



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**KISUMU**  
**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJA)**  
**CIVIL APPEAL NO. 217 OF 2012**

**BETWEEN**

**NEEPU AUTO SPARES LIMITED .....APPELLANT**

**AND**

**NARENDRA CHAGANLAL SOLANKI .....1<sup>ST</sup> RESPONDENT**

**DHANESWAR MONJI PANDYA .....2<sup>ND</sup> RESPONDENT**

**ULLAS DHANESWAR PANDYA .....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF KENYA .....4<sup>TH</sup> RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 34 OF 2013**

**BETWEEN**

**DHANESWAR MONJI PANDYA**

**ULLAS DHANESWAR PANDYA.....APPELLANTS**

**AND**

**NEEPU AUTO SPARES LIMITED .....1<sup>ST</sup> RESPONDENT**

**NARENDRA CHAGANLAL SOLANKI .....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Judgment and Decision of the Superior Court, (Karanja, J) dated 31<sup>st</sup> December, 2010

in

H.C.C.C. No. 90 of 2003)

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**JUDGMENT OF THE COURT**

These two appeals – Civil Appeal No. 217 of 2012 and Civil Appeal No. 34 of 2013 were consolidated by an order of a single judge of this court made on 19<sup>th</sup> December, 2013. The appellant in the first appeal is Neepu Auto Spares Limited (“*Neepu*”) and the appeal is against Narendra Changanlal Solanki (“*the 1<sup>st</sup> respondent*” - “*Solanki*”), Dhaneshwar Monji Pandya and Ullas Dhanewshwar Pandya (“*the 2<sup>nd</sup> and 3<sup>rd</sup> respondents*” – “*the Pandyas*”) while the 4<sup>th</sup> respondent is the Attorney – General. The appellants in the second appeal are the Pandyas and is against Neepu as 1<sup>st</sup> respondent, Solanki as 2<sup>nd</sup> respondent and the Attorney General as 3<sup>rd</sup> respondent. There is also a cross-appeal by Solanki. Being first appeals we must re-evaluate the evidence and come to our own conclusions but always bearing in mind that we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence – see the judgment of this court in **Maimuna s/o Patrick Mutoo v Wilson Njau Nyaki** Civil Appeal No. 131 of 1994. In **Peters v Sunday Post Limited** [1958] EA 424 it was held that while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.

What were the facts that were placed before the learned Judge?

A plaint was filed at the High Court of Kenya, Kisumu, on 3<sup>rd</sup> June, 2003 by Solanki against the 4 aforesaid parties where various allegations were made. That plaint was amended three times. Solanki alleged that he had for over 15 years resided with his family in a house in the Milimani area of Kisumu which was one of the three houses erected on the property known as Kisumu Municipality/Block 10/124 which parcel of land belonged to the Pandyas until March, 2003 when it was transferred to Neepu, a limited liability company whose shareholders were the Pandyas. That in early 1990 Solanki had entered into contract with the Pandyas where Solanki was to purchase the suit property – that is, the house he resided in with the attendant land – at a consideration of Kshs.250,000/= with an additional sum of Kshs.81,460/= which latter sum was to facilitate subdivision of the parent title into 3 separate titles and also go into construction of an independent sewerage system for the property. It was alleged that an agreement was duly drawn by advocates but was not executed by the Pandyas but that the full purchase price was paid and received by the Pandyas. That in furtherance of the said transaction the Pandyas on 17<sup>th</sup> May 1994 caused subdivision of the parent title and new certificates of lease were issued after a surrender had been registered the same day – 17<sup>th</sup> May, 1994. Solanki alleged further that in November, 1994 the Pandyas purported to change their minds claiming that the transaction was prohibited in law and that they had thereafter refused to effect a transfer in Solankis’ favour or to construct a sewerage system but had instead in March, 2003 effected a transfer of the whole parcel of land in favour of Neepu. Solanki believed this to be fraudulent because (as per paragraph 15 of the “Amended Plaint:

- “(a) The 2<sup>nd</sup> and 3<sup>rd</sup> defendants failed to notify the plaintiff that the subdivision process had been completed and fresh titles issued;**
- b. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants misrepresented to the plaintiff that the subdivision process could not be completed as the same was prohibited by law;**
  - c. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants misrepresented to the plaintiff that the contract for the sale of the suit property to the plaintiff was frustrated by the alleged prohibition of the subdivision;**
  - d. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants effected a transfer to the 1<sup>st</sup> defendant of a lease which they had surrendered nine years previously and over which their interests had ceased in terms of Section 63(1)(d);**
  - e. The 1<sup>st</sup> defendant acquired a non-existent lease which it is deemed through its officers to have known to have been surrendered;**
  - f. The 4<sup>th</sup> defendant accepted from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants the transfer of non-existent lease for which he had accepted its surrender nine years previously;**
  - g. The 4<sup>th</sup> defendant issued a fresh certificate of lease in favour of the 1<sup>st</sup> defendant of a lease for which registration was or ought to have been cancelled.”**

And that the Pandya actions were malicious because (as per paragraph 15A of the said Plaintiff):

- “(a) The 1<sup>st</sup> defendant is a company wholly owned by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are the sole subscribers and officers thereof and thus the 1<sup>st</sup> defendant is the corporate personification of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**
- b. The purported transfer to the 1<sup>st</sup> defendant of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ interest in parent title was intended to effect the legal transfer thereof to a separate legal person without effecting any change in ownership in fact and substance.**
  - c. The purported transfer of the parent title to the 1<sup>st</sup> defendant was intended to contrive the complete alienation of the plaintiff from the suit property by facilitating the creation of a legal charge by the 1<sup>st</sup> defendant in favour of its bank thereby creating another intervening ‘interest’ by a third party in the suit property ranking higher than the plaintiff’s interest.”**

Solanki further alleged that the Pandyas having failed to construct a sewerage system, had created undue hardship to him and he was forced to incur costs Ksh.11,714/= which he claimed against them. Also, that the Pandyas’ had turned against him by sending auctioneers to collect rent from him and he incurred a sum of Kshs.6,600/= which he claimed against them. For all these reasons Solanki prayed for judgment for:

- “i. In terms of a declaration of a resulting trust of the proprietary interest in the suit property in favour of the plaintiff and an order that the subdivision of the parent title be duly completed and a transfer of the title comprising the suit property be duly executed and registered in favour of the plaintiff.**
- ii. The sum of Kshs.6,600.00 from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally and the sum of Kshs.11,714.00 from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally, both respective sums as special damages.**
- iii. Against the 1<sup>st</sup> defendant for:-**

- a. *A permanent injunction restraining the 1<sup>st</sup> defendant, either itself or through its servants, employees or agents, restraining them from trespassing onto the suit property and from attempting or purporting to attach, distrain or otherwise alienate the property of the plaintiff purportedly to recover any rent or other monies from the plaintiff.*
  - b. *Damages for unlawful trespass.*
  - c. *The costs of this suit, both party and party and advocate and client together with interest thereon at court rates from the date of filing suit and until payment thereof in full.*
- iv. **Against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant for:-**
- a. *Specific performance compelling them to undertake and complete construction of an independent sewerage system on the suit property and in the alternative damages for breach of contract.*
  - b. *The costs of this suit, both party and party and advocate and client together with interest thereon at court rates from the date of filing suit and until payment thereof in full.*
- v. **Against the 4<sup>th</sup> defendant for:-**
- a. *An order compelling the creation of a register for and issuance of a lease for the suit property, the registration thereof of a transfer of lease in favour of the plaintiff and the issue of a certificate of lease in favour of the plaintiff.*
  - b. *The costs of this suit, both party and party and advocate and client together with interest thereon at court rates from the date of filing suit and until payment thereof in full.*
- vi. **Any other or further relief as the court may deem just.”**

Neepu and the Pandyas’ filed a joint statement of defence which was necessarily amended as often as was the plaint. The whole claim was denied, the said defendants only admitting to the existence of an offer by the Pandyas to sell part of the land and house to Solanki but not at the consideration alleged by Solanki. Receipt of a sum of Kshs.250,000/= by the Pandyas was confirmed and it was alleged that if the parcel of land was subdivided it was done fraudulently by Solanki and unnamed land officials – particulars of fraud were given as:

**“(a) Forging the signature of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

- a. *Colluding with land officials without the knowledge or consent of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants*
- b. *Perpetrating fraud even without the knowledge or the consent of District Physical Planner who had ruled out sub-division on the disputed parcel*
- c. *Falsifying papers and creating a lease dated 1<sup>st</sup> June, 1980 when the Defendants purchased the same in 1987 thus perpetrating fraud.”*

The said defendants claimed that the suit was incompetent because it was barred by laws of limitation, it was founded on an unwritten contract contrary to law and because Solanki had fraudulently tried to rob the said defendants of their property. Also that the property having been transferred to Neepu the Pandyas were non-suited to the action and they (the Pandyas) were entitled to mesne profits and damages from Solanki. There were no particulars pleaded in respect of alleged mesne profits and general damages.

The Attorney-General also filed a defence which was amended with leave of the court. Certain parts of the claim were admitted. It was stated at paragraphs 5A, 6A, 7A, 8, 9, 10, 11, 12, 13 and 14 of the

defence that:

**“5A In further answer and without prejudice the defendant states that in or about January 1990, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did apply to the commissioner of lands for sub division of KSM Municipality/Block 10/124 into three (3) parcels which sub division was duly approved.**

**6A. In further answer and without prejudice the defendant states that the approved subdivision was subject to the following conditions namely:-**

- a. Surrender of Original Title**
- b. Payment of Legal Fees**
- c. Payment of new rent for the new plots**

**7A. The defendant state that pursuant to the sub division the Survey Department amended the registry index map (hereinafter referred to as RIM) in effect creating 3 parcels namely Block 518/519, 520 vide survey plan No. F/R 208/78.**

**8. In further answer the defendant states that in or about June 1991 the 2<sup>nd</sup> – 3<sup>rd</sup> defendants surrendered the original Title Deed No. KSM/Municipality Block 10/124 to facilitate preparation of the surrender Lease.**

**9. The defendant further states that subsequent to the subdivisions, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were required by the defendant to pay a sum of Kshs.2,360 on account of conveyancing, stamp duty and registration fees which fees were paid by the defendants in or about 3/10/1992.**

**10. In further answer and without prejudice the defendant states that three (3) Lease documents for Kisumu/Mun/Block 10/518, 519 and 520 and a surrender Lease were prepared executed and stamped by the defendant on one hand and transmitted to the District Land Registry – Kisumu for registration in or about May 1994.**

**11. It is the defendant’s contention that prior to the registration of the aforesaid instruments, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were required to execute the instruments which they neglected, failed and or refused to do.**

**12. The defendant states that further to what is pleaded in paragraphs 10 and 11 of the defence hereinabove, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in or about 1996 returned the unexecuted instruments to the Commissioner of Lands with the reason that they were no longer interested in the subdivision.**

**13. The defendant states that as a result of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ refusal and or failure to execute the instruments hereinabove, the defendant was unable to effect any registration(s).**

**14. In answer to paragraph 12, 13, 14 and 15 of the plaint the defendant repeats the defence hereinabove and deny that the defendant has acted fraudulently or at all.”**

That was the status of pleadings and that was the case heard originally by Tanui, J, and was also handled by Mugo, J, and Mwera, J (as he then was) but it was finally taken over by J.R. Karanja, J, who in a judgment delivered on 31<sup>st</sup> December, 2010 allowed the **claim holding that:**

**“--- all in all, the plaintiffs claim succeeds to the extent that the plaintiff is entitled to an order of specific performance against the second and third defendants in terms of prayer 4 (a) of the amended plaint dated 25<sup>th</sup> May 2005 and to an order against the fourth defendant compelling him to create a register for an issuance of a lease for the portion of**

***the suit property purchased by the plaintiff and for registration thereof in his favour in terms of prayer 5(a) of the said amended plaint.***

***The plaintiff is also entitled to an order of injunction against the first defendant in terms of prayer 3 (a) of the said amended plaint. Finally, the plaintiff is entitled to the costs of the suit together with interest against all the defendants. Ordered accordingly.”***

That judgment provoked the 2 appeals which as we have stated were consolidated and also provoked the cross appeal.

In the testimony recorded by learned judge Solanki repeated the averments in the plaint – he had resided in house No. 2 erected on parcel number Kisumu/Municipality/ Block 10/124 for more than 15 years. The parcel was originally owned by the Pandyas and he entered the said house as their tenant. He was offered the said house and he purchased it and paid for it by a bank cheque of Kshs.331,460/=. A law firm represented both parties in the transaction. That law firm drew an agreement which was however not executed by the Pandyas or at any rate was never returned to the lawyers by the Pandyas. Solanki still resided in the house as the trial took place. He challenged the Pandyas repeatedly to complete the sale but this was not to be. He however knew that they had commenced the process of subdivision of the parcel of land which subdivision had resulted in 3 separate parcels – Blocks 518, 519 and 520. Upon paying purchase price he had stopped paying rent to the Pandyas. The Pandyas later wrote to the Commissioner of Lands cancelling the transaction. Solanki produced various letters and documents in support of his case. A certificate of official search showed that the parcel of land was still registered to the Pandyas as at 28<sup>th</sup> February 2001. By a letter dated 11<sup>th</sup> November, 2001 Solanki was informed by lawyers acting for the Pandyas that the parcel of land could not be subdivided. In January, 2002 the sewerage system was blocked by the Pandyas forcing him to incur costs of maintaining the same. He was later to learn that the Pandyas had transferred the whole property to Neepu. Solanki testified further that he received a letter dated 24<sup>th</sup> April, 2003 from lawyers instructing him to sign a tenancy agreement or vacate the premises. When he confronted the Pandyas on the issue he was told:

***“---- lets go to court, court will decide ---”***

On 8<sup>th</sup> May 2003 auctioneers descended on his house and issued a proclamation and thereafter attached his goods. He only got them back upon paying Kshs.5000/= to the auctioneers and also paid a further sum of Kshs.1600/= on another visit by the auctioneers. He also paid Ksh.8000/= to clean the septic tanks. The purchase price had not been returned to him and he believed the house belonged to him.

In cross examination Solanki stated that surrender documents for the said parcel of land had been found to have been forged after police investigations for which he was charged in criminal court but acquitted. On the issue of purchase price he admitted having received a cheque for Kshs.250,000/= which he had rejected and returned to the author.

Stanley Kiprotich Soi, an employee of Kenya Power and Lighting Company Limited was called to testify on disconnection of electricity to Solankis’ house by the Pandyas. He visited the premises and confirmed that disconnection had indeed taken place.

Solanki’s son Jiten Narendra Solanki testified that he paid a sum of Kshs. 8000/= received from his father for cleaning of septic tanks.

Charles Kipkirui Ngetich, a Registrar of Titles with the Ministry of Lands produced before court correspondence file relating to the parcel of land Kisumu Municipality/Block 10/124. One of the documents in the file was a lease in respect of Kisumu Municipality/Block 10/520 which was booked for registration on 17<sup>th</sup> May 1994 but had an erased signature. There were also letters confirming that parcel 124 had been surveyed and subdivided but there was no letter to show that consent of the Commissioner of Lands to subdivide and transfer the land had either been sought or obtained. It was necessary, under the Registered Land Act (now repealed) under which the parcel of land was registered that any instrument to confer an interest in land be witnessed. The surrender of lease in the file was not witnessed and all

considered, the witness thought that the transaction was questionable.

Dhaneswar Monji Pandya, the 2<sup>nd</sup> respondent in Civil Appeal No. 217 of 2012 testified on behalf of himself and that of his son the 3<sup>rd</sup> respondent. He denied selling any property to Solanki stating:

***“--- the plaintiff has instituted this suit saying that I sold to him land Kisumu Municipality/Block 1024 (sic). I do not have such property registered in my name and that of my son. Currently it is under our business name Neepu Auto Spares Ltd. ---”***

He admitted that he had offered to sell a portion of the property to Solanki but that offer was subject to subdivision whose consent was not obtained. He also admitted receiving a sum of Kshs.250,000/= purchase price. He denied ever executing a surrender of lease document and produced various letters and documents which showed the chain of events culminating in cancellation of the whole transaction. In March, 2003 the Pandyas transferred the property to Neepu because they needed money to expand the business undertaken by Neepu and were allegedly advised by a bank to do so so that the property would be secured to that bank as security for a loan. The witness denied blocking the sewage system and also denied disconnecting electricity for Solanki.

Fena Omondi Omollo was called as a witness for the Pandyas. He was a Physical Planner in private practice previously working for the Government as an Assistant Director of Physical Planning, Department of the Ministry of Lands. He testified that in February 2002 he in the company of the Kisumu District Surveyor visited the disputed parcel of land and made a report dated 26<sup>th</sup> February 2003 which stated in effect that it was not possible to sub-divide the parcel of land and there was in any event no record of any application for subdivision.

Samson Odoyo Odier was also called as a witness by the Pandyas. He was a Legal Clerk with the then Municipal Council of Kisumu. He produced various minutes of meetings of the Council and its committees.

Dhaneswar Monji Pandya (the 2<sup>nd</sup> respondent) was then “*recalled*” to:

***“--- adduce evidence as a director and on behalf of the 1<sup>st</sup> defendant ---”***

He repeated his earlier testimony adding that upon making an application to a bank for a loan he was advised that he should transfer the parcel of land to Neepu which would then be granted a loan. He transferred the property to Neepu but no loan was granted. He demanded rent from Solanki and when it was not paid he instructed auctioneers to levy distress. He asked that the case be dismissed.

That was the case presented before the learned judge who entered judgment as prayed in the plaint leading to these appeals.

Sixteen grounds are taken in the Memorandum of Appeal in Civil Appeal No. 217 of 2012 (referred to herein for convenience only as “*the 1<sup>st</sup> appeal*”) and a similar number is taken in Civil Appeal No. 34 of 2013 (“*the second appeal*”). The first ground in the 1<sup>st</sup> appeal faults the learned judge for failing to find that the relationship between Solanki and the Pandyas was a controlled transaction governed by statute hence a written contract was mandatory. In the 2<sup>nd</sup> ground the learned judge failed to find that there was no contract capable of enforcement between Solanki and the Pandyas, hence Neepu had no contract with Solanki. In the 3<sup>rd</sup> ground the judge erred in finding that there was a resulting trust and/or a constructive trust when no evidence or conditions for such finding had been made. In the fourth ground the judge erred in finding that the suit was not time barred by statute and in the fifth ground the judge erred in failing to consider and appreciate the relevant laws that governed transfer, sub-division and operation of land transactions at the time, hence came to a decision that offended the Land Control Act, the Physical Planning Act and the Local Government Act. The learned judge is faulted in the 6<sup>th</sup> ground for failing to find that the whole transaction was riddled with criminality and Solanki should not benefit from criminal

actions. In the 7<sup>th</sup> ground the judge erred in failing to consider the inconsistencies in Solanki's evidence and in the eighth, ground that the judge erred in considering extraneous matters that did not form part of the record. In the 9<sup>th</sup> ground the judge erred in wrongly interpreting the Law of Contract Act while in the 10<sup>th</sup> ground the judge erred in failing to consider the aspect of forgery and fraud in the relationship between Solanki and the Pandyas. The complaint in the 11<sup>th</sup> ground is that the judge erred in reaching a decision that was not supported by the evidence while in the 12<sup>th</sup> that, the judge erred in failing to assign any reason for not believing the evidence of Neepu and the Pandyas and instead believing that of Solanki. In the 13<sup>th</sup> ground the judge erred in finding that there existed a resulting trust between Solanki and the Pandyas when there was no pleading by the parties. The complaint in the 14<sup>th</sup> ground faults the judge for ordering the Pandyas to construct a new sewer line when such action required various approvals and consents of the local authority and (other) government departments which had denied approval for such a line. In the penultimate ground it is alleged that the judge erred in ordering the Pandyas to construct a sewer line on Neepus land without acknowledging that the land did not belong to the Pandyas but to Neepu. In the final ground the judge erred in law in failing to recognize Neepus' right to property as enshrined in the Constitution.

Save for the wording and numbering the grounds in the 2<sup>nd</sup> appeal are totally a reproduction of grounds in the first appeal and it would be otiose to repeat them here.

In the cross-appeal Solanki challenged the judgment and prays for an award of Kshs.6,600/= against Neepu and the Pandyas jointly and severally and a sum of Kshs.19,714/= against the Pandyas again jointly and severally. Secondly he prays for an award of general damages against Neepu and the Pandyas jointly and severally.

When the appeals came up for hearing before us learned counsel Mr. P. J. Otieno assisted by Mr. G.D. Yego appeared for Neepu; Mr. J.A. Mwamu appeared for the Pandyas; Mr. I.E.N. Okero appeared for Solanki while the learned State counsel Mr. J.E.N. Maroro appeared for the Attorney-General. Neepu and Solanki had filed written submissions which we were requested to rely on and which we have perused. The other parties had not filed written submissions. The counsel addressed us in respect of both appeals.

Mr. Mwamu was the first to go. He consolidated grounds 1, 2, 10 and 12 as first cluster; grounds 3 and 4 as the 2<sup>nd</sup> cluster; grounds 5, 13, 14 and 15 as 3<sup>rd</sup> cluster; grounds 6 and 7 as 4<sup>th</sup> cluster and final cluster comprised grounds 8, 9, 11 and 16.

Learned counsel Mr. Mwamu faulted the learned judge for finding that there was no resulting trust but that a constructive trust existed which was contrary to the pleading where Solanki had alleged a resulting trust. The learned judge also found that the essentials of a contract had been established by Solanki which counsel submitted was not part of Solankis' case in the plaint, the case being based on resulting trust. Counsel submitted in support of the 2<sup>nd</sup> cluster of grounds of appeal that the learned judge erred in finding that the suit was not time barred when, according to counsel, the suit was filed out of time. Counsel reminded us that the original plaint was filed on 3<sup>rd</sup> June, 2003; the learned judge found the claim was an action to recover land and therefore, according to counsel, time would have expired in early 2002 because it was alleged in the plaint that the parties entered into a relationship in respect of the suit property in early 1990.

In respect of the 3<sup>rd</sup> cluster of grounds of appeal learned counsel submitted that the learned judge did not analyse the issues and cited as an example the defence of fraud pleaded by the Pandyas – the judge found the transaction irregular but blamed government officials but not Solanki. On the orders of specific performance granted by the learned judge Mr. Mwamu submitted that Solanki was not entitled to those orders and further faulted the judge for relying on the decision of the Supreme Court of Uganda in **Manzoor v Baram** [2003] 2 EA 580 where that court restated conditions applicable for a party to be entitled to the equitable remedy of specific performance.

Counsel cited **Guilder Singh Birdi & Anor v Abubakar Madhubuti** Civil Appeal No. 165 of 1996 (ur) in support of the proposition that specific performance is granted to do more and perfect justice and a party in breach of contract would not be entitled to that remedy. Counsel finalized his submissions by stating that the cross-appeal should be dismissed for lack of proof of the claims made by Solanki.

On behalf of Neepu learned counsel Mr. Yogo and Mr. Otieno urged different grounds of appeal. It was argued that because controlled transactions are transactions performance of which is regulated by statute such transactions cannot be enforced if statute, is not followed. Reliance was placed on Section 3(3) of the Law of Contract Act which provides that:

***“Section 3(3) – No suit shall be brought upon a contract for the disposition of an interest in land unless –***

***a. the contract upon which the suit is founded-***

***i. is in writing;***

***ii. is signed by all the parties thereto; and***

***b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526) nor, shall anything in it affect the creation of a resulting, implied or constructive trust.”***

The learned judge was therefore faulted for holding in favour of Solanki when there was no contract in writing executed by the parties. **Machakos District Co-operative Union Limited v Philip Nzuki** Civil Appeal No. 112 of 1997 (ur) was cited for the proposition that no suit can be brought upon a contract for the disposition of land unless the provisions of the said Act have been complied with. Also cited was **Schon Noorani v Damji Patel & 2 Others [2006]** eKLR, a decision of the High Court, where it was held that where the sale of the suit premises was done orally and not in compliance with the Law of Contract Act such a transaction was unenforceable.

Counsel further submitted that the learned judge erred in holding against Neepu which was not a party to any agreement between Solanki and the Pandya and said there was therefore no privity of contract and Neepu could not be bound by a contract to which it was not a party. The old corporate law case of **Salomon v Salomon Company Limited** [1897] A.C 22 was cited for the proposition that a corporation is a different person from the personalities of its shareholders.

Counsel faulted the learned judge for giving effect to what, according to counsel, was an illegal contract and cited **Heptulla v Noor Mohammed** [1984] KLR 580 where it was held that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself involved in the illegality. Counsel relied on Article 40 of the Constitution of Kenya 2010 in support of the submission that upholding the judgment would deprive Neepu of its land contrary to law. In any event, wondered counsel, how could the unsurveyed and un-subdivided plot be transferred to Solanki who was not claiming the whole plot but only a portion of it. Counsel therefore submitted that the judgment as framed was not capable of execution.

On behalf of Solanki learned counsel Mr. Okero supported the judgment arguing that the learned judge was entitled to consider all the circumstances and evidence before him and that was why he found that a resulting trust existed leading to the order for specific performance. On the allegations of fraud against Solanki in the defence of Neepu and the Pandyas, learned counsel submitted that the same had not been proved to the required standard which was to a degree higher than on a balance of probabilities. On enforceability of the judgment learned counsel submitted that it was open to Solanki to apply for further proceedings in the High Court to execute the judgment. On the Law of Contract Act counsel reminded us

that Section 3(3) and submitted that the same could not apply to the suit at the High Court because that section was introduced by the Statute Law Miscellaneous Amendments Act (No. 2 of 2002) and became operational on 1<sup>st</sup> July 2003 by Legal Notice No. 188 of 2002. **The Registered Trustees Anglican Church of Kenya Mbeere Diocese v The Rev. David Waweru Njoroge** Civil Appeal No. 108 of 2002 (ur) was cited for the proposition that the amended Law of Contract Act could not apply to contracts that pre-dated the amendments. **John Gitiba Buruna & Anr v Jackson Rioba Buruna** Civil Appeal No. 89 of 2003 (ur) was also cited in support of the submission that since the Pandyas had received purchase price in 1990 Solanki had stopped paying rent and continued occupation of the premises and the Pandyas had remained the registered proprietors of the parent title, it would be inequitable in law to allow the Pandyas to assert full beneficial ownership of the property. It was further urged that Neepus indefeasible rights as registered proprietor of the land under Section 28 of the (repealed) Registered Land Act were subject to the proviso thereof where such a proprietor was not relieved of its obligations as a trustee.

On the issue of limitations learned counsel for Solanki submitted that the learned judge was right to hold that the action was not time-limited because the action was founded on the equitable principle of a constructive trust. Finally, in respect of the cross-appeal counsel submitted that special damages claims of Kshs.6,600/= and 19,714/= had been proved and the learned judge erred in not awarding those sums to Solanki. Counsel submitted further that the learned judge erred in not awarding general damages for nuisance.

The learned State Counsel did not take either side stating that the Attorney-General was ready to comply if so ordered by the court.

We have anxiously considered the Memoranda of Appeals, the records of appeal, the detailed submissions of counsel for which we are grateful and the applicable law.

Many of the grounds of appeal set out in each Memorandum of Appeal are related and this is perhaps why Mr. Mwamu, the learned counsel for the Pandyas, consolidated them into various clusters during the argument before us.

On the complaint that the transaction between Solanki and the Pandyas being a controlled one requiring a written contract in the absence of which there would be no contract the learned trial judge analysed the evidence and material placed before him and came to the conclusion that although the agreement between Solanki and the Pandyas was not executed by the said parties an oral contract existed which was binding on the parties because:

***“--- there was indication from the plaintiff that the contract was reduced into writing for execution by the parties but this was never done. The second defendant contended that he did not enter into a sale agreement with the plaintiff. It was noted herein-above, the essentials of a valid contract were established. However, in the absence of a written agreement duly executed by the plaintiff and the second and third defendants, it cannot be said that the agreement was formalized. The agreement was effectively a valid oral contract. The question emerging is whether the contract was enforceable. Being a contract for the disposition of an interest in land, the contract was governed by the Law of Contract Act (Cap 23 Laws of Kenya) which provided under section 3(3) that:-***

***“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or thereof (sic) is in writing and is signed by the party to be changed (sic) or by some persons authorized by him to sign it.***

***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or leasee who has performed or is willing to perform his part of a contract:-***

- i. ***has in part performance of the contract taken possession of the property or any part thereof, or***

- ii. ***being already in possession, continue in possession in part performance of the contract and has done some other act in furtherance of the contract***

***The Statute Law (Miscellaneous Amendments (No. 2) Act, 1990 amended the aforementioned provision.***

Section 3(3) was repealed and replaced with a new subsection providing that:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless –***

- a. ***The contract upon which the suit is founded***

- i. ***is in writing***
- ii. ***is signed by all the parties thereto, and***

***b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party provided that this sub section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation or operation of a resulting implied or constructive trust.”***

Section 3(4) provides that:-

***“subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that sub section affect the creation or operation of a resulting, implied or a constructive trust.”***

And section 3(7) provides that:-

***“The provisions of sub-section (3) shall not apply to any agreement or contract made or entered into before the commencement of that sub section.”***

The learned judge found on the evidence that the contract between Solanki and the Pandyas was entered into in 1990 before the commencement of the amended version of the Law of Contract Act which came into force on 1<sup>st</sup> June, 2003 through the Statute Law (Miscellaneous Amendments) (No. 2) Act No. 21 of 1990 (Legal Notice No. 189 of 2002) and that amendment could not affect the contract between the said parties which contract was governed by the Law of Contract Act as it stood in 1990. The learned judge also found that the contract between the said parties was saved by the provisions of section 3(7) of the said Act which is a saving clause affecting contracts entered into before the said amendment.

We have in this judgment set out in full various paragraphs of the defence filed by the Attorney-General. It is admitted in that defence that the Pandyas applied for sub-division of the parcel of land Kisumu Municipality/Block 10/124 into three parcels which application was approved; that pursuant to such approval and subdivision the Department of Survey of the then Ministry of Lands amended the Registry Index Map in effect creating three parcels named as Blocks 518, 519 and 520 (Survey Plan No. F/R 208/78); that in June 1991 the Pandyas surrendered the original title to the parcel of land to the Commissioner of Lands to facilitate surrender of lease; that on 3<sup>rd</sup> October 1992 the Pandyas paid a sum of Kshs.2,360/= to the lands office in respect of conveyancing, stamp duty and registration fees, that in May 1994 three Lease documents named Kisumu Municipality/Block 10/518, 519 and 520 and Surrender of Lease were prepared, executed and stamped by the Pandyas and transmitted to the District Land Registry, Kisumu, for registration but that in or about 1996 the Pandyas informed the Commissioner of Lands of a change of mind in relation to the transaction and that is why the transaction failed. The defence of the Attorney-General in effect is that all steps for the finalization of a sale of a parcel of land by the Pandyas to Solanki were undertaken and frustrated only at the tail end of the transaction when the Pandyas backtracked and failed to complete the transaction. The learned judge found as fact and this was not denied but was admitted by the Pandyas, that a sum of Kshs.250,000/= was paid by Solanki and was

received by the Pandyas in furtherance of what came to be an oral agreement between them. The other sum of Kshs.81,460/= was also received by the Pandyas to facilitate sub-division of the parcel of land and to undertake construction of an independent sewerage system to suit the sub-divided parcel of land.

Counsel for the Pandyas and Neepu complained that the learned judge had found existence of a resulting trust and/or a constructive trust when the evidence did not support such finding. But is that so?

After analyzing the evidence placed before him and which we have set out in this judgment, and after satisfying himself that an oral contract capable of enforcement existed between Solanki and the Pandyas the learned judge said:

***“--- since the plaintiff is entitled to a propriety interest in a portion of the suit property on the basis of the agreement between him and the second and third defendants, the element of a resulting trust and/or a constructive trust would not arise and if it were to arise, it would hinge towards a constructive rather than a resulting trust which was pleaded by the plaintiff.”***

It will therefore be seen that, far from the position taken by counsel for the Pandyas and Neepu, the learned judge did not find existence of either a resulting or constructive trust but based his findings on the oral agreement he found existed between the parties and which he found enforceable in favour of Solanki. The learned Judge found in the premises that it would be inequitable to allow the Pandyas who had entered into contract, received purchase price, taken all the steps set out in this judgment and in addition where Solanki was always in occupation and possession of the suit property for the Pandyas to assert full beneficial ownership of the property. As was held by this Court in John Gitiba Buruna and Anor v Jackson Rioba Buruna (Kisumu) CA 89 of 2003 (ur) although the rights of a registered proprietor are indefeasible under Section 28 of the (repeated) Registered Land Act, such registration did not, as the proviso to the said Section stated, relieve the proprietor from any duty or obligation to which he was subject as a trustee. It was also observed in that judgment that a constructive trust generally arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.

Then there is the complaint relating to the laws of limitation where the Pandyas and Neepu fault the learned Judge for finding that the suit was not barred by limitation. The counsel for those parties submitted before us that the suit was bad in law as time expired on it in early 2002, the agreement (which they did not admit) having been entered in 1990.

Mr. Okeros' position in response to the submissions on the issue of time limitation was that the Limitation of Actions Act did not apply to the claim because the claim was based on equity. He cited Section 22 of that Act which excludes the application of that Act to an action by a beneficiary under a trust in respect of a fraud or fraudulent breach of trust to which the trustee was party or privy. On this aspect of the matter the learned judge satisfied himself this way:

***“--- as to limitation of time, this claim is based on contract and is also a claim to recover an interest in land. Although, the contract was made in 1990, the activities leading to the suit arose in the year 2003 when the plaintiff was required to sign a lease agreement on the basis that he was a tenant in premises purchased by himself. He indicated that his attempt to discuss the matter with the second defendant was met with the remark “lets go to the court, court will decide---”.***

The evidence that comes fourth which we have set out repeatedly was that Solanki entered the premises as a tenant but in 1990, as properly found by the learned judge, entered into contract with the Pandyas to purchase the house which he had hitherto occupied as a tenant. All steps were taken to effect the transaction which only fell through when the Pandyas failed and refused to execute completion documents. The learned Judge was clearly right in his finding that the cause of action arose in 2003, not in 1990. We can find no error in this finding.

On the grounds of appeal relating to alleged fraud and acts of criminality against Solanki the Pandyas did not lead any evidence to meet the threshold required in law to establish fraud. Such evidence is in law to be led to satisfy a standard above balance of probabilities but below beyond reasonable doubt – see the case of **Gudka v Dodhia** Civil Appeal No. 21 of 1980 where Law, JA (as he then was) stated:

***“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in R G Patel Lalji Makanji [1957] EA 314.”***

This court stated on allegations of fraud in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others** Civil Appeal No. 215 of 1996:

***“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”***

On the alleged breach of Neepu’s property rights the position is that the Pandyas’ after entering into contract with Solanki devised what they thought was clever scheme where, after all steps had been taken to complete the transaction they had a change of mind and transferred the parcel of land to Neepu in the cleverly thought-out plan to ensure that Solankis’ rights to the property became unreachable. The learned judge was right to find that the said scheme could not affect Solankis’ rights to the property which had crystallized.

And then there is the submission taken by counsel for Neepu and the Pandyas that the judgment cannot be effected because according to them, the property had changed hands. On this we agree with counsel for Solanki that necessary steps will be taken in the appropriate court to give effect to the judgment.

All in all and upon our re-evaluation of the evidence and considering the record of appeal and the grounds of appeal and submissions made we are satisfied that the learned judge reached findings that cannot be faulted and the appeals have no merit and are accordingly dismissed with costs which we award to Solanki. The Attorney-General who did not take a position in the appeals would not be entitled to costs.

On the cross-appeal counsel for Neepu and the Pandyas urged that the claim had not been proved and the cross appeal should be dismissed. Counsel for Solenki on the other hand submitted that the learned judge having found that Solanki was entitled to the suit property erred by not sanctioning Neepu and the Pandyas who sent auctioneers to attach Solanki’s property. The cross appeal prayed for judgment for KShs.6,600 against Neepu and the Pandyas jointly and severally and in addition KShs.19,714/- against the Pandyas jointly and severally. There is also a prayer for general damages for nuisance against Neepu and the Pandyas.

From the record we are of the considered opinion that a proper basis was laid to entitle Solanki to an award of KShs.6600/- against Neepu and the Pandyas and a further sum of KShs.19,714/- against the Pandyas. This is because it was shown in evidence, and the Pandyas admitted it, that auctioneers were sent by the Pandyas and did actually attach Solankis goods. Receipts for those sums were tendered in evidence and the learned judge should have entered judgment on special damage claims which were proved as required in law.

From the record, however, and even on the submissions made before us, no basis has been laid on which the learned judge or this court would assess general damages for nuisance. We are entitled to, and we do hereby interfere with the learned judges findings only to the extent that we award a sum of KShs.6600/- to Solanki against Neepu and the Pandyas jointly and severally and another sum of KShs.19,714/- to Solanki against the Pandyas jointly and severally with interest from the date of filing suit in the lower court. We award half costs of the cross appeal to Solanki.

Those, then, are our orders.

*Dated and Delivered at Kisumu this 19<sup>th</sup> day of September, 2014.*

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**