



**Mcheru v Maina (Environment and Land Appeal E006 of 2025)
[2025] KEELC 7649 (KLR) (Environment and Land) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E006 OF 2025
MC OUNDO, J
NOVEMBER 6, 2025**

BETWEEN

ELIZABETH WAMBUI MUCHERU APPELLANT

AND

LYDIAH WANGARI MAINA RESPONDENT

*(Being an Appeal from the whole Judgement delivered by
Honourable E. Kelly, Principal Magistrate on 16th April 2025)*

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by E. Kelly, Principal Magistrate, wherein upon considering the evidence of both parties, vide her Judgment delivered on 16th April, 2025, the learned Magistrate found that the Defendant was the lawful owner of the suit property and proceeded to dismiss the Plaintiff's suit with no order as to costs.
2. The Plaintiff/Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in her Memorandum of Appeal:
 - i. That the learned Magistrate erred in law and in fact by finding that the Respondent was the lawful and rightful owner of property title No. Naivasha/Maraigushu Block 7/414.
 - ii. That the learned Magistrate erred in law and in fact by failing to appreciate that a registered proprietor of land has an absolute title in the said property.
 - iii. That the learned Magistrate erred in law and in fact by finding that the subject sale agreement was valid and enforceable.



- iv. That the learned Magistrate erred in law and in fact by failing to recognize that a claim made on the basis of a sale agreement dated 13th August 2023 (sic) was statute barred.
 - v. That the learned Magistrate erred in law and in fact by finding that the suit property did not fall within the definition of matrimonial property.
 - vi. That the learned Magistrate erred in law and in fact by finding that prior spousal consent was not required while disposing property Title No. Naivasha/Maraigushu Block 7/414.
 - vii. That the learned Magistrate erred in law and in fact by failing to recognize that the Respondent did not tender any evidence of a meeting by the Land Control Board.
 - viii. That the learned Magistrate erred in law and in fact by failing to recognize that the Respondent did not tender evidence of consent to transfer.
 - ix. That the learned Magistrate erred in law and in fact in failing to recognize that the signature in the subject sale agreement did not belong to the Appellant's husband.
 - x. That the learned Magistrate erred in law and in fact by failing to recognize that the subject sale agreement contained material errors.
 - xi. That the learned Magistrate erred in fact by failing to recognize that the matter in question related to disinheritance of property belonging to a widow by close family members including counsel for the defendant, who is the son to the defendant.
3. The Appellant thus prayed for the following orders:
- i. That the Appeal herein be allowed;
 - ii. That Judgement delivered on 16th April 2025 by Honourable E. Kelly Principal Magistrate and the Decree resulting therefrom be set aside;
 - iii. That costs of the Appeal be awarded to the Appellant;
 - iv. Any other relief that the Honourable Court may deem fit to grant.
4. The Respondent herein also being aggrieved by the Decree emanating from the said Judgement of Hon. E. Kelly (PM), cross appealed to the Honourable Court on the following ground:
- i. That the trial Court erred in failing to award the Respondent costs after successfully prosecuting her counterclaim and dismissing the Appellant's suit.
5. The Appeal was disposed of by way of Witten submissions.

Appellant's Submissions.

6. The Appellant framed seven issues for determination in the appeal, challenging the trial Magistrate's findings regarding property ownership, matrimonial property, spousal consent, limitation of action, validity of the sale agreement, proof of transfer consent, and the award of costs wherein she framed her issues for determination as follows:
- i. Whether the learned Magistrate erred in law and in fact by finding that the Defendant was the lawful and rightful owner of the property title No. Naivasha/Maraigushu Block 7/414.
 - ii. Whether the learned Magistrate erred in law and in fact by failing to recognize that the suit property falls within the definition of matrimonial property.



- iii. That the learned Magistrate erred in law and in fact by finding that prior spousal consent was not required while disposing property title No. Naivasha/Maraigushu Block 7/ 414.
 - iv. Whether the learned Magistrate erred in law and in fact by failing to recognize that a claim made on the basis of a sale agreement dated 13th August 2013 was statute barred.
 - v. Whether the learned Magistrate erred in law and in fact by finding that the subject sale agreement was valid and enforceable.
 - vi. Whether the learned Magistrate erred in law and in fact by failing to recognize that the Respondent did not tender any evidence of consent to transfer.
 - vii. Whether the trial Court erred in failing to award costs to the Respondent.
7. On the first issue for on the ownership of Property title No. Naivasha/Maraigushu Block 7/414 she submitted that the learned Magistrate erred in finding the Defendant (Respondent) as the lawful owner. That the Certificate of Title (Pf exh 1), issued on 14th November 1998, was registered in the name of the Appellant's late husband, Josiah Mucheru B. Kihereko wherein the Defendant (Respondent) had admitted having no Certificate of Title in her or her husband's name. That Under Sections 24(a) and 26(1) of the [Land Registration Act](#), a Certificate of Title was prima facie evidence of absolute and indefeasible ownership, and the late husband's title was unchallenged. Therefore, the property rightly formed part of his estate. She relied on the decision in the case of Samwel Ambasa & 3 Others v Stella Ingasia [2022] eKLR (which cited Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1977).
 8. On the second issue for determination, she submitted that the learned Magistrate erred in failing to recognize the suit property as matrimonial property stating that she and her late husband were married in 1974, wherein the property was acquired and registered in his name in 1988, during the subsistence of the marriage. This acquisition timeline thus placed the property within the definition of matrimonial property for which property acquired during the marriage in the name of one spouse was presumed to be held in trust for the other spouse. She cited Section 2 of the [Land Registration Act](#) on the definition of matrimonial property and the decided case in EKMT v ECC [2021] eKLR (which cited TMW v FMC [2018] eKLR) wherein it had been held that property acquired during the marriage was matrimonial property, unless otherwise agreed. That Section 14(a) of the [Matrimonial Property Act](#) spoke on the rebuttable presumption of a trust where property is acquired in one spouse's name during the marriage.
 9. She submitted on the third issue for determination that the learned Magistrate erred in finding that prior spousal consent was not required for disposing of the property. That DW2's evidence on cross-examination confirmed that no spousal consent had been obtained from the Appellant (the Plaintiff therein) during the alleged sale. In the absence of such consent, the sale of matrimonial property is invalid. She cited Section 12(1) of the [Matrimonial Property Act](#) which was on requirement for spousal consent for disposition of matrimonial property and a decision in Nakuru ELC No. 443 of 2016, E.K.N v A.S & 2 Others in support of her argument.
 10. On her fourth issue for determination, and while relying on the provisions of Section 4 of the [Limitation of Actions Act](#) that prescribed a 6-year limitation period for claims based on contract and on the decision in the case of Haron Onyancha v National Police Service Commission & Another (which cited Mehta v Shah [1985] E.A 321 and Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104) that spoke on the purpose and application of the Law of Limitation, she submitted that the learned Magistrate erred in failing to recognize that the claim based on the sale agreement dated 13th



August 2013, was statute barred. That a claim founded on contract ought to be filed within six years of the alleged contract date.

11. In regard to the question as to whether the learned Magistrate erred in law and in fact by finding that the subject sale agreement was valid and enforceable, she submitted that A Forensic Examination Report dated 14th February 2024, had found that the signature on the sale agreement did not match the signature of Josiah Mucheru B. Kihereko (the deceased). That further DW2 had testified that the deceased was terminally ill, aged, and vulnerable (64 years old, suffering from diabetes) wherein he had personally cared for the him, feeding, washing, and changing his diapers, which established a relationship of trust and vulnerability. That the transaction was thus orchestrated by DW2 and others, transporting the sick man without his wife to the Respondent's home where the agreement was drafted by DW2's nephew (a surveyor, not a lawyer) and executed, naming an incorrect purchaser (Philip Maina Mwangi instead of the Defendant and her husband). That these circumstances constituted undue influence and mistake, thus invalidating the agreement. She relied on the provisions of Sections 3(3) of the *Law of Contract Act* and 38 of the *Land Act*, the Black's Law Dictionary on the meaning of undue influence and the decision in the case of Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others (which relied on Lord Nicholls' finding in Royal Bank of Scotland v Etridge (No. 2) [2002] A.C. 773) to support her argument on undue influence.
12. On her issue on the failure to tender evidence of consent to transfer, she submitted that the learned Magistrate erred in failing to recognize that the Respondent did not tender any evidence of consent to transfer. That while the Respondent claimed in their counterclaim that the Appellant's husband had executed the transfer and attended the Land Control Board Committee to obtain the requisite consent, which consent document had been misplaced, the, the learned Magistrate had erred in law and in fact by failing to recognize that the Respondent herein did not tender any evidence to corroborate the said averments.
13. That finally the trial Magistrate erred in failing to award costs to he Respondent (in the initial suit). That the Respondent failed to demonstrate that the trial Magistrate, in granting no orders as to costs, had exercised her discretion unjudicially or on wrong principles. She relied on the provisions of Section 27 of the *Civil Procedure Act* on the discretion granted to the court on costs and the decision in Patrick Gitonga Muguku v Gilbert Maina Ngei [2017] eKLR (which cited Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006 on the principles governing the exercise of discretion in awarding costs.
14. The Appellant ultimately prayed for the appeal to be allowed and the judgement delivered on 16th April 2025, and the resulting Decree to be set aside.

Respondent's Submissions

15. The Respondent based her submissions on the duty of the first appellate court, citing Section 78 of the *Civil Procedure Act* and the case of Bwire v Wayo & Soiloki [2022] KEHC 7 (KLR). Her arguments addressed the Appellant's issues, focusing on the validity of the sale, the nature of the property, and the time bar.
16. On the ownership of Property Title No. Naivasha/Maraigushu Block 7/414 she submitted that trial court correctly found the Respondent (jointly with her late husband) were the lawful and rightful owner after the registered proprietor, Josiah Mucheru B. Kihereko (deceased) entered into a binding Sale Agreement dated 13th August 2013, with the Respondent and her late husband before his death on 23rd September 2019.



17. That the suit property was not "free property of the deceased" because it had already been sold before his demise and should not have been subject to succession.
18. She submitted that the Appellant's attempt to have the property transmitted to her via Thika Succession Cause No. 214 of 2020 was challenged by the Respondent wherein the Succession Court reviewed its order, and on 5th February 2024, ordered the suit property to be struck off the distribution schedule, rendering the earlier grant inoperative. The property has reverted to the name of the original owner, pending the court's pronouncement on ownership. The respondent relied on the provisions of Sections 2 and 3 of the Law of Succession Act the defined "free property of the deceased" and the holding in the case of Christopher Ndaru Kagira v Esther Mbandi Kagina & another [2016] eKLR where it had been held that property sold, transferred, or disposed of by a deceased person during their lifetime did not form part of their estate, regardless of whether the transfer was registered. She also relied on the holding in the case of Santuzzabilioti alias Mei Santuzza (deceased) v Giancarlo Felasconi [2014] eKLR thereby submitting that a succession court had the power to order a title deed to revert to the deceased person's name (cancellation of title deed).
19. On the validity and enforceability of the Sale Agreement dated 13th August 2013, she submitted that it was valid and enforceable, as it contained the requisite statutory ingredients. That the intention to sell was communicated on 4th November 2010, wherein a deposit of Kshs. 300,000/= had been paid into Josiah's account at Housing Finance, Buruburu Branch. That subsequently, Josiah had directed the Respondent where to collect the original Certificate of Title, which she still holds. That the written Sale Agreement was executed on 13th August 2013, wherein a further Kshs. 600,000/= was paid in cash, which the vendor (Josiah) counted and acknowledged.
20. That the vendor was of sound mind, able to read and write, and signed his part on the agreement which had been handwritten by DW1 (a surveyor) and attested by him.
21. That the Appellant's expert witness (PW2) on cross-examination admitted to not producing academic credentials, not knowing the agreement wasn't written by Josiah, not knowing that witnesses to the agreement were alive, and that his views could change if other documents were availed. The trial court was thus not bound to accept the expert opinion due to these flaws.
22. She submitted that the Appellant neither pleaded nor particularized the vitiating factors of undue influence and mistake, as required by Order 2 Rule 10(a) of the Civil Procedure Rules. Therefore, the allegation should be disregarded.
23. That the intention of the parties was clear, and the Appellant was selectively relying on the recital section to find a mistake.
24. That the trial court had correctly considered evidence of quiet possession by the Respondent since 2007 (18 years), including photos of mature trees, crops, semi-permanent structures, and the grave of her husband on the suit property, signifying her continuous possession. She relied on the provisions of Sections 3(3) of the Law of Contract Act and 38 of the Land Act and the decision in the case of Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) which had rejected an expert opinion that failed the qualification test, was contradictory, and favored the Defence case.
25. That Order 2 rule 10(a) of the Civil Procedure Rules required one to specifically plead and particularize particulars of undue influence. She also relied on the Black's Law Dictionary 11th Edition on the definition of constructive trust, as well as on the decision in William Kipsoi Sigei v Kipkoech Arusei & Another [2019] eKLR.



26. In regard to the issue on the Matrimonial Property and Spousal Consent, the Respondent's submission had been that the trial court did not err in failing to recognize the property as matrimonial property, and spousal consent was not an invalidating factor. That the Appellant merely termed the property "matrimonial" without justifying how it was acquired.
27. That the suit property did not qualify as Matrimonial Property under Section 6 of the Land Act and Section 2 of the Matrimonial Property Act because of the undisputed absence of the Appellant during its acquisition, her inability to justify a claim of contribution, and its registration in the deceased's sole name. That although it was acquired during the marriage, it was not jointly owned and acquired. That the claim for recognition of Matrimonial Property was not specifically pleaded and was therefore not within the trial court's jurisdiction, but the High Court's under Article 165(3)(a) of the Constitution.
28. She submitted that the transaction was an incomplete conveyance which had a valid sale agreement but no registered transfer. That a spousal consent did not validate or invalidate a contract but only formed part of the completion documents for the registration of a transfer. She relied on the provision of Section 2 of the Matrimonial Property Act and Section 6 of the Land Act: Definition of matrimonial property as well as the decisions in the cases of Christine Nekesa Wafula v Janerose Sakina Nduguyu [2021] eKLR and Anthony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR to submit that submissions were not evidence.
29. Her argument on the next issue for determination to whether the trial court had erred by failing to recognize that a claim made on the basis of the sale agreement dated 13th August 2015 (sic) was statute barred, submitted that indeed, the Appellant had placed reliance on the provisions of Section 4 of the Limitation of Actions Act to claim that since the Respondent had not taken any steps to have the suit property transferred to her or her husband since the sale agreement was executed on 13th August 2013, the same had become statute barred.
30. That her counterclaim was for the recovery of land and she sought equitable reliefs (constructive trust). That under Section 7 of the Limitation of Actions Act (for the recovery of land), the claim would expire after 12 years the 13th August 2025 in this case, and it therefore not statute barred. That her counterclaim was thus predicated on the doctrine of constructive trust, which is an equitable remedy to uphold the claim of a person whose property is wrongfully held by another. She relied on Section 4 of the Limitation of Actions Act that spoke to general limitation for contract (6 years), Section 7 of the Limitation of Actions Act that spoke of limitation for recovery of land (12 years) and the Black's Law Dictionary 11th Edition on the definition of constructive trust.
31. Lastly on the issue of Costs of the Suit, the Respondent submitted that she was seeking costs of the trial court suit (via cross-appeal) and the instant appeal arguing that costs follow the event, and the court had discretion. She cited the authority in Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others, Petition No. 4 of 2012; [2014] eKLR and sought for the dismissal of the Appeal as it was devoid of merit.

Analyses of the evidence.

32. According to the proceedings in the trial court, Elizabeth Wambui Mucheru, the Plaintiff/Appellant herein instituted a suit against Lydia Wangari Maina, the Defendant/Respondent in Naivasha CMCELC No. E079 of 2023 vide a Plaint dated 29th September 2023 seeking for the following orders;
 - i. An Order/Declaration that the Defendant is a trespasser as the Plaintiff is the registered owner with valid Title Deed No. Naivasha/Maraigushu Block 7/714 (North Karati).



- ii. An order of eviction do issue against the Defendants, his agents, servants, employees and or any other person by whatsoever name claiming ownership/leasing of the land through the Defendant.
 - iii. Costs of the suit.
 - iv. Any other relief that the court may deem fit and just to grant.
33. Subsequent to the filing of the suit, the Defendant/Respondent filed her Statement of Defence and Counterclaim dated 23rd October 2013 denying the allegations contained in the Plaintiff while putting the Plaintiff to strict proof. She stated that the suit property, Naivasha/Maraigushu Block 7/414, had been legitimately sold to her and her late husband by the original registered owner, the Appellant's late husband, and was therefore no longer part of his estate.
34. The defence centered on establishing the validity of the sale and her legitimate ownership and possession, effectively rebutting the Appellant's claims of trespass. That she and her late husband purchased the property from the registered proprietor, Josiah Mucheru B. Kihereko (deceased), via a binding Sale Agreement dated 13th August 2013. That there had been an initial expression of interest and a deposit of Kshs. 300,000/= in the year 2010 wherein she had collected the original Certificate of Title from a third party as directed by the vendor. That the final payment of Kshs. 600,000/= in cash was paid upon execution of the written agreement.
35. The vendor was of sound mind, and the agreement was valid and enforceable, thus invalidating the Appellant's claims of forgery, undue influence, and mistake. She stated that the property was not "free property of the deceased" under the Law of Succession Act because it had been sold during his lifetime wherein the Succession Court recognized this, and struck out the property off the deceased's distribution schedule, confirming the deceased had already alienated it.
36. She denied that the property matrimonial property under Section 6 of the Land Act, as the Appellant did not plead or prove her contribution or joint acquisition. Furthermore, the court was asked to note that the jurisdiction to determine matrimonial property belonged to the High Court (Article 165(3) (a)).
37. That she and her family had been in quiet possession of the suit property since 2007 (18 years), which was evidenced by mature trees, crops, semi-permanent structures, and the grave of her deceased husband located on the land.
38. In her Counterclaim, she sought equitable reliefs to recover the land from the Appellant, who had allegedly acquired it fraudulently by misleading the Succession Court into believing the property was part of the deceased's estate After she had wrongfully included it in the deceased's estate. Subsequently she had obtained a grant and transferred it to herself.
39. That the claim was for the recovery of land was subject to the 12-year limitation period under Section 7 of the Limitation of Actions Act, making it not statute barred as it expired in 2025. She had thus sought to have the property revert back to the name of the original owner Josiah Mucheru B. Kihereko until the court could conclusively pronounce itself on her ownership rights based on the valid sale agreement and her possession.
40. That subsequently, on 31st October 2022, she had applied to the 2nd Defendant for registration of a caution over the suit property to prevent any further dealings over the same and although she availed all her documents in support of her application, the 2nd Defendant had inexplicably declined to register the caution.



41. She stated that on 2nd March 2023, the 1st Defendant had misrepresented the true position of the suit property before the court in conduct of Succession Cause No. 214 of 2020 Thika wherein she had fraudulently obtained an amended certificate of grant enabling her to transmit the suit property to herself.
42. She particularized fraud by the 1st Defendant as:
- i. Misleading the Court to obtain a Certificate of Grant for herself despite being aware that her husband had sold the suit property to the plaintiff,
 - ii. Using information availed in the meeting held on 2nd May 2023 chaired by the Assistant County Commissioner to fraudulently acquire interest in the suit property.
 - iii. Fraudulently transmitting the suit property to herself without depositing the original title deed of the suit property.
43. She particularized fraud by the 2nd Defendant as:
- i. Registering a transmission on the suit property to the 1st Defendant without dispensing with the production of the original title deed;
 - ii. Registering a transmission of the suit property to the 1st Defendant without a replacement certificate of title;
 - iii. Failure to call for evidence from the 1st Defendant on the loss or destruction of the certificate of title of the suit property;
 - iv. Failure to publicize on the loss or destruction of the original title of the suit property in the Kenya Gazette or in any two local newspapers of nationwide circulation.
 - v. Failure to issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication.
44. She thus prayed for Judgement against the Defendants for:
- i. A declaration that the Plaintiff is the rightful owner of property Title No. Naivasha/Maraigushu Block 7/414;
 - ii. Cancellation of the certificate of title over property Title No. Naivasha/Maraigushu Block 7/414;
 - iii. An order for specific performance directed to the 1st Defendant within 30 days of the judgement on the transfer of the suit property.
45. In her Reply to the Defence and Defence to the Counterclaim dated 14th December 2023 the Plaintiff/Appellant reiterated the contents of her Complaint denying the allegations by the Defendant and categorically denied all the substantive claims made by the Defendant/Respondent seeking the dismissal of the Counterclaim.
46. She refuted the claim that the Defendant and her husband bought the suit property from the Plaintiff's late husband. She denied that she had irregularly acquired the title to the property through succession and argued that burying a body was not sufficient proof of ownership of land. Furthermore, she stated that she had vehemently opposed the burial of the Defendant's husband on the suit property, meaning the burial was done forcefully and contrary to her interests and wishes.



47. In her defence to the Counterclaim, she sought to invalidate the entire basis of the Defendant's Counterclaim, which was founded on the sale agreement and long possession. She denied that the Defendant had occupied the suit property uninterruptedly from the year 1999 or that there had been the existence of any sale agreement between the Defendant and her late husband. She specifically denied that her husband deposited the alleged Kshs. 300,000/= and the further Kshs. 600,000/=. She contended that the handwriting and the signature used on the alleged sale agreement on behalf of the Vendor did not belong to her late husband. She further denied that the Defendant possessed all the completion documents and that the Land Control Board Consent for the sale was ever issued.
48. She denied all particulars of fraud raised by the Defendant maintaining that obtaining the Certificate of Grant for her late husband's estate was within her legal right. She asserted that she had no duty to inform the Defendant about the succession case as the Defendant was neither a stakeholder nor a creditor of the estate. She also argued that she had no capacity to execute transfer documents in favour of the Defendant and doing so would have amounted to intermeddling with the estate.
49. She thus sought that the Defendant's Counterclaim be dismissed with costs and interest and Judgement be entered in her favour against the Defendant, as prayed in the Plaint.
50. Subsequently, the case proceeded for hearing wherein the Plaintiff testified as PW1 and adopted her witness statement as her evidence in chief. She also and also produced the following documents in evidence;
- i. Copy of Title Deed Naivasha/Maraigushu Block 7/414 (North Karati) as Pf exh 1
 - ii. Copy of official search as Pf exh 2
 - iii. Certificate of confirmation of grant in CMCC Succession Cause No. 214 of 2020 as Pf exh 3
 - iv. Certificate of Death for Josiah Mucheru Kihereko as Pf exh 4
 - v. Sale agreement between Elizabeth Mucheru and Grace Wambui Muchiri dated 5th June 1990 as Pf exh 5
 - vi. Marriage Certificate dated 7th January 2000 as Pf exh 6
51. She had then proceeded to testify that initially her husband had diabetes which led to a kidney failure thus affecting his eyes, kidney and other parts of the body.
52. In cross examination, she confirmed that whereas her deceased husband Josiah Mucheru had been of sound mind, sane and partially blind from about the year 2013, she had no certificate to prove the same. That whilst she had assisted in buying the suit property herein, she had opted for the same to be registered in the deceased's name, but also, she had no proof of the same. She explained that the deceased had bought the suit property from David Hoingi who was their best man. That she did not have a Sale Agreement to that effect.
53. She confirmed that she had instituted a succession cause number 214/2020 wherein she had filed copies of the title and thereafter, she had obtained the grant on the 7th July 2023. That whereas the suit property herein had not been included in the said succession cause, there
54. was a share certificate from North Karate Co-operative society which had been transmitted. Further, that whilst she did not have the title of the suit property at the time of succession, she had reported to the police but had neither the evidence of such report or an abstract for loss. That she had also not applied for replacement of the title that had been lost.



55. She testified that she had requested for a meeting with the area chief on 2nd May 2022 and whereas the Defendant had produced the original documents of title, she did not see the same. That on her part, she had produced the share certificate from Karate Co-operative society as her proof of ownership. She confirmed that she had been given a map and found the property after the said meeting. That subsequently, she had gone back to court to pray that the suit property herein be included in the succession. That she had also applied for a search at the lands registry wherein she had also been issued with a copy of the deed. She confirmed that she had been given another grant on 31st March 2023.
56. That latter proceedings had however been challenged wherein the court had expunged the suit property from the schedule of Josiah's property. She concurred that the court would cancel the title if it was proved that the same had been obtained fraudulently.
57. She confirmed that her husband had died on 23rd September 2019 and at a time when she was in Kenya. She refuted the claim that her husband had died in a hospital in London. That they were not separated and that their matrimonial home was Buruburu. She admitted that she did not buy the property in Nyayo estate but that they had another home in Thika.
58. That she never filed any caution, inhibition or restriction on the suit property and that she had no proof of the same. That she did not invite the Defendant at her home in February 2016 or any other person to explain to her about the property.
59. In re-examination, she confirmed that her husband had health challenges. That he was diabetic, partially blind, had kidney failure and wounds on the leg wherein he had been treated in the United Kingdom where they lived together. That they owned two homes. That they had lived in Buruburu for a long time, then moved to the United Kingdom and later on in Thika. She explained that the title deed had been obtained through grant after she had produced a share certificate for the suit property. That however, she had just learnt that the grant had been cancelled.
60. PW2, Emmanuel Karisa Kenga, gave evidence that he was a forensic document examiner of more than 30 years' experience having been trained both locally at the CID Headquarters and abroad. That he retired from the police service in the year 2015 after attaining the rank of a police commissioner and was currently working privately as an examiner of handwritings and signatures.
61. That on 13th February 2024, he received documents for analysis from the Plaintiff's law firm, that is A1 Sale Agreement wherein he was to examine the signature and handwriting. That his finding on comparing A1 and document of handwriting D1 was that there was no connection of the handwriting and the signature to show that they were from common/original author. That he had then prepared a comparison chart that had been allocated to the Report which he produced as Pf exh 7 and 8. (documents No. 8 and 9 in the Plaintiffs amended list of documents.)
62. It was his evidence that the signature and the handwriting in the Sale Agreement did not match that of Josiah Mucheru. He confirmed that he had been facilitated to attend court wherein he had been paid a sum of Kshs. 5,000/= and that he had also been paid for his services.
63. On cross-examination, he admitted that he had no evidence in court to prove his academic credentials nor academic testimonials. That he had been paid by the Plaintiff's firm. He also stated that he did not know if Josiah Mucheru did not prepare the agreement. He explained that page 5 and 6 of comparison chart contained different signatures. That his mandate had not been to find out if the witnesses were live witnesses(sic).
64. In re-examination, he confirmed that he had received seven (7) known samples of signatures and handwritings of Josiah Mucheru for analysis which did not match the one on the sale agreement.



65. Grace Muchiri who testified as PW3 adopted her witness statement dated 20th February 2024 as her evidence in chief before proceeding to testify that she was still the owner of the suit parcel of land having sold it the Plaintiff herein but which land had not been transferred into her name. That she was not aware of a sale agreement that had included her plot as part of the land that was being sold by Josiah Mucheru. She referred the title deed to Naivasha/ Maraigushu/Block 7/414 (North Karati) herein produced as Pf exh 1.
66. In cross-examination, she confirmed that Josiah Mucheru was the husband to the Plaintiff herein who is her friend. She admitted that she did not know much about the suit property.
67. In re-examination, she confirmed that she had sold plot 32 Kabati to the Plaintiff.
The Plaintiff had thus closed her case
68. The Defence case proceeded with the testimony of Benson Mwangi Kihereko, a land surveyor living in Kayole-Naivasha who while testifying as DW1, adopted his witness statement dated 18th July 2024 as his evidence in chief and proceeded to state that he had drafted an agreement for sale between the Defendant herein, Philip Maina Mwangi and Joseph Mucheru Kereko wherein he had witnessed and signed the same. That before then, he had witnessed Josiah Mucheru execute other documents. That indeed, there was another agreement between the said Josiah and Hellen Wamboi dated 18th April 2014 which he had witnessed. That it had not been indicated anywhere that Josiah Mucheru was blind. He confirmed that Josiah was not blind, that his sight was good and he needed no aid.
69. In cross-examination, he confirmed that the Plaintiff was married to his now deceased uncle. That he had qualified as surveyor from the Kenya Institute of Survey and Mapping. He also confirmed that suit land measuring 6.072 acres had been sold to Philip Maina Mwangi at a purchase price of Kshs. 600,000/=.
70. In re-examination, he confirmed that there was already a deposit of Kshs. 300,000/= that had been paid.
71. DW2, one Peter Wario Mwangi a businessman living in Nairobi also adopted his witness statement dated 18th July 2024 as his evidence in chief before proceeding to testify that Josiah Mucheru was his brother who had sold the suit property without any dispute.
72. That indeed in the year 2013, he had been in his company when Josiah was finalizing the agreement of sale of the suit property at which time he was in good health. He confirmed that before his death, Josiah and the Plaintiff had been living together although in different “spaces”. That he had taken care of him when his health began to fail wherein, he would take him to the hospital and even bath him. That Josiah did not inform him of any unpaid balance on the Shamba.
73. In cross-examination, he confirmed that Josiah was his brother and that the Plaintiff is his sister-in law. That he had taken care of Josiah while he was in Kenya. He confirmed that Josiah had been born in the year 1949 and was aged 64 years in the year 2013. He further confirmed that Josiah had been ailing from diabetes, and became terminally ill in the year 2013. That he would visit him every morning, change his diapers, feed and clean him and then keep him company the whole day since he trusted him.
74. He confirmed that he was Benson Mwangi Kihereko’s (DW1) uncle while Philip was the Defendant’s husband. That he had been in the company of Benson, and the deceased when they went to the Defendant’s home in Naivasha wherein together they had all gone to the Bank and he had deposited the money in the in the deceased Josiah’s account. That later they had gone back to the Defendant’s home.



75. He also confirmed that it had been Benson who had handwritten the agreement in the presence of the Defendant and her husband, himself and Josiah after which he (DW2) had given the same to Josiah to sign.
76. In re-examination, he confirmed that Josiah’s health had been good in the year 2013 and therefore he did not relay him but he trusted him. He confirmed that on 13th August 2013, they were with Philip Maina, the Defendant, Josiah and DW2 but not with the Plaintiff.
77. Lydia Wangari Maina, the Defendant herein adopted her witness statement dated 18th July 2024 as her evidence in chief and produced the documents filed in her list of documents dated 23rd October 2023 and supplementary list of documents dated 18th July 2023 as follows:
- i. Deposit voucher of Kshs. 300,000/= dated 24th November 2010 as Df exh 1.
 - ii. Sale Agreement dated 13th August 2013 as Df exh 2;
 - iii. Title Deed issued on 14th November 1988, as Df exh 3
 - iv. Josiah Mucheru Kihereko’s copy of KRA PIN Certificate, as Df exh 4
 - v. Josiah Mucheru’s copy of ID No. 3474317, as Df exh 5
 - vi. Certificate of death for Philip Maina Mwangi as Df exh 6
 - vii. Introductory letter from the Deputy County Commissioner dated 27th July 2022; as Df exh 7
 - viii. Burial permit for Philip Maina Mwangi; as Df exh 8
 - ix. Photos of the suit property as Df exh 9
 - x. Application for registration of a caution dated 31st October 2022, as Df exh 10
 - xi. Court Order issued on 15th February 2024 in Succession Cause 214 of 2020, as Df exh 11
 - xii. Amended certificate of confirmation of grant amended on 15th February 2024 as Df exh 12
 - xiii. Documents contained in parcel file title No. Naivasha/Maraigushu Block 7/1414 (to be produced by the Land Registrar) as Df exh 13
78. Thereafter, she testified that she lived in Kabati she had begun cultivating the subject parcel of land in the year 2007 wherein she had planted a variety of crops and even buried her husband therein in the year 2022. That they had bought the said land from Josiah Mucheru at a time when there had been only a “mabati” house. That there had also been no dispute with regard to the sale which was done before Josiah died.
79. That in the year 2023, she had been served with the documents touching on the instant matter.
80. She explained that they had gone to the bank wherein her husband had withdrawn money, that Benson had counted the same and thereafter, her husband had given the same to Josiah toas payment towards the purchase of the shamba.
81. In cross-examination, she confirmed that the Plaintiff was a wife to her brother who had died in the year 2013. She confirmed that she had the original title deed, registered in Josiah Mucheru’s name but thaty she did not have the title issued in September 2023 among her documents. She also admitted that she did not have a title certificate that has her name.



82. She proceeded to testify that whereas she had been in the Shamba since the year 2007, she had no witness to that effect. That further, whilst she had produced photographs showing her husband's grave, there had been was no certificate of the photographs production that had been produced.
83. She confirmed that she did not know what fraud meant and neither did she have proof that the Plaintiff had used information to fraudulently acquire the suit property. She also admitted that she had no evidence as per the contents of paragraph 3 of the Defence.(to the effect that the Plaintiff had irregularly acquired the title to the subject property wherein the said acquisition was being challenged in a different court seized of the matter)
84. She also confirmed that there had been no spousal consent for the sale of the suit property but reiterated that she had deposited money into Josiah's account.
85. In re-examination, she confirmed that it was Benson Mwangi Kihereko who had written the agreement and that they had been in occupation of the suit land for 18 years before the same was sold. She reiterated that she had the original title hence Elizabeth had falsely got her title.

The Defence had thus closed her case.

Determination.

86. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR)* where the court held as follows;

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

87. The Plaintiff's case was presented through her own testimony (PW1) and the evidence of two other witnesses (PW2 and PW3). She had adopted her witness statement and sought to establish her late husband's absolute ownership of the suit property, Naivasha/Maraigushu Block 7/414 (North Karati), and to invalidate the alleged sale agreement to the Defendant emphasizing that her husband was of his poor health hence the origin of the title held by the Defendant was challengeable. She produced the exhibits herein above stated and proceeded to give evidence that her deceased husband had diabetes, which led to kidney failure and partial blindness from about 2013. She confirmed he had been of sound mind, sane but partially blind from about the year 2013, although she had no certificate to prove the same. That he had been treated in the United Kingdom where they had lived together sometimes.
88. Her evidence had been that she had been assisted in buying the property from David Hoingi (their best man) but chose to register it in her husband's sole name abut that she did not have proof of contribution or a sale agreement for that initial purchase. That she had she instituted Thika Succession Cause No. 214/2020 wherein initially she had not included the title but later obtained a share certificate from North Karati Co-operative Society, which was transmitted and she obtained a Grant



- on 7th July 2022, which was amended on 31st March 2023, after having the suit property included. That the latter proceedings were challenged, where the court subsequently expunged the suit property from the schedule of the deceased's assets.
89. She claimed that the title was lost and had reported it to the police, although she had no evidence or abstract of loss and neither did she apply for a replacement. She confirmed that the Defendant had produced the original title documents at a meeting with the area chief on 2nd May 2022, although she did not see them. She refuted the claim that the burial of the Defendant's husband (which she opposed) proved ownership and admitted that she never filed any caution, inhibition, or restriction on the suit property.
 90. She produced a forensic expert report as Pf exh 7 and 8 through PW2 who concluded that there had been no connection between the handwriting and the signature on the Sale Agreement and the known samples of handwriting/signatures.
 91. Her other witness PW3 claimed to still be the owner of a plot No. 32 Kabati having sold the same to the Plaintiff but which property had not been into the Plaintiff's name. That she was unaware of any sale agreement by Josiah Mucheru.
 92. The defence sought to prove that a valid and binding sale of the suit property, Naivasha/Maraigushu Block 7/414, occurred between the registered owner (Josiah Mucheru) and the Defendant's late husband (Philip Maina Mwangi) and that the Defendant was in long-term, quiet possession.
 93. That DW1 had drafted, witnessed, and signed the Sale Agreement dated 13th August 2013, between the Defendant's husband, Philip Maina Mwangi, and the vendor, Josiah Mucheru for parcel of land which measured 6.072 acres where the purchase price had been Kshs. 900,000/=, for which the deposit of Kshs. 300,000/= had already been paid and after the agreement was executed on 13th August 2013, a further Kshs. 600,000/= was paid in cash, That at the time of the transaction, Josiah Mucheru was not blind and he needed no aid.
 94. Peter Wario Mwangi-DW2 also supported the transaction and rebutted the Plaintiff's claims about the vendor's health and separation. He confirmed that Josiah, his brother was present and in good health during the finalization of the agreement of sale in 2013 and although he was ailing from diabetes and became terminally ill, he had taken care of him (Josiah) when his health failed, including bathing and changing diapers, where he had created a relationship of trust for which there had been no undue influence. That in 2013 his brother's health was good when the agreement was executed, and he simply trusted him.
 95. He confirmed that he, DW1 (Benson), the Defendant, and her husband were at the Defendant's home in Naivasha when the agreement was handwritten by Benson (DW1) and signed by Josiah and that he was also present when the money was deposited in Josiah's bank account. That Josiah and the Plaintiff were living together, "although in different spaces."
 96. The Defendant produced the documents as herein above stated in her defence to substantiate her claim of purchase, payment, and possession wherein she proceeded to testify that she had been cultivating on the land since the year 2007 and had been in occupation for 18 years before the sale. That in the year 2022, she had also buried her husband on the land.
 97. Her testimony had been that the sale was completed and that her husband paid Josiah after withdrawing money at the bank, which DW1 (Benson) counted for which she was in possession of the original Title Deed although the same was not in her name. She further admitted that she had no witnesses to prove her claim of possession since the year 2007, no spousal consent for the sale and that



she also had no proof that the Plaintiff had fraudulently and irregularly acquired the title, although she did not understand what fraud meant.

98. Having given a brief history of the matter herein, I find that this is a matter that pities a wife to the original proprietor of the land against her sister in law wherein the issues arising therein for determination as follows:
- i. Whether the Appellants suit was time barred
 - ii. Whether the subsequent sale and the possession of the original title by the Respondent effectively defeated the registered title held by the deceased's estate
 - iii. Whether physical possession and prior interest (though equitable) is superior to the deceased's title.
99. In the matter before the court, whereas the Plaintiff's main objective was to establish her late husband as the absolute proprietor of the suit property, Naivasha/Maraigushu Block 7/414 (North Karati), and invalidate the alleged sale agreement to the Defendant terming the Defendant as a trespasser, the Defendant's defence and counterclaim centered on establishing that the title held by the Plaintiff was obtained fraudulently, that the sale was valid and she was the legitimate owner who was in possession, effectively rebutting the Appellant's claims of trespass.
100. The salient features that emerged in the matter are that Josiah Mucheru B now deceased, was the registered proprietor of land parcel No. Naivasha/Maraigushu Block 7/414 (North Karati), having been registered as such on the 14th November 1988. That he was the Plaintiff/Appellant's husband and a brother to both DW2 and the Defendant/Respondent herein.
101. That Josiah Mucheru B died on the 23rd September 2019 at which time he had given away the original title deed which was in the custody of his sister, the Defendant by virtue of a contested sale agreement of 13th August 2013 between Josiah Mucheru B and one Phillip Maina Mwangi (husband to the Defendant) wherein he had sold the land.
102. The sale agreement had been contested by the Appellant on the basis that there had been no spousal consent despite the suit land being matrimonial property. That secondly the vendor was critically ill and blind, this despite there having been no evidence that the suit property was matrimonial property and there having been no medical chits provided to support her allegations.
103. The evidence that the Appellant used to discredit the Sale agreement however was the evidence of PW2 a forensic document examiner who testified that the signature and the handwriting in the Sale Agreement did not match that of the deceased vendor Josiah Mucheru.
104. It also came out in evidence that despite the Respondent having been in possession of the original title deed to the suit land and being in occupation of the suit land, the Appellant had filed a succession cause vide Thika Succession Cause No. 214 of 2020 seeking inclusion of the suit property as part of the deceased's estate wherein she had been issued with a Grant which she used to register herself as the proprietor of the suit parcel of land where a title deed issued on the 13th September 2023. The Grant was however challenged by the Respondent after which the Probate court reviewed vide its order of 15th February 2024 and directed the removal of the suit parcel of land from the distribution schedule thereby issuing an amended Grant which had been further amended on the 15th February 2024 which then made the earlier Grant inoperative.
105. What then was the effect of the Title deed obtained by the Appellant through the initial Grant?



106. The title was vitiated (rendered invalid) by the court's subsequent order. The title did not become void from the beginning (ab initio) but became voidable and, upon the court order, ceased to have legal effect.
107. Lastly it is not in dispute that the Respondent had been in occupation and possession of the suit land since the year 2007 prior to the disputed Sale agreement wherein she had buried her husband and made some substantial developments which included planting trees (which were mature for harvesting), crops, and putting up semi-permanent structures.
108. On the first issue for determination, therefore, there is no dispute judging from the prayers sought in the Plaint dated the 29th September 2023, that the Appellant herein sought for the recovery of her deceased husband's parcel of land No. Naivasha/Maraigushu Block 7/414 (North Karati) this is more so because having found that the title issued to the Appellant pursuant to a Grant that had been issued in Thika Succession Cause No. 214 of 2020, was vitiated by the court's subsequent order of 15th February 2024.
109. Section 9(2) of the *Limitation of Actions Act* stipulates as follows:
- “(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.”
110. In essence therefore, this provision of the law deals with the accrual of a right of action in cases involving an interest in land and specifies the exact moment in time when the clock starts ticking for the purpose of the statute of limitations for lawsuits concerning land. The provision of the law envisages a situation where a person suing to recover the deceased's land does so within the 12 years from the date of the deceased's death, provided that the deceased was in possession of the land at that time.
111. Essentially, therefore the provision of Section 9 of the *Limitation of Actions Act* is crucial for determining whether a lawsuit to recover a deceased's land is time-barred for the "start date" for the 12-year limitation period stipulated in Section 7 of the same Act.
112. It is not disputed that the Appellants' husband died on the 23rd September 2019 which then meant that the Appellant could only sue to recover the suit land from the Respondent within twelve years after the said death. I find that by the time the suit was filed it had only been 4 years since the death of the Appellant's husband and therefore the suit was not time barred.
113. On the second issue as to whether the subsequent sale and the possession of the original title by the Respondent effectively defeated the registered title held by the deceased's estate. It was the Appellant's case through the Forensic Expert (PW2) that the signature and handwriting on the Sale Agreement (Pf exh 2) did not match Josiah's known samples (Pf exh 7 & 8) and whose evidence was shaken when the expert failed to produce his credentials. On the other hand, the defence presented eye-witness testimonial evidence of execution through DW1 who drafted, witnessed, and signed the agreement, and DW2 (Josiah's brother) who also witnessed Josiah sign and receive the money. They produced the deposit voucher (Df exh 1) dated 24th November 2010, in support of their evidence and relied on the testimony of DW2 and DW3 on the cash payment, counting, and acknowledgment in the Sale Agreement.
114. There was an allegation that the Agreement had been made out of an alleged undue influence/ Mistake based on Josiah's terminal illness, diabetes, partial blindness from the year 2013, as well DW2's admission of changing his diapers and feeding him which argument was challenged by the DW1 and



the vendor's brother DW2 who both confirmed that Josiah was not blind, his sight was good and he had been in good health at the time of sale in 2013. No medical chits were produced to confirm that at the time of the sale agreement, the vendor was an invalid or of unsound mind.

115. Section 107 of the *Evidence Act* provides that

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

While Section 109 of the same Act further stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

116. Section 107 and 109 of the *Evidence Act* placed the evidential burden upon the Appellant to prove that the vendor was an invalid or of unsound mind at the time of the sale agreement which she failed to do.

117. The Appellant's further argument had been that the suit property was matrimonial property and therefore the absence of the spousal consent vitiated the sale agreement.

118. Matrimonial Property according to the provision of Section 6 of the *Matrimonial Property Act* is;

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

119. Section 9 of the said *Matrimonial Property Act* provides as follows;

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

120. From the evidence available in court, it is not in dispute that the Appellant herein and the deceased were married in 1974 wherein the property was acquired and registered in the deceased's name in 1988, during the subsistence of the marriage. For the same to be considered as Matrimonial property, it had been incumbent upon the Appellant, based on the above provisions of the law, to adduce evidence of her contribution towards its acquisition which she failed to do. The claim for recognition of Matrimonial Property was not specifically pleaded and coupled with her inability to justify a claim of contribution, and its registration in the deceased's sole name therefore weakened the admissibility of her claim wherein this line of argument is rejected. The property was registered in Josiah's sole name, thus requiring proof of contribution or trust.

121. In regard to there having been no spousal consent during the sale agreement, I find that a spousal consent is a completion document for registration of transfer, and therefore it is not a requirement that validates or invalidates the underlying sale contract.

122. On the third issue as to whether physical possession and prior interest (though equitable) is superior to the deceased's title.

123. There having been evidence of the Respondent's possession and occupation of the suit land, since the year 2007, an equitable interest was created when the Respondent acted on the contract for sale by fulfilling their part of the obligation, even if the formal legal title transfer failed. The Respondent's deceased husband Phillip completed the purchase price of Kshs. 900,000/= vide the sale agreement



of 13th August 2013 by which time he and his wife the Respondent were already in possession and occupation of the suit land having taken possession in the year 2007 wherein they had built a temporary house planted trees, and had occupied it continuously. These actions, I find constituted part performance of the contract and their actual, visible, and continuous possession since 2007 was a basis for equity and a constructive notice to the entire world, including the Appellant that a competing interest existed on the land.

124. In *Obiero v Otwenya* (Civil Appeal 145 of 2019) [2025] KECA 541 (KLR) (21 March 2025) (Judgment), the Court of Appeal sitting in Kisumu while agreeing with Mutungi J’s holding had inter alia observed as follows at paragraphs 26 and 27

“It was the learned judge’s view that in the circumstances thereof, a constructive trust was created in favour of the respondent, and his possession was an overriding interest over the land that required no noting in the land register. At the pertinent portion of the judgment, the learned Judge had the following to say:

“...

28. In the instant suit on the evidence and the facts, I am satisfied that the plaintiff was let into possession of the suit land following the agreement of sale and payment of the purchase price. All that remained was for the parties to obtain the consent of the Land Control Board for the subdivision and transfer. Although consent for the subdivision was obtained no consent for transfer was obtained. The plaintiff remained in possession and effected developments on the suit premises. On the facts and evidence, a constructive trust was created in favour of the plaintiff such that the 1st defendant held title to the portion the plaintiff had purchased in trust for the plaintiff. The possession and occupation of the land by the plaintiff constituted an overriding interest within the provisions of Section 28 of the *Land Registration Act*, Cap 300 Laws of Kenya”

We completely agree with the learned Judge’s analysis of the case on both the facts and the law. Indeed, it is our view that the facts were not seriously contested. What was in question was whether the learned Judge was correct to apply the concept of constructive trust to rescue the respondent from the otherwise oppressive situation he would have found himself in on account of the provisions of the *Land Control Act*. As the learned Judge correctly observed, this Court has now spoken with authority on that question in the *Willy Kimutai Kitilit Case* (supra). We happily affirm this Court’s holding in that case; and we find the present case to be on all fours with it.”

125. The Supreme Court in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), while deciding on whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom had held as follows:

“...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 are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes



constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property is provided under law, and includes a constructive trust.

We have found that the doctrines of equity are part of our laws by virtue of section 3 of the *Judicature Act*. And while *the Constitution* entitles every person to the right to property at article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while sections 25 and 26 of the *Land Registration Act* provide for the rights of a proprietor and that the certificate of title is conclusive evidence of proprietorship, section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.”(my emphasis)

126. From the above finding, the Supreme Court had concluded that the law supports the importation of a constructive trust where required by equity and good conscience to prevent unjust enrichment, and this imposition acts as an overriding interest that defeats the claim of the registered proprietor under the framework of the *Land Registration Act* and *the Constitution*.
127. In effect therefore I find in favour of the Respondent’s Counterclaim and proceed to dismiss the Appellants Appeal. The Respondent shall have costs of both the trial courts suit and counterclaim as well as costs of the Appeal.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 6TH DAY OF NOVEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND COURT– JUDGE

