



REPUBLIC OF KENYA



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**Githinji v Mungai (Environment and Land Appeal E017 of 2023)
[2025] KEELC 4711 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

MN GICHERU, J

JUNE 23, 2025

BETWEEN

FRANCIS MAINA GITHINJI APPELLANT

AND

WILFRED BENJAMIN KAMAU MUNGAI RESPONDENT

*(Being an Appeal from the Judgment of the Honourable E.Muriuki Nyagah (SPM)
delivered on 4th May 2023, in Murang'a CMC E.L.C. Case No. 492 of 2014)*

JUDGMENT

1. The Appellant seeks the following orders against the Respondent.
 - a. This appeal be allowed and the judgment/decreed and any consequential orders of the lower court be set aside and they be substituted with an order dismissing the Plaintiff's suit against the Appellant.
 - b. The Appellant be awarded costs against the Respondent both in this Court and in the court below.
 - c. Any other or further relief this court deems fit to grant .

This is as per the memorandum of appeal dated 19-5-2023.

2. The Appellant filed four grounds for seeking to set aside the judgment and decree of the learned trial magistrate in Murang'a CMCC ELC No. 492/2014. The grounds were as follows.

The learned trial magistrate gravely erred in law and in fact/misdirected himself/erred by-

- i. failing to appreciate that as per the sale agreement dated 27-1-2009, the subject matter, land parcel number Loc.20/Mirira/1749 was agricultural land and being agricultural land, then the



consent of the Land Control Board was necessary and both parties were in agreement that no consent was obtained to date thereby arriving at the wrong decision,

- ii. failing to appreciate that Kiharu Land Control Board declined to grant the letter of consent due to objection raised by the Appellant's wife and other family members and it was evident that there was no consent obtained and failure to do so rendered the sale agreement null and void for all purposes thereby arriving at an unjust finding,
 - iii. failing to appreciate that at the execution of the said agreement the Respondent paid a sum of Kshs. 200,000/= leaving a balance of Kshs. 150,000/= which was to be paid on transfer upon acquiring the consent of the Land Control Board and signing the transfer form thereby arriving at a wrong decision and
 - iv. failing to appreciate that indeed the Respondent herein had not paid the full purchase price, a fact acknowledged by the Respondent by stating that he had a balance of Kshs. 150,000/= and therefore not entitled to transfer of the suit land to him by the Appellant but refund of the part purchase price already paid.
3. The facts of the case according to the Respondent are as follows.
- On 27-1-2009 he and the Appellant entered into a sale agreement for the sale of L.R. No. Loc. 20/Mirira/1749 measuring 1.21 hectares or 3 acres. The purchase price was Kshs. 350,000/=. The Respondent paid Kshs. 200,000/= to the Appellant. The balance of Kshs. 150,000/= was to be paid after the Appellant obtained the letter of consent from the Land Control Board. The Respondent took possession of the land. Eventually, the Appellant did not obtain the consent of the Land Control Board. This is what prompted the Respondent to file the lower court suit seeking the transfer of the suit land or a refund of the purchase price at the current market price for the land.
4. The facts of the case according to the Appellant are as follows.
- Firstly, he admits that there was indeed a sale agreement between him and the Respondent, and the Respondent paid Kshs. 200,000/= while the balance of Kshs. 150,000/= was to be paid upon the consent of the Land Control Board being obtained. Secondly, contrary to the agreement, the Respondent entered the land, cut down the mature trees, built structures and generally degraded the environment. Thirdly, no consent was obtained within six months and the Appellant sought to be compensated for the damage to the land and for an eviction of the Respondent from the suit land as per his defence and counterclaim dated 14-2-2025.
5. In his judgment dated 4-5-2023, the learned trial magistrate dismissed the Appellant's counter claim and entered judgment in favour of the Respondent in the following terms.
- a. The Plaintiff(Respondent) is entitled to the transfer of the suit property upon paying the balance of the purchase price or
 - b. A refund of the deposit paid with costs and interest.
6. Counsel for the parties filed written submissions dated 17-12-2024 and 31-12-2024 respectively. The submissions have not brought out clear cut issues for determination.
- That being the case, I will treat the four grounds of appeal as the issues for determination.
7. This being a first appeal, this court must reconsider the evidence at the trial Court, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. See *Selle and another vs. Associated Motor Boat Co. Ltd and Others* [1968] E.A. 123.



8. Looking at the first ground of appeal, I find that while it is true that the consent of the land control board was mandatory as per Section 6 of the Land Control Board Act, this case is also subject to the doctrines of constructive trust and proprietary estoppel which apply because the Respondent is in occupation of the suit land.

In the case of Willy Kimutai Kitilit vs. Michael Kibet Civil Appeal No. 51 of 2015, [2018] eKRL, the Court of Appeal at Eldoret held as follows, inter alia.

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of *the Constitution* of Kenya, equity is one of the national values which binds the courts in interpreting any law. See Article 10(1) (b). Further, by Article 159(2) (e) the courts in exercising judicial authority are required to protect and promote the purpose and principles of *the Constitution*. Moreover, as stated before, the 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 exception necessary to bring it into conformity with *the constitution*... it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board.”

9. The facts of the case in the case of Kitilit were as follows. The Appellant sold a 2 acre portion of land to the Respondent in 2008. He gave possession of the land to the Respondent. The Respondent paid the last installment of the purchase price in 2010. However, the Appellant did not transfer the 2 acres to the Respondent. Instead he caused all the land including the 2 acres to be registered in his name. He filed a suit for the eviction of the Respondent thereafter. The High Court found that by putting the Respondent in possession, the Appellant created a constructive trust. Comparing the facts of the Kitilit case to this case, the sale agreement dated 27-1-2009 provided that the Respondent was to take possession of the suit land on 15-2-2009. His evidence is that he is in possession. One of the prayers in the counterclaim dated 14-2-2015 is as follows.

c. An order compelling the Plaintiff to forthwith give vacant possession of Loc. 20/Mirira/1749 and in default the Defendant be at liberty to forcefully effect the Plaintiff through a licenced auctioneer.”

10. It is my finding that the Respondent’s entry into the suit land was in accordance with clause 3 of the sale agreement dated 27-1-2009. By the time of entering the suit land, the Respondent was not in breach of the agreement. Instead it was the Appellant who was dillydallying in complying with the sale agreement which he eventually breached. The entry into the land having been lawful, a constructive trust arose in favour of the Respondent.

In summary, I find that the consent of the Land Control Board was not necessary because the Respondent was in actual occupation of the suit land. This finding covers and applies to the second and fourth grounds of appeal.

11. Coming to the 3rd ground of appeal, I agree with the learned counsel for the Appellant that the trial magistrate should have considered that the Respondent did not pay the full purchase price for the suit land. He paid only Kshs. 200,000/= out of the total purchase price of Kshs 350,000/=. However, he was not at fault and it is the Appellant who was to blame. The Respondent is not entitled to the whole of the suit land but portion proportional to the amount of Kshs. 200,000/= vis a vis the purchase price of Kshs. 350,000/=, $200,000/= \text{ divide by } 350,000/= \text{ equals } 0.6914 \text{ ha} \times 2.471 = 1.78052 \text{ acres}$.



12. In summary and for the reasons given, I find as follows.

1. The Appellant to transfer to the Respondent 0.6914 hectares or 1.780 acres of the suit land and in default the Deputy Registrar of this Court to execute all the necessary instruments to give effect to this order.
2. Each party to bear its own costs in this Court and in the lower Court

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD JUNE, 2025.

M. N. GICHERU

JUDGE

Delivered online in the presence of:-

Court Assistant – Mwangi Njonjo

Appellant's Counsel – Mr. Kimani

Respondent's Counsel - Absent

