

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC APPEAL NO. E012 OF 2023**

**DENNIS GITONGA NJUE.....**

**APPELLANT**

**VERSUS**

**DIOMISIO MWANIKI CHUMUNI.....**

**RESPONDENT**

***(Being an appeal from the Judgment of Hon. W. Ngumi PM  
delivered on 13<sup>th</sup> April 2022 in Siakago MCL&E Case  
No.115 of 2018***

**JUDGMENT**

1. The Respondent herein was the Plaintiff before the trial court wherein he had sued the Appellant vide an amended Plaint dated 19/02/2021. In the said Plaint, the Respondent had sought, inter alia, a declaration that he was the legitimate owner of a portion of land known as Embu/Ngangara/3869 measuring 1.40Ha or thereabout. He sought for an eviction order to issue against the Appellant, his agents and or servants and thereafter an order restraining them from entering, occupying, selling, transferring, encumbering, wasting and or otherwise interfering with the Respondents quiet possession of the said land. He further sought a permanent injunction

restraining the Appellant from interfering or in any other way dealing with the said portion of land.

2. It was the Respondent's contention that he was allocated land parcel Embu/Gangara/1024 on 16/03/2017 through a Certificate of Confirmation of Grant issued at the Senior Principal Magistrate's Court at Siakago. He averred that the said land was subdivided into two parcels 3868 which he sold to someone else, and 3869 which he owns. He further stated that the Appellant without any colour of right unlawfully trespassed into the said parcel of land claiming to be the owner and put up temporary structures on part of the property and demarcated it. He set out the particulars of fraud against the Appellant.
3. The Appellant in a statement of defence and counterclaim dated 26/05/2021 averred that the Certificate of Confirmation of Grant was obtained before the Court was seized of all facts concerning his beneficial interest in the suit land. He further stated that he purchased a portion measuring 0.8Ha out of the suit land from the Respondent and that it was the Respondent who put him in vacant possession immediately after the execution of the sale agreement. He stated that he paid the Respondent the agreed purchase price in the manner they had agreed and that it was the Respondent who had defrauded him by failing to honor his part of the contract. He set out the particulars of fraud against the Respondent.

4. The Appellant sought a permanent injunction restraining the Respondent from interfering, harassing, trespassing or in any way dealing with the said portion of land. He further sought the transfer of the portion measuring 0.80Ha out of land parcel 3869 to him.
5. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
6. PW1 Diomisio Mwaniki Chumuni adopted his witness statement dated 19/02/2021 as his evidence in chief. He testified that Embu/Gangara/1024 belonged to his father and that he got the land through succession. He denied that he sold a portion of the suit land parcel 3869 to the Appellant through the Mbeere tradition and stated that the sale agreement was fake. He stated that the Appellant had lived on the suit land since 2012 and constructed a brick house thereon without his consent. He stated further that he also lives on the land and that when he told the Appellant not to build on the land, the Appellant threatened to kill him which he reported to the police.
7. He produced in evidence a demand letter, photographs of developments of the suit land, a Certificate of Grant in Siakago Succession Cause No. 29 of 2016, an OB number from Siakago Police Station and a copy of the title to parcel 3869.
8. DW1 Dennis Gitonga Njue adopted his written statement as his evidence in chief. He testified that in 2012 he purchased two 2 acres of land from the Respondent at an agreed price of Kshs.

50,000 per acre, which he paid in full, and that, in accordance with the parties' understanding and Mbeere custom, he also delivered a goat to the Respondent, which they shared and ate. He further stated that the Respondent had told him that there was no need to write an agreement as he was like his grandchild and that if they did, the Respondent would get a curse.

9. He stated that, however, they recorded an agreement after they went to the Land Control Board and were informed that they could not transfer the land without a sale agreement. He also stated that the Respondent told him that they should not indicate the purchase price on the sale agreement as he would get a curse. He moved into the land in 2013 and co-existed harmoniously with the Respondent until 2018 when the Respondent started sending him eviction notices.
10. He produced in evidence a sale agreement, an application for late registration of death, a receipt of Kshs. 1,500/= from the Land Control Board, a notice to vacate dated 15/06/2018 and summons to the Respondent dated 17/10/2018.
11. DW2 Lawrence Njiru Maguta adopted his written statement dated 17/05/2021. He testified that the Appellant told him that he had bought a parcel of land and wanted to buy a goat valued at Kshs. 7,000/=. That they bought the goat and took it to the Respondent who complained that it was small and therefore the Appellant gave him Kshs. 1,000/= on top of the goat because of the complaint. He averred that the

Respondent gave him Kshs. 150/= as a token of appreciation and that by the time they took the goat to the Respondent, the Appellant was already utilizing the land.

12. DW3 Jeravisio Ngari Nthiga adopted his adopted his written statement dated 17/05/2021. He testified that he accompanied the Appellant together with one Muriithi Gideon and took part of the purchase price of Kshs. 30,000/= to the Respondent who told them that since they were like his grandchildren, they would not record an agreement as he would be cursed. He stated that he did not witness any other money being paid nor was he there when an agreement was written.
13. DW4 Pepiano Njogu Njuki adopted his written statement dated 17/05/2021. He testified that he was called by the Appellant when land parcel 1024 was being sub divided by the Surveyor in 2013 to assist him erect beacons. He stated that the Appellants portion of land was excised and it was shown to him and that he erected the beacons. He stated that the Respondent was present during the exercise with two witnesses.
14. DW5 Gedion Muriithi Githega adopted his written statement dated 17/05/2021 as his evidence in chief. He testified that he witnessed the Appellant pay the Respondent the sum of Kshs. 30,000/= towards the purchase of the suit land. He stated that the parties did not write a sale agreement because of traditions.

15. Upon analyzing the suit, the trial Court in its judgment found that the Respondent sold the suit land to the Appellant. The Court observed however, that at the time the sale agreement was entered into in 2012, the Respondent did not have capacity to sell the suit land as he had not yet obtained the confirmation grant. The Court found that in accordance with section 45 of the Law of Succession Act, the action amounted to intermeddling with a deceased person's property and nullified the transaction.
16. The Respondent was declared the legitimate owner of the suit property and the Appellant was granted 90 days to voluntarily vacate the land or be evicted after the lapse of the 90 days. The Court further directed that after the lapse of 90 days, a permanent injunction issues restraining the Appellant and or his agents and servants from interfering or dealing in any way with the suit land to the detriment of the Respondent. The Appellants counterclaim was dismissed and parties directed to bear their own costs.
17. The Appellants' were aggrieved with the impugned decision and preferred the present Appeal on the following summarized grounds;
  - a. That the learned Magistrate erred on a point of law and fact in making a finding that the Appellant had not purchased of 0.8Ha out of land parcel No Embu/Gangara/1024 from the Respondent despite appreciating that the it was clear that the Appellant had purchased the suit land.

- b. The learned Magistrate erred in law and fact by proceeding to issue judgment against the Appellant without considering the evidence of the witnesses of the Appellant.
  - c. The learned Magistrate erred in law and fact by not considering the fact that the Appellant was in occupation of 0.8 acres out of the suit land parcel Embu/Gangara/1024 and that he had extensively developed the land and had no other place to live.
  - d. The Learned Magistrate erred in law and fact by ordering his eviction from the suit property without providing an alternative as he had nowhere else to go.
  - e. That the learned Magistrate erred in law and fact by appreciating that the Respondent had received the purchase price but failed to award the Appellant the suit land or an alternative remedy.
  - f. The Learned Magistrate erred in law and fact in failing to take into account the Appellants submissions and that the findings made were unsupportable in law on the basis of the evidence adduced and at the Magistrates disposal.
18. The Appellant sought to have the Judgment of the trial Court set aside and the appeal allowed.
19. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellant filed submissions dated 08/11/2024. He submitted that the Respondent transferred the suit land to him while the land was still going through succession and therefore his

actions were contrary to section 45 of the Law of Succession Act. He submitted that however, the trial Court should have compelled the Respondent to transfer the suit land to him or refund the purchase price as he is pained to lose his money and the extensive developments he had made on the suit land. He urged that the appeal be allowed.

20. The Respondent filed submissions dated 18/11/2024 through the firm of Murugi Muriithi and Company Advocates. He submitted that section 3(1) of the Trespass Act, Cap 294 provides that any person who enters, remains on, erects structures on or uses private land without the consent of the occupier commits an offence. He averred that the Appellant has, without any right, been in occupation of his land since 2012 and despite being asked to vacate, proceeded to put up permanent structures without any regard to the ongoing case. He submitted that for a contract to exist in Kenya, there must be offer, acceptance and consideration and that in this case, the three elements were not proved and the matter remained a “she said, he said” situation

21. He further submitted that section 3(3) of the Law of Contract Act provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract is in writing, signed by all the parties and the signatures duly attested. He averred that the trial Court made a judgement based on law and one that was fair and equitable and urged that the appeal be dismissed.

22. Having considered the record of appeal and the parties' respective submissions. The Court finds that the issue for determination is whether the appeal has merit.
23. It is not in dispute that Land Parcel No. 3869 is registered in the name of the Respondent. The Appellant's case was that he purchased a portion of the suit land from the Respondent in the year 2012 for the sum of Kshs. 100,000/= through a sale agreement entered into between the parties in the same year. He claimed that he paid the full purchase price and that the Respondent gave him vacant possession, whereupon he commenced development of the land, which developments are extensive. The Respondent, on the other hand, denied having sold the suit land to the Appellant, denied entering into any sale agreement with him, and suggested that the agreement may have been forged.
24. The Appellant called five witnesses who testified that they witnessed the Appellant paying part of the purchase price to the Respondent, including the delivery of a goat in accordance with Mbeere custom. The Court notes that although the Respondent denied receiving the goat, he did not deny receiving the purchase price. DW4 testified that he was present when land parcel No. 1024 was being subdivided to give rise to the suit land and that the Respondent was also present during the exercise together with witnesses. He further testified that he witnessed the Appellant being shown

his portion of land after it was excised and that he erected the beacons.

25. The Court has also examined the sale agreement dated 10/09/2012 between the parties for the sale of 0.8 Ha out of land parcel No. 1024. The agreement is signed by both parties and was witnessed by Macharia Muraguri, Advocate. Although the purchase price is not indicated in the agreement, the Appellant explained that the Respondent did not wish the price to be stated because, according to custom, he would be cursed. This averment was corroborated by the Appellant's witnesses. The Court further notes that the Respondent did not produce any evidence to support the allegation that the agreement and/or his signature was forged. In light of the existence of the agreement and the consistent testimony of the Appellant's witnesses, the Court finds that, on a balance of probabilities, the Respondent sold the suit land to the Appellant.

26. However, the Court finds that the trial court correctly held that, although the evidence demonstrated that the parties indeed entered into a transaction for the sale of land, the Respondent had no legal capacity to sell the suit land at the time, since he only obtained a certificate of confirmation of grant on 16/03/2017. The Court further correctly found that the transaction offended section 45 of the Law of Succession Act and therefore amounted to intermeddling with the estate of a deceased person. The sale agreement was consequently

invalid for having been entered into by a party without capacity. Notwithstanding this, the Court finds that this is a case in which a constructive trust may be implied from the conduct of the parties, even in the absence of a valid written contract.

27. The Supreme Court of Kenya, in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR), addressed the doctrine of constructive trust exhaustively and stated that:

“The Trustee Act defined a “trust” and “trustee” as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...

A constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.”

28. In this case, the parties entered into the agreement, and the Respondent gave the Appellant vacant possession of the land. It is undisputed that the Appellant resides on the suit land and

has made extensive developments thereon. In these circumstances, it is only fair and just that his proprietary interests be protected, allowing him to continue occupying the parcel.

29. In light of the above findings, I find that the appeal herein succeeds. The Judgement of the trial Court is hereby set aside and substituted with the following orders:

- 1) The Respondents suit is dismissed and the Appellants counterclaim is hereby allowed.
- 2) A declaration be and is hereby made that the Appellant is entitled to a portion measuring 0.8Ha out of land parcel No. Embu/Gangara/3869.
- 3) The Respondent is directed to execute the necessary transfer documents to effect the transfer of the 0.8Ha out of land parcel No. Embu/Gangara/3869 failing which the Deputy Registrar shall execute the same upon the lapse of 30 days from the date of this Judgement.
- 4) A permanent injunction be and is hereby issued restraining the Respondent, his agents and or servants from interfering, harassing, trespassing or in any way dealing with the portion of 0.8 Ha out of land parcel Embu/Gangara/3869 occupied by the Appellant.
- 5) The Appellant shall have costs of the suit at trial and in this appeal.

DATED, SIGNED AND DELIVERED at EMBU THIS 5<sup>TH</sup> day of MARCH,  
2026

**HON. E.C CHERONO**  
**ELC JUDGE**

In the presence of;

1. Appellant in person-present.
2. Respondent in person-present.
3. Mohammed Koja-C/A.