

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC APPEAL NO. E032 OF 2024

JOSEPH NTHIGA

MUNYI.....APPELLANT

VERSUS

**JOSEPH KANGANGAI GIKUNJU (Legal representative of the
estate of the late NEPHAT GIKUNJU KIRINGI).....**

.....1ST RESPONDENT

PETER MURIUKI NJERU.....2ND

RESPONDENT

*(Being an appeal from the Judgment of Hon. R. Njoki
Kihara PM delivered on 19th July 2024 in Siakago MELC
Case No. 101 of 2018)*

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court wherein he had sued the Respondents vide an amended Plaint dated 15/03/2017. In the said amended Plaint, the Appellant had sought, inter alia, the removal of the caution and restriction entered in the register for land parcel No. Mbeere/Kirima/1087 and an order for registration of land parcel No. Mbeere/Kirima/1087 in the name of the Appellant.

2. It was the Appellant's contention that he purchased the suit land from the late Nephath Gikunju Kiringa, and that they executed all the relevant transfer documents and a consent to transfer was issued. He averred that before the land could be transferred to him, the late Nephath Gikunju Kiringa moved to the Land Disputes Tribunal in Siakago LDT Case No. 40 of 2011, and lodged a complaint but the Tribunal gave an award for the land to be transferred to the Appellant and the late Kigoro Mtetu. The award was however quashed in Embu ELC Judicial Review Misc Application No. 33 of 2015 in a judgement delivered on 13/05/2016.
3. He averred further, that the late Nephath Gikunju Kiringa had caused a restriction to be entered in the register restraining any dealings in the title to the suit land pending hearing and determination of the judicial review matter. That the 2nd Respondent had equally placed a caution on the suit land claiming purchaser's interest. He contended that the Respondents had despite several demands by the Appellant, refused to remove the caution and restriction to enable the Land Registrar transfer the land to him.
4. The 1st Respondent in a further amended statement of defence and counterclaim dated 17/01/2012 sought: a declaration that the suit land lawfully belongs to the estate of the late Nephath Gikunju Kiringa; that the Appellant be ordered to return to the 1st Respondent the original title deed to the suit land illegally held by the Appellant; that the Appellant be permanently

restrained from entering upon, utilizing, occupying, cultivating on, cutting down trees, causing damage and wastage on the suit land and interfering with the 1st Respondents use and occupation of the land; he sought the sum of Kshs. 29,231.48/= being compensation for the damage caused by the Appellant to the 1st Respondents trees on the suit land.

5. He averred that his father, the late Nephath Gikunju Kiringa was the proprietor of the suit land and that he never sold the land to the Appellant, nor did he execute any transfer documents in favour of the Appellant. He further averred that no consent was obtained from the Land Control Board to transfer the suit land to the Appellant. He stated that the Appellant was not the proprietor of the suit land therefore he did not have the right to seek the removal of the caution and restriction placed on the suit land. He further averred that the Appellant was in unlawful possession of the suit land and the title deed thereto, which he had refused to surrender to his late father.
6. The 2nd Respondent in an amended statement of defence dated 29/08/2023 averred that he was ready to have the caution over the suit land removed since he had no claim over the land.
7. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
8. PW1 Joseph Nthiga Munyi adopted his witness statement dated 21/06/2016 as his evidence in chief. He testified that he

purchased land parcel 1087, which is about 13 acres, from the late Nephath Gikunju Kiringa who died before transferring the land to him. He stated that he purchased the land with the late Fredrick Kigoro M'tetu and that they paid the sum of Kshs. 150,000/= whereas he paid an additional Kshs. 100,000/= alone making a total of Kshs. 250,000/=. He stated that the purchase price was Kshs. 100,000/=. He further stated that he has been farming on the land, built thereon and that the things that are said he destroyed are his.

9. He denied that he forced the late Nephath to sell him the suit land. He admitted that the late Nephath said that he sent the Appellant to assist him get a title deed and that he did not sell him the land. He averred that the original title deed to the suit land was with the land registry. He produced in evidence, a sale agreement for land parcel 1087 dated 22/05/2009, acknowledgement letters dated 01/02/2011 and 15/07/2010, an application for consent of the Land Control Board dated 29/10/2010, a certificate of official search dated 04/05/2010, executed transfer forms, stamp duty transfer forms, proceedings for LDT Case No. 493 of 2011, decree issued on 23/12/2011 vide Siakago LDT Case No. 40 of 2011, Judgement in Embu ELC Misc Civil Application No. 33 of 2015 and a certificate of official search dated 06/06/2016.

10. DW1 Joseph Kangangi Gikunju adopted his written statement dated 24/10/2022 as his evidence in chief. He stated that his father, the late Nephath Gikunju, was the

proprietor of land parcel 1087 which he was given during the process of land adjudication and demarcation. He stated that his father then requested the Appellant to collect for him the title deed to the land from the Lands Office since the Appellant was the Assistant Chief of their sub location and since they had known each other for a long time, his father had no reason not to trust the Appellant. He averred that the Appellant however collected the title deed and retained it without his father's consent which is still in his possession to date. He averred that the Appellant later demanded that his father sells to him a portion out of the suit land together with the late Kigoro M'tetu.

11. He stated that on 22/05/2009, his father entered into a sale agreement with the Appellant and the late Kigoro M'tetu for the sale of 5 acres out of the suit land. However, he averred that the Appellant took advantage of his father's advanced age and semi-illiteracy and caused an agreement for sale to be drawn for the entire suit land. He further averred that upon his father discovering what the Appellant and the late Kigoro M'tetu had done, he declined to obtain consent for the transfer from the Land Control Board within the prescribed six months, thereby rendering the sale agreement null and void. He denied that the Appellant and the late Kigoro M'tetu paid any purchase price to his father.
12. He averred that the consent to transfer obtained on 29/10/2010 was fraudulently obtained as his father never

attended the Land Control Board meeting. That his father aggrieved by the Appellants actions filed the case before the Tribunal which held that the land be transferred to the Appellant and the late Kigoro M'tetu. He stated that the Tribunal's decision was quashed on the grounds that the Tribunal did not have jurisdiction to deal with matters relating to ownership of land registered under the Registered Land Act neither did it have power to entertain a claim relating to agreements for sale of land or breach of agreement. He denied that his father executed any transfer forms in favour of the Appellant and the late Kigoro M'tetu.

13. He stated further that he planted grevillea trees on the suit land which the Appellant destroyed around 2016 to 2019. He stated that the Appellant was on the suit land before his father died and that he has some structures and houses on the land. He produced in evidence a damage assessment report dated 22/11/2016, a copy of the judgement in JR Misc Application No. 33 of 2015, an official search for land parcel 1087 dated 28/10/2010 and 06/06/2016, correspondence, a limited Grant of letters of administration ad litem for the estate of Nephath Gikunju Kiringa and a certificate of death of Nephath Gikunju Kiringa.

14. DW2 Peter Muriuki Njeru adopted his written statement dated 29/08/2023 as his evidence in chief. He stated that he bought the suit land from the late Nephath Gikunju who was his uncle and an elder brother to his father. He stated that the late

Nephat also took him to the Tribunal and therefore he cautioned the land. He maintained that he had no objection to the caution being removed as he had no claim over the land.

15. Upon analyzing the suit, the trial Court in its judgment found that on the issue of the validity of the Land Control Board consent, the court found that the sale agreement for the suit land was entered into on 22/05/2009, but the consent of the Land Control Board was obtained on 29/10/2010, which was outside the six months period prescribed under Sections 6 and 8 of the Land Control Act. Since no extension of time had been sought from the High Court, the court held that the consent obtained outside the statutory period was invalid, and consequently the sale transaction became null and void.
16. On whether the suit land should be registered in the Appellant's name, the court found that the Appellants claim was contradictory and not credible. The court noted that the sale agreement produced showed that the land had allegedly been purchased jointly by the Appellant and the late Kigoro M'Tetu, a fact which the Appellant had failed to disclose in his pleadings and evidence in chief. The court further observed inconsistencies in the alleged payments and acknowledgment slips produced by the Appellants. In view of these inconsistencies and the invalid consent, the court held that the Appellant's claim for transfer of the suit land could not be granted.

17. On the issue of constructive trust, the court held that the Appellant had not demonstrated that he had been put into possession of the land pursuant to a common intention between himself and the deceased. The court found that the deceased had consistently disputed the alleged sale and had even lodged a complaint before the Land Disputes Tribunal. Consequently, the court held that the Appellant failed to prove the existence of a constructive trust. The court therefore found that the Appellant had not proved his case against the Respondents on a balance of probabilities, and dismissed the Appellants suit. With regard to the 2nd Respondent's caution, the court noted that the 2nd Respondent did not object to its removal. The court therefore ordered that the caution be removed. The Court also held that the 1st Respondents issue of damage to the trees was a criminal issue which ought to first be determined in a criminal case before the court could make an order that the Appellant compensates for the damage and therefore the prayer failed.

18. On the counterclaim, the court found that the suit land lawfully belonged to the estate of the late Nephath Gikunju Karinga. The court further held that the Appellant had unlawfully retained the title deed and ordered him to surrender the same to the 1st Respondent within 60 days, failing which the Land Registrar would issue a new title deed in the name of the deceased. The court also issued a permanent injunction restraining the Appellant from entering upon, utilizing, or

interfering with land parcel No. Mbeere/Kirima/1087. In the final disposition, the Appellants suit was dismissed, the 1st Respondents counterclaim was upheld, and the Appellant was ordered to pay costs of the suit and the counterclaim. The 2nd Respondent was also awarded costs against the Appellant.

19. The Appellant was aggrieved with the impugned decision and preferred the present Appeal on the following grounds;

1. That the Learned Magistrate erred in law and fact by finding that the Appellant was not entitled to land parcel No. Mbeere/Kirima/1087 whereas the Appellant and Nephath Gikunju Kiringi (deceased) had duly signed transfer documents including a sale agreement, an application for land Control Board Consent and transfer forms in favour of the Appellant which documents were not challenged by the 1st Respondent.
2. That the Learned Magistrate erred in law and fact by holding that the Consent for Transfer of land parcel No. Mbeere/Kirima/1087 issued in favour of the Appellant was invalid.
3. That the Learned Magistrate erred in law and fact by failing to hold that the Appellant was in peaceful occupation of land parcel No. Mbeere/Kirima/1087 despite the fact that the Appellant's occupation of the land was confirmed by the 1st Respondent.
4. That the Learned Magistrate erred in law and fact by holding that no constructive trust had been created in favour of the Appellant over land parcel No. Mbeere/Kirima/1087 while

Nephat Gikunju Kiringi (deceased) had given vacant possession to the Appellant since the year 2009 and no action had been taken against the Appellant to vacate the suit land.

5. That the Learned Magistrate erred in law and fact by dismissing the Appellant's case while there was sufficient evidence produced by the Appellant proving the sale of land parcel No. Mbeere/Kirima/1087 to him by Nephat Gikunju Kiringi (deceased).
6. That the Learned Magistrate erred in in law in and fact by upholding the 1st Respondent's counterclaim while the 1st Respondent had not proved his case against the Appellant.
7. That the Learned Magistrate erred In law an in fact in finding that the 2nd Respondent was entitled to costs while in fact the 2nd Respondent was not opposed to the Appellants suit.
20. The Appellants sought to have the appeal allowed, the Judgment of the trial Court set aside and substituted with an order allowing the Appellants case and dismissing the 1st Respondents counterclaim.

21. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellant filed submissions dated 08/10/2025 through the firm of Makworo Advocates LLP. It was submitted that the Appellant had proved that he had legally acquired the suit land, that he had availed valid documents to prove it and that he was in peaceful occupation of the suit land. He faulted the trial Court for failing

to find that a constructive trust had been created over the suit land while the late Nephath had given him vacant possession since the year 2009 and that no action had been taken against him to vacate the land. He argued that the 1st Respondent did not challenge the validity of the sale agreement that was executed by the Appellant and the 1st Respondent. He urged that the appeal had merit and that it ought to be allowed.

22. The 1st Respondent filed submissions dated 02/12/2025 through the firm of Duncan Muyodi & Company Advocates. He submitted that the issue of a constructive trust did not arise in the Appellants pleadings and therefore it was irregular for it to be argued in submissions. He averred that the trial Court did not make any wrong conclusions to warrant interference by this Court. He urged that the appeal be dismissed with costs.

23. Having considered the record of appeal and the submissions by the parties, the issue that arises for determination is whether the trial court erred in dismissing the Appellant's claim and in allowing the 1st Respondent's counterclaim.

24. The Appellant avers that he purchased land parcel No. Mbeere/Kirima/1087 from the late Nephath Gikunju Kiringa through a sale agreement dated 22/05/2009, which he produced in evidence. The Court has examined the agreement, which was made between the late Nephath Gikunju Kiringa as the vendor, and the Appellant together with the late Kigoro M'tetu as the purchasers of the entire parcel No. 1087. The

agreed purchase price was Kshs. 110,000/=, out of which Kshs. 10,000/= was indicated as paid on or before the signing of the agreement, the vendor acknowledging receipt. The balance of Kshs. 100,000/= was to be paid in two instalments, namely Kshs. 50,000/= on or before 11/12/2009 and the remaining Kshs. 50,000/= after obtaining consent of the Land Control Board. The agreement was signed by the parties and witnessed by Rose W. Njeru, Advocate.

25. The Appellant also produced acknowledgement slips to support the claim that the purchase price was paid. One acknowledgement is dated 15/07/2010 for payment of Kshs. 10,000/= by the Appellant pursuant to a sale agreement dated 22/07/2010. Another acknowledgement is dated 01/02/2011 for payment of Kshs. 90,000/= by the Appellant, with a balance of Kshs. 10,000/= said to be payable within three months before 31/03/2011.

26. The 1st Respondent denied that the late Nephath Gikunju sold the suit land to the Appellant or that he executed transfer documents or attended the Land Control Board to obtain consent for the transfer. In contrast, he averred that the deceased had entrusted the Appellant, who was an Assistant Chief in the area, to collect the title deed for land parcel No. Mbeere/Kirima/1087 from the Lands Office on his behalf during the period of land adjudication. It was his contention that the Appellant abused that trust by retaining the title deed and

later demanding that the deceased sell a portion of the suit land to him together with the late Kigoro M'tetu.

27. He further stated that on 22/05/2009 his father entered into a sale agreement with the Appellant and the late Kigoro M'tetu for the sale of only 5 acres out of the suit land. However, he averred that the Appellant took advantage of his father's advanced age and semi-illiteracy and caused an agreement to be drawn for the entire parcel of land. It was for this reason that the deceased lodged a complaint before the Land Disputes Tribunal.

28. The trial court correctly observed that there were several inconsistencies in the Appellant's evidence. Firstly, the acknowledgement dated 15/07/2010 was for payment of Kshs. 10,000/= pursuant to a sale agreement dated 22/07/2010, whereas the agreement the subject of this suit is dated 22/05/2009. The other acknowledgement is dated 01/02/2011 for payment of Kshs. 90,000/=:, which was well beyond the completion period provided in the agreement. It therefore appears that the alleged payments were not made pursuant to the sale agreement dated 22/05/2009.

29. It is also noteworthy that during the hearing the Appellant testified that the agreed purchase price was Kshs. 150,000/= and that together with the late Kigoro M'tetu they eventually paid a total of Kshs. 250,000/=:. This evidence is inconsistent with the sale agreement, which clearly indicates the purchase price as Kshs. 110,000/=:. Further, whereas the agreement

shows that the purchasers were the Appellant and the late Kigoro M'tetu jointly, the acknowledgement slips produced in evidence indicate that the payments were allegedly made by the Appellant alone. These inconsistencies cast doubt on the Appellant's version of events and the credibility of the alleged payments under the agreement.

30. The trial court also found that the alleged sale transaction was void for want of a valid Land Control Board consent, as the application for consent was made after the expiry of the statutory six-month period. The court stated as follows:

“Section 6 requires that all land transactions pertaining to agricultural land should apply for consent of the Land Control Board where the land is situated.

Section 8 (1) is captured in mandatory terms, that the application for consent SHALL be made within months of the making of the agreement of the land transaction. However, if the six months may have expired, the High Court may extend the six months period where it considers that there is sufficient reason to do so.

Back to this case, the sale agreement was entered in to on 22nd May 2009. It was expected that the consent of the land control board should have been obtained within 6 months from the date of the agreement. Thus the 6 months came to an end on 23rd November 2009. In the letter of consent adduced by the plaintiff as evidence, the application for consent was made on 29/10/2010 and approved on the same

day. This consent was therefore obtained out of the six months period prescribed by the law.”

31. This Court agrees with that finding. The sale transaction became null and void upon the expiry of six months from the date of the agreement since the application for consent of the Land Control Board was made after the expiry of the statutory period. Consequently, this Court finds no basis to interfere with the trial court’s determination on that issue.

32. This Court also finds no basis to interfere with the trial court’s finding that a constructive trust could not be implied in the circumstances of this case. The trial court held that:

“Building of just some structures in the land in my opinion does not amount taking possession of the land. Moreover, it is not the deceased who put the plaintiff in possession because all along the deceased maintained he had not sold any land to the plaintiff. It must be proved there was a common intention between the plaintiff and the deceased for the plaintiff to take possession of the land as a purchaser. There is proof that the deceased went to the land Tribunal committee complaining about the plaintiff’s claim over the suit land. Meaning, the deceased did not have a common intention with the plaintiff and wanted the plaintiff to stop interfering with his rights and ownership over the land. Therefore I find that the plaintiff has not proved his claim on constructive trust as against the 1st defendant.”

33. As earlier observed, there is also no credible evidence on record demonstrating that the Appellant paid the purchase price for the suit land as alleged, which further weakens the claim that a constructive trust arose in his favour.
34. Ultimately, the court finds that the Appellant did not prove his case on a balance of probabilities, that he is entitled to be registered as the proprietor of land parcel Mbeere/Kirima/1087.
35. Further, although the 1st Respondent alleged that the Appellant destroyed trees planted on the suit land, the evidence on record does not support that claim. The 1st Respondent admitted that the Appellant had been in occupation of the suit land. In the absence of clear evidence demonstrating that the trees were planted by the 1st Respondent, the claim for compensation was not sufficiently proved.
36. The Appellant further contended that the 2nd Respondent was not entitled to costs, as he did not oppose the suit. The record shows that the 2nd Respondent did not contest the Appellant's claim and in fact indicated his willingness to have the caution removed. In the circumstances, there was no justification for awarding costs in favor of the 2nd Respondent.
37. Having found that the alleged sale transaction was null and void for want of a valid Land Control Board consent and that the Appellant failed to prove the existence of a constructive trust or payment of the purchase price, it follows that the 1st Respondent's counterclaim was properly allowed. The

evidence on record shows that the suit land remained registered in the name of the late Nephath Gikunju Kiringa and therefore forms part of his estate. In the circumstances, the trial court was justified in ordering the Appellant to surrender the original title deed to the 1st Respondent and in issuing a permanent injunction restraining the Appellant from entering upon or interfering with land parcel No. Mbeere/Kirima/1087.

38. In the circumstances, this Court finds that the learned trial magistrate properly evaluated the evidence on record and correctly applied the law in reaching its conclusion. Accordingly, there is no basis upon which this Court can interfere with the findings and orders of the trial court.

39. Consequently, the appeal herein lacks merit and is hereby dismissed in its entirety. The judgment of the trial court dated 19/07/2024 is hereby upheld.

40. The Appellant shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19TH DAY OF MARCH, 2026.

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

In the presence of;

1. Mr. Okwaro for the 1st Respondent.

2. M/S Ndungu H/B for Mrs Makworo for the Appellant.
3. 2nd Respondent-present.
4. Diana Kemboi C/A.