



Lewa v Ngala & 2 others (Sued as Administrators of the Estate of Charo Ngala Mwangandi) (Environment and Land Appeal E019 of 2024) [2025] KEELC 4613 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E019 OF 2024**

**EK MAKORI, J
JUNE 12, 2025**

BETWEEN

ALFRED NGUMBAO LEWA APPELLANT

AND

BIBI CHARO NGALA 1ST RESPONDENT

MWANDA KITSAO JEFA 2ND RESPONDENT

SIDI CHARO NGALA 3RD RESPONDENT

**SUED AS ADMINISTRATORS OF THE ESTATE OF CHARO NGALA
MWAGANDI**

(An appeal from the judgment and decree of Hon. James Ongondo, Senior Principal Magistrate, delivered in Malindi on April 23, 2024, in CMELC No. E025 of 2023)

JUDGMENT

1. By a Plaint dated March 30, 2023, the Appellant, Alfred Ngumbao Lewa, sought the recovery of the following reliefs against the respondents:
 - a. A declaration of his legal ownership of the 6 acres in the suit property, Plot No. Gede/Mijomboni/486, and a request for the Defendants to fulfill the terms of the sales agreements.
 - b. That the Defendants be ordered by the Court to transfer the 6 acres of the property in the suit to the Plaintiff.
 - c. A permanent injunction order should be issued to restrain the Defendants, their agents, servants, family members, and anyone acting under them from trespassing on and entering the



Plaintiffs' portion measuring 6 acres within Plot No. Gede/Mijomboni/486, and from selling, transferring, or dealing with it in any manner whatsoever.

- d. In the alternative, an order should be declared stating that the Plaintiff has acquired the 6 acres through adverse possession after residing there for over 12 uninterrupted years. He has cultivated the land with cash crops, such as mangoes, coconuts, and cashew nuts, operates maize mills, and keeps cattle and goats on the property. The Court should order the Defendants to transfer the land to him.
 - e. Costs of this suit.
 - f. Interest thereon at the court rate.
 - g. Any other relief that this Court shall deem just to grant.
2. The respondents, Bibi Charo Ngala, Mwanda Kitsao Jefa, and Sidi Charo Ngala, sued as the administrators of the estate of Charo Ngala Mwangandi - filed their statement of defense dated April 18, 2023, asserting that the appellant had no legal claim to the estate of the deceased, the registered owner of the disputed land. They contended that the agreements for sale relied upon were products of deceit, claiming that there is no valid agreement for sale.
 3. After hearing the case, the learned Magistrate dismissed the Appellant's suit with costs.
 4. The Appellant has lodged an appeal against the entire judgment and decree, based on the grounds detailed in the Memorandum of Appeal dated May 24, 2024.
 5. The appeal was deliberated through written submissions presented by the esteemed counsel, Mr. Shujaa, representing the Appellant, and Mr. Atancha, representing the Respondents. The counsels referred this court to pertinent legal provisions and judicial precedents to assist the court in addressing the relevant issues, for which this court extends its sincere gratitude.
 6. Based on the materials and submissions presented to me, the issues I outline for the decision of this court can be succinctly summarized as follows: whether a sales agreement existed between the Appellant and the estate of the deceased, Charo Ngala Mwangadi; whether the appellant was granted possession of the six acres of the disputed property pursuant to that sales agreement; whether the aforementioned sales agreement could invalidate the registered interest of the deceased's estate; whether the Magistrate reached the correct conclusion in his judgment; and who should bear the costs associated with this appeal.
 7. The function of this court at this stage is to re-evaluate the evidence presented before the Lower Court and reach an independent conclusion. In the matter of *Okeno v Republic* [1972] EA 32 at 36, the East African Court of Appeal articulated the responsibilities of the court during a first appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”



8. A review of the Magistrate's judgment highlights the way the sale agreement was drafted. The Magistrate ultimately determined that the agreement was non-existent and bordered on fraudulent conduct, leading to the dismissal of the Appellant's suit. Counsel representing the parties hold divergent views, while Mr. Atancha supports the Magistrate's findings. Mr. Shujaa contests this.
9. During the proceedings of the case hearing, the Plaintiff, who testified as PW1, formally adopted the written statement dated March 30, 2023, as his primary testimony. He indicated that he acquired six acres from Land Title No. Gede/Mijomboni/486 through a sale agreement established with the late Charo Ngala Mwangandi on October 8, 1990, initially for Ksh. 19,000. This amount was subsequently revised to Kshs 40,000 in an agreement concluded on October 31, 1990, between the appellant and the deceased.
10. The deceased is the registered owner of the suit land. The Appellant presented copies of the agreements and a copy of the certificate of official search for the suit land, which certifies the deceased as the owner of Title No. Gede/Mijomboni/486.
11. The evidence presented proved that the Respondents are the administrators of the estate of Charo Ngala Mwangandi. The Appellant submitted a copy of the grant of letters of administration for the estate of the deceased as evidence.
12. The Appellant also produced evidence of an agreement dated March 9, 1992, made between himself and the Respondents, in which the Respondents acknowledge receipt of part of the purchase price that was paid to them after the deceased's demise.
13. The evidence presented by the Appellants was supported by the testimony of their witness, Charo Yaa, who testified as PW2. PW2 served as a witness to the agreement and the payment of a portion of the purchase price to the deceased. Additionally, PW2 was present during the demarcation of the boundaries of the 6-acre parcel of land sold to the Appellant by the deceased.
14. Another witness for the appellant was Wilfred Ngumbao Lewa, who testified as PW3. PW3 was a witness to the payment of Kshs 30,000 to the respondents following the demise of the deceased.
15. In defense, the 1st Respondent testified as DW1. She adopted her written statement as her testimony in chief. In her oral testimony, she disputes the sale agreement and the purchase of the suit property but confirms receipt of a portion of the purchase price. In her evidence, she partly stated the following:

“ We went to sign at the chief's office after the death of my husband. I was given Kshs. 10,000/- for deceased treatment. The deceased was to repay Kshs. 10,000/-.”
16. From the evidence presented by DW2, it can be concluded that the Appellant was put in possession of the suit property:

“ I know the Plaintiff. He stayed on our land. The deceased brought him on the land. Plaintiff came to the land long time ago. I cannot tell the years. I do not know if he bought land. We have not told him to vacate.”
17. Based on the evidence presented before the trial court, it is clear that the Appellant acquired the six acres in dispute and that the sale was conducted for a consideration. Furthermore, the evidence indicates that the Appellant took possession of the six acres of the subject property. I believe that the trial court



placed significant emphasis on the form of the agreement rather than the substance, as evidenced by the statement made in his judgment that:

‘Although it is not clear how the amount was paid there is no visible signature of the deceased or evidence of him acknowledging payment.

18. This finding by the learned Magistrate was erroneous, as all agreements clearly indicate that the purchase price was settled in installments. It is clear that each installment paid was both recorded and witnessed. Regarding the signature of the deceased, the agreement dated October 31, 1990, distinctly displays the deceased's signature at line 26, where he signed his name as Charo Ngala.

19. I further find that the Magistrate erred in the hallmark of his judgment and adopted a similar stance when he concluded that:

“looking at the two agreements one wonders whether the agreements are in respect of the same land or different parcels. If it is the same land then the Plaintiff is clearly on a fishing expedition bordering on fraud and misrepresentation. It is the court’s presumption that no such transaction took place as there cannot be two agreements over the same property with different prices.”

20. In conclusion, the learned Magistrate failed to evaluate the evidence presented adequately. He neglected to review the written statements that elucidate the rationale behind the initial agreement for the purchase of the suit land at Ksh. 19,000 and the subsequent agreement for the purchase of the same suit of land at Ksh. 40,000. The purchase price was revised and increased from Ksh. 19,000 to Ksh. 40,000.

21. The assertion that no such transaction took place also contradicts the learned Magistrate's earlier finding, as stated in his judgment as follows:

“The agreement of 31/10/1990 indicates that the plaintiff was to complete payment by 15/9/91 which meant that the deceased intended that time be of essence in the transaction. It is crystal clear that the plaintiff did not complete payments by the stipulated period, and he therefore breached the agreement.”

22. The evidence on record indicates that the Respondents persisted in receiving payment of the purchase price in installments, even subsequent to the designated period and following the demise of the deceased.

23. The learned Magistrate’s determination regarding forgery and the ages of the children was not founded upon any evidence. The Respondents failed to present any evidence pertaining to forgery or the ages of the children. No birth certificate indicating the ages of the children was submitted as evidence, and the children themselves were not summoned by the Respondents to provide testimony regarding their ages or to deny having affixed their signatures as witnesses to the agreements.

24. It is also a well-established legal principle that allegations of forgery must be explicitly pleaded and rigorously substantiated. The onus was upon the Respondents to assert in their statement of defense that the signatures contained in the agreements were forgeries and subsequently to provide evidence validating that the signatures in the agreements were indeed forgeries.

25. The signatures of both the Respondents and the purported children are facts that fall specifically within their knowledge, and Section 112 of the *Evidence Act* imposes the evidential burden of disproving these signatures upon the Respondents. The Appellant contends that the Respondents failed to fulfill this burden.



26. Regarding the acquisition of the suit property through the doctrine of adverse possession, this court will not devote considerable deliberation to this issue, given the Superior Court's determination that Magistrates' Courts lack jurisdiction to address such matters, see *Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others* [2024] KECA 1417 (KLR).
27. The Appellant acquired the six acres through the sale agreements. Evidence shows he took possession in 1990, built a residence, and cultivated trees. He provided photographs of the houses and trees. The Appellant's construction and planting activities challenge the registered owner's title to the property. His long-standing occupancy has created possessory rights against the Respondent's title.
28. The Superior Courts have articulated the principle that once a sale transaction is consummated through a sale agreement, and the seller subsequently hands over possession to the buyer, equity shall prevent the deprivation of rights acquired by the buyer of the purchased land. This principle was affirmed in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (December 28, 2023), *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri Civil Appeal No. 6 of 2011, consolidated with Nos. 26 & 27 of 2011* [2014] eKLR, and *Willy Kimutai Kitilit v Michael Kibet, Civil Appeal No. 51 of 2015* [2018] eKLR.
29. The concepts in question pertain to the equitable principles of constructive trust and proprietary estoppel, which are applicable and enforceable in matters concerning land sales, contingent upon the specific circumstances of each case. These principles correspond with the doctrine of equity, as articulated in Article 10 of our Constitution, aiming to ameliorate the rigors and rigidity of the law once a purchaser has fulfilled his obligations under a sale agreement, taken possession of the sold property over time, yet finds himself devoid of the essential ownership documents for various reasons, including a reversal by the seller, which the strictures of the law cannot reasonably support.
30. The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. The Supreme Court in the *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (December 28, 2023) (supra) had this to say:

“The first question before us therefore is not whether the Court of Appeal was correct in imputing a constructive trust but rather, whether such trust can be imported into a land sale agreement to defeat a registered title therefrom obtained for valuable consideration without offending the constitutional right to property under article 40 of *the Constitution* and other statutory provisions.”
31. The Apex Court proceeded to assert that by virtue of Article 40 of *the Constitution*, every individual, either singly or in conjunction with others, possesses the right to acquire and own property of any description, in any region of Kenya. However, this property right is not absolute. Pursuant to Article 40(3), the State may deprive an individual of property through the process of land acquisition for a public purpose or in the public interest, in accordance with *the Constitution*. Furthermore, under Article 40(6), the rights conferred by this Article do not extend to property that has been determined to have been unlawfully acquired.
32. Further, Article 40 specifies an internal limitation on property rights. In contrast, the general limitation on rights outlined in Article 24 of *the Constitution* states that any restriction on a right must be enacted by law and only to the extent that it is reasonable and justifiable in a society that values human dignity, equality, and freedom. Relevant factors include the nature of the right, the significance and intent of



- the limitation, and the relationship between the limitation and its purpose. Additionally, it states that the individual seeking to justify a specific limitation bears the responsibility to do so.
33. The *Land Registration Act*, No. 3 of 2012, regulates the registration of titles. According to Section 25 of this Act, a proprietor's rights cannot be invalidated except as specified within the Act, and this is subject to encumbrances and conditions in the register. Furthermore, rights and interests identified by Section 28 that do not require notation on the register are also subject to liabilities unless otherwise indicated in the register. Additionally, Section 25(2) clarifies that this provision does not exempt a proprietor from any responsibilities or obligations they may have as a trustee.
 34. Under Section 26 of the *Land Registration Act*, No. 3 of 2012, a Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor, shall be accepted by all courts as prima facie evidence that the individual named as proprietor of the land is the absolute and indefeasible owner. However, this is subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate. Furthermore, the title of the proprietor shall not be open to challenge except based on fraud or misrepresentation, or where the certificate of title was acquired illegally, unprocedurally, or through a corrupt scheme.
 35. Section 28 stipulates that, unless explicitly stated otherwise in the register, all registered land shall be subject to overriding interests that may currently exist and impact the land, regardless of their notation in the register. These overriding interests encompass trusts.
 36. While Sections 25, 26, and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, these rights are solely subject to the rights and encumbrances noted in the register and overriding interests. The overriding interests encompass trusts. In the absence of any limitations concerning the trusts, this encompasses constructive trusts. Consequently, applying the provisions of Article 24 of *the Constitution*, the limitation of the property right is established under law and includes a constructive trust.
 37. While *the Constitution* guarantees every individual the right to property as outlined in Article 40, this right is not absolute. Article 24 stipulates that a right may only be constrained in accordance with the law. Although Sections 25 and 26 of the *Land Registration Act* delineate the rights of a proprietor and affirm that the certificate of title serves as conclusive evidence of ownership, Section 28 indicates that such registration is subject to overriding interests. Among these overriding interests is the concept of trust, which encompasses constructive trust.
 38. Constructive trusts can arise in various circumstances, including land sale agreements. A trust constitutes an equitable remedy that serves as an intervention against unconscionable conduct. When the circumstances of a case necessitate that equity recognizes the legal owner as a trustee, the law will impose a trust. Such a trust is imposed by statute whenever justice and good conscience require it.
 39. Based on the circumstances surrounding this matter and considering the totality of what was presented before the trial court, I hold the considered view that a constructive trust should have been invoked in favor of the Appellant.
 40. In summary, the current appeal succeeds in overturning the judgment of the trial court dated April 23, 2024, which is set aside in its entirety and substituted with orders granting the Appellant's claim as requested in the plaint dated March 30, 2023, in this manner:
 - a. A declaration is hereby issued that the Plaintiff is the legal owner of the 6 acres in the suit property, Plot No. Gede/Mijomboni/486, by virtue of the sale agreements between the parties.



- b. The Defendants are hereby ordered by this Court to transfer the 6 acres of the suit property to the Plaintiff.
- c. A permanent injunction is hereby issued to restrain the Defendants, their agents, servants, family members, and anyone acting on their behalf from trespassing on and entering the Plaintiffs' portion measuring 6 acres within Plot No. Gede/Mijomboni/486, and from selling, transferring, or dealing with it in any manner whatsoever.
- d. Costs will be borne by the respondent both here and in the lower court.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 12TH DAY OF JUNE, 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Shujaa for the Appellant

Happy: Court Assistant

In the absence of:

Mr. Atancha for the Respondent

