



**Makokha v Shikhomoli (Environment and Land Appeal E051 of 2022)  
[2024] KEELC 5955 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5955 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E051 OF 2022  
DO OHUNGO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**SALIM WEFWAFWA MAKOKHA ..... APPELLANT**

**AND**

**JACQUELINE WIKHALAH SHIKHOMOLI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's  
Court at Kakamega (Hon. I Kassan, Chief Magistrate) delivered  
on 28th October 2022 in Kakamega MCELC No. E071 of 2020)*

**JUDGMENT**

1. The Respondent moved the Subordinate Court through an undated Plaintiff which she filed on 4<sup>th</sup> November 2020. She later replaced the initial Plaintiff with Amended Plaintiff filed on 25<sup>th</sup> January 2022. She averred in the Amended Plaintiff that the Appellant was the registered proprietor of the parcel of land known as Bunyala/Budonga/1594 measuring approximately 0.003 hectares (the suit property) and that on 18<sup>th</sup> April 2018, the Appellant sold to her the whole of the suit property.
2. The Respondent further averred that although she fully paid the purchase price and the Appellant allowed her to take immediate vacant possession, the Appellant later claimed in a letter that the transaction was void for want of consent of the Land Control Board. She averred that the Appellant was holding the title in trust for her and prayed for judgment against the Appellant for specific performance of the agreement and in default the Executive Officer of the Subordinate Court to be empowered to execute the necessary transfer documents. She also sought costs and any other relief that the Subordinate Court deemed fit and just to grant.
3. The Appellant filed Statement of Defence dated 8<sup>th</sup> March 2022 wherein he averred that the agreement was frustrated by operation of Section 6 of the Land Control Act and non-payment of the purchase



price by the Respondent. He denied that he allowed the Respondent to take vacant possession and prayed that the suit be dismissed with costs.

4. Upon hearing the matter, the Subordinate Court (Hon. L Kassan, Chief Magistrate, as he then was) delivered judgment on 28<sup>th</sup> October 2022 thus:

In a nutshell, I allow the following prayers with conditions;

- a. I allow prayer (a) being a refund of the purchase price of LP NO Bunyala/Budonga/1594, the value of permanent house constructed, developments plus interest. Parties are directed to identify an independent valuer or the court can appoint one. Interest of the purchase price shall be at court rate and from the date this suit was filed.
- b. In the alternative of the above, I allow prayer (b) being empowering of executive Officer to execute the necessary documents of transfer.
- c. The defendant shall choose either prayer (a) or (b) above in which case the plaintiff will have no option but to agree with the defendant's choice.
- d. Costs to the plaintiff.

5. Dissatisfied with the outcome, the Appellant filed this appeal on 7<sup>th</sup> November 2022, through Memorandum of Appeal dated 4<sup>th</sup> November 2022. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:

1. That the learned trial magistrate erred in law and in fact in holding that the respondent had proved her case on a balance of probabilities contrary to the evidence on (sic).
2. That the learned trial magistrate erred in law and in fact in ordering specific performance of the contract after holding that it was null and void for want of consent from relevant land control board.
3. That the learned trial magistrate erred in law and in fact in shifting the burden of proof herein contrary to the Law of Evidence Act.
4. That the learned trial magistrate erred in law and in fact in failing to exhaustively analyze the contents of the sale agreement before him hence occasioning miscarriage of justice.
5. That the learned trial magistrate erred in-law and in fact in relying on oral evidence to confirm payment of the purchase price when the sale agreement was silent about its payment and acknowledgement.
6. That the learned trial magistrate erred in-law and in fact trial magistrate erred in-law and in fact in holding that the mere signing of the agreement by the appellant signified that he had acknowledged receipt of the purchase price.
7. That the learned trial magistrate erred in-law and in fact in holding that the respondent had paid the purchase price contrary to the evidence on record.
8. That the learned trial magistrate erred in-law and in fact in ordering that the respondent is entitled to compensation contrary to the provisions of section 7 of the Land Control Act.

6. The appeal was canvassed through written submissions. The Appellant filed submissions dated 25<sup>th</sup> July 2023 while the Respondent filed submissions dated 9<sup>th</sup> February 2024.



7. The Appellant argued that the agreement was silent on whether the purchase price was paid. He added that his position that he was not paid was supported by the fact that he wrote a demand for payment through Anziya and Company Advocates. He further argued that the Respondent was under a duty to prove that she paid the purchase price and could have demonstrated payment through withdrawal from her bank or Mpesa. That in the circumstances, the Learned Magistrate erred in relying on oral evidence to find that money exchanged hands.
8. The Appellant went on to argue that pursuant to the agreement, possession was not immediate and that he only undertook to hand over possession upon being paid. That he allowed the Respondent to start utilizing the land in good faith and on trust but was shocked when the Respondent was unwilling to pay the purchase price despite erecting a permanent structure. He also argued that although the Respondent sought a refund of the purchase price, value of permanent house constructed and developments, she did not prove of the developments through any photographs or assessment report by a public works officer. That in the circumstances, the trial Court went out of its way to prosecute the Respondent's case on her behalf, yet it was upon the Respondent to prove her case.
9. The Appellant concluded by arguing that the Subordinate Court grossly misdirected itself by making its findings. He therefore urged this Court to set aside the judgment and replace it with an order dismissing the Respondent's case with costs.
10. On the other hand, the Respondent argued that PW2 and PW3 who were witnesses in the Sale Agreement testified that they were present at execution of the Sale Agreement confirmed that the Respondent to the Appellant the consideration of KShs 190,000. She further argued that she produced a Statement of Account (PEXh 1) from Afya Sacco Society Ltd, which showed that on 13<sup>th</sup> April 2018, she received a deposit of KShs 400,000 in her account and two withdrawals amounting to KShs 210,000 on 17<sup>th</sup> April 2018.
11. The Respondent posed: If no consideration was paid under the terms of the Sale Agreement as the Appellant claims, when was the consideration to be paid? She went on to argue that a perusal of the Sale Agreement does not disclose that consideration was to be paid in the future and does not reveal any term explaining a later payment of consideration. That on a balance of probabilities, given that the Sale Agreement was entered into on 18<sup>th</sup> April 2018, and taking into consideration the evidence she adduced, she proved her case.
12. The Respondent drew the Court's attention to the fact that after execution of the Sale Agreement in the year 2018, she took possession of the suit property and started embarked on developing a permanent structure on it and that it was until the year 2020 when the Appellant first challenged her through a letter from his Advocates. She wondered whether it is conceivable that the Appellant would have let her take possession and erect a permanent structure if no purchase price had exchanged hands.
13. The Respondent concluded by arguing that in the circumstances, the transaction was subject to the twin doctrines of proprietary estoppel and constructive trust in her favour with the result that the provisions of Sections 6 and 8 of the *Land Control Act* are ousted. She relied on the case of *Mary Akai Lutere v Johnstone Kamau Mwangi* [2020] eKLR.
14. This is a first appeal. The mandate of a first appellate Court was reiterated by the Supreme Court in *Janmohammed (SC)* (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi)



& another v District Land Registrar Uasin Gishu & 4 others (Petition 17 (E021) & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment) thus:

At this stage, all we can do is to re-state without more, the well-established principle of appellate practice and procedure that, on a first appeal ..., unless the appeal is on a point of law, the [Court] is duty bound where circumstances require, to consider and re-evaluate the evidence on record before arriving at a determination. This is all the more important in disputes relating to claims of title to land as recently pronounced by this Court in *Fanikiwa Limited v. Sirikwa Squatters Group & 20 Others* (Petition [32 of 2022](#) (consolidated) [2023] KESC 58 (KLR)).

15. I have carefully considered the pleadings, evidence and submissions. The issues that arise for determination are whether the purchase price was paid, whether the Respondent established trust and whether the reliefs granted were available.
16. There is no dispute that the Appellant is the registered proprietor of the suit property. A perusal of the Certificate of Official Search that was produced shows that he was registered as proprietor on 15<sup>th</sup> June 1998 and title deed issued to him the next day. It also shows that the parcel measures 0.03 hectares.
17. It is also not in dispute that the parties herein executed a Sale Agreement dated 18<sup>th</sup> April 2018. The Agreement was witnessed among others by Moses Omande and Grace Wafula who testified before the Subordinate Court as PW2 and PW3, respectively, as well as the area Assistant Chief. Pursuant to the Agreement, the Appellant sold the suit property to the Respondent at a consideration of KShs 190,000 and the Appellant undertook to execute all documents necessary for transfer of title to the Respondent.
18. The Agreement also provided:

That the vendor undertakes to handover to the purchaser vacant possession of the portion of land sold and the purchaser will be at liberty to fence and or utilize the portion of land sold as he (sic) deems fit.
19. It is not disputed that the Respondent took possession. According to the Respondent, she paid the entire purchase price on execution, took possession and started constructing a permanent structure on the suit property. The Appellant disputes that the Respondent paid the purchase price. I note however that in his testimony, he conceded that the Respondent was constructing. He claimed that he stopped her due to non-payment of the purchase price and failure to obtain consent of the Land Control Board.
20. The ‘stopping’ that the Appellant referred to was attempted through letter dated 4<sup>th</sup> November 2020, written on his behalf by Anziya & Company Advocates. I have noted that the letter is dated over two and a half years after the Agreement was entered into. The Agreement allowed the Respondent to take vacant possession. The Respondent’s evidence that she took immediate possession was not displaced by the Appellant.
21. While the Appellant denies that he was paid the purchase price, he did not offer any explanation in his Advocates’ letter dated 4<sup>th</sup> November 2020 whether he had received any portion of the purchase price, and if so, how much. He remained totally silent and was content to make the sweeping statement in the letter: “... you have failed to pay the agreed purchase price.” The Agreement did not allocate payment of purchase price to any future date. I agree with the Learned Magistrate that it is not likely that the Respondent would take and retain possession for over two and a half years after the Agreement and even start constructing permanent structures without paying the purchase price and without any complaint on the part of the Appellant.



22. I also note that the Respondent's testimony that she fully paid the purchase price was supported by the testimonies of PW2 and PW3 as well as by a Statement of Account from Afya Sacco Society Ltd showing that she received an advance or loan of KShs 400,000 on 13<sup>th</sup> April 2018 and that she withdrew KShs 100,000 on 17<sup>th</sup> April 2018 and a further KShs 110,000 the same day (17<sup>th</sup> April 2018). The withdrawals took place the day before execution of the Agreement.
23. In view of the foregoing, I agree with the Learned Magistrate that the Respondent fully paid the purchase price. The Appellant's complaint that the Learned Magistrate went against the weight of the evidence in holding that the Respondent had paid the purchase price has no basis. That disposes of the first issue for determination.
24. Did the Respondent establish trust?
25. The Respondent averred in her Complaint that the Appellant was holding the title in trust for her. Trust is defined in Black's Law Dictionary; 9th Edition as follows:
- The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).
26. Whether trust exists is a question of fact which must be proven through evidence. Trusts are usually created expressly by parties or by operation of law, in which case we could have a constructive trust. By its very nature, a constructive trust is an equitable instrument whose purpose is to prevent unjust enrichment.
27. The question of applicability of equitable doctrines of constructive trust and proprietary estoppel to land sale transactions is well settled. See *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR and *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR.
28. More recently, the Supreme Court stated in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) thus:
- (74) Vide Section 3(1) of the *Judicature Act*, Cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. ...
- (78) The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. ...
- (87) We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.
29. I found earlier in this judgment that that the Respondent fully paid the purchase price and took possession. The Respondent also commenced development of the suit property with the Appellant's knowledge. A perusal of the Agreement reveals that the only obligation it placed on the Respondent was to pay the purchase price.



30. In the Agreement, the Appellant undertook to execute all documents necessary for transfer of title to the Respondent. Basically, the Appellant promised to transfer the suit property to the Respondent in exchange for the purchase price. That promise included obtaining consent of the Land Control Board. In view of the material on record including the letter dated 4<sup>th</sup> November 2020, written on the Appellant's behalf by Anziya & Company Advocates, there is no dispute that consent of the Land Control Board was not obtained in respect of the transaction. The Respondent testified that the Appellant refused to Appear before the Land Control Board. The Appellant did not contradict that evidence or even demonstrate any effort to discharge his obligation in that regard. Instead, he manifested a clear intention to use his own non-compliance as an excuse to wriggle out of the transaction.
31. The circumstances disclosed in this case are a perfect fit for remedy through equitable doctrines of constructive trust and proprietary estoppel. The Appellant cannot keep both the purchase price and the suit property by relying on his own refusal to obtain consent of the Land Control Board. I have no doubt in my mind that the Respondent established trust and was entitled to the reliefs that she obtained.
32. I find no merit in this appeal. Consequently, I dismiss it with costs to the Respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Appellant present

Mr Osango holding brief for Ms Ikhumba for the Respondent

Court Assistant: M Nguyayi

