



Kombe alias Zablun Sulubu Kombe v Mwacharo & another (Environment and Land Appeal E47 of 2024) [2025] KEELC 7801 (KLR) (12 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E47 OF 2024
FM NJOROGE, J
NOVEMBER 12, 2025**

BETWEEN

SULUBU KOMBE ALIAS ZABLON SULUBU KOMBE APPELLANT

AND

SAFARI IKOMEKA MWACHARO 1ST RESPONDENT

ASIA NYALE WANJE 2ND RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 3/9/2024, the Appellant challenges the judgment and decree of Hon. Mwaniki (CM) delivered on 13/8/2024 in Malindi CMELC No. E135 OF 2023, on the following grounds: -
 1. The learned magistrate erred in law by repealing the *Land Control Act*, when it dismissed the plaintiff's claim and allowed the defendants' counterclaim for specific performance. Alternatively, like the Court of Appeal, whose decision(s) in this area of the law the trial court followed, the trial court ultra vires jurisdiction assumed law-making, thereby usurping the role of Parliament;
 2. The learned magistrate erred in law and fact by disbelieving the appellant and indirectly holding and imputing dishonesty or fraud in the appellant's dealing(s) with the defendants, merely on the plaintiff's reliance on the 'null and void' principle affecting unsanctioned transaction(s);
 3. The learned magistrate erred in law, and probably contravened or misapplied the per incuriam principle in selecting which of the conflicting Court of Appeal (CoA) decisions to follow in determining the disputants' respective claims before court;



4. Alternatively, the learned trial court in allowing the respondents' counterclaim for specific performance erred in law by failing to appreciate the par binding nature and character on subordinate courts, of the demonstrably conflicting CoA decisions in this area of the law;
 5. On merit, the trial court erred in law and fact when it allowed a claim for specific performance of a contract where neither leave of the High Court was sought to extend time to apply for a letter of consent, nor an explanation proffered why the purchasers (respondents in the appeal) did not comply, or attempt to comply with the dictates of the *Land Control Act*;
 6. The learned trial court erred in law when it failed to address and resolve all the issues on enforcement of contract in light of the limitation plea, availability of equitable remedy of specific performance outside the limitation period, and against the backdrop of the chaotic state of the law in this area;
 7. The learned trial court read an unconvincing judgement, devoid of any or any plausible reasons. Alternatively, the trial court delivered a judgement against the law and weight of the evidence adduced before it, in contravention of inter alia, order 21 Rules 4 and 6;
 8. The trial court in delivering itself the way it did misconstrued the juridical hierarchy and the doctrine of per incuriam, thereby acting in contravention of *the Constitution* of Kenya.
2. Based on the above grounds, the Appellant prayed that: -
- i. the appeal be allowed, the decree the decree of 13/8/2024 be set aside and in its place Plaintiff's claim be allowed and the defendant's counterclaim be dismissed with costs being awarded to him, both here and in the court below;
 - ii. The costs of this appeal are borne by the respondents in any event.
3. Before turning to the substantive merits of this appeal, it is proper to first outline a brief background of the case for context.
4. By a Plaint dated 15/11/2023, the Appellant instituted suit against the Respondents, asserting that he is the registered proprietor of all that parcel of land known as Kilifi/Mbaraka Chembe/35, measuring approximately 5.4 hectares (hereinafter "the suit property"). He averred that by agreements dated 4/5/2013 and 9/5/2014, he agreed to transfer to the Respondents a portion measuring one (1) acre out of the suit property for a consideration of Kshs. 300,000/=. According to the Appellant, this was the true agreement between the parties until the Respondents' advocate erroneously and wrongfully drafted the documents to reflect a sale of the entire suit property. The Appellant contended that, being illiterate, he was unaware of the misdescription in the agreements until sometime in 2023, when the Respondents forcefully entered the suit property and commenced hurried construction thereon.
5. The Appellant claimed that the purported sale agreement was null and void, and that the Respondents' entry onto the land was unlawful. He further contended that the suit property is agricultural land, and thus the agreements were subject to the provisions of the *Land Control Act*. In his view, the failure to obtain the requisite Land Control Board consent rendered the transaction void under Section 22 of the Act, and the Respondents' actions amounted to the perpetuation of a null transaction.
6. Consequently, the Appellant sought the following reliefs: a declaration that the agreements between the parties are null and legally unenforceable; a declaration that the Respondents' continued occupation and entry into the suit property is unlawful and a violation of the Appellant's proprietary rights; general damages of Kshs. 5,000,000/=; and a mandatory and permanent injunction restraining the Respondents from further trespass upon or interference with the suit property.



7. The Respondents filed a Statement of Defence and Counterclaim dated 20/3/2024. They contended that by a sale agreement dated 9/5/2014, they purchased one (1) acre out of the suit property from the Appellant for valuable consideration, which they fully paid. Upon execution of the agreement, they took immediate possession of the said portion and commenced cultivation. They further stated that at the time of executing the agreement, the Appellant disclosed that the title to the suit property was charged to Kenya Commercial Bank (KCB), but undertook to procure a discharge and avail the requisite completion documents in accordance with Clause 5.2 of the sale agreement, an obligation the Appellant failed to fulfil.
8. The Respondents further averred that the Appellant subsequently attempted to evict them from the suit property in an effort to resell it to a third party. In doing so, he offered to refund the purchase price or alternatively allocate them a different parcel of land, offers which the Respondents declined. They claimed that the Appellant was in breach of the sale agreement and, by way of counterclaim, sought an order of specific performance compelling the Appellant to provide all completion documents as per the agreement, and to effect subdivision and transfer of the one (1) acre portion to them. In the alternative, they prayed that the Land Registrar be directed to effect the transfer of the said portion to them in default of compliance by the Appellant.
9. The Appellant filed a Reply to Defence and Counterclaim dated 21/3/2024, wherein he reiterated the contents of his Complaint and denied the Respondents' assertions. He prayed that the counterclaim be dismissed with costs.
10. The matter proceeded to hearing on 26/6/2024, during which the Appellant testified in support of his case, while the 2nd Respondent gave evidence on behalf of the Respondents, and called one witness.
11. The Appellant (PW1) adopted his witness statement dated 15/11/2023 as his evidence-in-chief and produced the documents listed in his List of Documents as PExh. 1–8, as well as those in the Further List of Documents dated 6/5/2024 as PExh 9–11. In his oral testimony, he reiterated that he was willing to refund the purchase price to the Respondents and maintained that they had no lawful claim over the suit property.
12. During cross-examination, the Appellant confirmed that he had indeed entered into a sale agreement with the Respondents, and that the agreement expressly indicated he had received the full purchase price of Kshs. 300,000/=. He denied the Respondents' assertion that the title to the suit property was charged to KCB, stating instead that the title deed had been lost at some point, though he could not recall when. He further testified that the official search certificates produced by the Respondents were inaccurate. Regarding the issue of consent, he contended that it was the Respondents' responsibility to obtain the requisite approvals, but claimed they were inaccessible.
13. The 2nd Respondent (DW1) adopted her witness statement dated 20/3/2024 as her evidence-in-chief and produced the documents listed in the Respondents' List of Documents of even date as D. Exh 1–4. She testified that at the time of purchase, the Appellant did not have the original title to the suit property. She stated that despite numerous follow-ups, the transfer had not materialized. DW1 further asserted that the Respondents had only taken possession of, and continued to utilize, the one (1) acre portion they had purchased.
14. During cross-examination, the 2nd Respondent told the court that they never did any search until the year 2021 and while they had never engaged the services of a surveyor to know the extent of the portion they occupied, she was certain of the portion shown to them by the Appellant. She added that it was the duty of the Appellant to secure the consent of the Land Control Board.



15. Festus Yaa Mbaya (DW2) adopted his witness statement dated 20th March 2024 as his evidence-in-chief. He testified that he is a resident of the Baraka Chembe area and was familiar with the suit property. He stated that, to his knowledge, the suit property had never been surveyed, and that neither the Appellant nor the Respondents had attended the Land Control Board in relation to the transaction.
16. Thereafter, parties filed their submissions and the trial magistrate rendered himself on 13/8/2024 as follows: -

“In the end, I do not find any merit in the Plaintiff’s claim and the same is dismissed with costs to the Defendants.

I do find merit in the defendant’s counterclaim and make the following orders in favour of the defendants against the Plaintiff on the counter-claim;

 - i. An order for specific performance be and is hereby made compelling the plaintiff herein to avail all the requisite documents and to effect subdivision of the suit parcel of land no. Kilifi/Mbarakachembe/35 and transfer the portion of 1 acre bought by the defendants to the defendants within 30 days from the day of judgment herein.
 - ii. That in the alternative and without prejudice to order (i) above, the court administrator, Malindi Law Courts to execute all the requisite documents to effect the said transfer in favour of the defendants.
 - iii. Costs of the suit.”
17. It is against the above judgment that the Appellant has lodged this Appeal based on the grounds highlighted earlier in this judgment.
18. With the concurrence of the parties, the Court directed that the Appeal be disposed of by way of written submissions.

Appellant’s submissions

19. The Appellant, Mr. Sulubu Kombe (also known as Zablon Sulubu Kombe), submitted that the trial court erred in law and in fact by upholding a land sale agreement that was contrary to the express provisions of the *Land Control Act*. He contended that the trial magistrate effectively repealed Section 6 of the Act by enforcing a transaction that lacked the requisite consent of the Land Control Board, thereby purporting to legislate from the bench on matters of public policy and statutory interpretation. In his view, the court lacked authority to override statutory provisions under the guise of promoting equity or the public good.
20. The Appellant further submitted that the trial court wrongly imputed fraud and dishonesty on him based solely on his admission that he had received the purchase price in full. He maintained that the parties were either both at fault or that the Respondents were solely in breach, having failed to obtain the requisite consent or seek extension of time as required under the Act. He relied on the legal maxim *ex dolo malo non oritur actio*, and cited *Holman v. Johnson (1775) 1 Cowp 341* to support the proposition that courts should not assist parties who rely on illegal transactions. According to the Appellant, the doctrine of constructive trust or part performance cannot be invoked to validate an otherwise void transaction.
21. The Appellant took issue with the trial court’s reliance on recent decisions of the Court of Appeal, particularly *Aliaza v. Saul Civil Appeal No 134 of 2017 [2022] KECA 583 KLR* and *Macharia Mwangi Maina & 87 Others v. Davidson Mwangi [2014] eKLR*, which he argued were rendered per incuriam



and in disregard of earlier binding precedents such as *Kariuki v. Kariuki* [1983] KLR 225 and *Richard Kamiri Gachwe Kahia v. Edward Kamau Ng'ang'a* [2004] 1 EA 75. He submitted that these earlier decisions firmly held that failure to obtain Land Control Board consent within the prescribed period rendered a transaction void for all purposes, and no equitable doctrine could be invoked to revive or enforce such a contract.

22. It was the Appellant's position that the trial court, by following these divergent decisions, usurped the role of the legislature and sought to read doctrines of equity into a statute whose language is plain and mandatory. He criticized the reasoning in *Aliaza v. Saul* as populist and lacking empirical basis, arguing that the utility or redundancy of the *Land Control Act* is a matter best left to Parliament and not to be judicially legislated through obiter remarks.
23. The Appellant also submitted that the trial court failed to address several critical issues that had been raised in the pleadings and evidence. These included the exact size of land sold, the question whether the transaction was inchoate, the date and nature of possession taken by the Respondents (if at all), the existence and extent of any developments undertaken by the Respondents, whether the attempted enforcement of the agreement in 2023 constituted an offence under the *Land Control Act*, and whether the claim was barred under the *Limitation of Actions Act*.
24. In respect of limitation, the Appellant submitted that the Respondents' counterclaim, which sought specific performance, was brought more than ten years after execution of the agreement, well beyond the statutory six-year limitation period. This plea, he argued, was pleaded in the plaint but not addressed in the trial court's judgment.
25. In conclusion, the Appellant prayed that the appeal be allowed with costs, the judgment of the trial court be set aside, and that the declarations sought in the original plaint be granted. He urged the appellate court to find that the trial court erred both in fact and in law by enforcing a void contract, applying doctrines of equity in contravention of statute, and failing to resolve key legal and factual issues raised before it.

Respondents' Submissions

26. The Respondents submitted that the appeal lacks merit and should be dismissed. They supported the trial court's finding that the Appellant sold them one acre of land for Kshs. 300,000/-, which they paid in full and took possession of. They argued that the Appellant, having failed to provide the title deed or assist in securing Land Control Board consent, could not now rely on the lack of consent to invalidate the transaction.
27. They contended that the doctrine of constructive trust applied, given their payment, possession, and development of the land, and that equity would not allow the Appellant to benefit from his own non-compliance. They cited *Kiplagat Kotut v. Rose Jebor Kipngok* [2019] eKLR, to argue that courts have recognised equitable interests even in the absence of LCB consent where justice so demands.
28. Finally, the Respondents submitted that the trial court properly interpreted the law in line with *the Constitution*, including Articles 10 and 159, and that the Appellant's reliance on per incuriam was misplaced. They prayed for dismissal of the appeal with costs.

Analysis And Determination

29. I have carefully considered the pleadings, the evidence adduced before the trial court, the impugned judgment, the grounds of appeal, and the respective submissions by learned counsel for the parties. This being a first appeal, the court is required to re-evaluate, re-assess, and re-analyze the entire record



and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. (see *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR)

30. The issues arising for determination in this appeal may be distilled as follows:
- i. Whether the trial court erred in granting specific performance of a sale agreement for agricultural land that lacked Land Control Board consent;
 - ii. Whether the trial court correctly applied the doctrine of constructive trust or equity;
 - iii. Whether the trial court failed to address the issue of limitation and other material aspects raised in the pleadings;
 - iv. What Orders should issue?
31. On the one hand, the Appellant's main contention is that the sale agreement between him and the Respondents, relating to a portion of agricultural land, was rendered null and void by virtue of Section 6(1) of the *Land Control Act* for want of consent from the Land Control Board. The Appellant faults the trial court for upholding the agreement and granting specific performance, which he argues amounted to judicial legislation contrary to the express statutory prohibition. He relies, like at the trial court, on earlier Court of Appeal decisions such as *Kariuki v Kariuki* [1983] KLR 225 and *Richard Kamiri Gachwe Kahia v Edward Kamau Ng'ang'a*, which held that such contracts are void for all purposes and unenforceable, even in equity.
32. On the other hand, the Respondents maintain that they paid the purchase price in full, took possession of the land, and initiated development thereon. They invoke the doctrine of constructive trust and urge the court to uphold equity over technicalities citing decisions such as *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, and *Aliaza v Saul* (Civil Appeal No. 134 of 2017) (2022) KECA 583 (KLR).
33. It is apparent that the judicial landscape surrounding Section 6 of the *Land Control Act* has evolved. The traditional position, as espoused in *Kariuki v Kariuki*, held that transactions involving agricultural land that lack Land Control Board consent are void ab initio, and incapable of enforcement, regardless of whether consideration was paid or possession taken. Under this regime, equity would not override the statutory prohibition.
34. However, more recent Court of Appeal jurisprudence has softened this rigid position. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (supra), the Court held that where a purchaser has paid the purchase price, taken possession, and developed the land, equity may intervene through the doctrines of constructive trust or proprietary estoppel, to prevent unjust enrichment. Similarly, in *Willy Kimutai Kitilit v Michael Kibet* (supra), the Court emphasized that Article 10 and Article 159 of *the Constitution* require courts to prioritize substantive justice over technical legal formalities. In *Aliaza v Saul* (supra), Kiage J.A. notably criticized the utility of the *Land Control Act*, emphasizing that courts should not abet fraud by permitting unscrupulous vendors to escape liability on the strength of statutory technicalities. The learned judge observed as follows: -

“ 46. It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.



47. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.
48. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the [Land Control Act](#) in the circumstances of this case must be named for what they are and rebuffed. And the appellant should succeed.”
35. This decision was rightly applied by the trial court. These emerging decisions reflect a constitutional shift toward substantive justice, especially where the purchaser has fully performed their obligations. While the earlier position remains good law, the courts have demonstrated willingness to uphold equitable rights where enforcement is necessary to prevent injustice, particularly in cases of unconscionable conduct.
36. The challenge, therefore, is reconciling these two jurisprudential strands. The Appellant contends that the newer decisions were made per incuriam, and cannot override binding precedent. He argues further that the Respondents never sought leave for late consent, and their attempt to enforce the agreement nearly a decade later was statute-barred under the [Limitation of Actions Act](#).
37. From the record, it is evident that both parties did not secure Land Control Board consent. There was no application for extension of time under Section 8 of the [Land Control Act](#). However, the Respondents assert that they paid the purchase price, took possession, and developed the land. These findings were not rebutted by credible documentary or survey evidence from the Appellant. There was no dispute that the Respondents had purchased land from the Appellant, or the identity of the suit property. I am accordingly satisfied that the conclusion arrived at by the trial court was proper.
38. Further, the issue of limitation, though touched on in the plaint, was neither distinctly pleaded nor framed as a substantive issue for determination at trial. The Appellant merely averred under paragraph 8 of the plaint that the Respondents' conduct contravened various statutes, including the [Limitation of Actions Act](#). There was no specific pleading that the Respondents' counterclaim was time-barred nor was the limitation period distinctly raised as a preliminary objection. It is settled law that parties are bound by their pleadings.
39. That said, the Respondents' counterclaim was indeed filed nearly ten years after the date of the agreement. While the Appellant argued that this delay placed the counterclaim outside the statutory



six-year limitation period for enforcement of contracts, such argument was not properly framed for adjudication at trial. This Court therefore finds no fault in the trial court's silence on the matter.

40. The evidence on record shows that the Respondents had remained in possession of the land since 2014, had cultivated it, and had attempted to secure compliance from the Appellant. It would therefore be unjust to penalize them solely for delay where possession and part performance were clear and continuous.
41. It is not clear why the vendor in the present case never applied for the LCB consent and it can be discerned from his stance on the issue that he intended to rely on the absence of that consent to negate the sale which is equivalent to fraud. Accordingly, I am persuaded that the trial court correctly applied the principles of constructive trust and equitable estoppel to prevent the Appellant from unjustly enriching himself at the expense of the Respondents. The absence of Land Control Board consent, while rendering the agreement void in strict statutory terms, does not bar equitable intervention where the vendor has received full consideration, delivered possession, and stood by, watching as the purchaser acted to their detriment solely on the strength of his act of sale.
42. The Appellant cannot benefit from his own non-performance or inaction. The trial magistrate's invocation of the emerging jurisprudence in *Aliaza v Saul* [supra] was not only correct, but necessary in achieving substantive justice.
43. In view of the foregoing, I find no merit in the appeal, it is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 12TH DAY OF NOVEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

