



**Guandai v Metiaki & another (Civil Appeal 354 of 2019)  
[2026] KECA 498 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 498 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 354 OF 2019  
W KARANJA, K M'INOTI & LA ACHODE, JJA  
MARCH 13, 2026**

**BETWEEN**

**MAGDALENE NYOKABI GUANDAI ..... APPELLANT**

**AND**

**CHARLES MAATO METIAKI ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MAKE METIAKI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment and decree of the Environment & Land Court at Kajiado (C. Ochieng, J.) dated 3rd October 2018 in ELCC No. 785 OF 2017))*

**JUDGMENT**

1. On 3<sup>rd</sup> October 2018, the Environment and Land Court (ELC) at Kajiado (C. Ochieng', J.) dismissed a suit by the appellant, Magdalene Nyokabi Gundai, in which she had sued the respondents, Charles Maato Metiaki and Daniel Make Metiaki, for a declaration that she was the legal and beneficial owner of the property known as Kajiado/Ololoitikosh/Kitengela/2704 (the suit property) and an order for specific performance to compel them to transfer it to her. The dismissal of the suit was consequent upon the finding that the transaction between the appellant and Matiage ole Selembo Lekeyi (Deceased), who represented in the suit by Charles Maato Metiaki and Daniel Make Metiaki, the respondents herein, in their capacity as the administrators of his estate, was void for lack of consent from the Land Control Board. However, the ELC ordered the respondents to refund to the appellant a sum of Kshs 618,000 which it found she had paid as the purchase price for the suit property.
2. In her plaint, the appellant pleaded that by mutual trust and agreement with the deceased, she agreed to purchase a parcel of land measuring 50 acres to be excised from the property known as Kajiado/Ololoitikoshi/Kitengela/1849. The agreed purchase price was Kshs. 13,000.00 per acre and she made undocumented payments of Kshs 187,000 after which the parties entered into a written agreement on 19<sup>th</sup> December 2019 regularising the transaction.



3. Subsequently, the deceased excised the 50 acres which became the suit property, and the appellant took possession thereof and started farming, pending registration of the transfer in her name. The appellant further pleaded that she complied with the terms of the agreement, upon which her lawyers prepared the necessary application and forms for consent to transfer from the Land Control Board, but the deceased unlawfully declined to execute them, although he continued to receive payment of the purchase price from the appellant. As a result, she placed a caution on the suit property.
4. After the death of the deceased, the respondents declined to complete the sale and the appellant prayed, by way of reliefs, for a declaration that she was the legal and beneficial owner of the suit property, an order for specific performance of the agreement, and costs.
5. By a defence dated 7<sup>th</sup> August 2017, the respondents denied the appellant's claim and pleaded that the suit property belonged to the deceased and was occupied and used by his family. They added that the appellant was a stranger to them; that she had never been in occupation of the suit property; and that she had no legal or equitable claim to the suit property.
6. Specifically on the agreement for sale between the appellant and the deceased, the appellants pleaded that it was null and void and unenforceable because of lack of consent from the Land Control Board. They also averred that the appellant had not complied with the terms of the agreement for sale and therefore could not derive any benefit from it. They further pleaded that being in default, the appellant was not entitled to the remedy of specific performance.
7. Lastly, the respondents claimed to have occupied the suit property for over 12 years and therefore were entitled to the same by adverse possession.
8. By a Reply to Defence dated 30<sup>th</sup> August 2017, the appellant pleaded that after taking possession of the suit property she abandoned farming due to financial losses and removal of the fence by pastoralists in search of pasture. She also pleaded that she had discharged her obligations under the agreement and denied that the respondents were entitled to the suit property by adverse possession.
9. The appellant testified on her behalf while the two respondents testified for the defence. The ELC framed three issues for determination, namely, whether the agreement for sale was valid, and if so, whether the appellant had performed her part; whether the appellant was entitled to an order of specific performance; and who should bear the costs of the suit.
10. In the impugned judgment, the ELC found, as regards the first issue, that there was an agreement for sale between the appellant and the deceased; that the appellant paid the purchase price over a period of time; that in all she paid a total of Kshs. 618,000.00 leaving a balance of Kshs. 32,000.00; that under the contract, the appellant was required to pay the balance of the purchase price upon registration of the transfer; and that it was the deceased who frustrated the registration of the transfer.
11. On the second issue regarding specific performance, the ELC found that the agreement for sale became void for lack of consent from the Land Control Board and therefore the appellant could not sustain a claim for specific performance. However, the court found that she was entitled to a refund of the Kshs. 618,000.00 that she had paid to the deceased. Accordingly, the ELC awarded the plaintiff Kshs. 618,000.00 to be paid by the respondents within ninety (90) days from the date of the judgment and interest at court rates from 1994.
12. Lastly, as regards the third issue, the court awarded costs to the appellant.
13. The appellant was aggrieved, and lodged a notice of appeal dated 15<sup>th</sup> October 2018, filed the present appeal in which she faults the ELC on six grounds, all of which raise the single issue whether the ELC



erred by holding that the agreement for sale was void for lack of consent and therefore the appellant was not entitled to the remedy of specific performance.

14. In support of the appeal, learned counsel, Ms. Gichuki and Mr. Ochieng relied on written submissions dated 10<sup>th</sup> August 2020, which they highlighted during the hearing of the appeal on the Court's virtual platform. Counsel submitted that the ELC erred by holding that the agreement for sale was void for lack of consent from the Land Control Board. Counsel contended that the court found that the appellant had paid the purchase price save a balance which was payable after registration of the transfer and that it was the respondent who frustrated efforts to obtain consent from the Land Control Board by refusing to sign the relevant forms or appeal before the Board.
15. It was further contended that the evidence on record proved the existence of a constructive trust between the appellant and the deceased. Counsel relied on *Lloyds Bank PLC v. Rosset* [1991] 1 AC 107 and submitted that a constructive trust is based on common intention, like where in an agreement one of the parties relies or acts upon the agreement. Counsel also cited *Steadman v. Steadman* [1976] AC 586 in support of the proposition that a party to an agreement is not allowed to let the other party incur expenses and then turn round and claim that the agreement was unenforceable. It was contended that the deceased continued receiving the purchase price under the agreement and cannot be allowed to claim that the agreement was not enforceable.
16. The appellant also cited the decision of this Court in *Miana & 87 Others v. Kagiri* [2014] KECA 880 (KLR) and submitted that receipt of purchase price by a seller and possession by the buyer created a constructive trust. The decision in *Kiplagat Kotut v. Rose Jebor Kipngok* [2019] KEELC 1999 (KLR) was cited for the proposition that a seller who receives the purchase price and puts the purchaser in possession is barred by proprietary estoppel from reneging on the agreement while that in *Willy Kimutai Kitilit v. Michael Kibet* [2018] KECA 573 (KLR) was cited for the proposition that nothing in the *Land Control Act* prevents reliance on a constructive trust arising from the facts of the case.
17. It was the appellant's further submission that after paying the purchase price and having taken possession of the suit property until she fell ill and pastoralist removed her fence, the deceased held the suit property in trust for her. She also relied on section 25 of the *Land Registration Act* and submitted that the fact of registration of the deceased as the proprietor of the suit property did not relieve him of his obligation as a trustee and that section 28 of the same Act made registered land subject to overriding interests, including trusts.
18. As regards specific performance, the appellant submitted that this Court has moved away from the strict construction of the *Land Control Act* to ameliorate its harshness where the purchaser has paid the purchase price but the seller hides under section 6 of the *Land Control Act* to unjustly enrich himself. She cited the decision in *Willy Kimutai Kitilit v. Michael Kibet* (supra) where the Court recognised equity as one of the national values under Article 10 of *the Constitution* which must supersede the *Land Control Act* where it would otherwise wrought injustice.
19. For the foregoing reasons, the appellant urged the Court to allow the appeal with costs.
20. The respondents, who were represented by Mr. Theuri, learned counsel, opposed the appeal vide written submissions dated 16<sup>th</sup> November 2020 which, like the appellant, they highlighted on the virtual platform. In addition to responding to the appellant's appeal as regards whether the ELC erred in holding that the sale agreement was null and void due to lack of consent from the Land control Board and therefore an order for specific performance could not issue, the respondents introduced two other issues in which they contend that the ELC erred by failing to find that the appellant's suit was time barred, and for failing to consider their adverse possession claim.



21. As regards the lack of consent, the respondents submitted that the ELC did not commit any error because S. 6(1) of the [Land Control Act](#) makes all transactions involving agricultural property null and void if consent is not obtained from the Land Control Board. They relied on the decision of this Court in *David Sironga ole Tukai v. Francis Arap Muge & 7 Others* [2014] eKLR and submitted that in this appeal there was no consent from the Land Control Board and that the appellant had not paid the full purchase price, which was the reason why the deceased refused to apply for consent and to transfer the suit property to the appellant.
22. As regards constructive trust, the appellants relied on *Karuri v. Gituru* [1981] KECA 10 (KLR) and *David Sironga ole Tukai v. Francis Arap Muge & 7 Others* (supra) and submitted that no constructive trust could be declared in the absence of consent from the Land Control Board. It was further contended that to the extent that occupation of land without consent from the Land Control Board is declared an offence by section 22 of the [Land Control Act](#), payment of the purchase price and occupation of agricultural land without consent from the Land Control Board cannot constitute an overriding interest.
23. The respondents distinguished the decisions in *Willy Kimutai Kitilit v. Michael Kibet* (supra), *Kiplagat Kotut v. Rose Jebor Kipngok* [2019] KEELC 1999 and *Miana & 87 Others v. Kagiri* on the basis that the purchasers had fully paid the purchase price and were in occupation.
24. Turning to specific performance, the respondents submitted that the agreement for sale, having been made null and void for all purposes due to lack of consent from the Land Control Board, could not be enforced through specific performance and that the only remedy available to the appellant was refund of the purchase price. They also contended that having failed to pay the full purchase price, the appellant was not entitled to specific performance of the agreement for sale.
25. The respondents also made submissions contenting that the ELC erred in failing to address their contention that the appellant's suit was time-barred and their adverse possession claim. For reason which we shall give shortly, those issues are not properly before this Court and we cannot engage with them.
26. Ultimately, the respondents urged the Court to dismiss the appeal with costs.
27. We have carefully considered this appeal, the judgment of the ELC, the grounds of appeal, the submissions by the parties and the authorities they cited. We are of the view that this appeal turns on only one issue, namely, whether the ELC erred in holding that the agreement for sale was null and void and incapable of being specifically performed. But before we address that issue, we must dispose of the additional issues introduced in the appeal by the respondents.
28. The respondents did not file any notice of cross-appeal as required by rule 95 of the Court of Appeal Rules so as to anchor their submissions that the ELC erred as regards limitation of time and adverse possession. Rule 95(1) provides as follows:

“A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.”

Sub rule (2) and provide additional contents of the notice of cross-appeal rule 97 and for its lodgement and service on all persons directly affected by the cross- appeal.



29. In *Ethics & Anti-Corruption Commission v. The Chief Magistrate’s Court, Milimani & 5 Others*, Civil Appeal No 313 of 2014, this Court explained the purpose of the provisions of rule 95 as follows:

“The purpose of those provisions is to afford all the parties in the appeal a fair opportunity to know the issues raised by the concerned respondent and to prepare themselves accordingly. The provisions guarantee fair hearing and eliminate trial by ambush.”

30. Further, in *Mbiyu v. Koinange & 13 Others* [2017] KECA 799 (KLR) this Court reiterated the importance of the notice of cross-appeal as follows:

“Rule 93(1) (95(1) of the Rules of this Court obliged any respondent who wished to challenge any aspect of the findings of the learned judge to file and serve a notice of cross-appeal. The purpose of such notice is to give the other parties due notice and an opportunity to prepare to answer the issue or issues raised in the cross-appeal. A respondent who has indicated that he is happy with the judgment cannot, out of the blue, start attacking aspects of it without any notice.”

31. On the same vein, the respondents are remiss to purport to challenge the finding of the ELC that the appellant had paid the purchase price save Kshs. 32,000, which she was to pay upon registration of the transfer. Without a notice of cross- appeal, the respondents cannot challenge those finding. Secondly, and in any event, the ELC found that at the time of the transaction, both respondents were youths in school who did not have any personal information about the dealings between the deceased and the appellant.

32. Turning to the main issue in this appeal, the agreement for sale dated 19<sup>th</sup> December 1989 between the appellant and the deceased provided as follows in the relevant clauses:

“Land Sold: 50 acres out of Kajiado/Ololutikosh/ Kitengela /1849 Price: Shs. 13,000/- per acre (total price Sh. 650,000)

The buyer and the seller agree as follows:

1. Upon signing this agreement, the seller acknowledges that he has received a total sum of Kshs. 187,000 from the buyer which has been made by various instalments in the past and has also obtained a land control board consent to subdivide the land and excise 50 acres for the buyer.
2. The buyer shall pay a further sum of Kshs. 150,000 to facilitate the acquisition of the Land Control Board consent for transferring the 50 acres being sold to the buyer.
3. The buyer shall pay the balance of Kshs. 313,000 as follows:
  - a. Kshs 263,000 before the transfer
  - b. Kshs 50,000 after the transfer
4. The Advocate for the parties is A. Makundi of P.O. Box 444 Kajiado.”

33. As is readily apparent from the agreement, the appellant was supposed to pay the balance of the purchase price of Kshs. 50,000 after transfer of the suit property in her name. There was no specified time within which that amount was to be paid. The appellant testified, and the ELC agreed with her,



that she had paid the purchase price except for Kshs. 32,000 which she did not pay after the deceased declined to transfer the suit property.

34. The finding of the trial court that the appellant had performed her part of the agreement is supported by, among others, the fact that the deceased was able to obtain consent to subdivide the original property and excise therefrom 50 acres comprising the suit property. This was conditional on the appellant paying to the deceased Kshs. 150,000 and it could not have happened without the appellant paying that amount.
35. This is how the ELC rendered itself regarding the appellant's compliance with the agreement:
36. As we have already indicated, the finding cannot be faulted in the face of the evidence on record and more importantly, the fact that the respondents, who disputed payment were confirmed to have been youths in school who had no clear knowledge of the dealings between the appellant and the deceased.
37. Having found that the appellant had complied with her obligations under the agreement, the ELC declined to order specific performance on the grounds that the transaction was void because of lack of consent from the Land Control Board and therefore, specific performance was not available.
38. In this appeal the appellant primarily relies on decisions of this Court interpreting the Land Control Act in light of the provisions of the Constitution of Kenya, 2010, while the respondents rely on decisions of the Court largely predating the 2010 Constitution and interpreting the Land Control Act strictly, or decisions made post-2010 but which did not consider or refer to the significance of the provisions of the Constitution of Kenya in Article 10 that elevates equity to a constitutional principle in the form of national values and principles of governance which bind all State organs, State Officers, public officers and all persons, including the courts, when they interpret the law. Decisions like *Karuri v. Gituru* (supra) and *David Sironga ole Tukai v. Francis Arap Muge & 7 Others* (supra) fall in the first category, while *Willy Kimutai Kitilit v. Michael Kibet and Kiplagat Kotut v. Rose Jebor Kipngok* fall in the second.
39. Decisions of this Court now abound which posit that in light of the provisions of Article 10 of the Constitution under which equity binds the courts when they interpret the law, lack of consent per se cannot void a transaction where the purchaser has religiously complied with all the terms of the agreement for sale, but the seller, after pocketing the purchase price, declines to apply for consent so as to take cover under the Land Control Act. A distinction has been made between cases where an application for consent to transfer has been made to the Land Control Board and rejected on merit, and those where no application has been made because, in a bid to avoid his obligations, the seller has obstructed application for consent. While in the former case the transaction will be void for lack of consent, it is different in the latter case, where, strictly speaking the consent has not been refused, and the Land Control Act is being used simply and deliberately as an instrument to perpetuate fraud and unjust enrichment.
40. In *Aliaza v. Saul* [2022] KECA 583 (KLR), this Court considered the divergent opinions and cases and held as follows (Mumbi Ngugi, JA writing for the Court), which we quote in extenso:

“I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v. Rose Jebor Kipngok* best capture the spirit of the Land Control Act when interpreted through the prism of the Constitution of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of the Constitution. I should



observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the ole Tukai decision.

As was recognized by this Court in the Macharia Mwangi Maina case, the [Land Control Act](#) is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the ole Tukai decision where this Court observed as follows:

‘What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the [Land Control Act](#) in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.’

However, a distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where a seller fails or refuses to apply for such consent. The provisions of the [Land Control Act](#) cannot continue to be read as though the circumstances prevailing at its enactment are still in place. There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, Form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been ‘refused’ within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act...

Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with [the Constitution](#) null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to [the Constitution](#), the [Land Control Act](#) must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser.”

41. In his concurrence, Kiage, JA added as follows:

“It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and



impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit."

42. We agree with the above reasoning. As regards the argument based on lack of pleading pertaining to a constructive trust, the Court in the above case held that in the face of the constitutional provisions, the Court could not be precluded from inferring such a trust, if the evidence disclosed it. We only wish to add that the reasoning in some of the decisions cited above, which had already been rendered, were not brought to the attention of the ELC when it rendered the judgment impugned in this appeal.
43. Taking all the foregoing into account, we find merit in the appellant's appeal. We set aside the judgment of the ELC dated 3<sup>rd</sup> October 2018 and substitute therefor the following orders:
- a. a declaration is hereby issued that the appellant is the beneficial owner of the suit property;
  - b. the respondents shall transfer the same to the appellant within thirty (30) days from the date of this judgment;
  - c. in default, the registrar shall execute the necessary forms to effect the transfer;
  - d. the appellant shall pay to the respondents the balance of the purchase price of Kshs. 32,000.00 upon registration of the suit property in her name; and
  - e. costs of this appeal are awarded to the appellant.
44. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2026.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**K. ACHODE**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**

