Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 583 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 134 OF 2017

K M'INOTI, PO KIAGE & M NGUGI, JJA

JUNE 24, 2022

BETWEEN

GEORGE CHAYUGA ALIAZA ..... APPELLANT

AND

ZEPHANIA KHISA SAUL ..... RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Kitale (Obaga, J) dated 20th January, 2017 in Environment and Land Case No. 47 of 2012)

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. The appellant has filed the present appeal to challenge the decision of the Environment and Land Court (ELC) dated 20th January 2017 in which the ELC ordered the appellant to vacate a parcel of land measuring 1.3 acres registered in the name of the respondent within a period of three months failure to which he should be evicted. The ELC further entered judgment for the appellant in the sum of Kshs 217,000 which was the purchase price paid by the appellant for the said parcel of land. It further held that the contract for the sale of the suit property between the appellant and the respondent was void for lack of Land Control Board consent.

2. The ELC further directed that out of the sum of Kshs. 217,000 due from the respondent to the appellant, Kshs.160,000 would attract interest at court rates from 16th September 2002, the date of the contract between the parties for the sale of one (1) acre of land until payment in full. The balance of Kshs. 57,000, the amount paid by the appellant for the purchase of 0.3 of an acre from the respondent, would attract interest at court rates with effect from 21st November 2004 until payment in full. Each party was to bear its own costs of the suit.

3. Aggrieved by the decision of the trial court, the appellant filed a Notice of Appeal dated 25th January, 2017 and a Memorandum of Appeal dated 30th November, 2017 in which he raised five grounds of

appeal. These were that the learned Judge erred in law and fact in failing to find and hold that: the appellant had entered into a written agreement for the sale of land measuring one (1) acre at Kshs 160,000.00 on 16th September, 2002 and another on 4th October, 2004 for the purchase of zero point three (0.3) of an acre at Kshs. 57,000.00 being part of the whole of Kakamega/Mabusi/416 measuring approximately 3.11 hectares and Kakamega/Mabusi/419 of an undisclosed measurement; that the appellant had duly paid in full the total purchase price of Kshs 217,000.00 and a surveyor had executed the relevant forms facilitating the subdivision and transfer of proprietary rights to the appellant but the same was not concluded due to the respondent's noncompliance.

4. The appellant impugned the judgment further on the basis that the trial Judge erred in law and fact in failing to find that the respondent persistently and without reasonable cause refused to procure the consent of the relevant Land Control Board within the statutory period of six (6) months pursuant to the mandatory provision of section 8 of the *Land Control Act*; and in failing to find that since the appellant took vacant possession of the suit land, he had undertaken various developments including the construction of a six (6) roomed permanent house all valued at Kshs 3.4 million; and finally, in failing to find that in the year 2008, a dispute over the suit land arose and was adjudicated by the Lugari District Land Disputes Tribunal as Likuyani Claim No. LUG/LIK/01/2008 and duly disposed of within the law.

5. The appellant also filed Supplementary Grounds of Appeal dated 15th April, 2021 in which he raised four grounds, namely that the trial court erred in law and in fact in failing to: consider and determine all the issues raised in evidence; take into consideration matters that he ought to have taken into consideration and taking into consideration matters which he ought (not) to have taken into consideration in his decision. Further, that the trial court erred in law and fact and thereby misdirected itself in finding that the agreement entered into between the appellant and respondent over the suit land was unenforceable, null and void for lack of Land Control Board consent.

6. As this is a first appeal, we are required to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact. In doing so, we must bear in mind that we have neither seen nor heard the witnesses, which the trial court had the benefit of doing. As was held in *Selle v Associated Motor Boat Co. Limited* (1968) EA 123:

> " 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... 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 demeanor of a witness is inconsistent with the evidence in the case generally."

7. The facts before the ELC were that the respondent is the registered owner of land parcel number Kakamega/Mabusi/416 measuring 3.11 hectares. He entered into agreements with the appellant on 16th September 2002 and 4th October 2004 for the sale of 1 acre and 0.3 of an acre out of the suit land at a price of Kshs 160,000 and Kshs. 57,000 respectively. The appellant paid the total purchase price of Kshs. 217,000 in full. It appears, however, that the transaction between the parties in respect of the two parcels of land was not completed, though the respondent gave the appellant possession of the land parcels.

8. By an undated plaint filed in court on 21st March 2009, the respondent sought orders of eviction and general damages against the appellant on the ground that the transaction between the parties was null and void for want of Land Control Board consent. The appellant filed a defence and raised a

counterclaim in which he sought orders of specific performance of the agreements or, in the alternative, refund of the purchase price of Kshs. 217,000, cost of improvements on the land of Kshs. 3,400,000 and general damages for breach of contract.

9. In his evidence before the trial court, the respondent testified that he had sold the land the subject of the suit to the appellant. Later, the appellant started demanding that an access road serving the said land be expanded. That it is after the demand for an access road by the appellant that the respondent brought the suit against the appellant seeking a declaration that the sale transaction was null and void and for orders that the appellant be evicted from the suit land.

10. The respondent stated in cross-examination that he had sold to the appellant 1.5 acres in 1999 and the appellant had already obtained title to the portion, which was not the subject of the suit. That in the suit before the court, he was claiming 1.3 acres which he had sold to the appellant between 2002 and 2004. He conceded that the appellant was in possession of the suit land and had carried out developments on it.

11. In his evidence in opposition to the respondent's suit and in support of his counterclaim, the appellant stated that in 1999, he bought 1.5 acres from the respondent. The respondent took him before the Land Control Board and consent for the transaction was granted. The appellant later obtained title in respect of the 1.5 acres that he purchased in 1999. On 16th September 2002, he bought one acre from the respondent at a consideration of Kshs. 160,000 which he paid in full. On 4th October 2004, he purchased a further 0.3 of an acre from the respondent at Kshs. 57,000, which he also paid in full. The appellant produced a copy of the sale agreement and testified that the respondent did not, in this instance, take him to the Land Control Board for the requisite consent.

12. According to the appellant, the respondent had, sometime in 2008, closed an access road which connected the plot he had purchased in 1999 and the plots he had subsequently purchased in 2002 and 2004. He therefore filed a claim before the Land Disputes Tribunal which ruled in his favour and the verdict was adopted as an order of the court. Further, the District Surveyor was ordered to correct the width of the access road in contention which was carried out. This, according to the appellant, is what prompted the respondent to file the claim against him seeking possession of the suit land.

13. It was the appellant's testimony further that following his agreement with the respondent, a surveyor was brought to the ground and he excised the 1.3 acres. The appellant took possession of the suit land and put up a seven roomed permanent house; that he has a borehole, store, ablution block, cowshed, trees growing on the land and has connected piped water to the land. The appellant therefore prayed for specific performance of the contracts for sale or, in the alternative, a refund of the purchase price as well as the cost of improvements which had been valued at Kshs.3.4 million. A valuation report was produced by DW2, Francis Kariuki Njagi, who had carried out the valuation of the suit land.

14. The parties filed written submissions in support of their respective cases in this appeal. In his submissions dated 15th April 2021, the appellant condensed his main grounds of appeal into three, namely that the trial court erred in law and fact in failing to find: that he had paid the total purchase price; that the respondent refused to procure the Land Control Board consent within the meaning of section 8 of the *Land Control Act*; that having placed the appellant on the suit land, the respondent was holding title to the land in trust for the appellant.

15. The appellant submitted that it was not in dispute that he had entered into an agreement with the respondent for the purchase of the suit land; that he had paid the requisite consideration, was placed in possession by the respondent and that upon assuming possession, he had done extensive developments on the land.

16. It was the appellant's submission that the trial court had therefore applied the wrong principles in reaching its decision. Further, that courts had applied the principles of equity enshrined in Article 10 of *the Constitution* and the doctrine of constructive trust and proprietary estoppel to reach the conclusion that these provisions supersede the harsh provisions of the *Land Control Act*. The appellant supported this submission with the decision in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR in which this Court applied the doctrine of constructive trust and proprietary estoppel in circumstances similar to this.

17. In his submissions dated 22nd April 2021, the respondent argued that the judgment of the trial court is fair, well-reasoned and within the tenets of the pleadings and the remedies sought. In his view, from the circumstances and evidence adduced, the trial court rightly stated that the agreements for sale were unenforceable. The appellant had not given testimony for the extension of time within which the Land Control Board consent could be sought but had limited himself to the provisions of section 8 of the *Land Control Act* and had not sought a prayer for a constructive trust. The appellant had sought a refund of the purchase price in his counterclaim, which he was granted. The trial court had made a finding, based on the evidence, that the appellant could not be awarded damages as he did not support his claim for compensation.

18. The respondent distinguished the authorities relied on by the appellant. He submitted that in both *Willy Kimutai Kitilit v Michael Kibet* and *Kiplagat Kolul v Rose Jebor Kipngok & another*, evidence had been presented to the court to justify its finding. In the present case, the appellant had failed to establish that he is in actual possession of the suit land. In the respondent's view, the present appeal is defective in form and substance, lacks merit, and should be dismissed with costs.

19. I have considered the judgment and record of the trial court and the submissions of the parties. I note that the essential facts leading to the present appeal are not in dispute. The appellant and the respondent entered into agreements for sale of 1.3 acres of land out of Kakamega/Mabusi/416 by the respondent to the appellant, and the appellant paid the full purchase price. There is also no dispute that the appellant was given possession of the suit land. Indeed, the respondent stated in his evidence in chief and confirmed in cross-examination that he had put the appellant in possession. Further, the fact that the respondent had asked for possession of the suit land and an order had been made for eviction of the appellant puts the issue beyond dispute. Nonetheless, the trial court found that the sale transaction between the appellant and the respondent in respect of the suit land was void for lack of Land Control Board consent and issued orders for eviction of the appellant and refund to him of the purchase price.

20. The core issue before us, then, is whether the trial court was correct in finding that the transaction between the parties was void for lack of consent from the Land Control Board. Section 6 of the *Land Control Act* provides that:

> Transactions affecting agricultural land
>
> (1) Each of the following transactions that is to say—
>
> (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
>
> (b) ...
>
> is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

21. Under section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to section 22 of *the Act*. An application for consent is made under section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement. The proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

22. Section 9 (2) stipulates that where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void:

    (a) on the expiry of the time limited for appeal under section 11; or

    (b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

    (c) where a further appeal is entered under section 13 and dismissed, on that dismissal.

23. This Court has, in a number of cases, considered the effect of a failure to obtain Land Control Board consent on a transaction. There has, however, been no consensus on the issue, and in a sense, the question is still unsettled. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR the Court of Appeal sitting in Nyeri held, inter alia, that the possession of the land by purchasers was an overriding interest in favour of the purchasers. It stated further at paragraph 18 et seq that:

> 18. The other critical issue for our consideration is the lack of consent of the Land Control Board. The trial court held that the suit property being agricultural land was subject to the *Land Control Act*, Chapter 302, Laws of Kenya; Section 6 (1) of the said *Land Control Act* required the Land Control Board consent to be obtained in respect of the sale transactions; the failure of such consent made the said agreements void and unenforceable against the respondent. It is our considered view that the Honourable Judge erred in failing to appreciate the evidence given by the respondent as to how he intended to complete the sale transaction. The respondent testified that he did not obtain the Land Control Board consent for the sale transactions because he preferred obtaining the consent once he had sold all the 240 plots.
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> 19. Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots."

24. The Court went on to cite the decision in *Mwangi & another v Mwangi* (1986) KLR 328 in which it had been held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under section 126 (1) of the *Registered Land Act* (now repealed) is merely permissive and not mandatory.

25. The Court also cited the case of *Mutsonga v Nyati* (1984) KLR 425 and *Kanyi v Muthiora* (1984) KLR 712 in which it was held that the equitable doctrines of implied, constructive and resulting trusts

are applicable to registered land by virtue of section 163 of the *Registered Land Act*, then in force, which provided for the application of the common law of England as modified by equity.

26. At paragraph 20 and 25 of its decision, the Court stated as follows:

> 20. In *Yaxley v Gotts & Another*, (2000) Ch 162, 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. 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.
>
> 25. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the *Land Control Act* is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as he then was) in *Chase International Investment Corporation and Another v Laxman Keshra and Others*, [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:
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> "If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed...."

27. The Court of Appeal sitting in Nairobi took a totally different approach to the question in *David Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR. After a detailed analysis of the provisions of the *Land Control Act* and previous decisions on the failure to obtain consent from the Board, it differed with the Court in *Macharia Mwangi Maina* for several reasons, the main one being on the application of equitable principles to the *Land Control Act*. The Court held as follows:

> "...First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the *Judicature Act*. The said Court allowed the appeal from the decision of the High Court which had held that in the situation before the court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as Section 6 of the *Land Control Act*.

28. In *Willy Kimutai Kitilit v Michael Kibet* (*supra*) the Court of Appeal sitting in Eldoret, in agreeing with the reasoning in Macharia Mwangi Maina stated that:

> "(20) One of the reasons the Court gave in David Sironga ole Tukai decision for differing with the decision in Macharia Mwangi Maina (supra) was that the Court in the latter case ignored the provisions of Section 6 (2) of the *Land Control Act*. However, in our view, the phrase "declaration of a trust of agricultural land" refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by Section 36 as read with

Section 66 of the *Land Registration Act* or Section 126 of the repealed Registered *Land Act*, and not a constructive trust or trust created by operation of the law.

Similarly, equity is law and Section 6 (2) does not prohibit a court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity.

A court's decision being final and binding subject to appeal, it would be illogical to hold that such a decision of a court requires the consent of the Land Control Board before it becomes final and valid."

29. In *William Kipsoi Sigei v Kipkoech Arusei & another* [2019] eKLR this Court, in upholding the decision of the trial court, stated that:

> "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".

30. Finally, in *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR this Court cited with approval the holdings in *Macharia Mwangi Maina and William Kipsoi Sigei v Kipkoech Arusei & another* and held that the trial judge had erred in failing to apply the concept of constructive trust and the doctrine of equitable estoppel in the matter before it. In addressing its mind to the purposes of the *Land Control Act*, the Court observed as follows:

> 24. We hasten to state that the *Land Control Act*... was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another."

31. I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another* and *Kiplagat Kotut v Rose Jebor Kipngok* best capture the spirit of the *Land Control Act* when interpreted through the prism of *the Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of *the Constitution*. I should observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the *Ole Tukai* decision.

32. As was recognized by this Court in the Macharia Mwangi Maina case, the *Land Control Act* is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the *Ole Tukai* decision where this Court observed as follows:

> "What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land." (Emphasis added).

33. However, a distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where a seller fails or refuses to apply for such consent. The provisions of the *Land Control Act* cannot continue to be read as though the circumstances prevailing at its enactment are still in place.

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

35. In *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR, an obviously unhappy Apaloo JA captured the injustice visited on purchasers in interpreting situations such as presently before us as voiding the contract of sale of land on the basis that Land Control Board consent has not been obtained. In that case, the original owner of the land, one Ismael Machio, had sold it to the respondent, then he reneged on the sale on the basis that Land Control Board consent had not been obtained. He then sold it to the appellant and, together, they applied and obtained consent, and the land was transferred to the appellant. The High Court ruled in favour of the initial purchaser, and the appellant, the subsequent purchaser in whose name the land had been registered appealed. In his decision, Apaloo JA observed as follows:

> "In a contest of title between Machio and the respondent, if the latter sought to rely on the *Land Control Act* to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of parliament as a vehicle for fraud. If that argument

could properly be made against Machio, it can, in like manner be made against the appellant, who as the judge found colluded with Machio to purchase the land."

36. While acknowledging that he was bound by the decision of the East African Court of Appeal in *Rioki Estate Co (1970) Ltd v K Njoroge* [1977] KLR 146, Apaloo JA succinctly summarized the scenario resulting from the said decision as being the following:

> " "A" sold agricultural land to "B". The former was uncooperative in getting "B" to obtain the consent of the Land Control Board. "A" however obtained full payment of the purchase price and duly put "B" into possession. On the faith of this sale, "B" spent a large sum of money in developing and improving the land. Ten years afterwards, "A", motivated by the prospect of obtaining higher price for the land, sells the self-same land to "C", then with A's active co-operation, hurriedly obtained the consent of the Land Control Board, (it is possible to obtain this in one day) and thereafter registered his title. "C" then proceeds to seek B's eviction from the land. Without the aid of section 6(2) of the Act, "C" cannot obtain title to the land superior to "B"s". Yet as the law stands at present, "C" will be held entitled to evict "B". Indeed "A" would be entitled to say to "B" "yes, I accept that I sold the land to you, obtained full payment of the consideration money and put you in possession for 10 years and you may well have developed the land. But I say that an Act of parliament entitled me to resell to "C" and you must be content with the return of the purchase price you paid me ten years ago."

37. While the Learned Judge of Appeal felt constrained to agree with the decision of his brother judges upholding the appeal and setting aside the decision of the High Court in favour of the initial purchaser, the respondent in the appeal, he nonetheless felt that the decision, based on the provisions of the Act and the interpretation in *Rioki Estate Co. Ltd*, did not accord with equity, fairness or justice:

> " To think such a thing could be possible offends against one's idea of propriety and fairness. I believe that sound reasons of public policy motivated the parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be "void for all purposes". Strong words indeed! But one may be permitted to doubt whether the Act as judicially construed and applied, meets the ends of justice or is a true reflection of the legislative will."

38. The views expressed by Apaloo JA thirty-five years ago encapsulate, in my view, the proper interpretation of the provisions of the *Land Control Act*, its harshness ameliorated by considerations of equity and fairness. Unhappily for the Learned Judge of Appeal then, statute and binding judicial precedent hobbled his ability to deal fairly and render justice to a party who had clearly been taken advantage of by the seller, using legislation as his shield in an unfair situation. Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with *the Constitution* null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to *the Constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser.

39. In the present case, the respondent readily conceded that he sold the suit land to the appellant, and that he received the full purchase price for the land. He further conceded that he placed the appellant in

possession of the suit land, a fact that is confirmed by the evidence before the trial court and the orders for possession that he sought. He further conceded that the appellant had carried out developments on the suit land. Even when the issue of the expansion of the access road to the suit land parcels came up before the Land Disputes Tribunal and a decision was made in favour of the appellant, the respondent complied with the orders and brought a surveyor who rectified the access road.

40. In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.

41. Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust. Moreover, in his written submissions dated 30th August 2016, the appellant raised the issue of an implied or constructive trust having arisen in his favour. The respondent did not address this issue in his submissions dated 26th September 2016. I take the view, on the authority of the decisions in *Odd Jobs v Mubia* [1970] EA 476 and, among other decisions, *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court. The trial court did in fact address itself to the issue in its decision in which it stated as follows:

> 10. The defendant's counsel submitted that the plaintiff put the defendant in possession of the purchased portion and that this court should find that there was an implied or constructive trust created. In this respect, counsel cited a Court of Appeal decision in Nyeri Civil Appeal No. 26 and 27 of 2011 between *Macharia Mwangi Maina & 87 Others & Davidson Mwangi Kagiri* where the issue of consent of the land control board arose and the Court of Appeal Judges held that the existed constructive or implied trust in that the respondent had put the appellants in possession even though no consent of the land control board had been obtained.
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> 11. Counsel also quoted from a number of decisions which dealt with the issue of equity and estoppel some of which were cited in the *Macharia mwangi Maina* Case (*supra*). I sympathize with the predicament of the defendant herein. 1 have also had occasion to go with the decision of the *Machria Mwangi Maina* case (*supra*) in other cases depending on the circumstances of each ease but in the present case, the defendant did not adduce credible evidence that would have led me to go with the Court of Appeal decision in the above case. This is because, the defendant had testified that he bought his 1.3 acres out of LR, No Kakamega/Mabusi/416. The pleadings in this ease relate to L.R. No. Kamega/ Mabusi/416.
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> 12. The defendant premised his counter-claim on L. R. No.
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> Kairamega/Mabusi/416. It is therefore not clear as to whether the buildings are lying on the land in contention or on the land which he had purchased

> earlier on and which is not in dispute. The valuation report was based on a portion of LR. No Kakamega/Mabusi/416 measuring 1.3 acres. The two agreement did not refer to the plot number from where the defendant bought his contested 1.3 acres and as such it will be difficult to make a finding on where the improvements are based as the defendant's evidence is contradictory."

42. I note that the trial court, in declining to find that a constructive trust had been created in favour of the appellant, did so on the basis that it was not clear which parcel of land was in contention. He further found that he could not make an order for payment of special damages as it was not clear on which parcel of land the developments in respect of which the appellant was claiming special damages were on. I agree with his findings on this latter question.

43. However, the evidence on record showed that there was no dispute that the appellant had purchased land from the respondent, or the identity of the suit property. On the evidence before it, the trial court ought to have found, in line with the decision in *Macharia Mwangi Maina*, that the respondent held the suit land in trust for the appellant. That it did not do so was an error of law and fact.

44. I am accordingly satisfied that the present appeal has merit and I would allow it. I would set aside the orders of the trial court and substitute the said orders with an order for specific performance of the agreements for sale of the suit land between the appellant and the respondent dated 16th September 2002 and 4th October 2004 as prayed in the appellant's counterclaim. I would further make an order for transfer of the suit land to the appellant. Finally, I would grant the costs of the suit in this Court and in the trial court to the appellant.

JUDGMENT OF KIAGE, JA.

45. I have had the advantage of reading in draft the judgment of my learned sister Mumbi Ngugi, JA and I agree with her conclusions and the reasons she assigns therefor.

46. It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.

47. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.

48. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the appellant should succeed.

49. As M'Inoti, JA also agrees, the appeal is allowed in the terms proposed by Mumbi Ngugi, JA.

JUDGMENT OF M'INOTI, JA

50. I have had the advantage of reading in draft the judgment of my Sister, lady Justice Mumbi Ngugi, with which I concur. I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P.O KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR