



**Kiptum v Birir & another (Civil Appeal 66 of 2020)  
[2023] KECA 482 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 482 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 66 OF 2020  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 12, 2023**

**BETWEEN**

**RISPER JEROTICH KIPTUM ..... APPELLANT**

**AND**

**JOSEPH KIPCHICHIR BIRIR ..... 1<sup>ST</sup> RESPONDENT**

**JEROP KOECH ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Hon. Justice C.K Yano  
Judge at the Environment and Land Court at Mombasa dated 8th  
July, 2020 in Mombasa Environment and Land Case No. 407 of 2016)*

**JUDGMENT**

1. By their amended plaint dated September 28, 2018, the Respondents herein, who are husband and wife respectively, sued the Appellant before the Land and Environment Court sitting in Mombasa in Civil Suit No. 407 of 2016. They sought for an order for vacant possession of Plot Nos. Kilifi/Mtwapa/3834, Kilifi/Mtwapa/5487, Kilifi/Mtwapa/5486, Kilifi/Mtwapa/5485, Kilifi/Mtwapa/5484, Kilifi/Mtwapa/5483, Kilifi/Mtwapa/5482 and Kilifi/Mtwapa/5481. They also claimed for Title No. Kilifi/Mtwapa/5488. In addition, they sought a declaration that the Appellant has no legal or possessory right in the suit property and that any value addition by the Appellant be fairly valued and remunerated. Also sought by the Respondents was a permanent injunction barring the Appellant from living in, entering, remaining on, constructing, possessing or in any manner dealing with the above properties. The Respondents also sought the costs of the suit.
2. The Respondents' case, from the pleadings and from the evidence adduced by the 1<sup>st</sup> Respondent who testified as PW1, was that the Respondents were the registered proprietors of land parcel known as Kilifi/Mtwapa/3834 (hereinafter referred to as "the suit property") measuring approximately 0.46



hectares on which they carried out animal and plant husbandry. That parcel of land was excised, upon subdivision, from Kilifi/Mtwapa/48 which then measured approximately 12 acres.

3. In 2002, upon the 1<sup>st</sup> Respondent's transfer from Mombasa to Nairobi, the Respondents left the 1<sup>st</sup> Respondent's brother-in-law, Solomon Kipkorir, who was then living with the Appellant, to take care of the farm. According to the Respondents, the Appellant moved in with the said Solomon Kipkorir around 2004-2005 and that both stayed there until 2009 when Solomon Kipkorir left but the Appellant remained.
4. In 2006, the 1<sup>st</sup> Respondent was transferred back to Mombasa and the Respondents resumed the supervision and control of the activities on the farm. In 2013, when the Appellant fell sick, her father called the 1<sup>st</sup> Respondent and requested him to give the Appellant something, having stayed with the Respondents for long. Based on that said request, the 1<sup>st</sup> Respondent orally promised to give the Appellant 1/8 of an acre of the suit land. However, in 2014, when the Respondents instructed a land surveyor to subdivide the land into several plots measuring 1/8 of an acre so as to, inter alia, facilitate the transfer of one of them to the Appellant, the Appellant chased away the surveyor claiming that the suit property belonged to her. As a result of the foregoing the Respondents were no longer willing to transfer any part of the suit property to the Appellant. Accordingly, Respondents started the subdivision of the suit property in 2014 and that the titles came out in 2017. 5. The Respondents however, appreciated that the Appellant did some exemplary work for them in the farm in terms of survey and electricity connectivity, adding that they had never written to the defendant to vacate from the portion she was occupying. 6. PW2, Patrick Kingoo, testified that plot No. Kilifi/Mtwapa/5488 measuring 0.054 ha (1/8<sup>th</sup> of an acre) was sold to him by the Respondents in 2017 and his title was issued on July 27, 2017. He had, however, since sold the said plot to Kruss Limited in 2018. According to him, he was unaware of the order stopping the sale of the said plot and was unaware of the agreement between the Respondents and the Appellant.
5. In response, the Appellant filed a defence and a counterclaim. The Appellant admitted that the suit property, Kilifi/Mtwapa/3834 measuring 1 acre, was registered in the names of the Respondents. According to the Appellant, she was approached by the Respondents in 2002 and was requested to assist the Respondents in the management of their farm situated on the said Kilifi/Mtwapa/48. She contended that the Respondents offered to transfer 1/8<sup>th</sup> of the said original land to her for the good work she was doing on the farm. According to her the said 1/8<sup>th</sup> of the 12 acres was 5 acres.
6. It was the Appellant's case that the Respondents handed over the management as well as the care of the said farm to the Appellant and for that purpose requested the Appellant to relocate to the said farm where the Respondents had a house and a borehole, a request which the Appellant acceded to. It was her case that relying on the representation by the Respondents to transfer 1/8 of the said Kilifi/Mtwapa/48 to her, she made huge investments on the suit property by, inter alia, installing electric power to the said land at her own cost, building a permanent house and a shop and drilling a borehole as well as planting trees and crops. In addition, she put up other structures thereon.
7. It was the Appellant's case that though the Respondents stopped livestock farming in the said farm in 2007, the Appellant continued taking care of the said land and carrying out other works that the Respondents assigned to the Appellant. According to the Appellant, since her family and the family of the Respondents were well known to each other and being younger than the Respondents, she trusted the Respondents to keep their word as they were then on very good terms.
8. The Appellant averred that in 2010, she was instructed by the Respondents to find a surveyor to subdivide the 12 acres of the said Kilifi/Mtwapa/48 into portions so that the Respondents could transfer to her the 1.5 acre plot and have it registered in the Appellant's name. However, shortly before



the said subdivision the Respondents changed their minds and reduced the acreage to be transferred to her from 1.5 acres to 1 acre. Consequently, at the request of the Respondents, but at the Appellant's own costs, the Appellant sourced for a surveyor who subdivided the said 12 acre plot into 6 plots none of which measured 1.5 acres.

9. According to the Appellant, she neither protested the reduction of her acreage from 1.5 acres to 1 acre, nor did she bar the surveyors from undertaking the survey as alleged by the Respondents. However, the Appellant contended, while the Respondents sold and transferred part of the suit property, the Respondents were reluctant to transfer to her the 1 acre piece of land, which is the suit property herein. In 2016, the 1<sup>st</sup> Respondent informed her that she was required to pay land rates for that parcel of land which she agreed to, under the belief that that the Respondents were holding the title thereof in trust for her. However, when she demanded the transfer and the release of title deed for Plot No. Kilifi/Mtwapa/3834 measuring 1 acre, instead of the Respondents doing transferring and releasing the title to the suit property to the Appellant, the Respondents commenced the proceedings before the trial court. According to the Appellant, her entitlement, for the management of the said farm, was to be the said one acre though this agreement was never reduced into writing.
10. It was the Appellant's case that since she had been in open and continuous occupation of the suit property for 15 years and based on numerous representations from the Respondents that the suit property belonged to her, the Respondents are estopped by their conduct from denying her lawful occupation of the said property as the owner thereof. It was therefore her position that the Respondents were holding the title to the said property in trust for her. It was her case that due to the trust she had in the Respondents, she lost other opportunities that she might have ventured into for the said 15 years.
11. It was therefore the Appellant's prayer that the Court dismisses the Respondents' suit. Further, she claimed for declaration that she is entitled to the ownership and possession Kilifi/Mtwapa/3834 and that the same is being held in trust for her by the Respondents. She accordingly sought a mandatory order directing the Respondents to transfer the suit property to her, failure to which the transfer be effected by the Deputy Registrar of the High Court. In addition, she sought a permanent injunction restraining the Respondents from interfering with her quiet enjoyment and occupation of the suit property as well as the costs of the suit.
12. In his judgement, the Learned Trial Judge cited Section 3(3) of the *Law of Contract Act* as well as the case of *Patrick Tarzan Matu & Another v- Nassim Shariff Abdulla & 2 Others* [2009] eKLR, and found that the counter-claim was predicated on an alleged oral agreement between the parties for the transfer of a portion of the suit land by the Respondents to the Appellant in return for alleged managerial duties performed by the Appellant to the Respondent. The Learned Judge found that since the Appellant entered the land as an employee of the Respondents, it mattered not that the Appellant had been let into possession of the premises. According to the Learned Judge, if the contract pursuant to which the Appellant was granted possession was not validated in accordance with the above cited Section, the court was divested of the jurisdiction and that the said transaction was unenforceable as it related to a disposition of an interest in land. Since the Appellant admitted that she entered the land with the consent of the Respondents, the Learned Judge found that her possession could not be considered to have been adverse to the interests of the Respondents hence the claim under adverse possession could not succeed.
13. The Learned Judge was similarly not persuaded that the Respondents held the land in trust for the Appellant. Since the Appellant's claim was based on a claim for compensation for services rendered on the Respondents' farm, it was the Learned Judge's finding that this was a dispute between an employer and an employee hence the matter did not fall within the jurisdiction of the Environment



and Land Court, but ought to have been filed before the Employment and Labour Relations Court. He accordingly, found the counterclaim unmerited and dismissed it.

14. As regards the Respondents' claim, the Learned Judge found that since the Respondents were the registered proprietors of the suit land and that the Appellant was just invited to the suit land as an employee, their claim was, pursuant to Section 24 of the [Land Registration Act](#), merited. He accordingly, entered judgement for the Respondents.
15. This appeal was heard before us on the court's virtual platform at which Learned Counsel, Mr Gikandi Ngibuini appeared for the Appellant while Mr Akanga appeared for the Respondents. Both counsels relied on their respective written submissions which they highlighted.
16. On behalf of the Appellant, it was submitted that parties are bound by their pleadings and that in the Plaint filed by the Respondents, the Respondents expressly admitted that in consideration of the work that the Appellant had done over a long period of time in favour of the Respondents in the management of the Respondents' property then known as Kilifi/Mtwapa/48, the Respondents were to allocate 1/8<sup>th</sup> of that property in favour of the Appellant. Since Plot Kilifi/Mtwapa/48 then measured 12 acres, 1/8<sup>th</sup> therefrom would measure about 1.5 acres. Whereas this was a live issue before the Learned Trial Judge, it was submitted that the trial court completely avoided to make a determination on that issue in the Judgment. It was further submitted that the trial court completely failed to consider the express confirmation by the Respondents of their readiness to give a portion of the suit land to be allocated to the Appellant; and that the court failed to explain how it intended that evaluation of the development carried out by the Appellant be ascertained. In this regard the Appellant relied on the case of [Flannery and Another vs Halifax Estate Agencies Ltd \(Trading as Colleys Professional Services\)](#) [2000] 1 WLR 377 and in the Appellants view, once this ground is found merited, it really does not matter whether the appeal is meritorious or unmeritorious and that such a failure will result in such appeal to be allowed. Support for this submission was further sought from the provisions of Order 21 rule 4 of the [Civil Procedure Rules](#) and it was submitted that in this case it was submitted that no reasons were given in the judgment delivered on July 8, 2020 and further, the trial court did not state the points upon which the court was proceeding to determine upon. Based on the case of [Ole Nganai vs Arap Bor](#) [1981] eKLR the Court was urged to remit the issue of valuation of developments for hearing de novo by a different judge.
17. It was further submitted that from the evidence tendered in the trial court, the oral exchange agreement between the Appellant and the Respondents created an interest in the suit land in favour of the Appellant enforceable by way of a constructive and or resulting trust; further, that there was a common intention between the Appellant and the Respondent in relation to the suit property as evidenced by the 1<sup>st</sup> Respondent's evidence in court where the 1<sup>st</sup> Respondent confirmed that his intention was to give the Appellant 1/8 of an acre; that the 1<sup>st</sup> Respondent confirmed that the Appellant's house is on plot of land subdivision written 1 acre; that the Respondents never asked the Appellant to vacate from the said land. Based on that evidence it was submitted that the Respondents had acknowledged and had knowledge that that portion of land belonged to the Appellant absolutely, being the portion that the Respondents agreed to allocate to the Appellant in consideration of the work and services that the Respondents received from the Appellant.
18. Based on Article 10(2)(b) of [the Constitution](#), the case of [Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri](#) (2014) eKLR in which [Yaxley vs Gotts & Another](#) (2000) Ch 162 was cited and [Willy Kimutai Kitilit vs Michael Kibet](#) (2018) eKLR and [Black's Law Dictionary](#), Ninth Edition, it was submitted that the principles of equity ought to have been invoked in the determination of the dispute. According to the Appellant, the trial court erred in making its determination entirely on the



issue of lack of a written contract and selectively applying the provisions of section 3(3) of the Law of Contract, and unduly failed to appreciate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust as was the case with the Appellant.

19. Based on the equitable maxim that "Equity Looks As Done That Which Ought To Have Been Done", it was submitted that equity looks at the portion offered to the Appellant as belonging to the Appellant irrespective of the fact that the transfer and registration of the said portion had not been effected in favour of the Appellant. This submission was based on the holding in case of Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR and Serah Njeri Mwobi -vs- John Kimani Njoroge [2013] eKLR.
20. It was further submitted that in the initial Complaint, the Respondents cited plot No. Kilifi/Mtwapa/3834. The Appellant also counter-claimed to be declared as the owner of the said plot of land. However, unknown to the court and to the Appellant, the Respondents quietly and in a clandestine manner and while the suit was pending in court caused the said property to be subdivided into 8 portions namely Kilifi/Mtwapa/5487, 5486, 5485, 5484, 5483, 5482, 5481 and 5488. without informing the court and or seeking permission from the court. This action, it was submitted amounts to an illegality and offended the rule in *lis pendens* and that the trial court ought to have made adverse findings against the Respondents in this regard. To this extent, it was submitted that the said sub-divisions are null and void for all purposes. In this regard, the Appellant relied on Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another (2015) eKLR where the Court of Appeal cited the case of Bernadette Muriu vs National Security Fund Board of Trustees & 2 Others, Baber A Mawji vs United States International University & another (1976) eKLR and the definition of "*Lis Pendens*" in Black's Law Dictionary 9<sup>th</sup> edition. We were urged to decree that plot No. Kilifi/Mtwapa/3834 is the property that is properly before the court.
21. It was further submitted that the trial court erred in allowing the Respondents claim against the Appellant's notwithstanding the fact that the 1<sup>st</sup> Respondent was an unreliable witness and thereby did not qualify for a favourable finding by the trial court. It was further contended that the trial court, by making a determination on adverse possession, disregarded the parties' evidence on record thereby relying on irrelevant and unpleaded issues in arriving at its decision which the court did not have jurisdiction to determine. Further, the court erred in rewriting the contract between the parties when it held that the relationship between the Appellant and the Respondent is that of an employer and employee. This, in spite of the concession by the Respondents that in exchange of the Appellants services, they agreed to transfer 1/8 of their property to the Appellant a fact which created an interest in the land in favour of the Appellant enforceable by way of a constructive trust.
22. To the Appellant, those issues took the matter out of a simple employer - employee relationship whereby issue of existence of a trust, estoppel and unjust enrichment became apparent. These issues could only be properly dealt with by the Environment and Land Court as at the end of the day the Appellant's claim was of realization of the portion of land that she had been promised by the Respondents.
23. In the Appellant's view, the Respondents are simply using the lack of a written contract as an instrument for unjust enrichment which the law does not permit and reliance was placed on the case of Hannah Muruge Karago vs Peter Karuri Waweru & Another (2016) eKLR and we were thus urged to allow the appeal herein with costs.
24. On behalf of the Respondents, it was submitted that since the Appellant's relationship is tied down to that of an employer and employee, the Appellant, the employee, cannot be in occupation of the



- property claiming adversely to the rights of the employers especially after she was given permission onto the land by virtue of her employment. The Respondents relied on the cases of *Delamere Estates vs Ndungu Njai & Others* (2006) eKLR and *Wellington Lusweti Barasa & 75 Others vs Lands Limited & Another* (2014) eKLR.
25. It was further submitted that a disposition of an interest in land cannot, in those circumstances, be validated or enforced by a court of law. This position was based on the case of *Daudi Ledama Morintat vs Mary Christine Karie & 2 others* [2017] eKLR, reiterated the cases of *Patrick Tarzan Matu & Another vs Nassim Shariff Abdulla & 2 Others* [2009] eKLR, *Silverbird Kenya Limited vs Junction Ltd & 3 Others* [2013] eKLR, *Rainald Schumacher vs Aubrey Garth Monsey* [2008] eKLR, *Laikipia Mifugo Ranching Co. Ltd vs Nanyuki Ranching Ltd* [2007] eKLR and *John Michael Wanjao vs Alubala Abonayo Andambi* [2011] eKLR, all of which espoused the requirement in Section 3(3) of the *Law of Contract Act*, that contracts for the sale of land be evidenced in writing.
  26. As regards "constructive trust" resulting trust" "principles of equity" and "the rule of lis pendens", it was submitted that none of them by definition or meaning apply to the facts of the case or the law applying to this case. In this regard the Respondents relied on the case of *Charles Kangayia v Alfred Musavi & Another* [2020] eKLR.
  27. It was submitted that the Appellant cannot insist on the existence of a resulting trust while concurrently insisting the existence of a constructive trust since these are 2 very different concepts and it is impossible for both of them to be claimed at the same time.
  28. It was conceded that during her tenure as an employee residing on the Respondents' property, the Appellant made improvements on it for the betterment during her stay; the Respondents on that note agree to reimburse the Appellant for the improvement she has made on their property but insisted that this did not change the relationship between the parties.
  29. We were therefore, urged to dismiss the appeal with costs.

### **Analysis And Determination**

30. Being a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions always bearing in mind that we have neither seen nor heard the witnesses and hence we should make due allowance in this respect. However, we are not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See *Selle v Associated Motor Boat Co.* [1968] EA 123, *Abdul Hameed Saif-v - Ali Mohamed Sholan* (1955), 22 EACA 270, *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 and *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.
31. Before us, it was contended that though the Respondents expressly admitted that they had offered to allocate 1/8<sup>th</sup> of Plot No. Kilifi/Mtwapa/48 to the Appellant, the Learned Trial Judge completely avoided to make a determination on that issue. It was further submitted that the trial court completely failed to consider the express confirmation by the Respondents of their readiness to give a portion of the suit land to be allocated to the Appellant; and that the court failed to explain how it intended that evaluation of the development carried out by the Appellant be ascertained. According to the Appellant, the judgement failed to comply with the provisions of Order 21 rule 4 of the *Civil Procedure Rules*.



32. Order 21 rule 4 of the *Civil Procedure Rules* provides that:

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

33. In *Shah vs. Aguto* [1970] EA 263, the predecessor to this Court held that:

“Order 20 rule 4 [now Order 21 rule 4] sets out what a judgement should contain and it appears that the Resident Magistrate sufficiently complied with requirements of this rule. The law presumes that a judge or magistrate knows the law and is always mindful of the principles of the law applying to particular case and in particular as to where the onus of proof lies. A judge or magistrate is under no duty to set out in detail all the various principles of law which he is applying except, of course, where there is any particular question of law to be decided or where there is a dispute between the parties as to what is the law in any particular matter.”

34. In this case the complaint is that the learned trial Judge did not address himself to the admission by the Respondents that they had offered the Appellant 1/8 of the property and that they were willing to give the Appellant the same. In our view, having found that the Appellant’s claim was not properly before the Court and that her claim, based on trust, was not merited, any decision regarding the admission by the Respondents was unnecessary and would have been merely superfluous. As was held in *Ramjibhai vs. Rattan Singh S/O Nagina Singh* [1953] 1 EACA 71:

“This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision.”

35. In *Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, this Court appreciated that:

“It would be a waste of time if every trial Court was obliged to weigh and evaluate the evidence, arrive at its own findings of fact, and then go on to deal minutely with every standard allegation of negligence which has been lifted out of a book on precedents.”

36. As regards the failure to explain how the evaluation of the development carried out by the Appellant was to be ascertained, we have considered the judgement and we have not come across any express finding that the developments on the property were to be valued. We however agree that it would have been necessary for the learned trial Judge to have made a finding regarding the said developments since the Respondents were not disputing that the Appellant had undertaken some developments of the suit property for which they were ready and willing to compensate the Appellant. We agree that it was an error on the part of the learned Judge to have failed to deal with that issue, notwithstanding the dismissal of the Appellant’s counterclaim.

37. In this case, there are certain uncontested facts. From the evidence adduced, there is no dispute that the Respondents were the proprietors of a farm previously known as Kilifi/Mtwapa/48 measuring approximately 12 acres. It was from this parcel of land that the suit land, Kilifi/Mtwapa/3834, measuring 1 acre, was excised. It is also agreed that when the 1<sup>st</sup> Respondent was transferred from Mombasa to Nairobi, the Respondents left the Appellant in the said farm as a caretaker thereof. As a result of her good work the Respondents orally agreed to reward the Appellant with part of the land owned by the Respondents. It is agreed that the Appellant carried out extensive developments on the said property by way of electricity connection and construction.



38. The points of divergence however, were the acreage which the Respondents had offered the Appellant. According to the Appellant she was offered 1/8 of Kilifi/Mtwapa/48 which translated to 1.5 acres. However, the Respondents' position was that they offered the Appellant 1/8 of Kilifi/Mtwapa/3834 whose size was 1 acre. According to the Appellant, the Respondents, apparently for no reason reneged on that offer while the Respondents' position was that they rescinded their offer when the Appellant started demanding for a bigger size of land than was agreed.
39. According to the learned trial judge, the court had no jurisdiction in light of section 3 (3) of the *Law of Contract Act*; that the Appellant's claim arose from the relationship of employer/employee hence ought to have been the subject of a claim before the Employment and Labour Relations Court; that since the Appellant entered the suit land as an employee, she could not claim adverse possession; that the Appellant failed to prove that the Respondents held the land in trust for her; and that the Respondents' proprietorship of the suit land could not be impeached.
40. Section 3(3) of the *Law of Contract Act* provides that:

No suit shall be brought upon a contract for the disposition of an interest in land unless –

- a. the contract upon which the suit is founded—
  - i. is in writing;
  - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act*, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

41. However, subsection (4) of the said section provides that:

(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.

42. It is clear therefore that the Appellant's claim could not be founded on section 3(3) of the *Law of Contract Act*. As to whether it could be founded on subsection (4) of the said section, we shall deal with that later in this judgement. Suffice it to say that the Learned Trial Judge did not put any premium on subsection (4) which he never even mentioned in his judgement.
43. The other ground upon which the Appellant's counterclaim was dismissed was that her claim arose from the relationship of employer/employee relationship hence fell outside the jurisdiction of the Environment and Land Court but within the jurisdiction of the Employment and Labour Relations Court.

The question that arises is whether there existed the relationship of an employer/employee between the parties herein. Section 2 of the *Employment Act* provides that:

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;



"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

44. It is not in dispute that the Appellant entered the Respondents' farm as a caretaker of the farm. If she was rendering her services for wages or salary, she would no doubt fall under the definition of an employee. However, there is no evidence at all that the Appellant was being paid any salary or wages. In fact, there is no evidence at all that before the return of the Respondents from Nairobi, there was an agreed mode of remunerating the Appellant. In his evidence, the 1<sup>st</sup> Respondent categorically stated that at no time did he "sit down with the defendant on employment." From the 1<sup>st</sup> Respondent's evidence, it is clear that it was after the return of the Respondents from Nairobi that a deal was struck between the Appellant and the Respondents in which, in appreciation for the work done by the Appellant to the Respondents, the Respondent offered to give the Appellant a portion of the land. It is therefore clear that the offer to give the Appellant the land in question was not directly a result of the employment relationship between the Appellant and the Respondent, of which relationship there was no evidence, but was an independent act agreed between the parties as an appreciation rather than as payment for the work done.
45. To our mind had the Respondents not offered to give the Appellant the said portion of land, the Appellant would not have, based on employer/employee relationship, made a claim against the Respondents. In our view, if the Appellant could not lodge such a claim, then the mere fact that the Respondents made the said offer cannot be construed to bring into existence employer/employee relationship. If the 1<sup>st</sup> Respondent's evidence is to go by, the said offer was as a result of a request by the Appellant's father in appreciation for the exemplary services renders to the Respondents by the Appellant, rather than in respect of remuneration for the same. To say that every time a person offers a reward or a gift to another for the exemplary service offered then a relationship of employer/employee is thereby created is extending that relationship too far.
46. It is therefore our view and we hold that from the manner in which the Appellant and the Respondents treated each other, none of the parties contemplated the existence of an employer/employee relationship and this court cannot create such a relationship for them. We therefore find that the learned trial Judge erred in finding that there existed an employer/employee relationship and that that was the basis for the Appellant's counterclaim. The Appellant's claim against the Respondents was purely a claim for a portion of land which the Respondents had offered to her and based thereon, she had undertaken extensive developments. It was within her right to lodge a claim for her interest to land without the same being attached to the alleged employment relationship.
47. The learned Judge also found that the claim for adverse possession was not proven. We agree that since the Appellant entered the suit property based on permission from the Respondents the claim for adverse possession, even if had been properly made could not succeed. It to this limited extent that we agree with the position in *Delamere Estates vs Ndungu Njai & Others* (2006) eKLR and *Wellington Lusweti Barasa & 75 Others vs Lands Limited & Another* (2014) eKLR that:
- If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's Property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with Permission of his employer."
48. The issue that arises is whether the Appellant could successfully base her claim on trust. The application of trusts was extensively discussed by the Supreme Court in *Macharia Mwangi Maina &*



87 Others vs Davidson Mwangi Kagiri (2014) eKLR in which the court, while citing *Yaxley vs Gotts & Another* (2000) Ch 162 expressed itself as hereunder:-

"An oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Lloyds Bank Plc v Rosset*, (1991) 1 AC 107,132, a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v Steadman* (1976) AC 536, 540,

"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable."

The court further held that:

The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey v Palmer* (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."

49. In the instant case, it was the Respondents who put the appellants in possession of the suit property. From the evidence on record, it is clear that the Respondent expressly represented to the Appellant that the Respondents would give the Appellant a portion of the land owned by the Respondents. There is no doubt at all that in the instant case, there was a common intention between the Appellant and the Respondent in relation to the suit property and the Appellant went ahead to undertake extensive development on the suit property based on the said representation and with the knowledge of the Respondents. Since a constructive trust is based on "common intention " which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant, we are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege on their earlier representations. Further, there was a resulting trust created by the arrangements or understanding between the Appellant and the Respondent that the subdivision was for the purposes of, inter alia, effectuating the transfer of the portion of land that had been offered to the Appellant. By registering that portion in the name of the Respondents, a resulting trust was thereby created.
50. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.



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. This Court in James Archer & Another vs. Inger Christine Archer & 2 Others Mombasa Civil Appeal No. 39 of 2020 extensively dealt with the doctrine of trust and as regards constructive trusts cited Elements of Land Law, 5th Edition by Kevin Gray and Susan Francis Gray at page 825 in paragraph 7.1.13 and expressed itself as hereunder:

“By contrast, constructive trusts are intimately concerned not so much with money, but rather with expressly or implicitly bargained commitments respecting equitable entitlement. A constructive trust arises in circumstances where it would be unconscionable not to give effect to a common intention which has provided the basis of the parties' mutual expectations and dealings. A constructive trust emerges, in effect, where it would be fraudulent for the owner of a legal estate to maintain beneficial ownership of rights which have already been bargained away informally to another. The existence of the prior agreement, once relied on to the detriment of the claimant party, renders it improper for the legal owner to assert his beneficial title to the exclusion of the claimant. To prevent such inequitable outcomes equity imposes or “constructs” a trust to give effect to the parties' antecedent bargain as to their respective equitable rights.”

51. The Court in the above matter therefore held that a constructive trust is generated by circumstances where through some prior agreement or bargain, a trustee takes a fiduciary role which he or she cannot be allowed to disavow, and where the assertion of absolute beneficial ownership thereby becomes unconscionable as a result of his or her previous dealings and actions. In arriving at this holding, the Court cited this Court's decision in Twalib Hatayan & another vs. Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR where it was held as follows:

“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.”

52. In distinguishing resulting trust from constructive trust, the Court expressed itself as hereunder:

“Therefore, while the resulting trust focuses on monetary contribution towards purchase of a property, a constructive trust is concerned with the bargain or common intention of the parties relating to ownership of the subject property. It is also notable that the focus in resulting trusts is on the unilateral intention of the provider of the purchase money, while constructive trusts are rooted on the bilateral intentions of the relevant actors. *The House of Lords in Stack vs Dowden (supra)* held that a common intention is recognised as relevant, only if one party alters his or her position in detrimental reliance upon some form of bargain that would confer upon them a sufficiently defined beneficial interest in the subject property, and an unconscionable denial of rights would result if the legal estate



owner tries to evade the bargain. As regards the timing of the bargain, this can precede, be contemporaneous with, or occur after the acquisition of title.”

53. As was held in *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* (*supra*), the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.
54. In this case the Appellant embarked on extensively developing the portion that she was occupying by installing electricity and undertaking construction thereon. Even though the Respondents carried out the subdivision of the suit property and sold some parcels excised therefrom, the portion in occupation of the Appellant, which the 1<sup>st</sup> Respondent identified as Kilifi/Mtwapa/5482, was not interfered with and she was never asked to vacate the same. The only problem that the Respondents had with the Appellant was that the Appellant demanded for a bigger land than that which the Respondents had offered her. In our view, even if that was true, that cannot justify the Respondents’ complete renegeing from the earlier representation on which the Appellant acted.

We associate ourselves with the sentiments of this Court in *Hannah Mugure Karago vs Peter Karuri Waweru & Another* (2016) eKLR where the court held that: -

“It appears that human greed or inconsistency and perfidy have found a powerful tool and ally in the provision that declares void all transactions without timely or any consent. The question becomes whether a court of justice would so interpret the provision as to aid a fraudster, mischief-maker or a contract breaker. We are not prepared to hold that courts should provide judicial approval to such dishonesty and lack of integrity and approve of results that are plainly unjust. Nor should they wring their hands and emit impotent sighs in the face of such injustice.”

55. In all honesty, one would have expected the Respondents, if they genuinely believed that the Appellant was claiming more than she was offered, to at least keep their word and have an 1/8 of the suit property registered in the Appellant’s name rather than relying on the lame excuse to renege on the whole agreement and deny the Appellant the benefit of what she had been offered. This is more so considering the admission by the Respondent that the Appellant did exemplary work for them and the developments that the Appellant had admittedly undertaken on the property. This position was appreciated by this Court in *Serah Njeri Mwobi -vs- John Kimani Njoroge* (*supra*) where it held that:-

“...where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.”

56. Having considered the evidence placed before us, we find that the Respondents held the land that the Appellant was entitled to, based on the Respondents’ offer which offer the Appellant relied upon and undertook developments, in trust for the Appellant.
57. Having so found the next issue for determination is what the size of that land was. According to the Appellant the understanding was that the Appellant would get 1/8<sup>th</sup> of the 12 acres comprising Kilifi/Mtwapa/48 which translated to 5 acres. However, the Respondents’ position was that they offered the Appellant one eighth of Kilifi/Mtwapa/3834 whose size was 1 acre. According to the Appellant, on the instructions of the Respondents she retained the services of a surveyor who



subdivided Kilifi/Mtwapa/48 at her own costs. She exhibited the subdivision plan, the receipts for payment made to the surveyors, Mashamba Development Company Ltd, the agreement between her and Kenya Power and Lighting Company Ltd and the title deed for Kilifi/Mtwapa/3834 measuring 0.46 ha. The Respondents, on the other hand did not adduce any evidence to prove that they played any role in the said subdivision. According to the Appellant, though the said parcel was less than the 1.5 acres agreed between them, she was ready to accept the same.

58. From the evidence on record, land parcel no. 3834 was registered on 8<sup>th</sup> August, 2012. According to the evidence of the 1<sup>st</sup> Respondent, when the Appellant fell sick in 2013, her father called the 1<sup>st</sup> Respondent and requested him to give the Appellant something having stayed with the Respondents and it was then that the Respondents agreed to give the Appellant 1/8<sup>th</sup> of an acre. On the other hand, the Appellant's evidence was that she entered the Respondents' farm in 2002 when she was approached to manage the farm after the said Solomon Kipkorir was removed for mismanagement. She however stated that Solomon left the farm in 2004. According to her in 2002, when the Respondents approached her, they promised to give her 1/8<sup>th</sup> out of 12 acres. In his statement which he adopted as his evidence, the 1<sup>st</sup> Respondent's case seem to be that the offer of the 1/8<sup>th</sup> of an acre was made before the Respondents moved to Nairobi. Obviously at that time, Kilifi/Mtwapa/3834 was not in existence hence there could not have been an agreement with reference to the suit property.
59. We have considered the evidence on record. This being a civil matter, the standard of proof is on balance of probabilities. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, it was held by this Court that:-

“*Denning J. in Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties... are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

60. This Court in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR cited *Stapley vs. Gypsum Mines Ltd* (2) (1953) AC 663 at p. 681 where it was held that the question must be determined by applying common sense to the facts of each particular case. In the present case, it is not in doubt that the Appellant carried out developments to the land even before Kilifi/Mtwapa/3834 came into existence. In fact, there is evidence that she was the one who was instrumental in the subdivision of Kilifi/Mtwapa/48 from which process Kilifi/Mtwapa/3834 came into existence. In those circumstances, and without any explanation from the Respondents, the only plausible conclusion one may arrive at is that the Appellant was incurring the said expenses based on the offer by the Respondents to give her 1/8<sup>th</sup> of Kilifi/Mtwapa/3834. Since at the time of the said subdivisions, Kilifi/Mtwapa/3834 had not yet come into existence, the Respondents' contention that the agreement was in respect of Kilifi/Mtwapa/3834 cannot hold.
61. In the premises, we find that the agreement to give the Appellant 1/8 of an acre was in reference to Kilifi/Mtwapa/48. It is not in doubt that from the subdivision plan which was produced by the Appellant, the portion occupied by her was on the 1 acre portion which is Kilifi/Mtwapa/3834. The Appellant explained how the 1.5 acres was reduced to 1 acre by the Respondents.



62. In the estimation of PW2 who acquired plot no. Kilifi/Mtwapa/5488, a portion of Kilifi/Mtwapa/3834, the Appellant occupied about ¼ of the suit property. According to the 1<sup>st</sup> Respondent, the Appellant was in occupation of Kilifi/Mtwapa/5482 but had also put iron sheets on Kilifi/Mtwapa/5484, thereby confirming that the Appellant was in actual possession of at least one ¼ of the original Kilifi/Mtwapa/3834. From the 1<sup>st</sup> Respondent's own evidence, no attempt was ever made to have the Appellant vacate the said property.
63. Having considered the evidence on record, we come to the conclusion that at the time of the oral agreement to give the Appellant 1/8<sup>th</sup> of the Respondents' land, land parcel no. Kilifi/Mtwapa/3834 was not in existence and the parties were not contemplating that it was going to exist. What was in existence was Kilifi/Mtwapa/48 and it was that parcel of land that was in contemplation of the Appellant and the Respondent. Though the original offer would have seen the Appellant get 1.5 acres, this was unilaterally altered by the Respondents to 1 acre, an alteration that the Appellant seemed to not have had a serious issue with hence the creation of Kilifi/Mtwapa/3834. We therefore hold that the Respondents hold Kilifi/Mtwapa/3834 in trust for the Appellant.
64. However, it is clear that during the pendency of the suit, the Respondents undertook subdivisions of the said land into several pieces some of which were sold. The Appellant's position was that the Respondents ought not to have disposed of part of the suit property when the suit property was the subject of the ongoing litigation. In this case, however, the persons to whom part of the suit property were sold were not made parties to these proceedings. That however does not necessarily mean that the Appellant's entitlement is lost. This Court in [\*Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another\*](#) (2015) eKLR expressed itself as hereunder:

“*Black's Law Dictionary* 9<sup>th</sup> edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of [\*Mawji vs US International University & another\*](#) [1976] KLR 185, Madan, JA stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”



In the same case at page it was observed inter alia that:- “Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

65. As regards the relevancy of the said doctrine in light of the current legislative framework, the Court expressed itself as hereunder:

“The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the Land Registration Act (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case. Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the Judicature Act Cap 8...would remain applicable to this case.”

66. Our understanding from the above decision is that since the doctrine of lis pendens is a common law doctrine, it does not depend on the particular legal land regime. Similarly, the doctrine of lis pendens is not founded upon any of the peculiar tenets for a Court of equity as to implied or constructive notice and rests upon a foundation that it would be impossible that any action or suit could be brought to a successful termination, if alienation pendente lite were permitted to prevail as the plaintiff would be liable to be defeated by the defendant alienating before the Judgment or decree, and would be driven to commence his proceedings de novo subject again to be defeated by the same course of proceedings. (See *Bellamy vs Sabine* 1 DE J 566). Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of pending proceedings. (See *Bir Singh v Parmar* [1971] EA 211). Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party. The transfer pendente lite is not in fact void but only voidable at the opinion of the party whose interests are affected thereby since in a transfer of this kind the transferee stands in the shoes of the transferor and takes the title of the latter subject to the pending litigation. (See *Transfer of Property Act* 9<sup>th</sup> Ed by Mitra page 239). The effect of the maxim is not to annul the conveyance but only to render



it subservient to the rights of the parties subject to litigation. (See *Mulla's Transfer of Property Act*, 6<sup>th</sup> Ed at page 241).

67. The same position was adopted by Madan, J (as he then was) in Baber A *Mawji vs United States International University & another* (1976) eKLR where he stated that:

“Every man is presumed to be attentive to what passes in the court of justice of the State or Sovereignty where he resides and therefore, purchase made of property actually in litigation, pendente lite, for valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and will accordingly be bound by the judgement or decree in the suit...Only a fool-hardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject matter of litigation and it would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by fresh suit if the property in dispute is transferred to a third party. The court therefore must protect the status quo. The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.”

68. We must however appreciate that the third party purchasers are not parties to these proceedings no adverse orders may be made against them.

69. In the premises, we therefore allow this appeal, set aside the decision of the Environment and Land Court issued by Hon. Justice C.K Yano Judge at the Environment and Land Court at Mombasa dated 8<sup>th</sup> July, 2020 in Mombasa Environment and Land Case No. 407 of 2016. We substitute therefor the following orders:

- a. We direct that the suit by the Respondents against the Appellant be and is hereby dismissed with costs to the Appellant.
- b. We issue a declaration that the Appellant is entitled to the ownership and possession of all the parcels of land that were excised from Kilifi/Mtwapa/3834 being Kilifi/Mtwapa/5487, Kilifi/Mtwapa/5486, Kilifi/Mtwapa/5485, Kilifi/Mtwapa/5484, Kilifi/Mtwapa/5483, Kilifi/Mtwapa/5482 and Kilifi/Mtwapa/5481 and that the same are being held in trust for her by the Respondents.
- c. We issue a mandatory order directing the Respondents to transfer the said properties to the Appellant, failure to which the transfer be effected by the Deputy Registrar of the Environment and Land Court.
- d. We issue a permanent injunction restraining the Respondents from interfering with the Appellants' quiet enjoyment and occupation of the said properties.
- e. Regarding Kilifi/Mtwapa/5488 which was sold to PW2 during the pendency of these proceedings, pursuant to rule 33 of this Court's Rules, we remit the matter back to the trial court to determine, the value of the same free from any developments which value will be deemed to be  
a decree against the Respondents in favour of the Appellant.
- f. We award the costs of this appeal to the Appellant.

70. It is so ordered.



DATED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF MAY, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

