief for Mr. Arusei for the appellant

N/A for the respondents

Court Assistant: Ian