



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ensi Investments Limited v Were (Environment and Land Appeal  
36 of 2020) [2024] KEELC 5471 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 36 OF 2020**

**A NYUKURI, J**

**JULY 24, 2024**

**BETWEEN**

**ENSI INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**JOHN HABEL WERE ..... RESPONDENT**

*(Being an Appeal from the Judgment of Honourable C. C. Oluoch, Senior Principal Magistrate, Mavoko, delivered on the 23rd January 2019 in Mavoko SPMCC No. 333 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal was filed by Ensi Investments Limited, challenging the judgment of Honourable C. C. Oluoch, Senior Principal Magistrate, delivered on 23<sup>rd</sup> January 2019 in Mavoko SPMCC No. 333 of 2018. In the impugned judgment, the learned trial magistrate made a finding that the plaintiff (the appellant herein) failed to prove its case against the defendant (the respondent herein) to the required standard and therefore the court proceeded to dismiss the appellant's claim with costs to the respondent herein.

**Background**

2. On 20<sup>th</sup> March 2018, the defendant in the lower court, filed a plaint dated 19<sup>th</sup> March 2018 against the defendant therein seeking the following orders;
  - a. A declaration that the transfer and titles numbers, Mavoko Town Block 3/13447, Mavoko Town Block 3/13450 and Mavoko Town Block 3/13451 are illegal, unlawful, null and void.
  - b. An order do issue cancelling the transfers entries in the land register and titles numbers Mavoko Town Block 3/13447, Mavoko Town Block 3/13450 and Mavoko Town Block 3/13451.



- c. An order do issue directing the defendant to collect the purchase price from the plaintiff upon execution of the transfer forms in favour of the plaintiff
  - d. Costs of the suit.
3. The plaintiff averred that in the years 2009 and 2010, it had received various purchase prices and entered into sale agreements with third parties for the sale of various plots measuring  $\frac{1}{4}$  acre comprised in the parcel of land known as L.R. No. Mavoko Town Block 3/2359. That during this period it received purchase price from the defendant but never entered into any sale agreement with the defendant as required under section 3 (3) of the *Law of Contract Act*. It further alleged that between 26<sup>th</sup> July 2014 and 24<sup>th</sup> October 2012, it inadvertently under a mistaken belief, processed three title deeds in respect of parcels of land known as Mavoko Town Block 3/13447; Mavoko Town Block 3/13450 and Mavoko Town Block 3/ 13451 in favour of the defendant. It also confirmed that there is a suit in the commercial division of the High Court at Nairobi, being HCCC No. 451 of 2014 where the respondent and 16 others sued the plaintiff and 16 Others for various declarations in respect to L.R No. Mavoko Town Block 3/2359, but that the said suit not dealing with the issues before the honourable court.
  4. The defendant filed a statement of defence on 28<sup>th</sup> March 2018, wherein he denied the plaintiff's claim and stated that in July 2009 one Harun Nyamboki (Harun) together with other members of Christ Is The Answer Ministries, (CITAM) Karen, agreed to purchase through the plaintiff, 40 acres of land from parcel Mavoko Block 3/2359, which land belonged to one Mary Mueni Mulandi. That each member was required to pay Kshs. 550,000/= for every quarter acre plot (inclusive of Kshs. 50, 000/=) for "membership fees" and that the defendant paid Kshs. 1,000,000/= for two quarter plots and membership fee of Kshs.100,000/=. He stated that he signed a sale agreement but when a dispute arose, Harun refused to give him a copy thereof. He also stated that the plaintiff divided the plots into eighth acre instead of quarter acres and consequently transferred only three instead of four plots to the defendant, the subject of this suit. He stated that members learnt with shock that they never became members of the plaintiff which is owned by Mr. Harun Osoro Nyamboki; Dr. Charles Kerogo Bosire and Mr. Michael Nyamute. He also argued that since there is a pending case being Nairobi HCC No. 451 of 2014, the plaintiff should have instead filed a counterclaim within the said suit. He sought for the dismissal of the plaintiff's suit.

### **Plaintiff's Evidence**

5. At the trial, Harun Osoro Nyamboki one of the directors of the plaintiff testified as PW1 and adopted his witness statement dated 19<sup>th</sup> March 2018 as his evidence in chief. His testimony was that the plaintiff had on its own initiative sold an idea of purchasing and developing land within Mavoko Municipality to members of CITAM Karen, which idea was well received and proceeded well until the year 2012 when some members filed a suit in the High Court at Machakos, being HCCC (ELC) No. 366 of 2012 and sought an injunction and further orders for arbitration, leading to a discharge of the injunctive orders in 2018. He stated that the plaintiff was a vehicle to receive resources for purchase and development of land in Mavoko Municipality. He alleged that between July and October 2012, the defendant inadvertently, was allowed to execute transfer forms and the 3 subject titles processed in his favour. That later it was discovered that the defendant had not executed a sale agreement with the plaintiff and that therefore the titles were issued to the defendant contrary to the law of contract. He maintained that the plaintiff had acted under a mistaken belief though in good faith and that it was willing to refund the purchase price to the defendant once the title deeds are re-transferred back to it. He produced copies of titles for the 3 suit properties and a demand letter as exhibits.



6. Upon cross examination, he confirmed that the land was purchased from Mary Mulandi and the same was approximately 40 acres when it was purchased. He stated that the plaintiff received money to purchase the land and that all those with interests in the project would subscribe shares because the plaintiff was to hand over the shares to the members. He confirmed that the defendant deposited Kshs 1.1 million in the plaintiff's account. He stated that he could not explain why the defendant got 3 and not 4 plots. He stated that there was compromise of procedure among some of his staff as the defendant had not followed the correct procedure. He claimed that the procedure to be followed were in the minutes which he had not produced in court. He stated that there was an advocate who prepared agreements. He confirmed that the entire land was purchased and transferred to the plaintiff and the plaintiff therefore subdivided the property and transferred plots to various members including the defendant. He confirmed signing the transfer instruments in favour of the defendant. His main complaint was that the defendant was not entitled to the three plots because there is no contract. He confirmed that he serves in various positions in church and members respect what church leaders tell them. That marked the close of the plaintiff's case.
7. DW1 was the defendant. He adopted the contents of his witness statement filed on 28<sup>th</sup> March 2018 as his evidence in chief. It was his testimony that at the material time he had been a member of CITAM Karen. That in May 2009, under the Chairmanship of Michael Nyamute, in a Men's fellowship, they discussed ways of empowering members and it was agreed they invest in real estate. That later, the chairman informed them of having identified land owned by Mary Mulandi. That the members of the church agreed to contribute and buy land and that each ¼ acre was being sold at Kshs. 550,000/=, and that Harun was in charge of the entire process. He further claimed that Harun introduced members to the plaintiff and they were informed that the same will be a vehicle for acquiring the land and that the purchasers will be members thereof. That upon the members mobilising their resources, the plaintiff purchased the land and the same was registered in the plaintiff's name only for the members to realise later that the plaintiff was merely a private owned company, and owned by Harun, Dr. Bosire and Mr. Nyamute, which was never disclosed to the members.
8. He confirmed paying Kshs. 1.1 million whereof Kshs. 1 million was for the purchase of the land and Kshs. 100,000/= was allegedly "membership fees". He stated that he also paid for legal fees, survey, transfer and stamp duty for 4 plots. But that instead of getting 4 plots, he was given 3 plots. He stated that he entered into an agreement with the plaintiff just like other members because he trusted Harun, but did not pick the signed agreement from his office. He stated that he was shocked when a dispute arose and Harun refused to give him his copy of the agreement. He stated that since he was chairman of the land owners, he had been championing for accountability from the plaintiff and believes that the suit was merely revenge from Harun, which the arbitrator found as much.
9. He insisted that both Harun and the plaintiff have no proprietary rights over land bought by members including the defendant as the plaintiff was merely a trustee. He claimed that the plaintiff's allegation that the defendant's titles were unlawful was factually and legally misconceived because, Harun withheld his sale agreement and should not benefit from his mischief; and that the Law of contract does not state that a title issued in the absence of an agreement is illegal.
10. Upon cross examination, he stated that he signed a sale agreement at the Advocate's office but that he did not pay the amount of Kshs. 2,000/= for the agreement. He stated that the issue of a sale agreement came much latter after members had paid for the land. He also stated that he did not have a copy of the agreement and that he did not ask for a copy of the agreement. He further stated that he had been advised that a sale agreement was not necessary. On re-examination, he confirmed to have paid for 4 plots but only got 3 without any explanation for the 4<sup>th</sup> parcel. He also confirmed to have signed the transfer documents in Harun's office. That marked the close of the defendant's case.



11. Upon hearing the parties, the trial court found that there existed a constructive trust on the plaintiff in favour of the defendant as the defendant had been conferred titles to the suit land and allowed to take possession of the suit properly, consequently estopping the plaintiff from questioning regularity of the transaction long after the defendant took possession thereof. The court also found that the [Land Registration Act](#) was applicable in the case as the repealed acts ceased to apply on 2<sup>nd</sup> May 2012. It was the court's view that the plaintiff had not proved its case to the required standard and dismissed the same. It is the above decision that provoked the instant appeal.
12. By a Memorandum of Appeal dated 25<sup>th</sup> January 2019, the appellant herein appealed against the aforesaid judgment citing the following grounds;
  1. The Learned Senior Principle Magistrate erred both in law and fact by failing to address the issue in question which was the interpretation of section 3(3) of the Contract Act in light of land/property acquisition.
  2. The Learned Senior Principle Magistrate erred both in law and fact by interpreting and applying the Principle of constructive trust.
  3. The Learned senior Principal Magistrate erred in law and in fact in holding that constructive trust stops the plaintiff from questioning regularity of the transactions.
  4. The Learned Senior Principal Magistrate erred in law and in fact in holding that conferring of the title to the defendants allowed him to take possession of the property contrary to the evidence adduced and the requirements of the law.
  5. The Learned Senior Principal Magistrate erred in law and in fact by failing to hold that a sale agreement not signed by the parties cannot be overlooked as it renders the transaction void ab-initio pursuant to the provisions of Section 3 (3) of the [law of Contract Act](#).
  6. The Learned Senior Principal Magistrate erred in law in holding applicability of [Land Registration Act](#) in view of the date of transaction way back in 2009 and by so doing she arrived at a wrong decision.
  7. The Learned Senior Principal Magistrate erred in law in holding that there was no evidence of written procedure and requirement for acquisition of property when the provisions of section 3 (3) of the Law Act is clear on procedure of land acquisition.
  8. The Learned Senior Principal Magistrate erred in law and in fact that there was no evidence to prove certainty of the lapse in laid down procedure when there was enough evidence adduced by the appellant to support its claim of mistaken belief.
  9. The Learned Senior Principal Magistrate erred in law and in fact that the plaintiff will not suffer any harm if the title deeds are not cancelled.
  10. The Learned Senior Principal Magistrate erred in law and in fact by holding that it is not too late to sign any documents that maybe missing in the plaintiff records, as the law is clear on rules governing sale of land.
  11. The Learned Senior Principal Magistrate erred in law and procedure by failing to determine all issues filed by the applicant.
  12. The Learned Senior Principal Magistrate erred in law and in fact by holding that the plaintiff had failed to prove its case to the required standard contrary to the evidence presented before her.



13. The Learned Senior Principal Magistrate erred in law and procedure by failing to either apply or distinguish the authorities relied by the appellant and by so doing arrived at the wrong decision.
14. The Learned Senior Principal Magistrate erred in law by awarding costs to the defendant.
13. Subsequently, the appellant sought the following orders;
  - a. The Learned Senior Principal Magistrate's judgment be set aside and the appellant's suit be allowed as prayed in the Plaintiff and;
  - b. The appellant be awarded costs of the appeal.
14. The appeal was disposed by way of written submissions. On record are the appellant's submissions dated 26<sup>th</sup> October 2022 and the respondent's submissions dated 20<sup>th</sup> December 2022.

### **Appellant's submissions**

15. Counsel for the appellant argued grounds 1, 5, and 7 of the appeal together and submitted that an agreement was mandatory for a sale of land under section 3 (3) of the Law of Contract Act. Counsel argued that a valid contract requires mutual assent; valid offer and acceptance; adequate consideration; capacity and legality. Counsel argued that as there was no sale agreement between the parties herein, the defendant's titles were unlawfully issued.
16. It was also their submission that the respondent simply avoided entering into a sale agreement despite knowledge of the requirements by the law. They also submitted that the trial court wrongly applied the equitable principle of constructive trust to an undeserving party. They further argued that the appellant did not take occupation of the suit plots hence the finding by the trial court was not correct.
17. Counsel further stated that the court erroneously found that the Land Registration Act was applicable yet the repealed statutes ceased to exist after the commencement of the Act on 2<sup>nd</sup> May 2012. They also faulted the trial court for holding that it was not too late to sign any document that could be missing in the plaintiff's records and argued that the trial court failed to answer issues raised.
18. They concluded by submitting that the appellant had proven his case on a balance of probabilities and the admission by the respondent that they did not pay the Kshs. 2,000 for the agreement was sufficient evidence of proving the Appellant's case.

### **Respondent's Submissions**

19. Counsel for the respondent directed the court to provisions on section 3(3) of the Law of Contract Act and the Land Act 2012 which prohibit a suit upon a contract for the disposition of land unless the same is in writing, signed by all the parties thereto and the signature of each part attested by a witness who is present when the contract was signed by such a party. It was their submission that the named provision does not mean that failure to execute a sale agreement renders the titles issued illegal, unlawful, null or void, but that enforcing the contract would not be viable, but the contract will not be void. They opined that the contract would still be valid inter-partes and that the suit was not for enforcement of the contract but for nullification of a transaction based on an oral contract.
20. It was also submitted that a constructive trust existed, citing the Court of Appeal decisions in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR and Willy Kimutai Kitilit v Michael Kibet [2018] eKLR for the proposition that what is key is the parties' intention, which is the basis of a constructive trust. Counsel argued that the doctrines of equity being constructive trust



and proprietary estoppel are applicable in this matter. They also submitted that provisions of section 28 of the *Land Registration Act* were correctly applied by the trial court since the title deeds for the respondent were issued on 24<sup>th</sup> October 2012 and that the process for registration had begun before the *Land Registration Act* became effective. They concluded by submitting that the court was correct in exercising its discretion as provided under Order 15 Rule 2 of the *Civil Procedure Rules* to frame its own issues from the parties documents.

### **Analysis and Determination**

21. The court has carefully considered the appeal, parties' rival submissions and the entire record. This court is alive to its duty as the first appellate court, which is to re-analyse, re-evaluate and re-assess the evidence presented before the trial court and make its own independent conclusions bearing in mind that it had no advantage of hearing or seeing the witnesses and give due allowance for that.

22. The duty of the appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

23. This matter raises only one issue, which is whether titles held by the respondent are unlawful for the reason that there was no land sale agreement between the appellant and the respondent.

24. The disputed titles herein were registered in the respondent's name under the *Land Registration Act* on 26<sup>th</sup> July 2012 and 24<sup>th</sup> October 2012 respectively.

25. Article 40 (1) and (6) of the *Constitution* of Kenya 2010 provides Constitutional protection only in regard to lawfully acquired property as follows;

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —
  - a. of any description; and
  - b. in any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
  - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—



- i. requires prompt payment in full, of just compensation to the person; and
  - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
5. The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
26. Therefore, the law is vigilantly protective of the real owner of property, hence the legality of acquisition of property remains the core determinant for legal protection.
27. Section 26 of the [Land Registration Act](#), expounds the above Constitutional provisions and provides for conclusiveness of title, as follows;
  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
    - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
  2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
28. Therefore, a registered proprietor is entitled to legal protection, unless it is shown that their title was obtained by fraud, misrepresentation, illegality, want of procedure, or corruption. The law is concerned with the root of title and not just the face of the title. As stated above, an illegally obtained title cannot be accorded any legal protection.
29. In the case of [Funzi Development Limited & Others v The County Council of Kwale](#) [2014] eKLR, the Court of Appeal held as follows;
 

A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.
30. Similarly, in the case of [Elijah Makeri Nyangw'ara v. Stephen Mungai Njuguna & another](#) (2013) eKLR, the court held as follows;
 

...is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through



a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

31. In the instant case, the appellant argues that the respondent's three titles were illegally obtained as they did not comply with section 3 (3) of the Law of contract Act since the titles are not supported by any sale agreement between the appellant and the respondent.

32. Section 3 (3) of the Law of Contract Act provides as follows;

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.

33. Therefore, except where land is disposed by public auction or there exists a trust in relation thereto, a suit cannot be brought in regard to a contract for disposition of an interest in land, unless there is a written contract signed by the parties thereto and attested by two witnesses. It is clear that under section 3 (3) of the Law of Contract Act, legality of disposition of an interest in land may be demonstrated by a written agreement signed by the parties in the presence of their two witnesses; or a public auction or a resulting, implied or constructive trust. None of the three modes of disposition of interest land is superior than the other, so that where there is no written contract but there is a public auction or a trust, the disposition of an interest in land is legal for all intends and purposes.

34. The Black's Law Dictionary 11<sup>th</sup> Edition defines Constructive Trust as;

An equitable remedy by which a court recognizes that a claimant has a better right to a certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title. The court declares a constructive trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary

35. Therefore, a constructive trust is anchored in equity and it exists where a person holding title is not the real owner of that property, but holds the property for the benefit of another person and therefore is obligated to transfer the title to the constructive beneficiary. A constructive trust serves to avoid unjust enrichment by one party at the detriment of another. Article 10 our Constitution elevated equity to one of our national values and principles of governance, and therefore applicable in our justice system.

36. In the case of *Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others* (Petition 18 (E020) of 2022) [2023] KESC (KLR) (28 December 2023) (Judgment), the Supreme Court of Kenya held that a constructive trust will automatically arise where a person who is already a trustee takes advantage of



his position for his own benefit. This position was also stated by the Court of Appeal in the case of *Twalib Hatayan & Another v Said Saggah Ahmed Alheidy & 5 Others* [2015] eKLR, where that court also expressed itself as follows;

As earlier stated with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.

37. In discussing the purpose of constructive trust, in the case of *Soulos v Korkontzilas*, [1997] 2 SCR 217, the Canadian Supreme Court held as follows;

The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

38. The essence of constructive trust, was aptly captured in the case of *Murdoch v Murdoch* [1975] 1 SCR 423, where the Canadian Supreme Court stated as follows;

As is pointed out by Scott, *Law of Trusts*, 3<sup>rd</sup> Ed., 1967, Vol. 5, at p. 3215 "a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property." And again, , at p. , 3413 quoting Judge Cardozo, a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

39. Essentially, a constructive trust is the instrument adopted by the law to remedy situations where a title holder of property holds the property for the benefit of another and is under equitable obligation to convey it to the real owner, and therefore if he is left to retain it, that retention will amount to unjust enrichment.

40. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR the Court of Appeal pronounced itself as follows;

"The doctrines of equity are part of our laws although Section 3 of the *Judicature Act* subordinates common law and the doctrines of equity to the *Constitution* and written law in that order. Sections 3(3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in *Yaxley v. Gotts* [2000] Ch. 162 (Yaxley's case) on which the Court in *Macharia Mwangi Maina* Decision relied, amongst others, shows that the doctrine of constructive trust and



proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.”

41. In the instant case, I have carefully considered the pleadings and evidence of both parties. My perspective of the matter is that, it is a fairly straight forward matter. There is concurrence on many matters, save on the existence of a sale agreement between the parties herein and the import of the lack of a sale agreement on the legality of the respondent's titles.
42. It is not disputed that the respondent and the directors of the appellant were all members of CITAM Karen. There was concurrence of both parties that members of CITAM Karen intended to purchase land, and agreed that the plaintiff would be the vehicle to help them accomplish this goal. They identified the parcel of land to be purchased, namely, Mavoko Town Block 3/2359 owned by one Mary Mulandi, which was being sold at Kshs. 500, 000/= per ¼ acre. The agreement between CITAM Karen members and the appellant was for the former to mobilise their resources, and hand over their respective purchase prices to the appellant for the purchase of the 40 acres from Mary Mulandi. The appellant was to buy the land ON BEHALF OF the members of CITAM Karen and was obligated to hand over the land to them in accordance with what each member had paid for. CITAM Karen members, including the respondent herein, complied with their obligation by depositing their respective purchase prices with the appellant, and in turn the appellant purchased the 40 acres from Mary Mulandi. It appears that after the land was transferred from Mary Mulandi to the appellant, the latter asked CITAM Karen members to enter into land sale agreements with it. It is at this point that the respondent alleges that he signed the land sale agreement which was vengefully withheld by the appellant's director, Harun; while on the other hand, the appellant insisted that no such agreement was signed, and therefore the respondent's titles are unlawful.
43. From the above history, it is crystal clear that the appellant never owned the parcel of land known as Mavoko Town Block 3/2359. In addition, the appellant's purchase of the land from Mary Mulandi was not for its own benefit, but was for the benefit of all those persons who deposited purchase prices in its accounts. What the appellant did was basically to receive money from the respondent and other CITAM Karen members and hand over that money to Mary Mulandi, prompting the latter to transfer the land to the appellant. The appellant itself was emphatic both in its pleadings and evidence that the Kshs. 1.1 Million received from the respondent was purchase price. The ultimate recipient of this purchase price was Mary Mulandi the vendor of the land. Therefore, the issue of “inadvertence and mistaken belief” alleged by the appellant does not arise and is a red herring and pure dishonesty on the part of the appellant.
44. Did the act of transferring the land to the appellant confer ownership thereof on the appellant? I do not think so. As the consideration for purchasing land from Mary Mulandi did not belong to the appellant, the transfer of the land to the appellant did not make the appellant the owner of the suit property, but it merely held it as a trustee on behalf of the CITAM Karen members who deposited their funds with the appellant. That being the case, it is clear that the acquisition of title by the appellant before transfer of the same to CITAM Karen members was on the basis of a trust. Therefore, the real vendor and owner of the land was Mary Mulandi and the real purchasers were CITAM Karen members. The appellant was merely a trustee because it did not apply any of its resources on purchasing the suit property, but purchased it using funds from CITAM Karen members. That being the case, and since the appellant did not own the land although it had been transferred to its name, there was no justification for it to demand a sale agreement with the respondent because, it could not sell that which it did not own. The act of transfer to CITAM Karen members from the appellant did not amount to a sale because the sale happened when Mary Mulandi received consideration deposited by CITAM Karen members. The registration of the suit property in the appellant's name, rendered the appellant subject to an equitable



obligation to transfer the land to everyone on whose behalf the land had been purchased, including the respondent. Therefore, the appellant being a trustee, had no legal, or equitable basis to demand that there should be an agreement between it and any of the CITAM Karen members who gave it money to buy the land on their behalf, including the respondent.

45. The requirement of section 3 (3) of the Law of Contract applies to a sale of immovable property between the real owner and the real purchaser, and the appellant having been a trustee and not the real owner, the above legal provision was not applicable between the appellant and the respondent and or any other CITAM Karen members who deposited purchase price in the appellant's accounts. It would be unconscientious for the appellant to retain the respondent's titles on the basis of lack of written agreements, when the appellant had no legal capacity to sell the land which it acquired using the money deposited by the respondent and other CITAM Karen members. Therefore, as there existed a constructive trust, the demand for a written contract was superfluous, as the legal requirement for disposition of an interest in the suit property had been met. I therefore find that the respondent's titles were lawfully acquired.
46. In the premises, I find and hold that the trial court was right in finding that there existed a constructive trust on the part of the appellant in favour of the respondent. The result is that I find and hold that this appeal lacks merit, is an abuse of the court process, and the same is hereby dismissed with costs to the respondent.
47. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the Presence of;

Mr. Manyara for appellant

Mr. Musyoka for respondent

Court assistant – Josephine

