



Kamuthi Farmers Co-operative Society Ltd v Nairobi City County; Archdioces of Nairobi (Kahawa West Catholic Church) & 18 others (Interested Parties) (Civil Appeal E047 of 2021) [2025] KECA 87 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 87 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E047 OF 2021
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA
JANUARY 24, 2025**

BETWEEN

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LTD APPELLANT

AND

NAIROBI CITY COUNTY RESPONDENT

AND

ARCHDIOCES OF NAIROBI (KAHAWA WEST CATHOLIC CHURCH) INTERESTED PARTY
SARAH WAITHERA NJUGUNA INTERESTED PARTY
JOSEPH KAMAU THUO INTERESTED PARTY
REGINA WITHUTI KIMARU INTERESTED PARTY
PETER KAMAU NJOROGE INTERESTED PARTY
MARY WANJIRU NJOROGE INTERESTED PARTY
GORDON MWANGI MACHARIA INTERESTED PARTY
SAMUEL KINGORI KARIUKI INTERESTED PARTY
JOSEPH PETER GATUNG'O INTERESTED PARTY
DANIEL GITAU KIMANI INTERESTED PARTY
LAWRENCE KIOI NGARUIYA INTERESTED PARTY
RALPH AUGUSTINE MWANGI KIMOTHO INTERESTED PARTY
ESTHER TABU MWADIME INTERESTED PARTY
RAHAB WANJIKU GIKUNGU INTERESTED PARTY



HANNAH MUTHONI MWANGI INTERESTED PARTY
GABRIEL NJOROGE KAMAU INTERESTED PARTY
JAMLICK NGUGIRA KAMANDE INTERESTED PARTY
WILFRED NDURE KAMARU INTERESTED PARTY
ANNE GATHONI KABAYA INTERESTED PARTY

(Being an appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (L. Komingo, J.) delivered on 4h June, 2020 in E.L.C. Case No. 6898 of 1991.)

JUDGMENT

1. The dispute giving rise to this appeal has a long -winded history and has been in the court corridors for more than a generation, about 33 years! It is evidence of a situation where parties, most likely friends, in good faith, enter into certain arrangements, documents are not perfected, the parties leave the scene either by being replaced in office by others or through natural attrition; that successors lose sight of the original good intentions of the parties and pursue causes that the original parties would not have contemplated. Memories fade and disappear, documents are lost, misplaced or destroyed; the concatenation of events is broken, it becomes not easy to follow. We have done our best to follow the record and it is our hope that when we pen off this judgment the parties will accept the decision, move on with their lives and put an end to the litigation.
2. The original plaint is dated 23rd December, 1991 by the appellant, Kamuthi Farmers Co-operative Society Limited, against the respondent, Nairobi City Commission (today Nairobi City County). It was claimed that the appellant was at all material times the registered proprietor of the property known as L.R No. 71/7 ('the suit property'), measuring 415 acres or thereabouts situate in Nairobi; that the appellant was the successor of Kahawa Farmers Co-operative Society Limited, which company was liquidated vide a Gazette Notice No. 3864 by the Commissioner of Co-operatives, and that upon liquidation the suit property was "handed over" to the appellant through a conveyance dated 20th December, 1989 to hold the same for an interest in fee simple, free from all encumbrances or interest from any 3rd party; that the respondent had since such conveyance been occupying the suit property without consent of the appellant "... which occupation is illegal and unlawful..." The appellant further claimed in the plaint that the respondent had no right or tangible interest in the suit property "... despite the agreement dated 2nd day of January 1973 ..." for the reasons that there were no minutes by the appellant to allow the sale of the suit property; that consent of the Commissioner (of Co-operatives) was not sought or obtained to allow the alienation of the suit property; consent of the Land Control Board was not sought, and, "... the terms of the Agreement are quite onerous and the same was entered into in return of a reward to secure to the then office bearers." It was therefore prayed that the Court issue an eviction order against the respondent to vacate the suit property; mesne profits be awarded since the year 1989, costs of the suit and interest, and any other or further relief which the court may deem fit and just to grant.
3. The respondent delivered a defence and counter-claim which was amended twice. The first was dated 13th June, 1992 and the last version is dated 9th April, 2009 by Wanjiku Maina & Co. Advocates. The claim was denied, the respondent stating instead that the suit property was registered in the name of Kahawa Farmers Co-operative Society Limited ('Kahawa Farmers') up to 20th December, 1989 when the same was irregularly conveyed to the appellant by the said Kahawa Farmers in breach of a



contractual obligation on the part of Kahawa Farmers to transfer the suit property to the respondent. It was further stated in the defence that the respondent and Kahawa Farmers had entered into an agreement of sale on 2nd January, 1973 for the agreed consideration of Kshs.135,000, which sum the respondent had paid in full and which Kahawa Farmers had acknowledged. That agreement, it was averred, provided that in consideration of the said sum Kahawa Farmers would convey the entire suit property to the respondent together with all buildings and other improvements erected and being thereon; that upon completion of the survey the respondent would re-convey to Kahawa Farmers free of charge a portion of land measuring 260.5 acres or thereabouts, provided that the “vendor” would pay stamp duty and legal fees relating to re-conveyance; that pending completion of the said conveyance the respondent be at liberty to enter the land “... and do all manner of things necessary for the proposed development of L.R No. 71/7 as a Housing Estate provided that unless the parties hereto otherwise agree such activity shall be confined to an area not exceeding one hundred and fifty four (154.5) acres, such area to be selected by the purchaser ...” It was averred that pursuant to that agreement the respondent sought and obtained from the late President Jomo Kenyatta exemption of the transaction from the provisions of the Land Control Act, which exemption was gazetted as Legal Notice No. 260 of 19th October, 1974; that in pursuance of the agreement the respondent had entered and taken possession of the portion of 154.5 acres in 1973 and commenced the development plans for a housing estate for which the land was purchased and proceeded to erect and fully develop 600 housing residential units which it had allocated to tenants on a tenant purchase basis, “...and are in occupation as the allottees, majority of whom have completed paying for their houses and are awaiting formal conveyancing of the houses to their names.”

4. It was further averred in the defence that on or about 1980 the respondent and Kahawa Farmers negotiated and agreed on purchase of 21.238 acres of the suit property in consideration of Kshs.425,000 which had been paid in full in 2 installments; that this latter purchase was for the sole construction of Kahawa Sewerage Treatment works, which project was completed in 1982 and serves Kahawa West Estate and adjacent areas; that:

“3D. The Defendant has been in actual, effective and uninterrupted possession and occupation of a portion of 154.5 and 21.238 acres where the Defendant has constructed and developed the Kahawa West Housing Estate since 1973 and the Kahawa Sewerage and Treatment Works. The transfer of the entire suit land to the Plaintiff in December, 1989 could only have been subject to the Defendant’s rights and interest aforesaid.

3E. The Defendant further states that after it had paid the purchase price for the portion of 154.5 and 21.238 acres respectively of the suit land Kahawa Farmers’ Co-operative Society Limited continued being registered as proprietor of the said portion as trustees for the Defendant pending the execution and registration of the Conveyance in the Defendant’s favour pursuant to the agreement for sale.

4. The liquidator of the said Kahawa Farmers’ Co- operative Society Limited held the suit premises subject to the trust and/or interest created in favour of the Defendant following the contract of sale of the said 154.5 and 21.238 acres to the Defendant and the Liquidator did not therefore have any valid title to the said portion of 154.5 and 21.238 acres which he could validly and properly convey to the Plaintiff.



- 4A. The Defendant further states that the Plaintiff was not a Purchaser for value without notice of the Defendant's rights and interest to the portion of 154.5 and 21.238 acres since to the Plaintiff's knowledge the Defendant had purchased the said portions from their predecessor M/s Kahawa Farmers' Co-operative Society Limited and that the Defendant had been in effective and continuous occupation of the said two portions of land for over 15 years during which period the Defendant had openly effected permanent developments and had fully developed the Kahawa West Housing Estate together with Sewerage Plant and allocated houses to third parties.
- 4B. The Defendant further and without prejudice to the foregoing states that the proprietary interest of M/S Kahawa Farmers' Co-operative Society Limited to the portion of 154.5 and 21.238 acres occupied by the Defendant was extinguished in favour of the Defendant on or about 1985 after the Defendant had been in adverse possession of the said portion for a period of 12 years and the said Kahawa Farmers' Co-operative Society did not therefore have any title to the said portion of 154.5 and 21.238 acres which they could convey to the Plaintiff in terms of the conveyance dated 20.12.1989.
- 4C. The Defendant in reply to paragraph 4 of the Plaintiff states that the suit land was handed over to the Plaintiff at no consideration and that the hand-over of the suit property to the Plaintiff by the Liquidator of Kahawa Farmers' Co-operative Society Limited was subject to the Defendant's rights and interest over the suit property.
5. The respondent repeated the above averments in its counterclaim and further stated:
- “9C The Defendant further avers that conveyance of the entire L.R No. 71/7 (i) by Kahawa Farmers Co-operative Society Limited to the Plaintiff in blatant disregard of the rights of the Defendant is illegal and without any justifiable cause and hence untenable in law by virtue of the facts pleaded herein above.
- 9D It is the Defendant's case that the claim of the Plaintiff lacks bonafide(sic) in (i) that it has always been fully cognizant of the Defendant's rights and interest in the suit land and the Plaintiff's claim does not constitute that of an innocent purchaser for value and without notice.”
6. It was averred that consent of the Land Control Board was not necessary for the two transactions in view of the exemptions of the same by the President; that the respondent was in physical occupation of the land since 1975 without any disturbance or interference, and for all that it was prayed that judgment be entered on the counterclaim for a declaration that the respondent was entitled to be registered as proprietor of a portion of 154.5 and 21. 238 acres of the suit property in view of the agreements; that it be declared that the sale of 21.238 acres from Kahawa Farmers to the respondent was valid; that it be declared that Kahawa Farmers held the portion of 154.5 and 21.238 acres in trust for the respondent, and the conveyance of the suit property to the appellant absolutely was void; that an order be issued requiring the appellant to excise and transfer the said portions of 154.5 and 21. 238 acres from the suit property to the respondent, failing which the Registrar of the High Court be directed to execute the necessary documents to vest title to those portions of land to the respondent; that in the alternative the respondent be declared the rightful owner of the said portions of the suit property by virtue of the doctrine of adverse possession, and costs of the suit and other reliefs be given to the respondent.



- 40 interested parties filed a statement of defence and counter-claim where the appellant's claim was denied. They stated that they were bona fide purchasers or allottees for value without notice of the appellant's alleged proprietary interests in the suit property, stating that they had been in "open, uninterrupted, defiant and continuous occupation of the suit property for a period in excess of twenty-five years, and have since acquired good title by virtue of the doctrine of adverse possession against the plaintiff." They further stated that they had been allocated plots on the suit property by the respondent for value without notice of any anomalies and as such the appellant was estopped "... from raising those issues almost forty years later..." Stating that the suit was barred by laws of limitation, they prayed in the counter-claim that the suit be dismissed; that it be declared that they had acquired good titles to the suit properties by adverse possession; that it be declared that the appellant's title had been extinguished by *Limitation of Actions Act*; that it be directed that the appellant and the respondent forthwith issue titles to them, or in default the Registrar of the Court execute such documents of transfer, or in the alternative an order of indemnity be issued in their favour against the respondent as per notice they had filed.
7. The suit that had originally been filed at the High Court of Kenya at Nairobi passed through the hands of many Judges, some of who took evidence of various witnesses. It was in the course of time transferred to the Environment and Land Court ("ELC") where Komingoi, J. heard and concluded it.
 8. In his testimony before the Judge, James Mungai Wainaina, a resident of the suit property where he had resided since 1954, and who is a member of the appellant's cooperative society, adopted his witness statement which had been filed with the plaint. As we have said at the beginning, with time documents get lost or are misplaced – the witness statement is not in the record of appeal. He testified that the whole acreage of 415 of the land belonged to the appellant. According to him, efforts by the then Mayor of the City Council of Nairobi to acquire 154.5 acres to be excised from the suit property were resisted by members of the appellant. He admitted that the respondent had developed the suit property by erecting houses on it. He asked that the appellant's members be compensated for 154.5 acres that had been acquired by the respondent. In cross-examination, he stated that he had served as vice-chairman of the appellant and admitted that when the respondent entered the land and started developing it, neither he nor any other member of the appellant took any action to resist the said entry.
 9. Eliud Perminus Njoroge, who was the secretary of the appellant at the time of the trial, testified that upon assuming office he was handed over an inquiry report conducted by the Ministry of Cooperatives which emanates from transactions between Kahawa Farmers and the respondent after members of Kahawa Farmers had lodged a complaint about the running of its affairs. He and his committee had been mandated by their members to deal with the issue of excision of 2 parcels of land to the respondent (LR No. 71/7/1 measuring 154.5 acres and LR No. 71/7/10 measuring 21.97 acres) in 1973. He said:

"I do not know who was the chairperson/secretary/treasurer then. From the register of members, I am not able to confirm whether the officials who signed were the genuine office holders. Cooperation (sic) are about equity."
 10. He had been informed by unnamed members of the appellant that the members did not consent to sale of any land to the respondent. He admitted that he had records where the President had exempted



the transaction from the provisions of the [Land Control Act](#). According to him, the entire suit property had been transferred on 21st December, 1989 from Kahawa Farmers to the appellant:

“...By that time the city council of Nairobi had erected on (sic) estate in relation to 154.5 acres. This still the position. (sic) It is called Kahawa West Estate. ...”

11. According to him, moneys paid as per documents shown to him in respect of purchase price for the 2 parcels measuring 154.5 acres and 21.97 acres had been received by persons not authorized to receive them. Most of the original officials were dead. He did not know who the officials of Kahawa Farmers were when the 1973 agreement was signed; he admitted that the agreement was signed and sealed; “... the estate had been constructed and people were in occupation school, churches, sewerage etc. ...”
12. The third witness for the appellant was David Nyika, a licenced Land Surveyor, who was engaged in 2004 by the appellant and the respondent’s Chief Land Surveyor to determine which land the respondent was occupying. His findings were that the respondent was occupying L.R No. 71/1 measuring 154.5 acres (Kahawa West Estate/Village) contained in Survey Plan FR 133/14, and also occupied L.R No. 71/7/10 measuring 21.97 acres contained in Survey Plan FR 184/66 (Sewerage Works). The lands were subdivisions from the suit property.
13. That marked the close of the appellant’s case. The respondent called as a witness Stephen Gathuita Mwangi, its Chief Officer, Lands, who was also a Licenced Surveyor. He testified that the respondent bought from Kahawa Farmers 154.5 acres of land in 1973 for Kshs.135,000, which sum was paid in full. Part of that sum (Kshs.70,000) was paid to Agricultural Finance Corporation on instructions of Kahawa Farmers to offset an outstanding loan, and the balance (Kshs.65,000) paid to Kahawa Farmers. He produced documents to support those payments. He also produced an agreement dated 2nd January, 1973 between Kahawa Farmers and the respondent in respect of that sale. According to him, the subdivision in respect of 154.5 acres was done as per a Deed Plan No. 198427. He testified on the exemption of the transaction by the President from the provisions of the [Land Control Act](#). The respondent did not have a title to the subdivided land because the original title to the whole land had been misplaced or lost. According to him, the parcel comprising 21.238 acres was acquired by the respondent in 1979 for construction of a sewerage treatment plant. Kshs.435,000 was paid for that parcel and the respondent paid compensation to appellant’s members whose developments were affected when the parcel for the sewerage treatment plant was acquired. The respondent constructed about 600 house units which were sold to third parties and the land had been fully developed for a period of 45 years.
14. The 2nd witness for the respondent was Michael Njuguna Makindu, who had recorded a witness statement filed in Court on 17th November, 2011. He was the appellant’s Member No. 129 and had been a member of Kahawa Farmers, as was his mother. He and his mother were among 12 members who had been compensated by the respondent after their houses and crops had been affected when the respondent put up the sewerage treatment plant. Because he had a permanent house, he was paid Kshs.41,000 by the respondent and his mother, Wangari Makindu, was paid Kshs.9,900 for her semi-permanent house. According to him, Kahawa Farmers had sold the land to the respondent for construction of a sewer treatment plant. Kahawa Farmers was liquidated and the appellant registered in 1986 when he was elected Chairman (1999). He was aware of the suit in court and a consent was recorded giving 154.5 acres to the respondent (by the appellant). There were complaints by the appellant’s members that the respondent had taken more than the said acreage for the sewer treatment



plant; a surveyor was appointed who established that the respondent occupied 154.5 acres of land and 21.3 acres for the sewer treatment plant. He said:

“... I saw all the documents confirming the sale and called a meeting of the members to inform them and they were satisfied...”

15. The next witness was Isaac Njuguna, the Chief Valuer of the respondent, who knew about the 2 parcels of land, one measuring 154.5 acres comprising Kahawa West Estate and 21.97 acres for the sewerage treatment plant. On the former, the respondent had constructed 600 houses, some being 2 bedrooms and others 1 bedroom, which had been sold on a tenant purchase scheme; there was a public market comprising 250 stalls; there was Mahiga Primary School, a public playground, public administration offices, service roads, and infrastructure street lights. Phase 2 comprised 2000 serviced plots allocated to individuals, which had been built up by the time he testified before the Judge. Other developments were permanent houses, private schools, churches, residential flats, a petrol station, and commercial buildings. He estimated that there were 300,000 residents. A sewer had been constructed and was in use. He estimated the value of the developments at Kshs.10,000,000,000. Titles had not been issued to tenant/purchasers because of the litigation in Court; it was the respondent’s wish to process titles to the purchasers.
16. That marked the close of the respondent’s case. Komingoi, J. considered the case made out by both sides, and in the judgment delivered on 4th June, 2020, the Judge dismissed the appellant’s case and made the following findings and orders:
 - “(a) That a declaration is hereby issued that the defendant is pursuant to the sale agreements between itself and Kahawa Farmers’ Co-operative Society Limited entitled to be registered as proprietor of two portions measuring approximately 154.5 acres and 21.238 acres out of LR No. 71/7.
 - b. That a declaration is hereby issued that the sale transaction of 21.238 acres between the defendant and Kahawa Farmers’ Co-operative Society Limited between 1979 and 1981 is valid and that the defendant is entitled to be registered as the proprietor of the said portion out of LR No. 71/7.
 - c. That a declaration is hereby issued that Kahawa Farmers’ Co-operative Society Limited held the portions of 154.5 and 21.238 acres respectively in trust for the defendant and the conveyance of Land Reference No.71/7 to the plaintiff absolutely was void.
 - d. That an order is hereby issued compelling the plaintiff to excise and transfer the portions of 154.5 acres and 21.238 acres out of Land Reference No. 71/7 in occupation by the defendant to the defendant. In default the Deputy Registrar of the High Court is hereby directed to execute the necessary documents to vest to the portions of 154.5 acres and 21.238 acres in the Defendant.
 - e. That the defendant do have the costs of the suit and interest.”
17. It is those orders that have provoked this appeal through Memorandum of Appeal drawn for the appellant by its advocates, Paul Mwangi & Co., where 7 grounds of appeal (they are actually 6) are set out. The Judge is faulted for finding that the Sale Agreement dated 2nd January, 1973 was binding on the appellant “... whereas the appellant was an innocent purchaser for value without notice from the liquidator of Kahawa Farmers’ Co-operative Society”; that the Judge erred in law and fact by finding



that the Sale Agreement between Kahawa Farmers and the “1st” respondent survived the liquidation of Kahawa Farmers vide Gazette Notice No. 3864 by the Commissioner of Cooperatives; that the Judge erred in finding that the claim laid by the “1st” respondent on the Sale Agreement dated 2nd January, 1973 through defence and counterclaim dated 13th July, 1992 was valid despite expiry of the period of limitation of 12 years from the date of the sale agreement and the date of the claim; that the Judge erred in law and fact by finding that the Sale Agreement dated 2nd January, 1973 was valid despite:

- “ a) There being no minutes by the society to allow the sale of LR. 71/7 to the Defendant.
- b. There being no consent by the Commissioner sought to allow the alienation of the said property.
- c. The consent of the Land Control Board not being sought.
- d. The terms of the Agreement being onerous and the same entered into in return of a reward to accrue to the then official bearers.”

18. The appellant in further grounds of appeal faults the Judge for finding that the claim by the “1st” respondent on 21.238 acres through further amended defence and counterclaim was valid despite the expiry of the period of limitation of 12 years from the date of the alleged sale to the date of the claim. Finally, that the Judge erred in finding that an enforceable contract existed for the sale of 21.238 acres despite:

- “ (i) The fact that the sale was entered into by non- authorised officials.
- ii. The fact there was no resolution passed by the members on the alleged sale.
- iii. The fact that payments for the land were paid to strangers.”

19. For all that, we are asked to set aside the said judgment; enter judgment for the appellant as prayed in the plaint; award costs to the appellant and make such further orders as we may deem fit to grant.

20. When the appeal came up for hearing before us on 1st July, 2024, the appellant was represented by learned counsel Mr. Paul Mwangi, while the respondent was represented by learned counsel Mrs. Wanjiku Maina. There was no representative of the interested parties, and we allowed counsel to urge the appeal, being satisfied that the interested parties had been served with a hearing notice through their counsel on record.

21. In a highlight of written submissions, counsel for the appellant revisited the case where there was an agreement between Kahawa Farmers and the respondent’s predecessor for sale of 154 acres of land. According to counsel, the agreement was not completed and Kahawa Farmers went into liquidation; the entire suit land was sold by the official Liquidator, to the appellant. When a suit was filed by the appellant, the respondent filed a counter-claim making prayers that according to counsel, were time barred. Counsel submitted that once a claim is time barred a court loses jurisdiction to hear the case; that the court hearing the case should have returned the counter-claim. On the respondent’s counter-claim relating to adverse possession, counsel submitted that the claim could not be made as the wrong procedure had been used.

22. Mrs. Maina for the respondent did not agree. According to her, the respondent had bought the suit property in 1973, had constructed about 600 houses which it had sold to members of the public, there were schools, churches, a public market and a sewer plant constructed on about 21 acres of land. She submitted that there was evidence by Michael Njuguna, former chairman of the appellant, that 21



acres of land had been sold to the respondent in 1979 for the sewer to serve residents constructed in 1981. According to counsel, the issue whether the suit property had been sold to the respondent was not an issue in the trial court but was being introduced on appeal. Counsel submitted on the issue of limitation that the appellant in its plaint had sought eviction of the respondent from the entire 415 acres of the suit land; that the respondent in its defence pleaded that it only occupied part of the suit property; that it is the plaint that had been filed late, outside the time allowed by the *Limitation of Actions Act*. In further submissions, it was counsel's view that the 1973 agreement was valid, it was appropriately signed and sealed. On provisions of the *Co-operative Societies Act*, counsel submitted that the Act came into force in 2004, while the transaction subject of the suit was in 1978 and 1979, and those provisions were therefore inapplicable to the case before the trial court. Counsel submitted, in conclusion, that the litigation had taken many years, Kahawa West Estate had been sold out and was housing thousands of families.

23. Counsel for the appellant, in a rejoinder, submitted that there was no evidence on when time had began to run for purposes of limitation; that the parcel comprising 154 acres did not exist.
24. We have considered the whole record, submissions made and the law, and this is our determination of this appeal.
25. The grounds of appeal raised are related and run across.
26. The appellant faults the Judge for finding that the agreement dated 2nd January, 1973 was valid when, according to the appellant, it (the appellant) was an innocent purchaser for value without notice.
27. The agreement for sale dated 2nd January, 1973 was made between Kahawa Farmers' Cooperative Society Limited of the one part and City Council of Nairobi of the other part. It identified the parcel of land subject of the agreement as L.R No.71/7 (original Numebr 71/5/2) comprising 415 acres or thereabouts. It provided, inter alia, that the purchaser (the respondent) had agreed to purchase from the vendor (the appellant) 154.5 acres "or thereabouts" being part of the said parcel of land; that the land had not been fully surveyed to facilitate conveyance and the consideration was stated as Kshs.135,000. It is signed by officials of Kahawa Farmers under seal for the vendor and by the Deputy Mayor and Town Clerk of the respondent under seal.
28. In an affidavit at page 74 of the record, Bernard Kungu Maina, who describes himself as the chairman of the appellant, depones at paragraphs 4-6 (inclusive)
 - “ 4. That it is correct that the parties to the suit entered into a sale agreement whereby the plaintiff was to sell to the defendant 154.50 acres to exercised off L.R No. 71/7.
 5. That under clause 3 of the agreement the defendant was pending completion of the conveyance authorized to enter the land and do all manner of things necessary for the proposed development of L.R/71/7 as a housing estate provided that unless the parties agreed otherwise such activity would be confined to an area not exceeding 154.5 acres.
 6. That in the subsequent consent that was recorded in court it was expressly agreed and ordered that a formal survey of L.R No. 71/7 be undertaken with a view of sub-dividing the same into two portions of 154.50 acres in favour of the defendant and 260.50 acres in favour of the plaintiff.”



29. There is an affidavit of Edward Kibe Njau, who says that he was the Farm Manager of Kahawa Farmers and later Assistant Manager of the appellant from 1968 to 1983. He depones at paragraphs 3-9 (inclusive) of his affidavit sworn on 5th April, 2006:
3. “That it is true that in 1973, Kahawa Farmers Co-operative Society Limited received Ksh.135,000/= for the sale of L.R. No. 71/71/1 with an acreage of 154.5 acres.
 4. That I am the Edward Kibe mentioned under clause 4(iv) of the said Sale Agreement whose copy is attached in Mary Ngechi Ng’ethe’s supporting affidavit marked “MNN2” sworn on 7th November 2005.
 5. That around 1979, I was again actively involved in the transaction for the sale of Kahawa Sewerage and Treatment and I remember writing to the Nairobi City Council several times and holding several meetings with Council officials regarding the transaction.
 6. That I have seen the copies of the documents annexed to the affidavit of the Chief Valuer F. M. Muraa sworn on the 5th of April 2006 and confirm that I am the E. M. Kibe appearing on the annexures marked “FM1”, “FM2” and “FM4”.
 7. That the Kahawa Farmers Co-operative Society Limited sold 21.3 acres to the Nairobi City Council at a price of Kenya Shillings Twenty Thousand (Ksh.20,000/=) per acre and received Ksh.425,000/= in 1981.
 8. That I also recall that the City Council of Nairobi made further payments to individual members of the Co-operative Society being compensation for buildings that had to be demolished and premature crops that had to be removed to pave way for the construction of the sewer.
 3. That the current officials of Kamuthi Farmers Co-operative Society Limited who assumed office on 11th May 2004 are not entirely honest as regards the sewerage land as all the relevant documents are available both in their offices and at the Council offices and all the former officials are available.”
30. The witness statement by Stephen Gathuita Mwangi, who was the respondent’s Chief County Officer, Lands, as at 26th September, 2018 when he made the statement, recounted the whole history of how the respondent acquired the 154.5 acres and 21.238 acres. He attached all relevant documents to show how the lands were acquired and stated the reasons for lack of transfer of the same to the respondent as loss of the lead title, and later reluctance or refusal by the officials of the appellant who had come to office to effect transfer.
31. Then there were the documents produced in evidence to show the correspondence exchanged between Kahawa Farmers and the respondent and the minutes in respect of both parcels of land (154.5 acres and 21.238 acres).
32. The trial Judge analyzed all the pieces of evidence produced and found that the agreement dated 2nd January, 1973 was properly executed by the parties who made it; that there was no challenge to the fact that the President of Kenya had exempted the transaction and that involving 21.238 acres from the provisions of the *Land Control Act*; and that the full purchase price had been paid for both parcels of land. Of the second parcel (21.238 acres) the Judge held:
- “... DW2 who was an official of the plaintiff confirmed that there was such a transaction. He confirmed that he was among the members who were compensated for the developments



in the said portion. The plaintiff did not challenge this evidence. The defendant produced documents executed by the official of the Kahawa Farmers Cooperative Society Limited acknowledging receipt of the purchase price. The defendant's evidence that it had paid the full purchase price for the 21. 97 acres has not been challenged by the plaintiff....”

33. Upon consideration of all the material that was placed before the Judge by the parties, we are satisfied that Kahawa Farmers and the respondent entered into a valid sale agreement for sale of 154.5 acres of land to be excised from the original parcel of land.
34. Further evidence of this, if that be necessary, is the consent order recorded by Aluoch, J. on 29th November, 1993 (issued on 9th January, 1994) where the parties (the appellant and the respondent) agreed that the original parcel of land LR No. 71/7 be surveyed with a view of subdividing the same into two portions of 154. 50 acres in favour of the defendant (the respondent) and 260. 50 acres in favour of the plaintiff (appellant). It was further agreed that the parties appoint a surveyor to undertake the exercise; that costs of the surveyor be shared equally and:
- “ 4. That the 154.50 acres subdivision be on the portion that the Defendant has occupied and erected residential houses.
 5. That pending the subdivision the Defendant undertakes not to make any new plot allocations.
 6. ...”
35. Although this consent order was later set aside for stated reasons by Mbogholi Msagha, J. in a ruling delivered on 16th December, 2009, it is still part of the record and is a reflection of the parties' intentions in the matter where it was expressly agreed that the respondent had purchased 154.50 acres and was in occupation and was entitled to ownership of the same.
36. The parties thereafter entered into an agreement as evidenced by exchange of correspondence for sale to the respondent of 21.358 acres which was fully paid for as witnessed by two payments of Kshs.180,000 and Kshs.245,000, making in all the agreed purchase price of Kshs.425,000. We agree with the Judge that the 1973 agreement and the latter agreement were valid and enforceable by the respondent. The complaint by the appellant that it was an innocent purchaser for value without notice has no basis at all and is dismissed. The whole of the parcel of land measuring 154.5 acres was fully developed by the respondent, which had erected over 600 housing units immediately after acquiring the land in 1973 and the 21. 238 acres were fully developed where a sewerage treatment plant had been established, all before the appellant purportedly acquired the whole parcel of land comprising 415 acres in 1989. There was evidence of residential housing units on the ground, a school, a big catholic church, market stalls and other infrastructure and the appellant could not claim any innocence when all those structures were on the ground when it purportedly had the whole parcel of land transferred to it.
37. Having so found, we need not examine in any detail the appellant's complaint that the 1973 agreement was invalid despite liquidation of Kahawa Farmers. The Judge found, and we agree, that once the respondent had been put in possession by Kahawa Farmers a constructive trust had been created in favour of the respondent. This is how the Judge expressed herself on that issue at paragraph 43 of the judgment:
43. It is not in dispute that upon receiving the purchase price the Kahawa Farmers Cooperative Society Limited gave vacant possession to the defendant in respect of the two parcels. It is in evidence that in 1989, Kahawa Farmers Cooperative Society Limited transferred the entire LR No. 71/7 measuring 415 acres to the plaintiff without excising off the two portions to the



defendant. The defendant is neither a trespasser nor a licensee on the suit property as it was put in possession by Kahawa Farmers Cooperative Society Limited. In the case of Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] the Court of appeal stated thus:

“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman –vs Steadman* (1976) AC 536, 540. “if one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.”

38. We find, like the Judge, that Kahawa Farmers held the two parcels of land in trust for the respondent and the conveyance of the whole parcel of land to the appellant in 1989 was void for all purposes.
39. These findings dispose all the grounds of appeal.
40. We may say in passing that the appellant’s complaint in faulting the Judge for not finding that the counter-claim was time - barred by the laws of limitation has no place or basis at all. Firstly, this issue was not raised in the appellant’s reply to defence and defence to counter -claim; secondly it was not made one of the issues during the proceedings for the Judge to decide (*Odd Jobs vs. Mubea* [1970] E A 476); it was displaced by the fact that a constructive trust had arisen after the respondent was permitted openly to take possession, occupy and develop both parcels of land measuring respectively 154.50 acres and 21.238 acres. The appellant lost any claim or right to those lands in the circumstances.
41. The appellant finally faults the sale of the two parcels of land on grounds that there was no consent to transfer. As we have shown, the totality of the conduct of the parties, the transactions which were accompanied by acknowledged consideration, and the correspondence exchanged all proved that there were valid transactions involving the two parcels of land. The Gazette Notice No. 260 of 19th October, 1974 under the hand of Jomo Kenyatta, then President of Kenya, which exempted the controlled transactions from the provisions of the *Land Control Act*, was not challenged by the appellant at all. It exempted the proposed sale by Kahawa Farmers to the respondent of the suit lands. The President was authorized by section 24 of the said Act to give such exemption.
42. We find no merit in this appeal and hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR.

