

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC APPEAL NO. E088 OF 2024

SUSAN KABURO.....APPELLANT

VERSUS

ERASTUS KIMATHI MITUNGA.....RESPONDENT

*[Being an appeal against the Judgment and decree of Hon. S.K Ng’etich –
SPM delivered on the 13th November 2024 in Nkubu SPM ELC No. E017 of
2023]*

JUDGMENT

1. The Appellant herein [*who was the Plaintiff in the subordinate court*] filed the Complaint dated the 10th May 2023; and wherein same sought the following reliefs;
 - a. An order for Transfer of L.R No. Nkuene/Uruku/2726 and 2727 to the Plaintiff.*
 - b. Costs of the suit.*

2. The Respondent was duly served with the Complaint and summons to enter appearance. However, the Respondent neither entered appearance nor filed a statement of defence. To this end, the suit in the subordinate court proceeded ex-parte and on the basis of formal proof.

3. The suit in the subordinate court was disposed of *vide* Judgment rendered on the 13th November 2024; and wherein the learned Magistrate [Hon. S.K Ngétich-SPM] found and held that the Appellant had failed to prove his claim on a balance of probabilities. In this regard, the Learned Magistrate proceeded to and dismissed the Appellant's suit.
4. It is the said judgment and the consequential decree which has aggrieved the Appellant and thus provoking the subject appeal. The Appellant has approached this court *vide* memorandum of appeal dated the 10th December 2024; and wherein same has highlighted the following grounds;
 - i. ***The Honourable Magistrate erred in law and in facts in failing to find that the appellant having bought the suit land and having paid the full purchase price and the vendor having given her the vacant possession of the purchased land then the land has passed to the appellant and the Respondent holds it in trust of the appellant.***
 - ii. ***The Learned Magistrate erred in Law and in facts in failing to find that there existed a constructive trust between the appellant and the Respondent.***
 - iii. ***The Learned Magistrate erred in Law and in facts in failing to find that the appellant testimony was unconverted and therefore showed have been believed as presented.***
 - iv. ***The Learned Magistrate erred in law and in facts in deciding the whole case against the weight of evidence.***

5. The appeal came up for directions on the 9th July 2025; whereupon directions were given. In particular, the court directed that the appeal shall be disposed of by way of written submissions to be filed within a circumscribed timeline.
6. The Appellant filed written submissions and wherein same has highlighted two [2] key issues, *namely*; the learned trial magistrate misapprehended the Appellant's case and thereby arrived at an erroneous conclusion that the Appellant had not established his claim on the basis of trust; and the Judgment of the learned trial magistrate is contrary to the weight of evidence on record.
7. Regarding the first issue, learned counsel for the Appellant has submitted that the Appellant entered into and executed a sale agreement with the Respondent herein wherein the Respondent covenanted to sell to and in favour of the Appellant a portion measuring half acre out of L.R No. Nkuene/Uruku/386.
8. Furthermore, it was submitted that the sale agreement under reference was reduced into writing and same was thereafter signed/ executed by both parties.
9. Furthermore, it has been submitted that upon the execution of the sale agreement, the Appellant duly paid to and in favor of the Respondent the entire purchase price. In addition, it was contended that the purchase price was duly confirmed and acknowledged.

10. Learned counsel for the Appellant has equally submitted that upon execution of the sale agreement; and receipt of the purchase price, the Respondent allowed the Appellant to enter upon and to take possession of the sold portion of land. To this end, it has been posited that the Appellant has remained in occupation and possession of the said portion of land for over [more than] 11 years.

11. Based on the foregoing, it has been submitted that the Appellant established and proved his claim on the basis of trust. In this regard, it has been contended that the learned trial magistrate ought to have returned a favorable finding on account of trust.

12. Turning to the second issue, learned counsel for the Appellant has submitted that the evidence that was tendered by the Appellant was neither challenged nor controverted. In this regard, it has been submitted that the evidence on record ought to have been believed and acted upon by the trial court.

13. Nevertheless, learned counsel for the Appellant has submitted that despite the fact that the evidence was neither controverted nor rebutted, the learned trial magistrate dismissed the Appellant's case. To this end, it has been posited that the judgment of the trial court is contrary to the weight of evidence on record and thus same ought to be set aside.

14. Flowing from the foregoing, learned counsel for the Appellant has invited the court to find and hold that the subject appeal is meritorious. In this regard, the court has been implored to allow the appeal; set aside the

judgment of the trial court; and to grant the reliefs sought at the foot of the Plaint dated the **10th May 2023**.

15. The Respondent was served with the record of appeal but same failed to attend court and/or file written submissions. In this regard, it suffices to observe that the only set of submissions on record are the ones filed by the Appellant.

16. Having reviewed the record of appeal; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by the Appellant, I come to the conclusion that the determination of the subject appeal turns on two [2] issues, *namely*; whether the Appellant established his claim as pertains to trust or otherwise; and whether the Appellant satisfied the requisite ingredients/elements to warrant an order of specific performance or otherwise.

17. 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. 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]***.

18. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to scrutinize; 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.

19. 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 [EACA] elaborated on the applicable principle[s] 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.."

20. 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”

21. Without endeavoring to exhaust the case law that elaborates 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 ...”.

22. Duly guided by the principles espoused in the various decisions cited in the preceding paragraphs, I am now well disposed to revert to the instant matter and to discern whether the findings and conclusions arrived at by the trial court accord with the totality of the evidence on record. Furthermore, I will also be able to ascertain whether the conclusions are founded on the relevant legal principles or otherwise.

23. Back to the issues highlighted for determination. I beg to address the issues sequentially, starting with the first issue.

24. The Appellant had approached the court seeking to be declared as the lawful owner of half acre out of L.R No's Nkuene/Uruku/2726 and 2727 [hereinafter referred to as the suit properties]. For good measure, the

Appellant contended that same has acquired the designated portions of the suit properties by way of constructive trust.

25. In addition, the Appellant ventured forward and supplied the particulars of trust. [See paragraph 6 of the Plaint dated the 10th May 2023]’

26. It is instructive to observe that even though the Appellant impleaded constructive trust, the Appellant herein did not adduce and/or tender any evidence to underpin the claim for constructive trust.

27. Suffice it to underscore, that the Appellant adopted her witness statement dated the 10th May 2023 and thereafter adduced two exhibits, *namely*; copy of the sale agreement; and certificate of official search in respect of the suit properties. Nothing more.

28. I beg to highlight that the Appellant herein did not advert to and/or reference constructive trust in the body of the witness statement. Furthermore, the Appellant did not seize the opportunity during the hearing to speak to the claim[s] as pertains to constructive trust.

29. To this end, there is no gainsaying that the only place where constructive trust has been alluded to is the plaint. Nevertheless, there is no gainsaying that the plaint [which is the operative pleading] only contains averments, or bare assertions by the claimant. Such assertions/averments are subject to proof by way of evidence tendered in the conventional manner. [See Section 3 of the Evidence Act, Chapter 80 Laws of Kenya]. [See also *CMC Aviation Limited versus Crusair Limited [1987]eklr*].

30. Absent evidence to underpin the plea of constructive trust, there is no way that the Appellant herein could have accrued a positive [favourable] finding in her favour.

31. Notably, proof of trust depends on the quality; weight of the evidence tendered. Moreover, it is common ground that a court of law will not presume, infer; or proclaim trust unless the obtaining circumstances are such as to warrant such inference.

32. In the case of *Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] KECA 592 (KLR)*, the Court of Appeal expounded on the manner in which trust is to be proved.

33. For coherence, the court stated as hereunder;

28. 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 Saggah 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 wrongdoing. ... 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)."

31. As earlier stated, the existence of a trust is a question of evidence. In the **Juletabi** case [supra], the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

"The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

34. The onus to prove the existence of a trust lay squarely on the Appellant. **Section 107** of the **Evidence Act** further provides that:

“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.”

35. Other than the fact that the Appellant did not advert to or adduce any evidence to prove trust, there is yet another issue that merits mention and due consideration. The issue herein touches on and concerns the fact that the sale agreement which the Appellant references relates to L.R No. Nkwene/Oruku/386. However, the suit properties in respect of which the Appellant seeks a declaration of trust are L.R No. Nkuene/Uruku/2726 and 2727, respectively.

36. It is not lost on me that the suit properties are separate and distinct from the parcel of land which was referenced at the foot of the sale agreement. No evidence was tendered to demonstrate whether the suit properties are sub-divisions of the parcel of land alluded to at the foot of the sale agreement; or otherwise.

37. In the absence of evidence to show the origin of the suit properties; it is difficult to connect the suit properties to the parcel of land captured at the foot of the sale agreement.

38. Turning to the second issue, it is imperative to recall and reiterate that other than impleading constructive trust, the Appellant herein also

appears to have staked a claim on the suit properties on the basis of specific performance. This much is discernible from the reliefs sought at the foot of the Plaint.

39. Moreover, it is evident that the learned trial magistrate addressed the question whether the Appellant had established a basis to warrant the grant of an order of specific performance.

40. Regarding the question of specific performance, I beg to state that such an order can only be issued and granted sparingly and subject to proof that there exists a valid and enforceable contract. In addition, the claimant must also demonstrate that same has performed his part of the bargain or is ready and willing to perform his part of the bargain. [See **Openda versus Ahn [1982] KECA 59; See also Sisto Wambugu versus Kamau Njuguna [1983] eKLR**].

41. Furthermore, there is an additional requirement that the claimant must prove that damages may not suffice. In addition, it worthy to underscore that specific performance is an Equitable relief; and hence the grant of same also takes into account the conduct of the Claimant.

42. The law as pertains to specific performance was aptly/ succinctly explained in the case of **Reliable Electrical Engineering Ltd vs Mantrac Kenya Ltd [2006] eKLR**, where the court [Justice D. K Maragra, Judge – as he then was] stated as hereunder;

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy.

In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

See also

[Sisto Wambugu v Kamau Njuguna \[1983\] KECA 69 \(KLR\)](#)

; GURDEV SINGH BIRDI & ANOTHER v ABUBAKAR MADHBUTI [1997] KECA 13 (KLR)

43. Did the appellant establish a basis to warrant an order of specific performance? I am afraid that the Appellant herein did not meet the threshold for the grant of such an order.

44. I beg to address two sub-issues. Firstly, the sale agreement which is being relied upon by the Appellant to underpin the claim for specific performance [aka transfer] was entered into with a person who had not procured and/or obtained the requisite grant of letters of administration in respect of the estate of M'gitunga M'riwara [deceased]. The contents of paragraph 4 of the sale agreement are explicit.

45.To my mind, the impugned sale agreement which underpins the Applicant's claim for transfer [if at all] is vitiated by illegalities. [See Section 82 of the Law of Succession Act, which prohibits any dealings with an immovable property belonging to a deceased person before confirmation of grant].

46.Secondly, it is also worthy to recall that the sale agreement touched on and concerned a portion of L.R No. Nkuene/Uruku/386. However, the claim for specific performance/transfer relates to the suit properties; which are separate and distinct from the parcel of Land at the foot of the sale agreement.

47.It may well be that the suit properties are subdivisions of the parcel of Land that was referenced at the foot of the sale agreement, but in the absence of evidence to that effect, there is no way that a court of law can draw nexus between the named properties.

48.Suffice it to state that courts of law act on the basis of evidence and not hypothesis/assumptions. Moreover, it is the duty of the Claimant to tender and adduce the Evidence. [**See the provisions of Section 107; and 108 of the Evidence Act, Chapter 80, Laws of Kenya**].

49.I agree with the learned trial magistrate that the Appellant has not provided any nexus and connection between the parcel of land at the foot of the sale agreement; and the suit properties. The failure to provide the nexus was clearly detrimental to appellant's claim.

50.Before concluding on this issue, it is imperative to underscore that the suit properties which the Appellant is seeking to be transferred to her;

measures 0.453 Ha and 0.154 Ha, respectively. [See the certificate of official search which were produced as exhibit P2]. However, it bears repeating that what was [sic] purchased by the Appellant is Half acre of LR. No Nkuene/Uruku/386.

51. What comes to the fore is that the Appellant herein was clearly seeking to use the machinery of the Court [Judicial process] to accrue unjust enrichment, at the foot of the sale agreement.

52. Simply put, the acreage[s] at the foot of the Suit properties exceed half acre [1/2], which the Appellant [sic] bought at the foot of the impugned Sale agreement. To this end, if the Appellant were to succeed on the basis of the subject matter, the Appellant would have acquired more Land than was [sic] bought from the Respondent.

53. I must have said enough to demonstrate that the learned trial magistrate correctly held that the Appellant did not demonstrate a basis to warrant an order of specific performance; or better still transfer of the suit properties in the manner adverted to at the foot of the Plaint under reference.

FINAL DISPOSITION.

54. Flowing from the foregoing analysis, it must become apparent that the appeal beforehand is devoid of merits. Differently put, the Appeal is meritless.

55. Same courts dismissal.

56. In the upshot, and for the reasons hereinbefore stated; the final orders that commend themselves to this court are as hereunder;

- i. The Appeal be and is hereby dismissed.
- ii. The Judgment of the Subordinate Court; and the consequential decree be and are hereby affirmed.
- iii. No orders as to costs.

57. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU this 16TH DAY OF OCTOBER 2025.

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

In the presence of:

C/A Hussein/Mukami

Mr. L Kimathi Kiara for Appellant

N/A for the Respondent