



**Ng'ang'a v Wamiti (Suing on Behalf of the Estate of Henry Wamiti Ng'ang'a) (Civil Appeal 40 of 2019) [2024] KECA 1345 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1345 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 40 OF 2019  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 4, 2024**

**BETWEEN**

**DAVIS NDERI NG'ANG'A ..... APPELLANT**

**AND**

**MIRIAM MUGURE WAMITI ..... RESPONDENT**

**SUING ON BEHALF OF THE ESTATE OF HENRY WAMITI NG'ANG'A**

*(Being an appeal from the judgment of the Environment and Land Court of Kenya at Murang'a (Kemei, J.) dated and delivered on 31st July, 2018 in ELC Case No. 100 of 2017.)*

**JUDGMENT**

1. The dispute herein relates to Land Parcel Number Loc/9/Ichilchi/164 (hereinafter referred to as 'suit land'), measuring approximately 1.7 acres. The respondent, vide a plaint dated 8<sup>th</sup> November 2016, instituted a suit against the appellant, seeking to have the suit land registered in her name, to hold in trust for the estate of Henry Wamiti Ng'ang'a. It was the respondent's case that on 9<sup>th</sup> January 1997, the appellant entered into an agreement with her late husband, Henry Wamiti Ng'ang'a, for the purchase of the suit land, for an agreed price of Kshs 161,500.00. That Henry Wamiti paid a deposit amounting to Kshs 75,000.00 which the appellant acknowledged upon execution of the sale agreement.
2. The respondent averred that Henry Wamiti immediately took vacant possession of the suit land. She stated that the balance of Kshs 86,500.00 was paid to the appellant in full, via several installments. That even after completion of payment of the purchase consideration, the appellant refused to transfer the suit property to the respondent. The respondent prayed for orders of specific performance directing the appellant to transfer title to the suit land to the respondent.
3. In response, the appellant filed a statement of defence dated 16<sup>th</sup> December 2016. The appellant admitted that he entered into an agreement for sale of the suit land with Henry Wamiti for an agreed consideration of Kshs 161,500.00. The appellant agreed that Henry Wamiti paid a deposit of Kshs



75,000.00 upon execution of the agreement. He, however, denied the remaining contents of the plaint which alluded to the fact that Henry Wamiti settled the balance of the purchase price and took possession of the suit land. The appellant averred that the remedy of specific performance was not available to the respondent as the consent of the Land Control Board was never obtained, making the agreement void and unenforceable for all purposes.

4. The respondent filed a reply to the defence, dated 8<sup>th</sup> January 2018, which reiterated the averments contained in her plaint.
5. The case was heard by viva voce evidence. The respondent testified as PW1. It was her testimony that her husband, Henry Wamiti, entered into an agreement with the appellant, for sale of the suit land, on 9<sup>th</sup> January 1997. The respondent stated that they paid a deposit of Kshs 75,000.00, and took possession of the suit land on 8<sup>th</sup> April 1997. She averred that her husband paid a further sum of Kshs 56,400.00, in installments, between 28<sup>th</sup> January 1997 and June 1998. It was agreed that since the appellant was constructing his residential home, the respondent's husband would supply timber to the appellant, to cover the remaining balance of the purchase price. The respondent testified that the appellant finished the construction of his home in 2002, and at that time, the outstanding balance totaled Kshs 21,993.00. She stated that at that time her husband fell ill, and was in and out of hospital. He eventually died on 6<sup>th</sup> October 2004, a fact which was well within the appellant's knowledge.
6. It was her testimony that in February 2007, she received a demand notice from the appellant's advocate, directing her to vacate the suit land, since her husband had failed to settle the balance of the purchase price. She was asked to make arrangements to collect Kshs 75,000.00, being the deposit amount that had been paid. She stated that she met with the appellant's advocate on 8<sup>th</sup> February 2007, where she explained that the completion date with respect to the sale agreement dated 9<sup>th</sup> January 1997, had been extended by the parties, that the appellant had received a total of Kshs 64,507.00, as well as a cow and timber from her husband, and that he had acknowledged receipt of the same.
7. The respondent stated that the appellant's advocate advised her to settle the remaining balance of Kshs 21,993.00, as well as his legal fees. She stated that she paid a total of Kshs 25,000.00 and was issued with a receipt. It was her evidence that despite being in receipt of the full purchase price, the appellant refused to transfer the suit property to her. The respondent testified that in January 2016, the appellant attempted to fraudulently receive payment from Athi Water Company, who had temporarily leased the suit land, which prompted her to file the suit before the superior court.
8. The appellant gave evidence as DW1. It was his testimony that he and Henry Wamiti did indeed enter into an agreement for the sale of the suit land, and that Henry paid a deposit of Kshs 75,000.00. The appellant stated that the respondent failed to pay the balance of the purchase price amounting to Kshs 86,500.00. He maintained that although the respondent and her husband took possession of the suit land in 1997, it was not uninterrupted as his advocate wrote to the respondent on 9<sup>th</sup> January 2007, asking them to vacate the suit land, and that the respondent was yet to vacate from the same. The appellant reiterated that the agreement was void as the Land Control Board consent was not obtained.
9. The learned Judge, in a judgment dated 31<sup>st</sup> July 2018, found in favour of the respondent. The learned Judge determined that the respondent furnished documentary evidence proving payment of the balance of the purchase price which was received by the appellant. The learned Judge found that the doctrines of constructive trust and proprietary estoppel were applicable in this case, and as such, the agreement was not void for lack of consent of the Land Control Board. The learned Judge noted that the respondent and her husband had been in possession of the suit land since 1997, and that the appellant continued to receive payments from them, notwithstanding the terms of the sale agreement, and as such, varied the terms of the agreement.



10. Aggrieved by this decision, the appellant lodged this appeal citing six grounds of appeal. In summary, the appellant faulted the learned Judge for finding that he held the suit land under constructive trust, when the said trust was not pleaded by the respondent. He was aggrieved that the learned Judge failed to consider his submission, that the sale agreement was void for want of the Land Control Board consent. He took issue with the fact that the learned Judge applied principles of equity while failing to consider that the provisions of Section 6 of the *Land Control Act* had been violated. He was of the view that the decision of the learned Judge was against the evidence on record. The appellant invited us to set aside the decision of the superior court, and allow his appeal as prayed.
11. The appeal was canvassed by way of written submissions, which were duly filed by the appellant. Counsel for the appellant, Mr. Ndegwa, submitted that the evidence on record was that the respondent's husband did not pay the balance of the purchase price, and therefore the superior court erred in implying a constructive trust. It was his submission that the fact that the appellant issued a notice to terminate the agreement, and offered to reimburse the respondent the monies paid, was an indication that he did not wish to proceed with the agreement. He stated that agreement was void, as the parties failed to procure a consent from the Land Control Board, and faulted the learned Judge for finding that doctrines of equity overrode the provisions of the *Land Control Act*.
12. The respondent did not file any written submissions.
13. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. This duty was reiterated by this Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court observed thus:

“An appeal to this Court from a trial by the High Court is by way of 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 itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.” See *Selle v Associated Motor Boat Co.* [1968] EA 123.
14. Having re-evaluated the record, as well as the arguments from both sides, the issue arising for our determination is whether the respondent was entitled to the prayers sought in her suit before the superior court.
15. The appellant, in his first ground of appeal, faulted the superior court for finding that constructive trust existed, yet the respondent did not plead constructive trust. It is our considered view that this does not preclude a court of law from inferring such a trust, if the circumstances of the case permit, as it falls under the category of trusts established by operation of the law.
16. The Supreme Court in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) defined a constructive trust as follows:

“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...

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.”



17. Did the learned Judge err in finding that constructive trust existed in this case? A party seeking a declaration of the existence of a trust bears the burden of placing before a court of law plausible, cogent evidence to underpin such a declaration. See the holding of this Court in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR.
18. It is common ground that the parties entered into an agreement for sale of the suit land on 9<sup>th</sup> January 1997. It is also not contested that the appellant received a deposit sum of Kshs 75,000.00 from the respondent's husband, after which the respondent and her husband took possession of the suit land. What is in contention is whether the respondent settled the balance of the purchase price. Although the respondent testified that the balance of the purchase price was paid in full, it was the appellant's contention that other than the sum paid as the deposit, he did not receive any other monies from the respondent and her husband.
19. The respondent availed documentary evidence in form of acknowledgement of receipts, which were signed by both appellant and the respondent's husband. The acknowledgements indicated that the appellant received several cash installments from the respondent's husband on several dates, between January 1997, and December 2002. The documents further indicated that the appellant accepted part of the payment in form of a cow as well as timber. The respondent further availed a receipt exhibiting payment of Kshs 25,000.00 received by the appellant's advocate, on 8<sup>th</sup> February 2007, which was the final installment towards payment of the purchase price. This documentary evidence adduced by the respondent remained unchallenged by the appellant.
20. We agree with the finding of the learned trial Judge that the appellant's assertion that he did not receive any further payment from the respondent, other than the deposit sum, was unfounded. The evidence on record clearly showed that the full purchase price was received by the appellant.
21. We shall now consider the question of whether the agreement was void for lack of consent from the Land Control Board, and whether an enforceable constructive trust arose in this case. While it is not disputed that the parties failed to obtain the consent of the Land Control Board, as is required by the provisions of Section 6 of the *Land Control Act*, the evidence on record showed that the respondent paid the full purchase price of the suit land. They had also been in possession of the same since 1997.
22. This Court, in the case of *Maina & 87 others v Kagiri* (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR), while dealing with a similar set of facts, had this to say:

“The transaction between the parties is to the effect that the Respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the *Land Control Act* is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice... This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment.”
23. Similarly, in the case of *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR, this Court sitting at Eldoret observed as follows:

“We hasten to state that the *Land Control Act*, Cap 302 of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the



doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.”

24. In this appeal, the appellant entered into an agreement with the respondent’s husband, for sale of the suit land. He continued to receive payments, in form of installments, from the respondent, from 1997 until 2007, when the full purchase price was paid. The appellant put the respondent in possession of the suit land upon execution of the agreement in 1997. The respondents are still in possession to date. Just like the respondent, the appellant made no effort to obtain a consent from the Land Control Board. He acted in concert with the respondent in initiating and continuing with this illegal transaction for period of over ten years.
25. It is our considered holding that the appellant, having obtained the full purchase price from the respondent, is in essence trying to benefit from his own default, and defeat the respondent’s rights, while evading his contractual obligations. He cannot be allowed to do so. Equity frowns at such conduct.
26. From the foregoing, upon our re-evaluation of the evidence on record, and the submission made before us, we find no reason to depart from the findings of the learned trial Judge.
27. The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondent.
28. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

