



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 179 OF 2013

DANIEL CHAKA DANI..... PLAINTIFF

VERSUS

ALI SULEIMAN NGUVU.....1ST DEFENDANT

OMAR SULEIMAN NGUVU.....2ND DEFENDANT

OMAR SHEE PATO.....3RD DEFENDANT

HAMAD SULEIMAN NGUVU.....4TH DEFENDANT

SAID SULEIMAN NGUVU.....5TH DEFENDANT

JACOB OPUYO..... 6th DEFENDANT

J U D G E M E N T

1. The plaintiff brought this suit via a plaint dated 15th August, 2013 and filed on 22nd August, 2013 against the defendants seeking the following orders;

- a. A declaration that the 6th Defendant holds the parcel of land known as Kwale/Mrima/358 in trust for the plaintiff
- b. An Order of specific performance of the agreements made between the plaintiff and the 1st, 2nd, 3rd, 4th and 5th defendants.
- c. An order cancelling the title No. Kwale/Mrima/358 issued to Jacob Opuoyo and allowing the plaintiff to be registered as the proprietor of the suit property.
- d. Cost of the suit.

2. The 1st, 2nd, 3rd, 4th, 5th and 6th Defendants filed their statement of defence and counterclaim dated 25th September, 2013 on 26th September, 2013. The defence pleaded that the plaintiff generally utilized the land for a period of eight years without paying up the full purchase price. It is also pleaded that the plaintiff frustrated the contract therefore the defendants Counterclaim for;

- a. Eviction of the Plaintiff and/or demolition of the structures irregularly erected on the said land
- b. "Mesne Profit" for the use of the land and harvesting of trees and produce for a period of eight (8) years.

3. The suit was listed for pre- trial hearing on 12th March 2014 and was later set down for hearing on 12th April 2014.

Plaintiff's Case

4. The plaintiff's case is that the defendants were the beneficial owners of the suit property known as Kwale/Mrima/358 registered in the

name of Suleiman Ali Nguvu (Deceased) measuring approximately 2.8 ha. That during the registered owner's lifetime, he subdivided the land into three portions for the 1st wife's family, 2nd wife's family and the third portion measuring 4 acres sold to the 3rd defendant.

5. It was the plaintiff's testimony that the 2nd and 3rd defendants acting on behalf of the 1st wife's family entered into an agreement dated 13/08/2006 with him for the sale of their portion for Kshs.65,000 which price was fully paid. The plaintiff produced and marked the Sale Agreement dated 13/08/2006 as **Pex 2**. In his submissions, the plaintiff contends that this position was not disputed by the 1st defendant and the 4th defendant.

6. That later in 2008, the 3rd defendant agreed to sell his portion of 3 acres to the plaintiff at a price of Kshs.220,000 to which the plaintiff paid a deposit of Kshs.183,000 leaving a balance of Kshs.37,000. The plaintiff produced and marked the Sale Agreement as **Pex 3**. The last portion was sold to the plaintiff by the 4th and 5th defendants for Kshs.83,000 which amount was fully paid. The plaintiff produced and marked the Sale Agreement dated 01/08/2010 as **Pex 4**. It is the plaintiff's submission that the sale of the 3rd portion was confirmed by the 4th defendant who stated during examination in chief that their mother's share of 2 acres was sold to the plaintiff.

7. The 1st, 2nd, 3rd, 4th and 5th defendants agreed to take out letters of administration and to transfer the whole parcel of land known as Kwale/Mrima/358 to the plaintiff. The plaintiff testified that he has been in possession of the suit property immediately after executing the first sale agreement in 2006 to date.

8. The plaintiff further testified that the land was transferred to the 1st defendant on 15/07/2013 and a search conducted on 22/07/2013 confirmed that the suit property belonged to the 1st defendant. The search was produced and marked as **Pex 5**. It is the plaintiff's testimony that he sought to pay the balance of the purchase price however his efforts were unfruitful as the 3rd defendant refused to receive and/or acknowledge the payment and later without his knowledge transferred to the 6th defendant. He confirmed that the 6th Defendant is now the registered owner of the suit property as shown in a Certificate of Official Search dated 13/08/2013 produced as **Pex 6**.

9. The plaintiff further pleads that the 1st, 2nd, 3rd, 4th and 5th defendants committed acts of fraud. The particulars of fraud pleaded under paragraph 8 of the plaint are listed below;

- a. Purporting to sell the suit property when they had already sold it to the plaintiff
- b. Misrepresenting a transfer to the land registrar-Kwale in favour of the 6th defendant in complete disregard of the plaintiff's interests.
- c. Consenting to the registration of the suit property in the name of the 6th defendant even after they had received the purchase price from the plaintiff
- d. Intimating to the registrar that the 6th defendant is the rightful transferee of the suit property while fully aware of the sale agreement over the same with the plaintiff.
- e. Failing to take heed of the equitable rights of the plaintiff over the suit property

10. The plaintiff filed the list of documents enumerated hereunder on 22/08/2013 in support of his case;

- a) Agreement dated 13/08/2006, 22/03/2010, 01/08/2010.
- b) Certificates of Official Searches dated 27/06/2008, 22/07/2013, 13/08/2013.
- c) Photographs of the plaintiff's development and perennial crops dated 23/07/2013.
- d) Proof of payment to Omar Shee Pato dated 29/08/2008.
- e) Chief's Letters dated 22/07/2013, 28/06/2013, 08/07/2013.
- f) Demand Letter dated 06/07/2013.
- g) Copy of plaintiff's I.D Card.

Defendant's Case

11. The defence hearing was set for 24/10/2017. It is also worth noting that only the 1st, 3rd and 5th defendants testified in court and from the record, its the 3rd defendant only who filed his submissions. **DW1 Ali Suleiman Nguvu** testified that the suit property belonged to his deceased father, Suleiman Ali Nguvu, and that he sold a portion of it to Daniel Chaka (the plaintiff) who paid a deposit of Kshs.15,000 leaving a balance of Kshs.17,700 and that he does not recall the date of the sale. It was his testimony that the plaintiff refused to pay the balance and proceeded to stay on the land for 8 years and has done a number of developments. That following the plaintiff's refusal to pay the balance, he found a new buyer for the parcel of land.

12. On Cross-examination, the 1st defendant conceded that the 1st agreement was between himself, Omar Suleiman Nguvu and the plaintiff

and that it was indeed his signature that appeared on **Pex. 2** for sale of 1¾ acres where Kshs.65,000 and Kshs.55,300 was paid on execution of the agreement. It was his testimony that the plaintiff bought 3 portions in succession and took possession of the same and started ploughing it. He further testified that he was not satisfied by what he was offered by the plaintiff and decided to sell the land to the 6th Defendant.

13. That together with the 6th Defendant he inspected the land and that the 6th Defendant was aware of the plaintiff's presence on the land. However, this testimony is later changed to the effect that the 6th defendant did not inspect the suit property. The 1st defendant further stated in cross examination that the plaintiff did not pay for the crops and even after reporting the dispute to the chief, the plaintiff refused to pay. The 1st defendant admitted that he does not know the balance amount owed but insist that the plaintiff should pay the balance as opposed to vacating the land. The 1st defendant further on cross examination, testified that he sold 3 acres part of his deceased's father land to the 3rd defendant.

14. The 4th defendant, **Hamad Suleiman Nguvu** testified on 19/02/2019 as **DW2**. He stated that the plaintiff who is like a brother to him came looking for land to buy. Therefore, the 3rd defendant who had earlier bought 3 acres of the suit property, Kwale/Mrima/358, decided to sell the land to the plaintiff. He further avers that the 3rd defendant had paid them a sum of Kshs.120,000 but he was unable to raise the balance of Kshs.50,000 which the plaintiff agreed to settle. It was **DW2's** testimony that the plaintiff paid them Kshs.14,000 and then ceased paying and efforts to trace him were futile. **DW2** further attest that the 1st, 2nd, 4th and 5th defendants later decided to sell their mother's portion to the plaintiff and agreements were drawn.

15. It was the 4th defendant's further testimony that they got another offer for the land from the 6th defendant who offered to buy the land on condition that the 1st, 2nd, 4th and 5th defendants refund the plaintiff's deposit for the suit property. **DW2's** further testimony is that the 1st defendant without informing him entered into an agreement with the 6th defendant for the sale of 2.5 acres of the suit property and was paid some money which was shared between the 1st, 2nd, 4th and 5th defendants. On cross-examination, **DW2** confirmed that the 1st defendant only had capacity to sell his own portion and not any other portion.

16. **DW2** stated that the suit land is 7 acres, out of which 3 acres was earlier sold to the 3rd defendant and later to the plaintiff. The other two houses had 2 acres each which were both sold to the plaintiff.

17. **DW3; Omar Shee Mwapato (3rd Defendant)**, gave his testimony on 02/07/2019 confirming that the 2nd, 4th and the 5th defendants are his cousins and that they sold to him 3 acres of the suit property for Kshs.116,000 in 2002. That the land belonged to the 1st, 2nd, 4th and 5th defendant's father who was now deceased. **DW3** contends that the plaintiff had an agreement with his now deceased father for the sale of 3 acres which was part of plot No. 114 for a consideration of Kshs.220,000. The agreement was made at the office of the village chairman and the payment was to be made in a number of installments amounting to Kshs.25,000. Later the plaintiff paid **DW3** Kshs.25,000 in the presence of witnesses. That after this, the plaintiff made no further payments.

18. **DW3** contends that due to the plaintiff's failure to pay the balance of the purchase price, he sought to have the land sold to someone else. However, this was met with hostility from the plaintiff making him decide to report the matter to the chief. They agreed that the plaintiff deposit the money with the Chief and the plaintiff deposited a sum of Kshs.68,000/= which the witness says was received by his wife although the wife told him she had only received Kshs.10,000. That the chief summoned the plaintiff to pay the balances but the plaintiff never honoured the summonses.

19. That the Chief then summoned the 1st, 2nd, 4th, 5th defendants and advised them to take out letters of administration and then transfer to me my share. That he sought to refund the plaintiff the sum of Kshs.123,000 through the chief who acknowledged receipt of the money dated 10th July 2013 and marked as **Dex 1** however, the plaintiff did not take the money but filed the present suit. The witness produced the documents contained in their list dated 25/9/2013 as **Dex 1-5**.

20. On cross examination, **DW3** stated that he sold 4 acres part of the suit property to the 6th defendant after the plaintiff refused to pay the full purchase price. **DW3** denied that the purchase price for the 3 acres was Kshs.170,000. That he did not disclose to the 6th defendant that he had earlier sold the suit land to the plaintiff. He stated that the people present when he refunded the money did not execute **Dex 2**. He also denied accompanying the other defendants to the lands office to effect the transfer to the 6th defendant.

21. Documents relied on by the defendants;

- a) Agreement dated 06/06/2013 between the 1st and 3rd defendant (**this document was precluded from being relied on in a Ruling dated 24/10/2017 by Hon. Justice L. Komingoi**).
- b) Agreement between the 1st defendant and the 6th defendant for sale of 4 acres (**This was not in the list of document filed on 26/09/2013**).
- b) Chief's letter dated 10/07/2013.
- c) Chief's letter dated 05/06/2013 to facilitate succession.
- d) Letter of consent dated 10/07/2013.
- e) Certificate of search dated 22/07/2013.

Issues Raised by the Plaintiff in his Submissions:

22. Whether the plaintiff purchased the suit land from the 1st, 2nd, 3rd, 4th and 5th defendants?

The plaintiff avers that there were indeed valid sale agreements between himself and the defendants that were signed and attested to by witnesses. It is his contention that the 4th defendant in his testimony before the court corroborated his claim of how and when the suit property was sold to him. The plaintiff has referred the court to **Section 3 of the Law of Contract, Cap 23, Laws of Kenya** which provides *inter alia*;

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

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

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

23. Whether the 1st, 2nd, 3rd, 4th and 5th defendants breached the agreement for sale in respect of the suit property?

The plaintiff submits that he did not frustrate the sale agreement with the 3rd defendant as he was ready and willing to pay the balance of Kshs.37,000 to the 3rd defendant who refused to collect the same from the chief. It is the plaintiff's submission that the 1st, 2nd, 3rd, 4th and 5th defendants neither rescinded nor issued a completion notice to make time of essence before selling the property to the 6th defendant while he was still in possession and was ready to complete his obligations under the contract. The plaintiff further submitted that since the subject matter is land which is not perishable and one with no urgency, the parties to the agreements did not stipulate time to be of essence in their contract and referred to the case of *David Mose Gekara Vs Hezron Nyachae [2012] eKLR*. Further, the plaintiff contends that the 1st, 2nd, 3rd, 4th and 5th defendants were also not ready to complete their obligation under the contract as they had not transferred the suit property to their names so as to effect transfer to him.

24. Whether the 1st defendant committed acts of fraud by selling the suit property to the 6th defendant?

The plaintiff has enumerated the particulars of fraud as pleaded under paragraph 8 of the plaint and has asked this court to find that the 1st defendant wrongfully and illegally colluded with the other defendants and fraudulently transferred the suit property to the 6th defendant. The plaintiff further avers that both the 1st and 4th defendants in their testimonies before court confirmed selling the parcel of land to the 6th defendant well aware of the agreement with the plaintiff and his actual possession of the land. The plaintiff referred to the case of *Kibiro Wagoro Makumi Vs Francis Nduati Macharia & Another [2018] eKLR*.

25. Whether the 6th defendant is a bonafide purchaser for value of the suit property?

It is the plaintiff's submission that the 6th defendant neither conducted due diligence to ascertain the authenticity of the suit property nor show any consents to solidify his claim of being innocent purchaser for value without notice. The plaintiff has referred to the case of *Francis Mburu Kamau Vs Methi & Swani Farmers Co-Operative Society Limited & 5 Others [2019] eKLR*.

The plaintiff further referred to the provisions of Section 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya which provides that;

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden; The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact; The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. The plaintiff submits that the 6th defendant is not a bonafide purchaser for value without notice because the plaintiff was in occupation of the suit property and had developed the same which could be easily visible to any person viewing the property. It was the plaintiff submission that the 6th defendant was well aware of his equitable interest on the suit property as stated by 4th defendant during examination in chief. The plaintiff therefore seeks that the court finds that the 6th defendant is not a bonafide purchaser for value without notice for his failure to conduct due diligence.

3rd Defendant's Issues

27. Cause of action against the 3rd defendant;

It is the 3rd defendant's submission that the plaintiff has no cause of action against the 3rd defendant because the land sold and transferred to the 6th defendant belonged to the deceased father of the 1st, 2nd, 4th and 5th defendants. Further, the 3rd defendant avers that the plaintiff did not prove that he paid Kshs.183,000 to the 3rd defendant's father as alleged. The 3rd defendant further submits that due to the plaintiff's breach of the agreement, he refunded Kshs.123,000 that had been paid to him and that the Chief's letter dated 05/07/2013 and the document **dated 18th June, 2013** confirmed the same.

28. Filing of the suit against the 3rd Defendant;

It is the 3rd Defendant's submission that the suit is bad in law and an abuse of the court process as the same is filed in contravention of the provisions of Section 3 of the Law of Contract Act, which provides that no suit can be filed when there is no contract signed by both parties to an agreement and witnessed. It is the 3rd defendant's contention that the agreement between the plaintiff and the 3rd defendant for the sale of 4 acres of land was not produced by the plaintiff in court.

29. Plaintiff's Remedy;

The 3rd defendant submitted further that the plaintiff admitted that the land is agricultural land however he did not produce an application for consent from the Land Control Board for the sale of the 4 acres making the transaction null and void. As a consequence, the 3rd defendant submits that the plaintiff is only entitled to refund of the purchase price which is Kshs.123,000 as evidenced by the Chief's letter as there was no evidence payment of Kshs.183,000 by the plaintiff. The 3rd defendant further urged this court to dismiss this suit with costs to him.

Determination

30. Section 3 (3) of the Law of Contract provides *inter alia*;

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

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

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

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

31. The following issues arise for determination of this Court;

- (a) Whether or not there was a valid sale agreement between the plaintiff and the 1st – 5th defendants.
- (b) Whether or not the plaintiff is entitled to the suit land Kwale/Mrima/358.
- (c) Whether or not the 6th defendant's title should be cancelled and in his place, the plaintiff be registered; OR
- (d) Whether or not the plaintiff should be evicted from the suit land.

32. There is no dispute that the plaintiff is in occupation of the suit property. There is also no dispute that the title has since been transferred to the 6th defendant necessitating the filing of this suit. The 6th defendant did not present any evidence to defend his title. However, this court is alive to the fact that the burden of proving the case rests on the plaintiff. The plaintiff gave a narration of how he purchased the entire suit property which at the time was registered in the name of the 1st – 5th defendants' father.

33. The plaintiff produced the agreement executed between him and the 1st and 2nd defendant on 3/8/2006. Although the agreement did not indicate the plot number sold, it was witnessed by the village elder. There is no contention that it was made in respect of the suit land as the plaintiff was thereafter put into possession. It thus revealed the intents of the parties as to which land was being sold. Secondly, the agreement does show that the agreed purchase price was paid in full on the date of execution. DW2 stated that before their father died, he distributed two acres each to each house/wife. Consequently, the agreement of 13/8/2006 was for selling 2 acres belonging to the house of the 1st and 2nd defendants who were brothers.

34. The 2nd agreement is dated 1/8/2010 and 22/3/2010 between the plaintiff and the 4th and 5th plaintiff. This agreement was specific that the portion sold is the share of the 4th and 5th defendants' household comprised in Land Title No. 358. On 1/8/2010, Kshs.43,000 was paid to the vendors out of which Kshs.3,000 is indicated for the plants (mimea) on the land. On 22/3/2010, Kshs.10,000 was paid. The agreement was duly witnessed. The 4th defendant in his evidence conceded to the plaintiff's claim. As far as he is concerned, they sold the land to the plaintiff and this portion could only be sold to the 6th defendant if the plaintiff was refunded his money. The 4th defendant stated there was a balance owing which the plaintiff has not paid. The plaintiff stated that he was to pay the balance upon transfer and when he tried to pay, the 1st defendant did not co-operate.

35. The 3rd defendant submitted that the plaintiff did not produce any agreement to prove he had bought their portion. This submission contradicts the oral evidence of the 3rd defendant wherein he stated that the plaintiff was sold the 3 acres at a consideration of Kshs.220,000. That the instalments payment made by the plaintiff totaled to Kshs.50,000. Further, DW3 said he demanded for payment of the balance through the chief's office and he got information that the plaintiff had deposited a sum of Kshs.68,000 which was collected by the wife. DW3 added that when he asked the wife, the wife said he had only collected Kshs.10,000. DW2 also stated that the plaintiff was introduced to them by DW3. That DW3 had earlier bought the land but was unable to pay the balance of Kshs.50,000. Out of this balance, DW2 and his brothers were paid Kshs.14,500. This evidence is further corroborated by the chief's letter dated 29/8/2008 which showed that the plaintiff deposited Kshs.40,000 at the chief's office for onward transmission to the Omar Shee Pato (3rd defendant). Lastly, DW3 conceded that the plaintiff is using that whole land. This clearly demonstrates that there was a sale transaction between the plaintiff and the 3rd defendant which the 3rd defendant cannot deny.

36. Consequently I am satisfied that the plaintiff has established that he had valid sale agreements executed between him and the 1st – 5th defendants and he was put into possession. The 1st and 3rd defendants evidence is that they decided to sell the suit land to the 6th defendant because the plaintiff had frustrated the contract by failing to pay the balance. From the agreement of 2006, there is no balance that was owing to the 1st and 2nd defendant. He also did not make a formal demand to put the plaintiff on notice for payment of the balance from the plaintiff who was already in possession. Further the 1st, 5th defendants had not executed a transfer in favour of the plaintiff thus they had also not completed their obligations to the plaintiff. Both parties were thus guilty if at all and none can use this to their advantage (see *Chief's letter dated 10/7/2013 item No. 4 on defendants list*).

37. Should the defendant's title be cancelled in favour of the plaintiff. The defendants produced as Dex 1 agreement dated 6/6/2013 between Omar Pato and Ali Suleiman Nguvu as vendors and Jacob Apwoyo (6th defendant) as purchaser. The plot number given is Kwale/Mrima/357. The 2nd agreement dated 2/7/2013 was between 1st defendant and 6th defendant. From the 1st agreement, the land sod is parcel No. 357 and not 358 that is being claimed by the plaintiff. In any event the 1st defendant had sold his share in plot No. 358 and paid in full. He had no further interest and or good title to pass to the 6th defendant.

38. The 6th defendant did not give any evidence to defend his interest in the land. How does the law protect him under the maxim of bonafide purchaser for value without notice when the plaintiff was already in possession of the land? Not all the parties who were entitled to the land sold their portions. A constructive trust had arisen between the 1st – 5th defendants and the plaintiff and having put him in possession, they would transfer the land to him. The defence of lack of consent of the land board cannot be used to defeat the trust.

39. The Court of Appeal in the Case of *William Kipsoi Sigei Vs Kipkoech Arusei & Ano (2019) eKLR* discussed the subject on whether a constructive trust could apply where the transaction required consent of the Land Control Board. While referring to its previous decisions, the Court of Appeal held thus;

“18. In *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR (Willy Kimutai Kitilit decision)*, we considered similar arguments and had the opportunity to consider the *Macharia Mwangi Maina decision* alongside another decision of this Court, differently constituted, *David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR (Sironga Ole Tukai Decision)*, where the Court in finding that the *Macharia Mwangi Maina decision* was made in error expressed the view that the clear provisions of section 3(1) of the Judicature Act precluded the application of the doctrines of equity and as such, a transaction that required the consent of the Land Control Board, would, without such a consent, be void and therefore unenforceable in law. In rejecting the arguments in the *Sironga Ole Tukai decision* and following the *Macharia Mwangi Maina decision* this Court in *Willy Kimutai Kitilit decision* noted among other things, that:

“the phrase ‘declaration of trust of agricultural land’ refers to an express creation of a trust by parties over agricultural land by deed or instruments envisaged by section 36 as read with section 66 of the Land Registration Act or section 126 of the repealed Registered Land Act, not a constructive trust or trust created by operation of the law.”

19. In addition, in the same case, the Court noted that equity is one of the national values that the Courts must apply in interpreting the Constitution stating as follows:

“Thus since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, 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 enforceable for lack of consent of the Land Control Board.”

20. Taking into account the *Macharia Mwangi Maina decision* and the *Willy Kimutai Kitilit decision* alongside the

circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where 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. This was also the approach taken in *Macharia Mwangi Maina decision* where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.

40. Taking a cue from the position set in law and the facts of his case, I conclude that the plaintiff is entitled to the suit property. Consequently, orders of eviction as prayed in the counter-claim cannot be granted. Instead I enter judgment for the plaintiff as prayed in the plaint with the result that the defendants counter-claim is dismissed for want of merit.

41. Costs of the suit and the counter-claim is awarded to the plaintiff.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21st Day of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE