



**Maina & 87 others v Kagiri (Civil Appeal 6, 26 & 27 of 2011  
(Consolidated)) [2014] KECA 880 (KLR) (22 January 2014) (Judgment)**

*Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR*

Neutral citation: [2014] KECA 880 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 6, 26 & 27 OF 2011 (CONSOLIDATED)  
MK KOOME, PM MWILU & JO ODEK, JJA  
JANUARY 22, 2014**

**BETWEEN**

**MACHARIA MWANGI MAINA & 87 OTHERS ..... APPELLANT**

**AND**

**DAVIDSON MWANGI KAGIRI ..... RESPONDENT**

**Effect of Lack of Land Control Board Consent on Sale and Subdivision of Agricultural Land.**

Reported by Emma Kinya and Opiyo Lorraine

**Land Law** - *Rights of a Registered Proprietor - Principle of indefeasibility of title - Whether the rights of a registered proprietor can be defeated and subjected to other claims and interests - Registered Land Act, section 28.*

**Land Law** - *Overriding Interests - whether all registered land is considered subject to the overriding interests - Registered Land Act, section 30(g).*

**Land Law** - *Controlled Transactions - Land Control Board Consent - Whether lack of consent would make the sale agreement void and unenforceable against the Respondent - Registered Land Act, section 30(g).*

**Constitutional Law** - *Procedural Technicalities and substantive justice - Constitution of Kenya 2010, article 159(2)(d).*

**Equity and Law of Trusts** - *Principle of Constructive Trust - 'Common intention which is an agreement or arrangement or understanding actually reached between the parties and relied on by the Claimant' - Llyods Bank Plc v Rosset, (1991) 1 AC 107,132.*

**Brief facts**

The Appeal was against a decision of the High Court at Meru where the Honorable Justice Kasango issued a permanent injunction restraining the Appellants from encroaching on LR No 6324/10 and an eviction order in favour of the Respondent in this matter. The said suit property was a subdivision of LR No 632/8 which was previously jointly owned by the Respondent and another (deceased).



The Respondent had begun selling portions of his parcel between 1983-1990 while awaiting subdivision of the land as both he and the dec had clear distinct portions which they had occupied. The Respondent's portion was subdivided into 240 plots of 1 acre each, which he sold to the Appellants leaving only 16 acres where his home was situated. He later on decided to rescind the sale agreement based on several grounds adduced in evidence hence the Court ordering an injunction and eviction against the Appellants who had occupied the said parcels of land.

### **Issues**

- i. Whether the rights of Appellants who are in possession of land can be defeated by the rights of a registered proprietor who put them in possession as *bona fide* purchasers for value.
- ii. Whether lack of Land Control Board Consent affects the legal status and relationship that exists between the Respondents and the Appellants as Purchasers who had paid the purchase price for the individual plots.
- iii. Whether the said suit property was still in existence subject to the subdivision between the joint proprietors.

### **Relevant provisions of the Law**

#### **Registered Land Act**

##### **Section 28**

*"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever"*

##### **Section 30**

*"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:*

*g). the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed."*

#### **Held**

1. The evidence on record revealed that the Appellants were in possession of the suit property and as such, they came within the protection of section 30(g) of the Registered Land Act. The Respondent having put the Appellants in possession of the suit property created an overriding interest in favour of the Appellants in relation to the suit property.
2. The Respondent had put the Appellants in possession of the suit property not as licensees but with the intention that he was to transfer the individual plots purchased by them. He had received the purchase price from the Appellants and thus created an implied and constructive trust in favour of the people who had paid the purchase price pending the sale of the suit property. Therefore, the doctrines of constructive trust and proprietary estoppels were applicable and the Respondent could not renege.
3. A constructive trust was based on common intention which was an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevented the claimants from relying upon the doctrine of constructive trust created by the Respondent subject to the Land Control Act was enforceable.
4. The Respondent all along had acted and represented that the Appellants were going to obtain proprietary interests in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention (*Steadman v Steadman* [1976] AC 536,540)
5. The evidence on record led the Court to conclude that the suit property was in existence as LR No 6324/8, which upon subdivision became LR No 6324/10 registered under the name of the Respondent which the



Appellants had been put in possession of by the Respondent himself. The notion that the suit property no longer existed was not tenable. The suit property existed.

*Appeal allowed with costs.*

### **Citations**

#### ***East Africa***

1. *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 - (Followed)
2. *Githu v Katibi* [1990] KLR 634 - (Mentioned)
3. *Hirani Ngaithe Githire v Wanjiku Munge* [1979] KLR 50 - (Followed)
4. *Kabia v Nganga* [2004] 1 EA 75 - (Mentioned)
5. *Kanyi v Muthiora* [1984] KLR 712 - (Followed)
6. *Kariuki v Kariuki* [1983] KLR 226 - (Followed)
7. *Kimotho, Michael Githinji v Nicholas Muratha Mugo* Civil Appeal No 53 of 1995 - (Followed)
8. *Minjire, Jacob Gichuki v Agricultural Finance Corporation* Civil Appeal No 61 of 1982 - (Mentioned)
9. *Mutsonga v Nyati* [1984] KLR 425 - (Followed)
10. *Mwangi & another v Mwangi* [1986] KLR 328 - (Followed)
11. *Njamunyu v Nyaga* [1983] KLR 282 - (Followed)
12. *Satia, Richard & Partners & another v Samson Sichangi* Civil Appeal No 164 of 1995 - (Mentioned)
13. *Selle & another v Associated Motor Boat Co Ltd* [1968] EA 123 - (Followed)
14. *Simiyu v Watambamala* [1985] KLR 852 - (Mentioned)

#### ***United Kingdom***

1. *Hussey v Palmer* [1972] 3 All ER 744 - (Followed)
2. *Llyods Bank Plc v Rosset* [1991] 1 AC 107 - (Followed)
3. *Steadman v Steadman* [1976] AC 536 - (Followed)
4. *Yaxley v Gotts & another* (2000) Ch D 162 - (Followed)

### **Statutes**

#### ***East Africa***

1. Land Control Act, (cap 302) section 6(1); 7 - (Interpreted)
2. Registered Land Act (cap 300) (repealed) sections 27, 28, 30(g);126(1);163 - (Interpreted)

## **JUDGMENT**

1. This Judgment is delivered in three consolidated Appeal Numbers 6, 26, and 27 of 2011. The consolidated appeals arise from a single judgment of the High Court (Kasango, J) dated 29<sup>th</sup> October, 2010, wherein, inter alia, a permanent injunction restraining the Appellants from encroaching on LR No 6324/10 was granted as well as an order evicting the appellants from the said property, which is registered in favour of the respondent. LR No 6324/10 is a subdivision of LR No 6324/8 which was jointly owned in equal shares by the respondent and one George Wamai Hinga.
2. The genesis of these appeals is that the Respondent and one George Wamai Hinga (deceased) were registered as joint proprietors of LR No 6324/8 situated in Nanyuki measuring 512 acres. The Respondent was entitled to 256 acres thereof. Despite the fact that the said land had not been subdivided, both the Respondent and George Wamai Hinga occupied distinct portions thereon. Before the demise of George Wamai Hinga they obtained the land board consent for subdivision of the said land. Before the actual subdivision was done, between 1983 to 1990 the Respondent began selling



portions of his parcel. It was the Respondent's case that in the year 1983, he approached Kamwere & Associates to assist him subdivide his portion so that he could sell the same; one Kariuki, from the said firm, drew a proposed map of the Respondent's portion showing 240 plots each measuring one (1) acre which the Respondent desired to sell leaving a portion of 16 acres wherein the Respondent's home was situated. He sold the said plots to the Appellants using the said map. He sold the 240 plots between 1983 to 1990. The Respondent maintained that it was a term of the sale agreements between the Appellants and him that the Appellants would meet the costs of obtaining titles to their respective portions.

3. The Respondent gave the Appellants vacant possession of the respective portions each had purchased once the full purchase price was paid and the sale agreement executed. The initial LR No 6324/8 was subdivided between the two co-owners and the Respondent obtained the title to his portion on 21<sup>st</sup> November, 2000 which was registered as LR No 6324/10. The Respondent testified that he did not obtain the Land Control Board consent for the aforementioned transactions because he preferred obtaining the consent once he had sold all the 240 plots. After selling all the portions, the Respondent convened a meeting with the Appellants and requested them to pay all outgoings which included survey work and obtaining titles totaling to Kshs 353,000. For every one acre purchased, the purchaser was required to pay Kshs 2,500. The Respondent contends that in breach of the sale agreements, the Appellants refused to pay the required amount. The Respondent testified that in further breach of the sale agreements, the Appellants engaged M/s Gatome & Associates, surveyors, to repeat subdivision on the suit property without his consent; the Appellants through the said subdivision allocated themselves bigger portions than indicated in their respective sale agreements encroaching on other purchasers' portions and the Respondent's 16 acre portion.
4. It was the Respondent's contention that the Appellants tried to coerce him, using the local area Chief and the District Officer, to transfer the suit property to a 3<sup>rd</sup> party, an entity known as Munyaka farmers. On account of the foregoing breach, the Respondent rescinded the sale agreements with the Appellants. The Respondent received threats on his life causing him to leave the suit property in the year 2000. Subsequently, the Respondent filed a suit in the High Court seeking, inter alia, an injunction restraining the Appellants from encroaching on the suit property and eviction of the Appellants.
5. In their defence, the Appellants filed a joint defence and counterclaim denying the Respondent's allegations. It was the Appellants' case that the Respondent sold unsurveyed plots to them and it was a term of the sale agreement that each Appellant would meet the survey fees. Despite meeting their part of the sale agreement, the Respondent had refused to transfer the suit property to the respective purchasers/appellants. They maintained that they had developed their respective portions of the suit property by erecting permanent structures, schools, churches and installing water and electricity thereon. The Appellants also sought, inter alia, an order compelling the Respondent to transfer the suit property to them.
6. DW1, Charles Wangonde Ngunguru (Charles), testified that he bought two acres of the suit property from the Respondent in 1983 for a consideration of Kshs 5,000 per acre; at the time of the said sale the suit property had been surveyed and subdivided; despite being aware that he was required to pay the requisite fees for obtaining a title over his portion, Charles was never informed that he would be required to pay the survey fees as well. He stated that he together with the other purchasers hired the services of Gatome Associates to confirm the survey that had been done by the Respondent. According to him, it was important for them to engage a licensed surveyor to confirm the survey work which had been done by an unlicensed surveyor who had been engaged by the Respondent. Charles gave further evidence that he attended a meeting in the year 1991 convened by the Respondent wherein the respondent demanded money for obtaining the title deeds for the respective portions of the suit



property; they became suspicious when the Respondent was unable to give a breakdown of the money he had demanded. They decided not to pay the survey fees directly to the Respondent but to the surveyor through the area District Officer; the payment was made by Munyaka Farmers, a group formed by the Appellants. This gave rise to a dispute between the Respondent and the Appellants culminating in the Respondent refusing to transfer the suit property.

7. DW4, James Wambugu Wachira (James), gave evidence that the Respondent had misled the trial court by stating that all the Appellants had purchased the portions of the suit property from him; he purchased 2 acres of the suit property from a third party who had purchased the same from the Respondent.
8. Upon hearing the evidence of the parties herein, the trial court entered judgment in favour of the Respondent and dismissed the Appellants' counter-claim. The learned Judge (Kasango, J) found *inter alia* that the suit land being agricultural land was subject to the said Act, Chapter 302, Laws of Kenya; section 6(1) of the said 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.
9. Aggrieved by the said decision the Appellants have filed this first appeal based on grounds which can be aptly summarised as follows:-The learned Judge erred in law by failing to make a finding that the suit as filed by the 1<sup>st</sup> Respondent and the prayers sought therein was defective in substance and incompetent to warrant the orders sought in that:-There was no copy of Title produced in respect of LR No 6324/8 upon which the suit was based. There was no proof of ownership of LR No 6324/8 by the 1<sup>st</sup> Respondent to enable maintenance of the suit of eviction. (sic) The Appellant's suit as per the pleadings were based on LR No 6324/8 yet the orders issued were in respect of LR No 6324/10. The learned Judge erred in law and fact by misdirecting and prejudicing herself against the Appellants case in considering only the 1<sup>st</sup> Respondent's case in that-The trial court only heard 3 of the 86 Appellants. The Appellants counter-claim was never considered despite the fact that the 1<sup>st</sup> Respondent never defended or replied to the same. The learned Judge relied on her own surmises, conjectures, presuppositions and theories as to how the suit property LR No 6324/8 became LR No 6324/10. The learned Judge erred in law and fact in aiding the cause of the 1<sup>st</sup> Respondent against the Appellants. The learned Judge erred and misdirected herself in law by selectively interpreting the law by:-

Requiring the Appellants to produce a Land Control Board consent to establish their legality in occupying the land yet failing to ask the 1<sup>st</sup> Respondent for the land control Board Consent allowing him to partition the original land LR No 6324/8 to become LR No 6324/10.

The learned Judge erred by granting orders that were not prayed for by the 1<sup>st</sup> Respondent. The learned Judge erred in law in failing to make a finding that the 1<sup>st</sup> Respondent had cunningly deceived the Appellants into buying LR No 6324/8 which land the 1<sup>st</sup> Respondent had no legal capacity to sell or deal with. The learned Judge failed to make a finding of both fact and law that the 1<sup>st</sup> Respondent herein confirmed having sold the suit property, receiving the entire purchase price and placing the Appellants in possession of the same thereby creating a constructive trust in favour of the Appellants.

10. Mr FN Njanja, learned counsel for the Appellant in Civil Appeal No 26 of 2011, submitted that it was not in dispute that the Appellants had purchased portions of the suit property from the Respondent. The terms of the sale agreements were that the Respondent had surveyed and subdivided the suit land; the entire purchase price had been paid by the respective Appellants; the costs for securing the title would be borne by the appellants; the Appellants were put in possession and entitled to use and develop



the same. He argued that the sale agreements neither indicated that his client would be required to pay additional fees for the survey nor that the Land Control Board consent was required.

11. According to Mr Njanja, the Respondent did not file any response to the Appellants' counter-claim and the Judgment of the trial court was also silent on the counter-claim. He stated that the Respondent gave evidence that he obtained the title to his portion of land being LR No 6324/10 on 21<sup>st</sup> November, 2000, as a result of the subdivision of LR No 6324/8 which was jointly owned by George Hinga and himself. The title was issued to the Respondent seven years after he filed the suit yet he did not amend the same. He maintained that the law does not allow a party to use a statute to perpetuate fraud. Therefore, the learned Judge erred by introducing the requirement of the Land Control Board consent yet it was neither pleaded nor canvassed by any of the parties.
12. Mr Kariuki, learned counsel for the Appellants in Civil Appeal No 6 of 2011, in support of the Appeal abandoned the prayer in the Appeal seeking refund of the purchase price paid by the Appellants. He relied on the written submissions filed before this Court on 3<sup>rd</sup> July, 2013, which echoed the submission made by Mr Njanja. He submitted that during the trial about 18 defendants had died but the trial Judge failed to indicate the same and to also indicate whether the claim against them had been abandoned. Mr Kariuki argued that the appellants' case was based on constructive trust. He contended that the Land Control Act should be interpreted in light of the 2010 Constitution to ensure the appellants receive substantive justice.
13. Mr DO Owang, learned counsel for the Respondent, in opposing the appeal, submitted that the Appeal herein was self defeating because the orders sought were not capable of being enforced. He argued that the appellants are seeking orders in respect of LR No 6324/8 which no longer exists. He maintained that the respondent gave evidence as to how the new title LR No 6324/10 was acquired and that the land occupied by the Appellants was LR No 6324/10. According, to Mr Owang, the Appellants in the joint statement of defence averred that he had sold to them unsurveyed plots clearly indicating that the Appellants were aware they were required to pay the surveying fees. He submitted that constructive trust was a matter to be proved by and which the Appellants failed to do. He maintained that equity was not applicable where the law is clear as in this case.
14. We have considered the rival submissions by learned counsel and examined the Record of Appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in *Selle v Associated Motor Boat Co* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).”

15. Several issues arise in this Appeal. The first and most critical is that the Appellants are in actual and physical possession and occupation of the suit property. The Appellants contended that they are bona fide purchasers for value of the suit property. They admit that individual titles have not been processed and transferred to them by the Respondent. The issue for our consideration is whether the rights of the Appellants who are in possession can be defeated by the rights of the registered proprietor who actually



put them in possession as bona fide purchasers for value. The Appellants are neither trespassers nor licensees on the suit property as they were put in possession by the Respondent. In *Michael Gitbinji Kimotho v Nicholas Muratha Mugo* Civil Appeal No 53 of 1995 this Court differently constituted stated that:-

“the protected rights of a proprietor under section 28 of the *Registered Land Act* cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser”.

16. The Respondent’s case is premised on the fact that he is the registered proprietor of the LR 6324/10 and as such his title is indefeasible. However, sections 27, 28 and 30 of the repealed *Registered Land Act*, Chapter 300, Laws of Kenya (Repealed) provide exceptions to indefeasibility of title. Section 28 provides that:

“

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

a) .....

b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.”

Section 30 of the *Registered Lands Act* provides:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

a) ...

b) ...

c) ....

d) ....

e) ....

f) ....

g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.”

17. The evidence on record reveals that the Appellants are in possession of plots in LR No 6324/10 and as such they come within the protection in section 30(g) of the *Registered Land Act*. We find that the Respondent having put the Appellants in possession of the suit property created an overriding



interest in favour of the Appellants in relation to LR No 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the Appellants were in possession and occupation of LR No 6324/10 prior to the title being issued and registered in the name of the Respondent.

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.
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. In Mwangi & another v Mwangi (1986) KLR 328, it was 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 is merely permissive and not mandatory. In Mutsonga v Nyati (1984) KLR 425 and Kanyi v Muthiora (1984) KLR 712, 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 which provides for the Application of the common law of England as modified by equity.
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. As Lord Bridge observed in Llyods Bank Plc v Rosset, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the Claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property. Nothing in the Land Control Act prevents the Claimants from relying upon the doctrine of constructive trust created by the facts of the case. The Respondent all along acted on the basis and represented that the Appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman v Steadman (1976) AC 536, 540,

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



21. As to the consent of the Land Control Board, in *Mwangi & another v Mwangi*, (1986) KLR 328, it was held that the creation of a trust over agricultural land situated in a land control area, does not constitute any “other disposal or dealing” with the land within the meaning of section 6(1)(a) of the *Land Control Act* and therefore the consent of the local Land Control Board is not required. This position had earlier been applied in the case of *Gatimu Kinguru v Muya Gathangi* (1976) KLR, 253 where it was stated:
- “The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for the purpose of section 6(1) of the *Land Control Act* and, therefore, does not require the consent of the local Land Control Board...”
22. We take note that the judicial decisions cited by the Respondent were all made prior to the promulgation of the 2010 *Constitution of Kenya* and before the Overriding Objective principles were enacted into the *Appellate Jurisdiction Act*, Chapter 8, Laws of Kenya. This Court is enjoined to dispense substantive justice. What is justice” Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void” The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey v Palmer* (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution
23. From the facts of the present case, it was the Respondent who put the Appellants in possession of the suit property. The Respondent received the entire purchase price from the Appellants. It is the Respondent’s submission that he rescinded the contract of sale since the Appellants reneged or refused to pay survey fees, stamp duty, legal fees and other monies due for completion of the transaction. The issue for our consideration is whether there was an obligation on the part of the Appellants to pay survey fees, stamp duty, legal fees and other monies. Was there a condition that unless the Appellants paid the survey fees the Respondent would rescind the sale agreement” The evidence from the various sale agreements on record reveals that in some agreements, it was expressly stated that the costs of acquiring title deeds, survey fees, stamp duty, land rent, legal fees and other costs was to be borne by the purchasers/ appellants. Other sale agreements are silent on this issue. Another key consideration is that none of those charges are payable to the Respondent, these were payable to the Government except the lawyer’s fees. No sum was payable to the Respondent, only the purchase price.
24. The Respondent submitted that failure to obtain the Land Control Board consent rendered the agreements for sale of land and the transaction between the parties void for all intents and purposes and the only remedy for the Appellants is to recover the purchase price or consideration they paid under section 7 of the *Land Control Act* (See *Kariuki v Kariuki*, 1983 KLR 226). In *Njamunyu v Nyaga* (1983) KLR 282 it was held that Land Control Board consent does not make an agreement for sale of land binding. The agreement is only binding between the parties who make it, though it is not enforceable until consent has been given. In *Hirani Ngaithe Githire v Wanjiku Munge*, (1979) KLR 50, it was stated that under section 6 of the *Land Control Act*, failure to obtain Land Control Board consent makes the sale agreement void for all intents and purposes and no principle of equity can soften or change this mandatory statutory provision. The Respondent cited the case of *Githu v Katibi* (1990) KLR 634 in support of its submission that the transaction between the parties in this appeal was null and void for want of consent of the Land Control Board. (See also *Kabia v Nganga* (2004) 1 EA 75; *Jacob Gichuki Minjire v Agricultural Finance Corporation* Civil Appeal No 61 of 1982; *Richard Satia & Partners & another v Samson Sichangi* Civil Appeal No 164 of 1995); *Simiyu v Watambamala* (1985) KLR 852).



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 Kesbra and others [1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“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....”

26. Article 159(2)(b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159(2)(a) of Constitution requires justice to be administered to all, irrespective of status; Article 159(2)(g) of Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

27. We now turn to consider whether the suit property as originally registered and known by the Appellants is still in existence or not. The Respondent contends that when he entered into sale agreements with the Appellants, the suit property was Land Reference No 6324/8 which was registered in the joint names of the Respondent and one George Wamai Hinga. It is the Respondent's contention that LR No 6324/8 no longer exists as it was sub-divided and gave rise to LR No 6324/10 which was not subject to any transaction with the Appellants. That LR No 6324/8 was the title sold between the years 1983 to 1990 as acknowledged by all the parties in the trial and LR No 6324/10 was only issued to the Respondent on 21<sup>st</sup> November, 2000 and as such the Appellants have no claim or right over LR No 6324/10.

28. The issue of existence or non-existence of the suit property is pertinent because this Court cannot make an order in vain when the subject matter or substratum of the suit is no longer in existence. The record reveals that the physical suit property was all along in existence as LR No 6324/8 which land was owned and held in common between the Respondent and one George Wamai Hinga. The Respondent's share in LR No 6324/8 was very clear, ascertainable and determinable. The respondent in fact was selling his portion of LR No 6324/8. Upon sub-division of LR No 6324/8 between the then two co-owners, the Respondent's share and portion of land became LR No 6324/10. The Appellants were put in possession of plots of land in LR No 6324/10. At the time of the entire transaction between the parties to this suit, the Appellants have all along been in actual occupation and possession of plots in LR No 6324/10 which is a subdivision of LR No 6324/8. The Respondent has all along had actual knowledge of the occupation and possession of plots in LR No 6324/10 by the Appellants. When the Respondent obtained title in LR No 6324/10 on 21<sup>st</sup> November, 2000, he knew of the claim by the Appellants to plots in that parcel of land. If we are to count from the year 2000 when the title to LR No 6324/10 was issued or granted, the Appellants were in actual physical possession and occupation of plots within this land. This possession fortifies the finding that the Appellants have an overriding interest protected under section 30(g) of the Registered Land Act. If at all the character and nature of the suit property changed, it was changed by the Respondent. A party cannot change the nature and character of the suit property and then plead the change as a defence to an action in relation to the



said property; this is more so when the party had actual knowledge of existing claims to the property. We hold that the registration of LR No 6324/10 in the name of the Respondent under the Registered Land Act cannot be to defeat any claims that existed prior to the creation and registration this title. Tracing is an equitable remedy and equity shall trace the suit property for ends of justice to be served. The notion that the suit property no longer exists is not tenable. We find that the suit property exists and is presently registered as LR No 6324/10 in the name of the Respondent. All and any orders made by this Court shall and are hereby declared to be in respect to the property now known as LR No 6324/10 in the name of the Respondent. The Respondent in supporting the Judgment by the High Court is admitting and acknowledging that the suit property is LR No 6324/10.

29. The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the Appellants were in possession of the suit property, that the Respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. We do find that the possession and occupation by the Appellants of the suit property is an overriding interest attached to the said property. Based on the reasons given, we find that this Appeal has merit and we hereby set it aside in its entirety the Judgment and decree of the High Court (Kasango, J) delivered at Meru dated 11<sup>th</sup> November, 2010. We substitute in its place judgment dismissing the Respondent's Plaint dated 16<sup>th</sup> August, 1993, and enter judgment in favour of the Appellants as per the Counterclaim in the Statement of Defence dated 1<sup>st</sup> September, 1993. The plan to be used to identify and allocate the individual plots is the one prepared by Kamwere and Associates in 1983. We further order and direct that each of the Appellants shall pay the costs of surveying his/her respective plot and the requisite stamp duty and any fees necessary to secure and obtain individual title deeds. A total of 16 acres of land situate at the site and locale where the Respondent had his house shall remain the property of the Respondent and shall be registered in his name. For avoidance of doubt, we reiterate that this Judgment and all and any orders made by this Court shall and are hereby declared to be in respect to the property now known as LR No 6324/10 in the name of the Respondent. Having received the purchase price from the Appellants, put them in possession of the suit property and reneged and/or refused to transfer the individual plots to the Appellants, the Respondent shall bear the costs of the suit before the High Court and the costs of this Appeal. The upshot is that this Appeal is allowed with costs.

**DATED AND DELIVERED AT NYERI THIS 22ND DAY OF JANUARY, 2014.**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**PHILOMENA MWILU**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

