

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
APPEAL CASE NO. E036 OF 2024

BEATRICE AWINO TARKO.....1ST
APPELLANT

GEORGE OTIENO TARKO.....2ND
APPELLANT

VERSUS

VIVIAN ANYANGO OKELLO.....
RESPONDENT

JUDGEMENT

1. The Appellant **VIVIAN ANYANGO OKELLO**, being aggrieved by the of the Hon. E. Tsimonjero (SRM) delivered on 4th October 2024 in ELC CASE NO. E015 of 2022, Ukwala Senior Resident Magistrate’s Court preferred this appeal vide a Memorandum of Appeal dated 9/10/2025 on the following grounds;-

- 1) That the trial magistrate erred if both law and facts by totally disregarding the evidence and submissions by the Defendants.
- 2) That the trial magistrate erred in both law and facts by disregarding the evidence by the Defendants that the transaction between John Ratanga and the Plaintiff was stunk of illegalities and failed to meet

the prerequisite of transfer process pursuant to Land Control Act and Land Registration Act.

- 3) That the trial magistrate erred in facts by shifting the burden of proof from the Plaintiff to the Defendants.
- 4) That the trial magistrate erred in facts and law by ignoring the evidence adduced by the Defendants that John Otieno Ratanga was holding the suit land in trust for the family of Defendants after selling it off in 1995.
- 5) That the trial magistrate erred in facts and law by dismissing the Land sale agreement between the Appellant's family and John Otieno Ratanga even after admission by Ratanga that he signed the agreement.
- 6) That the trial magistrate erred in facts and law by holding that indeed there was evidence that the Plaintiff acquired the title unprocedurally, illegally or through corrupt scheme, but later turns the blind eye and holds that her Title is indefeasible.
- 7) THAT the trial magistrate erred in facts and law by failing to analyze the evidence of the Plaintiff but rather basing his findings on the evidence of the Defendants only.
- 8) That the trial magistrate erred in both the law and facts by rewriting the agreement between John Ratanga and Tarko Mbala.

2. On the basis of the above grounds the Appellant prays for judgment against the Respondent;

1. That this Appeal be allowed.

2. That the Judgement and the Decree of CMC ELC E015 OF

2022 at Ukwala be and is hereby set aside and substituted with the order dismissing the claim with costs

3. That the Appellant counter Claim be upheld.

4. That the costs of this appeal be to the Appellant.

SUBMISSIONS

3. The appeal was heard by way of written submissions. Both parties complied and the submissions are summarised as follows; -

Appellants Submissions

4. The Appellants submission are filed through his advocate on record M/s. Agina & Associates dated 9/10/2024. The appellant condensed the 8 grounds of appeal into two choosing to submit on ground No 2 above and whether the trial court erred in fact and law by dismissing the land sale agreement between the 1st and 2nd respondents' family and John Ratanga.

5. It is submitted that there was no evidence that transfer charges were paid, compliance with section 8 of the Land Control Act and Section 5 of the Stamp duty Act. That the

Respondent abandoned his documents during the hearing. There was no contract between the Respondent and Ratanga contrary to the provisions of section 3(3) of the Law of Contract Act.

6. It is submitted that the Respondent never conducted due diligence to confirm the land was available for sale. That the same was not available for sale since Ratanga was holding it in trust for the appellants having sold it in 1995 and them having taken possession. The Respondent was expected to inspect the property. Had they done so they would have realised active use of the land. The court is referred to the Court of Appeal decision in **Chemey Investment Ltd Vs AG & 2 Others (2018) CA No.30 of 2015**.
7. It is submitted the documents produced by the Respondent pointed to an illegality. Referring to page 91 of the Record of Appeal the appellant imputes double speak on the part of the trial court.
8. On the dismissal of the agreement between the appellants family and John Ratanga it is submitted that a counterclaim survives as a separate action even where the substantive action is struck out/dismissed. That while the trial court noted the agreement did not refer to the parcel the same was confirmed in evidence by the said Ratanga to be the suit property. It is urged that parties are bound by their pleadings and the court cannot rewrite the contract of parties.

9. Additionally it is contended that section 3 of the Law of Contract Act exempts implied, resulting, constructive trusts. That possession of the land was a step into ownership as held in **Syantone Ene Mututua Siringet Vs Phillip Amusi & Another Kajiado 266 of 2017.**
10. On the effect of absence of LCB consent the court is referred to the decision in **Willy Kimutai Kitilit Vs Michael Kibet Civil appeal No. 51 of 2015 (Eldoret)** where it was held that where the purchaser is in possession it would not be fatal as the agreement could still be enforced under constructive trusts and proprietary estoppel.
11. It is further contended that the counterclaim ought to succeed since the Respondent did not respond to it by filing Defence and Defence to Counterclaim. It is submitted that the appellant proved their case to the required standard and the appeal should be held with costs to the appellant as the successful party.

Respondents Submissions

12. The 1st Respondent submission are filed through his advocate on record M/s. Jesse David, Ochanyo & Kurgat Advocates LL.P. Rehashing the findings of the trial court vis a vis the evidence adduced it is submitted that the agreement between the Plaintiff and John Otieno Ratanga met the requirements of section 3(3) of the Law of Contract Act for the disposition of an interest in land. The fact that the transaction was performed on both sides will

often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty - to buttress this position the respondent cited Lord Steyn in *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25 from Chitty on Contracts, 32nd Edn, Vol.1, pg 13.

13. Further that the Plaintiff undertook due diligence before purchase as evidenced by a land official search dated 29th June, 2021 showing that the said John Otieno Ratanga was the then registered owner of the suit property.
14. It is urged that the Torrent System of registration was applicable in Kenya and under the system the title of a bona fide purchaser for value without notice of fraud could not be impeached except only by proof of fraud or misrepresentation in which the buyer is himself involved." - Reliance is placed on **Petition No. 29 of 2012 and Civil App. No.12 of 2013 Charles Karethe Kiarie & 2 Others -vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 Others (2013) eKLR.**
15. Defining the meaning of trespass under the section 3 (1) of the Trespass Act, Cap. 294, Laws of Kenya, 10th Edition of Black's Law Dictionary it is submitted that having proved the unlawful entry of the Defendants into the land the Plaintiff is entitled to general damages without proving the injury. Reliance is placed on the holding in **Park**

**Towers Ltd v. John Mithamo Njika & 7 others (2014)
eKLR.**

16. That no legitimate owner of title should be dispossessed of their hard-earned property and the plaintiff is entitled to protection under Section 26 (1) of the Land Registration Act.
17. The court is urged to award costs to the respondent upon dismissing the appeal.

Supplementary Submissions

18. The appellant also filed supplementary submissions dated 1/10/2025 with leave of the court and reiterated that there is no further list that was filed by the Respondent even after the court had ordered them to do so. The same was not served upon the Appellant, and if the same is on record of the court, the same was smuggled after the judgment in Ukwala. The documents that this court should consider is the Record of Appeal as filed.
19. Throughout the proceedings in Ukwala, the Respondent never brought the alleged sale agreement between Ratanga and the Respondent. This was fatal to their case. The relationship between the two parties was not clear. Later on they allegedly smuggled the Land Control Board consent into the court.
20. Further it is not in dispute that the Appellant has been in occupation from 1995, when they purchased the land from Ratanga who seemed to be inconsistent in his testimony

had confirmed that he was aware the purchase of the land by the Appellant's family.

21. It is submitted that the family of the Appellant has been in occupation for the last 30 years. The attempt by the Respondent to recover land from them was statute barred pursuant to Section 7 of the Limitation of Action Act.

ANALYSIS AND DETERMINATION

22. I have examined and considered the full record of the trial court; the grounds of appeal; and the parties' respective submissions together with the issues they identified. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues falling for determination in this appeal.
23. In my view, the following are the issues that fall for determination in this appeal;
- 1) Whether the trial court erred in upholding the Plaintiff as the lawful owner of the suit property
 - 2) Whether the trial court erred by failing to invoke the doctrine of trust in favor of the Appellants who were the 1st and 2nd defendant in the main suit
 - 3) Whether the counterclaim should be upheld
 - 4) Costs of this appeal
- 24.. As this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. The court will not lightly differ from the findings of a trial court and will only interfere

with them if they are based on no evidence. See Selle -vs- Associated Motor Boat Co. [1968] EA 123; Jabane - vs- Olenja, [1986] KLR 661, 664, Jabane - vs- Olenja [1986] KLR 661, and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.

25. The genesis of this appeal is the Complaint dated 4th April 2024 which was commenced by Vivian Anyango Okello (the Respondent in this appeal) where she sought the orders against Beatrice Awino Tarko and George Otieno Tarko (the Appellants in this appeal) claiming to be the lawful registered owner of the suit property and sought orders to be declared the lawful owner of the suit property following valid transfer. She also sought orders of permanent injunction against the 1st and 2nd defendants from inter alia selling, alienating, trespassing or in any other manner dealing with the suit property and costs.
26. The 1st and 2nd Defendants responded by Statement of Defence dated 10th May 2023 denying the allegations in the Complaint adding that John Ratanga defrauded the plaintiff by purporting to sell her land that he had already received payment of 24,000/- in 1995 from Lucas Tarko Mbala, the second Defendant's father. That they have been tilling the land since then. Further that it was the estate of the said Lucas Tarko Mbala which ought to be sued and not his children.
27. The record bears at (page 35) a Statement of Counterclaim dated 4/07/2022 and filed on 15/07/2022.

The counterclaim reiterates the purchase above and that Lucas Tarko Mbala started working on the land until his demise on 1/12/2012. That his efforts to have John Ratango transfer the land to him were futile though the family led by the 1st and 2nd Defendants continued to work on the land to date. That the plaintiff purchased the land when she knew it was not available for sale her mother having been aware of the sale to Tarko Mbala and usage by the family through the neighbours. That Ratanga was holding the title in trust for Lucas Tarko Mbala and had no good title to pass to the Plaintiff. The counterclaim sought the cancellation of the Plaintiff title and damages from John Ratanga.

28. I must at the outset observe that the counterclaim has handwritten insertions which I have noted were not contested and I will leave it at that.

1) Whether the trial court erred in upholding the Plaintiff as the lawful owner of the suit property.

29. The trial court identified one issue for determination namely - 'Who between the Plaintiff and the 1st and 2nd Defendants has proved their case on a balance of probabilities to warrant the granting of the reliefs sought by either of them. Having noted that since both parties claims were anchored on purported land sale agreements between them and one John Otieno Ratanga, the learned magistrate proceeded to premise his determination on the validity or otherwise of the sale agreements.

30. It is important at this juncture to look into what constitutes a valid land sale agreement. Section 3 (3) of the Law of Contract Act is pertinent which the trial court cited. It provides that; -

No suit shall be brought upon contract for disposition of land unless, the contract which the suit is founded upon is in writing, signed by all parties thereto and the signature of each party has been attested by witnesses who is present when the contract was signed.

31. Section 3(3) above must be read together with the provisions of section 38 of the Land Act 2012. Section 38 reiterates the provisions of section 3(3) above but also exempts creation of a constructive trust and any agreement executed before the coming into effect of the Land Act 2012.

32. In the case of **Kingasia v King'asia & 4 others (Environment and Land Case E019 of 2025) [2025] KEELC 6558 (KLR) (1 October 2025) (Judgment)** Nzili J discussing the ingredients of a valid contract for the sale of land persuasively stated the same to include Details and description of the parties; Description of the land; Consideration; Duties and responsibilities of the parties; Dispute Resolution Mechanism; Completion details and Execution.

33. Evaluating the agreement produced by the 1st and 2nd Defendants, the trial court made a finding that the same

did not meet the threshold of a valid sale agreement. The trial court found that it did not bear the date when it was made but dates when payment instalments were made which he identified. That the location of the assistant chief where it was made is not indicated including the chiefs name thereof and description of the property.

34. The 1st and 2nd Defendants list of documents is dated 4/07/2022. Item 1 thereof is Land Sale agreement between Lucas Tarko Mbala and John Otieno Ratanga (see page 43 of the ROA). I have reviewed the same against the criteria hereinabove. I agree that the same does not bear the date of the agreement. The property is described only as being in Ulumbu area. However, the signatures of both the seller and buyer are there and are witnessed. I think for purposes of the agreement the issue of who drafted the document is neither here nor there based on the criteria given.
35. But the above notwithstanding while the agreement produced by the defendant didn't bear a date, the evidence point to the fact the arrangements between Tarko and Ratanga happened around the year 1993 - 1995. The arrangements were therefore not subject to the provisions of section 3(3) herein which came into effect in the year 2003. The trial court ought not to have applied the said provisions to the agreement produced by the Defendant Appellant. In this regard I'm emboldened by the holding of the Court of Appeal in the case of Peter Mbiri

Michuki Vs Samuel Mugo Michuki (2024) eKLR where the court emphasised that section 3(3) of the Law of Contract Act does not apply to Contracts entered before the year 2003.

36. With regard to the Plaintiff the trial court placed reliance on the acknowledgement note dated 30/9/2021 signed on behalf of the Plaintiff by her mother one Elizabeth Okello Omboko and the title issued on 13/9/2021 and the transfer documents. The trial court observed that from these documents John Ratengo gave effect to his intention to sell the property to the Plaintiff and further that if ever he intended to sale to Lukas Mbala Tarko he would have effected the same as done with the Plaintiff. That the said Lucas never took steps to ensure the agreement was implemented.
37. From the above it is clear that the trial court did not analyse the acknowledgement note dated 30/9/2021 for purpose of compliance to section 3(3) above. Indeed, the said provisions were applicable the agreement having been entered way after the year 2003.
38. The Plaintiff list of documents dated 4/04/2022 refers to Payment of acknowledgement note between the Plaintiff and the Seller dated 30th September 2021 (see page 20-21 of the ROA). My review of the same shows that it was not signed by the Purchaser Vivian Anyango Okello. It is also not signed by the Vendor. The document is only executed by the Vendors witness Elizabeth Okelo Omboko. Applying

the criteria above clearly the agreement did not meet the threshold for a legally binding land sale agreement.

39. Even assuming Elizabeth Okello Omboko signed on behalf of the daughter this court was not led to a Power of Attorney donated to the mother by the daughter - See Section 48 of Land Registration Act 2012.
40. Having considered all the foregoing to me there was no valid sale agreement between John Atieno Ratango and Vivian Onyango the Plaintiff.
41. However, the above notwithstanding the Plaintiff produced in evidence a title **South Ugenya /IIRO/2594** in her name issued in September 2021. This is one of the documents that according to the analysis the trial court recognised together with the transfer documents. The transfer documents are listed in the Plaintiffs List of Documents dated 4/04/2022 as item No. 3. I did not come across this exhibit. This court can only come to the conclusion that it was not produced in evidence. It is therefore not clear how the suit property was transferred and title was issued in the absence of the most critical conveyance instrument.
42. Section 26 (1) of the Land Registration Act provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts

as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

43. Arising from the above provisions a title may be impeached on grounds of fraud to which the title holder is found to have participated or for having been obtained illegally or unprocedural.
44. Clearly there were unexplained gaps pointing to illegalities in the registration of the Plaintiff as the absolute proprietor. It is not just enough to dangle a title. It is therefore the finding of this court the trial court erred in upholding the Plaintiff as the lawful owner of the suit property.

Whether the trial court erred by failing to invoke the doctrine of trust in favor of the Appellants who were the 1st and 2nd defendant in the main suit

45. The above finding then paves way for a consideration of the defence and counterclaim which stands as separate suit of its own. I have already made observations on the

purchase agreement produced by the 1st and 2nd Defendants. Section 38 of the Land Registration Act reiterates the provisions of section 3(3) of the Law of Contract Act. However, it exempts creation of a constructive trust and any agreement executed before the coming into effect of the Land Act 2012.

46. In the case of **Kabogo v Gitau (Civil Appeal 82 of 2019) [2025] KECA 193 (KLR) (7 February 2025)** the Court of Appeal stated thus:-

*37. It is clear that all contracts for disposition of interest in land must be in writing, signed by the parties thereto which signatures are to be attested by a witness at the time of their execution. Unless these requirements are complied with, the contract is unenforceable by a court, as was stated in *Kukul Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR. However, as we have stated above the appellant's case was based on fraudulent breach of trust. The plea of trust, unless successfully challenged, would bring the transaction within the proviso to section 3(3) of the Law of Contract Act. The learned Judge in the impugned judgement stated that:*

“However, the oral contract alleged herein by the plaintiff is not made by an auctioneer in the course of public auction as auctioneers were never involved at all. Infact the sale herein was by Private Treaty, which the lender allowed with the consent of the Plaintiff. The Plaintiff is alleging an oral contract between himself and the Defendant to assist him salvage the suit properties. The said oral contract forms the basis of the Plaintiff's cause of action and it is not in writing though the said alleged contract dealt with disposition of land. The sale was done by

the Bank and there is no evidence of any trust created. Therefore Section 3(3)(b) is not applicable herein.”

38.The learned Judge failed to appreciate that the proviso imported two separate scenarios. The first scenario is where the contract is made in the course of a public auction by an auctioneer while the second scenario is where it is alleged that the transaction created a resulting, implied or constructive trust. The trial court only considered the first scenario without considering the second one and in so doing misapprehended the law. That misapprehension warrants our interference with the decision..’
Emphasis is Mine

47. Guided by the foregoing, I note that the 1st and 2nd Defendant pleaded at paragraph 13 of the counterclaim that Ratanga had no good title to transfer to the plaintiff as the same was held as trustee for Mbala and subsequently the 1st and 2nd Defendant. The trial court therefore ought to have proceeded to interrogate if the facts supported this allegation. The trial court did not.
48. The registration of person as proprietor of land is subject to overriding interest set out under section 28 of the Land Registration Act. One of the interests recognised is trusts including customary trusts.
49. The said Ratanga testified as PW2. He stated that he signed the agreement and also received the money but it was to help him to bury his father. According to him if the defendants stayed on the land it was because of their money. He stated that the defendant have cultivated the land since the year 1993. That the witnesses recorded in

the agreements were helping as family members. PW2 also confirmed that the 1st and 2nd Defendants were his relatives. It appears to me for a period of over approximately 27 years going with the year 1995 Ratanga did nothing about his claim against the Defendants occupation. This must have been in recognition of the said monies paid.

50. Can the court then infer trust based on the above. I will now look into the doctrine of trust.

51. In the case of **Twalib Hatayan & Another vs. Said Saggar Ahmed Al-Heidy & 5 Others [2015] eKLR** (Makhandia, Ouko & M'inoti, JJ.A.) discussing trusts stated as follows:

“Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts...”

The Appellants' case therefore turns on whether a trust can be implied from the facts of the appeal. The authors of **Elements of Land Law (supra)** explain when a resulting trust arises as follows at page 825 in paragraphs 7.1.12:

“Resulting trusts are intrinsically concerned with the money contributions laid out in the purchase of an estate in land. The beneficial ownership implied under a resulting trust gives effect to the intention presumptively disclosed by the pattern of money purchase. Thus, in the absence of any evidence of countervailing intention, a financial contribution towards the acquisition of a legal estate in the name of another normally generates a resulting trust in favour of the contributor, the latter's beneficial entitlement being directly proportional to his or her cash contribution.”

52. The Supreme Court of Kenya in the case of **Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others (2023) KESC 106 (KLR)** expounded further on Constructive Trust as follows;-

“64. On the other hand, the respondents submit that a constructive trust overrides the registered title where a party has exerted undue influence when obtaining and retaining the property transferred to him, as was in the instant case. Furthermore, section 25 (2) of the Land Registration Act provides for overriding interests, which include trusts, which can be imposed to defeat the title of a registered proprietor. The respondents further urge that, equity will impose a ... trust in an agreement for the

sale of land and the resultant registration whenever it is shown that the claimant obtained the ... title while standing as a fiduciary ...

85. While Sections 25, 26 and 28 of the Land Registration Act recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of Article 24 of the Constitution therefore, the limitation of the right to property is provided under law, and includes a constructive trust.

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

87. ... Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law

will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.”

53. Guided on the above dictum I think the present case is a perfect case for this court to infer a constructive trust. The evidence adduced points to the fact that Ratanga was aware of the arrangements, he admitted in cross examination he received Kshs.23,000/- in the presence of the area chief and the village elder who were since deceased. Ratanga despite all this admits to selling the suit property to the Plaintiff in the trial court. He further allowed possession to the Tarko family. This is unconscionable and equity must intervene to make things right.
54. Consequently, having failed to take the above into consideration the trial court erred and arrived at the wrong decision. I find that a Constructive Trust was created and the title held by the Plaintiff cannot stand.
55. In the Counterclaim the 1st and 2nd Defendant sued as the administrators of Tarko Mbala as plaintiffs. I have seen the Limited Grant of Letters of Administration Ad Litem dated 1/07/2022 (page 44 of the record of Appeal) issued under Principal Magistrates Court Ukwala Succession Cause No. E026 of 2022. This court having imposed a constructive trust, then the suit property was held by Ratango in trust

of Tarko Mbala the deceased for the benefit of his estate and beneficiaries.

56. The upshot of the foregoing is that this Appeal succeeds.
57. Therefore the Judgement and the Decree in CMC ELC E015 of 2022 at Ukwala be and is hereby set aside and substituted with the order dismissing the Plaintiff's claim.
58. The Counterclaim in the trial court is upheld and judgement is entered for the 1st and 2nd Defendants as Plaintiffs in the Counterclaim to the extent that an order is hereby issued for the cancellation of Title Issued to Vivian Anyango Okello issued in September 2021 and substituting the same with the name of LUCUS TARKO MBALA (Deceased) by the Land Registrar Ukwala.
59. As to costs there shall be no orders as to costs on both the trial court proceedings and the present appeal. Let each party bear their own costs to enable peaceful living between Mr. John Otieno Ratango and the Appellants.
Orders accordingly.

HON. JUSTICE A. E. DENA

JUDGE

24/02/2026

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of

Mr. Agina for the Appellants

Mr. Ochanyo for the Respondents

Ishmael Orwa

ORIGINAL