

**IN THE COURT OF APPEAL  
AT ELDORET**

**(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.)**

**CIVIL APPEAL NO. ELD 127 OF**

**2020 BETWEEN**

**MESO MULTIPURPOSE SOCIETY LIMITED.....APPELLANT**

**AND**

**LUORE NYAIRO COMPANY LIMITED.....1<sup>ST</sup>  
RESPONDENT M/S AGRICULTURAL  
FINANCE CORPORATION.....2<sup>ND</sup>  
RESPONDENT  
THE CHIEF LAND REGISTRAR.....3<sup>RD</sup>  
RESPONDENT  
THE HON. ATTORNEY GENERAL.....4<sup>TH</sup>  
RESPONDENT**

*(An appeal from the judgement and decree of the  
Environment and Land Court of Kenya at Kitale (**Yano,  
J.**) dated 2<sup>nd</sup> March 2020 delivered on her behalf by **M.  
Njoroge, J.** on 7<sup>th</sup> May 2020*

**in**

***ELC Case No. 111 of 2008).***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. Meso Multipurpose Society Limited (the appellant) seeks to overturn the judgment rendered by *Yano, J.* on 2<sup>nd</sup> March 2019 in favour of the respondent in Kitale Environment and Land Court (ELC) Case No.111 of 2008 delivered on his behalf by *Mwangi Njoroge, J.* on 7<sup>th</sup> May 2020. A summary of the dispute before the trial is necessary in order to

contextualize the issues

urged in this appeal. Luckily, the facts are essentially common ground or uncontroverted.

2. Briefly, by a plaint dated 19<sup>th</sup> December 2008 which was amended on 20<sup>th</sup> June 2009 and re-amended on 12<sup>th</sup> July 2008, the appellant sued the respondents contending that it was the legal owner of LR. No. 7060/2 measuring approximately 6 acres, also known as IR No.1155, located in Trans-Nzoia District. It was its case that it purchased the said land from one James Omondi Ouko (hereinafter referred to as the deceased) pursuant to sale agreements dated on 29<sup>th</sup> April 1989, 30<sup>th</sup> May 1991 and a further agreement as specifically stated in a letter dated 20<sup>th</sup> June 1993 by the deceased's advocates.
3. The appellant averred that the deceased granted it possession and ownership of the said land. Further, the deceased had obtained a loan of Kshs.5 million from the 2<sup>nd</sup> respondent but the 2<sup>nd</sup> respondent consented to the sale despite the existence of an unpaid loan secured by the suit land. The appellant asserted that it agreed with the deceased that it would pay him Kshs.300,000/- and pay Kshs.700,000/- to the 2<sup>nd</sup> respondent towards the said loan. It maintained it started

liquidating the loan through the 2<sup>nd</sup> respondent's Kitale branch with the consent of the 2<sup>nd</sup> respondent.

4. The appellant maintained that despite paying the 2<sup>nd</sup> respondent as aforesaid, in 1994 the 2<sup>nd</sup> respondent acting in bad faith threatened to sell the land but the auction was put off after the appellant paid Kshs.198,630/- to the 2<sup>nd</sup> respondent through the auctioneer. Further, the appellant claimed that it continued paying money to the 2<sup>nd</sup> respondent which aggregated to Kshs.15,642,604/-. However, despite repaying the loan in full, the 2<sup>nd</sup> respondent refused to transfer the land to the appellant. It asserted that the dispute was arbitrated severally and the 2<sup>nd</sup> respondent was prevailed upon to transfer the land to the appellant but it refused to do so. The appellant accused the respondent of committing fraud and contended that the deceased had sold part of the land to the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondent purchased the other portion at a public auction. The appellant averred that it was apprehensive that the respondent was scheming to evict it from the suit land.
5. It prayed for the following reliefs against the respondents:
  - (a)

a permanent injunction restraining the respondents or their agents from inter alia selling or in any manner alienating LR

No. 7060/2 or demolishing their structures; (b) a declaration that the appellant is the legal proprietor of the said land and that the 2<sup>nd</sup> respondent be compelled to execute the necessary transfer documents in default, the deputy registrar of the court to execute the required documents; and, (c) costs of the suit.

6. The 1<sup>st</sup> respondent in its defence and counter-claim denied the appellant's claim and maintained that LR. No.7060/2 was not in existence as at 19<sup>th</sup> July 1991 when the appellant claims to have acquired it. It denied the appellant took possession of 600 acres or it ever bought land from the deceased and averred that it is the sole legal owner of 250 acres registered in its name. It also denied ever having any desire or intention prior to 25<sup>th</sup> November 2008 of evicting the appellant as alleged and stated that it acquired a right to evict the appellant from LR. No. 7060/4 on 25<sup>th</sup> November 2008 when the appellant through its members trespassed on the said land. In its counter-claim against the appellant, it prayed for an order that the appellant was a trespasser and sought their eviction from the land. It also prayed for a permanent injunction against the appellant restraining it from in any manner interfering with the said

land.

7. In addition, the 1<sup>st</sup> appellant averred that it occupied and used the suit land from 1989 to 25<sup>th</sup> November 2008 without any interference. Further, in 1984 or thereabouts, the deceased charged LR. No. 7060/2 to the 2<sup>nd</sup> respondent to secure the repayment of a loan advanced to him by the 2<sup>nd</sup> respondent. During the subsistence of the charge, in 1989 or thereabouts, the deceased sub-divided the said land into two portions, namely LR. Nos.7060/3 and 7060/4 measuring 350 acres and 250 acres each. The deceased sought and obtained a partial discharge for LR. No.7060/4 from the 2<sup>nd</sup> respondent on 7<sup>th</sup> December 1990 allowing the deceased to transfer LR. No.7060/4 to the 1<sup>st</sup> respondent. The transfer was registered and a certificate of title issued to the 1<sup>st</sup> respondent on 12<sup>th</sup> February 1990.
8. The 1<sup>st</sup> defendant also averred that upon issuance of the certificate of title in its name, the deceased and the 2<sup>nd</sup> respondent ceased to have any rights or interests in LR. No.7060/4, therefore, they were incapable of selling or conveying any rights or interests in the land. The 1<sup>st</sup> respondent avowed that on 25<sup>th</sup> November 2008, the appellant through persons claiming to be its members forcefully took possession of LR No.7060/4 without any

colour of right and

without its permission. It averred that it never sold, leased, charged, assigned or in any other manner disposed of its rights and interests in LR. No.7060/4 to the appellant or any other person or body affiliated to the appellant. It stated that prior to 25<sup>th</sup> November 2008 and subsequently, it never had any dealings with the appellant.

9. Further, the 1<sup>st</sup> respondent and its members trespassed into its land and embarked on wanton destruction of the land including pulling down the entire perimeter fence, cutting down trees and erecting structures thereon which constituted irreparable waste of the land. They also threatened to destroy the homestead on the said land, forcing the 1<sup>st</sup> respondent to engage the services of armed policemen to guard the property. The 1<sup>st</sup> respondent prayed for an order compelling the appellant and its members to vacate its land failing which they be forcefully evicted.

10. In its defence and counter-claim, the 2<sup>nd</sup> respondent denied the appellant's claim and averred that on 23<sup>rd</sup> August 1984, it advanced a loan of Kshs.5,000,000/- to the deceased. Between the years 1985 and 1987, it granted additional loans to the deceased amounting to Kshs.1.97 million. The loan was

secured by a charge over LR. No.7060/2 measuring 600 acres.

The deceased defaulted in the repayment and in 1988, the 2<sup>nd</sup> respondent advertised the security for sale. However, following negotiations, the 2<sup>nd</sup> respondent permitted the deceased to excise and sell 250 acres out of the charged property to enable him to repay the loan which as at then stood at Kshs.9.8million. The security was subdivided into LR. No. 7060/3 measuring 350 acres and LR No.7060/4 measuring 250 acres. A partial discharge was granted for LR No.7060/4 which was transferred to the 1<sup>st</sup> respondent who purchased it for Kshs.3.75 million and the 2<sup>nd</sup> respondent retained LR. No. 7060/3 as security. However, the proceeds from the said sale were insufficient to clear the loan, therefore, in 1991, the deceased decided to sell another 150 acres to the appellant for Kshs.6 million. The appellant failed to make lump sum payment as it had agreed with the deceased. Instead, it paid only Kshs.300,000/- and subsequently took possession of the land. Meanwhile, the 2<sup>nd</sup> respondent continued to demand loan repayments from the deceased, but, he was unable to meet his loan repayment obligation. In 1997, the 2<sup>nd</sup> respondent advertised LR No. 7060/3 for sale. The advert attracted only two serious bidders, the appellant's bid of Kshs.

13 million and the 2<sup>nd</sup> respondent's bid at the reserve price of Kshs.16 million.

11. The 2<sup>nd</sup> respondent also averred that after the appellant entered into a sale agreement with the deceased, it paid the deceased Kshs.300,000/-. Thereafter, it continued paying directly into the deceased's loan account to the extent that by the time the land was auctioned and bought by the 2<sup>nd</sup> respondent on 9<sup>th</sup> October 1997, it had paid Kshs.2,777, 330/- The 2<sup>nd</sup> respondent contended that the appellant is occupying the suit land illegally. Further, even though the appellant had shown interest in purchasing the land, the transaction could not proceed because the 2<sup>nd</sup> respondent had not transferred the land into its name. The transfer was finally effected on 13<sup>th</sup> August 2002 and this enabled the 2<sup>nd</sup> respondent to formally take possession. It stated that the appellant offered to purchase the parcel from the 2<sup>nd</sup> respondent at Kshs.16 million which was the reserve price. However, the 2<sup>nd</sup> respondent counter offered a purchase price of Kshs.17 million. The 2<sup>nd</sup> respondent stated that it received Kshs.7,779, 458/- from the appellant between 25<sup>th</sup> May 2001 and 31<sup>st</sup> May 2005, however, the balance of the purchase price was Ksh.9.22 million. The 2<sup>nd</sup>

respondent stated that the plaintiff

was to pay Kshs.2.3million or 25% of the purchase price on acceptance of the offer and the balance was to be repaid within one year and was to attract an interest rate of 15% p.a. on reducing balance. That between 1<sup>st</sup> June 2005 and 3<sup>rd</sup> September 2008, an additional sum of Kshs.1,504,465/- was paid, making the total sum received by the 2<sup>nd</sup> respondent to be kshs.9,283,923/-. The 2<sup>nd</sup> respondent averred that a balance of Kshs.7,716,017/- is outstanding and the same has accrued and interests continue to accrue. The 2<sup>nd</sup> respondent denied the allegations of fraud on its part.

12. In their joint defence, the 3<sup>rd</sup> and 4<sup>th</sup> respondents denied the appellant's claim and averred that the plaintiff's suit disclosed no cause of action, is frivolous, mischievous, scandalous, statute barred and untenable. Further, the plaintiff had no registrable interest in the suit land and the agreement for sale relied upon by the plaintiff is not only statute barred but also none of the respondents herein, including the 3<sup>rd</sup> and 4<sup>th</sup> respondents were parties thereto. The 3<sup>rd</sup> and 4<sup>th</sup> respondents further aver that if at all the appellant had any claim as alleged or at all, the same was against the deceased's estate. They contended that the

dealings and subsequent sub-division of LR. No.7060/2 to  
create LR. No.7060/3 and LR. NO.7060/4

and the subsequent transfer of the said sub-divisions were done absolutely in good faith and based on genuine and proper documents and the 3<sup>rd</sup> respondent acted within its Constitutional and statutory duty, therefore, the titles vested in the 1<sup>st</sup> and 2<sup>nd</sup> respondents were good and ought to be protected by the Court. The 3<sup>rd</sup> and 4<sup>th</sup> respondents further contended that they were not privy or party to the alleged fraud.

13. All the parties adduced evidence before the trial court in support of their respective cases, essentially, geared to prove their respective averments in their pleadings. The parties' evidence was rehashed in detail by the trial Judge in the impugned judgment. We have carefully re-evaluated it. We will only highlight salient points. This does not mean that we have disregarded some on the evidence. Conversely, we have read in totality the testimony tendered by all the witnesses as captured in the record and the analysis accorded to the evidence by the trial court.
14. The appellant's case stood on the testimony of two witnesses.

PW1 stated that the appellant bought LR. No.7060/2 measuring 600 acres from the deceased and that they were

living on the said land. Initially, they bought 250 acres and

paid the deceased Kshs.700,000/-. Pursuant to another sale agreement, they purchased 150 acres at Kshs.300,000/-. The deceased informed them he had charged the title to the 2<sup>nd</sup> respondent to secure a loan which had accrued to about Kshs.9 million. PW1 stated that he paid the 2<sup>nd</sup> respondent Kshs.400,000/- and they were issued with a receipt. The 2<sup>nd</sup> respondent allowed them to liquidate the outstanding loan of Kshs.9,355,117.90/- which they paid into the deceased's loan account. Upon being cross-examined by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel, he reiterated that they purchased the land from the deceased. However, he did not produce any agreement or receipt in support of the payments made to the 2<sup>nd</sup> respondent.

15. Cross-examined by learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, PW1 confirmed that after executing the two sale agreements with the deceased, they did not apply for consent from the Land Control Board and as at the date of the trial, they had not done so nor did they register a caution against the title. He admitted he knew the deceased had charged the title and had defaulted in repaying the loan.

16. PW2 produced the two agreements and stated that

initially

they did not know that the land had been charged but

subsequently discovered that the deceased had charged the land and because he was unable to repay the loan, he wanted to sell LR. No 7060/2 to the plaintiff. Further, the 2<sup>nd</sup> respondent allowed them to liquidate the deceased's loan of Kshs.9,355,117.90/- and produced a bundle of receipts in support of payments, a letter from the 2<sup>nd</sup> respondent acknowledging receipt of payments, payment of land rates to the County Council of Trans-Nzoia, court proceedings in criminal case No.1011 of 2011 in which some of the appellant's members were acquitted for the offence of trespass, a caveat emptor notice by the 2<sup>nd</sup> respondent, a letter dated 31/10/2000 from the 2<sup>nd</sup> respondent's advocates indicating that 2<sup>nd</sup> respondent had bought the land, a letter dated 27/2/1998 from the 2<sup>nd</sup> respondent applying for consent from the Commissioner of Lands to transfer LR No. 7060/2 and the letter of consent.

17. The crux of the 1<sup>st</sup> respondent's evidence as we discern it from his sole witness was that sometimes in or about 1989, it was approached by the deceased who offered to sell a portion of his land which he had charged to the 2<sup>nd</sup> respondent. The price was agreed at Kshs.3,750,000/- which it paid in full into the deceased's loan account. Upon

full payment, they applied and

obtained consent to subdivide and transfer. LR. No.7060/2 was subdivided into LR. No.7060/3 and LR. No.7060/4. A partial discharge for LR. No. 7060/4 and transfer to the 1<sup>st</sup> respondent were registered on 12<sup>th</sup> February 1990. Therefore, by the time this suit was filed in 2008, land parcel LR. No.7060/4 was already in the 1<sup>st</sup> respondent's name and it was already in occupation. It was the 1<sup>st</sup> respondent's evidence that the appellant invaded the land after the collapse of their deal with the deceased. He stated that the 1<sup>st</sup> respondent prays for a declaration that it is the rightful owner of parcel LR. No.7060/4 and an order of eviction to against the appellant.

18. The nub of the 2<sup>nd</sup> respondent's evidence is that on or about 7<sup>th</sup> July 1984, the deceased applied for an agricultural development loan of Kshs.5,000,000/- from the 2<sup>nd</sup> respondent which was advanced to him on the strength of a charge over LR. No.7060/2. The deceased defaulted in repaying the loan and the 2<sup>nd</sup> defendant instituted recovery process. At his request, the deceased was allowed to sub divide the land and sell part of it to settle the debt. Sub-division was done and a partial discharge of charge was registered in respect of LR. NO.7060/4 to enable a transfer

in favour of the

1<sup>st</sup> respondent. That the discharge of charge and transfer were registered on 12<sup>th</sup> February 1990. The consideration of Kshs. 3,750,000/- which was paid directly to the Agricultural Finance Corporation. The remaining parcel of land being LR. No.7060/3 was charged in favour of the 2<sup>nd</sup> respondent to secure the outstanding loan balance due from the deceased. The deceased pleaded to be allowed to excise approximately 250 acres and sell the same by private treaty to enable him pay the then outstanding loan. The 2<sup>nd</sup> appellant consented to the request, and the sub-division was done creating LR. No. 7060/3 and LR No. 7060/4. The latter portion was sold for Kshs.3,750,000/- which was not sufficient to offset the then outstanding loan, a fact the 2<sup>nd</sup> respondent communicated to the deceased who promised to make arrangement to offset the balance. However, the loan remained unpaid. The 2<sup>nd</sup> respondent initiated recovery process including serving the deceased with the requisite notices. This prompted the deceased to seek a further consent from the 2<sup>nd</sup> respondent to dispose a further 150 acres to offset the balance. The deceased stated that the appellant was the potential buyer. However, the deal never materialized because the appellant wanted to

purchase 150 acres out of the remaining 350 acres. The

2<sup>nd</sup>

respondent through its duly appointed auctioneers advertised the land for sale. The appellant placed a bid of Kshs. 13,000,000/- while the 2<sup>nd</sup> respondent placed a bid of Kshs. 16,000,000/-. The appellant's bid was rejected since it was below the reserve price while the 2<sup>nd</sup> respondent's bid was declared the highest bidder in the auction held on 9<sup>th</sup> October 1997. The transfer was registered and a certificate of title issued on 13<sup>th</sup> August 2002, but the appellant's members continued paying money into the deceased's loan account, but there was no agreement with the deceased. The outstanding loan balance as at 24<sup>th</sup> October 2011 was Kshs.104,853,341/- which remains unpaid and continues to accrue interest until payment in full.

19. On behalf of the 3<sup>rd</sup> respondent, the Chief Land Registrar produced the certified copy of title and testified that LR No. 7060/2 was transferred to Nembu Holdings for Kshs.1,400,000/- on 18<sup>th</sup> April 1980, while LR. No. 7060/2 was subdivided resulting to LR. No.7060/3 and LR. No. 7060/4, which was transferred and registered in the name of the 1<sup>st</sup> respondent on 12<sup>th</sup> February 1990. He produced copies of the partial discharge and transfer and copy of the Certificate of Title for LR. No.7060/4.

20. After evaluating the evidence adduced by both parties and their submissions, the learned Judge distilled 5 issues for determination, namely, (a) whether the appellants purchased LR No. 7060/2 which upon sub-division yielded LR Nos. 7060/3 and 7060/4; (b) whether the said sub-division and the subsequent transfer was fraudulent; (c) whether the appellant had any interest in the suit property; (d) whether the appellant was entitled to the reliefs sought; (e) whether the 1<sup>st</sup> respondent was entitled to the orders sought in the counter-claim.
21. In the definitive paragraphs, the trial Judge determined the above issues as follows:

***“28. From the material on record, it is not disputed that parcel of Land LR No. 7060/2 comprised of 242.7 Ha (approximately 600 acres) was registered in the name of Dr. James Omondi Ouko (deceased). It is also not in dispute that there was a charge that was registered against the said parcel of land LR No. 7060/2 to secure a loan of Kshs.5,000,000/= advanced to the deceased by the Agricultural Finance Corporation, the 2<sup>nd</sup> defendant herein. The evidence on record indicate that immediately the loan became due and owing, the deceased borrower failed to honour his obligation to repay the loan and his continued default in repaying the loan prompted the 2<sup>nd</sup> defendant to institute recovery process in a bid to realize the security. From the material on record, it appears the deceased approached the 2<sup>nd</sup> defendant and pleaded with it to allow him to excise approximately 250 acres and have the***

***same sold by private treaty to enable the deceased offset the outstanding loan. The 2nd***

**defendant as chargee gave its consent whereupon the security parcel LR No. 7060/2 was subdivided into LR No. 7060/3 and 7060/4 measuring approximately 350 acres and 250 acres respectively and the security was partially discharged.**

- 29. The evidence on record confirms that LR. No. 7060/4 was sold and transferred to Luore Nyoiro Company Limited, the 1st defendant herein on 12th September, 1990. However, the proceeds of the sale being Kshs.3,750,000/- was not sufficient to offset the outstanding loan amounts in the deceased borrower's loan account. From the evidence on record, it is apparent that the remaining portion being parcel LR No.7060/3 measuring approximately 350 acres remained charged in favour of the 2<sup>nd</sup> defendant to secure the outstanding balance of the loan in the loan account of the late Dr. James Omondi Ouko. By his letter dated 3<sup>rd</sup> April 1991, Dr. James Omondi Ouko requested the 2<sup>nd</sup> defendant for consent to subdivide a further 150 acres and sell to repay the outstanding loan. In their letter dated 16<sup>th</sup> July 1991, the Plaintiff through their advocates, Esther Chege & Co. Advocates wrote to the 2<sup>nd</sup> defendant indicating that the plaintiff had entered into a contract to buy 150 acres out of LR. No. 7060/2 and wanted to know whether the said parcel of land had any encumbrances.**
- 30. The plaintiff relied on an alleged agreement for sale dated 29<sup>th</sup> April 1989 for 250 acres and another dated 30<sup>th</sup> May 1990 for 150 acres. It is also the plaintiff's evidence that thereafter, the late Dr. James Omondi Ouko (deceased) wanted to sell the entire parcel LR. No.7060/2 as per the proposed sale agreement dated 1994 and which was not executed by any of the parties. That it is on the strength of the said proposed sale agreement that the plaintiff was allowed by the 2<sup>nd</sup> defendant to continue liquidating the loan for LR No.7060/2 in the account of the late Dr. James Omondi Ouko. The plaintiff also relied on some letters to support its claim that Dr. James Omondi**

***Ouko (deceased) was ready to sell to the plaintiff  
the entire parcel LR. No. 7060/2 measuring***

**approximately 600 acres. The plaintiff also relied on some receipts.**

- 31. It is clear that whereas the plaintiff's case is that Dr. James Omondi Ouko was ready to sell them the entire parcel LR. No.7060/2, the evidence on record show that parcel LR. No. 7060/2 had already been subdivided resulting into LR. NO.7060/3 measuring approximately 350 acres and LR. No. 7060/4 measuring approximately 250 acres. Besides, it is clear from the evidence on record that LR. No. 7060/4 had been sold and transferred to the 1st defendant and the 1<sup>st</sup> defendant is the registered owner of that parcel. The plaintiff's claim that they bought 600 acres from the original owner cannot be true. The plaintiff principally relied on oral evidence in claiming that it purchased the suit land. The sale agreements tendered, as already stated were not concluded and were more or less agreement of intention to purchase the suit land.**
- 32. It is also clear from the evidence on record that Dr. James Omondi Ouko (deceased) wanted to sell and the plaintiff had expressed an interest to purchase 150 acres out of LR. No. 7060/2. However, there was no evidence produced by the plaintiff to show that that transaction was ever concluded.**
- 33. Following the sale and transfer of the LR. No. 7060/4 to the defendant, the only parcel that was left and which was still charged to the 2<sup>nd</sup> defendant was LR. NO. 7060/3 measuring 350 acres or thereabouts. From the evidence on record, it is apparent that both the plaintiff and the 2<sup>nd</sup> defendant expressed interests to purchase this parcel. It is apparent that the land was advertised for sale by public auction and the 2<sup>nd</sup> defendant's bid was successful. The land was later transferred to the 2<sup>nd</sup> defendant on 13<sup>th</sup> August, 2002. From the evidence on record, I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired their respective parcels of land procedurally and lawfully. The plaintiff has failed to tender any evidence to demonstrate that the registration**

***and transfer of land parcel LR. No 7060/3 in favour of the 2<sup>nd</sup> defendant and LR. No 7060/4 in favour of the 1<sup>st</sup>***

**defendant were tainted with illegality or breach of statutory provisions. In the absence of any tangible evidence implicating the defendants in any fraudulent, illegal or corrupt scheme, I am not persuaded that 1<sup>st</sup> and 2<sup>nd</sup> defendants are not holding good titles. It is therefore my finding that the 1<sup>st</sup> and 2<sup>nd</sup> defendants acquired their titles procedurally and their titles are valid. It is trite law that any allegations of fraud must be pleaded and strictly proved. The plaintiff alleged fraud on the part of the defendants. The burden to prove those allegations lay squarely on the plaintiff who failed to discharge that burden. In any case any sale agreement, if any, between the plaintiff and the late Dr. James Omondi Ouko can only be enforced against the said Dr. James Omondi Ouko or his estate, and cannot be enforced against the defendants who were not party to the transaction.**

**34. It is not in dispute that the plaintiff's members have been paying money directly to the 2<sup>nd</sup> defendant to liquidate the loan account of the late Dr. James Omondi Ouko. However, it is my view that this does not confer propriety rights to the plaintiff over the suit property. The plaintiff has not tendered any enforceable agreement for sale, or indeed any document that can be said to be evidence of an enforceable or valid transaction between itself and the original owner, Dr. James Omondi Ouko or even with the 2<sup>nd</sup> defendant as the then chargee of the property. It is trite law that if one wishes to enforce an agreement over land, then such a transaction must be in writing, signed and attested. This is provided for under Section 3 (3) of Law of Contract Act, Cap 3 Laws of Kenya which provides as follows: ...**

**35. The plaintiff principally relied on oral evidence in claiming that it purchased the suit land. The sale agreements tendered, as already stated, were not concluded and were more or less agreement of intention to purchase the suit land. It was incumbent upon the plaintiff to tender a valid and**

***enforceable sale agreement. However, the plaintiff failed to do so.***

- 36. It is also doubtful the transaction relied on by the plaintiff was valid without consent from the 2<sup>nd</sup> defendant, as chargee, and also without consent from the Land Control Board. So that even if there was a sale between the plaintiff and the late Dr. James Omondi Ouko, such a sale would be void for the reason that no consent of the Land Board was ever obtained. The Land Control Act Cap 302, Laws of Kenya, does require that transaction over agricultural land be subject to grant of consent by the relevant Land Control Board...**
- 37. It will be seen from a reading of Section 6 (1) (a) that a sale of agricultural land is one of the transactions that require consent of the Land Control Board and if not consent is given then the transaction will be rendered void. The remedy given in Section 7 of the Statute for an agreement rendered void for lack of Land Control Board consent is a refund of the purchase price paid. The plaintiff witness did not tender any evidence to the effect that consent of the Land Control Board was ever applied for and issued in respect of the transaction between the plaintiff and the late Dr. James Omondi Ouko. Given this position, even if there was a sale of the suit land to the plaintiff, such sale is null and void and cannot be given effect. On their other hand, the transactions in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants were supported by the requisite consents.**
- 38. The plaintiff has also claimed to have been in occupation of the suit property since 1989. I however, wish to point out that the issue of possession was concluded by Ombija, J. in his ruling and order dated 28<sup>th</sup> January 2009 and 17<sup>th</sup> February 2009 which position was re-affirmed by the Court of Appeal in Civil Appeal No. 145 of 2009 vide its order dated 28<sup>th</sup> October 2015. The plaintiff is therefore estopped from revisiting the issue and I will not make a finding on it because a finding on the issue was made by courts of competent jurisdiction and is still in force.**

**39. From the evidence on record, I am satisfied that the 1<sup>st</sup> defendant is the absolute and indefeasible owner of the parcel LR. No.7060/4. I am also satisfied that**

***the 2<sup>nd</sup> defendant is the absolute and infeasible owner of the parcel known as LR. No.7060/3. As the absolute proprietors of those properties, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are entitled to enjoy rights and privileges associated with such ownership which include exclusive use, possession and enjoyment thereof without interference by any third party. The 1<sup>st</sup> defendant has asserted that the plaintiff have entered into the 1<sup>st</sup> defendant's parcel LR. No.7060/4 without the 1<sup>st</sup> defendant's consent. The plaintiff has admitted occupying the said land. The plaintiff having unlawfully entered the said land without the permission of registered and lawful owner, the plaintiff's action amounts to trespass.***

***40. The upshot of this is that this Court is not satisfied that the plaintiff has proved its case against the defendants on a balance of probability. On the other hand, this Court is satisfied that the 1<sup>st</sup> defendant has proved its case against the plaintiff."***

22. The appellant is now before this Court seeking to overturn the said decision citing a whopping 16 grounds of appeal in its memorandum of appeal dated 10<sup>th</sup> September 2020 which are verbose and repetitive. The grounds can be summed up into one critical issue, which is, whether the impugned decision was supported by the evidence and the law.

23. During the virtual hearing of this appeal on 21<sup>st</sup> January 2026, learned counsel Mr. Mokuia appeared together with Mr. Kaosa for appellant. Learned counsel Mr. Munuang'o was present for the 1<sup>st</sup> respondent. Learned counsel Mr.

Odongo together with Ms. Cheruiyot for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 3<sup>rd</sup> and 4<sup>th</sup>

respondents did not file submissions but in his brief submissions before us, Mr. Odongo relied on the evidence on record and answering to a question from the Court stated that the disputed land belonged to the 2<sup>nd</sup> respondent.

24. The salient points in the appellant's counsel's submissions are that the 1<sup>st</sup> respondent admitted the existence of three agreements entered into between the deceased and the appellant for the purchase of LR No. 7060/2, pursuant to which the appellants occupied the land with the deceased's consent. Counsel asserted that the issue of possession was settled by *Ombija, J* in an interlocutory application which was appealed against and a consent on *status quo* recorded. Counsel questioned the existence of the agreement between the deceased and the 1<sup>st</sup> respondent and the assertion that LR No. 7060/2 was subdivided on 12<sup>th</sup> February 1990 yielding LR Nos. 7060/3 and 4. Counsel emphasized that the appellants have been in occupation of the land since 1989 and it continued to liquidate the deceased's loan, a fact counsel insisted the respondents admitted.

25. The appellant's counsel also maintained that the alleged

trespass does not arise because its agreements with the deceased are admitted. Also, its members were acquitted of

the offence of trespass in a criminal trial as evidenced by the proceedings they produced in Court. Counsel maintained that the appellant had proved the existence of a constructive trust and underscored that Article 10 of Constitution enshrines the principles of equity and natural justice.

26. There are 2 sets of written submissions filed for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. These are the submissions dated 28<sup>th</sup> February 2024 filed by Omondo, Obande and Company Advocates on behalf of the 1<sup>st</sup> respondent and submissions dated 14<sup>th</sup> June 2024 filed by Erry S. Mabonga advocate on behalf of the same parties. The key points in the submissions are that whereas the deceased's intention to sell the land to the appellant has been demonstrated, the same is not supported by a written agreement and there is no evidence to show that the transaction was ever concluded. Counsel cited this Court's decision in **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR** in support of the holding that a contract for the sale of land must be in writing. Counsel argued that the appellant only produced unexecuted agreements and it did not obtain consent from the Land Control Board as required

by Section 6 of the Land Control Act. It was contended that the appellant had trespassed into

the suit land. Regarding the prayer for constructive trust, it was argued that this prayer was not sought before the trial court. Lastly, the 1<sup>st</sup> respondent's counsel citing Section 27 of the Civil Procedure Act urged this Court to award costs against the appellant.

27. This is a first appeal, therefore, it is by way of retrial. The principles upon which this Court acts in such an appeal are well settled. Briefly, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. An appellate court will not interfere with a trial court's findings of fact unless they are based on no evidence, a misapprehension of evidence, or incorrect legal principles. Such findings are binding unless they are demonstrably based on wrong principles. (See **Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**).

28. For starters, there is no dispute that the suit land was charged to the respondent by the deceased. It is also common ground that the deceased had defaulted in repaying the loan. The critical question is whether the

deceased could validly sell the

charged land or part of it without the express consent of the lender.

29. It is basic law that land charged to a bank is typically subject to a "*restriction*" at the Land Registry Land, which prevents the registration of any sale, transfer or lease without the bank's express consent or, in the absence of consent, a court order. (See **Cheltenham and Gloucester BS vs. Krausz [1997] 1 All ER 21**). Court decisions and statutory law (particularly the Registers Land Act (Repealed), the Registration Titles Act (repealed), the Government Lands Act (repealed), the Land Act 2012 and Land Registration Act 2012) strongly uphold that land subject to a registered legal charge cannot be sold or transferred without the lender's (chargee) consent. A legal charge is considered an overriding interest, meaning it remains superior to any other interest, including a subsequent sale. Section 87 of the Land Act and Section 59 of the Land Registration Act generally prohibit the registration of a transfer without the chargee's written consent. (See **Paul Gatete Wangai & 13 Others vs. Capital Realty Ltd & Ano. [2020] eKLR**. As was held in **Tassia Coffee Estate Limited & Ano. vs. Milele**

**Ventures Limited [2013] eKLR**, even with "*informal charges*" (e.g., lien by deposit of documents), lenders must be

involved in the sale process. Section 79 (7) of the Land Act 2012 requires a court order for a chargee to sell, preventing unilateral sales by owners. There is nothing on record to show that the lender granted the consent to sell the suit premises to the appellants. The deceased could not sell even a portion of land without the lender's express consent. The lender only granted consent for subdivision and partial discharge of the parcel of land which was sold as highlighted earlier. There is nothing to show that the lender granted consent for the sale of the portion claimed by the appellant. On this ground alone, the appellant's appeal stands on shaky ground.

30. But there are other equally lethal grounds the appellant must surmount to sustain this appeal. The 1<sup>st</sup> respondent maintained that there is no evidence to show that the agreement between the deceased and the appellant was concluded. To our mind, a litigant basing its case on a sale agreement must show that the agreement was concluded by proving the essential ingredients of a valid contract exist. To prove the existence of a binding contract, it is generally necessary to demonstrate the presence of six core elements: offer, acceptance, and consideration,

intention to create legal relations, capacity, and legality.

Even though

written contracts provide the best evidence, oral agreements, or contracts formed by conduct (actions), can be equally binding if these foundational elements are present.

31. To demonstrate the above elements, positive evidence that a binding contract existed, whether written or oral, rather than merely relying on preliminary negotiations or an expression of intent is a requirement. (See the High Court decision in **Timau Agro Industires Limited vs. National Oil Corporation of Kenya (Civil Case 237 of 2013) [2025] KEHC 2547 (KLR) (Civ) (21 February 2025) (Judgment)**). In this case, the absence of evidence to show that the lender granted express consent to the alleged sale raises serious doubts on the capacity of the deceased to sell the land without the lender's express consent and the legality of the sale. Both parties must intend for the agreement to be legally binding, meaning they expect the law to intervene if the contract is breached. As mentioned earlier, the absence of the lender's consent to sell this particular portion casts a dark cloud on the legality of the sale to the appellants by the deceased.

32. The other ground of attack mounted by the respondents is

that the much-hyped contract between the appellant and the deceased was not concluded. The UK Supreme Court decision

in **Barton vs. Fox Pace Ltd [2023] UKSC** underscored that if the contract's completeness is disputed, the party relying on it must show the terms were sufficiently certain. Similarly, the celebrated decision in **Trentham Ltd vs. Luxfer [1993] EWCA** demonstrates that while a "completed" contract can be inferred from conduct even without a formal written document, the claimant must still show that the parties' actions constituted acceptance and performance, thus demonstrating a concluded, or completed, working contract.

33. Equally relevant in this context is the decision in **Kleinwort Benson Ltd vs. City of Glasgow District Council [1997] EWCA/UKHL** in which it was stated that a party basing a claim on a contract must show it was not void *ab initio* (from the beginning) and that it had legal existence. The general principle in all these cases is that in civil claims based on contract, the burden of proof is on the claimant to prove all necessary elements of the cause of action, including the existence of a valid, binding contract. If the contract is not finalized (i.e., not completed), the claim will fail. As was held by the trial court, no evidence was adduced to show that the contract was concluded.

34. The above discourse on the legality of the questioned contract leads us to the next pertinent ground urged in opposition to this appeal, which is lack of evidence to support the existence of a written sale agreement between the appellant and the deceased. In Kenya, agreements for sale of land are governed by Section 3 (3) of the Law of Contract Act, which stipulates that contracts for the disposition of an interest in land must be in writing, signed by all parties and attested by a witness to be enforceable. As was held by the Environment and Land Court in **Sidi & Ano. vs. Mwero & Ano. [2025] KEELC,** under Section 3 (3) of the Law of Contract Act and Section 38 of the Land Act, land transactions must be in writing, signed, and witnessed. The appellant alluded to several sale agreements, none of which was provided.

35. While we appreciate the “*merciless*” effect of the above provisions and the numerous cases from our superior courts consistently upholding this strict requirement under the above provisions, emphasizing that failure to comply renders the contract void and unenforceable, an oral contract for the sale of land in specific circumstances, could give rise to a “*constructive trust*,” a ground urged

by the appellant before us. While an oral contract for the sale of land cannot be

directly enforced as per the above provisions, proprietary estoppel or a constructive trust may be invoked to prevent a party from acting unconscionably provided the party does not directly circumvent the statute. As was held in **Peter Mbiri Michuki vs. Samuel Mugo Michuki [2014] eKLR**, while writing is mandatory, exceptions may apply regarding trusts or specific historical contexts.

36. However, the attempt by the appellant to invoke the doctrine of constructive trust before us, attractive as it is, faces a formidable hurdle which it must surmount. As a general rule, points of law, theories, or arguments not brought to the attention of the trial court cannot be raised for the first time on appeal. Appellate courts are primarily concerned with reviewing the decisions of the trial court for errors based on the record that was before it, not retrying the case or evaluating new evidence. This statement reflects a fundamental principle of appellate procedure designed to ensure fairness, efficiency and finality in litigation. The principles behind this uncompromising principle are: (a) fairness: It is considered unfair to reverse a judgment on a point that the trial court was not given an opportunity to rule on or that the opposing party did not

have the chance to

address with evidence; (b) efficiency: Allowing new arguments on appeal could incentivize parties to withhold arguments at the trial level, leading to fragmented litigation. (c) Finality: It ensures that the litigation process has a definitive end at the trial court level.

37. This Court in ***Karanja vs. Murigi [2025] KECA 517 (21 March 2025)*** confirmed the long-established principle that where a party fails to present arguments or issues in the trial court, they are bound by that record and cannot introduce new grounds of appeal. The Court emphasized that it is not in the interest of justice to allow parties to change their case on appeal. The Supreme Court in ***Gitonga vs. Republic (Petition 11 of 2017) [2018] KESC 6 (KLR) (7 December 2018)*** affirmed that an appellate court has no jurisdiction to entertain a ground of appeal that was never raised in the lower courts. This case established the principle that litigation must have an end and parties must bring their entire case forward at the first instance court. While Rule 3 (1) of the Court of Appeal Rules, 2022 empowers the Court to re-appraise evidence, it does not permit the introduction of entirely new un-argued legal grounds. We have looked at the appellants pleadings

before the trial court. The issue of constructive trust

was not pleaded nor was it urged in the submissions or even alluded to. We have said enough to confirm that we are precluded from entertaining this ground.

38. From our analysis and conclusions on the issues discussed above, we have sufficiently demonstrated that the trial court properly analyzed the facts presented before it, correctly applied the law and arrived at the correct findings. Accordingly, we find no reason to interfere with the impugned judgment. Arising from our above conclusions, we find that this appeal lacks merits. Therefore, we dismiss it with costs to the first and second respondents.

**Dated and delivered at Nakuru this 27<sup>th</sup> 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  
a true copy of the  
original.  
Signed.*

**DEPUTY REGISTRAR.**