



**Yawa & another (Suing as the legal representative of the estate of Makupe Yawa Mwalungo(Deceased)) v Baya & another (Civil Appeal 69 of 2019) [2022] KECA 395 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 395 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 69 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 4, 2022**

**BETWEEN**

**KAHASO MAKUPE YAWA ..... 1<sup>ST</sup> APPELLANT**

**JOHN MWAMUYE MAKUPE ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MAKUPE  
YAWA MWALUNGO(DECEASED)**

**AND**

**OMAR TSUMA BAYA ..... 1<sup>ST</sup> RESPONDENT**

**LUCY TSUMA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Environment & Land Court at Mombasa (Omollo, J.) delivered on 15th March 2019 in ELC Land Case No. 185 of 2013)*

**JUDGMENT**

1. The appellants, Kahaso Makupe Yawa, and John Mwamuye Makupe, are the widow and son respectively of Makupe Yawa Mwalungo, deceased who died on 21<sup>st</sup> January 2002. They were appointed as the administrators of his estate by the High Court at Mombasa and instituted the suit before the ELC in that capacity. They averred in their plaint that by an agreement dated 29<sup>th</sup> July 1988, the deceased agreed to sell to the 1<sup>st</sup> respondent, who agreed to purchase 3 acres out of the suit property for a price of Kshs.54,000.00; that the 1<sup>st</sup> respondent only paid Kshs.10,000.00 leaving a balance of Kshs.44,000.00 which he failed or refused to pay; that the deceased died on 21<sup>st</sup> January 2002 before completion; that as a result of the 1<sup>st</sup> respondent's failure or refusal to pay the balance of the purchase price, the sale was never completed; that the respondents, who are in occupation, were claiming an



- additional 4 acres of the suit property on which they trespassed preventing the appellants and other beneficiaries of the deceased from utilizing or accessing the four acres.
2. Based on the foregoing the appellants in their plaint sought: a declaration that an agreement for sale of land dated 29<sup>th</sup> July 1988 was not binding on them due to non-completion; an order compelling the respondents to hand over to the appellants vacant possession of “three (3) acres and any extra land they claim on plot number Kilifi/Mtwapa/1944” or alternatively an order for eviction of the respondents from the said property; and a permanent injunction to restrain the respondents from trespassing or dealing with the property
  3. The respondents’ case, on the other hand, was that the sale was completed in 1988, that the 1<sup>st</sup> respondent is the rightful/legal owner of the property having purchased the same for value since the year 1988 and residing peacefully therein awaiting the final transfer; that what remained “was the eventual transfer and processing of separate title” in the 1<sup>st</sup> respondent’s name which was “awaiting the completion of all legal processes culminating to obtainance (sic) and securing of title by the deceased”.
  4. In their counterclaim, respondents averred that the deceased sold another three acres of the property, referred to as plot No. 211/B Mtwapa Settlement Scheme to one Joseph Ndugu Irungu, who, with the concurrence of the deceased, sold the same to the 1<sup>st</sup> respondent for Kshs.54,000.00 and an agreement in that regard dated 29<sup>th</sup> July 1988 concluded in the Chief’s office; that land control board consent was then granted and the 1<sup>st</sup> respondent became the owner of the 6 acres and took possession the full purchase price having been paid.
  5. The respondents further averred that subsequently, in October 1988, the deceased offered to sell to the 1<sup>st</sup> respondent an additional one acre of the property; that the purchase price was agreed at Kshs.25,000.00 which the 1<sup>st</sup> respondent paid to the deceased in full; that thereafter the 1<sup>st</sup> respondent had the 7 acres of the property surveyed and beacons in the presence of the deceased and his wife; that the 7 acres were then fenced off and the family has since resided on the same; that despite promises by the deceased to regularize the final transfer, he died in 2002 before that was done.
  6. The respondents prayed, by counterclaim, for a declaration that they are the lawful owners of the 7 acres and that they are rightfully in possession and use of the said parcel and for orders for the appellant to be compelled to transfer the 7 acres to the 1<sup>st</sup> respondent.
  7. In impugned judgment delivered on 15<sup>th</sup> March 2019, the Environment and Land Court (Omollo, J.) (ELC) dismissed the appellants’ suit against the respondents and allowed the respondents’ counterclaim and held that they (respondents) are entitled to the property by virtue of their occupation and use; that the appellants are holding title in respect of the property “in trust and for the benefit of the [respondents] in respect of 7 acres they are in occupation of”; and ordered the appellants to execute within 30 days, the sub-division and transfer documents and to avail all necessary documents to enable the process of subdivision and transfer of 7 acres to the 1<sup>st</sup> respondent and in default the Deputy Registrar of the ELC to sign the documents after expiry of the said 30 days.
  8. Aggrieved, the appellants lodged this appeal. Our duty therefore is to consider and evaluate the evidence with a view to drawing own independent conclusions bearing in mind that unlike the trial court, we did not have the advantage of seeing or hearing the witnesses. As held by the Court in *Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212*:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect.



Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

9. The evidence presented before the trial court was as follows: Kahaso Makupe Yawa, the 1<sup>st</sup> appellant, the only witness who testified on behalf of the appellants stated that her late husband, the deceased, entered into an agreement dated 29<sup>th</sup> July 1988 with the 1<sup>st</sup> respondent for the sale of 3 acres of the larger property Kilifi/Mtwapa/1944; that of the agreed purchase price of Kshs.54,000, the 1<sup>st</sup> appellant only paid Kshs.10,000 and failed or refused to pay the balance of Kshs.44,000; that it was the refusal or the failure by the 1<sup>st</sup> respondent to pay the balance of the purchase price that resulted in the non-completion of the transaction; that in addition, the respondents were claiming an additional 4 acres of the suit land on which they had trespassed and encroached preventing the appellant and other beneficiaries of the deceased from utilizing or accessing it. She produced the certificate of death in respect of the deceased as well as the grant of letters of administration in respect of the deceased that was issued to the appellants.
10. It was her further testimony that the deceased wanted to sell 3 acres of the land to one Irungu who gave him Kshs.10,000; that the said Irungu later “asked to be refunded his money and sell to someone else”; that the deceased then got the 1<sup>st</sup> respondent and they agreed the price of Kshs.54,000; that the 1<sup>st</sup> respondent paid a deposit of Kshs.10,000 but never paid the balance of Kshs.44,000. She produced as exhibits, a copy of the agreement for sale, a copy of the title deed, a copy of the official search and receipt.
11. She went on to state that after her husband died, the 1<sup>st</sup> respondent approached her and said that he had a balance of Kshs.5,500 which she refused to accept; that the 1<sup>st</sup> respondent was put in possession after payment of the deposit; that the 1<sup>st</sup> respondent allowed his daughter, the 2<sup>nd</sup> respondent, to live on the property and that the 1<sup>st</sup> respondent started claiming 7 acres of the land; that she reported the matter to the clan elder, the area chief and district officer; that the 1<sup>st</sup> respondent began quarrels after she had refused to accept the Kshs.5,500 he had offered and that thereafter her advocate issued a demand notice to the 1<sup>st</sup> respondent dated 24<sup>th</sup> January 2013. She maintained, “as far as I know it is only 3 acres that was sold. Mr. Irungu only bought 3 acres and he was refunded his money.”
12. Under cross examination, the 1<sup>st</sup> appellant stated that she could not remember when she got married to the deceased; that the deceased’s first wife Uchi, lived with the deceased on the property but they had separated by the time the deceased died; that the deceased had more than 16 acres and only sold 3 acres to Irungu for Kshs.10,000; that she did not know how much Irungu sold the plot to the 1<sup>st</sup> respondent; that the 3 acres were sold to Irungu before she got married to the deceased; and that she was not aware that her husband sold land to the 1<sup>st</sup> respondent measuring 3 acres. In her words, the “agreement was entered into before I got married” and she was not present when the first payment was made and did not know whether the 1<sup>st</sup> respondent made further payments to her husband; that when she got married the 1<sup>st</sup> respondent was already living on the suit plot with his family; that the plot had no title deed at the time of the agreement and the title deed was obtained on 7<sup>th</sup> November 2001 and her husband died two months later. With that, the appellants’ case was closed.
13. Three witnesses testified for the respondents. Omar Tsuma Baya, the 1<sup>st</sup> respondent stated that 1988 a property agent, a Mr. Kalenga, introduced him to Joseph Ndugu Irungu who informed him of availability of 3 acres of land for sale in Mtwapa, namely plot No. 211/B with a price of Kshs.54,000.00; that he was shown the parcel together with all the boundaries and agreed to buy it; that the same property agent informed him that the person who had sold the said parcel to Joseph Irungu, one Makupe Yawa, was also selling 3 acres at the same price.



14. He stated that that his employer, a Mr. Zul, agreed to finance him in the purchase of both plots and all three of them (the 1<sup>st</sup> respondent, Irungu and Makupe Yawa) proceeded to the area Chief's office where they entered into the sale agreements on 29<sup>th</sup> July 1988 (which he produced as exhibits) and he paid a deposit of Kshs.10,000 for each of the plots; that the balance was payable upon land control board consent being obtained in Kilifi; that subsequently land control board consent was given (which he produced as exhibits); that he took possession of the 6 acres after which together with the vendors they proceeded to his employer's place of work where the balances of the purchase price were paid in full.
15. The 1<sup>st</sup> respondent stated further that in October 1988, Makupe Yawa offered to sell to him an additional one acre of the property, which he agreed to buy at the price of Kshs.25,000; that an agreement was prepared and he paid the price in two instalments of Kshs.15,000 and Kshs.10,000; that thereafter he organized with his surveyors who, in the presence of the deceased and his wife Uchi, identified the boundaries, surveyed the 7 acres and placed beacons to demarcate it.
16. It was his evidence that he has since 1988 been occupying the 7 acres without any disturbance; that he built his house on the land but later moved out after the death of his wife; that he lived on the land without any problem until the death of the deceased; that the reason the 7 acres was never transferred to him was because the deceased had not obtained the title as "there were some government dues owing" and the deceased had requested him to be patient but he died before the 1<sup>st</sup> respondent got his title; that the deceased's remaining wife was to notify him once they got the title; and that the title was issued shortly before the deceased died.
17. Under cross examination the 1<sup>st</sup> respondent stated that he was informed that the deceased got title in 2001; that the land control board consents were issued before the title was issued; that the parcel he bought from Irungu had not been carved out of the original plot No. 211/B; that the plot he bought from the deceased is 211; that when he did the purchase, the deceased's wife was Uchi and that Kahaso Makupe is also a wife of the deceased; and that at the time of his testimony, his child was the one living on the property.
18. The respondents' next witness was Uchi Makupe Yawa, the first wife of the deceased who testified as DW1. She stated that she knew the 1<sup>st</sup> respondent as a neighbour of a very long time; that that he purchased 7 acres portion of land from her late husband; that at the time she was residing with the deceased on the same parcel of land; that in 1988 her husband informed her that he had found a buyer for 3 acres of his land where they were living; she recalled the husband took the purchase price money home after which they welcomed the 1<sup>st</sup> respondent "as a neighbour and owner of the parcel"; that later, as they had financial problems, the deceased suggested to her that they sell another one acre to the 1<sup>st</sup> respondent which they did; that thereafter the 1<sup>st</sup> respondent expressed interest in fencing off his 7 acre portion and brought a surveyor to demarcate and identify the beacons which was done in her presence and in the presence of her husband; that she knew that the land had no title and her husband was following up on that and had promised to subdivide once the mother title came out.
19. Under cross examination, the witness stated that she was separated from the deceased one year before his death and no longer lived on the property. She maintained that she witnessed the sale of the 7 acres to the 1<sup>st</sup> respondent; that she was present when the plot was first sold to Irungu and subsequently to the 1<sup>st</sup> respondent; that the first 3 acres was sold to Irungu and the 1<sup>st</sup> respondent "refunded Irungu his money" and that another 3 acres was sold to the 1<sup>st</sup> respondent by her husband for Kshs.54,000. She stated that the known widow of the deceased is Kahaso Makupe who took her husband and their relationship "is therefore strained".



20. The third witness for the defence was Kenyatta Chege Ramadhan (DW3) who adopted his written statement on which he was cross examined. He stated that he was a co-employee of the 1<sup>st</sup> respondent and was present when their employer, one Mr. Zul, offered to purchase property for the 1<sup>st</sup> respondent in reward for his devoted service; that he was aware of the purchases made by the 1<sup>st</sup> respondent of the two three acre portions of land from the deceased and from Mr. Joseph; that he was also present at the Chief's office where he witnessed the purchase agreements; that he also witnessed when the payments for the purchase price were made; and that he was also aware that the 1<sup>st</sup> respondent purchased an additional one acre portion from the deceased. With that, the defence case was closed.
21. Upon considering the evidence, the trial court delivered the impugned judgment, in which, as already stated it dismissed the appellants' suit and upheld the respondents' counterclaim. In doing so, the learned trial Judge noted that both parties had raised the issue of limitation in their respective submissions; that the appellants' contended, "that the agreement dated 29<sup>th</sup> July 1988 is not enforceable because; it is time barred" while the 1<sup>st</sup> respondent had "also raised the issue of limitation in his submissions". On the merits, the learned Judge was satisfied, based on the evidence, that the respondents had established that the purchase price was paid in full during the lifetime of the deceased and that the respondents had established that they were entitled to the property on account of their occupation and use.
22. In their memorandum of appeal, the appellants framed ten grounds of appeal which raise the issues whether the learned Judge was right in: holding that appellant's claim was barred by limitation; in rejecting the appellant's claim that the agreements for sale were not binding due to non-payment of balance of the purchase price and in finding that the purchase price was paid; and holding that the respondents are entitled to the property on account of their occupation and use.
23. Learned counsel for the appellants, Mr. Lewa, relied entirely on his written submissions. On limitation, counsel submitted that the Judge was wrong to take 30<sup>th</sup> September 1988 as the date on which the cause of action first accrued; that in order to determine when the cause of action first arose, one has to ascertain the date of completion of the agreement for it is upon a party's failure to complete on the completion date that the cause of action accrues; that although the sale agreement was silent on the completion date, the intention of the parties was that completion was to be on the date consent of the land control board was to be obtained as the balance of the purchase price was to be paid upon that consent being obtained.
24. Counsel submitted at length that the four letters of land control board consent produced before the trial court were not genuine; that no consent of the land control board was applied for or given, and therefore, the balance of the purchase price could not have been paid. Referring to Sections 39 and 41 of the Land Act No.6 of 2012, it was submitted that a vendor is entitled to rescind an agreement on account of breach by the purchaser and that the appellants in this case rescinded the agreement for sale dated 29<sup>th</sup> July 1988 on account of non-payment of the balance of the purchase price.
25. It was further urged that since the deceased was issued with the title over the property on 7<sup>th</sup> November 2001, that is when the deceased acquired capacity to apply for land control board consent but he did not do so; that the suit in the superior court having been instituted on 27<sup>th</sup> August 2013, the 12-year limitation period for bringing an action to recover land had not lapsed and therefore the learned Judge erred in law and in fact in holding that the appellant's claim was time barred.
26. Issue was also taken regarding the additional one acre the 1<sup>st</sup> respondent stated he purchased from the deceased. Counsel submitted that no agreement for sale was produced and neither was consent of the



- land control board for the subdivision and sale of that additional one acre applied for or obtained; and that by reason of Section 6 of the Land Control Act, the sale of the additional acre is null and void.
27. It was also submitted that the Judge was wrong in holding that the respondents are entitled to the 7 acres by virtue of their occupation and use of the property when no such claim was either pleaded or made during the hearing.
  28. In concluding his submissions, counsel for the appellants submitted that the judge was wrong in relying on the evidence of the DW-2 Uchi Makupe Yawa. According to counsel, that witness was not on the list of witnesses the respondents had provided and witness statement in that regard was by Uchi Mkanyi, a different person from Uchi Makupe Yawa.
  29. In opposing the appeal, learned counsel for the respondents Mr. Hamza, submitted that the appeal is devoid of merit; that the respondents have had actual physical occupation and possession of the 7 acres for over 30 years; that sale agreements were produced in respect of the two parcels of 3 acre each purchased from Joseph Ndugu Irungu and the deceased respectively while the sale agreement in respect of the one acre was oral and the respondents have enjoyed peaceful and quiet possession of the 7 acres since 1988.
  30. It was urged that based on land control board consent issued on 27<sup>th</sup> March 1986 the deceased's property Plot No. Mtwapa Sett. Scheme/211 was subdivided to yield Plot No. Mtwapa Sett. Scheme/211B which the deceased sold to Joseph Ndugu Irungu, who in turn sold it to the deceased under the agreement for sale dated 29<sup>th</sup> July 1988; that land control board consent was given on 26<sup>th</sup> August 1988 with respect to the transfer from Joseph Ndugu Irungu to the 1<sup>st</sup> respondent although that consent referred, inadvertently, to parcel Mtwapa Sett. Scheme/211 instead of Mtwapa Sett. Scheme/211B. As for the purchase of the additional 3 acres from the deceased, counsel referred to the sale agreement dated 29<sup>th</sup> July 1988 between the deceased and the 1<sup>st</sup> appellant and to the land control board consent dated 30<sup>th</sup> September 1988.
  31. In relation to the one acre which the deceased sold to the 1<sup>st</sup> respondent based on an oral agreement, it was submitted that all the respondents' witnesses acknowledged the sale; that Section 3(7) of the Law of Contract Act excludes the requirement as to writing under Section 3(3) of that Act for contracts made before 1<sup>st</sup> June 2003.
  32. Moreover, counsel submitted, on the 1<sup>st</sup> appellant's admission, all the transactions in question took place before she got married to the deceased. Consequently, she could not have been privy to the contracts or information relating thereto. In contrast, DW2, the deceased's first wife testified as to the purchases and payment of the purchase price and the occupancy of the property by the respondents.
  33. It was submitted that the claim that land control board consents could not have been issued before title was issued to the deceased in 2001 is not correct; that there is no requirement that the land has to have a title deed for land control board consent to be granted.
  34. Counsel submitted, in the alternative, that the 1<sup>st</sup> respondent acquired an equitable beneficial interest in the property having purchased it from the deceased; that it is not in dispute that the appellants have not been in possession since 1988; that by virtue of Sections 9 and 37(a) of the Limitation of Actions Act the deceased's or appellants rights in the 7 acres is extinguished by adverse possession; that since the deceased acquired title to the property in 2001, there arose a constructive trust where the deceased was holding the title in the property on behalf of the 1<sup>st</sup> respondent and the trial court was therefore right in granting the respondents the declarations they had sought having established their claim in that regard. Counsel submitted that the Judge was also right in holding that the appellant's claim was filed out of time as a period of 25 years had lapsed from the time the sale agreements were entered into.



35. Counsel also submitted that the contention by the appellant that the person who testified as DW2, Uchi Makupe Yawa, is different from the maker of the witness statement, Uchi Mkanyi, is facetious as there is no doubt that it is the same person, the first wife of the deceased.
36. As already indicated, the issues arising are whether the learned Judge was right in holding that appellant's claim was barred by limitation; whether the Judge was right in rejecting the appellant's claim that the agreements for sale were not binding due to non-payment of balance of the purchase price and in finding that the purchase price was paid; and whether the Judge was right that the respondents are entitled to the property on account of their occupation and use.
37. For a start, the issue of limitation was not pleaded by either party. Authorities abound that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. See *Independent Electoral and Boundaries Commission and another vs Stephen Mutinda Mule and 3 others [2014] eKLR*. See also *Gandy vs. Caspair [1956] EACA 139* and *Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd [2000] 2 EA 385*. In *Anthony Francis Wareham t/a AF Wareham & 2 others vs. Kenya Post Office Savings Bank [2004] eKLR*, the Court stated that:
- “... cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings...”
38. That said, even though limitation was not an issue arising from the pleadings, it was addressed in the closing submissions before the trial court. Based on the principle in *Odd Jobs vs Mubia [1974] EA 476* that a court may base a decision on an issue that is not pleaded where it appears the course followed at the trial the issue has been left to the court for decision, the Judge was justified in addressing it. It is however apparent from the judgment that even though the Judge did address the matter of limitation, the reason why the appellants' case ultimately failed was because the trial court was not satisfied that the appellants had established their case that the 1<sup>st</sup> respondent had refused or failed to pay the balance of the purchase price.
39. The learned Judge addressed the matter of limitation from the perspective of the appellant's claim that the balance of the purchase price was not paid, and also from the perspective of the respondents claim of entitlement to occupation and use of the property. In doing so, the learned Judge stated:
- “Section 4 (1) of the *Limitation of Actions Act* puts a cap that actions founded on contracts must be brought before the expiry of six years from the date when the cause of action arose. Under section 7 of Cap 22, a claim to recover land shall not be brought after the lapse of 12 years. The evidence shows that the 1<sup>st</sup> defendant was put in possession the year the agreement was executed. The occupation of the defendants is admitted by the plaintiff in paragraph 8 of the plaint and in her oral testimony.
21. According to the plaintiffs' submissions, the balance was to be paid in full immediately the consent of the Land Control Board to transfer was obtained and that such consent was obtained on 30<sup>th</sup> September 1988. Based on the plaintiffs' submission that the agreement of 29.7.1988 is invalid for non-payment of the purchase price
- within the agreed time; the time being referred by the plaintiffs is then calculable to run from 30<sup>th</sup> September 1988. For this Court to declare the agreement as not binding for breach (of contract), the claim ought to have been brought on or before the end of the sixth (6<sup>th</sup>) year from 30<sup>th</sup> September 1988 had lapsed which time fall on or before 29<sup>th</sup> September 1994.



By 1994, Makupe Yawa was still alive yet no claim was made by him despite the fact that he was the party to that contract. No application to extend time was made by the administrators of his estate before this suit was filed. This prayer for an alleged breach of contract now made about 25 years later cannot have legs to stand on. Further in prayer (b) of the plaint, the plaintiffs sought for vacant possession of the 3 acres and any extra land the defendants are claiming on plot number Kilifi/Mtwapa/1944. The limitation to claim this portion of the land assuming they were entitled to it also expired after the end of the twelfth (12<sup>th</sup>) year from the date when the “balance of purchase price” was due and vacant possession was not demanded. Again the time lapsed during the lifetime of the seller. The upshot of this is that I make a finding that the issue of limitation raised by the plaintiff favours the defendants rather than them.”

40. We respectfully agree with the learned Judge. It was pleaded in the plaint that sale agreement was made between the deceased and the 1<sup>st</sup> respondent on 29<sup>th</sup> July 1988. And even though reference in the plaint was made to only one agreement, there were, as the evidence revealed, two separate agreements entered into on the same day for a total of 6 acres. The sales agreements were produced as exhibits. The agreements were silent on the completion date. The Judge was however persuaded that completion was tied to obtaining the land control board consent which was obtained on 30<sup>th</sup> September 1988; and that time began to run from that date and consequently, the latest the action based on the sale agreement should have been 29<sup>th</sup> September 1994. The appellants did not institute the suit until 2013, some 19 years later and eleven years after the death of the deceased who would have been the one claiming that the balance of the purchase price had not been paid. We are unable to fault the reasoning or the conclusion reached by the learned Judge on the matter of limitation.
41. The appellants have urged before us that the Judge was wrong in proceeding on the basis that land control board consent was given on 30<sup>th</sup> September 1988 and reckoning the 6 years from that date. It was contended before us, for the first time, that the land control board consent letters produced before the trial court were not genuine. That again is a matter which was never pleaded, raised or canvassed before the trial court. The respondents, who produced those consents before the trial court were never cross examined on those letters. Neither did the trial judge deal with the question of authenticity of those consents in her judgment. It is an evidentiary matter. It is not a matter that can be raised at this stage.
42. As to whether the appellants established that the 1<sup>st</sup> respondent  
“failed and or refused to pay the balance” of the purchase price, the only evidence tendered in support of the appellant’s case was the testimony of the 1<sup>st</sup> appellant. Based on her testimony during cross examination, the transactions relating to the sale of the properties took place before she got married to the deceased. She was not present when the agreements were entered into or when the deposits acknowledged as having been paid to the deceased, were paid. Her testimony on matters that took place before she entered the scene was of little probative value.
43. The deceased died on 21<sup>st</sup> January 2002. That was 14 years after the sale agreements were entered into. The only evidence of demand having been made for the respondents to vacate the property was through the appellant’s advocates demand letter dated 23<sup>rd</sup> January 2013 written 11 years after the death of the vendor, the deceased.



44. On the other hand, there was the evidence of the 1<sup>st</sup> respondent; the evidence of first wife of the deceased who was living with the deceased at the time; and the evidence of the 1<sup>st</sup> respondent's co-worker who also witnessed the sales agreements, all of who testified that the balance of the purchase price was paid.
45. Based on our review and evaluation of the evidence, we conclude, as the trial Judge did, that the appellants fell short of establishing, on a balance of probabilities, that the balance of the purchase price was not paid. Conversely, the respondents established on a preponderance of evidence, that the balance of the purchase price was paid long before the demise of the vendor.
46. The last issue for consideration is whether the Judge erred in allowing the respondents' counterclaim having concluded that the respondents are entitled to the suit property by virtue of their occupation and use. In that regard, the Judge expressed in her judgment thus:

“On the other hand, I find the defendants' case as proved that they are entitled to the land by virtue of their occupation and use. It is my finding that the plaintiffs are holding the title in trust and for the benefit of the defendants in respect to the 7 acres they are in occupation of. Accordingly I enter judgment in favour of the defendants as prayed in paragraphs (b) (c) and (d) of the counter – claim. To give effect to prayer (c) of the counter – claim, I make an order under prayer (f) that the plaintiffs to execute within 30 days of this judgment the sub-division & transfer documents as well as avail the necessary documents that would enable the process of subdivision and transfer to be effectualised in having the suit land being registered in the 1<sup>st</sup> defendant's name. In default of the plaintiffs signing these documents and or availing the required documents, the deputy registrar of the Court shall sign the said documents after the expiry of 30 days.”

47. As already stated, the appellants fault the judge for holding that the respondents had established their counterclaim. The respondents in their counterclaim pleaded that the 1<sup>st</sup> respondent is a bona fide purchaser for value and that the suit property was its only home and residence and livelihood since 1988. They prayed for a declaration that they are the lawful owners of the property and are as such rightfully in possession and use of the said parcel of land.
48. The circumstances in this case are in certain respects similar to those in *Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR* where the Court stated:

“It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”

49. Also, in *William Kipsoi Segei vs. Kipkoech Arusei [2019] eKLR*, this Court pronounced itself thus:

“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.

21. 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.”

50. Based on the foregoing, there was factual and legal basis upon which the learned trial court allowed the counterclaim and granted the reliefs that the court did. We have no basis for interfering with the judgment of the trial court. The appeal is devoid of merit. It is dismissed with costs to the respondents.

**DATED AND DELIVERED AT MOMBASA THIS 4<sup>TH</sup> DAY OF MARCH 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

