Diasproperty Limited & 5 others v Githae & 10 others (Civil Appeal E155 & E157 of 2023 (Consolidated)) [2024] KECA 318 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 318 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E155 & E157 OF 2023 (CONSOLIDATED)

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MARCH 22, 2024

BETWEEN

DIASPROPERTY LIMITED ..... 1ST APPELLANT

SAMUEL THUITA MWANGI ..... 2ND APPELLANT

AND

JACK KAGUU GITHAE ..... 1ST RESPONDENT

JAMES MUGO KINGA ..... 2ND RESPONDENT

DANIEL NGATIA KINGA ..... 3RD RESPONDENT

HENRY WAITHAKA KINGA ..... 4TH RESPONDENT

CRISPIN MUCHERU KINGA ..... 5TH RESPONDENT

MICHAEL MAINA KINGA ..... 6TH RESPONDENT

STANLEY KINGA MWENDIA ..... 7TH RESPONDENT

MOSES KANYUTU MWENDIA ..... 8TH RESPONDENT

JOSEPH MWENDIA KINGA ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E157 OF 2023

BETWEEN

JAMES MUGO KINGA ..... 1ST APPELLANT

MICHAEL MAINA KINGA ..... 2ND APPELLANT

STANLEY KINGA MWENDIA ..... 3RD APPELLANT

MOSES KANYUTU MWENDIA ..... 4TH APPELLANT

AND

JACK KAGUU GITHAE ..... 1ST RESPONDENT

DIASPROPERTY LIMITED ..... 2ND RESPONDENT

SAMUEL THUITA MWANGI ..... 3RD RESPONDENT

(Being an Appeal from the judgment of the Environment and Land Court of Kenya at Nanyuki (K. Bor, J.) dated 3rd July 2023inELC No. 56 of 2021 (formerly Nyeri ELC No. 25 of 2020))

JUDGMENT

1. These two appeals, Civil Appeal No. E155 of 2023 and Civil Appeal No. E157 of 2023, arise from the judgment of the learned Kossy Bor, J. of the Environment and Land Court at Nanyuki that was delivered on 3rd July 2023. In the case leading to the judgment, the plaintiff was Jack Kaguu Githae and the defendants were James Mugo Kinga (1st defendant), Daniel Ngatia Kinga (2nd defendant), Henry Waithaka Kinga (3rd defendant), Crispin Mucheru Kinga (4th defendant), Michael Maina Kinga (5th defendant), Stanley Kinga Mwendia (6th defendant), Moses Kanyutu Mwendia (7th defendant), Joseph Mwendia Kinga (8th defendant) (all being sued as the administrator (1st defendant) and beneficiaries (the 2nd to 8th defendants) of the estate of the deceased Kinga Wamwendia), and Diasproperty Limited (9th defendant) and Samwel Thuita Mwangi (10th defendant) being the purchasers of the suit property..

2. In Civil Appeal No. E155 of 2023, the appellants are Diasproperty Limited (1st appellant) and Samwel Thuita Mwangi (2nd appellant) whereas the respondents are Jack Kaguu Githae (1st respondent), James Mugo Kinga (2nd respondent), Daniel Ngatia Kinga (3rd respondent), Henry Waithaka Kinga (4th respondent), Crispin Mucheru Kinga (5th respondent), Michael Maina Kinga (6th respondent), Stanley Kinga Mwendia (7th respondent), Moses Kanyutu Mwendia (8th respondent) and Joseph Mwendia Kinga (9th respondent). The 2nd respondent was sued as the administrator of the estate of the late Kinga Wamwendia, while the 3rd to 9th respondents were sued as the beneficiaries of the estate of the deceased Kinga Wamwendia.

3. In Civil Appeal No. E157 of 2023, the appellants were James Mugo Kinga (1st appellant), Michael Maina Kinga (2nd appellant), Stanley Kinga Mwenda (3rd appellant) and Moses Kanyutu Mwendia (4th appellant), and the respondents were Jack Kaguu Githae (1st respondent), Diasproperty Limited (2nd respondent) and Samwel Thuita Mwangi (2nd respondent).

4. Senior counsel Mr. Siganga and learned counsel Ms. Wambui Ng'ang'a appeared for Diasproperty Limited and Samwel Thuita Mwangi. Learned counsel Mr. Gikaria appeared for Jack Kaguu Githae and learned counsel Mr. Jessee Kariuki appeared for James Mugo Kinga, Michael Maina Kinga, Stanley Kinga Mwendia and Moses Kanyutu Mwendia. Counsel consented to having these two appeals heard together and for one decision to be rendered in respect thereof.

5. Consequently, and for ease of reference, the appellants shall be Diasproperty Limited (1st appellant), Samwel Thuita Mwangi (2nd appellant), James Mugo Kinga (3rd appellant), Michael Maina Kinga (4th appellant), Stanley Kinga Mwendia (5th appellant) and Moses Kanyutu Mwendia (6th appellant). Senior counsel Ms. Siganga and learned counsel Ms. Wambui Ng'ang'a represent the 1st and 2nd appellants and

learned counsel Mr. Jessse Kariuki represents the 3rd to 6th appellants. The respondent is Jack Kaguu Githae who is represented by learned counsel Mr. Gikaria.Daniel Ngatia Kinga, Henry Waithaka Kinga, Crispin Mucheru Kinga and Joseph Mwendia Kinga are all deceased.

6. The appellants were dissatisfied with the decision of the learned Judge who had declared that a constructive trust existed between the respondent and the estate of the deceased Kinga Wamwendia, whose administrator was the 3rd appellant and the beneficiaries included the 4th, 5th and 6th appellants. The trust was in respect of 200 acres being part of LR No. 11306 Ex-Moller Farm, situated in South West of Rumuruti Township, Grant No. IR 20579 (the suit property) by virtue of the deceased having sold the 200 acres to the respondent and placed him in possession and having received payments from the respondent on the understanding that he would convey the 200 acres to the respondent.

7. The trial court found that the 3rd appellant, being the administrator of the estate of the deceased Kinga Wamwendia, and while knowing that the deceased, his father, had sold 200 acres of the suit property to the respondent in 1986, had gone to a succession court in High Court Succession Cause No. 1711 of 2006 in Nairobi and obtained a grant of letters of administration, following which he had caused the entire suit property measuring 264 acres to be registered in his name jointly with his siblings, who included the 4th to 6th appellants. The 3rd to 6th appellants, and the other beneficiaries of the estate of the deceased, had on 22nd September 2011 sold the entire suit property for Kshs.9,500,000/= to the 1st and 2nd appellants. It was found that the 3rd appellant ought to have disclosed to the succession court that 200 acres of the suit property had already been sold by the deceased to the respondent who had been put in possession. Lastly, the trial court found that when the 1st and 2nd appellants were buying the suit property from the 3rd to 6th appellants, and others, they knew that the respondent was in possession, and had been cautioned against the purchase. Consequently, they were not innocent purchasers for value without notice as, in any case, there was a constructive trust in favour of the respondent over the 200 acres of the suit property.

8. The 1st and 2nd appellants grievances against the judgment and decree of the learned Judge is contained in the Memorandum of Appeal dated 14th August 2023 as follows:-

> " 1. The Learned Judge erred in both law and fact in finding that the 1st Respondent had successfully met the burden of proof and established his case before her. This resulted in the infringement of the Article 40 constitutional rights of the Appellants herein with respect to the land known as LR number 11306 delineated in Land Survey Plan number 80149 measuring 264 acres and engrossed in Grant number I.R 20579 under The *Registration of Titles Act*, Cap 281 of the Laws of Kenya (now repealed).
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> 2. The Learned Judge erred in law and fact by not properly recognising the jurisdiction of the Environment and Land Court compared to that of the High Court according to the *Law of Succession Act*, Chapter 160 of the Laws of Kenya in High Court at Nairobi, Succession Cause number 1711 of 2006-in the matter of the Estate of Kinga Wamwendia and the context of the dispute before her in light of the express injuncts of Articles 1(1), 2(1), 2(2), 2(4),3(1), 10(1)(a), 10(1)(b), 19(3)b), 19(3)(c), 20(1),20(2), 20(3), 20(4), 21(1), 40, 162(2)(b), 162(3) and most pertinently 165(6) of the *Constitution of Kenya*, 2010.
>
> 3. The Learned Judge erred in law and fact by not recognising and enforcing the provisions and safeguards outlined in the *Registration of Titles Act*, Chapter

281 of the Laws of Kenya (now repealed), the applicable registration law to the land known as LR number 11306 delineated in Land Survey Plan number 80149 measuring 264 acres and engrossed in Grant number I,R 20579 thereunder, with respect to the choses in action and inchoate transactions between the late Kinga Wamwendia (deceased) and the 1st Respondent herein on the first part and the Appellants on the other part.

4. The Learned Judge erred in law and fact in failing to apply and uphold the express provisions of Sections 70, 71, 80, 81, 82(e), 97, 98, 107, 108, 109, 110, 112, 116, 117, 119 and 144 the *Evidence Act*, Chapter 80 of the Laws of Kenya. This led to a reversal of the burden of proof from the 1st Respondent herein to the Appellants and their witnesses, concerning the following facts in issue: -

    a. Payment of the full purchase price by the 1st Respondent herein.

    b. Possession and occupation of the land in dispute by the 1st Respondent herein and his herbal clinic-SAMTECH,

    c. Eviction and disruption of the 1st Respondent herein and his herbal clinic- SAMTECH from and in the land in dispute.

    d. Occurrence of tribal clashes in the area within which the land in dispute is situated.

    e. Reasons, justifications and excuses given by the 1st Respondent herein for not vindicating his alleged rights to the land in dispute.

    f. Knowledge by the 1st Appellant herein of the alleged 1st Respondent's proprietary interest in the land in dispute.

    g. Alleged material non-disclosure and willful concealment of the alleged 1st Respondent's proprietary interest in the land in dispute by the 1st Appellant herein in the Succession proceedings within High Court at Nairobi, Succession Cause number 1711 of 2006 - in the matter of the Estate of Kinga Wamwendia.

    h. Alleged notification of Dr. Mugo, described by the 1st Respondent herein as a friend of the 10th Appellant herein, of the 1st Respondent's proprietary interest, in the land in dispute.

5. The Learned Judge erred in law and fact in making definitive findings and inferences on contested facts, which goes against the entirety of the presented evidence with respect to the following facts in issue and thus arrived at her impugned Judgment delivered and dated 3.7.2023:-

    a. Payment of the full purchase price by the 1st Respondent herein.

    b. Possession and occupation of the land in dispute by the 1st Respondent herein and his herbal clinic – Samtech.

    c. Eviction and disruption of the 1st Respondent herein and his herbal clinic- SAMTECH from and in the land in dispute.

    d. Occurrence of tribal clashes in the area within which the land in dispute is situated.

e. Reasons, justifications and excuses given by the 1st Respondent herein for not vindicating his alleged rights to the land in dispute.

f. Knowledge by the 1st Appellant herein of the alleged 1st Respondent's proprietary interest in the land in dispute.

g. Alleged material non-disclosure and willful concealment of the alleged 1st Respondent's proprietary interest in the land in dispute by the 1st Appellant herein in the Succession proceedings within High Court at Nairobi, Succession Cause Number 1711 of 2006-In the matter of the Estate of Kinga Wamwendia (deceased).

h. Alleged notification of Dr. Mugo, described by the 1st Respondent herein as a friend of the 10th Appellant herein, of the 1st Respondent's proprietary interest in the land in dispute.

6. The Learned Judge erred in law and fact in finding a constructive trust for 200 acres of the suit property without satisfying herself whether the requirements of a constructive trust had been met and declaring the 1st Respondent as the legal owner of the 200 acres without sufficient justification.

7. The Learned Judge erred in law and fact in deeming the purchase of the property by the 1st and 2nd Appellants as illegal, despite evidence showing an uncontested succession process and the absence of any inhibitions or cautions on the land.

8. The Learned Judge erred in law and fact in dismissing the counterclaim despite sufficient evidence supporting it and granting an injunction against the Appellants without objectively verifying the truth of the alleged trespass.

9. The Learned Judge erred in making an order for the transfer of land LR No. 11306 despite the plaintiff's inability to prove ownership, thereby contravening Order 21, rule 6 of the Civil Procedure Rules which mandates submission of a certified copy of the title for land potentially impacted by the judgment."

9. The Memorandum of Appeal for the 3rd to 6th appellants has the following grounds:-

"1. The Learned Judge erred in law in shifting the burden of proof to the Respondents to disapprove the Plaintiffs case by having a predisposition against the Respondents from the start of her analysis of the evidence and therefore had a bias to the prejudice of the Appellants and therefore made the wrong decision.

2. The Learned Judge erred in law and in fact in making presumptions and inferences in favour of the 1st Respondent herein as against the Respondents herein. The Learned Judge made a presumption and/or inference to the fact the 1st Appellant knew of the transaction between his deceased father Kinga Wamwendia and the 1st Respondent before the filing of the Nairobi Succession Cause Number 1711 of 2006, without any basis or credible evidence whatsoever and therefore made the wrong decision.

3. The Learned Judge erred in law and in fact in making a presumption that the 1st Appellant and the sister in-law to the 1st Appellant were using and living on the remaining 64 acres of the land and not the whole or any other part of the parcel of land without any basis and therefore made the wrong decision.

4. The Learned Judge erred in law and in fact in holding that the evidence of the Retired Chief, Chepkwony corroborated the evidence of the 1st Respondent having use and occupation of the suit land, whereas the said Chief categorically and specifically denied the Plaintiff had any possession of the land and that he had just known him when he visited the area to collect medicinal herbs and therefore made the wrong decision.

5. The Learned Judge erred in law and in fact in finding that the 1st Respondent was in occupation of the suit land whereas there is no evidence whatsoever of his eviction there from when the 2nd and 3rd Respondent took over possession of the suit land after the purchase thereof.

6. The learned Judge erred in law and in fat in making a conclusion that the 1st Respondent had paid the total purchase price due to the fact that the deceased Kinga Wamwendia was pursuing the subdivision of the land into two portions, whereas documentary evidence presented to court even by the 1st Respondent showed that a balance thereof remained unpaid and therefore made the wrong decision.

7. The Learned Judge erred in law and in fact in not finding any wrong doing on the part of the 1st Respondent herein in the whole process despite the fact that there was evidence of wrong documents of transfer purportedly signed by the Deceased Kinga Wamwendia. The Document Examiner concluded the signatures in the said documents were forged. Further, a purported Consent from the Laikipia District Land Control Board presented by the 1st Respondent was disowned by the Secretary to the said Board. The Learned Judge never considered this evidence or made any finding on the same and therefore made the wrong decision.

8. The Learned judge erred in law and in fact wherein or one had she held that the evidence of the Retired Chief Chepkwony was unreliable and could not be believed whereas on the other had the said evidence was taken to be a corroboration of the 1st Respondent's evidence and therefore made the wrong decision.

9. The Learned judge erred in law and in fact, by holding that, the deceased Kinga Wamwendia did not fulfill him part of bargain of subdividing the land and getting the necessary documents whereas at the same time the learned judge concluded that the same conduct of the deceased could be used to presume that he created a constructive trust in favour of the 1st Respondent which is inconsistent and contradictory and therefore made the wrong decision.

10. The Learned Judge erred in law and in fact in holding that all the evidence given by the 1st Respondent was not controverted whereas it was specifically controverted by statements of the Defendants' witnesses. Further, the fact that evidence is not controverted does not mean it is true and should have put to

further test and weighed against all the evidence and circumstances of the case and therefore the learned judge made a wrong decision.

11. The Learned Judge erred in law and in fact in disregarding clear provision of the statutes that were breached, and/or defaulted by the 1st Respondent and shifted the burden to the deceased Kinga Wamwendia for the breach and therefore made the wrong decision.

12. The Learned Judge erred in law in finding that there was a constructive trust in favour of the 1st Respondent whereas the facts of the case are distinguishable from all the precedents cited as at no time did the 1st Respondent hold possession and use of the property in dispute and therefore made the wrong decision.

13. The Learned Judge erred in law and in fact in overturning a decision of a court of a similar jurisdiction without following due process and gave orders to counter a determination already made by the High Court in Succession Cause Number 1711 of 2006 and therefore made the wrong decision.

14. The Learned Judge erred in law in holding that the 1st Respondent, as a Creditor to the estate of the deceased could not initiate a Probate and Administration Cause by himself and that the fact that the Probate and Administration Cause of the deceased Kinga Wamwendia was published in the Kenya Gazette was not relevant as the 1st Respondent did not object to the said process and therefore made the wrong decision.

15. The Learned Judge erred in law in issuing directives to the 1st Respondent to apply to revoke the grant in favour of the 1st Appellant which may be deemed to be an order directed against another court and therefore made the wrong decision.

16. The Learned Judge erred in law and in fact in dismissing the 2nd and 3rd Respondent's counter claim without first analyzing the evidence and documents provided and laying a basis thereof and made the wrong decision.

17. The learned judge erred in law and in fact in allowing the 1st Respondent claim and issuing orders that had not been specifically prayed for by the 1st Respondent and therefore made the wrong decision."

10. Our mandate as a first appellate Court is donated by Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 which commands that:-

> "(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
>
> (a) to re-appraise the evidence and to draw inferences of fact;"

This mandate was expressed in the decision in *Sumaria & Another v Allied Industries Limited* [2007]2 KLRI in the following terms:-

> "This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see *Peters v Sunday Post Ltd* [1958] EA 424, *Selle & Another v*

Associated Motor Boat Co. Ltd & Others [1968] EA 123 and *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] IKAR 278."

11. In *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* (*supra*), Hancox, J.A. said the following at page 292:-

> " A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."

12. The undisputed facts of this case were that the deceased, Kinga Wamwendia was the owner of LN 11306 Ex-Moller Farm situated in South West of Rumuruti Township in Laikipia, Grant No. IR 20579. This suit property measured 264 acres. The deceased had a loan of Kshs.315,539.10 with the Settlement Fund Trustees over the suit property. In the agreement dated 2nd July 1986, the respondent, Jack Kaguu Githae bought 200 acres of the suit property from the deceased. The purchase price was Kshs.600,000/=. The arrangement was that, as payment for the suit property, the respondent would pay the outstanding Kshs.315,539.10 owing to the Settlement Fund Trustees and then pay the balance of the Kshs.600,000/= to the deceased. The Kshs.315,539.10 was paid by the respondent to Settlement Fund Trustees and thus the loan was paid off in full. The respondent told the trial court that he completely paid what was due to the deceased, but according to the 3rd to 6th appellants the deceased was owned Kshs.38,000/= by the time he died on 13th October 1999. According to the signed agreement, the transaction was subject to the Laikipia Land Control Board consent. The deceased undertook to apply for the consent within three months. According to the 3rd to 6th appellants no consent had been obtained by the time the deceased died.

13. Lastly, the respondent was to be put into possession after paying the first instalment of Kshs.100,000/= of the purchase price. The instalment was paid. The respondent testified that he was put into possession, but the appellants denied this.

14. Following the death of the deceased, the 3rd appellant petitioned the High Court in Nairobi in Succession Cause No. 1711 of 2006 for the grant of letters of administration intestate, and listed himself, the 4th to 6th appellants, and others, as the beneficiaries. The suit property was listed as one of the properties of the deceased. The respondent was not made aware of the succession cause. When the grant was issued, and finally confirmed, the suit property moved from the deceased to the 3rd to 6th appellants and the other beneficiaries in the Assent registered on 15th July 2008 which was endorsed as entry No. 8 on Grant No. 2027.

15. It is not in dispute that in the sale agreement dated 22nd September 2011, the 3rd to 6th appellants, and others, sold the entire suit property to the 1st and 2nd appellants. It was the 1st and 2nd appellants' case before the trial court that, before entering into the agreement, they conducted due diligence, including visiting the land and making inquiries from the Local Chief Francis Kiprono Chepkwony, and were satisfied that the land was unoccupied. They also did a search at the Lands Office and confirmed that the title was not encumbered. According to the respondent, he had at all material times been in occupation of the suit land. The 1st and 2nd appellants paid Kshs.9,500,000/= for the suit property. Completion documents were signed following the consent of the Land Control Board. The vendors executed the instrument of transfer and the appellants paid the stamp duty. When they lodged the transfer documents they discovered that a caveat had been registered against the suit property in April 2012. In the meantime, the 1st and 2nd appellants had been put into possession by the 3rd to 6th appellants. They erected an electric fence around the suit property and begun to develop the property. By the time

of their testimony before the trial court, they claimed that they had spent upto Kshs.230,000,000/= towards the development of the suit property, the court was told.

16. On the contested matters, as shown in the foregoing, the respondent testified and called witnesses, as did the appellants. It was the respondent's evidence that he paid the full purchase price to the deceased, and that that was why at no time did the deceased write to indicate that there was any outstanding balance. The learned Judge noted that the last time that the deceased wrote to the respondent about the balance was on 11th May 1988. At the time, the balance was Kshs.61,460.90; that up to the time the deceased died there was no indication by the deceased to the respondent that any balance was outstanding. The Court noted that the deceased was doing everything to complete the transaction. According to the Court, this was evidence that all payment had been made. This is how the learned Judge went about the issue:-

> "86. Apart from the letter dated 11th May 1988 vide which the late Kinga confirmed the balance of the outstanding purchase price from the plaintiff at Kshs.61,468.90, there is no evidence to show that the late Kinga demanded any further sums from the plaintiff subsequent to that letter. If indeed the purchase price had not been paid in full by February 1989, then the late Kinga would have demanded the balance of the purchase price or mentioned that matter in his letter dated 16th February 1989 when he sought to know from Mr. Mwangi Kariuki Advocate what steps were outstanding for the finalization of the subdivision and transfer."

17. We have considered that the evidence of the 3rd to 6th appellants was that they did not know that the deceased had sold part of the suit property to the respondent, and that their evidence about the balance of the purchase price came from their perusal of the documents that the deceased had left. Against the sworn testimony by the respondent who was a party to the transaction, we find that the learned Judge was correct in her finding that the entire purchase price had been paid.

18. There was the question whether or not the respondent was put in possession of the 200 acres once he paid the deposit of Kshs.100,000/= as was required by the agreement. He testified that he was put in possession and begun to utilize the property. The 3rd to 6th appellants stated that the respondent was never in possession, and so testified the 2nd appellant who stated that his due diligence revealed that the property was vacant at the time he entered into the agreement to purchase it. There was no dispute that the respondent dealt in herbal medicine. He testified that he bought the 200 acres because of its dear and sentimental value, as a source for his herbal extracts; because of its unique agricultural and eco-tourism value; that the land had unique biodiversity habitat. He undertook agroforestry related activities on the said property, and dealt with local and international organizations in relation to the property. The evidence of possession was denied by the appellants. The 3rd appellant testified that between 1994 and 1997 he was farming on 5 acres of the suit property, and that his brother was keeping animals on the property. The 2nd appellant testified that before he bought the said property, he visited it and found it unoccupied. He made contact with the local chief Francis Kiprono Chepkwony who confirmed to him that the suit property was unoccupied. The record shows that Francis Kiprono Chepkwony testified at the instance of the 1st and 2nd appellants. He was the chief of the location in which the deceased owned the suit property. He knew the deceased, and stated that the deceased's daughter in-law (one Wanjiru Mwendia) was living in the farmhouse in the suit property. He noticed that certain varieties of trees were being uprooted and/or cut down and that the leaves were being taken away. He found out from Wanjiru Mwendia that the deceased had let part of the suit property to the respondent to harvest roots for preparation of herbal medicine. He was using workers to do

the harvesting. The chief ordered these workers to stop destroying the trees on the said property. He requested Wanjiru Mwendia to ask the respondent, whom he did not know at the time, to report to his office. The respondent failed to report. When cross-examined, the chief stated that he used to see the respondent go to the suit property for herbs.

19. The learned Judge found that the respondent had proved that, following the agreement, he immediately took possession of the 200 acres; that he remained in possession, using the property, throughout the period the deceased was alive; and that there was no time the deceased interfered with that possession. Senior counsel Mr. Siganga attacked these findings, and submitted that the respondent had failed to demonstrate how he was in possession of the property, and how he became to be dispossessed. Senior counsel submitted that there was no evidence as to possession and development by the respondent.

20. In the submission by learned counsel Jessee Kariuki for the 3rd to 6th appellants, and while relying on the decisions in *Munyu Maina v Hiram Gatuiha Maina* [2013]eKLR and *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others* [2015]eKLR, the respondent had failed to show that he took possession of the property, or that there was any time that he was in possession.

21. On our own reconsideration of the evidence, we agree with the learned Judge on the question of possession. It is quite clear to us that the evidence by the respondent as to possession found material support in the evidence of Francis Kiprono Chepkwony, the chief, who kept seeing the respondent and his workers come to the suit priority to extract herbs and other materials from there. The respondent is a herbalist and part of the reason he said he purchased the suit property was the natural medicinal herbs and roots that he could obtain from the land. The witness may have thought that the respondent and his works were mere intruders interfering with the deceased's property. He may have been told that the deceased had leased the suit property. The truth of the matter was that, the respondent was using the property in furtherance of the agreement he had entered into with the deceased. He was in possession of the suit property.

22. Did the agreement between the respondent and the deceased over the 200 acres receive the blessings of the Land Control Board under the Land Control Act? It was not in dispute that the consent of the Land Control Board was required to subdivide the suit property into two, for the respondent to be allocated his share of 200 acres, and thereafter the consent to transfer the 200 acres to the respondent. The first consent was, admittedly, obtained and the process to subdivide the title into LR No. 11306/1 and LR No. 11306/2 begun. Regarding the consent to transfer, the respondent called evidence to say that it was obtained, and produced a copy, but the appellants' case was that that was a forgery; that the consent was not obtained. The other aspect concerning the requirements of the *Land Control Act* was that, according to the appellants, the consents, if obtained, came long after the statutory period of 6 months. It was submitted on their behalf that the agreement between the respondent and the deceased was null and void because of the lack of consent to subdivide and transfer; consents that came late in the day. The respondent acknowledged this lateness, as he was seeking for extension of time. The appellants' case was that the only legal recourse for the respondent was to seek for the refund of the purchase price.

23. To us, the *Land Control Board* consent to transfer the 200 acres that came on 20th August 1997 was a late consent, according to the *Land Control Act*. Forged or not forged, is to us not an issue. Indeed, the trial Judge acknowledged that the parties by their own conduct did not abide by the timelines under their own agreement. This is what the learned Judge observed in the judgment:

> "89. It is not in dispute that the suit land was not subdivided to create the two portions,that is, the 200 acres which the Plaintiff was purchasing from

the late Kinga and the 64 acres was to retain. It is apparent that the late Kinga commenced the subdivision process but did not complete it. The letter dated 30/11/1987 from the Clerk of the Laikipia Council confirmed that the Council had no objection to the subdivision of LR No. 11306 into two portions. Kariuki Mwangi Advocate wrote to the Nyahururu District Settlement Officer on 4/3/1988 requesting him to forward the documents relating to LR No. 11306 sought by the Chief Accountant in the Ministry of Lands and Settlement. The letter was copied to both Kinga and the plaintiff.

90. On 16/2/1989, the late Kinga wrote to Mr. Kariuki Mwangi Advocates seeking to know if he had made up his mind as to the steps necessary for the finalization of the sub- division and transfer of LR No. 11306. The indent dated 7/2/1990 prepared on behalf of the Director of Surveys requested Mr. Omondi, a licensed Surveyor to clarify the position of the access road to the two plots so that the survey could be approved in relation to LR No. 11306/1-2. It indicated that plan number F/R209/62 representing the survey had been approved. The plaintiff produced the sketch plans representing the subdivision. Lucy Mwai Advocate wrote to John Miano on 4/6/1994 expressing concerns over the manner in which he had conducted the survey of LR No. 11306 in 1989 by failing to provide an access road and reducing the land by 2 acres."

It was evident, as found by the learned Judge, that up to the time of his death, the deceased was actively involved in making sure that the respondent gets the 200 acres transferred to him. But was the transaction null and void by the time?

24. The other argument that was put forth to us by Senior counsel Mr. Siganga and learned Counsel Mr. Jessee Kariuki was that the respondent was guilty of laches, and had slept on his rights for far too long and therefore could not make any claim to the 200 acres; that when he filed this claim he had been caught up by the *Limitation of Actions Act*. In rebuttal, it was argued on behalf of the respondent that his possession of the property, and the deceased's overall conduct over the same, constituted an overriding interest over the property, and created a presumptive and constructive trust in his favour; and that such constructive trust was not subject to the *Limitation of Actions Act*. Reference was made to the decision in *William Kipsoi Sigei v Kipkoech Arusei & Another* [2019]eKLR in which the Court of Appeal, while upholding the decision of the trial court, decided as follows:-

> " We come to the conclusion that in the circumstances of this case the equitable principles of constructive trust and proprietary estoppel were applicable and enforceable to land subject to the *Land Control Act*. We therefore agree with the learned Judge of the Environment and Land Court that despite the lack of the consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the Appellant and the 1st respondent."

25. Learned counsel Mr. Gikaria went on to submit that, once a constructive trust was created in favour of the respondent as a purchaser in respect of the 200 acres from the time he entered the land after buying it, that constructive trust became an overriding interest over the land and that the failure of the deceased to obtain the necessary Land Control Board consent within the stipulated time under the *Land Control Board Act* to enable the transfer of the land did not render the transaction void and unenforceable. Reliance was placed on the decision in *George Chaguya Aliaza v Zaphaniah Khisa Saul* [2022]KECA 583 (KLR).

26. Further, the respondent's counsel submitted that the Land Control Act was never intended to be an instrument for unjust enrichment, or meant to exempt a malafide vendor from his contractual obligation. (See *Kiplagat Kotut v Rose Jebor Kipngok* [2019]eKLR). The *Land Control Act* is not a statute aiding unconscionable conduct between the parties.

27. We have considered the evidence that was received by the trial court, the judgment and these rival submissions. We have found that the agreement was entered into in 1986 between the respondent and the deceased over the 200 acres; that the respondent paid the full purchase price; that the respondent was put into possession, and remained in possession all the time until the deceased died in 1999; that throughout this period the deceased endevoured to have the property transferred to the respondent, but had not succeeded by the time of his death; and that the respondent was in possession by that time the 1st and 2nd appellants were making inquiries from Francis Kiprono Chepkwony on whether the suit property was occupied.

28. We agree with the learned Judge that, given the evidence of Francis Kiprono Chepkwony, the contention by the 1st and 2nd appellants, and as submitted by senior counsel Mr. Siganga, that they were innocent buyers for value without notice was not true in the circumstances. It was quite clear that the respondent was all the time in occupation of the 200 acres that he had bought from the deceased. In reaching this decision, we are alive to the Supreme Court's decision in *Dina Management Limited v County Government of Mombasa & 5 Others* (Petition No. 8 (E010 of 2021) [2023] KES C 30 KLR, that was cited to us by the 1st and 2nd appellants' counsel, in which it was noted that for a party to successfully rely on the bona fide doctrine, he must prove that:-

    a. he holds a certificate of title;

    b. he purchased the property in good faith;

    c. he had no knowledge of the fraud;

    d. he purchased for valuable consideration;

    e. the vendor had apparent valid title;

    f. he purchased without notice of any fraud; and

    g. he was not party to the fraud.

29. In this case, we have found that at the time the 1st and 2nd appellants bought the suit property they knew that the respondent was in possession. The respondent's possession, we find, was an overriding interest on the land.

30. It was submitted to us that the 1st and 2nd appellants have a title over the suit property, and that such title is protected by sections 24, 25 and 26 of the *Land Registration Act*, 2012. First, the appellants' transfer was not registered as there was a caveat. They did not therefore acquire a title. Even then, any rights of a title holder are subject to overriding interests declared by section 28 of the *Act* as not requiring to be noted on the register. Under section 28(b) of the *Act*, trusts including, customary trusts, constitute an overriding interest. As was submitted by the senior counsel, the concept of trust has to be proved by the person seeking to rely on it to impeach a title. Reference was made to the decisions in *Mumo v Makau* [2002] IEA 170 and *Kanyi Muthiora v Maritha Nyokabi Muthiora*, NRB Court of Appeal Civil Appeal No. 19 of 1982. In these cases, it was reiterated that the law never implies, and the court never presumes, a trust unless it is a case of absolute necessity, and where, by the conduct of the parties, they intended to create a trust.

31. On the evidence, we agree with the learned Judge as held in the judgment as follows:-

> "105. By the time the 1st to 8th Defendants caused the transfer by Assent to be registered against the whole suit land on 15/7/208 as administrator and beneficiaries of the Estate of the late Kinga Wamwendia respectively, they were constructive trustees of the plaintiff and it would be unjust and inequitable to allow the 1st to 8th Defendants to retain and distribute or sell the 200 acres of land belonging to the plaintiff. Article 10 of the Constitution binds this court to apply equity as one of the values and principles of governance when applying or interpreting the Constitution or any law.
>
> 106. In *George Chaguya Aliaza v Zephania Khisa Saul* [2022] KECA 583 (KLR) whose facts are somewhat similar to this case where the live issue was the lack of LCB consent, Mumbi Ngugi, JA. observed that a constructive trust was created in favour of the purchaser in respect of the land from the time he entered the land after purchasing it. Her Ladyship added that it became an overriding interest over the land and that the failure by the vendor to obtain the necessary LCB consent within the period stipulated under the *Land Control Act* to enable the purchaser transfer the land to his name did not render the transaction void. Applying that reasoning here, the failure by the late Kinga to obtain LCB consent to subdivide the suit land and excise the 200 acres as well as the failure to obtain LCB consent to transfer the 200 acres comprised in LR No. 11306 to the plaintiff does not render the transaction between the plaintiff and the late Kinga unenforceable."

32. We hold that there was proof that, following the purchase and the occupation of the 200 acres by the respondent, as shown in the foregoing, a constructive trust over the portion was created in favour of the respondent. The constructive trust became an overriding interest over the land and the failure by the deceased to obtain the necessary Land Control Board consent within the time indicted under the *Land Control Act* did not render the transaction void and unenforceable. When we read the *Land Control Act* in terms of Article 10(2) of the *Constitution* we find that, the constructive trust that the learned Judge found that had been created by the facts of this case was the necessary equitable remedy to enable the respondent to obtain justice as against the unconscionable conduct of the appellants.

33. The last issue for our determination relates to the interplay between the jurisdiction of the Environment and Land Court and that of the High Court under the *Law of Succession Act* (Cap. 160). This issue arose in this case because, following the death of the deceased, the 3rd appellant filed Succession Cause No. 1711 of 2006 at Nairobi seeking the grant of letters of administration intestate in respect of his estate. The grant was issued and subsequently confirmed. The 3rd appellant had indicated that the suit property was one of the free properties of the deceased that was available for distribution among his beneficiaries. Following the grant, the 3rd, 4th, 5th and 6th appellants, and others, became the registered proprietors of the suit property. This is the property that they eventually sold to the 1st and 2nd appellants. It was submitted on behalf of the appellants that, the trial court had no jurisdiction to entertain the present claim by the respondent as the succession court had settled the issue of the suit property which it devolved to the beneficiaries of the deceased who then sold it to the 1st and 2nd appellants; that the trial court had found itself in this unfortunate situation and had been forced, in its trial orders, to direct that the respondent should go to the succession court and seek the revocation of the grant on the basis of its findings; and that, once the respondent wanted to lay claim to the 200

acres he was obliged to pursue the claim in the succession court, and not before the Environment and Land Court.

34. In the submissions by the learned counsel for the respondent, the trial court had powers under Article 162(2)(b) of the *Constitution* to deal with the questions raised between the parties herein, especially the questions regarding the ownership of the suit property and whether the respondent's claim to the 200 acres was enforceable in the circumstances. According to learned counsel, the succession court's jurisdiction was limited to ascertaining what assets were available to the estate, who the beneficiaries were and the mode of distribution to them.

35. We appreciate that a court of law can only deal with such matters that is allowed by the Constitution or statute. The Supreme Court of Kenya in *Samwel Kamau Macharia v Kenya Commercial Bank & 2 Others*, Civil Application No. 2 of 2011 expressed itself in the following terms:-

> " A court's jurisdiction flows form either the *Constitution* or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

36. Under Article 165(5)(b) of the *Constitution*, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of the *Constitution* and section 13 of the Environment and Land Court Act, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

37. It is notable that under Rule 43(1) of the *Probate and Administration Rules*, made under the *Law of Succession Act*, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with the *Constitution* and the *Environment and Land Court Act*, such a dispute has to be referred to the Environment and Land Court for resolution.

38. It was argued before us by the 1st and 2nd appellants' counsel that if the respondent had an interest in the deceased's land he ought to have presented himself before the succession court, and even sought the revocation of the grant once he learnt of the cause after the grant was confirmed. Reference was made to the decision of *In re Estate of Dominic Nandi Ernest (Deceased)*(Succession Appeal No. E004 of 2021 [2023] KEHC 2074 (KLR).

39. We have considered these arguments. In the first place, when the 3rd appellant approached the succession court he did not notify the respondent. On the evidence, it is clear to us that he knew of the respondent's claim to the land, based on the sale agreement with the deceased. Even assuming that he did not know, he went to the succession court on the basis that the suit property was the free property of the deceased. It turns out that that was not the case. Even if the respondent had become aware that the 3rd appellant had filed the succession cause, what would have been open to him would have been to lodge a claim in the cause as a creditor to the estate of the deceased. And since his claim was disputed by the 3rd appellant ad his siblings, the succession court would have had no jurisdiction to hear and determine the claim. It would have asked the respondent to file a suit in Environment and Land Court to have the claim determined there. In the meantime, it would have adjourned the confirmation of the grant to allow for such determination. The result of such determination would then have formed the basis of the distribution of the estate of the deceased to the beneficiaries. As matters stand, we find, that procedure was not followed owing to the fact that the 3rd appellant concealed the fact of the succession

proceedings from the respondent. But now, the Environment and Land Court has determined that the deceased held the 200 acres in trust for the respondent.

40. For good measure, the Environment and Land Court has deferred to the jurisdiction of the High Court in the succession cause and that is why it has asked the respondent to take the determination to that court in an application for revocation under section 76 of the *Law of Succession Act* because clearly, as we have found in upholding the decision of the learned judge, there was material non-disclosure and concealment of the true ownership of the suit property when the list of the properties that belong to the estate of the deceased was presented to the succession court. to have the deceased's estate re-distributed in accordance with the determination. In other words, we find nothing wrong with the decision of the learned Judge in this dispute.

41. One cannot argue that the dispute over the 200 acres is *res judiciata*. This is because, as was decided by the Supreme Court of Kenya in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another* [2016]eKLR, where the issue of *res judicata* is raised, the court ought to look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case, and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same or litigating under the same title; and whether the previous case was determined on merits by a court of competent jurisdiction.

42. In the instant matter, the question of the ownership of the 200 acres was not before the succession court; and the succession court could not competently deal with the question because it lacked jurisdiction.

43. In the final analysis, we determine that the two appeals (Civil Appeal No. E155 of 2023 and Civil Appeal No. E157 of 2023) have no merits, and each is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF MARCH 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original.

signed

DEPUTY REGISTRAR