



Mboroki v Nchebere (Suing through Attorney and Agent, Nkatha Rose Munya) (Environment and Land Appeal E077 of 2024) [2025] KEELC 5022 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELC 5022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E077 OF 2024**

**JO MBOYA, J
JUNE 19, 2025**

BETWEEN

GERALD KATHURIMA MBOROKI APPELLANT

AND

DOUGLAS THIANE NCHEBERE RESPONDENT

SUING THROUGH ATTORNEY AND AGENT, NKATHA ROSE MUNYA

*(Being an Appeal from the ruling delivered by Hon. Chief Magistrate
J.M Njoroge on 18th September 2024 in Civil suit No. E024 of 2021)*

JUDGMENT

1. The suit before the subordinate court, namely; Meru CMCC ELC No. E024 of 2021; was filed by the Respondents herein and wherein the respondents sought the following reliefs:
 - i. On the basis of the Equitable doctrine of resulting trust and proprietary estoppel, the defendant be compelled to transfer to the plaintiff L.R No. Ntima/Igoki/12271 without changing the location or position of the said L.R No. Ntima/Igoki/12271 which the plaintiff fenced and cultivates as indicated to him by the defendant and in default the court administrator be empowered, directed and authorized to sign all transfer instruments in place of the defendant and the land registrar – Meru be empowered, directed and authorized to dispense with the necessity of production of the original title deed in effecting the transfer.
 - ii. A permanent injunction be issued, restraining the defendant, his family members, representatives, employees, servants and anybody else acting at his behest, direction or instructions from changing or altering the present actual position on the ground, entering into, trespassing into or in any other way whatsoever interfering with the plaintiffs quiet, peaceful, undisturbed and interrupted possession, cultivation, user and enjoyment of L.R No. Ntima/Igoki/12271.



- iii. Costs of the suit plus interests thereon at court rate.
2. The appellant herein duly entered appearance and thereafter filed a statement of defence and counterclaim. The statement of defence and counterclaim is dated 26th June 2023; and wherein same sought the following reliefs:
 - i. The Defendant prays that the sale agreement dated 3rd December 2014 be declared void for the reason that it was written when the vendor [defendant] had no property rights or interests on any parcel of land in the estate of his father Mboroki M'Ringer.
 - ii. The Plaintiffs suit be dismissed with costs.
 - iii. The Plaintiff be ordered to vacate the peace of land which he fenced and started cultivating contrary to section 45 (1) of the Law of Succession Act Cap 160 Laws of Kenya.
 - iv. The Plaintiff be ordered to restore the fencing he removed on the boundary between parcel number Ntima/Igoki/1366 and which he removed contrary to section 24 of the Registered Land Act, Cap 300 Laws of Kenya.
3. The suit before the subordinate court was heard and disposed of vide Judgment rendered on 18th September 2024 whereupon the learned Chief Magistrate found and held that the respondents had duly proved [sic] his case. To this end, the trial court proceeded to and entered judgment in favour of the respondent. On the other hand, the trial court found and held that the counterclaim by the appellant was devoid of merits and same was dismissed with costs.
4. Aggrieved by and dissatisfied with the Judgment of the trial court, the appellant herein approached this court vide memorandum of appeal dated 14th October 2024 and wherein same has highlighted 15 grounds of appeal. However, it is worthy to note that the grounds of appeal are prolix and repetitive. To this end, I do not find it expedient to reproduce same. Nevertheless, there is no gainsaying that the court has been able to discern the crux of the appeal beforehand.
5. The appeal came up for directions on 24th March 2025, when the appellant confirmed that same had duly filed and served the record of appeal. Furthermore, the appellant posited that the record of appeal was comprehensive and contained all the requisite documents that were utilized in the subordinate court.
6. On the other hand, Learned Counsel for the respondent contended that the record of appeal was incomplete. In particular, learned counsel for the respondent contended that the appellant did not include the copy of the Further amended Plaint dated 10th February 2023, which underpinned the proceedings before the subordinate court. In this regard, learned counsel for the respondent sought and obtained leave to file a supplementary record of appeal. For good measure, the supplementary record of appeal was subsequently filed.
7. Additionally, the parties agreed to canvass and dispose of the appeal by way of written submissions. To this end, the court proceeded to and prescribed the timelines for the filing and exchange of the written submissions.
8. The appellant filed written submissions dated 11th April 2025 and wherein the appellant has raised two [2] salient issues for consideration by the court. The issues raised by the appellant are namely; the sale agreement entered into between himself and the respondent was void for being in contravention of the provisions of section 45 of the Law of Succession Act; and that the decision of the Learned trial magistrate did not consider and or take into account the evidence tendered by the Appellant.



9. Regarding the first issue, the appellants submitted that the original property, namely; L.R No. Ntima/Igoki/1360 belonged to and was registered in the name of Mboroki M'Ringera, who was deceased as at the time when the sale agreement was being entered into and executed. In this regard, the appellant has contended that to the extent that the original property belonged to and was registered in the name of a deceased person, no dealing[s] and or transaction[s] could have been taken in respect thereof before the issuance of a Certificate of Confirmed Grant.
10. Furthermore, the appellant has submitted that by the time the sale agreement was being entered into, no succession proceedings had been taken over and in respect of the estate of Mboroki M'Ringera [Deceased]. To this end, the appellant posited that the dealings underpinned by the sale agreement therefore constituted intermeddling with the estate of the deceased.
11. As pertains to the second issue, the appellant has submitted that though same tendered and adduced credible evidence before the trial court, the evidence in question was neither considered nor taken into account. In this regard, it has been contended that the Judgment of the trial court is skewed and or slanted, for failure to give due weight to the evidence tendered by the appellant.
12. The Respondent filed written submissions dated 19th May 2025; and wherein same has highlighted two [2] key issues namely; whether or not the trial court erred in allowing the respondent's claim in the primary suit on the basis of equitable doctrine of constructive trust and proprietary estoppel; and whether the respondent paid to the appellant the sum of Kshs.875,000/= only on account of the agreed consideration or otherwise.
13. Regarding the first issue, learned counsel for the respondent has submitted that the appellant and the respondent entered into and executed the sale agreement pertaining to and concerning a portion of the original parcel of land namely, L.R Ntima/Igoki/1360 [now sub-divided]. Furthermore, it was submitted that the sale agreement related to a portion measuring $\frac{1}{4}$ of an acre. Besides, it was submitted that the purchase price was agreed at in the sum of Kshs.875,000/= only; which monies are contended to have been duly paid and acknowledged by the appellant.
14. It was the further submissions by learned counsel for the respondent that the appellant herein thereafter allowed the respondent to enter upon and take possession of the designated portion of the original parcel of land which was the subject of the sale. In addition, it was submitted that the respondent duly entered upon; took possession; and fenced the designated portion.
15. On the other hand, it was also submitted that the respondent has been in occupation and possession of the designated parcel of the original parcel of land [now sub-divided]. To this end, it was submitted that the act of entering into the sale agreement, accepting the payment of the purchase price, retaining the said purchase price and allowing the respondent to enter onto the designated portion of the original property creates trust as between the appellant and respondent.
16. Furthermore, it was submitted that having accepted and retained the purchase price, it would be unjust to allow the appellant to now turn round and seek to evict the respondent from the suit property, merely on the basis that the sale agreement was entered into prior to the issuance of the Certificate of Confirmation of Grant.
17. Arising from the foregoing, learned counsel for the respondent has therefore submitted that the circumstances surrounding the subject dispute necessitate the invocation and application of the equitable doctrine of resulting trust and proprietary estoppel.
18. To this end, Learned Counsel to the respondents has cited various decisions including Arvind Shah & 7 others vs Mombasa Bricks and Tiles Ltd and 5 others Supreme Court Petition No. 19 [E020 of



2022]; Francis Soita vs John Simiyu Dalila (2018) eKLR, Willy Kimutai Kitilit vs Michael Kibet (2015) eKLR and James Kendagor Simatei vs Philip Kipruto Simatei (2019) eKLR, respectively.

19. Regarding the second issue, learned counsel for the respondent has submitted that the appellant herein was paid the entire sum of Kshs.875,000/= only being the agreed purchase price. In particular, it was submitted that the appellant was paid the agreed deposit [stakeholder sum] and thereafter paid the balance of the purchase price vide installments. To this end, learned counsel for the respondents referenced the various acknowledgements that were tendered and produced before the court.
20. Moreover, learned counsel for the respondent has submitted that the appellant herein did not controvert and or impeach the totality of the evidence pertaining to and concerning payments of the various instalments. Consequently, learned counsel implored the court to find and hold that the appellant was duly paid the entire purchase price.
21. Having reviewed the record of appeal, the pleadings that were filed before the trial court, the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusions that the determination of the subject dispute turns on three [3] key issues, namely; whether the sale agreement entered into between the appellant and the respondent was illegal null and void for contravening the provisions of section 45 of the *Law of Succession Act* or otherwise; whether the respondent established and proved the existence of constructive or resulting trust or otherwise; and what reliefs [if any] ought to issue.
22. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court.
23. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the pleadings filed, evidence on record and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].
24. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.
25. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, 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...”



26. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.

It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses”

27. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court held as hereunder;

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters vs- Sunday Post Ltd [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

28. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, the Respondent [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.
29. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at, were perverse to the evidence on record.



30. Regarding the first issue, it is important to recall and reiterate that the original parcel of land, namely; Ntima/Igoki/1360, was registered in the name of Mboroki M'Ringera [deceased]. The fact that the original property was in the name of the deceased was well captured at the foot of the sale agreement dated 3rd December 2014.
31. Furthermore, it is also important to highlight that by the time the appellant and the respondent were entering into the impugned sale agreement, the estate of the deceased had not been succeeded. Instructively, no succession proceedings had been commenced or at all. For good measure, the fact that no succession proceedings had been commenced is also adverted to at the foot of the sale agreement.
32. Additionally, it is not lost on this court that the appellant herein, who was stated to be the son of the deceased and was in the process of filing a succession cause, had not been constituted as the legal administrator of the estate of the deceased. [See section 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya].
33. The foregoing facts and issues were well within the knowledge of the respondent herein. Indeed, the respondent signed and executed the sale agreement knowing that the original property belonged to and was registered in the name of a deceased person. Nevertheless, the respondent threw caution to the wind and adopted a carefree attitude while dealing with the suit property. Notably, the respondent did not care to interrogate the legal implications and consequences of transacting over the estate of a deceased person.
34. To my mind, the entry into and execution of the sale agreement as well as the entry upon and the taking possession of the designated portion of the suit property, constituted intermeddling with the estate of the deceased. Such actions are criminal in nature and punishable under the law.
35. For ease of appreciation, it is instructive to reproduce the provisions of Section 45 of the *Law of Succession Act*, Chapter 160, Laws of Kenya.
36. The same stipulates thus:
- No intermeddling with property of a deceased person
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
37. Quite clearly, the law prohibits and indeed criminalizes any dealing[s] or transaction[s] that affects the properties of a deceased prior to the issuance of grant of letters of administration. Simply put, whosoever transacts over the estate of a deceased in contravention of the provisions of the law is amenable to punishment.
38. On the other hand, it is also important to underscore that what the Appellant and the respondent were dealing with was an immovable property. In so far as the subject of the sale agreement was an



immovable property, it suffices to posit that no dealings could have taken prior to and before the Confirmation of the Grant.

39. To this end, the provisions of section 82 of the *Law of Succession Act*, Chapter 160, Laws of Kenya; are apt and explicit.

40. The said section stipulates as hereunder:

Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - (ii) no immovable property shall be sold before confirmation of the grant;
- (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—
- (i) no appropriation shall be made so as to affect adversely any specific legacy;
 - (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

41. Arising from the foregoing, there is no gainsaying that the transactions that were entered into between the appellant and the respondent were prohibited under the law. Same were therefore illegal, unlawful, null and void.

42. To my mind, what is illegal and void is incapable of conferring; vesting and/ or conveying any rights to anyone. Such a transaction is dead. One cannot seek to put something on nothing and expect to go home with something.

43. Before departing from this issue, it is appropriate to take cognizance of the decision in the case of Benson Mutuma Muriungi vs the CEO Kenya Police Sacco & another (2016) eKLR where the court



reiterated the import of section 45 of the law of the Succession Act. [see also Re-estate of M'Ng'arithi M'Miriti [deceased] (2017) eKLR; Re-estate of John Gakinga Njoroge (2015) eKLR].

44. Turning to the second issue, namely; whether the respondent established and or proved the existence of constructive trust; resulting trust and proprietary estoppel, it is worthy to start by observing that it is the respondent who approached the court contending that the circumstances surrounding the dealings and or transactions with the appellant creates trust.
45. To the extent that it is the respondent who had impleaded trust, it was therefore incumbent upon the respondent to tender and place before the court plausible, cogent and credible evidence. [See sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya. [See also the holding in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi (2014) Eklr].
46. The obligation; burden; and/ or onus of the respondent to tender and prove the existence of trust was also highlighted by the Court of Appeal in the case of Kazungu Fondo Shutu vs Japhet Noti Charo (2021) eKLR where the court stated thus;

The concept of trust must however be proved. This Court in the case of Mumo v Makau [2002] 1EA.170, held that “trust is a question of fact to be proved by evidence.....” See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982.

29. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR and re-stated the law on trusts as follows: -

“ According to the Black’s Law Dictionary, 9th Edition; a trust is defined as

1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

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. ... 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 para 1453). 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. ...



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 ...

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)."

47. The court ventured forward and stated as hereunder:

36. Further, the Court cannot imply a constructive trust since there was no evidence placed before the trial court that the 1st respondent acquired the property by way of any wrongdoing and therefore unjust enrichment cannot be inferred.

37. The circumstances of this appeal are distinguishable from the circumstances in Charles Kandie (supra) which was cited by the appellants in their submissions. In that matter, the court noted that there was no constructive trust but went on to find that there was a resulting trust.

48. Did the respondent place before the court the evidence to warrant a finding of resulting trust or proprietary estoppel? The answer to this question can only be discerned by reverting to the evidence tendered by PW 1.

49. Same testified and stated as hereunder;

Prior to filing the case, I found a demand letter [produced as exhibit P12] having paid the land and settling the land I want the defendant to transfer a ¼ acre and I be registered as the owner of the ¼ of land and costs of the suit and injunction.

50. The foregoing constitutes the crux of the evidence that was tendered by PW 1 while giving evidence in chief. Quite clearly, the respondent did not place before the court any other evidence to demonstrate the existence of trust.

51. Moreover, it is important to recall that the transaction underpinning the entry of the respondent onto a portion of the suit property was itself illegal and unlawful. To this end, the said sale agreement cannot be deployed as a basis for establishing resulting trust. [See the doctrine of Ex nihilo nihil fit [out of nothing comes nothing]. [see also the dictum in Mcfoy vs United Africa (1961) ALL ER 1169].

52. Other than the foregoing, it is important to highlight that for the doctrine of constructive trust or resulting trust to apply it must be proven that the person who entered into the transaction underpinning the invocation of trust was the legal owner of the property in question and that same made representations which were thereafter acted upon by the opposite party. [See the decision of the Supreme Court in Arvind Shah & others vs Mombasa Bricks & Tiles Ltd and 7 others Petition No. 18 of 2022 at paragraph 87 thereof].



53. Suffice it to state that the appellant herein who entered into the impugned sale agreement, was not the legal owner of the original property [now sub-divided] and thus same could not make any binding representations that can now be deployed to found trust.
54. The respondent has cited and referenced various decisions, including *Macharia Mwangi & 87 others vs Davidson Mwangi Kagiri* 2014 eKLR and *Willy Kimutai Kitilit vs Michael Kibet* (2015) eKLR, but it is important to highlight that the facts of the said cases are at variance with the facts of this case. Notably, the transactions which underpinned the invocation and application of the doctrine of constructive and resulting trust were entered into between the legal owners and the third parties [claimants].
55. Arising from the foregoing, I am not persuaded that the Learned Chief Magistrate correctly put into account the peculiar circumstances surrounding the instant matter. In my humble albeit view, the declaration of trust, whether constructive or resulting trust, must be borne out of the evidence tendered. Certainly, such a declaration cannot be plucked from the air and decree in favour of the claimants.
56. Next is the issue pertaining to the reliefs, [if any] which ought to issue. At the onset, I pointed out that the appellant had also filed a counterclaim and whose effect was to invalidate the sale agreement and the consequential transactions leading to the sub-division of the original parcel of land.
57. While dealing with issue number one, I have since found and held that the impugned sale agreement was illegal, criminal and thus void. To this end, it means that the declaration sought by the appellant is merited.
58. On the other hand, it is also worthy to recall that the respondent paid to the appellant the sum of Kshs.875,000/= only and which monies the appellant had previously indicated that same was willing to refund. [See paragraph 8 of the ruling rendered on 4th December 2024]. Having previously demonstrated his willingness to refund the monies in question, it would be unjust to let the appellant retain the purchase price as well as the land. Such endeavor would be contrary to Equity; Comon sense; and Social Justice. [See Article 10 (2) (b) of the *Constitution* of Kenya 2010].
59. In the premises and having taken into account the principles enunciated in the case of *Mwanasokoni vs Kenya Bus Service Ltd* (1985) eKLR, I am minded to depart from the findings of the Learned Chief Magistrate. Pertinently, the finding[s] and holding[s] that trust was established was not premised on any evidence.

Final Disposition:

60. For the reasons which have been highlighted in the body of the Judgment, it must have become evident that the appeal beforehand is meritorious. In this regard, I find and hold that the appellant has proven the appeal and thus same be and is hereby allowed.
61. In the premises the final orders of the court are as hereunder;
 - i. The Appeal be and is hereby allowed.
 - ii. The Judgment and decree of the Learned Chief Magistrate dated 18th September 2024 be and is hereby set aside.
 - iii. The Judgment under reference be and is hereby substituted with an order dismissing the respondent's suit in the subordinate court.
 - iv. The Transfer and registration of L.R No. Ntima/Igoki/12271 [the suit property in the name of the respondent be and is hereby revoked, cancelled and nullified.



- v. The Suit property be and is hereby ordered to be re-transferred to the appellant.
- vi. Costs of the appeal be and are hereby awarded to the Appellant.
- vii. Each Party shall however bear own cost of the suit in the subordinate court.
- viii. Furthermore, and taking into account the provisions of section 13 (7) of the environment and *land act* (2011), the Appellant herein be and is hereby ordered to refund the sum of Kshs.875,000/= only with interest at court rates [14%] w.e.f date of filing of suit until full payment.
- ix. The Refund in terms of clause (VIII) shall be made within 90 days from the date hereof; and in default the respondent shall be at liberty to execute.

62. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JUNE, 2025.

OGUTTU MBOYA,FCI Arb; CPM [MTI-EA].

JUDGE.

In the presence of;

Mr. Mutuma – Court Assistant

Gerald Kathurima Mboroki – Appellant [present in person].

Mr. CarlPeters Mbaabu for the Respondent

