

**IN THE COURT OF APPEAL
AT ELDORET**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A) CIVIL APPEAL NO. ELD 100 OF 2020

BETWEEN

ERICK KIPKURGAT KIPRONO.....APPELLANT

AND

PATRICK KIMUTAI KIPRONO.....RESPONDENT

*(Being an appeal from the judgment of the Environment and
Land Court of Kenya at Eldoret (A. Ombwayo, J.) dated 30th
May, 2019*

in

***ELC Cause No. 290 of
2013)***

JUDGMENT OF THE COURT

1. The appeal before us principally turns on the issue of whether there was a trust in favour of the respondent over parcels of land described as Title No. Pioneer/Ngeria/Block 1 (EATEC) 1426. (the suit land), registered in the appellant's name.
2. Times without number, this Court has outlined the circumstances under which a court would be prepared to

imply

a trust. One such case is **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR** wherein the Court succinctly observed:

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied."

3. That instructive passage serves as the lens through which the central complaint in this appeal falls to be examined. With those principles firmly in mind, a synopsis of the relevant facts will place the appeal in its proper context.
4. The parties to this appeal are brothers. The respondent, Patrick Kimutai Kiprono, is the younger of the two. At the material time he was employed as a chemist with Kenya Pipeline Company Limited and was based in Nairobi.
5. Towards the close of the year 2000, Lonrho Agribusiness (East Africa) Limited offered for sale large tracts of land within the then Uasin Gishu District. The respondent avers that he and the appellant agreed to purchase 10 acres jointly from that

company at a total purchase price of Kshs. 350,000, to be shared equally

between them. Because the respondent's employment then required him to be based in Nairobi, it was mutually agreed that the appellant would act on his own behalf and as agent for the respondent in the purchase transaction. Pursuant to that arrangement, the respondent contends that he contributed Kshs. 200,000 towards the purchase price, with the appellant topping up the balance.

6. The agreement of sale was executed on 21st December 2000 in respect of a parcel then known as Provisional Plot Number F295, which thereafter became registered as Title No. Pioneer/Ngeria/Block 1 (EATEC) 1426 measuring 10 acres. One of the special conditions of that agreement expressly provided that the appellant was acting on his own behalf and as agent for the persons listed in a schedule appended thereto, and that the transfer was to be effected in favour of both the appellant and those persons. That schedule identified the respondent as owner of 5 acres and the appellant as owner of the remaining 5 acres. The agreement was attested by an advocate of the High Court of Kenya. Notwithstanding those provisions, the entire 10 acres was

registered in the appellant's name alone upon completion of the conveyancing process. The respondent avers that the appellant thereby held and continues to hold 5 acres of the suit land on trust for him, and that the appellant's subsequent refusal to recognise his interest constituted a breach of that trust.

7. The appellant denied the respondent's account in its entirety. He contended that Lonrho Agribusiness (East Africa) Limited offered land for sale in the late 1990s or thereabouts, and that he purchased the suit land solely on his own account. He denied entering into any agreement for a joint purchase, denied receiving any sum of money from the respondent towards the purchase price, and denied acting as the respondent's agent in the transaction. To the contrary, he maintained that all payments towards the purchase, including the purchase price of Kshs. 350,000, the conveyancing charges and all other related expenses were made by him alone, and that all transactional documents, including the receipt, the occupation certificate, the Land Control Board consent and the title deed, were issued in his name alone. He

further contended that the suit land being

agricultural land, any trust arrangement in respect thereof required the consent of the Land Control Board under the Land Control Act, Cap. 302, which consent was never obtained, rendering any such arrangement void. By way of counterclaim, the appellant sought the removal of a caution which the respondent had registered against Title No. Pioneer/Ngeria/Block 1 (EATEC) 1426, contending that the caution had been wrongfully and unjustifiably lodged.

8. The respondent consequently filed suit at the Environment and Land Court at Eldoret, seeking to vindicate his claimed interest in the suit land. By an amended plaint dated 12th June 2013, he sought the following reliefs *inter alia*:

a) a declaration that the appellant holds 5 acres of land comprised in Title No. Pioneer/Ngeria/Block 1 (EATEC) 1426 on trust for him and the remaining 5 acres for the appellant himself;

b) a declaration that by virtue of the special conditions of the agreement of sale dated 21st December 2000 the said 5 acres belonged to him and that the appellant do convey and transfer the same accordingly;

- c) a declaration that the trust be brought to an end;**
- d) an order directing the County Surveyor, Uasin Gishu County, to subdivide the suit land and issue fresh title deeds of approximately 5 acres each in the names of the parties respectively; an order directing the County Land Registrar, Uasin Gishu County, to rectify the register to reflect the resultant changes;**
- e) an order directing the appellant to execute all conveyancing documents necessary to effect the transfer of 5 acres into the respondent's name, with the Deputy Registrar empowered to do so in default.**

9. Upon considering the pleadings, the evidence on record and the rival submissions of counsel, the trial court (Ombwayo, J.) in a judgment delivered on 30th May 2019 allowed the respondent's suit and dismissed the appellant's counterclaim seeking to remove the caution placed on the property. In arriving at that decision, the learned judge expressed himself as follows:

"I do find that the plaintiff has established that there exists a trust between himself and the defendant. The court further finds that the contract dated 21.12.2000 was a valid contract between the parties having been executed by both parties and is in writing.

The same was attested by an advocate of the High Court of Kenya. This court finds that the consent of the Land Control

Board was not necessary as between the plaintiff and the defendant but between the defendant and Lonrho Agribusiness (EA) Ltd. The issue as to whether the consent of the Land Control Board was obtained before transfer of the land from Lonrho Agribusiness (EA) Ltd to the defendant is not before court, the issue is whether the defendant is holding half of the land in trust for the plaintiff. On the issue as to whether the plaintiff's claim is time barred, I do find that the defendant was registered as the proprietor of the land on 6.9.2002 and the suit was filed on 20.5.2013, twelve (12) years had not lapsed. Moreover, time starts running when the defendant refused to give the plaintiff his share and this was in mid-2005 when the plaintiff deposited the building materials and the defendant became hostile. I do find that the suit is not time barred. Ultimately, I do find that the plaintiff has proved his case on a balance of probabilities."

10. It is that decision that has provoked the appeal before us which is premised on the grounds that the learned Judge erred in law and fact by:

- a. ignoring the clear provisions of the Land Control Act on transactions relating to trust in agricultural land;**
- b. finding that a claim based on trust on agricultural land had been established;**

c. holding that the respondent had contributed towards the acquisition of the suit property in the absence of any proof of the said contribution by the respondent.

11. The appeal came up before us on 21st January 2026. Mr. Momanyi appeared for the appellant and Mr. Kagunza appeared for the respondent. Both parties relied entirely on their written submissions.
12. Mr. Momanyi submitted that the appellant was the sole purchaser of the suit land and that no trust had been established in favour of the respondent. He contended that the parties to the sale agreement were the appellant and Lonrho Agribusiness (East Africa) Limited alone; there were no joint purchasers and no joint signatories to the agreement. Had there been two purchasers, nothing would have prevented the advocates preparing the agreement from indicating so on the face of the document. He further submitted that all the supporting transactional documents; the banking slip, the receipt, the occupation certificate, the Land Control Board consent and the title deed were issued exclusively in the appellant's name, and that the appellant

alone had been in occupation of the land.

13. On the question of the respondent's alleged monetary contribution, it was submitted that the respondent had failed to produce any evidence demonstrating that he had handed over any money to the appellant. The failure to prove contribution was fatal to the respondent's claim, since the existence of the alleged trust was entirely predicated upon that contribution. Counsel further submitted that the special condition in the sale agreement which the respondent relied upon as establishing his agency arrangement had not been part of the original agreement as executed, and appeared to have been introduced into the document without the appellant's knowledge or consent.

14. Finally, it was submitted that the suit land was agricultural land situated within a land control area and was therefore subject to the Land Control Act, Cap. 302. Citing section 6(2) of that Act, which expressly declares that the declaration of a trust over agricultural land situated within a land control area constitutes a dealing in that land for the purposes of section 6(1), and is accordingly void unless the consent of the relevant Land Control Board has been obtained. Counsel

submitted that no such

consent was sought or obtained in respect of the alleged trust, and that the agreement, in so far as it purported to create a trust, became null and void and unenforceable six months after its execution, that is, by approximately 21st May 2001. He further submitted that the learned judge had failed entirely to address the effect of the Land Control Act upon the alleged trust, and that this constituted a dereliction of duty. In support of this ground, the appellant relied on **Mucheru v Mucheru [2000] 2 EA 453, Simiyu v Watambamala [1985] KLR 852 and Kanda v Kanda [2008] 1 EA 158.**

15. Conversely, Mr. Kagunza, learned counsel for the respondent, submitted that the evidence on record clearly established the existence of a trust in the respondent's favour of the suit land. He submitted that the agreement of sale was a valid written contract, duly executed by the parties and attested by an advocate of the High Court of Kenya, and that its special conditions, particularly condition H and the schedule expressly identified the respondent as a beneficiary of 5 acres and confirmed that the appellant was acting as agent for the

respondent. Counsel submitted that the evidence of the attesting advocate and the vendor's advocate, both of whom confirmed the agency arrangement and the respondent's interest, was cogent, credible and unchallenged in cross-examination.

16. On the Land Control Act point, Mr. Kagunza submitted that the consent of the Land Control Board was not required as between the parties to an implied or resulting trust. He relied on **Mwangi & Another v Mwangi [1986] KLR 328**, wherein it was held that the creation of a trust over agricultural land in a land control area does not constitute an "other disposal or dealing" for the purposes of section 6(1)(a) of the Land Control Act and therefore does not require the consent of the local land board. Counsel further submitted that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of the Judicature Act and the Constitution, and that equity could not be defeated by the mechanical invocation of the Land Control Act.

17. Additionally, counsel relied on **Willy Kimutai Kitilit v**

Michael Kibet [2018] eKLR, wherein this Court held that
the lack of Land

Control Board consent does not preclude a court from giving effect to equitable principles, and further held that, by virtue of Article 10(2)(b) of the Constitution, the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board. Counsel further relied on **Francis Soita v John Simiyu Ndalila, Civil Appeal No. 349 of 2014**, wherein this Court followed and applied that principle, holding that a respondent who had paid the full purchase price and been placed in possession was entitled to the land under the doctrines of constructive trust and proprietary estoppel, notwithstanding that the sale agreement was void for want of Land Control Board consent. The respondent maintained that he had an overriding interest in the suit land which was binding on the appellant, and the learned judge was right to grant the reliefs sought. He urged this Court to dismiss the appeal, with costs. The respondent maintained that he had an overriding interest in the suit land which was binding on the appellant, and the learned judge

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right to grant the reliefs sought. He urged this Court to dismiss the appeal, with costs.

18. We have anxiously considered the record, the submissions by learned counsel, the authorities cited on behalf of the respective parties and the law. Conscious of our duty as the first appellate Court in this matter, we have reconsidered the evidence, assessed it and made our own conclusions on the evidence, subject to the cardinal fact that we did not have the advantage singularly enjoyed by the trial judge, of seeing and hearing the witnesses as they testified. (See **Seascapes Ltd V. Development Finance Company of Kenya Ltd [2009] KLR, 384**). We also remind ourselves that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. (See **Ephantus Mwangi & Another V Duncan Mwangi Wambugu [1982-88] 1 KAR 278**).

19. Three questions fall to be determined in this appeal. The first

is whether the respondent established a trust over five acres
of the

suit land on the evidence before the trial court. The second is whether, even assuming such a trust was established, it is rendered void by the operation of the Land Control Act, Cap. 302. The third is whether the appellant's counterclaim for removal of the caution ought to have succeeded. We address each question in turn.

20. The concept of trusts is well settled in our jurisprudence. As was stated by this Court in **Peter Ndungu Njenga (supra)** a court will not imply a trust unless the parties' intention to create one is clearly established. Once that intention is established, equity supplies the doctrines by which the beneficial interest is given legal effect.

21. Trusts arise either expressly, where the parties have clearly identified the trust property, its purpose and its beneficiaries, or by operation of law. Section 2 of the Trustee Act, Cap. 167, Laws of Kenya extends the expressions "trust" and "trustee" to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property. As this Court stated in **Twalib Hatayan & Another v Said Saggar**

Ahmed Al-Heidy &

Others [2015] KECA 713 (KLR), *“the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial.”*

22. On the facts before us, that threshold presents no difficulty. The intention of the parties does not require to be presumed, implied or laboriously inferred from surrounding circumstances. It is expressed in writing, in the very agreement by which the appellant acquired his title. The agreement states:

Special Condition H:

"The purchaser is acting on his own behalf and as an agent for the persons listed in the schedule appearing hereunder and the transfer shall be effected in favour of the Purchaser and the persons appearing in the said schedule as indicated thereon."

The Schedule:

NAME	ID/NO.	ACREAGE
Patrick Kimutai Kiprono	—	5 acres
Erick Kipkurgat Kiprono	1114442	5 acres

23. The agreement thus embeds the respondent's beneficial

interest in the very document that gave rise to the appellant's title. It is a

document the appellant himself procured, through his own advocates Nyaundi Tuiyott and Co Advocates, from the vendor Lonrho Agribusiness (East Africa) Limited. The appellant's response was to allege that the agreement is a forgery and that special condition H and the schedule were introduced into the agreement without his knowledge or consent. That allegation, serious in character lacked any evidence. At the hearing, when pressed as to who had introduced it, counsel was unable to say. That answer is telling. An allegation of forgery that cannot be attributed to any person, that is unsupported by any expert evidence, any handwriting examination or any document analysis, is no allegation at all. It is a bare assertion

24. On the contrary, the respondent called 3 witnesses in support of his case. Advocate Simon Kitur, who attested the agreement on behalf of the appellant and his nominees; Advocate Joseph Songok, who held the original agreement and produced it in court; and Mr. David Korir, an employee of Lonrho Agribusiness (East Africa) Limited who was a signatory to the agreement on behalf of the vendor. The convergent

effect of their evidence was

that the agreement produced by the appellants is the genuine and authentic agreement; that it contains special condition H and the schedule as produced; that the schedule names both brothers and their respective five-acre shares; and that the appellant was understood by the vendor's own representative to be purchasing the land jointly. Mr. Korir went further. When the appellant subsequently reported the respondent's caution to the police, Mr. Korir attended Eldoret Police Station and recorded a statement confirming that the land belongs to both brothers. Lonrho's own company records supported that position. The version that was produced was a certified copy held in the custody of Advocate Songok, confirmed as genuine by two advocates with direct professional involvement in the transaction and by the vendor's own representative. It is the version this Court acts upon.

25. This evidence was not successfully challenged in cross-examination. The trial court, which had the advantage of observing the witnesses, found their testimonies credible and un rebutted. We see no basis on which to disturb those findings.

The evidence of Advocates Kitur and Songok, as officers of the court who had direct involvement in drafting and attesting the agreement, carries particular weight. Their testimony cannot be dismissed as the interested evidence of the respondent's family members.

26. In our view, the appellant's contention that the respondent produced no receipt, no bank slip and no independent witness to prove the actual handover of Kshs. 200,000 also holds no water. That submission, while superficially attractive, fails to engage with the nature and texture of the relationship between the two brothers. The evidence, including evidence given by the appellant himself under cross-examination establishes a consistent and longstanding pattern of joint property acquisitions conducted entirely on the basis of personal trust, without written records of payment passing between the brothers. In the late 1990s, the parties jointly purchased a plot at Kimumu estate, each contributing equally. In 2001 the appellant surrendered his share in the Kimumu plot to the respondent in exchange for Kshs. 100,000, as the evidence on record demonstrates. They

jointly purchased land at Illula Settlement Scheme, which remained with the appellant. The appellant admitted all of this under cross-examination. Not one of those transactions was accompanied by a receipt or formal acknowledgment of payment between the brothers. Yet each was honoured. The appellant does not contend that those transactions did not occur. The absence of a receipt for the Kshs. 200,000 contribution to the Lonrho purchase is therefore not remarkable on these facts. It is entirely consistent with the way these brothers invariably conducted their joint affairs. To demand, in this context, the kind of paper trail one might expect between strangers dealing at arm's length is to ignore the evidence of how these parties actually operated. That consistent pattern of joint acquisition, operated without written documentation but reliably honoured by both parties, is corroborative/consented evidence that the purchase of the Lonrho land in 2000 was conducted on the same basis. The respondent's evidence that he entrusted his contribution to the appellant, as he had done before, rings true against that pattern. At the risk of repetition, the advocates who acted for

the appellant and the respondent gave evidence that

was not controverted that indeed this was a joint purchase by the appellant and the respondent. This evidence removes any doubt on the issue of the joint purchase and this clearly shows that, as found by the trial Court, the appellant is less than honest.

27. We have considered the totality of the evidence with care and it all points in one direction; that the respondent has established on a balance of probabilities that the appellant purchased the suit land on his own behalf and as agent for the respondent pursuant to a common intention between them, that the respondent contributed Kshs. 200,000 towards the purchase price in reliance on that intention, and that the appellant holds five acres of Title No. Pioneer/Ngeria/Block 1 (EATEC) 1426 on trust for the respondent. The trial court's finding on this issue was correct and there is no basis upon which we could properly interfere with it.

28. We turn to the appellant's contention that even if a trust was created the suit land being agricultural land situated within a controlled area and the alleged trust was a controlled

transaction

within the meaning of section 6(2) of the Land Control Act and is therefore void for want of Land Control Board consent.

29. The appellant's argument draws its principal strength from this Court's decision in **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR** .That decision held, among other things, that a declaration of a trust over agricultural land within a land control area is a controlled transaction within the meaning of section 6(2) and is void in the absence of Land Control Board consent; that money paid under a void transaction is recoverable only as a debt; and that possession under a void transaction constitutes a criminal offence under section 22 of the Act.

30. The court further held that the decisions in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** and **Mwangi & Another v Mwangi [1986] KLR 328** both of which had held that a trust over agricultural land did not require Land Control Board consent were per incuriam, having been decided in ignorance of the Land Control (Amendment) Act of 1980 amendment that

introduced section 6(2) specifically to override the earlier High Court decision in **Gatimu Kinguru v**

Muya Gathangi [1976] KLR 253 where Madan J. held “*The creation of a trust over agricultural land in a land control area does not constitute an 'other disposal of or dealing' for the purposes of section 6(1)(a) of the Land Control Act and, therefore, does not require the consent of the local land control board.*”

31. In our view, this Court in **Sironga** (supra) was addressing a materially different factual situation from the one before us. In that case, the registered proprietor of agricultural land entered into a written agreement to sell that land to the respondents. No Land Control Board consent was ever sought or obtained. The respondents took possession and paid a portion of the purchase price. When the transaction collapsed, they sought to invoke constructive trust to enforce, in substance, what was a void sale agreement. The court declined, holding that no equitable doctrine could be invoked to enforce a void controlled transaction, and that consent was required absolutely. The case was therefore one in which the entire transaction, the sale itself was conducted without any Land Control Board involvement whatsoever.

32. The present case is, on its facts, in a fundamentally different position. Here, Land Control Board consent was sought and obtained. The transfer of the suit land from Lonrho Agribusiness (East Africa) Limited to the appellant was a controlled transaction which was duly sanctioned by the relevant Land Control Board. That consent was obtained on the basis of the sale agreement dated 21st December 2000 which contained special condition H and the schedule recording that the appellant was purchasing as agent for himself and the respondent and that the title was to be transferred to both of them in equal shares of 5 acres each. The controlled transaction was therefore completed with full Land Control Board sanction, and the agreement upon which that sanction was obtained disclosed on its face the respondent's interest as a joint beneficiary of the suit property.

33. This factual distinction is, in our opinion, decisive. The rationale of the Land Control Act, as the court in Sironga explained, is to interpose the judgment of an independent board between the parties to a transaction involving

agricultural land, so that the board may consider such matters as the economic development

of the land, the maintenance of standards of good husbandry, the proposed purchase price and the effect of any subdivision on agricultural productivity. Where that statutory purpose has been fulfilled and where the Land Control Board has in fact considered and sanctioned the transaction the mischief at which section 6 is directed has been addressed. The question then is not whether consent was obtained but whether the consent that was obtained extended to the full transaction as documented.

34. We are satisfied that on the facts of this case, that the agreement presented to and sanctioned by the Land Control Board was an agreement that transparently recorded a joint purchase. The appellant signed that agreement as agent for himself and the respondent. The schedule attached to the agreement named both brothers and allocated 5 acres to each. The Land Control Board, in giving its consent, consented to the transaction as disclosed; a transaction that from its inception contemplated two beneficial owners. The appellant cannot now be permitted to approbate and reprobate: he cannot rely on that agreement as the

foundation of his registered title while simultaneously repudiating the special

conditions in the same agreement which establish the respondent's beneficial interest. To allow him to do so would be to permit him to use the machinery of the Land Control Act as an instrument of the very fraud and unconscionable dealing that equity exists to prevent.

35. Again, the appellant, as the party who presented the agreement to the Land Control Board, caused or permitted the Board to act on a document that disclosed the respondent's beneficial interest and having obtained the benefit of that consent (a valid title in his name) cannot now be heard to say that the document he presented to the Board did not mean what it said. As this Court recognised in **Kariuki v Kariuki [1983] KLR 225**, the Land Control Act was not designed to be an instrument of dishonesty in the hands of a party who would invoke it to deny rights he himself voluntarily recorded and disclosed.

36. In the end, this ground too must fail. The learned judge was correct to find that the consent of the Land Control Board was not necessary as between the plaintiff and the defendant in

relation to the trust, the relevant controlled transaction
having

been completed with consent on the basis of a document that disclosed the respondent's interest.

37. Having found that the trust was validly established and that it is not defeated by the Land Control Act, the logical consequence is that the respondent held, and continues to hold, a legitimate caveatable interest in the suit land at the time the caution was lodged. The caution was not wrongfully lodged. The trial court was therefore correct to dismiss the appellant's counterclaim, and we affirm and uphold that dismissal.

38. We wish to add one observation. The evidence in this case was overwhelming. The advocates who were directly involved in the transaction, and the vendor's own representative, all testified consistently and without contradiction to the same effect: this land was purchased jointly, for the benefit of both brothers. The appellant knew it. It was only when self-interest overcame conscience that he elected to deny the documents, the witnesses and his own conduct had established beyond any reasonable doubt. This is a case where one brother,

entrusted with the agency of another, used the shelter of
registered title to deny the

very interest he had openly undertaken to protect. Courts exist, among other purposes, to ensure that the law does not become a tool of oppression between those who ought to be bound by ties of family and mutual trust. This Court must come to the aid of the respondent to protect and preserve his right to land purchased jointly.

39. For all the foregoing reasons, we find no merit in any of the grounds of appeal argued before us. This appeal is accordingly dismissed in its entirety with costs to the respondent.

Dated and delivered at Nakuru this 27th day of February, 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY

REGISTRAR