Kioko v Musembi (Environment & Land Case E076 of 2022)
[2024] KEMC 31 (KLR) (5 August 2024) (Judgment)

Neutral citation: [2024] KEMC 31 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

ENVIRONMENT & LAND CASE E076 OF 2022

CN ONDIEKI, PM

AUGUST 5, 2024

BETWEEN

SAMMY KISILU KIOKO ..... PLAINTIFF

AND

MESHACK MUSEMBI ..... DEFENDANT

JUDGMENT

Part I

1. In circumstances where the Land Control Board consent has not been obtained for whatever reason and the equitable remedy of specific performance is sought by the innocent party, two schools of thought have emerged on whether or not, the said remedy can be granted. Whereas the first school of thought posits that it cannot proceeding on the premise that lack thereof renders the contract void and that the doctrines of equity are no panacea to this statutory position (as they cannot unseat and supplant express and unequivocal prohibitory provisions of statute, contrary to the hierarchy of laws contemplated under section 3 of the *Judicature Act*), the second school of thought takes a diametrically opposing position which is that the want of the said Land Control Board consent, especially in circumstances where the Defendant is clearly in breach or is plainly uncooperative to secure the consent, considered in the face of the doctrines of equity, should not render the contract void and should instead invite invocation of the twin doctrines of constructive trust and unjust enrichment in favour of the innocent party.

2. One of the remedies available to a seller of land who has not been paid the full purchase price, as against the purchaser is either repudiation, refund of the partial purchase price and repossession or rescission, refund of the partial purchase price and repossession. While the former is self-help remedy, the latter is a Court action remedy.

3. The principal question in this matter is whether the remedy of specific performance is available to a purchaser who has undoubtedly been in breach of the contract, by failing to pay the full purchase

price, compounded further by the fact that no land control board consent was secured with 6 months from the date of the Sale Agreement.

Part II: The Plaintiff's Case

4. In his Plaint dated 20th July 2022 and filed on even date, the Plaintiff brought this action against the Defendant seeking Judgment for: (1) A declaration that the agreement between the Plaintiff and the Defendant dated 2.5.2020 for sale of 1 acre from land parcel title number Wamunyu/Kambiti/400 was rendered unenforceable by breach by the Defendant and failure to apply for/secure the requiste consents from Land Control Board within 6 months from the date of the agreement and the only remedy available to the Defendant is refund of the part of the purchase price he paid. (2)An order directing the Defendant to deliver vacant possession of the portion he has fenced off in land parcel title number Wamunyu/Kambiti/400 immediately and in the event he does not, order of eviction issues against him. (3) An order of permanent injunction restraining the Defendant whether by himself, servants, agents, family members or anybody claiming through him prohibiting them from trespassing into land parcel title number Wamunyu/Kambiti/400 or in any way interfering with ownership and possession of the Plaintiff.

5. The Plaintiff claims that he is the registered proprietor of the parcel of land known as Wamunyu/Kambiti/400 (hereinafter "the suit property"). He avers that on 2nd May 2020, with the Defendant, he entered into a Sale Agreement for sale to the Plaintiff 1 acre to be hived from the suit property, for a consideration of Kshs. 330,000 to be paid in installments as follows: Kshs. 100,000 upon signing the agreement; and the balance thereof to be paid by October 2020.

6. It is claimed that by 30th October 2020, the Defendant had only paid Kshs. 100,000 instead of the full balance of Kshs. 230,000. It is claimed that after paying Kshs. 100,000 in October, the Defendant undertook to pay the balance of Kshs. 130,000 by 26th December 2020 but he again reneged. The Plaintiff claims that on 3rd December 2020, the Defendant hived off a portion without his participation and fenced it with the help of the area assistant chief. It is claimed that vide a letter dated 20th January 2022, the Plaintiff repudiated the contract and offered to refund Kshs. 200,000 to the Defendant which was followed up with another letter dated 2nd June 2022.

7. In his Reply to the Statement of Defence and Defence to the Counterclaim, the Plaintiff joined issues with his averments in the Plaint.

8. At the hearing of the Plaintiff's case, the Plaintiff adopted his witness statement dated 20th July 2022 as his evidence-in-chief. In his said statement, the Plaintiff has rehashed the facts in the Plaint. In buttressing his case, the Plaintiff exhibited the following documents: (i) a copy of the Sale Agreement in Kikamba as the Plaintiff's Exhibit 1; (ii) a copy of the Sale Agreement translated to English as the Plaintiff's Exhibit 2; (iii) a copy of the title deed as the Plaintiff's Exhibit 3; (iv) a certificate of search as the Plaintiff's Exhibit 4; (v) 4 photographs of the fenced off portion as the Plaintiff's Exhibit 5; (vi) a letter dated 20th January 2022 as the Plaintiff's Exhibit 6; (vii) a letter dated 2nd June 2022 as the Plaintiff's Exhibit 7;

9. In cross-examination of the Plaintiff, he conceded that the subject of the Sale Agreement was 1 acre from the suit property. He stated that the Defendant demarcated for himself and fenced while the Plaintiff was away. He stated that the Defendant breached the contract by failing to pay the purchase price as per the terms of the Sale Agreement.

10. In his written Submissions dated 29th April 2024 and filed on 11th June 2024, learned Counsel Mr. Mutia instructed by the Firm of Messieurs Mutia JM & Associates representing the Plaintiff, has

recapitulated the substance of the Plaint, the Reply to the Statement of Defence, the Defence to the Counterclaim, and the witness testimonies. I find it unnecessary to regurgitate.

11. Learned counsel has proposed three issues for determination as follows: (i) whether the Defendant is in breach of the contract; (ii) whether the failure to secure the LCB consent voided the contract; and (iii) whether the contract is capable of being enforced.

12. In regard to the first proposed question, learned counsel submits that evidence was adduced on a balance of probabilities that the Defendant breached the contract by failing to pay the balance of the purchase even after time was extended to enable him pay. It is submitted that when a contractual relationship is governed by documents, the parole rule excludes extrinsic evidence. In this regard, reliance is placed upon Speaker of Kisii County Assembly vs. James Omariba Nyaoga [2015] eKLR as highlighted in Toshike Construction Company Limited vs. Harambee co-operatives Savings and Credit Society Limited [2021] eKLR; and Twiga Chemicals Industries Limited vs. Allan Stevens Reynods [2015] eKLR.

13. Concerning the second proposed question, it is urged that failure to secure an LCB consent invalidated the contract, citing Concepta Nyaboke vs. Peter Muasya Wangaika & 2 others [2019] eKLR.

14. Concerning the third proposed question, it is urged that since the contract is now void, it is incapable of enforcement and the only remedy available to the Defendant is refund of the purchase price. In this connection, reliance is placed upon Sisto Wambugu vs. Kamau Njuguna [1983] eKLR as cited in Toshike Construction Company Limited vs. Harambee co-operatives Savings and Credit Society Limited [2021] eKLR; Billey Oluoch Orinda vs. Ayub Muthiee M'Igwetta & 2 others [2017] eKLR; and Lucy Njeri Njoroge vs. Kalyahe Njoroge [2015] eKLR.

Part III: The Defendant's Case

15. In his Statement of Defence and Counterclaim dated 17th August 2022 and filed on 25th August 2022, the Defendant admitted that there was a Sale Agreement and that he paid Kshs. 205,000 out of the total purchase price of Kshs. 330,000. The Defendant however denied that he breached the contract averring that the period of payment of the balance was mutually extended to July 2021 to enable the Defendant get funds to pay the balance. The Defendant thus avers that the balance was Kshs. 125,000 and not Kshs. 130,000 as claimed by the Plaintiff.

16. In his Counterclaim, the Defendant prays for Judgment for: (a) An order of Specific Performance compelling the Plaintiff to excise and execute all relevant documents to facilitate transfer of the portion occupied by the Defendant into the Defendant's names and in default, the Executive Officer of this Court be empowered to sign all the necessary documents to effect the transfer. (b) In the alternative, the Plaintiff do refund Kenya Shillings 205,000/= paid to him by the Defendant together with interest from 2.5.2020 till payment in full. (c) Costs of the suit and interest.

17. At the hearing of the Defendant's case, the Defendant adopted his Replying Affidavit dated 17th August 2022 and filed on eve date as his evidence-in-chief. In his said Affidavit, the Defendant rehashes the facts in the Statement of Defence.

18. In cross-examination, the Defendant stated that the Plaintiff was not paid the balance of Kshs. 125,000. He stated that the Plaintiff was paid Kshs. 205,000. He stated that he took possession and fence off the portion with the consent of the Plaintiff.

19. In his written Submissions dated 29th April 2024 and filed on the even date, the Defendant (who at this stage was self-represented) has recapitulated the substance of the Plaint, the Reply to the Statement

of Defence, the Defence to the Counterclaim, and the witness testimonies. I find it unnecessary to regurgitate.

20. The Defendant proposed two questions as follows: (i) whether the Defendant deserves an order of Specific Performance compelling the Plaintiff to excise and execute all relevant documents to facilitate transfer of the portion occupied by the Defendant into the Defendant's names. (ii) In the alternative, whether the Plaintiff should be ordered to refund Kenya Shillings 205,000/= paid to him by the Defendant together with interest from 2.5.2020 till payment in full.

21. Regarding the first proposed question, the Defendant submits that he is entitled to an order of specific performance since his failure to pay was caused by unavailability of funds, which fact was communicated to the Plaintiff. Reliance is placed upon Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri [2014] eKLR; and Aliaza vs. Saul [Civil Appeal 134 of 2017] [2022] KECA 583 [KLR] [24 June 2022] [Judgment] Neutral Citation: [2022] KECA 583 [KLR].

22. Concerning the alternative remedy proposed by the Defendant, it is submitted that should this Court not find merit in the main prayer of the Counterclaim, then the Defendant is entitled to a refund of Kshs. 205,000, with interest effective 2.5.2020, citing Njoroge & 3 others vs. Maina [Environment and Land Appeal 16 of 2021] [2022] KEELC 4799 [KLR] [15 September 2022] [Judgment]; and Kihuba Holdings Limited vs. Charo Karisa Ngulu [2021] eKLR.

Part IV: Questions for Determination

23. Since it is not in dispute that there was a valid Sale Agreement for sale of 1 acre to be hived from Wamunyu/Kambiti/400 (the suit property), gleaning from the Plaint; the Statement of Defence & Counterclaim; the Reply to the Plaint & Defence to the Counterclaim, and the rival written Submissions are narrower issues which can be packaged into two questions for determination as follows:

    i. First, whether on a balance of probabilities, the Plaintiff has proved that the only remedies available in the current circumstances - where the full purchase price had not been paid and Land Control Board consent had not been secured – are rescission of the contract and refund of the partial purchase price which had been paid by the Defendant or whether in the same circumstances, the Defendant's Counterclaim has met the requisite threshold for an order of specific performance.

    ii. Third, who should bear the costs of this suit?

Part V: Analysis of the law; examination of facts; evaluation of evidence and determination

24. I now embark on analysis, interrogation, assessment and evaluation of each of the two issues, in turn.

(i) Whether on a balance of probabilities, the Plaintiff has proved that the only remedies available in the current circumstances - where the full purchase price had not been paid and Land Control Board consent had not been secured – is a declaration that the contract is void and enforceable accompanied with a refund of the partial purchase price which had been paid by the Defendant or whether under the same circumstances, the Defendant's Counterclaim has met the requisite threshold for an order of specific performance

25. In this matter, it is common ground that owing to financial constraints which befell the Defendant, he did not pay the full purchase price in accordance with the Sale Agreement dated 2nd May 2020 which gave him until October 2020 to clear the balance of the purchase price (in the sum of Kshs. 230,000). Vide a further agreement dated 30th October 2020, having paid a further sum of Kshs. 100,000, the

completion period was reviewed and the period extended to enable the Defendant comply by 26th December 2020. He did not.

26. It is a further common ground that no Land Control Board consent was obtained within 6 months from the date of the Sale Agreement and no extension of the period to secure the consent was sought.

27. Since it will offer a key to untangle this controversy, this Court will first analyze the principles of law governing the remedy of specific performance.

28. What is the nature of specific performance remedy? Under what circumstances is it appropriate to grant this remedy? One of the remedies available to a purchaser of land who has paid the full purchase price, as against a vendor or his personal representative who has failed to transfer the purchased property to the purchaser is specific performance. The impetus to grant a remedy of specific performance is based on the existence of a valid enforceable contract. The remedy of specific performance is tailored at protecting and realizing the legitimate expectation of an innocent and evidently loyal purchaser. In this connection, the conscience of equity will not settle and leave a purchaser who has faithfully invested in a contract of purchase to suffer injustice at the hands of the merciless vendor, conditioned on the following principles/parameters.

29. First, being an equitable remedy, the principles which govern equitable remedies are applicable as follows: (i) the remedy of specific performance is granted upon exercise of a discretionary power of the Court; (ii) a Court of law will ordinarily not grant this remedy if there is another adequate remedy available to the aggrieved party, either in statute or common law. It is the last resort. The very last port of call. It follows that wherever an alternative and adequate remedy like damages or an injunction is available, this remedy should be avoided. See Lumley vs. Wagner (1852) 64 ER 1209. In Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited [2006] eKLR, Maraga, J. (as he then was) had this to say about the order of specific performance: "Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well 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 enforceable. Even when 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 when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant." In the same vein, in Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & Anor [2012] eKLR, R.N. Nambuye, J. (as she then was) laid the following guiding parameters for specific performance to be availed to the Plaintiff: (a) The remedy is an equitable remedy meaning that the Court has to satisfy itself that on the facts presented to it (the Court) it is equitable in the interests of both parties to grant the reliefs; (b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the Court can withhold it and award damages instead; (c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the Courts exercise of its discretion which is trite and which this Court has judicial notice of is that the discretion has to be exercised judiciously with a reason; (d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to cause hardship to the Defendant even if circumstance giving rise to the hardship to be suffered by the Defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract; and (e) The party entitled to earn the relief

has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.

30. Second, the discretionary power in this regard should be exercised to aid a purchaser who has fulfilled his part of the bargain under the contract, to allow the purchaser benefit from the contract without impediment. In Ole Meikoki vs. Ole Sirere [1981] KLR 593, the Court of Appeal had this to say about the guiding ray in considering appropriateness of the remedy of specific performance: "When a party fulfills his obligation under a contract, he must be allowed to benefit from the contract without impediment." See also Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & Anor [2012] eKLR, per R.N. Nambuye, J. (as she then was).

31. Third, the remedy cannot avail to the purchaser if the contract was unconscionable.

32. Fourth, the remedy will ordinarily not be available to the purchaser is execution of this remedy is impossible.

33. Fifth, this remedy cannot avail to the purchaser if performance consists of a personal service. The underpinning rationale being that granting this remedy in such circumstances will then offend the constitutional probation against servitude. See Lumley vs. Wagner (1852) 64 ER 1209. Instead, in such cases, an injunctive relief is more appropriate. In this case, Wagner wanted to severe a contract of performance at will. Lord St Leonards LC held that although an order of specific performance cannot not issue in the circumstances, an injunctive relief did not constitute indirect specific performance reasoning that "Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity. It was objected that the operation of the injunction in the present case was mischievous, excluding the Defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the Court, and being of opinion that it is proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction in restraining J. Wagner from singing elsewhere may, in the event of an action being brought against her by the Plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly."

34. Sixth, it will not avail to the purchaser if the contract is too vague to be enforced.

35. Seventh, it will not avail to the purchaser if the contract was terminable at will.

36. Eighth, it will not be available to the purchaser if consensus ad idem was missing ab initio or in instances where the contract was built on a mistake or misrepresentation of facts actuated by the purchaser. See Tamplin vs. James (1880) 15 Ch D 215. In Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited [2006] eKLR, Maraga, J. (as he then was) had this to say about the order of specific performance: "Specific performance like any other equitable remedy is discretionary and the Court will only grant

it on well 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 enforceable. Even when 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 when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant." See also Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & Anor [2012] eKLR, per R.N. Nambuye, J. (as she then was).

37. Ninth, it will not avail to the purchaser if the contract was made for no consideration. See Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited [2006] eKLR, per Maraga, J. (as he then was), cited supra. See also Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & Anor [2012] eKLR, per R.N. Nambuye, J. (as she then was).

38. Tenth, the norm is that it will not avail to the purchaser if the contract is void or unenforceable. See Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited [2006] eKLR, per Maraga, J. (as he then was), cited supra. See also Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & Anor [2012] eKLR, per R.N. Nambuye, J. (as she then was). The exception to this norm is the circumstance where the purchaser has met all his part of the bargain by payment of the full purchase price but the Defendant frustrates the contract by failing to secure a land control consent. See Jackson Kamau Kanyuru vs. Stephen Githinji Weru [2018] eKLR; and Jerusha Wangari Mwangi vs. Beatrice Muthoni Karanja & 2 others [2018] eKLR.

39. Transactions affecting agricultural land – including sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing or division - is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction. See section 6 of the *Land Control Act*. And if money has exchanged hands, then section 7 thereof provides that "7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

40. In precis, the specific performance remedy is not and cannot be available if the contract suffers from some fatal defect, such as failure to comply with the formal requirements or mistake or illegality which vitiates the contract and makes it invalid or unenforceable.

41. In this case, I find that the facts proven point to the direction all factors are in favour of the Plaintiff except one sticky issue which this Court will now embark on analysis. Was the contract vitiated by want of a Land Control Board consent to transfer?

42. Jurisprudence on this issue, revolving around section 6 of the *Land Control Act*, reveals that it has always been sticky and two schools of thought have emerged therefrom.

43. The first school of thought posits that want of a land control board consent renders the contract void and the only remedy available to the Plaintiff is refund of the purchase price. A majority of decisions of the superior Courts and especially the Environment and Land Court ascribe to this school. See inter alia the East African Court of Appeal decision in Rioki Estate Co (1970) Ltd vs. K Njoroge [1977] KLR 146; Hirani Ngaithe Githire vs. Wanjiku Munge [1979] eKLR, per Chesoni, J.; James Njuguna Mwaura vs. Paul Wandati Mbochi [2018] eKLR, per Lucy Gicheru, J.; and Danson Muniu Njeru vs. William Kiptarbei Korir & 6 others [2014] eKLR, per M. Sila, J. The principal thesis of this

school is that the doctrines of equity cannot unseat and supplant express and unequivocal prohibitory provisions of statute, contrary to the hierarchy of laws contemplated under section 3 of the *Judicature Act* which places the said doctrines below statute law. The Court of Appeal in David Ole Tukai vs. Francis Arap Muge & 2 Others [2014] eKLR, reasoned that "...First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the Courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the *Judicature Act*. The said Court allowed the appeal from the decision of the High Court which had held that in the situation before the Court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as Section 6 of the *Land Control Act*." See also Concepta Nyaboke vs. Peter Muasya Wangaika & 2 others [2019] eKLR; Sisto Wambugu vs. Kamau Njuguna [1983] eKLR; Toshike Construction Company Limited vs. Harambee co-operatives Savings and Credit Society Limited [2021] eKLR; Billey Oluoch Orinda vs. Ayub Muthiee M'Igwetta & 2 others [2017] eKLR; and Lucy Njeri Njoroge vs. Kalyahe Njoroge [2015] eKLR.

44. The second school of thought takes a diametrically opposing position which is that the want of the said Land Control Board consent, especially in circumstances where the Defendant is clearly in breach or is plainly uncooperative to secure the consent, considered in the face of the doctrines of equity, should not render the contract void and should instead invite invocation of the twin doctrines of constructive trust and unjust enrichment in favour of the Plaintiff.

45. Since the first school of thought is plain and obvious, anchored on the plain text of section 6 aforesaid, I will take time to interrogate the second school of thought. In the considered thoughts of the second school, once a purchaser pays the full purchase price which is received and accepted by the vendor but transfer of the property to the purchaser's name is not effected for one reason or the other, the purchaser becomes a child of the law under care and protection. In this connection, the conscience and doctrines of equity will imply, construe and impose a trust upon the vendor, making the proprietor or legal owner a trustee of the purchaser constructively. See inter alia Jackson Kamau Kanyuru vs. Stephen Githinji Weru [2018] eKLR; and Jerusha Wangari Mwangi vs. Beatrice Muthoni Karanja & 2 others [2018] eKLR. Henry Campbell Black, the learned author of the now locus classicus Dictionary in legal definitions popularly known as the Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition) defines the term 'constructive trust' to mean "...An equitable remedy that a Court imposes against one who has obtained property by wrongdoing. A constructive trust, imposed to prevent unjust enrichment, creates no fiduciary relationship..." A constructive trust is thus an implied trust - contra-distinguished from an express trust - inferred by operation of law. It is imposed by law to situations either presuming an intention of the parties to create a trust or simply because of facts at hand. It is ordinarily imposed to the benefit of an innocent party who has been wrongfully deprived of his rights due to diverse unjust reasons including situations where a person obtains or holds a property right which they should not hold in the first place due to unjust enrichment of interference or due to breach of a fiduciary duty.

46. I now turn to briefly offer a background of the doctrine of unjust enrichment. Except where it is a gift, the doctrines of equity frown on unjust enrichment. In such cases, these doctrines impose an implied or constructive (involuntary) trust upon that person who has obtained property unwarrantedly or by wrongdoing or by voluntary conferment of benefit for total failure of consideration. In such circumstances, the doctrines of equity afford the innocent party a right known as restitution interest and prescribed therefor the remedy of restitution (also known as recuperation or restitutionary redress or restitutory right) as the appropriate chiefly guided by its sufficiency.

47. It is imperative to appreciate the historical background of the doctrine of unjust enrichment and restitutory claims which was discussed in great detail in Samuel Kamau Macharia vs. Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR, per R. Kuloba, J.

48. What are the elements of unjust enrichment? The Plaintiff is expected by law to prove that first, the Defendants have been enriched. Second, the enrichment is at the Plaintiff's expense. Third, the enrichment at the Plaintiff's expense is unjust. And fourth, there is no justifiable and an unassailable bar or Defence. In the said Samuel Kamau Macharia case, R. Kuloba, J. set down the elements of unjust enrichment as follows: "And, on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the Chase International Investment Corporation case (supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the Plaintiff; and (3) that it would be unjust to allow the Defendant to retain the benefit in the circumstances of the case."

49. How does it arise? In the same Samuel Kamau Macharia case, R. Kuloba, J. proceeded to enunciate a sample of scenarios where unjust enrichment arises thus: "At the moment I sample the following: 1. non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payor and payee; 2. voluntary conferment of benefit for total failure of consideration; 3. benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust; 4. ultra vires demand; 5. abuse of a power entrusted to the Defendant by Parliament or by a contractual instrument such as a debenture or other agreement; 6. illegitimate use of self-help sanctions; 7. vindication of equitable title to property." {Emphasis supplied}

50. And what is the test in determining whether unjust enrichment has been established and what is the Plaintiff expected to demonstrate? In the said Samuel Kamau Macharia case, R. Kuloba, J. had this to say: "In short, on the part of the Plaintiff there must be found, in truth, factors which negative the voluntary character of the transfer of benefit to the Defendant. The Plaintiff must be found to have had a qualified or vitiated intent that the Defendant should be enriched. On the side of the Defendant, there must have been free acceptance of the transfer, in the sense that the Defendant had a choice whether to accept or reject, and had sufficient knowledge of the facts to make that choice a real one. The Defendant must know that a benefit is being offered to him non-gratuitously, and having the opportunity to reject, elects to accept. Those are some of the most outstanding restitution-yielding events. I am not forgetting situations where the Defendant has behaved unconscionably; for we all know equity's long established jurisdiction to set aside a bargain if there is "some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself..."

51. What is the remedy to unjust enrichment and are there valid defences in law or vitiating factors which militate against restitution? They include compromise; if public policy precludes restitution; impossibility; changed circumstances; acquiescence; compulsion; and charity or a gift. In the said Samuel Kamau Macharia case, R. Kuloba, J. had this to say: "On establishing one of the grounds of a restitutionary claim, the Plaintiff is prima facie entitled to restitution. But circumstances may be present which may constitute a valid defence to defeat the claim. There are limits to restitutionary claims. For instance, a restitutionary claim may fail (1) if the Plaintiff has entered into a compromise or made a payment meaning to waive all inquiry into it, in pursuance of the Defendant's honest claim (unless, of course, such payment was induced by misrepresentation or made under duress or undue influence or grudgingly under protest); (2) if public policy precludes restitution (such as in case of res judicata , statutes of limitation and laches, illegality, statutory bar); (3) if the Defendant cannot be restored to his original position (such as that there can be no restitutio in integrum , or that there has

been a total failure of consideration), or that he is a bona fide purchaser for value without notice; (4) if the Defendant has so changed his position which has cancelled out his unjust enrichment, that it would be inequitable in all the circumstances to require him to make restitution at all or in full, and restitution should either be terminated or diminished pro tanto (i.e. that he acted to his detriment on the faith of the validity of the receipt of the enrichment); (5) if the Defendant not having requested or acquiesced in the payment, the Plaintiff has conferred the benefit as a mere volunteer, i.e. that the Plaintiff was officious, or thrust himself on the Defendant, or intervened without adequate justification in short, that he made an unwanted benefit or an uninvited payment when not acting under legal compulsion or necessity; (6) if the Plaintiff conferred a benefit on the Defendant while acting in his own self interest in the absence of compelling factors like compulsion, necessity or request; (7) if the Plaintiff conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the Defendant; or (8) if the money received was paid out and given by the Defendant as a charitable donation. These, and many other defences are fully discussed in all the standard works on restitution, e.g. in Goff & Jones, op cit, at pp 46-72; and Burrows, The Law of Restitution, (1993), Chapter 15, pp 420 – 477."

52. In aligning with the second school of thought therefore, the conscience of equity will be troubled until and it cannot gleefully sit and spectate as unjust enrichment unfolds. For instance, in Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri (2014) eKLR, the Court of Appeal reversed the reasoning of the ELC Court which had ascribed to the first school of thought and held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent the absence of the LCB consent notwithstanding. Similarly, see the Court of Appeal decisions in Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR; Kiplagat Kotut vs. Rose Jebor Kipngok [2019] eKLR; Mwangi & another vs. Mwangi [1986] KLR 328; Mutsonga vs. Nyati [1984] KLR 425; Kanyi vs. Muthiora [1984] KLR 712; Gabriel Makokha Wamukota vs. Sylvester Nyongesa Donati [1987] eKLR; and Public Trustee vs. Wanduru Ndegwa [1984] eKLR, in which the twin doctrines of constructive trust and proprietary estoppel was applied in favour of the purchaser, the want of the LCB consent notwithstanding.

53. Imposition of a trust is a question of law. It follows that a constructive or resulting trust emerges by operation of law. This debate did not begin recently. In this context, as early as 1984, in Public Trustee vs. Wanduru Ndegwa [1984] eKLR, Madan, JA. (as he then was) reasoned that "The provisions of *Land Control Act* have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land."

54. Again, in 1987, the Court of Appeal was faced with the said Gabriel Makokha Wamukota case and in his minority opinion, Apaloo, JA took a view that ""A" sold agricultural land to "B". The former was uncooperative in getting "B" to obtain the consent of the Land Control Board. "A" however obtained full payment of the purchase price and duly put "B" into possession. On the faith of this sale, "B" spent a large sum of money in developing and improving the land. Ten years afterwards, "A", motivated by the prospect of obtaining higher price for the land, sells the self-same land to "C", then with A's active co-operation, hurriedly obtained the consent of the Land Control Board, (it is possible to obtain this in one day) and thereafter registered his title. "C" then proceeds to seek B's eviction from the land. Without the aid of section 6(2) of the Act, "C" cannot obtain title to the land superior to "B"s". Yet as the law stands at present, "C" will be held entitled to evict "B". Indeed "A" would be entitled to say to "B" "yes, I accept that I sold the land to you, obtained full payment of the consideration money and put you in possession for 10 years and you may well have developed the land. But I say that an Act of parliament entitled me to resell to "C" and you must be content with the return of the purchase price you paid me ten years ago... To think such a thing could be possible offends against one's idea

of propriety and fairness. I believe that sound reasons of public policy motivated the parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be "void for all purposes". Strong words indeed! But one may be permitted to doubt whether the Act as judicially construed and applied, meets the ends of justice or is a true reflection of the legislative will."

55. In the said Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR, Obaga, J. had imposed a constructive trust upon the vendor who had received the full purchase price but failed to transfer two acres of land on the pretext that the LCB consent had not been obtained. In affirming the ELC position, Githinji, JA (as he then was), Okwengu and Mohammed, JJA held as follows: "[25] ...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. [26] For the reasons in paragraphs *20*, *21*, *22*, *23*, *24* and *25* above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the Court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance. [27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph *3* above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2-acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be Registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be Registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case. As we have held in essence that, the lack of the consent of Land Control Board does not preclude the Court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial Court reached the correct decision and therefore the appeal has no merit."

56. In the said Kitilit case, in discounting and differing with the holding of another bench of the Court of Appeal in David Ole Tukai vs. Francis Arap Muge & 2 Others [2014] eKLR, the Court of Appeal reasoned that "(20) One of the reasons the Court gave in David Sironga ole Tukai decision for differing with the decision in Macharia Mwangi Maina (supra) was that the Court in the latter case ignored the provisions of Section 6 (2) of the *Land Control Act*. However, in our view, the phrase "declaration of a trust of agricultural land" refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by Section 36 as read with Section 66 of the *Land Registration Act* or Section 126 of the repealed Registered *Land Act*, and not a constructive trust or trust created by operation of the law. Similarly, equity is law and Section 6 (2) does not prohibit a Court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity. A Court's decision being final and binding subject to appeal, it would be illogical to hold that such a decision of a Court requires the consent of the Land Control Board before it becomes final and valid."

57. Again, in one of the recent decisions of the Court of Appeal in William Kipsoi Sigei vs. Kipkoech Arusei & another [2019] eKLR, the reasoning of the ELC Court which aligned with the second school of thought was upheld for the following reasons: "We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent".'

58. In the same year (2019), the Court of Appeal again rendered a decision in Kiplagat Kotut vs. Rose Jebor Kipngok [2019] eKLR, finding that the trial judge (ELC) had erred in failing to apply the concept of constructive trust and the doctrine of equitable estoppel in the matter before it, rendering itself as follows: "24. We hasten to state that the *Land Control Act*... was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another."

59. And in the most recent decision of the Court of Appeal (rendered on 24th June 2022) in *Aliaza vs. Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment), M. Ngugi, Kiage and M'Inoti, JJA took cognizance of the divergent schools of thought around this issue, conducted an in-depth analysis of both schools and eventually affiliated with the second school of thought (effectively reversing the decision of the ELC which ascribed to the first school of thought) reasoning that "33... a distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where a seller fails or refuses to apply for such consent. The provisions of the *Land Control Act* cannot continue to be read as though the circumstances prevailing at its enactment are still in place. 34. There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a Sale Agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, Form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been 'refused' within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act. 35. In Gabriel Makokha Wamukota v Sylvester Nyongesa Donati [1987] eKLR, an obviously unhappy Apaloo JA captured the injustice visited on purchasers in interpreting situations such as presently before us as voiding the contract of sale of land on the basis that Land Control Board consent has not been obtained. In that case, the original owner of the land, one Ismael Machio, had sold it to the respondent, then he reneged on the sale on the basis that Land Control Board consent had not been obtained. He then sold it to the appellant and, together, they applied and obtained consent, and the land was transferred to the appellant. The High Court ruled in favour of the initial purchaser, and the appellant, the subsequent purchaser in whose name the land had been registered appealed... 38. The views expressed by Apaloo JA thirty-five years ago encapsulate, in my view, the proper interpretation of the provisions of the *Land Control Act*, its harshness ameliorated by considerations of equity and fairness. Unhappily for the Learned Judge of Appeal then, statute and binding judicial precedent hobbled his ability to deal fairly and render justice to a party who had clearly been taken advantage of

by the seller, using legislation as his shield in an unfair situation. Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with *the Constitution* null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to *the Constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser."

60. In sum, although the norm is that the order of specific performance is not available to the purchaser if the contract is void or unenforceable, the exception to this norm is the circumstance where the purchaser has met all his part of the bargain by payment of the full purchase price but the Defendant frustrates the contract by failing to secure a land control consent.

61. It is a horse of a different colour, in circumstances where the purchaser who has not paid the vendor the full purchase price.

62. Being an equitable remedy, if a party is to benefit from the remedy, must approach the Court of equity with clean hands. Certainly, it cannot be available to a party who has approached the Court of equity with dirty hands. In this case, the Defendant approached this Court with dirty hands, having beached the contract by failing to meet his part of the bargain. Put differently, the discretionary power to grant an order of specific performance can judiciously so be exercised only in favour of a purchaser who has fulfilled his part of the bargain under the contract, by paying the full purchase price within the period agreed in the contract. The Court of Appeal precedents upon which heavy reliance has been placed by the Defendant namely *Aliaza vs. Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment) and Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri (2014) eKLR, are distinguishable from the current circumstances and cannot come to the aid of the Defendant since they are deployable only in circumstances where the purchaser has met his part of the bargain, by payment of the full purchase price. In this case, the Defendant did not fulfill his part of the bargain by payment of the full purchase price within the time stipulated by the in the Sale Agreement.

63. Although the Defendant asserted that the completion period had been mutually extended to July 2021, this Court finds this assertion extrinsic to the Sale Agreement and consequently in contravention of the parole rule. Whenever there are documents governing a contractual relationship, the parole rule applies. In this context, in Fidelity & Commercial Bank Ltd vs. Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal stated thus: "So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it." Relatedly, in Attorney General of Belize Et Al vs. Belize Telecom Ltd & another (2009), 1WLR 1980 at page 1993, the Court cited Lord Person in Trollope Colls Ltd vs. North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, where the Court stated that "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable." See also Speaker of Kisii County Assembly vs. James Omariba

Nyaoga [2015] eKLR; Toshike Construction Company Limited vs. Harambee co-operatives Savings and Credit Society Limited [2021] eKLR; and Twiga Chemicals Industries Limited vs. Allan Stevens Reynods [2015] eKLR.

64. It follows that the only remedy available to the Defendant is refund of the partial purchase price he had paid. And having been in breach, the Defendant cannot benefit from interest from the date of the Sale Agreement.

65. The sum which was proved and acknowledged in the said Sale Agreement is Kshs. 200,000 and not Kshs. 205,000, which also find in contravention of the parole rule afore-discussed.

(ii) Who should shoulder the costs of this suit?

66. Upon considering the cause of action and circumstances unique to this case including but not limited to the history of the matter, this Court does not find a good cause to depart from the general proposition of the law that costs follow the event.

Part VI: Disposition

67. Wherefore this Court finds the Plaintiff's claim fully meritorious but the Defendant's Counterclaim partially meritorious. Accordingly, Judgment is entered as follows:

    i. A declaration is hereby issued that the agreement between the Plaintiff and the Defendant dated 2nd May 2020 for sale of 1 acre to the Defendant, which was to be hived from the parcel of land known as Wamunyu/Kambiti/400 (the suit property) is void and accordingly unenforceable, on account of failure to obtain the requisite Land Control Board consent within 6 months from the date of this agreement.

    ii. Consequently, the Plaintiff is ordered to refund the Defendant the partial purchase price which had been paid by the Defendant in the sum of Kshs. 200,000, without interest.

    iii. With effect from the date of refund of the said sum in full, a declaration is hereby issued that the Defendant shall be a trespasser on the suit property.

    iv. Effective from the date of refund in full, the Defendant is granted 60 days to vacate from the suit property. The vacation in this regard includes removal of all his belongings including but not limited to the fence and harvesting crops if any.

    v. In the event the Defendant fails to vacate within the 60-day vacation notice, the Plaintiff shall be at liberty, without further recourse to this Court, to appoint an Auctioneer or Court Bailiff to evict the Defendant. In this regard, the Officer Commanding the nearest Police Station, is directed to provide security during the eviction exercise.

    vi. An order of permanent injunction is hereby issued against the Defendant by himself, his agents, servants, employees and/or any other person claiming under his title, restraining him from continued trespass, re-entry, dealing and/or in any other way interfering with the suit property, with effect from the date of expiry of the 60-day vacation notice issued under order (iv) above.

    vii. The Defendant shall bear the costs of this suit and the Counterclaim.

68. It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 5TH DAY OF AUGUST, 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff:.....

Advocate for the Defendant:.....

Court Assistant:.....