Kabui v Kabui (Civil Appeal 415 of 2018)
[2024] KECA 1396 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1396 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 415 OF 2018

SG KAIRU, S OLE KANTAI & PM GACHOKA, JJA

OCTOBER 11, 2024

BETWEEN

GEORGE MWAURA KABUI ..... APPELLANT

AND

CATHERINE MUTHONI KABUI ..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) delivered on 30th August 2018 in ELC No. 1032 of 2003.)

JUDGMENT

1. Central to the issue before us is the question of ownership over one acre excised from all that parcel of land namely L.R. No. Chania/Kanyoni/2088. Both laying credence as to ownership, it was therefore incumbent on the parties to establish that on a balance of probabilities, one was the lawful proprietor of that piece of land. The court was thus tasked to determine with the evidence adduced before it, who should be declared its proprietor.

2. To contextualize the appeal, we shall give a background to the dispute, albeit in summary. By plaint amended on 22nd May 2014, the respondent contended that she is the registered proprietor of all that parcel of land namely L.R. No. Chania/Kanyoni/2088 measuring 1.945 Ha. She averred that the property was registered in her name in 1987 under the Registered *Land Act* regime (now repealed).

3. It was further averred in the amended plaint that in 1990, the respondent entered into a sale agreement with the appellant to sell one acre of the parcel of land (to be excised from L.R. No. Chania/Kanyoni 2088) for a sum of Kshs. 70,000.00. On agreement, the respondent received a sum of Kshs. 40,000.00 and in exchange, the appellant was given vacant possession of the one- acre.

4. The respondent further averred that the parties agreed that on settlement of the balance of the purchase price, the respondent would transfer the said one acre to the appellant. However, the said sum remains due and owing to date. It is for this reason that the respondent opined that in the circumstances, the

agreement was rendered moot. In addition, the transaction was frustrated on account of the fact that there was no consent obtained from the Land Control Board.

5. In light of the foregoing, the respondent sought a declaratory order that the land belonged to her in its entirety, a declaration that the sale agreement entered between the parties was null and void, an order for eviction of the appellant and a refund of the sum of Kshs. 40,000.00 to him as well as costs.

6. Disputing the claim in its entirety, the appellant filed its statement of defence and counterclaim amended on 12th June 2014. He acknowledged that indeed parties entered into a sale agreement for the purchase of one acre of the parcel of land namely Chania/Kanyoni/2088. However, his evidence was that he had paid the full purchase price sum of Kshs. 70,000.00. In fact, following the settlement of this sum, the parties herein appeared before the Gatundu Land Control Board on 7th June 1990. It is on this day that they were granted the necessary consent. He added that the respondent was not entitled to the orders sought as he had been in occupation of the one acre of land since 1990.

7. Finally, the appellant advanced that the suit was statutory barred by dint of section 4 (1) (a) of the *Limitation of Actions Act*. He thus prayed that the respondent's suit be dismissed with costs. He further prayed for a declaratory order that he was entitled to one acre of all that parcel of land namely Chania/Kanyoni/2088. As such, he urged the trial court to compel the respondent to transfer the said parcel of land to him. Alternatively, the appellant prayed for a refund of the purchase price in the sum of Kshs. 70,000.00 with interest from the date of the agreement plus compensation for the improvements carried out on the said parcel of land.

8. In her judgment dated August 30, 2018, Bor, J. held as follows:

> " The issue for determination is whether the court should grant the orders sought in the amended plaint or those sought in the Amended Defence and counterclaim.
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> Ordinarily it would be the owner of the land applying for consent to subdivide the land from the land control board. On obtaining the consent the owner undertakes subdivision of the land and gets the mutation forms from the surveyor which are then presented for registration and issuance of new titles for the subdivided portions. Subsequently, the owner seeks consent to transfer the newly created portions. There is no evidence that the Plaintiff carried out these processes. It is not clear why the Defendant got the consideration indicated as at
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> Kshs. 25,000/= yet the purchase price was Kshs. 70,000.00 out of which he paid Kshs. 40,000/=.
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> The sale agreement was oral. The Defendant did not produce evidence to show that he paid the full purchase price of Kshs. 70,000/=. The court prefers the evidence of the Plaintiff that after paying the deposit of Kshs. 40,000/= to the Plaintiff, the Defendant failed to pay the balance of the purchase price. In his submissions, the Defendant states that he proved his case for adverse possession. The Plaintiff's evidence is that she allowed the Defendant to take possession of the Suit Property pursuant to the oral agreement after he had paid the deposit of 40,000/= in 1990. The court also believes the Plaintiff's evidence that she did not obtain the consent from the Land Control Board to transfer the Suit Property to the Defendant.
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> The court finds that the Suit Property belongs to the Plaintiff. An order of eviction is issued against the Defendant who is required to vacate the Suit Property within six months. The Plaintiff will refund the sum of Kshs. 40,000/= paid by the Defendant as a deposit together

with interest to be calculated at court rates from 1/6/1990 until payment in full. The counterclaim is dismissed. The Plaintiff will have the costs of the suit and the counterclaim."

9. The appellant is aggrieved by those findings. He filed his notice of appeal dated 7th September 2018. The appellant also filed his memorandum of appeal dated 9th November 2018 that raised 15 grounds impugning the findings of the learned judge. In summation, the appellant disputed those findings on the following grounds: the learned judge disregarded the evidence of the chairman of the Gatundu Land Control Board as well as the documentary evidence emerging from the Land Control Board; the trial court ignored his oral testimony to the extent that he had fully paid the purchase price; the mutation form was ignored; the learned judge improperly failed to award compensation on account of the developments the appellant made to the property; the learned judge failed to take into consideration that the current market value of the suit property had since escalated; the respondent had failed to prove her case on a balance of probabilities; the trial court dismissed his counterclaim without reason; the respondent rescinded the contract and was therefore the one in breach of the agreement. Therefore, the learned judge erred in finding him in breach of the contract; and the learned judge failed to consider the appellant's evidence in totality, his written submissions and authorities cited thereto.

10. In the premised circumstances, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court.

    He also urged this Court to allow his counterclaim as prayed and further prayed for costs at trial and in this appeal.

11. When this appeal was heard virtually on 15th May 2024, learned counsel Mr. Farah together with learned counsel Miss Kiombe informed the Court that they were representing the appellant while the respondent was represented by learned counsel Mr. Ongengu. Parties highlighted their respective diametrically opposed written submissions.

12. The appellant relied on his written submissions dated 12th February 2024. He also relied on a list and bundle of authorities similarly dated. He submitted that upon payment of the full purchase price, a constructive trust was created in his favor until such a time subdivision of the property took place. He argued that since possession in 1995, without any interruptions that was actual and continuous, he held an overriding interest over the parcel of land. He constructed his matrimonial home where he has lived with his family for more than 12 years. That an inference could be drawn that he paid the full purchase price and the appellant could not renege on those facts. In his view, the respondent would not have subdivided the parcel of land if the purchase price had not been paid.

13. On whether consent was obtained from the Land Control Board, learned counsel for the appellant submitted in the affirmative. The appellant relied on his bundle of documents to fortify this submission. He accused the respondent of attempting to void the contract by not applying for consent from the Land Control Board since the provisions of the *Land Control Act* would take effect and void the transaction. That the respondent ought to have applied to subdivide the parcel of land upon obtaining the title deed in 1997.

14. On the accusations of fraud laid out against him, the appellant submitted that the respondent failed to plead and prove particulars of fraud. She could not therefore succeed in that claim. The appellant questioned the intentions of the respondent to rescind a contract 13 years later. Be that as it may, since the contract was not reduced into writing, no parameters had been set out to invoke rescission. He submitted that the doctrine of equitable estoppel had arisen and his claim was thus merited. He urged this Court to allow the appeal.

15. The respondent filed her written submissions and case digest both dated 9th May 2024 to oppose the appeal. She submitted that by dint of section 26 of the *Land Registration Act*, she was the lawful and registered proprietor of all that parcel of land namely Chania/Kanyoni/2088. She relied on her evidence at trial and the findings therein to advance that she had proved on a preponderance of the evidence adduced, that judgment ought to and was entered in her favor. She also stated that the evidence of the appellant was marred with irregularities and falsities and was therefore unreliable.

16. The respondent justified that it was well within her rights to rescind the contract because the respondent had failed, refused and/or neglected to honor his financial obligations. She made several follow ups and demands to the appellant but all fell on deaf ears. She pointed out the issue of fraud by relying on annexures to the appellant's affidavits both dated 13/03/2006 to wit the appellant attached two letters of consent bearing opposed serial numbers. Ultimately, the respondent urged this Court to dismiss the appeal with costs.

17. We have considered the parties' rival submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

18. In order to formulate the issues for determination, it is important that we lay out a background abridgment of the facts as per the record before us. The parties both called one witness to support their cases.

19. The respondent PW1 testified that she is the lawful and registered proprietor of all that parcel of land namely L.R No. Chania/Kanyoni/2088 (originally Chania/Kanyoni/1149) since 1987. She explained its origins by stating that the said L.R. No. Chania/Kanyoni/1149 was subdivided into two plots in 1997 namely L.R. No. Chania/Kanyoni/2088 and L.R. No. Chania/Kanyoni/2089. The property namely L.R. No. Chania/Kanyoni/2088 is registered under the aegis of the Registered *Land Act* (now repealed) measuring approximately 1.945 Ha. The title deed was issued on 15th December 1997.

20. In 1990, the respondent entered into a sale agreement with the appellant to sell one acre of the parcel of land for a sum of Kshs. 70,000.00. On agreement, the respondent received a sum of Kshs. 40,000.00 and in exchange, the appellant was given vacant possession. The appellant occupied the said parcel of land by cultivating it.

21. She added that it was further agreed that on settlement of the balance of the purchase price, the respondent would transfer the said one acre to the appellant's favor. However, the said sum remains due and owing to date. As a result of this breach, the respondent has not transferred the suit land in favor of the appellant which remains registered in her name. Furthermore, she proceeded to rescind the contract on 18th September 2003 since she had not been paid for more than ten years.

22. The respondent lamented that instead of vacating the suit premises, the appellant continued to occupy the same and even erected structures on it. She denied that they appeared before the Land Control Board. She further challenged the application for consent as lacking veracity for it was neither dated nor signed. She however admitted that the ID number captured therein was hers. Flowing from the above, the letter of consent adduced in evidence was obtained fraudulently and could not compel her to transfer the said portion of the suit land. Be that as it may, the said consent had expired by effluxion of time.

23. She further questioned the reputability of the letter of consent for alleging that the consideration sum was Kshs. 25,000.00 yet the parties had agreed on a sale price of Kshs. 70,000.00. She further denied that the signatures embedded in the transfer of undivided shares belonged to her. In fact, she was emphatic that the document was manufactured through fraudulent means.

24. In support of her claim, she produced the title deed registered in her name, an official search dated 11th April 2003 confirming that she is the registered proprietor, the demand letter dated 18th September 2003 and the Chania location map together with an official receipt thereof.

25. On the part of the appellant, he testified that the respondent and her husband approached him to sell one acre of the parcel of land emanating from L.R. No. Chania/Kanyoni/2088. He entered into an agreement with the respondent who agreed to sell it for a sum of Kshs. 70,000.00. He paid the sum of Kshs. 40,000.00 with the balance of Kshs. 30,000.00 being agreed to be paid upon survey for subdivision.

26. It was his further evidence that in 1995, the property was surveyed whereupon he paid the balance of Kshs. 30,000.00. Based on the principle of trust, the appellant constructed on the suit property with the expectation that the same would be transferred to him in due course. Following the completion of the residential house, the appellant moved in with his family in 1996 and has remained in possession of the suit property to date. He then discovered that the respondent filed suit in 2003.

27. In support of his claim, the appellant adduced an undated application for consent to subdivide the parcel of land into two plots, a letter of consent dated 7th June 1990, a transfer of undivided share whose date is illegible, the green card in respect to the suit land and the mutation form dated 7th September 1995. He admitted that the letter of consent indicated that the sale price was Kshs. 25,000.00.

28. As stated earlier on in this judgment, parties herein are at loggerheads as to who is the rightful and lawful proprietor of an acre of land hived out of all that parcel of land namely Chania/Kanyoni/2088. The main issue for determination thus is whether the learned judge arrived at a just and correct decision in declaring that the respondent is the owner of that portion of the suit land.

29. Section 26 (1) of the *Land Registration Act* CAP 300 provides that the certificate of title issued upon registration shall be taken as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner. However, that title deed can be challenged if it is demonstrated that it was obtained through fraud, misrepresentation, illegality, unprocedurally or by way of a corrupt scheme.

30. It is not disputed that the respondent is the registered proprietor of all that parcel of land namely L.R. No. Chania/Kanyoni/2088. The same was morphed out from a subdivision of L.R. No. Chania/Kanyoni/1149 into two plots namely L.R. No. Chania/Kanyoni/2088 and L.R. No. Chania/Kanyoni/2089. It is also not denied that sometime in 1990, parties entered into a mutually agreed oral contract for the sale of one acre of the said parcel of land. It is acceded to by both parties that the consideration sum was agreed at Kshs. 70,000.00 with Kshs. 40,000.00 being paid at the onset; notwithstanding the fact that no documentary evidence supported the same. It is that settlement of the initial sum that granted the appellant access to occupy that one portion.

31. The disaccord however lies in the actions that led up to the letter dated 18th September 2003 where the respondent rescinded the contract. The appellant purported to suggest that firstly, he had settled the full purchase price and by virtue of fulfilling his obligations, a constructive trust had arisen in his favor. Therefore, the respondent was under an obligation to secure his interest.

32. Before delving into the issues, it is important to point out that the parties herein relied on the oral agreement mutually entered into by the parties to enforce the rights they each coaxed upon the trial

court that they had acquired in 1990. Section 3 (3) of the *Law of Contract Act* No. 21 of 1990, the statute operational at the time parties entered into the agreement, provided as follows:

i. Has in part performance of the contract taken possession of the property or any part thereof; or

ii. Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

33. Although not disputed, it is important to clarify that though the law has since incorporated that contracts for the disposition of land must be reduced into writing, it was previously and expressly stated by law that oral contracts did not defeat the institution of a claim by virtue of them not being reduced in writing.

34. We also note that the parties did not canvass the issue of the limitation of time as provided in section 4 (1) (a) of the *Limitation of Actions Act*. It also did not form part of the grounds of appeal. We shall therefore not analyze the said issue.

35. The main issue for determination is who is the rightful owner of the disputed parcel of land. It is agreed between the parties that there was no written agreement. It is also common ground that the purchase price was Kshs. 70,000.00. The respondent admits receiving Kshs. 40,000.00 but denies receiving the balance of the Kshs. 30,000.00. It is also agreed by the parties that upon receiving the sum of Kshs. 40,000.00, the respondent allowed the appellant to move into the property and that he has constructed and resided on the land since the year 1990. The elephant in the room is whether the appellant paid the full purchase and if so whether a constructive trust arises in the circumstances.

36. Moving on to the issues for determination, the definition of a constructive trust was at length demystified by this Court in Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, where it was held:

" According to the Black's Law Dictionary, 9th Edition; a trust is defined as:

" 1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...

...Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them inrelation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage

> of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled. This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

37. Our apex Court in the case of Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) also weighed in on this matter as follows:

> "The *Trustee Act* defined a "trust" and "trustee" as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law...
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> A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit."

38. The appellant's claim firstly lies on the fact that he fulfilled his financial obligations having settled the full purchase price; a fact that is vehemently opposed by the respondent. In fact, the respondent maintained that she made several demands over the years to the appellant for settlement of the balance of Kshs. 30,000.00. Regrettably, none of the parties adduced documentary evidence to either prove or disprove these allegations. For this reason, whether the appellant did indeed settle the full purchase price will have to be corroborated by the conduct of the parties herein.

39. Firstly, it has not been established with credible evidence that demands were made to the appellant. The respondent merely states in evidence that she indeed demanded the settlement of the balance. If indeed the balance of the purchase price remained due and owing, one wonders why the respondent took 13 years to institute a claim and purport to rescind the contract again only 13 years later. It would have been incumbent on the respondent to enforce her interests, safeguard her rights and move with speed. It is also significant that save for that demand that was done 13 years later, the appellant had peacefully resided on the parcel of land. In a situation like this where a court has to weigh the evidence of the parties, such a fact cannot be ignored.

40. In support of his claim, the appellant adduced inter alia an undated application for consent to subdivide the parcel of land into two plots, a letter of consent dated 7th June 1990, a transfer of undivided share whose date is illegible and the mutation form dated 7th September 1995. He admitted that the letter of consent indicated, erroneously, that the sale price was Kshs. 25,000.00.

41. Observing those documents, we note that indeed the application for consent to subdivide the parcel of land into two plots was undated and unsigned. However, the application sought to divide the property between the parties: the respondent was to have 4.12 acres while the appellant was to obtain 1.00 acres out of the 5.12 acres of the property.

42. The letter of consent dated 7th June 1990 made reference to an application dated 17th May 1990. According to the consent, by meeting held on 7th June 1990, the property, namely Chania/Kanyoni/1149, was transferred and divided into two parcels measuring 4.12 acres and 1.00 acres for a consideration sum of Kshs. 25,000.00.

43. The appellant also relied on a transfer of undivided shares document which divided for transfer, the property namely L.R. No. Chania/Kanyoni/1149 into two plots measuring 4.12 acres and 1.00 acres. It was executed by both the transferor and transferee; that is the respondent and the appellant respectively. There is also a mutation form in respect to L.R. No. Chania/Kanyoni/1149 dividing the property into two plots: 'A' measuring 0.40 and 'B' measuring 1.61. It is dated 7th September 1995 and has an annexed sketch map.

44. The respondent raised several objections regarding the authenticity of these documents. However, none of them were countermanded as to demonstrate that the appellant's documents had been forged.

45. While certain aspects of the documents could not be explained such as the consideration sum and the unexecuted documents, we find that there was a trail of actions that supported the appellant's version of facts: the parties herein had intended that the said acre of the suit land would eventually be transferred in favor of the appellant.

46. Although the respondent contended that she did not execute the transfer document, she did not raise those particulars of fraud in her pleadings. The law is clear in matters of fraud as was held in the case of Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR where it was stated as follows:

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

47. On the standard of proof regarding allegations of fraud, this Court in Kinyanjui Kamau vs. George Kamau [2015] eKLR held:

48. Curiously, she also did not adduce expert opinion evidence to demonstrate that the signature had been forged. She only raised those allegations in her testimony. We find her allegations as a mere afterthought. She did not raise the particulars of fraud in her pleadings and did not establish with cogent evidence that the appellant had committed acts of fraud. Consequently, those allegations must beyond a shadow of a doubt fail.

49. Ultimately, we find that indeed upon settlement of the purchase price, the respondent held a constructive trust in favor of the appellant. It was therefore imperative upon her to secure the interests of the appellant when she obtained a title deed on 15th December 1997. We adopt the pronouncements

of the Supreme Court of Kenya in Shah & 7 others vs. Mombasa Bricks & Tiles Limited & 5 others (supra) that held as follows:

> "While sections 25, 26 and 28 of the *Land Registration Act* recognized that the rights of a registered proprietor of land were absolute and indefeasible, those were only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests included trusts. In the absence of any limitation as to the trusts, that included constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property was provided under law, and included a constructive trust. Section 28 of the *Land Registration Act* provided that the registration was subject to overriding interests. One of the overriding interests was a trust, which included constructive trust...
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> ... Constructive trusts could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it. A constructive trust can be imported into a land sale agreement to defeat a registered title."

50. The respondent ingeniously raised another angle contesting ownership in favor of the appellant. That since no Land Control Board consent had been obtained within 6 months, the contract was void. Taking into account the circumstances of this case, we see it just and fit to take this Court's approach as was held in the case of Aliaza vs. Saul [2022] KECA 583 (KLR). The Court pronounced itself as follows regarding a seller who had not applied for consent from the Land Control Board:

> "There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, Form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been 'refused' within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act."

51. The Court adopted the reasoning of the Court in Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri (2014) eKLR which we similarly adopt as follows:

> "The other critical issue for our consideration is the lack of consent of the Land Control Board. The trial court held that the suit property being agricultural land was subject to the *Land Control Act*, Chapter 302, Laws of Kenya; Section 6 (1) of the said Land Control Act required the Land Control Board consent to be obtained in respect of the sale transactions; the failure of such consent made the said agreements void and unenforceable against the respondent. It is our considered view that the Honourable Judge erred in failing to appreciate the evidence given by the respondent as to how he intended to complete the sale transaction. The respondent testified that he did not obtain the Land Control Board consent for the sale transactions because he preferred obtaining the consent once he had sold all the 240 plots.

Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots."

52. The above holding buttresses our finding that indeed the respondent created a constructive trust in favor of the appellant and cannot renege from this duty.

53. As to the purported rescission of the contract per the letter dated 18th September 2003, the question before this Court is whether the respondent was entitled to this right and properly invoked the same. In Gurdev Singh Birdi & Another vs. Abubakar Madhbuti [1997] eKLR, the Court discussed this principle as follows:

> " It cannot be denied that where a contract for sale of land does not make time the essence of the contract, equity requires that time be made of such essence before the contract can be rescinded. This requirement is also subject to the ability of the purchaser to complete the contract in good time. Equity requires that the vendor calls upon the purchaser to complete the contract within a reasonable time when time is not the essence of the contract. It is for this reason that I agree with the holding in the case of Graham v. Pitkin [1992] 2 All E. R. 235 which I quote:
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> "Unreasonable delay by a purchaser in completing a contract for the sale of land does not entitle the vendor to rescind the contract without first serving a notice to complete, although delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract."
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> In the Graham v. Pitkin case (supra) Lord Templeman delivering the judgment of the Board (Privy Council) said at page 238:
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> "The dictum of Surgent J (91 LJ Ch 758 at 759 [1992] All E. rep 748) is not authority for statement in Emmet on Title (19th Edn,1986) para 7. 043 that if delay has been unreasonable no notice to complete need be given, albeit that the statement was approved by Goff J. in Accuba ltd. v. Allied Shoe Repairs Limited [1975] 3 All E.R. 782 at 787-788,
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> [1975] 1 WLR 1559 at 1564. Delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract. But in the present case the delay appears to have been the fault of the solicitor. The vendor never complained about the purchaser or reserved a notice to complete. On 2 December, 1980 the purchaser paid and the vendor accepted $10,000 in reduction of the purchase price and as late as April 28, 1981, the purchaser affirmed that she wished to purchase the property. There was no evidence of repudiation by the purchaser in the absence of a notice to complete."

54. It is established that the contract was oral. Other than the terms for settlement of the purchase price, other modalities were not disclosed to the Court. It was also not established that time was of the essence and even if so, that the respondent gave notice of its intention to rescind the contract. All the respondent did was go straight for the kill. Certainly, that would not amount to a lawful rescission that can be upheld by this Court.

55. The appellant has made improvements on the land. We observe that he has even constructed his matrimonial home. In the circumstances, it is only right and just that his proprietary interests be

safeguarded to continually occupy the said parcel of land. The interest of justice dictates that the title deed issued in favor of the respondent be interfered with.

56. In light of the above findings, we find that the appeal herein succeeds. We will therefore interfere with the findings of the learned judge by making the following orders:

    1 The appeal is hereby allowed;

    2 The judgment of the trial court dated August 30, 2018 be and is hereby set aside;

    3. A declaration be and is hereby made that the appellant is entitled to one acre of all that parcel of land namely L.R. No. Chania/Kanyoni/2088;

    4. The respondent is directed to execute the necessary transfer documents and other ancillary documents to effect the transfer of the one acre of all that parcel of land namely Chania/Kanyoni/2088 failing which the Deputy Registrar shall execute the same in her stead upon the lapse of 30 days from the date of this order;

    5. The appellant shall have costs of the suit at trial and in this appeal.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR