Obuba v Nyabwatana (Civil Appeal 30 of 2019)
[2022] KECA 1425 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1425 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 30 OF 2019

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

DECEMBER 16, 2022

BETWEEN

NELSON NYAMACHE OBUBA ..... APPELLANT

AND

ITIRA MOKONO NYABWATANA ..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Migori (G.M.A. Ong'ondo, J.) dated and delivered on 25th September 2018 in ELC CASE NO. 598 OF 2017 FORMERLY KISII ELC CASE NO. 70 OF 2011)

JUDGMENT

JUDGMENT OF J. NGUGI, JA

1. This appeal arises from the judgment and orders of the Environment and Land Court (ELC) (Ong'ondo, J) dated September 25, 2018. Nelson Nyamache Obuba ("the Appellant"), was the Plaintiff in the suit. By a plaint dated April 20, 2011 and amended by consent on May 15, 2013, the Appellant sought the following reliefs: -

    a. A permanent injunction restraining the defendant (Respondent), his family members, servants and/or agents from invading/trespassing into Land Title Number BUKIRA/BUHIRIMONONO/577 owned by the plaintiff (Appellant) herein with the aim of chasing away his (plaintiff's) workers, servants and family members.

    b. A mandatory order directed at the Officer Commanding Isibania Police Station to criminally prosecute the defendant (Respondent), his agents, family members and/or servants the moment he continues to unnecessarily interfere with the plaintiff's (Appellant's) peaceful occupation and utilization of his parcel of land known as BUKIRA/BUHIRIMONONO/577.

c. Costs of the suit and interest.

d. Special damages Kshs 115,000/= being the value of tree seedlings destroyed by the defendant (Respondent) on 9/4/2010, 14/8/2010. December 12, 2010 and 20/4/2011.

2. Itira Mokono Nyabwatania ("the Respondent") was the defendant at the ELC. He also filed a counter claim dated May 20, 2011 and amended by consent on May 15, 2013. The prayers were as follows: -

a. A declaration that the acquisition by the plaintiff (Appellant) of 10.3 acres out of the defendant's (Respondent's) Land Parcel No BUKIRA/BUHIRIMONONO/107 was fraudulent and unlawful.

b. An order directing the plaintiff (Appellant to re-transfer the 10.3 acres from BUKIRA/BUHIRIMONONO/577 to the defendant (Respondent).

c. In the event of refusal by the plaintiff (Appellant) to sign or execute transfer documents, the Honourable Court does direct the Executive Officer of the court to sign them.

d. Costs of the counter claim.

3. The evidence that emerged from the trial was as follows.

4. Back in 1982, the Appellant lived and worked for gain in Nairobi. He hailed from the same village as the Respondent; indeed, he described him as a "traditional grandfather". The Respondent went to see the Appellant in Nairobi with a proposal. The Respondent wanted to sell a parcel of land which was under the threat of forced sale because of a loan he had taken from Kenya Commercial Bank. The land in question was LR No Bukira/Buhirimonono/107 ("Original Parcel"). The Respondent wanted the Appellant to buy a portion of the property under private treaty instead so that he could raise the amounts owed to the Bank and thereby save the land from the forced sale by the Bank.

5. The Appellant was amenable. Together, the Appellant and the Respondent went to the Bank's lawyers, Hamilton, Harrison & Mathews Advocates, to find out the total amounts owed to the bank. They found out that it was Kshs 43,340.50. The Appellant testified that they paid Kshs 35,000 on that day leaving a balance of Kshs, 9,340. He was not specific how much of the Kshs 35,000 he contributed. However, he testified that he promised the Bank's lawyers that he would pay the remaining Kshs, 9,340. He also testified that, true to his word, he cleared the balance in full. He then collected the title to the land from the Bank's advocates and, accompanied by his (Appellant's) father and a surveyor, they went to Isebania to see the Respondent so that he could be shown the parcel of land he had purchased.

6. The Appellant testified that the Respondent showed him the parcel he had agreed to sell to him and the surveyor did the measurements and mapping. The surveyor, then, engaged the government surveyor and they mounted beacons on the land. All these, the Appellant insisted, was done in the presence of the Respondent.

7. The surveyor prepared the necessary mutation forms. The Respondent signed them. They were lodged in the Land Registry on August 26, 1986. The mutation form was for the subdivision of the Original Parcel into three parcels. The Appellant was to purchase one of the parcels; a second parcel was to be bought by a third party; while the Respondent was to remain with the third parcel. The three parcels were to be renamed, respectively, as Numbers 557; 558; and 556.

The Mutation Form – signed by Respondent; the District Surveyor and the Land Registrar was produced as Plaintiff's Exhibit 1.

8. Also produced, as Plaintiff's Exhibit, was the Application for Consent of the Land Control Board. It is dated November 8, 1983. The Application is "to subdivide my land of 21.5 Ha into three portions of 13.5 Ha, 4.0 Ha, and 4.0 Ha and to transfer 4.0 Ha and 4.0 Ha to the above named persons." The two persons named under the part of the Application Form that requests for the name of proposed purchaser or transferee are: Nelson M Obuba (the Appellant) and Jadson Maranga Nyangau. The Application for Consent is duly signed by the Respondent.

9. In the Record of Appeal, there is a Letter of Consent from the Land Control Board permitting the transaction in the form of subdivision of the Original Parcel and transfer to Nelson M. Obuba (the Respondent) and Jadson Maranga Nyangau. However, the Letter of Consent was, by omission of the Appellant's counsel, not produced as an exhibit during trial. During cross-examination, however, the Appellant indicated to the Court that he had the Letter of Consent with him in Court.

10. In addition, the Appellant and the Respondent executed a transfer of land form on 25/8/1986 which was duly registered. Thereafter, the Appellant obtained the Certificate of Title for LR No Bukira/Buhirimonono/557 ("the Suit Property") dated 11/9/1986. The Suit Property measures 4.92 Ha.

11. The Appellant testified that upon obtaining the Certificate of Title for the Suit Property, he took possession and put up a house. However, he said, he later demolished it in 1984 and moved away as the area became forested and hence, not conducive for residential habitation. From 1984, he used the Suit Property to cultivate subsistence crops and plant trees and was in peaceful occupation until February 2011 when he got summons from the Land Registrar, Kuria with regard to boundaries of the parcel. Later, on February 23, 2011, the Appellant received a demand letter from the Respondent's advocates demanding that he transfers 10.3 acres of the Suit Property to the Respondent within thirty (30) days. The Appellant also got information from his workers that the Respondent had, on April 10, 2010 and February 2, 2011, chased them from the Suit Property. He decided to report the matter to the Police. The Police advised him to file a civil suit. He then instructed his advocates who responded to the demand letter from the Respondent. However, the Respondent continued interfering with the Suit Property and only stopped after he obtained an injunction against him. The Appellant testified that by that time, the Respondent had caused destruction by uprooting tree seedlings worth Kshs 115,000.

12. During cross-examination, the Appellant acknowledged that there was a sale agreement for the Suit Property but stated that he had lost it. He contended that the Respondent initially agreed to sell to him 10 acres of land. He pointed to the Application of Consent of the Land Control Board in which the Respondent indicated his intention to subdivide the original parcel into three (3) portions, part of which consisted of 4.0 Ha that was to be sold to him (Appellant). The Appellant explained that there was a variance of 2.3 acres between the acreage on the land title and the acreage the Respondent had applied to sell to him (Appellant). To resolve this, the Appellant told the Court that he paid an extra Kshs 9,000/= to the Respondent for the 2.3 acres. He testified that in the long run, he had acquired 4.92 Ha from the Respondent and fully paid the purchase price. He admitted that he had the Land Control Board consent but that he forgot to present it before Court.

13. On his part, the Respondent denied the Appellant's claims that he bought 10 acres of land from him and that he had used his parcel of land as security for a loan facility. He also denied chasing the Appellant's workers from the Suit Property and destroying tree seedlings. He testified that he only sold 2 acres of his parcel of land to the Appellant. He testified that, having done subdivision, the Appellant remained with LR No 557 (the Suit Property) while he (Respondent) remained with LR No 556 measuring 13.2 hectares. He testified that the Appellant trespassed onto his land (LR No 556), which matter he reported to the area land registrar and the Appellant was summoned to the Suit Property.

That it was during this time that he carried out a search and discovered that the Appellant had taken 12.5 acres rather than the 2 acres that he had sold him.

14. The Respondent further testified that there was no consent from the Land Control Board that showed that he had transferred 4.92 Ha to the Appellant. He admitted that his application for consent of the Land Control Board was for subdivision of the original parcel into three (3) portions measuring 13.5ha; 4.0ha and 4.0ha. Regarding the Transfer Form, however, he contended that the Appellant gave him a blank transfer form to sign and that he was illiterate. He, therefore, testified that he did not know that the Transfer Form was for 4.92 Ha. Lastly, he acknowledged that there was a sale agreement for the Suit Property but that he had lost it.

15. Counsel for the Appellant filed written submissions in which he argued that: the Respondent voluntarily signed transfer and mutation forms in favour of the Appellant; that the evidence of the Respondent was full of glaring contradictions, lies and malice; and it was not clear why the Respondent took twenty-five (25) years to lay his claim.

16. Counsel for the Respondent also filed written submissions in which he analyzed five (5) issues for determination, some of which included whether the Appellant bought land from the Respondent and whether the parties were entitled to the reliefs sought in their respective pleadings.

17. The matter was initially filed and partly heard at the ELC at Kisii before it was transferred to ELC at Migori where further hearing and determination took place: Okongo J. at Kisii ELC took the evidence of the Appellant (who was the Plaintiff) while Ong'ondo J at Migori ELC took the evidence of the Respondent, the submissions of the parties and rendered the judgment.

18. In its decision, the Trial Court framed the following issues for determination: -

    a. Whether PW1 (Appellant) is the registered proprietor of the Suit Property.

    b. Whether the defendant (Respondent) trespassed on the Suit Property.

    c. Whether PW1 (Appellant) and DWI (Respondent) are entitled to the reliefs sought in their respective pleadings.

19. The Trial Court made a finding that there was a genuine Certificate of Title issued by the Land Registrar in favour of the Appellant. After noting that the Certificate of Title cannot be defeated except as provided for in the statute, the Court held that, the position did not hold here because "[T]he available evidence is abundantly clear that PW1 did not obtain consent from the land control board for the sale of the suit as required under section 6(1) [of the *Land Control Act* hence the transaction was rendered void...." Consequently, the Judge reasoned, the transaction was void.

20. The Learned Judge, then, ventured into an analysis of whether the Appellant was entitled to any equitable remedies which would allow him to retain the Suit Property. The Court held that while a written or oral agreement for the sale of property could create an interest in the property and was enforceable based on a constructive trust and proprietary estoppel though it was void and unenforceable as a contract, neither doctrines could benefit the Appellant in the instant case. The Learned Judge reasoned that the doctrines of constructive trust and proprietary estoppel were inapplicable because the Appellant had testified that he did not stay on the Suit Property and the Respondent had testified that the Appellant only trespassed onto the Suit Property in the year 2011. Further, the Learned Judge held there was no evidence to show that the Appellant was in "an open and notorious occupation and possession of the suit land". As such, the Judge concluded, that the "existence of constructive trust does not arise or at all."

21. On trespass, the trial court held that the Appellant did not establish that the Respondent unlawfully occupied the Suit Property. Ultimately, the Trial Court held that the Appellant failed to prove his claim against the Respondent on a balance of probability and determined the matter in favour of the Respondent. The Court specifically found that the Respondent had only sold 2 acres of land, and found the counterclaim credible and sufficiently proved. The Court's final orders were as follows:

    a. The plaintiff's (Appellant) claim by way of a plaint dated April 20, 2011 is dismissed with costs to the defendant (Respondent).

    b. The judgment be and is hereby entered for the defendant/counter claimer (Respondent) against the plaintiff (Appellant) in terms or orders (a), (b), (c) and (d) in the defendant's counter claim amended on May 20, 2011.

    c. Costs of the counter claim to be borne by the plaintiff (Appellant).

22. Aggrieved by the decision of the trial court, the Appellant filed a Notice of Appeal dated October 8, 2018 and a Memorandum of Appeal in which he raised four (4) grounds of appeal. These are that the trial court erred in law and fact by: failing to appreciate the Appellant's constructive possession of the Suit Property; failing to appreciate that both parties voluntarily appeared before the Land Control Board at Kehancha whereby a letter of consent to transfer the Suit Property was issued; failing to appreciate the absolute and indefeasibility of title held by the Appellant; and in not taking into account entirely the submissions and testimony of the Appellant with regard to ownership of the Suit Property.

23. Consequently, the Appellant prayed that the appeal be allowed; the entire judgment of the Trial Court be set aside and/varied as against the Appellant; and the Appellant to have the costs of the appeal.

24. During the virtual hearing of the appeal, Learned Counsel Mr Ratemo held brief for Mr Orare who was on record for the Appellant. There was no appearance of counsel for the Respondent. Both parties had filed written submissions.

25. Mr Ratemo relied entirely on their written submissions and argued that the impugned judgment hinged on two pillars which were faulty and these were that: the Appellant never obtained the Land Control Board consent in the sale of the Suit Property and that the equitable remedy of constructive trust is not available to the Appellant for want of occupation. In this regard, he argued that their contention was three (3) pronged: -

    a. Consent of the Land Control Board vis-à-vis constructive trust.

    b. The Appellant's absolute and indefeasible title and want of proof of fraud or trespass by the Respondent.

    c. The apparent contradiction in the impugned judgment and want of proof of fraud.

26. On consent of the Land Control Board vis-à-vis constructive trust, Mr Ratemo submitted that the main ground for revocation of the Appellant's land title by the Trial Judge was lack of consent of the Land Control Board for the sale of the Suit Property which made the sale transaction void and denied the Appellant equitable remedy. In this regard, counsel cited *Dakianga Distributors (K) Ltd vs Kenya Seed Company Ltd* [2015] eKLR and *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR and contended that parties are bound to their pleadings and neither parties pleaded that the Suit Property fell under the controlled area and that the Appellant did not obtain consent of the Land Control Board. That be that as it may, evidence on record shows that the Land Control Board consent was obtained as the Appellant, during trial, was shown a duly filled and executed application for the Land Control Board consent which was granted

and wherein the Respondent had indicated his intention to subdivide his land into three (3) portions and transfer a portion to the Appellant. To support this argument, Mr Ratemo submitted that the Respondent testified that he applied for consent of the Land Control Board to subdivide and transfer a portion of the same to the Appellant.

27. It was also argued that the Appellant's purchase of the Suit Property was never challenged and that, in addition, he cultivated subsistence crops, planted trees and had workers therein. To buttress this, the Appellant faulted the Trial Judge for believing the Respondent's allegations that the Appellant had trespassed on the Suit Property and yet, in self-contradiction, denied that he (Appellant) occupied the Suit Property either wholly or a portion. This, Counsel argued, leaves one to wonder how he trespassed onto it in the first place. It was submitted that this Court in *Peter Mbiri Michuki vs Samuel Mugo Michuki* [2014] eKLR found that taking of legal possession of a Suit Property as a *bona fide* purchaser for value upon entry of a sale agreement by parties and construction of a house and the purchaser putting another in actual physical possession and occupation constituted actual and/or constructive possession of the Suit Property as happened in this case. That further, in *Willy Kimutai Kitilit vs Micaheal Kibet* [2018] eKLR, it was held that planting of trees on a Suit Property was development and demonstrated occupation and possession of land. Thus, the Appellant was in actual and constructive occupation and possession of the Suit Property and equitable remedy of constructive trust was available to him.

28. On the Appellant's absolute and indefeasible title and want of proof of fraud or trespass by the Respondent, it was submitted that both the Appellant and the Respondent admitted that there was a sale agreement between them but they had lost their copies, which admission was evidence of the overall intention of both parties. Be that as it may, the mutation form presented before the trial court showed that the Suit Property measured 4.92ha and/or 12 acres and the transfer form showed that the same had been transferred to the Appellant. Therefore, the allegation by the Respondent that he only sold the Appellant 2 acres could not be relied on and the same was also not substantiated. Further, the Respondent did not present evidence that the Appellant trespassed onto his land. That as a matter of fact, the Appellant honoured the summons by the land registrar and went to the Suit Property whereby the land registrar was shown the boundary and thereafter, the Respondent never filed any report from the land registrar to confirm his allegations that the Appellant had trespassed onto his land.

29. Lastly, on the apparent contradiction in the impugned judgment and want of proof of fraud, it was argued that the trial court, having voided the land transaction and disentitled the Appellant, could not turn around and hold that the Appellant only acquired 2 acres of the Suit Property by constructive trust or otherwise and had defrauded the Respondent 10.5 acres. Further, the Respondent never proved any particulars of fraud on the part of the Appellant in which regard reference was made to the case of *Arthi Highway Developers Ltd vs West-End Butchery Ltd & 6 Others* [2015] eKLR. The Appellant submitted that the Respondent voluntarily and with full knowledge of the contents of the land transactional documents executed them and facilitated the sale and transfer of the Suit Property to the Appellant; and the issue of illiteracy was never pleaded by the Respondent and neither did he testify that he ever sought explanation of the contents of the documents he executed but did not comprehend them or that he was coerced or forced to sign any document, as such, his allegation was an afterthought.

30. The Respondent, in his submissions, opposed the appeal. On consent of the Land Control Board vis-à-vis constructive trust, it was submitted that in as much as the Respondent never pleaded either through defence or counter claim, that the Suit Property and its sale fell under Section 6 of the *Land Control Act*, it mattered not as consent of the Land Control Board was indispensable and both parties knew that failure to comply with that requirement voided the whole transaction making it a nullity.

31. As regards the Appellant's claim of constructive trust, the Respondent cited the case of *Macharia Mwangi Maina & 87 Others vs David Mwangi Kagiri* [2014] eKLR wherein this Court observed that a constructive trust is based on common intention which is agreement, arrangement or an understanding reached between parties and relied on and acted on by the claimant. That constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner defeating the common intention. Based on this, the Respondent argued that the issues in this instant case did not expressly or impliedly show a common intention between the Appellant and the Respondent with regard to the Suit Property and that even though there was a common ground of an agreement, such agreement was only in respect to 2 acres and not the extra 10 acres that was fraudulently acquired by the Appellant. The Respondent also cited the case of *Alberta Mae Gacci vs Attorney General & 4 Others* [2006] eKLR for the preposition that the registration of the Suit Property was void ab initio as it was acquired through forgery and fraud.

32. As regards the Appellant's absolute and indefeasible title and want of proof of fraud or trespass by the Respondent, it was contended that since the Appellant's title was a first registration and indefeasible in nature as per Section 26 of the *Land Registration Act*, the same was unimpeachable unless proved that it was acquired illegally by fraud or misrepresentation. In this regard, the Respondent argued that in his testimony at the trial court, he confirmed that he only sold 2 acres to the Appellant and signed the mutation and transfer forms but later in the year 2011, he discovered that the Appellant had obtained title for 12.5 acres instead of 2 acres and cited the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* [2013] eKLR; *Munyu Maina vs Hiram Gathiha Maina*, Civil Appeal No 239 of 2009; and *Republic vs Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others*, Mombasa HCMCA No 617 of 2003 [2006] KLR (E&L) 563.

33. Lastly, as regards the Appellant's allegation that the trial court did not entirely consider his submissions and testimony with regard to ownership of the Suit Property, the Respondent submitted that there is documented evidence that shows that the Appellant bought only 2 acres from the Respondent and not 10 acres as alleged and that once such ownership is challenged, it remains subject to proof as to how the Appellant acquired the title. The Respondent further argued that the record shows that he filed a boundary dispute claim at the District Land Registrar's Office when he discovered that the Appellant fraudulently and unlawfully acquired an extra 10.3 acres of his land and cited the case of *Alice Chemutai Too vs Nickson Kipkurui Kori & 2 Others* [2015] eKLR wherein it was held that the protection of a title can be removed and the title impeached if it is procured through fraud or misrepresentation, to which the person is proved to be a party or through a corrupt scheme.

34. This being a first appeal, we are required to re-evaluate and re-analyze afresh the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanor of witnesses. (See S*elle vs Associated Motor Boat Co. Limited* (1968) EA 123) In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs Olenja* (1968) KLR 661).

35. Having considered the pleadings in the record of appeal, the judgment of the trial court, the Appellant's grounds of appeal and the rival submissions of the parties, the substantive issues that fall for determination in this appeal are: -

    a. First, whether there was Land Control Board Consent for the transaction for the sale of the Suit Property, and if not, whether the equitable doctrines of Constructive Trust and Proprietary Estoppel were available to rescue the transaction in favour of the Appellant.

b. Second, whether the Appellant's title to the Suit Property is absolute and indefeasible.

c. Third, whether, in view of the findings in both (a) and (b) above, there was trespass by either the Appellant or the Respondent.

36. On the first issue, both parties agreed that there was a sale transaction between them. They disagreed on the exact acreage of the property that was the subject of the sale: the Appellant insisted that he purchased 4.92 Ha while the Respondent insisted that the Appellant only purchased 2 acres of land. It was also incontrovertible that the Respondent filed an Application for Consent of Land Control Board which was produced as evidence during the trial. The Respondent does not deny that the signature on the Application is his. Similarly incontrovertible is that the Respondent signed the Transfer Form for the transfer of 4.92 Ha to the Appellant. Finally, the Respondent does not deny signing the Mutation Form which paved way for the subdivision of the Original Parcel into three parcels one of which is the Suit Property.

37. The Respondent's main defence to the official documents submitted which would seem to suggest that he, indeed, intended to, and sold 4.92 Ha of the Original Parcel, seems to be the defence of non est factum: he signed the documents but he is illiterate and did not know exactly what he was signing. It was not his deed, he seemed to say. He insists that all along he knew he was selling only 2 acres and it was not until 2011 that he realized that the Appellant had, somehow, fraudulently transferred to himself 4.92 Ha. He only realized this, he insisted, when did an official search.

38. The Learned Judge found it unnecessary to resolve the question whether the preponderance of the evidence showed that the Respondent had sold 4.92 Ha to the Appellant. Instead, the Learned Judge pivoted on the proof or otherwise of the Land Control Board Consent for the transaction. Finding none, the Judge centered his analysis on whether the equitable doctrines of Constructive Trust or Proprietary Estoppel were applicable. Again, he found they were not applicable – and that ended, in the Learned Judge's mind, the Appellant's quest for his right to be adjudged the owner of the Suit Parcel.

39. I think, with respect, that the Learned Judge fell into error on both accounts. First, while it is true that the Letter of Land Control Board Consent was not formally produced as evidence before the Court, there was no basis for the Learned Judge's strident finding that "the available evidence is abundantly clear" that the Appellant did not obtain the Land Control Board consent for the transaction. I say so for two reasons. First, the issue of Land Control Board Consent was not properly pleaded and was not an issue before the Learned Judge. It was not raised in the pleadings and only arose during the cross-examination of the Appellant. During the cross-examination, the Appellant made it clear that he had the Consent and that he had only failed to produce it in Court. Second, there is contextual evidence on record to demonstrate that there was, indeed, Land Control Board Consent for the transaction. For one, the Appellant produced the Application for Consent of the Land Control Board. The same was not controverted at all. Two, the Appellant testified that pursuant to the Application, the Consent was actually given. The Respondent did not deny or adduce any evidence to impeach the testimony. Indeed, he was eminently silent on the topic. Looked at contextually, the inescapable conclusion is that Land Control Board Consent was applied for vide the Application produced in Court, and was, in fact granted. It was, therefore, an error for the Learned Judge to conclude that the sale transaction was void for lack of Land Control Board Consent.

40. Even if there was no evidence of the existence of Land Control Board Consent, the equitable doctrines of Constructive Trust and Proprietary Estoppel would rescue the transaction in favour of the Appellant in the specific circumstances of this case.

41. The correct legal position on the two equitable doctrines as they apply to section 6 of the *Land Control Act* is perspicaciously expounded by this Court in *William Kipsoi Sigei vs Kipkoech Arusei & Another* [2019] eKLR in the following words: -

> 19. In addition..... the Court noted that equity is one of the national values that the Courts must apply in interpreting the *Constitution* stating as follows:
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> > " Thus since the current *Constitution* has by virtue of Article 10(2(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board."
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> 20. 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.
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> 21. We come to the conclusion that the 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. ..."

42. In the present case, whether or not consent of the Land Control Board was obtained with regard to subdivision and not the sale of the Suit Property herein as submitted by the Respondent, the undisputed evidence adduced at trial showed the following:

a. There was a duly executed Transfer Form showing that the Respondent transferred the Suit Property to the Appellant for a consideration of Kshs 25,000;

b. The Appellant obtained a *bona fide* Certificate of title to the Suit Property following the lodgment of the necessary documents at the Land Registry and was duly registered as the owner of the Suit Property;

c. The Respondent allowed the Appellant to take possession and, for a period of twenty-five (25) years, let him remain on the Suit Property un- disturbed. Indeed, the Respondent did not, at all, dispute that the Appellant was in possession of the Suit Property. The Learned Trial Judge seemed to discount the fact of possession by wrongly equating possession with "staying" on the land. While the Appellant testified that he had built and then demolished a house on the Suit Property, he was categorical that for all the years he had been cultivating the Suit Property.

This evidence was not disputed by the Respondent who only contested that he had uprooted the Appellant's seedlings.

43. In the circumstances of this case, therefore, it is easy to conclude that a constructive trust had been created even if Land Control Board consent had not been acquired. This is irrespective of whether or not the Appellant was "staying" in the Suit Property. As this Court decided in *Willy Kimutai Kitilit v Micaheal Kibet* [2018] eKLR, planting of trees on a Suit Property is development and demonstrates occupation and possession of land.

44. Having resolved the first issue as I did, the second identified issue requires only a parsimonious analysis. There was evidence that the Appellant had a Certificate of Title in his name for the Suit Property. The Learned Judge observed that such a Certificate of Title is *prima facie* evidence that the Appellant is absolute and indefeasible owner of the Suit Property as envisaged in section 26(1) of the *Land Registration Act*, 2012. That section reads as follows:

> 26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

45. In the present case, the Respondent was unable to prove on a preponderance of evidence that the Appellant was fraudulent in obtaining the Certificate of Title. Speaking for myself, after analyzing the entire record, I am unable to find any evidence of fraud, misrepresentation by the Appellant or unprocedural or corrupt scheme or conspiracy to defraud the Respondent. The facts as they emerge simply do not bespeak the allegations of fraud. There is, therefore, no permissible ground to impeach the Certificate of Title to the Suit Property.

46. If the Certificate of Title is not impeachable by dint of section 26(1) of the *Land Registration Act*, it follows that the fact of registration, in a sense, renders moot any investigation whether Land Control Board consent was required and obtained or not. This is because section 26, in essence, provides the statutory presumption that all the procedures that were required to be fulfilled before issuance of the Certificate of Title were, in fact, so fulfilled. The section only allows that presumption to be defeated in the limited number of instances comprehended in the exceptions to the times when a Certificate of Title will be held not to be conclusive evidence of proprietorship of a parcel of land. Differently put, any failure to adhere to the administrative or procedural steps not rising to the threshold provided in the exceptions enumerated in section 26(1) – including the failure to obtain Land Control Board Consent – cannot be a ground to impeach an otherwise validly issued Certificate of Title to land in Kenya. The very issuance of the Certificate of Title inoculates the proprietor from challenges to the title outside the narrow statutory exceptions enumerated in section 26(1) of the *Land Registration Act*.

47. There is one final issue it behooves me to deal with before finalizing this judgment. This is the issue of acreage of the Suit Property. The Appellant insisted that he bought and paid for 4.92 Ha. The Respondent insisted that the Appellant only bought and paid for 2 acres. As pointed out above, the Application for Consent to the Land Control Board shows that the Respondent intended to subdivide the Original Parcel into three (3) portions of 13.5ha; 4.0ha and 4.0ha. However, the Mutation Form

shows that the three parcels were to measure 11.72Ha, 4.92Ha and 4.63Ha. The three parcels are identified in the Mutation Form as Numbers 556, 557 and 558 respectively. The Suit Property is Number 557. The Certificate of Title shows that the size of the Suit Property is 4.92Ha. The question arises how an Application for Consent to subdivide and Transfer 4.0Ha to the Appellant metamorphosized to 4.92Ha in the Mutation Form and the Certificate of Title. How did the Appellant end up with 0.92Ha (or almost 2 acres) more?

48. The Appellant explained that the difference occurred due to some slippage that occurred when translating the originally surveyed pieces onto the Mutation Form. It was realized, on the ground, the Appellant testified, that the beacons mounted by the surveyor encompassed a larger surface area than the 4.0Ha that the Respondent had originally intended to sell to the Appellant. The Appellant testified that he agreed to pay the Respondent an extra Kshs 9,000 for the extra acreage. This explanation sounds plausible. However, we find it unnecessary to delve into the question in any more details since we have already held that there was Land Control Board Consent to transfer the whole parcel covered by the Suit Property; or that there was a Constructive Trust or Proprietary Estoppel entitling the Appellant to the whole of the Suit Property; or that the Certificate of Title entitles the Appellant to the whole parcel. Differently put, the Respondent's claims that he only sold 2 acres fails in the face of our findings above. At the same time, those findings accentuate the Appellant's claim that he purchased the entire 4.92Ha covered by the Suit Property.

49. I will finally turn to the question of trespass. Given my findings above, it follows that it is the Respondent who trespassed into the Suit Property owned by the Appellant. The Appellant produced a Report which showed that the damage the Respondent caused was assessed at Kshs 115,000. The Report was produced at trial and was not disputed. Although the Respondent denied that he had uprooted the seedlings, the oral evidence coupled with the charge sheet produced showing that the Respondent had been charged with malicious damage to property establishes on a preponderance of evidence that the Respondent trespassed on the Suit Property and did the damage. As such, the Appellant is entitled to the damages sought as compensation for the uprooted seedlings. The injury was specifically pleaded and was sufficiently proved.

50. Accordingly, I find merit in the appeal and would propose the following orders:-

    a. The appeal is allowed with costs to the Appellant.

    b. The judgment and decree of the High Court dated September 25, 2018 is set aside.

    c. For the avoidance of doubt and to bring clarity on the outcome of this appeal and the way forward, judgment is entered in favour of the Appellant as follows: -

        i. A permanent injunction is hereby issued restraining the Respondent (defendant), his family members, servants and/or agents from invading/trespassing into Land Title Number BUKIRA/BUHIRIMONONO/577 owned by the Appellan(plaintiff) herein with the aim of chasing away his workers, servants and/or family members.

        ii. Special damages Kshs 115,000/= being the value of tree seedlings destroyed by the Respondent on 9/4/2010, 14/8/2010. December 12, 2010 and 20/4/2011 plus interests thereon since the date the suit was filed.

    iii. The Respondent's (defendant's) counterclaim is dismissed.

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of Joel Ngugi, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Joel Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2022.

JOEL NGUGI

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR