

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. E062 OF 2021

BETWEEN

RURAL DEVELOPMENT SERVICES LTD.....APPELLANT

AND

AFRICAN COTTON INDUSTRIES LTD.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the Environment
and Land Court at Murang'a (Kemei, J.) delivered on 10th February
2021*

in

ELC Case No. 25 of 2021)

JUDGMENT OF THE COURT

1. This is a first appeal arising from the decision of the Environment and Land Court (ELC) at Muranga. The dispute centers around the sale of the property identified as title number **Kakuzi/Kirimiri Block 7/281**, located in Makuyu, measuring approximately 51.28 hectares (the "suit property"). The ELC in **Case No. 25 of 2021** entered judgement in favour of the respondent.
2. This being a first appeal, it is our duty, in addition to considering submissions by the parties, to examine, analyse and evaluate the evidence on record and reach an

independent

conclusion in the matter. This approach was adopted in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR**, while citing Selle vs. Associated Motor Boat Co. [1968] EA 123, the Court stated as follows; -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

3. In order to contextualize the case, we shall briefly set out the evidence of each party as presented before the High Court. The respondent’s witnesses informed the court that the respondent is a local manufacturer of cotton wool products such as, sanitary towels, baby diapers and hospital cotton wool products. As part of the company's expansion plans, it intended to integrate backwards and manufacture cotton wool products locally rather than import them, and thus needed to expand. They came across the appellant’s land

and expressed interest.

An initial transaction failed due to the appellant's change of mind. However, on 14th June 2013, Dr Kimani approached PW1 offering the suit property for sale, which the respondent accepted, and an agreement for sale was thereafter signed. The purchase price agreed upon was Kenya Shillings Two Hundred and Five Million Three Hundred and Sixty Thousand (Kshs. 205,360,000), and a deposit of Kenya Shillings Twenty Million Five Hundred and Thirty-Six Thousand (Kshs. 20,536,000) was paid and acknowledged. The completion date was set 60 days after, on 2nd September 2013.

4. The respondent contended that after signing the agreement for sale and in anticipation of the project, the respondent engaged professionals and put up warehouses for sale, pricing them at Kshs. 300 million. **PW1** even travelled abroad to prepare for the project.
5. Further, the respondent's witnesses disputed that Dr Kimani was mentally incapacitated at the time of negotiating and entering into an agreement on behalf of the appellant. It was their testimony that, at the time, Dr Kimani was engaged in various other commercial transactions. The respondent asserted that Dr Kimani's family members pressured him not to proceed with the sale. It was also denied that the second director of the appellant, Mrs Kimani (**DW1**), signed the agreement under duress as alleged.
6. In support of the claim for special damages, the court was told that the respondent analysed and calculated the costs

of the

project, as well as the approximate cost of loss/profit and other relevant damages incurred due to breach of contract by the appellant. Four categories of damages were identified:

Damages for historical costs in the project amounting to Kshs. 36,451,629. This included the initial costs incurred by the respondent from February 2013 to December 2014. “Accrued interest” on historical costs as of September 2016, the date of the report, which totalled Kshs. 6,319,254 or USD 62,405.

Damages for loss of profits amounting to Kshs. 803,068,692 or USD 7,930,626 and

Damages for lost interest on the deposit of the purchase price, which amounted to Kshs. 474,672 or USD 4,688. The total amount payable was Kshs. 846,314,247 or USD 8,357,693.

7. In opposing the case, the appellant’s witnesses testified that the managing director of the appellant, Dr. Kimani, who was key in the negotiations and eventual signing of the agreement for sale with the respondent, had been involved in an accident on 28th February 2013, and that he also suffered from other diseases; he had undergone surgery of the brain, and he was not in a stable mental condition when he entered into the transaction with the respondent. Further, due to Dr. Kimani’s mental condition, his family did not believe that he was in a position to comprehend the

consequences of his actions or make sound decisions, and as a result they objected to the sale. Further they contended that the suit property was their only rural home.

8. The appellant further asserted that the respondent was informed of the decision to rescind the agreement and was offered 30-40 acres of the suit property in its place, but the respondent declined, insisting on purchasing the entire property. **DW1** posited in evidence that she had been coerced into signing the sale agreement.
9. In a judgment delivered on 10th February 2021, the trial court held that the existence of a valid sale agreement had not been challenged. The court also formed the view that there was no evidence of Dr. Kimani's mental incapacity placed before it. As for DW2's allegation of duress, the court found that the allegation was an afterthought. Further, the court held that the appellant could not use the absence of the Land Control Board's consent to invalidate the agreement, which it was contractually required to honour. In the end, the court held that damages would not be an adequate remedy and that the interests of justice would be best served by directing the parties to fulfil the terms of the agreement. The Court awarded the following reliefs; -

- a. A declaration that the sale agreement dated 2nd July 2013 between the appellant and the respondent notwithstanding the appellant's refusal to complete the same remains valid and enforceable against the appellant;***
- b. An order of specific performance do issue compelling the appellant to complete the agreement for sale dated 2nd July 2013 and in this regard to take all such actions and to execute all such documents as shall be necessary to effect due and effectual***

transfer of the suit

property Kakuzi/Kirimiri Block 7/281 situated in Makuyu and containing by measurement 51.28 hectares or thereabouts to the respondent within a period of 30 days from the date of judgment;

- c. Upon the appellant successfully completing the agreement for sale dated 2nd July, 2013 by executing and delivering to the respondent all such documents as shall be necessary to effect due and effectual transfer of the suit property to the respondent, the respondent within 15 days thereon shall pay to the appellant the sum of Kshs. 205,360,000.00 being the full purchase price of the suit property as expressed in the agreement for sale;**
- d. An order for extension of the statutory time limit for applying for Land Control Board consent pursuant to Section 8(1) of the Land Control Act is hereby granted for such period of 120 days from the date of judgment;**
- e. An order do issue compelling the appellant to honour and discharge its obligations under the agreement for sale and to inter alia apply for the consent to transfer from the relevant Land Control Board within 14 days of this order, in default whereof the Deputy Registrar of the court shall be empowered to apply for the said consent on behalf of and at the cost of the appellant to apply for the Land Control Board consent to the transaction as per the sale agreement dated 2/7/2013 within the statutory time limit or in the alternative the Registrar of this Court to apply for such consent on behalf of the respondent;**
- f. If the appellant refuses and/or fails within 30 days from the date of judgment to execute and deliver to the respondent all such documents as shall be necessary to effect**

due and effectual transfer of the suit property, namely, Kakuzi/Kirimiri Block 7/281 situated in Makuyu containing by measurement 51.28 hectares or

thereabouts to the respondent the Deputy Registrar of this Honourable Court does execute and deliver the said documents to the respondent at the appellant's expense;

g. The appellant does pay the costs of the suit for one counsel on the higher scale to the respondent.

10. The appellant was aggrieved by the impugned judgment and has raised 17 grounds of appeal in its memorandum of appeal dated 27th May 2021. We have taken the liberty to summarise the grounds as follows: the learned Judge erred; in failing to hold that lack of consent from the relevant Land Control Board rendered the transaction void for all purposes; for disregarding the provisions of the sale agreement which anticipated the possibility of default and provided for appropriate relief of recession or refund of the deposit; not finding that an order of specific performance after seven (7) years was oppressive; injurious, unjust; not finding that no estoppel can militate against the provisions of the Act or a statute for that matter; by imposing the doctrine of constructive trust; by failing to appreciate that Dr. Kimani's family had an overriding interest in the property; and failing to take into account the medical status of Dr. Kimani when he entered into the contract. The appellant sought that the appeal be allowed and that the judgment of the trial court be set aside.
11. At the hearing, the appeal was disposed of by way of written submissions, with learned counsel for the parties each

highlighting the same briefly. Learned counsel Mr. Paul Wanga

appeared for the appellant, while learned counsel Mr. Njoroge Regeru, SC, appeared for the respondent.

12. Learned counsel for the appellant relied on submissions dated 7th August 2023, a list of authorities dated 31st August 2023 and a case digest dated 22nd November 2023. He submitted that the suit property hosts a rural/matrimonial home of a family. Though the same is registered in the name of a private company; the appellant herein. That barely 20 days after the directors of the appellant signed the agreement for sale, their family members got wind of the same and protested against the sale, including placing a caution at the Land Control Board, claiming that due to the old age and failing health of their father, he did not appreciate the consequences of his action of selling the suit property and asserted that he ought to have consulted the family before transacting.

13. Counsel further, faulted the trial court for applying the doctrine of constructive trust, urging that the learned Judge erred in disregarding the factual and legal threshold applicable. He contended that the cancellation of the sale was due to the family's resistance to the sale of the suit property; the sale had not been completed; the respondent had not taken possession and had been notified of the intention to rescind the contract, and the deposit had been duly refunded. Further counsel submitted that the circumstances in the cases of **William Kipsoi Sigei & Another vs. Kipkoech Arusei & Another [2019] KECA**

446 (KLR) and Willy Kimutai Kitilit vs. Michael

Kibet [2018] KECA 573 (KLR), relied upon by the trial court, are clearly distinguishable from the case before us. He submitted that in the cited cases, the purchase price had been fully paid and possession had been given. In support of his contention that the scenario would be different if the case of the respondent was that the purchase price had been paid in full, possession given and it was already in occupation for several years and the appellant had benefitted from the proceeds of sale, he referred to **Aliaza vs. Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR)**.

14. Counsel further submitted that since the appellant was faced with a legitimate concern of its directors' family, which in turn affected the completion of the transaction, and the respondent having been fully refunded its deposit, while also not having acquired possession of the suit property, this Court should find the doctrine of constructive trust does not apply in favor of the respondent.
15. On the relief for specific performance, counsel contended that the trial court ordered relief of specific performance, having erroneously found that there existed a constructive trust. He further submitted that the contract between the parties provided appropriate remedies in the event it was frustrated by either party. Counsel referred to Clause **P** of the sale agreement, which provided that if any of the warranties is untrue or misleading, or has been breached, the purchaser shall be entitled, upon notice to the vendor,

to terminate the

contract and to receive any monies paid without interest. Further counsel referred to **section 7** of the Land Control Act ('the Act'), which provides that in a controlled land transaction, when the contract becomes void, any money paid is recoverable as a debt.

16. Counsel further asserted that an order of specific performance is an equitable remedy and can only be granted based on well-established principles, as held by this Court in **Joyce Mugure Mwangi & 7 Others vs. Joachim Ngugi Kiarie & 16 Others [2019] KECA 596 (KLR)**. He contended that the contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the appellant, who has not been guilty of laches nor inordinate delay, to part with its property more than seven years after the event, when the property's current value has materially appreciated. In support of this contention, counsel referred to **Gurdev Singh Birdi & Another vs. Abubakar Madhbuti [1997] KECA 13 (KLR)**, urging that the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. Further that the respondent was well aware that an order of specific performance was untenable, hence the amended plaint, which sought an alternative relief of damages for breach of contract. Further the trial court was erroneous in holding that the appellant authored its own misfortune.

17. Additionally, counsel asserted that the Judge erred by failing to recognise that the family members of the appellant's directors had overriding interests in the suit property in the form of a customary trust, and in dismissing the family members of Dr Kimani as strangers to the suit property. In support counsel cited the Supreme Court of Kenya judgment in **Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & Another (Petition 10 of 2015) [2018] KESC 22 (KLR)**, which interpreted **section 28** of the Land Registration Act, 2012 to establish that customary trusts, along with other trusts, are overriding interests.
18. On whether the sale between the parties was void for lack of consent from the Land Control Board, counsel cited **section 8(1)** of the Act, which stipulates that an application for consent regarding a controlled transaction must be made in the prescribed form to the appropriate Land Control Board within six months of the agreement being made. Additionally, individuals with an interest in the suit property communicated their objections to the Chairman of the Land Control Board on 22nd July 2013, which was 20 days after the agreement for sale was executed.
19. Counsel contended that the six-month period to obtain consent expired on 2nd January 2014, thus rendering the sale void due to non-compliance with the law. Furthermore, under **section 7** of the Act, the only remedy available to the respondent is the recovery of the deposit or any payment made pursuant to the agreement, and which sum was

refunded in 2013. In support

of this assertion, counsel relied on **Samuel Kimani Maigua vs. Simon Njoroge Kariuki [2007] KEHC 569 (KLR)**, where the court noted the unwillingness of the vendor to transact and held that the available remedy was a refund of the purchase price.

20. In opposing the appeal, learned counsel for the respondent filed submissions and a list of authorities, both dated 12th October 2023, a supplementary list of authorities and a digest of authorities dated 18th December 2024. On whether the learned Judge was erroneous in applying the doctrine of constructive trust over the suit property in favour of the respondent, counsel submitted that the learned Judge took into account all the relevant factors, applied the relevant law and ultimately found that a constructive trust existed in favour of the respondent, having regard to the inequitable, unconscionable and unfair conduct of the appellant. In support of this contention counsel referred to **Aliaza vs. Saul** (supra) and submitted the case dealt with the vexed question of Land Control Board consent in respect of agricultural land and reflects the new and progressive position taken by this Court resolving the question as to whether a party who deliberately breaches his obligation under a valid agreement for sale of land can be aided by the courts and allowed to benefit from his own wrongdoing. Learned counsel argued that the appellant's conduct violated equitable principles, which are now recognised as national values under **Article 10(2)(b)** of the Constitution of

Kenya, 2010.

21. Counsel further asserted that, in line with the decision in **Aliaza's** case (supra), this Court should not condone the appellant's actions and should not allow the appellant to benefit from its own wrongdoing. He urged that the trial court was justified in finding that the doctrines of constructive trust and proprietary estoppel applied in this case and, consequently, ordered specific performance compelling the appellant to fulfil its obligations under the sale agreement. This Court should therefore reject any invitation to reward impunity and uphold the High Court's decision.
22. On specific performance, counsel maintained that neither the agreement for sale nor the accompanying documents excluded specific performance as a potential remedy for the respondent in the event of default by the appellant. In fact, such exclusion would not be lawful, as specific performance is an equitable remedy enshrined in the Constitution, and parties cannot contractually escape from it. Counsel further argued that the trial court's exercise of discretion in awarding specific performance was appropriate, given the applicable law, the parties' contract terms, and the circumstances of the case. He further posited that the trial court was correct in finding that damages would not be a sufficient remedy, given the business objectives and the unavailability of a substitute property. Furthermore, the appellant has not provided any valid or lawful basis for its refusal to complete the agreement for sale and pay the

purchase price, as ordered by the High Court.

23. On whether the appellant's managing director's family members held an overriding interest in the suit property in the form of a customary trust, counsel cited ***Isack M'inanga Kiebia vs. Isaaya Theuri M'lintari & Another (Petition 10 of 2015) [2018] KESC 22 (KLR)***, where the Supreme Court held that it is not every claim in land that qualifies as a customary trust, and it set out requirements that would qualify a claimant to be deemed as a trustee. Counsel submitted that the defence of customary trust must fail as it was not explicitly pleaded before the trial court; parties are bound by their pleadings, and this argument cannot be raised at this stage. Secondly, the family of Dr. Kimani have no claim to the suit property, as the ownership is distinct and separate from the directors and their family.
24. Further counsel argued that it is well-established that a customary trust must be proven through evidence, as was held in ***Justus Maina Muruku vs. Jane Waithira Mwangi [2018] KEELC 2366 (KLR)***. Since the appellant is a juristic person, it lacks any customs to support its argument that a customary trust exists in this instance, rendering the appellant's claim invalid. Thirdly, the appellant's assertion contravenes the warranty made by the appellant as a vendor to the respondent as a purchaser in the agreement for sale, to the effect that the property is not subject to any overriding interest or equities in favour of a third party. Counsel argued further that to turn around and claim the existence of an overriding interest at this

junction is tantamount to clutching at straws in an attempt to escape its obligations under the contract.

25. Lastly, on whether failure to obtain the Land Control Board consent rendered the sale void, counsel contended that it is unconscionable to allow a party to take deliberate steps to breach a contract freely entered into and then turn around and blame the innocent party by implying that the innocent party ought to have been aware that the contract entered into would collapse. In support, counsel referred to **David Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR**, in which this Court overturned the trial court's decision on Land Control Board consent. The Court determined that there was no legal basis for disregarding clear statutory requirements under the pretext of applying equitable doctrines.
26. Learned counsel further submitted that the shift in jurisprudence became apparent in **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kangiri [2014] eKLR**, where the court established that the Act's provisions should not be imposed without considering prevailing circumstances, especially when consent cannot be obtained due to refusal by the Board or seller. Further in the case of **Kiplagat Kotut vs. Rose Jebor Kipngok [2019] eKLR**, the Court opined that the Act was not intended to facilitate unjust enrichment, aid unconscionable conduct, or exempt a bad-faith vendor from contractual obligations. Counsel also referred to **Willy Kimutai Kitilit vs. Michel**

Kibet [2018] eKLR, where the

Court held that application of principles of equity, including estoppel, implied, resulting, or constructive trust, should not be restricted by the Act.

27. Learned counsel argued further that the appellant's reliance on the High Court case of **Samuel Kimani Maigua vs. Simon Njoroge Kariuki [2007] KEHC 569 (KLR)**, is misplaced as the decision was delivered on 7th December 2007, before the enactment of the Constitution currently in effect. Therefore, the Court should be guided by jurisprudence that aligns with the Constitution as enunciated in **Aliaza's** case (supra).
28. In arriving at our decision we have anxiously considered the record, rival submissions by counsel for the respective parties, various cases cited and the law. The appellant raised cumulatively five issues for consideration by the Court and which the respondent responded to, namely (i) whether the appellant's directors' family members have an interest in the suit property by way of a customary trust (ii) whether the doctrine of constructive trust is applicable in favour of the respondents; (iii) whether failure to obtain a Land Control Board consent rendered the transaction invalid and null and void; (iv) whether the relief of specific performance was appropriate where the contract spelt out appropriate reliefs to parties; (v) whether the court was right in awarding damages.
29. There is no dispute about the facts of the case. The appellant

offered its land, and the respondent, interested in expanding its business, found it suitable for its purposes. An agreement for

sale was entered into, and the necessary deposit was paid to the appellant's counsel. A few days before the completion date, the appellant reneged on the agreement for sale, claiming that the family of its directors was opposed to the deal. Indeed, a son of the couple and a brother of the majority shareholder, Dr. Kimani, lodged a caution with the Land Control Board. The respondent was informed of the family's opposition to the sale of the suit property, and the deposit was returned, though it had been initially rejected. The appellant had not obtained the Land Control Board consent by the time it reneged on the sale. In defending itself, the appellant refutes that the family members of its directors are impostors and cites customary trust as their interest.

30. The respondent had high expectations arising from the agreement for sale, it paid the deposit and alleges that it incurred loss as it carried out a feasibility study, engaged consultants and sought a financier. That despite due diligence, since the appellant's refusal to complete the sale it has failed to get any other suitable land and thus it sought for a declaration of constructive trust, specific performance and damages.
31. Can the appellant lean on the doctrine of customary trust to justify the repudiation of the agreement for sale and subsequent failure to complete the transaction? From the appellant's perspective, the appellant is a Limited Liability Company owned by a family whose children and a brother

were unhappy when they discovered that the parents were out to sell the suit

property. The majority shareholder, their father, appeared eager; he later went mum, and the minority shareholder sided with the family and was at the forefront in opposition to the sale of the suit property, citing family interests and coercion.

32. As regards the issue of customary trust, we agree with the respondent's submissions that the issue was neither pleaded by the appellant nor canvassed at the trial and cannot be raised on appeal. Courts have held time without number that a party is bound by its pleadings. The purpose of pleadings is to establish one's claim, to set the agenda for the case, and to allow the rival party to respond to the issues raised. The appellant cannot, at this stage, blame the trial court for failing to consider an interest based on a customary trust. A court cannot adjudicate on a matter not in issue or canvassed before it. This Court in the case of ***Wajohi vs. Mukabi (Civil Appeal 144 of 2017) [2021] KECA 476 (9 July) (Judgment)*** cited the case of *Sheikh vs. Sheikh & Another* [1991] LLR 2219 (CAK) and *Sande vs. Kenya Cooperative Creameries* [1992] LLR 314 (CAK) where it was stated:

“A Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended.”

33. The Court in ***Sheikh vs. Sheikh*** (supra) also noted a passage from Bullen and Leak on pleadings, 12th Edition, that

states:

***“The system of pleadings operates to define
and***

delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It does serve the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time, informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial, and which we the court will have to determine at the trial.”

34. We have said enough on the unpleaded issue of customary trust; it does not arise from the pleadings and must be outrightly rejected.
35. We shall marry the two issues of; whether the Court can imply constructive trust; with the absence of the letter of consent from the Land Control Board and deal with them together. The appellant, in admitting that it reneged on the sale agreement because the family of its directors opposed the sale, contends that, at the time it informed the respondent of the repudiation, no due diligence or survey had been conducted. It also returned the deposit early and did not hand over possession, and, further, there have been no developments on the land attributed to the respondent. It further asserts that the respondent amended its claim seeking damages, aware that the agreement for sale provided for an eventuality in the event that any of the

parties was unable to complete the transaction. It cited Clause **P** of the Agreement on Warranties, which states:

“The Parties agree that if any of the Warranties is untrue or misleading or has been breached, the purchaser shall be entitled upon receiving a notice in writing to the vendor and without prejudice to any other rights or remedies available to the purchaser, to terminate this agreement as of the date specified in the notice and monies paid by or on account of the purchaser to the vendor or the vendor’s advocate pursuant to or under this agreement shall be repaid forthwith to the purchaser without interest.”

It also cited **section 7** of the Land Control Act which stipulates that:

“If any money or other valuables consideration has been paid in the course of a controlled transaction, that becomes void under this Act, that money is recoverable as a debt by the person who paid it from the person whom it was paid, but without prejudice to section 22.”

36. On the other hand, the respondent's position is that the appellant twice offered its land for sale to it. In the second instance, an agreement was signed and a deposit paid, and despite the respondent being ready to fulfil its part of the agreement, the appellant breached its obligations, particularly by failing to apply for the Land Control Board consent due to what it terms ‘the unlawful intrusion by the director’s family’ and to avail all other documents in line with Special Conditions **D** of the agreement for sale which states:

“On or before the Completion Date, the

vendor's advocate shall forward certified true copies of

the Completion Documents listed hereunder to the purchaser's advocates and shall allow the purchaser's advocate to inspect the originals thereof. The vendor's advocates shall also give their irrevocable undertaking to release the original Completion Documents to the purchaser's advocates by way of Real Time Gross Settlement of the balance to the vendor's advocates account."

37. The respondent further contend that it has incurred loss and, despite due diligence, it has failed to find an alternative land for its project, and further, it remains ready to conclude its part of the bargain. The respondent cites **section 28(b)** of the Land Registration Act, stating that the appellant holds a constructive trust over the property as an overriding interest and has infringed on its fundamental right under **Article 40(1) & (3)** of the Constitution to own property. It urges that the appellant should not be allowed to benefit from a wrongdoing which connotes impunity and advances unfairness and unjustified benefit.
38. From the record, it appears to us that in entering into negotiations and signing of the agreement for sale on behalf of the appellant, Dr. Kimani may have been absolutely sure of the sale; however, his wife (co-director) and other members of his family objected to the sale of the entire property. The trial court was informed that the respondent declined an offer to sell a portion of the suit property. The question is whether the circumstances of this case militate towards a finding of

constructive trust in favour of the respondent. The finding of a constructive trust is a mechanism meant to avert an injustice. It is an equitable remedy imposed by the Court in situations of fraud or mistake, or where it would be unjustifiable for the owner to retain title, making the legal owner a trustee.

39. As for **section 7** of the Act, the Court has not spoken in unison on the effect of the same under the new constitutional dispensation, and on the application of constructive trust in situations that involve obtaining consent from the Land Control Board. Having so stated the jurisprudence emerging is that where the full purchase has been paid, possession given and developments or occupation is apparent, the Court is of the view that lack of the consent from the Land Control Board cannot be an excuse to enrich a scrupulous or greedy seller, as to do so would be unfair, unjustified and unconscionable.
40. In **William Kipsoi Sigei vs. Kipkoech Arusei & Another (2019) KECA 446 (KLR)**, where the land was subject of the Land Control Board, consent to transfer had not been obtained; the respondent had been in possession for over 20 years and had made improvements on the land and the full purchase price had been paid, the Court referenced an earlier decision **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR**, where the Court was of the view that under the new constitutional dispensation constructive trust can be created where the consent of the Land Control Board has not

been obtained, where full purchase price was paid and possession granted.

41. The trial court cited the above two cases, including **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri [2014] eKLR**. In all the cases cited above, the full purchase price had been paid, the parties had taken possession for a considerable time awaiting consent to effect the transfer, and the only remedy available in the circumstances was to formalise what appeared to be the actual situation on the ground.
42. Both parties have cited the case of **George Chayuga Aliaza vs Zephania Khisa Saul (Aliaza Case)** in support of their different positions. Similar to the earlier cited cases, the appellant in the Aliaza case admitted receipt of the full purchase price, having parted with possession and with the developments carried out on the land by the respondent. The dispute arose as the appellant was enraged by the respondent's demand for an access road to another property (not in issue) that he had purchased and had been transferred to him by the same appellant. The Court in the Aliaza case, after interrogating other similar cases went ahead to state:

“39. In the present case, the respondent readily conceded that he sold the suit land to the appellant, and that he received the full purchase price for the land. He further conceded that he placed the appellant in possession of the suit land, a fact that is confirmed by the evidence before the trial court and the orders for possession that he sought. He further conceded that the

appellant had carried out developments on the suit land. Even when the issue of the expansion of the access road to the suit

land parcels came up before the Land Disputes Tribunal and a decision was made in favour of the appellant, the respondent complied with the orders and brought a surveyor who rectified the access road.

40. In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of Macharia Mwangi Maina, became an overriding interest over the suit land. The failure of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.
(Emphasis added)

43. We agree with the principle emerging that where vendors obtain full purchase price, part with possession to the extent that purchasers occupy and develop the properties in question, justice and fairness demand that vendors do not turn to **section 7** of the Act to enrich themselves or benefit to the detriment of the purchasers. We also concur with the sentiments expressed in the Aliaza case concerning the

noble policy that necessitated the enactment of the Act. The Court stated:

“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.”
(Emphasis added).

44. There is no denial in the instant case that the vendor failed to obtain the Land Control Board consent and has attempted to *inter alia* invoke **section 7**, stating that the sale

agreement is void. It is also undisputed that; the purchase price was not paid; the deposit was refunded within a short time; possession

was not taken; there are no developments by the vendor; and the respondent was advised of the decision to rescind the agreement before the completion date, albeit late. The facts of the case are also clear, which is not denied, that Dr. Kimani, the majority shareholder, appears overwhelmed by opposition from his entire family, including his wife and co-director. He is aged and not in good health (though no proof of infirmity of mind was placed before the court).

45. Even with the undisputed facts set in the preceding paragraph, we find that the appellant, having failed to obtain the Land Control Board consent, it cannot use it to defeat the agreement for sale and simply get away, there being a breach of the same. At the same time, we find that the facts of the case are distinguishable from those in the cases cited above in favour of a constructive trust. As it were, each case must be considered on its own facts and merit and we find that the doctrine of constructive trust cannot be implied in favour of the respondent for the reasons stipulated above.
46. Special Conditions **K** and **P** provide that:

“K. It is agreed by the parties that in the event that the Special Conditions have not been satisfied or waived by the purchaser by the completion date or by the date of registration the purchaser shall be entitled, upon serving a notice in writing to the vendor and without prejudice to any other rights or remedies available to the purchaser to terminate this agreement as of the date specified in the notice and the

vendor shall forthwith refund and shall forthwith procure the refund of all monies paid by or on behalf of the purchaser to the Vendor's Advocates pursuant to or under this agreement.

P. The Parties agree that if any of the Warranties is untrue or misleading or has been breached, the purchaser shall be entitled upon receiving a notice in writing to the vendor and without prejudice to any other rights or remedies available to the purchaser, to terminate this agreement as of the date specified in the notice and monies paid by or on account of the purchaser to the vendor or the vendor's advocate pursuant to or under this agreement shall be repaid forthwith to the purchaser without interest."

47. The agreement gave the respondent the option of giving a notice and getting back its deposit without interest, without prejudice to other rights. The question is whether, having been repaid its deposit within less than 60 days of signing the agreement, the respondent should be awarded any damages.
48. The trial court ordered specific performance on the basis of its finding of a constructive trust. Under the special conditions, the respondent had the opportunity to give notice of termination of the contract and to seek a refund of the deposit. It did not do so, probably because the deposit was safely in its bank, having been refunded by the appellant.

49. Further, it is unacceptable that a party sits put without mitigating its loss, if any, for the reason that it cannot find suitable land comparable to the appellant's land. This certainly is not a serious proposition, seven years later, after the aborted sale.

In **Joyce Mugure Mwangi & 7 Others vs. Joachim Ngugi Kiarie & 16 Others [2019] eKLR**, in considering the issue of specific performance, this Court had this to say:

“Also, as was held in a persuasive case of **Reliable Electrical Engineers Ltd....vs....Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

“Specific performance, like any other equitable remedy is discretionary and the Court will only grant it on well known principles.

The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy

specific performance may still be refused on the ground of undue influenced

or where it will cause severe hardship to the defendant.” (Emphasis added)

50. On the remedy of specific performance in the circumstances of this case, we find the same is untenable, bearing in mind the period of time that has lapsed; the fact that the deposit was refunded early enough, notice of cancellation communicated to the respondent, possession was not granted, and there are no developments by the respondent. An order of specific performance would cause hardship and loss to the appellant and would be unfair.
51. In the end, we allow the appeal.
52. As for costs, it is our considered view that the circumstances and justice of the case militate towards each party bearing its own costs.

Dated and Delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original
Signed*

DEPUTY REGISTRAR