



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ELC LAND APPEAL CASE NO. E015 OF 2024

JONATHAN KIAMBI MUKETHA.....1ST

APPELLANT

KITHAKA WA MBERIA.....2ND

APPELLANT

KAJOGO KATHEYA.....3RD

APPELLANT

=VERSUS=

CHARLES MWENDA NDIGA.....1ST

RESPONDENT

ABISHAG KINA MWENDA.....2ND

RESPONDENT

(An Appeal against the Judgment of the Chief Magistrate Court at Chuka (Hon J. M. Gandani CM), rendered on 16/8/2024 in Chuka CMC E & L Case No. 71 of 2018)

JUDGMENT

Introduction

- 1.** This appeal was initiated through a memorandum of appeal dated 13/9/2024. The memorandum of appeal was amended on 22/5/2025. Through the amendments, **Kajogo Katheya** who had initially been named as the 3rd respondent was, by consent, redesignated as the 3rd appellant.
- 2.** The appeal challenges the judgment of the **Chief Magistrate Court at Chuka (Hon J. Gandani)** rendered on 16/8/2024 in **Chuka CMC E & L Case No 71 of 2018**. Some of the key issues that fell for determination in the said suit were: (i) Whether the respondents proved existence of a valid and enforceable land sale agreement dated 15/3/2007 through which the 3rd appellant sold to the respondents two (2) acres out of land parcel number **Meru South/Kathwana/985**; (ii) Whether the respondents paid the full agreed purchase price for the 2 acres and were given possession of the 2 acres; (iii) Whether the respondents proved existence of a constructive trust in their favour against the appellants; and (iv) Whether the respondents proved fraud and/or illegality on part of the three appellants. Invariably, these are some of the key issues that fall for determination in this first appeal. Before I analyse and dispose the issues, I will briefly outline the background to the appeal, the grounds of appeal and the parties' respective submissions in the appeal.

Background

- 3.** Through a plaint dated 17/11/2016, the two respondents instituted **Meru ELC Case No 261 of 2016** against the three appellants seeking: (i) a declaration that the 1st and

2nd appellants held 2 acres out of land parcel number **Meru South/Kathwana/985** in trust for the two respondents; (ii) an order decreeing immediate transfer of the 2 acres out of the said parcel to the two respondents; (iii) an order of permanent injunction restraining the appellants and their agents against interfering with the two respondents' ownership, possession and use of the suit land; and (iv) an order awarding the respondents costs of the suit.

4. The case of the respondents was that, vide a sale agreement dated 15/3/2007, the 3rd appellant sold to the 1st respondent land measuring 2 acres out of land parcel number **Meru South/Kathwana/985** at a consideration of Kshs. 36,000. The said agreement was acknowledged on various dates, including 21/1/2009 and 1/7/2013. In the same year, 2007, the 3rd appellant put the respondents in possession of the said 2 acres. Upon receipt of the last instalment of the purchase price on 1/7/2013, the 3rd appellant executed an application for consent of the Land Control Board together with a transfer form in favour of the respondents and handed the said documents to the respondents.
5. The respondents contended that while in the process of transferring the land into their names, they discovered that the 3rd appellant had on 11/4/2014 and 15/4/2014 caused the suit land to be transferred and registered in the names of the 1st and 2nd appellants. They contended that the 1st and 2nd appellants had always been aware of the sale of the 2 acres to them (to the respondents) by the 3rd appellant and the fact that they (the respondents) were in possession

and user of the land. They averred that the three appellants had acted fraudulently and had colluded with the intention of defeating their interest in the suit land. They itemized various particulars of fraud/illegality.

6. The respondents further averred that the registration of the 1st and 2nd appellants as owners of the suit land did not and could not override their interest as owners in possession, adding that they (the 1st and 2nd appellants) were their trustees. They itemized various particulars of trust. They urged the court to grant them the above reliefs.
7. The suit was subsequently transferred to **Chuka Environment and Land Court** where it was registered as **Chuka ELC Case No 193 of 2017**.
8. On or about 16/2/2018, the appellants filed a joint defence dated 2/11/2017 in which they contested the respondents' claim. They denied existence of the alleged contract and averred that the 3rd appellant had never contracted with the respondents for the sale of **Meru South/Kathwana/985** as alleged or at all and put the respondents to strict proof. They further denied the allegations of fraud and illegality and further denied dealing with the suit land fraudulently. They contested the respondents' claim of ownership and occupation of the suit land. They denied the relevance and applicability of the doctrine of constructive trust and put the respondents to strict proof. They averred that the suit was frivolous and did not raise any reasonable cause of action against them. They urged the court to dismiss the suit with costs.

9. Once more, the suit was subsequently transferred from Chuka Environment and Land Court to the Chief Magistrate Court at Chuka on 21/2/2018. It was registered as **Chuka CMC E & L Case No 71 of 2018.**
10. Upon conducting trial and upon receiving submissions, the Chief Magistrate Court rendered the impugned judgment in which it identified the following as the issues that fell for determination in the suit: (i) Whether a constructive trust could be imported into a land sale agreement to defeat a registered title therefrom (sic); and (ii) Whether the documents produced by the respondents in support of their claim were forgeries. The trial court found that there existed a constructive trust on the part of the 3rd appellant, which was transferred to the 1st and 2nd appellants. The trial court further found that the appellants had failed to prove forgery in relation to the documents which the respondents had relied on. Consequently, the trial court decreed excision of 2 acres out of "**Kathwana Meru South/985**" and transfer of the 2 acres to the respondents. The trial court awarded the respondents costs of the suit.

Appeal

11. Aggrieved by the findings and decree of the trial court, the appellants brought this appeal advancing the following 10 verbatim grounds of appeal:

1) That the Learned Trial Magistrate erred and misdirected herself in fact and law in finding that the 1st and 2nd appellants held 2 acres of the title of parcel of land No.

Kathwana/Meru South/985 in trust on behalf of the 1st and 2nd respondents.

2) That the Learned Trial Magistrate erred and misdirected herself in fact and law in failing to find the 1st and 2nd appellants the absolute proprietors of the title of parcel of land No. Kathwana/Meru South/985.

3) That the Learned Trial Magistrate erred and misdirected herself in fact and law in finding that the 1st and 2nd respondents proved their case in absence of any or any proper evidence.

4) That the Learned Magistrate erred in law and fact in failing to find that the 1st and 2nd respondents had failed to make out their case and hence dismiss the same.

5) That the Learned Magistrate misapprehended the provisions of the Law of Contract Act and laws relating to the disposal of rights in land in finding a constructive trust existed in favour of the plaintiffs.

6) That the Learned Magistrate misapprehended the provisions of Section 3 (3) of the Law of Contract Act as well as the general principles governing the creation of legally binding and valid contracts by finding

that the sale agreements entered between the respondents was enforceable despite the 1st and 2nd respondents admitting that the said agreement was not executed by the 3rd respondent.

7) That the Learned Magistrate failed to appreciate that no power of attorney was tendered that instructed the 3rd Respondent's son to execute on his behalf.

8) That the Learned Trial Magistrate erred and misdirected herself in fact and law in finding that the 3rd appellant had a duty to transfer a portion of 2 acres out of the portion number Kathwana/Meru South/985 to the 1st and 2nd respondents.

9) That the Learned Magistrate erred in failing to consider and critically analyze the submissions made on behalf of the appellants.

10) That the Learned Magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.

12. The appellants urged this court to find that the respondents failed to prove their claim, set aside the judgment and decree of the trial court, and dismiss the respondents' suit. In addition, the appellants prayed for costs of the appeal.

Appellants' Submissions

- 13.** The appeal was canvassed through written submissions dated 31/7/2025, filed by **M/s Wachira Wekhomba AIM & Associates Advocates**. Counsel for the appellants identified the following as the issues that fell for determination in the appeal: (i) Whether there existed a valid sale agreement between the 3rd appellant and the respondents; (ii) Whether, in the absence of a legally binding contract for purchase of land, the trial court erred in holding that a constructive trust existed in favour of the respondents; and (iii) Whether the 1st and 2nd appellants' title could be impeached by the doctrine of constructive trust.
- 14.** On whether there existed a valid sale agreement between the 3rd appellants and the respondents, counsel submitted that the respondents pleaded that they entered into a sale agreement dated 15/3/2007 with the 3rd appellant for sale/purchase of 2 acres out of land parcel number **Meru South/Kathwana/985** at a consideration of Kshs. 36,000. Counsel added that a perusal of the sale agreement tendered by the respondents revealed that: (i) it was drafted by the 1st respondent; (ii) it related to a one-acre portion of an unidentified parcel of land; (iii) the one acre portion was in addition to 9 acres which the 1st respondent had purchased from the 3rd appellant and was to bring the total to 10 acres; (iv) the consideration for the one acre that was being purchased was Kshs. 15,000; the entire purchase price was paid on the date of the agreement; and the only identification card number captured in the agreement was that of the 1st respondent.

- 15.** Counsel observed that there were serious inconsistencies between the respondents' pleadings and the contents of the agreement relied on by the respondents in terms of: (i) the acreage; and (ii) the purchase price.
- 16.** Counsel further submitted that the respondents relied on an application for consent of the Land Control Board (the LCB Consent Form) in which the purchase price was indicated as Kshs. 200,000. Counsel added that the respondents relied on a transfer form in which the consideration was indicated as Kshs. 200,000. Counsel submitted that the Land Control Board consent form and the transfer form relied on did not relate to the alleged agreement of 15/3/2007 because the consideration in the alleged agreement of 15/3/2007 was Kshs 36,000.
- 17.** Citing **Section 3 (3)** of the **Law of Contract Act**, counsel argued that the exhibit dated 15/3/2017 did not satisfy the requirements of the Act. Counsel added that in the absence of the parcel number of the land that was being sold, the alleged agreement dated 15/3/2007 fell short of the statutory threshold and was incapable of conferring any proprietary interest capable of protection or enforcement by way of transfer. Counsel argued that the alleged agreement dated 15/3/2007 was void and unenforceable.
- 18.** On whether the trial court erred in inferring a constructive trust in the absence of a legally binding contract for purchase of land, counsel pointed out that the respondent did not prove payment of the pleaded consideration of Kshs. 36,000. Counsel submitted that a constructive trust could

not be inferred or presumed out of a purchase that had not been proved. Counsel added that the respondents' documentary evidence had no bearing on parcel number **Meru South/Kathwana/985**. Pointing out that the 3rd appellant categorically denied selling to the respondents' land out of parcel number **Meru South/Kathwana/985**, counsel submitted that the trial court erred in finding that the 3rd appellant had a duty to transfer 2 acres out of **Meru South/Kathwana/985** to the respondents.

Respondents' Submissions

- 19.** The respondents filed written submissions dated 8/9/2025 through **M/s Mithega & Kariuki Advocates**. Counsel for the respondents identified the following as the issues that fell for determination in the appeal: (i) Whether the respondents proved their claim of constructive trust; (ii) Whether the appellants proved their claim on fraud; and (iii) the question of costs of the appeal.
- 20.** On whether the respondents proved their claim of constructive trust, counsel cited **Sections 25 and 28** of the Land Registration Act and the pronouncements of the Court of Appeal in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014) eKLR** and **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR** and submitted that the equitable doctrine of constructive trust applies by looking at the intentions of the parties to the transaction and by taking into account the fact that purchase price was paid and the purchaser was put into occupation and possession of the land. Counsel argued that there was evidence of common intent and an agreement

between the respondents and the 3rd appellant; that the 3rd appellant received the consideration of Kshs 36,000; that the 3rd appellant signed the application for consent of the Land Control Board; and that the 3rd appellant put the respondents in occupation and use of the suit land. Counsel invited the court to find that existence of a constructive trust was proved.

- 21.** On whether the appellants proved fraud, counsel submitted that the 3rd appellant disowned the respondents' key documents and termed them forgeries, adding that the 3rd appellant did not, however, tender evidence to prove that the said documents were forgeries. Counsel faulted the 3rd appellant for failing to object to the production of the documents and for failing to subject the documents to forensic examination. Citing the pronouncement of the Court of Appeal in ***Vijay Morjaria v Nansingh Madhusingh Darbar & another (2000) eKLR***, counsel argued that fraud must be specifically pleaded and particularized and distinctively proved. Counsel contended that the appellants failed to plead and prove fraud as required under the law.
- 22.** Counsel added that the 1st and 2nd appellants' contention that they were innocent purchasers for value was without basis, adding that the duo did not tender any evidence of purchase of the suit land from the 3rd appellant. Counsel added that the conveyance of the suit land into the names of the duo was "shrouded with fraud", adding that there was no evidence of payment of purchase price. Counsel further submitted that the 1st and 2nd appellants were neighbours

of the respondents and knew the fact that the respondents had purchased the suit land from the 3rd appellant. Counsel urged the court to reject and dismiss the appeal.

Analysis and Determination

- 23.** I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the legal frameworks and the jurisprudence relevant to the key issues in this appeal. The following are the key issues that fall for determination in the appeal: (i) Whether the respondents proved existence of a valid and enforceable land sale agreement dated 15/3/2007 through which the 3rd appellant sold to the respondents two (2) acres out of land parcel number **Meru South/Kathwana/985**; (ii) Whether the respondents paid the full agreed purchase price for the 2 acres and were given possession of the 2 acres; (iii) Whether the respondents proved existence of a constructive trust in their favour against the appellants; (iv) Whether the respondents proved fraud and/or illegality on part of the three appellants; and (v) What order should be made with regard to costs.
- 24.** Did the respondents prove existence of a valid and enforceable sale agreement dated 15/3/2007 through which the 3rd appellant sold to the respondents two (2) acres out of land parcel number **Meru South/Kathwana/985**? The case of the respondents has been outlined in paragraphs 3 to 6 of this judgment. Their case was that, vide an agreement dated 15/3/2007, the 3rd appellant sold to the 2nd respondent 2 acres out of land parcel number **Meru**

South/Kathwana/985. They contended that the agreed consideration/purchase price was Kshs 36,000 and added that the said consideration was paid in full. Did they tender evidence to prove the above allegations?

- 25.** The court has looked at the list and bundle of documents which the respondents relied on as their exhibits. They itemized the exhibits as follows: (i) Sale agreement dated 15/3/2007; (ii) Acknowledgment receipt dated 21/1/2009; (iii) Acknowledgment receipt dated 1/7/2013; (iv) Copy of Application for LCB consent; (v) Copy of transfer form; (vi) Certificate of official search for land parcel No **Meru South/Kathwana/985**; (vii) Acknowledgment receipt dated 5/12/2006; (viii) Copy of title deed for LR No **Kathwana/1252**; and (ix) Demand notice dated 16/6/2014.
- 26.** None of the above exhibits is a land sale agreement involving the two respondents as purchasers on one part and the 3rd appellant as vendor on the other part. None of the exhibits constitutes a land sale agreement dated 15/3/2007 containing the above terms which the respondents pleaded. **Section 107 to 109** of the **Evidence Act** required the respondents to tender evidence proving their case as pleaded. They were required to tender a land purchase agreement bearing the two of them as purchasers and the 3rd appellant as vendor because this is what they pleaded in the plaint that formed the basis of the trial. The agreement was to be a land sale agreement dated 15/3/2007 as pleaded. The acreage sold was to be 2 acres as pleaded. The consideration in the agreement was to be Kshs 36,000

as pleaded. The court has gone through the exhibits and has not come across any such agreement. The exhibits which the respondents relied on were at sharp variance with the claim which they pleaded.

- 27.** Secondly, the current framework in Section 3 (3) of the Law of Contract Act came into force in 2003. The framework provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto;

and

(b) the signature of each party signing has been attested by a witness who is present when the

contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

- 28.** For the respondents to be considered to have proved existence of an enforceable sale of land contract, they were obligated to tender an agreement that complied with the mandatory requirements of **Section 3 (3)** of the **Law of**

Contract Act. That agreement was to be dated 15/3/2007 as pleaded and contain the pleaded terms. Regrettably, the respondents did not discharge their evidentiary burden.

- 29.** The respondents having failed to tender, as an exhibit, the land sale agreement dated 15/3/2007 between the two of them on one part and the 3rd appellant on the other part; and having failed to establish the existence of the pleaded terms of the alleged land sale contract, the finding of this court is that the two respondents did not prove existence of a valid and enforceable land sale agreement dated 15/3/2007 through which the 3rd appellant sold to them jointly 2 acres out of land parcel number **Meru South/Kathwana/985.**
- 30.** Did the respondents prove that they paid the pleaded purchase price of Kshs 36,000 to the 3rd appellant for the purchase of 2 acres? The court has examined the exhibits which the respondents relied on. Exhibit no.7 which is contained in the further list dated 5/11/2019 relates to purchase of 9 acres by the 1st respondent. It does not relate to purchase of 2 acres in March 2007. Exhibit no. 2 is contained in the list dated 17/11/2016 and relates to purchase of one acre and was an acknowledgment of Kshs 3,000 only. The other acknowledgments are by a third party called **Muriithi Nyaga** who was not a contracting party and was not called as a witness.
- 31.** That is not all. The respondents relied on an application for consent of the Land Control Board and a land transfer form. Both documents make reference to a consideration/purchase

price of Kshs 200,000, meaning that the two exhibits do not relate to the purchase of 2 acres at Kshs 36,000. With this kind of evidence, there would be no basis for coming to the conclusion that the respondents proved payment of Kshs. 36,000 for the alleged 2 acres.

- 32.** Did the two respondents prove existence of a constructive trust in their favour? To prove a constructive trust in the circumstances of the claim that was before the trial court, the respondents were required to prove existence of a valid contract for sale of land between the two of them on one part and the 3rd appellant on the other part. Secondly, they were required to prove that they fully complied with the terms of the sale agreement, including payment of purchase price in terms of the contract. Lastly, they were required to prove that upon payment of purchase price in terms of the contract, they were put in possession of the suit land. Regrettably, it does emerge from the evidence that was before the trial court that the duo did not prove existence of a valid contract between them on one part and the 3rd appellant on the other part. Besides the missing essential elements already pointed out, there was nothing to suggest that the 2nd respondent was a contracting party. This court has not seen any basis in her claim. Clearly, the respondents failed to establish existence of a constructive trust.
- 33.** Similarly, no evidence was tendered to demonstrate fraud or illegality in the transfer of the suit land to the 1st and 2nd appellants.

- 34.** In light of the above findings on the key issues in the appeal, this court finds that the respondents did not prove their claim in the trial court to the required. Consequently, this appeal succeeds.
- 35.** On costs, the general principle is that costs follow the event. There are no special circumstances to warrant a departure from the general principle.

Disposal Orders

- 36.** In the end this appeal is allowed in the following terms:
- a) The judgment of the trial court in Chuka CMC E&L Case No 71 of 2018, dated 16/8/2024, is set aside wholly and is subsisted with an order dismissing the plaintiffs' suit with costs.***
- b) The respondents shall bear costs of this appeal.***

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JANUARY, 2026.

**B M EBOSO [MR]
ELC JUDGE**

In the Presence of:

Mr. Oduor holding brief for Mr. Wakhomba for the Appellants
Respondents - Absent
Court Assistant - Nelly

ORIGINAL