



Sang v Letting (Sued as legal representative of Josphat Letting (Deceased) & another (Environment & Land Case 14 of 2022) [2024] KEELC 482 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 14 OF 2022**

**MN MWANYALE, J
JANUARY 31, 2024**

BETWEEN

JOHN KIPKIRONG SANG PLAINTIFF

AND

ROSE LETTING (SUED AS LEGAL REPRESENTATIVE OF JOSPHAT LETTING (DECEASED) 1ST DEFENDANT

NELSON KORIR 2ND DEFENDANT

JUDGMENT

1. The Plaintiff John Kipkirong Sang, by his plaint dated 11/11/2013 Originally filed before the Environment and Land Court Eldoret as E&L 510 of 2013 before transfer to Environment & Land Court Kapsabet sued the Defendants Josephat Letting and Nelson Korir seeking;
 - a) The 2nd Defendant to forthwith surrender back to him the title deed in respect of Nandi/ chepkunyuk 80 and Nandi/ chepkunyuk 81.
 - b) Mesne profits for loss of use of the land from the 1st Defendant since 2010 to the date of the judgment at kshs 392,000/= per year.
 - c) The eviction orders against the 1st Defendant and order of injunction against the Defendants their agents and/or workers and/or any other person claiming for and on their behalf in the parcel of land known as Nandi/ chepkunyuk 80 and 81.
 - d) The house constructed by the 1st Defendant be demolished
 - e) costs of the suit and interest at Court rates
 - f) Any other relief that his Honourable Court may deem fit to grant



2. It appears that the 1st Defendant Josephat Letting passed on in the before the proceedings were concluded and an Amended Plaint amended on 23rd February 2021 was filed.
3. The Amendment in the amended plaint introduced an additional prayer (cc) which was injunction against the Defendants, their agents, and/or workers and/or any other person claiming on their behalf in respect of Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81.

Plaintiff Case and Evidence: -

4. It is the Plaintiff's case against the Defendants that
 - i) he is the registered owner of parcel known as Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81. Measuring 0.7 Ha and 0.6 Ha respectively, that he leased his land to the 2nd Defendant for a period of 10 years to plant tea crops at the 2nd Defendant's cost and the 2nd Defendant was to harvest the tea and get the proceeds thereof for that period to recover his cost for land preparation seedlings and the c trop tendering process and after the lease period, the tea plants were to belong to the Plaintiff.
 - ii) That the Plaintiff gave the 2nd Defendant the title deeds for both parcels of land so as he would obtain permit from the tea company for growing tea;
 - iii) The Plaintiff further averred that the late Josephat Letting thereafter uprooted all the tea bushes in the above land and destroyed the common boundary between the land parcel No. Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81.
 - iv) That the late Josephat Letting had trespassed into the said parcels in 2009, while the 2nd Defendant was holding the title deeds in respect of the suit property illegally while the late Josephat Letting and family occupying the parcels illegally.
 - v) That the dispute in relation to the parcels had been heard by the Land Dispute Tribunal at Kapsabet (LDT No. 1/2010) and parcels were awarded to 2nd Defendant, but the Tribunal decision was quashed by the High Court in Eldoret High Court J.R. No. 36 of 2010.
 - vi) The Plaintiff sought for surrender of the title to himself.
5. On the strength of the above, the Plaintiff sought for the prayers set out at paragraphs 1 and 3 of this judgment.
6. The Plaintiff testified as the sole witness in support of his case. It was his evidence that; he never knew the original 1st Defendant who is now deceased but knew the substituted 1st Defendant Rose Letting and the 2nd Defendant Mr. Nelson Korir. It was his testimony that he had leased the suit property to the 2nd Defendant the witness adopted his witness statement dated 11/11/2013 as part of his evidence in chief
7. In further evidence, the witness states that he had in 2000 leased the two suit properties to the 2nd Defendant for 10 years; the properties were still in his name, and the witnesses produced the searches thereof as P Exhibit 1 (a) and 1 (b).
8. It was the Plaintiff's further testimony that the 2nd Defendant did not pay any monetary consideration but planted tea bushes on both parcels and failed to vacate after the 10 years, the 2nd Defendant had requested for the title deeds so as to register as an out grower but after registration declined to return the same and kept them.



9. It was the Plaintiff's further evidence that the 2nd Defendant had lent him kshs 20,000/= and the Plaintiff was to sell trees on the property so as to refund the 20,000/= but the Plaintiff requested to buy the trees and he sent 100,000/= through Gilbert Maritim, but Mr. Maritim only gave him (Plaintiff) 46,000. The Plaintiff was thereafter given 54,000 and 60,000 hence making it a total of kshs 180,000 as cost for the trees.
10. It was the Plaintiff's further case that he refunded the 2nd Defendant kshs 66,000 and retained kshs 114,000 from the sale of trees. The Plaintiff stated that he had a house on the suit property but had authorized its demolition and he sued in the LDT and he produced the award as P Exhibit No. 2, he stated that he challenged the award at Eldoret High Court and produced the Ruling as P Exhibit No. 3.
11. The witness stated that he utilized the said farm for rearing dairy cows and would supply milk to KCC where he had an account, he produced statements from KCC and receipts as P Exhibit No. 4. The witness also produced a loan application to the National Dairy Development Project as P Exhibit 5. Since he had not utilized the property he urged the Court to order for the return of his titles and prayed that he be paid kshs 393,000 per annum from 2010 as loss of user and for the 1st Defendant to be evicted from the property and her house demolished.
12. He also sought for costs, and dismissal of the defence as he had never sold the property to anyone.
13. On the day the Plaintiff testified the Defendant's Advocate Mr. Awi was absent and the Court called on the Defendants who were in Court to cross – examine the Plaintiff.
14. The 1st Defendant, Rose Letting had nil cross – examination but the 2nd Defendant Mr. Korir did cross – examine the Plaintiff
15. On cross- examination by the 2nd Defendant, the Plaintiff stated that he had been lent kshs 20,000 so as to take his son to Kapsabet Boys, which he refunded. He stated that he had sold blue gums trees worth kshs 180,000/=. He said he had given the 2nd Defendant titles so as he 2nd Defendant would get permit to grow tea. He was adamant that he had not sold the property to Gilbert Maritim and that he late Josephat Letting had not consulted him over the property. He stated that he did not have a lease agreement for sale.
17. On re-examination, the witness stated that he did not transfer the property and neither was there a request for transfer. The witness stated that the money given to him by Gilbert was for fees and not part of the Agreement with the testimony of the PW1 the Plaintiff's only witness the Plaintiff case was closed.
18. Before the Defence Case was filed the Defendant's Advocates filed an application dated 13/9/2023 which he sought to recall the Plaintiff for cross – examination and the admit the defence and counterclaim filed out of time on 3/3/2023 as properly filed.
19. The said application was allowed as prayed and the Plaintiff's case was re-opened for cross – examination of PW1 and re-examination.
20. On cross – examination by Mr. Awi Learned Counsel for the Defendants, the Plaintiff said that he lives in Arwos, and knew the 2nd Defendant but he met the late Josephat Letting on his property and he did not know hitherto. He only knew Josephat Letting's wife when the case started. He stated that he knew Gilbert Martim who lived in the neighborhood but he never sold his property to him and Gilbert did not enter his property.
21. The witness stated that Gilbert Maritim was given 100,000/= to give him by Mr. Nelson Korir out of which Gilbert Martim retained 46,000/= and gave him 54,000/=. He denied any involvements of



- his wife and children in the sale of the property, and that Joseph Letting and Solomon Rotich did not visit him.
22. in respect of the defence witness, the Plaintiff stated that Benjamin Chirchir and Solomon Rotich were his nephews being sons to his brother, while John Kiplagat was the son to his sister and Simon Mutai was a son to his cousin, the witness stated that he had not read their witness statements but he did not call any meeting that the said Defendants witnesses were present.
 23. He had authorized demolition of his house in the suit property as he had built another house in Arwos; and the other house belonged to his farm hand. He did not sale his property to pay school fees for his sons but he gave his titles to Nelson Korir.
 24. On re-examination, he stated that Gilbert Maritim was sent to him money for buying eucalyptus and cypress on his property. He said he had received the money in installments of kshs 20,000, 46,000, 54,000 and 60,000 to make it kshs 180,000/=, he did not sale their suit property but sold trees for kshs 180,000/= neither his children nor his wife sold the suit properties. He stated further that the Defendants witness were his relatives and lived far away and were not witnesses to any sale, he was related to them but they were not close.
 25. He stated that he had demolished 2 houses on the suit property leaving the main house and kitchen for the farm hand. After demolition he moved to Arwos, and authorized Nelson Korir (2nd Defendant) to demolish the main house and kitchen so as to plant tea. He had not transferred the titles which were in his name but had given them to Nelson Korir so as to register as an out grower to plant tea.
 26. As indicated earlier in this judgment, the Plaintiff was the only witness to his case, and with his testimony, the Plaintiff's case closed.

Defence Case and Evidence: -

27. Vide their joint statement of defence and counterclaim dated 1st March 2023, it is the Defendants case that the Plaintiff gave the 2nd Defendant the title deeds for the suit parcels since he had paid up the consideration and to facilitate the transfer process.
28. In the counter claim, the 2nd Defendant averred that he entered into sale agreement with the Plaintiff in 2001, where upon Plaintiff sold Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81 to him and he took possession of the suit parcels and received the original titles for purpose of obtaining the necessary consents and final transfer to his name
 - i) That the Plaintiff refused/neglected to sing the relevant documents for purposes of the Land Control Board.
 - ii) That the 2nd Defendant is a bonafide purchaser of the suits parcels and he prayed for an order of specific performance upon the Plaintiff to sign the transfer forms.
29. On the strength of the above averments in the counterclaim, the Defendants prayed for dismissal of the Plaintiffs suit with costs and judgment entered for;
 - a) declaration that the 2nd Defendant is a bonafide purchaser and owner of all that parcel of land known as Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81
 - ii) The Court be pleased to order the Plaintiff to sing all relevant instruments of transfer to enable the 2nd Defendant to acquire the titles deeds of all that parcel of known as Nandi/chepkunyuk 80 and Nandi/chepkunyuk 81



- iii) In default the Deputy Registrar of this Court be authorized, to execute any necessary documents.
 - iv) Costs of this suit and counterclaim together with interest and Court rates.
 - v) Any other relief deemed fit and just by the Court so to grant.
30. DW4, DW5, DW6 were all related to the Plaintiff being his paternal nephews. They all testified that the Plaintiff their uncle had sought their concurrence to sale the suit property to the 2nd Defendant during a family gathering.
 31. DW4 stated that he was present when the suit property was sold by his uncle to the 2nd Defendant, while DW5 stated that he took the late Josephat Letting for initially buy property from one of his other uncle Peter Lelei, but eventually Josephat Letting bought from Nelson Korir the property which Nelson had bought from the Plaintiff.
 32. DW1, Nelson Korir stated that he initially bought ½ an acre from Gilbert Maritim who had bought from the Plaintiff, but additional bought a ½ acre and gave kshs 1000,000 out of which Gilbert retained the kshs 54,000 and gave the Plaintiff 46,000/-. The Plaintiff bought another property in Arwos and moved.
 33. The witness stated he paid the Plaintiff another 60,000/= and kshs 100,000/= since he had lent the Plaintiff kshs 20,000 for school fees, they agreed to convert it to purchase price and in total he paid kshs 280,000/= and added another 68,000 to make it 348,000 including 28,000 for borehole, fence and trees thus by December of 2000 he had fully paid for the 3.2 acres.
 34. The witness stated that in December 2004, he was given the title by the Plaintiff's son Amos Murey who had reported to Kapsabet Boys earlier, he did not transfer the property and the Plaintiff declined to execute the transfer forms.
 35. It was the witnesses' further evidence that in 2006, Josephat Letting approached him with an offer to buy the properties, and the witness sold the properties with a rider that the properties were still registered in the name of the Plaintiff.
 36. The late Letting bought the property and started living thereon in 2007, and in 2009 the Plaintiff reported to the chief and went to the Tribunal where his case was dismissed. The family of Mr. Letting was still on the property and the witness prayed that the property be transferred to the Administrator of her Letting's Estate who was the 1st Defendant.
 37. On cross – examination, the witness stated that he had bought a ½ acre from Gilbert Maritim and another ½ from John Sang in Nandi/chepkunyuk/80. He did not enter into any written agreement and did not see the agreement between John Sang and Gilbert Maritim since they were all villagers.
 38. He stated that the two parcels were adjacent but not demarcated. The witness had no written agreement in respect of Nandi/chepkunyuk/81 and nothing to show that he had paid kshs 348,000/= for the two properties, but he had custody of both titles. He had planted tea in 2001 and it was not a requirement to have titles so as to plant tea during the time. The titles were delivered to the witness in March 2004 by the Plaintiff's son Amos Murey for purposes of transfer. The witness stated that he had sent the Plaintiff transfer forms but the Plaintiff did not return them and did not go to the Land Control Board. He had not sought orders to go for the Plaintiff to go to the Land Control Board. The Plaintiff reported to the village elder, the chief and filed a case at the Tribunal, but the Tribunal award was quashed by the High Court.



39. The witness stated that he did not live on the property but utilized the same for growing tea, Sang has not utilized the property.
The witness stated that he Plaintiff had livestock on the property but was not aware that the Plaintiff took milk to KCC.
40. In re-examination, the witness stated that the ½ acre utilized by Gilbert Maritim was fenced but there was no demarcation on the other property. He stated that the Plaintiff had vacated the property in November 2000 witness asked for execution of the transfer documents, and stated that the Plaintiff had not sought for injunction orders against him or Letting's family.
41. It was DW2, Gilbert Kiplagat Maritim evidence while adopting his witness statement dated 25/5/2018 as part of his evidence in chief that the Plaintiff approached him and sold him ½ acre so as to pay fees for a son who was joining a teacher's college. The son was Joseph Kiplagat Murey and the agreed purchase price was 50,000/= of which the witness paid kshs 46,000 and left a balance of 4,000/= in 2000, the Plaintiff had wanted to sale another ½ acre but the witness could not afford and he referred the Plaintiff to a third party.
42. In cross- examination, the witness stated that he bought ½ acre from the Plaintiff in 1997 at kshs 50,000 but did not execute an written Agreement nor transfer, he had sold this same portion to Nelson Korir in 2000, he did not erect a wire but had planted a live hedge on the property.
43. The witness stated that he did not have written agreement for sale but had a verbal one he had nothing to show receipt of the 130,000 but he confirmed receipt of the money from Nelson Korir.
44. On re-examination the witness stated he was paid kshs 100,000 by Korir in cash out of which he took his 46,000 and paid the Plaintiff, as he had not paid fully the amount and the Plaintiff received the money in the presence of his wife.
45. With the testimony of the 6 Defence Witness, the Defence Case was closed.
46. Parties were directed to file submissions on the matter.

PLaintiff's Submissions: -

47. The Plaintiff submits that the Defendants claim is not enforceable in law pursuant to Section 3 (3) of the Law of Contract Act that requires a disposition of an interest in land to be in writing and signed by all the parties, and signatures to be attested by a witness. In support of this limb of submissions the Plaintiff cites the decisions in Patrick Tarzan Mutu and Another vs Nasimu Shariff Abdalla and 2 others (2009) eKLR as well Silverbird Kenya Limited vs Junction limited and 3 others (2013) eKLR.
48. The Plaintiff submitted that the transaction was a nullity due to the fact that there was no Land Control Board consent. In this regard the Plaintiff places reliance on Section 6 of the Land Control Act and the decisions in Elizabeth Cheboo vs Mary Cheboo Civil Appeal No. 40 of 1978 Mbutia Chege vs Kiarie Kuguru Civil Appeal No. 87 of 1986, Jacob Michuki Minjire vs Agricultural Finance Corporation (1983) KLR which all pointing to the fact that where no Land Control Board consent is issued such a transaction is a nullity.
49. On the strength of the above submissions, the Plaintiff urges the Court to allow his case and dismiss the Defence and counterclaim with costs.

Defendants Submissions: -

50. The Defendant has also submitted on the two issues that the Plaintiff had submitted.



51. On lack of a written agreement the Defendant submits that he doctrine of proprietary estoppel applied to this case, and has cited the case of William Kiptarbei Korir and 6 others vs Danson Miniu Njeru (2018) eKLR, as well as the definition of Estoppel in the Halsbury's Laws of England.
52. On the issue of lack of the consent of the Land Control Board, the Defendants places reliance in the decision in *Alianza vs Saul* (Civil No. 134/2017 (2022) KECA 583.
53. On mesne profits, the Defendant submitted that the claim for mesne profits having been filed after 6 years was time barred and placed reliance of the decision in *Martha Karwira Antohony vs Barclays Bank Limited* (2019) eKLR.
54. The Defendants submit that costs follow the event, and submit that the Plaintiffs suit be dismissed and costs of the suit and counterclaim be awarded together, with interest at Court rates.
55. Before framing the issues for determination the Courts notes a number of undisputed facts as follows;
 - a) It is not contested that the Plaintiff is the registered owner of Nandi/chepkunyuk/80 and Nandi/chepkunyuk/81
 - b) It is also note disputed that the 2nd Defendant was given vacant possession of the two suit properties by the Plaintiff and planted tea thereon in late 2000 or early 2001 or thereabouts.
 - c) It is also not disputed that the late Josephat Letting and his family have been on the suit parcels since 2007.
56. Having perused the pleadings, heard the evidence of the witnesses, and considered the issues raised in the respective submissions, the Court frames the following as issues for determination.
 - i) what was the nature of the transaction between the Plaintiff and the 2nd Defendant was it as lease a claimed by the Plaintiff or was it a sale of the suit properties as claimed by the Defendants?
 - ii) Whether the Plaintiff proved his case on a balance of probabilities or whether the Defendants have proved the counterclaim?
 - iii) What reliefs ought to issue?
 - iv) who bears the costs of the suit?

Analysis and Determination: -

57. At paragraph 4 of the Amended Plaint, the Plaintiff pleads that he leased the suit properties to the 2nd Defendant for a period of 10 years to plant tea, while the Defendant at paragraph 4, 11, 12 and 13 of the Defence and Counterclaim pleaded that the transaction between him and the Plaintiff was a sale transaction.
58. Section 107 of the *Evidence Act* provides as follows; -

- “ 107 whoever desires any Court to give judgment as to any legal right or liability
- 1) dependent on existence of facts, which he asserts must prove that those facts exists.
 - 2) when a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person.”



59. The Plaintiff was required to adduce evidence as to the existence of the lease between him and the 2nd Defendant.
60. Similarly, the 2nd Defendant was required to adduce evidence of the existence of a sale between him and the Plaintiff.
61. Other than pleadings the existence of the lease between him and the 2nd Defendant, the Plaintiff did not call any witness or lead any evidence to corroborate the existence of the said lease. The Plaintiff led evidence on sale of trees on his property to the 2nd Defendant for kshs 180,000/-. The said sale of the trees was not pleaded but the Plaintiff had pleaded existence of a lease. The Court finds that the Plaintiff did not adduce evidence as to the existence of a lease between him and the 2nd Defendant.
62. On his part the 2nd Defendant called with 5 witnesses.
DW2, Mr. Gilbert Maritim did testify on a verbal agreement for sale between him and the Plaintiff so as to enable the Plaintiff raise school fees for his then college going son in 1979, and was offered another half-acre by the Plaintiff which he could not afford but directed the Plaintiff to the 2nd Defendant.
63. The second ½ acre was being sold according to DW2 so as to send another of the Plaintiff son to high school.
64. DW3, DW4, DW5 all being relatives of the Plaintiff testified that he had consulted them on his intention to sell property to the 2nd Defendant so as to raise fees for his son who was joining the high school.
65. In the initial amount given to the Plaintiff by the 2nd Defendant through DW2, it was explained that DW2 retained kshs 46,000/= which he had used to purchase the ½ acre, the said retention of the 46,000 was confirmed by the Plaintiff and DW2.
66. The Plaintiff confirmed giving possession by demolishing two houses on the suit property and authorizing the 2nd Defendant to demolish the remaining house, once the Plaintiff had moved to Arwos.
67. The Court finds that the conduct of the Plaintiff in demolishing his house and authorizing demolition of the other house, to be consistent with a sale as opposed to a lease.
68. Taking into account the testimony of 5 witnesses who testified on their knowledge on the existence of a sale between the Plaintiff and the 2nd Defendant, and taking into consideration that the 2nd Defendant's account of payments was consistent with the evidence of DW2 and the Plaintiff himself, the transaction between the Plaintiff and the 2nd Defendant was thus a sale and not a lease.
69. Thus in answer to issue number 1, the Court finds that the nature of the transaction between the Plaintiff and the 2nd Defendant was a sale transaction and not a lease.
70. On issue number 2, and having found that there was a sale transaction between the Plaintiff and the 2nd Defendant, the Court shall endeavour to answer the issues as raised by the Plaintiff and Defendants in their submissions, to wit
 - i) whether the sale offends Section 3 (3) of *Law of Contract Act* as it was not evidenced by way of a written agreement and whether he sale offends Section 6 of the Land Control Board and is a nullity.



71. The respective submissions on the above twin issues are captured at paragraph 47 and 48 of this judgment in respect of the Plaintiffs position and at paragraph 51 and 52 in respect of the Defendants position.
72. The Plaintiff submits that as per the provisions of section 3 (3) an Agreement for disposition of an interest in land ought to be in writing signed by all parties and signatures attested by a witness. The Plaintiff has placed reliance on the decision in Patrick Tarzan Mutu & another vs Nassim Shariff Abdalla (2009) eKLR as well as Silver bird Kenya Limited vs Junction Ltd and 3 others.

In response the Defendant has urged the Court to find that proprietary estoppel applies in this case and has cited the decision in the case of William Kiptarbei Korir and 6 others vs Danson Miniu Njeru.
73. The Plaintiff has vide paragraph 4 pleaded the transaction to have been made in the year 2000, and this not disputed.
74. Section 3 (3) of the law of Contract came into force in 2003 and Section 3 (7) thereof exemptions oral/ verbal agreements entered before commencement.
75. Having entered the verbal sale agreement in 2000, Section 3 (3) of the [Law of Contract Act](#) does not apply to the sale transaction between the Plaintiff and the second Defendant and this limb of agreement thus fails.
76. In arriving at the above finding the Court is guided by the Court of Appeal decision in Peter Mbiru Michuki vs Samwel Mugo Michuki (2014) eKLR where the Court observed as follows; “paragraph 25 It is our view that Section 3 (7) of the [law of contract act](#) makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3(3) of the [law of Contract Act](#) came into effect in 2003 and does not apply to oral contracts for sale concluded before Section 3(3) of the Act came into force. The provision to Section 3 (3) of the [law of contract act](#) applies in this case and we hold that the sale agreement between the Appellant and the Plaintiff did not violate or offend the provisions of the [law of Contract Act](#).”
77. On the Second limb that the agreement is a nullity for lack of Land Control Board Consent, the Plaintiff placing reliance on the decision in Elizabeth Cheboi vs Mary Cheboi Civil Appeal No. 40/1978, Mbuthia Chege vs Kiarie Kuguru Civil Appeal No. 87 of 1986, Jacob Muchuki Minjire vs Agricultural Finance Corporation (1983) KLR, urges the Court to find that the issue of lack of LCB consent for sale renders a sale transaction a nullity under Section 6 of the [Land Control Act](#).
78. On the other hand the Defendants submit for the Court to find that proprietary estoppel exists and as a result the issue of lack of a LCB consent is no longer fatal to a sale transaction. The Defendants in this regard place reliance on the decision in Alianza vs Saul Civil Appeal No. 134/2017 (2022).
79. The decision cited by the Defendant Alianza vs Saul has quoted a number of decisions including the decision in Macharia Mwangi Maina and Willy Kimutai Kitilit decision.
80. The decisions in Macharia Mwangi Maina and Willy Kimutai Kitilit suggest a shift in the jurisprudence post 2010 constitution and it follows that the decisions cited by the Plaintiff being decisions made before the 2010 constitution are no longer good law.



81. The above decisions which the Defendant relies on having been cited in the Alianza case were also cited with approval by the Supreme Court in its decision rendered on 28th December 2023 in Aruind Sha and others vs Mombasa Bricks and tiles Limited where the Supreme Court held interalia;

“in Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri Civil Appeal No. 6/2021 Consolidated with No. 26 and 27 of 2011 (2014) eKLR and in Willy Kimutai Kitilit vs Michael Kibet Civil Appeal No. 2015 (2018 eKLR the Court of Appeal in matters involving the Sale of Land held that the equitable doctrines of Constructive Trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case.

78. The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transaction.....”

82. The decision cited by the Defendant in essence that the doctrines of constructive trust and proprietary estoppel apply to oral contracts and that lack of consent of LCB does not preclude the Court from giving effect to equitable principles in particular the doctrine of constructive trust.

83. In view of the above, the Court shall now examine whether Constructive Trust has been established in this case.

In Twalib Hatayan & Another vs Said Suggar Ahmed Al-heidy and 2 others, the Court of Appeal defined a Constructive Trust as follows; -

“A constructive Trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as Trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit. As earlier stated with constructive trusts, proof of party’s intention is immaterial; for the trust is nonetheless be imposed by law.... for “the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.....”

84. From the evidence on record, the Plaintiff gave vacant possession to the 2nd Defendant, he demolished his houses and authorized demolition of the remaining house. He moved with his family to Arwos only to claim the property later on after he had been paid.

The Defendants have established both proprietary estoppel and the Court shall infer a constructive trust to avoid against unjust enrichment on the part of the Plaintiff.

85. The Court thus finds that no merit in the agreement by the Plaintiff that the sale was void by virtue of Section 6 of the *Land Control Act*.

86. Has the Plaintiff proved his case? The answer is a resounding no, for reasons firstly that the Plaintiff failed to discharge the evidentiary burden under Section 107 of the *Evidence Act* to prove the existence of the lease he pleaded and secondly, in adducing evidence of sale of trees as opposed to the lease, the Plaintiff’s evidence and pleadings were at variance, and as held in the case of IEBC vs Stephen Mule where the Court observed “ it is now a very trite principle pf law that parties are bound by their pleadings and any evidence led by any of the parties which does not support the averments of the pleadings or put in other words, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”



87. Having found that the Plaintiff did not prove the existence of the lease and his evidence was at variance and noting the principles in the IEBC VS Stephen Mule case above, the Court thus finds that the Plaintiff did not prove his case on a balance of probabilities and his case is hereby dismissed.
88. The Defendants have proved the existence of a verbal/oral agreement for sale between the 2nd Defendant and the Plaintiff, and the 2nd Defendant having been given possession over the suit properties in 2001 and the 1st Defendant having bought and taken possession in 2007, the Court finds the Defendants have on balance of probabilities proved his case and is entitled to the reliefs sought in the counterclaim.

Disposition: -

89. The Plaintiff suit is hereby dismissed.
90. Judgement is entered in favour of the Defendants in terms;
- a) declaration be and is hereby issued that the 2nd Defendant is a bonafide purchaser and/or owner of Nandi/chepkunyuk/80 and Nandi/chepkunyuk/81
 - b) The Plaintiff to execute all the necessary and relevant documents to enable and transfer of Nandi/chepkunyuk/80 and Nandi/chepkunyuk/81 to the 2nd Defendant within 30 days from today.
 - c) In default of (b) above the Deputy Registrar of this Court to execute the necessary documents to effect the transfer.
 - d) In view of the 2nd Defendant own admission that he had sold Nandi/chepkunyuk/80 and Nandi/chepkunyuk/81 to the late Josephat Letting represented in this case by the Administrator of his Estate, Rose Letting the 1st Defendant herein, the 2nd Defendant upon transfer of the suit property in his name shall within 7 days cause a transfer to be affected to the 1st Defendant who is the ultimate beneficial owner of Nandi/chepkunyuk/80 and Nandi/chepkunyuk/81
 - e) The Defendants are jointly are awarded the costs of the Plaintiffs suit and the counterclaim.
91. Judgment accordingly.

JUDGEMENT, READ AND DELIVERED AT KAPSABET THIS 31ST DAY OF JANUARY, 2024.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

Mr. Kiboi for the Plaintiff

Mr. Awi for the Defendant

