



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obiero v Otwenya (Civil Appeal 145 of 2019)  
[2025] KECA 541 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 541 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 145 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
MARCH 21, 2025**

**BETWEEN**

**BARNABAS OYARO OBIERO ..... APPELLANT**

**AND**

**JOSEPH OMUSA OTWENYA ..... RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court at Kisii (Mutungi, J.)  
dated 20th March, 2019 in ELC Case No. 1252 of 2016 Formerly Kisii HCC No. 119 of 2007)*

**JUDGMENT**

1. The respondent herein filed a plaint dated 20<sup>th</sup> November, 2007, in Kisii Environment and Land Court Case No. 1252 of 2016 formerly Kisii High Court Case No. 119 of 2007, for a claim of breach of a sale agreement and/or adverse possession against Chude Ontumba who died on 14<sup>th</sup> January, 2008 (deceased) and the appellant. In the plaint, the respondent sought orders against the two jointly and severally for:
  - a. A declaration that the plaintiff is entitled to land parcel West Kitutu/Mwagichana/2548 by way of adverse possession or prescription.
  - b. An order of specific performance compelling the 2<sup>nd</sup> defendant to transfer the whole of the land parcel West Kitutu/Mwagichana/2548 to the plaintiff, in the event of default, the Executive Officer of this Honourable Court be empowered to execute the necessary papers to effect transfer.
  - c. Costs of the suit.
  - d. Any further relief this Honourable Court may deem fit and just to grant.



2. The respondent's claim as it emerges from his pleadings is as follows. The respondent and the deceased entered into a sale agreement dated 25<sup>th</sup> September, 1982, for a portion of 1.00 ha out of land parcel West Kitutu/Mwagichana/1. The purchase price was Kshs. 22,500/= . The respondent paid an initial deposit of Kshs. 22,200/= and cleared the balance of Kshs. 300/= on 12<sup>th</sup> October, 1982.
3. On or about 23<sup>rd</sup> December, the deceased, who was the original registered owner of the land parcel, sought and obtained consent to subdivide the said land parcel. The consent was duly granted but thereafter, the deceased declined to attend the subsequent Land Control Board meeting for consent to transfer the land parcel. This prompted the respondent to file suit Kisii HCCC No. 12 of 1996 against the deceased. The case was referred to arbitration by a council of elders and they returned a verdict in favour of the respondent.
4. The original land parcel was subdivided into three portions in 1982 namely: West Kitutu/Mwagichana/2547, West Kitutu/Mwagichana/2548 and West Kitutu/Mwagichana/2549. The respondent's portion was West Kitutu/Mwagichana/2548 (suit land). After the subdivision, he took possession of the suit land and has since built a house and also carries out farming activities thereon. At trial, the respondent maintained that since he took possession, he has had a quiet and uninterrupted occupation for over 25 years. However, the appellant contested the evidence of quiet possession. In any event, the respondent claimed that he had obtained good title by way of adverse possession or prescription.
5. The respondent claimed that when he sued the deceased in Kisii HCCC No. 12 of 1996, he fell ill immediately after; and later learnt that the deceased seized that opportunity to transfer the suit land to the 2<sup>nd</sup> defendant (the appellant herein).
6. In his statement of defence and counterclaim dated 10<sup>th</sup> December, 2007, the appellant denied the claims by respondent and averred that he is the registered owner of the suit land and has been in occupation thereof for the last 25 years. He also averred that the respondent started trespassing onto the suit land in February, 2007, and was warned to desist by the area administrators. However, as a result of the said trespass, the respondent deprived the appellant and altered the nature and use of the suit land, in total disregard of the appellant's right over it. Hence, he sought the following orders against the respondent:
  - a. A declaration that the 2<sup>nd</sup> defendant is the absolute owner of all that piece of land known as West Kitutu/Mwagichana/2548 and that the plaintiff is a mere trespasser therein.
  - b. That a permanent injunction do issue restraining the plaintiff, his servants and/or agents from cultivating, entering, trespassing, tilling and or doing anything in land parcel no. West Kitutu/Mwagichana/2548.
  - c. Costs of the suit.
7. During trial, the respondent reiterated the contents of his plaint and added that upon purchase of the suit land, the deceased showed him the boundaries of his portion. Further, he stated that of the three portions of the said land parcel, one portion was to be transferred to him (respondent), while another was to be transferred to one Beautah Nyangara; and the deceased was to remain with one portion.
8. He also testified that when he filed suit no. Kisii HCCC No. 12 of 1996, the court referred the matter to the D.O's office in Mososcho for arbitration by the clan elders and the decision was in his (respondent's) favour. Afterwards, the proceedings and decision of the arbitration was forwarded to the court on 4<sup>th</sup> December, 1996. However, in 2007, the appellant laid claim to the suit land and obtained title. It was then that he filed this suit against the deceased and the appellant.



9. The respondent called two witnesses, Beautah Nyagara (PW1) and Joshua Saisi (PW3).
10. PW1 testified that the respondent purchased the suit land from the deceased and it was on the upper side, whereas PW2's land (Plot No. 2549) was on the lower side. She further explained that the deceased retained the plot in the middle and sold part of it to the appellant. She reiterated that the respondent is in occupation of the suit land and has built a house thereon. She also stated that the appellant occupies the portion that the deceased sold him; and was categorical that he was not entitled to get title for the whole land incorporating the portion the deceased sold to the respondent.
11. PW2 testified that he was the one who drew and witnessed the sale agreement between the respondent and the deceased. He confirmed that the parties went to the suit land whereby the boundary of the respondent's portion was marked on the ground, and that the same has remained intact to date. He also reiterated that the respondent took possession of the suit land and has since developed it and remained in possession of it to date.
12. The appellant supported his defence and counterclaim and maintained that he purchased a portion of West Kitutu/Mwagichana/1, which was originally in the name of the deceased's father, one Ontumbi Siro. Thereafter, the deceased did succession and the portion (suit land) he bought was transferred to his (appellant's) name. Further, he stated that upon transfer of the suit property, he took possession and has been living thereon to date; and has even grown coffee and planted trees. However, several years later, the respondent lay claim to the suit land. Additionally, he denied being aware that the respondent bought the suit land in 1982 or that he has been in occupation thereof since 1982. However, he acknowledged that the respondent lodged a caution against the suit title before it was transferred in his name but that he did not know the circumstance thereof. Lastly he admitted being aware that the respondent had sued the deceased and the award was in favour of the respondent.
13. The appellant called one witness, Jane Nyachama, who was wife to the deceased. She confirmed that land parcel West Kitutu/Mwagichana/1 was subdivided into three portions but that the deceased had a sale agreement with the appellant. She denied knowing the respondent and whether he had a sale agreement with the deceased. However, she admitted that the respondent resided on what she called the appellant's portion of land; and that he has resided there for a long time.
14. In his decision, the learned trial judge found that there was indeed a sale agreement of the suit land between the respondent and the deceased, but the sale agreement did not receive the sanction of the Land Control Board to transfer the suit land as required under the *Land Control Act*; and the agreement was not enforceable in law by way of specific performance; That since the respondent honoured his part of the sale agreement by paying the purchase price in full, taking possession and utilizing his portion of land, the deceased held the suit land in trust for the respondent; that despite the deceased selling the same land to the appellant behind the respondent's back a constructive trust was created in favour of the respondent, and his possession was an overriding interest over the land that required no noting in the land register.
15. The learned judge also found that the respondent occupied the suit land from 1982 and by the time the deceased effected the transfer to the appellant in 2004, the deceased's title had become extinguished by reason of Limitations of Actions Act as the respondent was still in possession utilizing the suit land. Hence, the respondent's possession was without doubt adverse to the interest of the deceased. In other words, the deceased's title to the suit land having become extinguished, he had no interest in the land which he could have transferred to the appellant; and thus the transfer of the suit land to the appellant was not effectual and passed no interest, as it was subject to the respondent's overriding interest over the suit land. Ultimately, the learned trial judge held that, having been in possession and occupation of



the suit land for about 22 years prior to the transfer being made to the appellant, the respondent had acquired title over it by way of adverse possession and/or prescription.

16. Aggrieved by the decision of the High Court, the appellant filed a Notice of Appeal dated 3<sup>rd</sup> April, 2019, and a Memorandum of Appeal dated 24<sup>th</sup> July, 2019, in which he raised the following seven (7) grounds of appeal:
1. The learned trial judge erred in law and fact by not considering that upon the demise of the 1<sup>st</sup> defendant, substitution was necessary to give a fair and just hearing to both parties.
  2. The learned trial judge erred in law and fact by bringing into play irrelevant laws unnecessary to this suit when he had already found correctly that the contract between the plaintiff and the 1<sup>st</sup> defendant had become null and void under the relevant laws applicable.
  3. The learned trial judge erred in law and fact by punctuating a void contract into a valid one without relying on the plaintiff's evidence and/or without the plaintiff's application for extension of time.
  4. The learned trial judge misdirected himself in not considering that the 1<sup>st</sup> defendant filed a succession cause to inherit the suit land from Ontumbi Siro whereof the grant was issued and confirmed to him by the Honourable Court without the plaintiff filing an objection to the same.
  5. The learned trial judge failed to give consideration to the fact that the plaintiff after entering a land sale agreement with the 1<sup>st</sup> defendant, slept on his rights and never objected even when the 1<sup>st</sup> defendant went through all the necessary land processes to give rise to new titles.
  6. The learned trial judge erred in law and fact in not considering that this was purely a claim of adverse possession brought by way of plaint and not originating summons.
  7. The learned trial judge erred in law and in fact in not considering that after the contract between the plaintiff and the 1<sup>st</sup> defendant became null and void by statutory period, the 2<sup>nd</sup> defendant purchased for value the suit property free from encumbrances, and purchased the same in 1980 while the plaintiff purchased the same afterwards in 1982.
17. Consequently, the appellant prayed that the judgment and of the learned judge be set aside and substituted by a judgment dismissing the plaintiff's suit and entering a judgment in favour of the appellant (2<sup>nd</sup> defendant) as prayed for in the counter claim.
18. During the virtual hearing of the appeal, there was no appearance for both parties. However, since both parties had filed written submissions, the Court decided to give a judgment based on the written submissions
19. This is a first appeal. We are required to review issues of both facts and law afresh and come to our own independent conclusions.

We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123). In addition, this Court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs. Olenja* (1968) KLR 661).



20. We have carefully considered the appeal, the rival submissions of the parties in support of the opposing positions. We will now address them.
21. First and foremost, we take note that even though the appellant listed seven (7) grounds of appeal, his submissions alludes generally to three issues which are that: the respondent did not lead any evidence to prove that he indeed bought a portion measuring 1.00 ha out of West Kitutu/Mwagichana/1, and the sale agreement produced did not indicate the size he allegedly bought; the learned trial judge erred in finding that even though the sale agreement between the deceased and the respondent was void and unenforceable, the respondent was entitled to the suit land by reason of constructive trust; and, during the arbitration proceedings, the respondent testified that the suit land was sold to another party on or about 1993 and the deceased categorically denied ever receiving the full purchase price, thus he cancelled the agreement he had with the respondent.
22. On his part, the respondent simply submitted that the appellant's grounds of appeal did not raise any issue that could invalidate or otherwise put to question the well thought out and sound judgement of the trial court. According to the respondent, the learned trial judge properly analyzed and applied the law to reach its decision, which was premised on constitutional provisions and precedents from this Court. Thus, there was no material for this Court to consider. Consequently, he urged this Court to dismiss the appeal, uphold the judgment of the trial court, and award him costs for this suit and the court below.
23. As regards the first and second issues summarized in paragraph 21 above, we note that the record does not bear the sale agreement between the deceased and the respondent. Therefore, we cannot verify the said allegations by the appellant. It was incumbent upon the appellant to include all material from the trial in his Record of Appeal – but he failed to include a copy of the agreement whose actual text he wishes to rely on. The absence of the agreement can only be held against him. In any event, we agree with the learned trial judge that it is not in dispute that the deceased and the respondent entered into an agreement of sale. This fact has also not been disputed by the appellant herein who has submitted that the trial court correctly noted that the sale agreement became null and void.
24. The appellant has also submitted that the trial court noted that the said sale agreement became null and void after the lapse of six months from the date of agreement based on the fact that no consent for transfer was obtained from the Land Control Board after the subdivision of West Kitutu/Mwagichana/1. He, therefore, complains that the trial court somewhat gave life to a transaction it had already declared “null and void” and finds the trial court's reasoning in this regard legally problematic.
25. It is true that the trial court found and held that the sale agreement between the deceased and the respondent became void and unenforceable in law by way of specific performance due to the fact that it did not receive the sanction of the Land Control Board to transfer the suit land as required under the *Land Control Act*. Nevertheless, the trial court found that the respondent acquired legal title of the suit land as he paid the purchase price in full, took possession and utilized his portion of the land. Consequently, the deceased held the same in trust for the respondent;
26. It was the learned judge's view that in the circumstances thereof, a constructive trust was created in favour of the respondent, and his possession was an overriding interest over the land that required no noting in the land register. At the pertinent portion of the judgment, the learned Judge had the following to say:

“22. Thus, even though I have found there was an agreement for sale of land between the plaintiff and the 1<sup>st</sup> defendant, this agreement did not receive the sanction of the Land Control Board as required under the *Land Control Act*.



The agreement became null and void by operation of the law. The agreement would in the circumstances not be enforceable in law by way of specific performance. The intention however as between the 1<sup>st</sup> defendant and the plaintiff was that the 1<sup>st</sup> defendant would sell and the plaintiff would purchase the portion of land from the 1<sup>st</sup> defendant. The plaintiff honoured his part of the bargain by paying the agreed purchase price of kshs. 22,500/= in full. The 1<sup>st</sup> defendant on his part allowed the plaintiff to take possession and utilize the sold portion of land. It is evident that initially both parties were committed to the agreement but perhaps owing to passage of time, the 1<sup>st</sup> defendant became 'wiser' and opted to wriggle out of the agreement by selling the same land he had sold to the plaintiff to the 2<sup>nd</sup> defendant behind the plaintiff's back.

23. It is my view that once the plaintiff fulfilled his part of the agreement and was let into possession of the portion of land he had purchased from the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant henceforth held the portion of land in trust for the plaintiff. In the circumstances of the present case, a constructive trust was created in favour of the plaintiff. The possession by the plaintiff of the suit land was an overriding interest over the land that required no noting in the land register.

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26. The Court of Appeal Judges in the case of Willy Kimutai Kitilit (supra) while departing from the decision of the David Ole Tukai case (supra) and upholding the reasoning and holding in the Macharia Mwangi Maina case (supra) expressed themselves thus at paragraph 23 and 24 in the judgment:-

“ 23. The Land Control Act does not, unlike Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act save the operation of the doctrine of Constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrine of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrine of constructive trust and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.



24. There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of Clause 7 of the Transitional and Consequential provisions in the sixth schedule of the Constitution, the Land Control Act should be construed with the alterations, adaptations and exceptions necessary to bring it into conformity with the Constitution.”
27. It is a truism that the strict application of the provisions of the Land Control Act has at times resulted in occasioning injustice to parties particularly where vendors after receiving the purchase monies refuse to complete the transactions and/or offer for sale the same property to another party who agrees to pay more for the land. In such instances, the vendors usually resort to using the lack of consent of the Land Control Board to avoid the contract and hence back out of a contract that was otherwise perfectly valid. The Land Control Act, at times, has invariably been used as an instrument to perpetrate fraud. The Court of Appeal decision in the Macharia Mwangi (supra) case which the Court of Appeal sitting at Eldoret in Willy Kimutai Kitilit (supra) case agreed with, comes in handy to temper the adverse effects that the strict application of the provisions of the Land Act otherwise occasions to parties whose contract become void and unenforceable by reason of lack of consent of the Land Control Board.
28. In the instant suit on the evidence and the facts, I am satisfied that the plaintiff was let into possession of the suit land following the agreement of sale and payment of the purchase price. All that remained was for the parties to obtain the consent of the Land Control Board for the subdivision and transfer. Although consent for the subdivision was obtained no consent for transfer was obtained. The plaintiff remained in possession and effected developments on the suit premises. On the facts and evidence, a constructive trust was created in favour of the plaintiff such that the 1<sup>st</sup> defendant held title to the portion the plaintiff had purchased in trust for the plaintiff. The possession and occupation of the land by the plaintiff constituted an overriding interest within the provisions of Section 28 of the Land Registration Act, Cap 300 Laws of Kenya.
27. We completely agree with the learned Judge’s analysis of the case on both the facts and the law. Indeed, it is our view that the facts were not seriously contested. What was in question was whether the learned Judge was correct to apply the concept of constructive trust to rescue the respondent from the otherwise oppressive situation he would have found himself in on account of the provisions of the Land Control Act. As the learned Judge correctly observed, this Court has now spoken with authority



on that question in the Willy Kimutai Kitilit Case (supra). We happily affirm this Court’s holding in that case; and we find the present case to be on all fours with it.

28. How about the fact that the deceased had already transferred the suit land to the appellant? The learned Judge addressed the issue as follows:

29. Under Section 28 of the *Land Registration Act*, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law. The plaintiff occupied the suit land from 1982 and the evidence establishes that as at the time the 1<sup>st</sup> defendant effected the transfer of the suit land to the 2<sup>nd</sup> defendant in 2004, the plaintiff was still in possession. Other than the 1<sup>st</sup> defendant holding the land in trust for the plaintiff as at 2004, the 1<sup>st</sup> defendant’s title had as that time become extinguished by reason of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya. The plaintiff was utilizing the land as the owner thereof and his possession was without any doubt adverse to the interest of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant’s title to the suit land having become extinguished, he had no interest in the land which he could have transferred to the 2<sup>nd</sup> defendant. The transfer of LR No. West Kitutu/Mwagichana/2548 that the 1<sup>st</sup> defendant made to the 2<sup>nd</sup> defendant was not effectual and passed no interest. The transfer was subject to the plaintiff’s overriding interest over the suit property. The plaintiff had acquired title over the suit property by way of adverse possession and/or prescription having been in possession and occupation for about 22 years prior to the transfer being made to the 2<sup>nd</sup> defendant.”

29. we wholly agree with the reasoning of the learned Judge: the deceased no longer had good title to give; and, therefore, passed none to the appellant

30. Lastly, on the third issue that during the arbitration proceedings, the respondent testified that the suit land was sold to another party on or about 1993 and the deceased categorically denied ever receiving the full purchase price, thus he cancelled the agreement he had with the respondent. It is our considered view that the learned Judge properly analyzed the facts before him and concluded that there was an executed sale agreement between the respondent and the deceased. We have found nothing on the record to impugn that fact. Besides, we note that the arbitral proceedings were concluded in favour of the respondent which indicates that the fact finders disbelieved the deceased while they found sufficient evidence of the sale agreement between the respondent and the deceased. We further note that the deceased did not file an appeal against those findings; and the appellant cannot take up the case on his behalf long after he is deceased.

31. The upshot is that we find no basis for interfering with the judgment and order of the Environment and Land Court. Accordingly, we are satisfied that this appeal lacks merit. We hereby dismiss it with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

