Kivindu & another v Musau & 4 others (Civil Appeal 233 of 2020)
[2023] KECA 1015 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 1015 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 233 OF 2020

MSA MAKHANDIA, AK MURGOR & J MOHAMMED, JJA

JULY 28, 2023

BETWEEN

JOSEPH MUTHIANI KIVINDU ..... 1ST APPELLANT

WAYUA KIVINDU ..... 2ND APPELLANT

AND

FREDRICK MWANIKI MUSAU ..... 1ST RESPONDENT

AUGUSTINE NZUKI MULI ..... 2ND RESPONDENT

BONIFACE MAKAU ..... 3RD RESPONDENT

THE REGISTRAR OF LANDS, AND THE ATTORNEY GENERAL ..... 4TH RESPONDENT

KENYA UNION OF SAVINGS AND CREDIT CO-OPERATIVES LIMITED (KUSCCO) ..... 5TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court in Machakos (Angote, J.) dated 8th May 2020 in Machakos ELC Case No. 97 of 2015)

JUDGMENT

1. Joseph Muthiani Kivindu and Wayua Kivindu, the appellants herein, are aggrieved by the judgment and decree of the Environment and Land Court (ELC) in relation to the land situate at Ngelani Ranching Unity, Athi River Plot No. 13A of Block 8914, currently registered in the name of the 1st respondent now known as LR No 8914/43 "the suit property". The ELC (Angote, J.) found that the appellant had not proved their case on a balance of probabilities to warrant the court to declare them as owners of the suit property through purchase, hence dismissed the suit.

2. The appellants had sued the respondents vide an amended plaint dated 15th March, 2017 claiming that in the year 1966, one, Pius Kivindu Kingoo (King'oo), who is deceased, and father and husband to the 1st and 2nd appellants respectively, was approached by the late Musau Mwaniki (Mwaniki) the father to the 1st respondent so that he could sell him his share in the land, that ended up being the suit property and which he was still paying for his contribution together with other partners. That the original parcel of land initially belonged to five partners who included Mulinge Ikwava, Kasuli Nthenge, Musembi Nzivu, Muli-Nzuki and Musau Mwaniki.

3. The appellants' case was that part of the consideration for the purchase of the share was paid by one cow to Mwaniki and that the balance was to be paid by instalments and the final instalment of KShs500 was paid to Mwaniki by Makau Nzusyo, the uncle to Mr King'oo whereupon his name was entered in the book for the shareholders held by the principal shareholder, Muli Nzuki, in place of Mwaniki in 1968 and Mr King'oo thereafter took possession. That as proof that they took possession of the suit property, the appellants averred that Mr King'oo proceeded and constructed a home and started assisting in school construction projects; that his children went to school within the suit property; and that at the time of his death, he was still the owner and in possession of the suit property that he had purchased.

4. The appellants stated that during the process of sub-division of the original land, the 2nd and 3rd respondents connived and un-procedurally transferred Mr King'oo's share into the name of the 1st respondent; and that the 1st respondent had since been issued with a title deed for the suit property. That following the issuance of the title, the 1st respondent had since sold and transferred the suit property to the 5th respondent. The appellants therefore, prayed that the trial court do issue a declaratory order that it is the appellants who are the legal and or beneficial owners of the suit property, and that an order for the cancellation, revocation and rectification of any titles, entries or rights in respect of the same should issue.

5. On the other hand, the 1st to 3rd respondents filed a joint statement of amended defence dated 4th April, 2017 denying all the appellants' allegations. It was their averment that the record held at the Ngelani does not have the name of Pius Kivindu King'oo as the proprietor of the suit property at all and further that the late King'oo never settled on the suit property as alleged. That the appellants' suit was in any event statute barred, bad in law and had not indicated that any contract in writing between the appellants and the respondents or anyone else had been entered into.

6. The 4th respondent in its defence stated that he was a stranger to the claim. That there was no cause of action against him disclosed by the appellants in their plaint, and, if there was any claim, then he was not responsible and that Ngelani Ranching Unity being the original owner of the property was better placed to answer on all issues of proprietorship.

7. The 5th respondent equally denied the appellants' claim through a defence dated 30th March, 2017 and averred that it is the legally registered owner of the suit property as a purchaser for value without notice having purchased the same from the 1st respondent. That the plaint did not disclose any reasonable cause of action as against it and that the suit should be dismissed.

8. In a reply to the defences dated 8th June 2017, the appellants reiterated their averments in their plaint and further stated that the 1st respondent had never been in possession of the suit property and had no capacity to acquire it on behalf of his late father. That upon the sale of his share in the suit property, Mwaniki moved and settled in Shimba Hills having given vacant and exclusive possession to Mr King'oo who thus acquired equitable beneficial proprietary interest in it. On the issue of the suit being time barred, the appellant averred that the same is not true by reason of possession, processing

of title and continuous dispute over the suit property until the secretive issuance of the title to the 1st respondent and thereafter illegal and contemptuous transfer to the 5th respondent. That the 1st respondent had been as a result found in contempt of court for his actions and appropriately punished. Further, that the 5th respondent had bought the suit property in full glare of contempt of the court to which the 1st respondent was punished, thus, the title by the 5th respondent was a mere paper and the doctrine of lis pendens applied.

9. The matter proceeded by way of viva voce evidence and both the appellants and the respondents called four witnesses each. The appellant's case before the trial court can be summarized as below.

10. Kathuma Kimii, told the court that his late father was among the first twenty (20) principal shareholders of Ngelani Ranching Unity (the ranch) which is situated in Athi River, Machakos. That he started living on the ranch in 1938 way before it was sold to the first twenty (20) principal members and that he knew the late King'oo and Mwaniki. According to him, Mwaniki became a shareholder of the ranch under one of the principal members known as Muli Nzuki in 1964 and when he left, his place was taken over by Mr King'oo together with his mother, Syokau, and that the two took possession of the suit property and started farming and grazing thereon. That he came to learn later that Mwaniki had sold his share in the ranch to Mr King'oo before moving to Shimba Hills in Kwale and that he never came back to the ranch again. That in the year 1976, the members of the ranch contributed money to repay a loan that the ranch had taken in 1963. King'oo and the witness were amongst the committee members who were appointed to collect money and that King'oo lived on the portion of the land belonging to the ranch until his death in 2007. He further stated that Musau leased to King'oo, the suit property that he was meant to occupy and only members of the ranch were allowed to graze in the ranch and that King'oo lived in the ranch and was at one time a village elder.

11. Wayua Kivindu, the 2nd appellant and wife of King'oo, in her evidence stated that in 1966, Mwaniki, who at the time was still paying for his share in a partnership of four (4) persons, namely Mulinge Ikwava, Kasuli Nthenge, Musembi Nzivu and Muli Nzuki agreed to sell to her late husband his share in the ranch.

12. It was her evidence that the five members were allocated Plot No. 13 which was divided into five portions being 13A to 13E and that the negotiations for the purchase of Musau's share were oral. That those present during the negotiations included her sister-in-law, Luis Mbulwa Muinde and her mother-in-law, Syokau King'oo. That the consideration for the same was one (1) cow as the initial payment and the balance thereof was to be paid in instalments. The last instalment of Kshs. 500 was paid to Mr Musau through her husband's uncle, Makau Nzusyo and that the change in the shareholding was made in a book kept by Muli Nzuki and they took possession of the suit property. Further, that the Management Committee of the ranch, unlawfully transferred the share of King'oo to the 1st respondent, the son of Makau.

13. Joseph Muthiani Kivindu, the 1st appellant adopted the evidence of his mother, the 2nd appellant aforesaid word for word as per the record. In addition, it was his evidence that when a dispute arose between themselves and the 1st respondent, the then District Commissioner (DC), convened a meeting and directed the family of Nzuki Muli to produce the original book which had a list of the members; that he made a copy of the said book and that the book shows how the five partners contributed towards the share. It further shows how the original owner's name of Mwaniki was cancelled in favour of King'oo. That King'oo was once a member of the Board of Governors of Kaseve Primary School that later changed its name to Ngelani Ranch Primary School, which is within the ranch. That he only learnt of a new title in favour of the 5th respondent in 2014, and that the same was effected during the pendency of the suit before the ELC.

14. Beatrice Mutua testified that her husband, one, Mutua moved to the ranch in the year 1967 where his mother, Mulimi Kasuli had bought shares with five (5) other partners being Muli Nzuki, who was the principal shareholder, Musau Mwaniki, Musembi Nzivo and Mulinge Ikwava. That in 1969, Mwaniki summoned her together with Muli Nzuki, his wife, Kisove Muli and Mulako Nzuva and informed them that he had sold his share in the ranch to King'oo. Thereafter, King'oo was allowed to take possession of the suit property while he moved to Shimba Hills where he settled. Thus, according to her, it is the appellants' family, which has had possession of the suit property since 1969.

15. The respondents' case was presented by four witnesses as well. According to Fredrick Mwaniki Musau, the 1st respondent inherited the suit property from his late father, Mwaniki; that the bigger portion of the land was owned by five partners, including his father; and that Muli Nzuki was the principal partner. That in 1966, Mwaniki allowed one, Syokau King'oo the mother to King'oo to graze her cows on the suit property and migrated to Shimba Hills. That when Syokau King'oo died, her son, King'oo, continued with the animal husbandry on the suit property. Later in the year 1992, Mwaniki came back from Shimba Hills and asked King'oo to vacate the land. That even his father dared King'oo to take the traditional oath to establish if he ever paid him for the suit property, which King'oo declined. He stated that the appellants did not have any document to show that King'oo purchased the suit property. That in 1992 while Mr King'oo was still living on the suit property, upon receiving a demand letter from Mwaniki's advocate, King'oo vacated the suit property and only came back 2001 after the death of Mwaniki in 2000. It was his evidence that the sub- division of the entire ranch was carried out by the elders in the year 2009 and that upon the said subdivision, the suit property that his father was entitled to was allocated to him. He admitted though that he had sold it to the 5th respondent in the year 2016 after obtaining the title deed.

16. The 2nd respondent testified that he was the son of the late Muli Nzuki; that his father was one of the original members of the ranch which had a total of 22 members with equal shares; and that his father's share was owned by himself and four other partners, namely Mulinge Ikwava, Mulimi Kasuli Nthenge, Musembi Nzivo and Mwaniki. That Mwaniki allowed Syokau King'oo, who is the mother of Mr King'oo to keep her cattle on the suit property and to pay the County Council, the necessary charges. That in 1992, his late father called for a meeting to confirm if indeed Mwaniki had sold his share to Mr King'oo and that Mwaniki was willing to take the traditional oath to confirm that he had only allowed Syokau King'oo to graze on his land. According to him, there was no evidence of the alleged sale of Mwaniki's share to the late Syokau King'oo or King'oo and that if there was any such sale, then all the five partners would have been involved. Responding on the issue of how King'oo's name entered the records of the five partners, he stated that all the partners who were in the meeting of 12th July, 1992 stated that they had heard that King'oo had purchased Mwaniki's share and that Makau Nzusyo informed the meeting that he is the one who had handed to Mwaniki the last instalment of Kshs 500. That the records showed that it was King'oo who paid the Council's charges of Kshs. 200 for the land, and that King'oo was not paying for the land but for grazing rights.

17. According to, John Kivuva Makumi who was the secretary of the ranch from 1995 stated that the original member Muli Nzuki had four partners and they did not include King'oo. That from his records, there was no entry of any alleged transaction between Mwaniki and Mr King'oo.

18. It would appear that the 4th respondent did not offer any evidence.

19. The 5th respondent testified through one, Martin Okanda Ngilo, the Deputy Manager, Risk Management Services, of the 5th respondent. His testimony was that on 21st October, 2015, the 1st respondent legally sold the suit property to the 5th respondent; that the 5th respondent carried out due diligence prior to the purchase. As such, the 5th respondent was an innocent purchaser for value and

without notice and that it held a valid and proper title to the suit property and it was not privy to the dispute between the appellants and the 1st to 4th respondents.

20. Parties after close of the proceedings filed written submissions and the court after considering the evidence and the supporting documents delivered a judgment in terms earlier mentioned in this judgment.

21. The appellants being aggrieved by the judgment and decree aforesaid, preferred the present appeal in which they raised fifteen (15) grounds of appeal which can be condensed into eight grounds to wit that:- the learned Judge erred in law and fact by failing to: appreciate that the appellant had proved on balance of probabilities, oral contract for the purchase of land share consideration paid and possession given as part performance of the oral contract; making findings on issues based on evidence which was at variance with the respondents' pleadings; in finding that the respondents bore the burden of proof on affirmative issues raised in their defences some of which were not pleaded; in failing to holistically and entirely evaluate the whole evidence on record, and instead proceeded on selective cherry picking of the appellants' evidence in favour of the respondents' case; failing to draw adverse inference against the respondents for withholding and objecting to crucial evidence, calling family witnesses, and selectively use the same evidence against the appellants; find that the undisputed long period of possession and acts done on the suit property pointed to, and created proprietary title, common intention, and constructive trust in favour of the appellants; take judicial notice of facts such as- town council were not created to collect cattle grazing fees, the respondents' conduct as a contemnor who sold the suit property lis pendence immediately upon acquiring title to defeat the appellants' claim, and failure to obtain letters of administration intestate; and finally, misapprehended part of the appellants' evidence regarding the school leaving certificate issued to the 1st appellant, as evidence confirming their eviction from the suit property.

22. When the appeal came up for hearing, parties opted to rely on their written submissions with limited oral highlights. It was the appellants' submissions that there was an oral agreement for the sale of the suit property. That the evidence of the 2nd appellant showed how the transaction was concluded and that there was a common intention and trust to sell it for a consideration of Kshs. 1,500 which was paid with one cow and the balance thereof of Kshs. 500 was later paid by King'oo's uncle, Makau Nzusyo. There were witnesses who confirmed the sale for instance, Lau Muli, Lau Makau and Mulako which was contrary to the finding of the learned Judge that there were no such witnesses. That from the evidence even the shareholders testified that they heard that the suit property was sold to King'oo. That the name of Mwaniki was removed from the shareholders record book and replaced with that of Mr King'oo. That the trial court erred in finding that there was no knowledge by the other partners of the sale to Mr King'oo of the suit property since the record showed that the shareholders had indicated that they had only heard of the sale but never witnessed.

23. On possession, the appellants submitted that their families had been in occupation of the suit property from 1960 to the exclusion of Mwaniki who after selling it to King'oo moved to Shimba Hills. That they had utilized the same and the said possession had been corroborated by evidence which even confirmed that King'oo died in 2007 while still in possession.

24. As to the eviction notice, the appellants submitted that King'oo resisted the same stating that he had been on the suit property from 1964. There was no compliance with the eviction notice against the finding of the learned Judge that the appellants moved out based on the notice issued by Masika Advocates. To further show that they were in possession, there was evidence that King'oo had paid money to the Council with other members save for one Mwaniki. That contrary to the finding of the learned Judge that, King'oo did not state categorically that he purchased the suit property, there was no evidentiary obligation on him to state that in the reply to the advocate's eviction letter. The

appellants submitted that the 60 days eviction notice, if any, was ineffective, as the record shows that the 1st appellant joined school in 1993-1994, two years after the eviction letter, hence the learned Judge was in error to find that the 60 days eviction notice was complied with in July, 1992.

25. The appellants further submitted that the trial Judge misapprehended the receipts of veterinary and tick control of 1987 which had been produced by the appellants to mean that they were indeed evidence that the suit property was leased to King'oo for grazing purposes only. The receipts were tendered in evidence to corroborate the evidence that whilst staying on the suit property, King'oo kept cattle on the same. It was the appellants' further submission that the respondents were estopped by the doctrine of proprietary estoppel from denying the purchase of the suit property due to the conduct of the parties. That there were several facets of acts which were evidence enough that indeed King'oo had taken possession of the suit property after purchase. This included the evidence which showed that he had a homestead and was involved in school construction activities amongst others.

26. According to the appellants, there was uncontroverted evidence that they were in possession in the 1960s after purchase of King'oo's share. While relying on section 116 of the *Evidence Act* and the case of *Pankajkumar Shah v Abbas Lali* [2019] eKLR, they submitted that possession is *prima facie* evidence of ownership and that once pleaded and proved, the burden had shifted to the 1st respondent to disprove the same, failing which, it created a constructive trust, proprietary estoppel and overriding interest over the suit property in their favour. That as was held in the case of *Isaack Minanga v Isaaya Theuri* [2018] eKLR, the court is enjoined in finding equitable rights of parties from the circumstances of the case to ensure fairness and equity. That this Court ought to disregard the finding of the learned Judge on the issue of shareholders as the court misdirected itself due to selective interpretation of evidence. Further, that the minor inconsistencies on the date and time of the sale agreement did not impeach the whole substance of the appellants' evidence of an oral contract and possession.

27. The appellants further submitted that the 1st respondent had to prove whether he had acquired title to the suit property lawfully as it was clear that there were no succession proceedings that had been taken out by the 1st respondent before the issuance of the title. Further, that the respondents never pleaded grazing lease in their amended defence. Reliance was placed on the case of *Shadrack Kibor v Samuel Kipkoech* [2009] eKLR for the proposition that a litigant who takes a particular defence and fails to call evidence in support thereof affects the credibility of such deposition and an adverse inference may be drawn. That even PW1, 2 and 3 who had been on the ranch for long rejected the fact that there was any grazing lease, as according to them, only members had a right to graze in the ranch. That the 1st respondent had never been on the suit property after leaving when he was only ten years old. That limitation of time and lack of contract in writing did not apply to the case as the appellants were in possession and the cause of action arose in 2014 when title to the suit property was issued to the 1st respondent.

28. As to the 5th respondent being an innocent purchaser for value without notice, the appellants submitted that the suit property was a subject of litigation with interim orders at the time of the purported sale. Reliance was placed on the case of *Kawaljeet Singh v Peter Wainaina* [2016] eKLR for the proposition that a sale and transfer undertaken over a property subject of litigation and breach of a court order was null and void and amounts to nothing. That according to the case of *Alice Chemutai v Nickson Kipkurui* [2015] eKLR, a title of an innocent purchaser is impeachable if obtained illegally.

29. The 1st to 3rd respondents in their submissions stated that from the record, King'oo and his mother occupied the suit property with the consent of Mwaniki and were allowed to graze on it only. The ranch was at the time not subdivided. There was no sale or payment by King'oo of any consideration and when the allegations that King'oo had bought the suit property from Mwaniki in 1992 came to his

knowledge, he immediately gave the late King'oo a notice to vacate. That save for the mention of being in possession of the suit property, the appellants had neither shown any sale agreement nor did the appellants witnesses refer to any such sale agreement or at least witness one. That upon issuance of the eviction notice, the appellants vacated and King'oo did not take any steps or action to assert ownership rights and the suit property remained unoccupied up to the time of subdivision and issuance of title deed commenced. That the document referred to as the share book record was clarified by the 2nd respondent as being a record of payment for grazing rights and not a register of shareholders.

30. Lastly, that there was doubt as to the alleged contract and who were the witnesses.

31. The 5th respondent submitted that none of the witnesses called or the documentary evidence tendered pointed to the existence of any valid and legally binding agreement over the suit property between King'oo and Mwaniki. Further, even the dates of the purported agreement were at a great variance from one witness to the other. It was pointed out that the witness simply stated that they heard that the suit property had been sold but they never witnessed the transaction. That to counter the notion that there was such an agreement, or transaction, when King'oo was served with the letter dated 31st July, 1992 to vacate by Masika Advocates on behalf of Mwaniki, he said nothing about any legally binding agreement in his response dated 24th August, 1992 but simply vacated the suit property. That the burden of proving the existence of a legally binding agreement to purchase the suit property was on the appellants who failed to discharge that burden. That the reliance of the appellants on the doctrine of proprietary estoppel and constructive trust could not hold as they were never pleaded in the trial court. It was not clear what property King'oo had taken possession of and there was no prove before the trial court of the developments made on the suit property by King'oo, if any.

32. As regards the doctrine of *lis pendens*, the 5th respondent submitted that it was upon the appellants to prove that they were the rightful owners of the suit property so as to seek to rely on the doctrine in calling for the cancellation of the title. That the 5th respondent is the current registered owner of the suit property having purchased it for a consideration which was proved in court. Whilst relying on the case of *Moses Parantai and Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Makuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, it was submitted that the 5th respondent was the registered owner without any aspect of fraud being attributed to it and hence its title deed was protected by the law.

33. This is a first appeal, and this Court's role in this regard was expressed in the celebrated case of *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 as follows:

> " 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 allowance in this respect. In particular this Court is 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."

34. The issues for our consideration in this appeal include whether: there was a sale agreement between King'oo and Mwaniki; King'oo became the owner of the suit property at any time; the doctrine of proprietary estoppel and trust, applicability of the doctrine of lis penden were established; and lastly, who is the rightfully registered owner of the suit property.

35. On the first issue, we are not convinced just like the trial court that there was any land sale agreement be it oral or written between the parties at any given time. The question is whether an oral agreement for sale of land is valid if it all there was one. Before the amendment of the *Law of Contract Act* in June 2003, the law allowed for oral agreements for disposition of land.

36. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* then excluded the application of section 3(3) of the said Act to contracts made before the commencement of the subsection. Prior to the amendment of section 3(3) of the *Law of Contract Act* as aforesaid, the subsection read as follows:

> "(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> 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."

37. It is our understanding that section 3(7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. We find that section 3(3) of the *Law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale of land concluded before the said section came into force. The proviso to section 3(3) of the *Law of Contract Act* applies in this case and we hold that the oral sale agreement between King'oo and Mwaniki, if at all there was one, did not violate or offend the provisions of the *Law of Contract Act* as claimed by the respondents.

38. We agree that an oral agreement would be valid in the circumstances given the time of the alleged agreement. However, as earlier stated, we are not convinced that from the evidence placed before the trial court there was any agreement of whatsoever nature. There was no direct evidence to that effect by any of the witnesses called by the appellants. None of the witnesses who testified on the exact date of the agreement, aspects of the agreement, consideration and mode of payment thereof were present during the transaction. None of them witnessed the negotiations leading to the transaction and the payment of the consideration. Even the uncle to the appellants who is alleged to have paid the last instalment of Kshs 500 did not testify. All the witnesses called by the appellants including the appellants all talked of being told of the transaction. Even the cancellation of the name of Mwaniki and its replacement thereof with that of King'oo was on account of merely being told that Mwaniki had sold his share in the ranch to King'oo. No reason(s) were given why the alleged witnesses who were present and witnessed the transaction could not be availed to testify. As it is therefore, all this evidence was hearsay, useless and of no probative value and was properly rejected by the trial court. We may also point out that the evidence of possession that King'oo relied on that would support and determine part performance of that oral agreement was doubtful as we will demonstrate later in this judgment.

39. On the second issue, it is clear that Mr. King'oo took possession of the suit property for a considerable time. This is not in dispute from the record as both the appellants and the respondents allude to this fact. What is in question is whether the possession by Mr. King'oo translated into his ownership of the suit property or was he a mere licencee allowed to graze his livestock thereon and nothing more. We remind ourselves that this is not a case of adverse possession so that the limitation period under the law can be considered. Rather, possession is being advanced in support of the proposition that King'oo was sold the suit property and given possession. This was disputed by the 1st respondent who stated that the interest in the suit property given to Mr. King'oo was a licence to graze his animals and nothing more.

40. From the evidence, it is not clear exactly when the alleged oral agreement was entered into, if at all. According to PW4, who is the wife of one of the five partners in Mr. Muli Nzioki's share, Mr. Mwaniki informed her in 1969 that he had sold the suit property to Mr. King'oo. The evidence tendered before the trial court shows that the only book/register with the names of the people who were in possession or occupation of the ranch that Mr. Muli Nzuki was entitled to as one of the principal shareholders was kept by Mr. Muli Nzuki. The original book which is in Kamba language, was produced in evidence by Mr. Muli's son (DW2). The copy of the book with the translated version was produced by the appellants.

41. Furthermore, the first entry in the book was made on 2nd July, 1966, with a heading "Book of the Company". It shows the five names with some money indicated against each name. The names are Muli s/o Nzuki; Musau s/o Mwaniki; Musembi s/o Nzivu; Mulinge s/o Ikwava and Mulinge s/o Kasuli. The name of Mwaniki, is cancelled. The entries below that the appellants seem to rely on were indicated as:

> "We have agreed whoever will not bring his balance will take home his cows and when he clears he brings them back."

42. From the foregoing, it is clear that what is being demanded is the balance of the grazing fees and cannot by any stretch of imagination mean that King'oo was being addressed as the owner of the suit property. If anything, it fortifies the claim by Mwaniki that he had merely leased to King'oo the suit property for grazing purposes. Again from the record, there was another entry on 16th April, 1968 which the name of the son of Mwaniki had been replaced with the name of King'oo. The meeting of 1992 does not show whether Mr. King'oo was declared the rightful possessor of the suit property. However, there is uncontroverted evidence that if Mwaniki had to sell and transfer the suit property to King'oo, he had to seek and obtain permission from his co-partners which was not the case here. Further, the continued stay by Mr. King'oo on the suit property was questioned in 1992 by Mwaniki through a letter by his advocates seeking the eviction of Mr. King'oo which evidence was not controverted sufficiently by the appellants. If anything, there is overwhelming evidence that indeed after the eviction notice, Mr. King'oo and his family vacated the suit property only to reappear much later after the death of Mwaniki to lay a claim over it. We therefore agree with the trial court that the response to the eviction letter and the movement from the primary school that the 1st appellant had enrolled in a year after are factors worth of consideration and tend to support the assertion by the 1st respondents that they did indeed vacate. We take note of the response by Mr. King'oo to the letter of eviction which is critical when analyzed properly. It read in part:

> "I was very much disturbed by your letter of 31st July, 1992, that I vacate from your client's plot at Katani within sixty (60) days. Take note that I dwelt in Ngelani Ranching Unity from 1964 until today and your letter left me in full darkness."

43. The plain reading of the said response leaves one in no doubt at all that King'oo was aware that the suit property he was living on belonged to Mwaniki. There was nothing difficult in King'oo saying firmly in his letter that the suit property belonged to him by way of an oral purchase agreement and which Mwaniki was fully aware of. That lukewarm response merely confirms that King'oo was well aware of the status of his possession of the suit property, otherwise he would have taken steps to assert his title to the suit property. This goes to prove that the possession of the suit property by King'oo was as licensee and not as the owner of the suit property.

44. We are thus satisfied that the possession by King'oo was temporary and never meant to dispossess the original owner of the suit property. We also note from the record that King'oo was challenged by Mwaniki to take a traditional oath to establish if he ever paid him for the suit property and that his possession of the same was not on a licencee basis. King'oo flatly rejected this invitation, why? We take judicial notice of fact that in this community traditional oaths are taken seriously in matters requiring ascertainment of the truth or otherwise of some allegations. That King'oo refused to take oath for no apparent reason(s), speak volumes regarding his candidness.

45. During the subdivision leading to the issuance of the title to the 1st respondent, why did the appellants not raise any finger? None of the initial partners were aware of the transaction, they had merely heard of it, but nonetheless, okayed the sub-division with the full knowledge of King'oo and or appellants who did not protest and push for the recognition of their interest. Further, when served with the eviction notice, Mwaniki complied and moved out of the suit property only for the 1st respondent to resurface much later. When King'oo passed on, it would have been expected that he would be buried on the suit property if indeed it was his. Instead he was buried in Kangundo. Finally, there was no record of the transaction between Mwaniki and King'oo according to the evidence of the secretary of the ranch. All these factors go to prove the status of King'oo on the suit property.

46. On the proprietary estoppel, in *Halsbury's Laws of England*, 4th Edition, Volume 16(2) paragraph 1089, the authors have stated as follows on the elements of proprietary estoppel:

> "Proprietary estoppel usually arises when the representation consists of a promise of an interest in land although its principles have been used in the context of commercial relationships not involving such promise. The traditional formulation was based on the principle that, where the owner of land (A) knowingly allowed his rights to be infringed by another(B) who expended money on the land in the mistaken belief that it belonged to B, A could not afterwards be allowed to assert his own title to the land. From this formulation a five- fold test, referred to as 'the five probanda', developed, under which the following circumstances had to be present in order that an estoppel might be raised against A:
>
> (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted;
>
> (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights;
>
> (3) acquiescence is founded on the conduct with the knowledge of one's legal rights, hence A must know of his own rights;
>
> (4) A must know of B's mistaken belief; with that knowledge, it is inequitable for him to keep silence and allow B to proceed on his mistake;
>
> (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.

This five-fold test has, however, now largely been abandoned in favour of a three-fold inquiry based not on B's mistake but on an agreement between A and B or on A's encouragement of B's expectation. The court will inquire:

(a) whether an equity in favour of B arises out of the conduct and relationship of the parties;

(b) what is the extent of the equity, if one is established; and

(c) what is the relief appropriate to satisfy the equity."

47. Further on the same, in the case of *Thorner v Major and others* [2009] UKL 18[2009] 1 WLR 776, Lord Walker stated as follows:

> "This appeal is concerned with proprietary estoppel. An academic authority (*Simon Gardner, An Introduction to Land Law* (2007) p. 101 has recently commented:
>
> > "There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)."

Nevertheless, most scholars agree that the doctrine is based on three main elements, although they express them in different terms; a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance. (see *Megarry & Wade, Law of Property*, 7th edition (2008) para 16-001; *Gray & Gray, Elements of Land Law,* 5th edition (2009) para 9.2.8, *Snell's Equity*, 31st edition (2005) paras 10-16 to 10- 19; *Gardner, An Introduction to Land Law* (2007) para 7.1.1)."

48. The burden was upon the appellants to establish the said elements of proprietary estoppel. We have gone through the pleadings and the record and we are not satisfied that the appellants even pleaded the same. Though the appellants in their written submissions addressed the issue, this is a principle of law that must come out clearly from the pleadings and not through submissions. Submissions perse cannot take the place of pleadings as in this case. In any event, we discern no promise made either by Mwaniki which induced King'oo to stay in the suit property. Indeed, from the appreciation of the doctrine, one cannot relate it to the scenario obtaining in this case, where the appellants have at one point claimed that King'oo bought the suit property from Mwaniki and at the same time claim that they were represented to or induced by Mwaniki with regard to the suit property, and, that on the basis of the representation he acted to his detriment. In the final analysis, it is our finding that the appellants have failed to establish the elements of proprietary estoppel.

49. As regards constructive trust, we wish to state from the outset that it was once again not pleaded. It is being raised for the first time in this appeal. We may have for this reason opted not to address it. However, as it is a matter of law, we shall bend backwards and deal with it. From several authorities of this Court which we highlight below, there was no prove of the existence of such trust from the record availed to us.

50. In the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR this Court observed that:

> "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."

While in the case of *William Kipsoi Sigei v Kipkoech Arusei & another* [2019] eKLR, this Court held as follows:

> " Taking into account the Macharia Mwangi Maina decision and the Willy Kimutai Kitilit decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & another*, (2000) Ch 162, where it was held that 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. This was also the approach taken in Macharia Mwangi Maina decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege. We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the *Land Control Act*. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent. In the circumstances, we find that the first appellate court, made the correct decision, and we have no justification to interfere with that decision."

51. Based on our analysis above while relying on the two decisions of this Court, we find that since Mwaniki had not received any purchase price from King'oo, and further, that he never took possession of the same as a potential buyer but as a licencee, the doctrine was inapplicable in the circumstances of the case, and neither was it pleaded.

52. The appellants have submitted that the 5th respondent obtained title to the suit property when it was the subject of litigation and indeed, the 1st respondent had been found in contempt of court when he sold and transferred the suit property to the 5th respondent. They raise the doctrine of lis pendens. We agree that the 1st respondent and the 5th respondent could not deal with the suit property as it was the subject of contentious litigation pending in court as was rightly held in the court's ruling. The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.

53. In *Bellamy v IDeG & J* 566 it was held:

> " The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. 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 ... "

54. We have had the opportunity of reading the said ruling. We are aware that, that issue was dealt with by the trial court and the 1st respondent was accordingly punished in accordance with the law. As at the time the court proceeded to hear the main suit, this issue had been settled and the court was categorical that the 5th respondent would not be punished for what they were not aware of as at the time of sale, when they were not even parties to the suit. No appeal, review and or setting aside of the said Ruling was preferred. We are therefore satisfied that, yes, the doctrine would apply but the same had been disposed of by exonerating the 5th respondent. Further, after holding that the 1st respondent violated a court order, the trial court did not proceed to nullify the transaction. Both the 1st and 5th respondents cannot be punished twice and neither can that doctrine apply to the title held by the 5th respondent given the circumstances.

55. In deciding who the rightful owner is, the trial court dismissed the appellants' claim that the appellants should be declared the rightful owners of the suit property. We are similarly of the same view as there is nothing that has been put forward to show that the 5th respondent obtained the title through either fraud, misrepresentation, corrupt act or other means otherwise known that can impeach the title. The suit property belongs to the 5th respondent having purchased it for value and without notice of any encumbrances. The assertion that the 1st respondent sold the suit property without first obtaining a grant of letters of administration intestate of his father's estate falls flat on its face. First, that issue was never raised in the trial court and secondly, there is ample evidence that indeed he had nevertheless obtained them.

56. Having found as such, we dismiss the appeal in its entirety with costs to the 1st, 2nd, 3rd and 5th respondents.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

signed

DEPUTY REGISTRAR