



**Dabasa v Chege (Environment & Land Case 16 of 2014)  
[2024] KEELC 14167 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14167 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 16 OF 2014  
FM NJOROGE, J  
DECEMBER 17, 2024**

**BETWEEN**

**MATHIAS DABASA ..... PLAINTIFF**

**AND**

**FRANCIS CHEGE ..... DEFENDANT**

**JUDGMENT**

1. This is a claim by the plaintiff for recovery of land that is in occupation of the defendant. The defendant claims that the land was sold to him indirectly by a third party through an arrangement that involved the plaintiff the defendant and the third party in which the land was offered to the third party and sold to the defendant to satisfy a debt owed by the plaintiff to the third party.

**Pleadings**

2. Vide a plaint dated 27/2/2013, the plaintiff seeks the following orders:
  - a. An injunction restraining the defendant either by himself, his agents or servants or otherwise from trespassing, destroying, cutting and or carrying out any wastage of any nature or however on parcel of land known as Lamu/ Lake Kenyatta 11/379;
  - b. A mandatory injunction compelling the defendant either by himself, his agent or servant or otherwise to remove and or demolish any structure of any nature on parcel known as Lamu/ Lake Kenyatta/11/379.
  - c. Costs.
3. The plaintiff's case is that he has at all material times been, and still is the legal owner of Lamu/ Lake Kenyatta/11/379 (hereinafter "the suit land"). He has a title deed. The defendant has trespassed thereon and conducted acts of destruction and construction. He has cut down trees and built a temporary structure. He has also been cultivating crops thereon. Those acts have shut out the plaintiff



from benefiting from the land. His attempts to have the issue amicably resolved have failed, hence the present suit.

#### **Defence.**

4. The defendant filed a defence dated 2/5/2014. In that defence he states as follows: the plaint is defective for want of disclosure of the date of alleged trespass; that he denies trespassing on the land.

#### **The Counterclaim.**

5. In his amended counterclaim dated 9/12/2016 the defendant avers that in 2003 one Husuni Alawi Husuni Mohamed offered to him the suit land for sale, stating that the suit land had been offered to him by the plaintiff in exchange for a debt due and owing from the plaintiff to the said Husuni. The defendant accepted the offer. The land had no title by then. Husuni took the defendant to the plaintiff. An agreement was reached allowing the defendant to take possession of the suit land to avoid repossession and offer to third parties by the Settlement Fund Trustees for failure to develop. The defendant thus took possession and began cultivation from that date. Titles were however issued during an election year while the plaintiff's name had not been removed from the records at the settlement office and title therefore issued in the name of the plaintiff; however, the defendant maintains that the plaintiff had relinquished his rights and interests over the suit land to him and given him possession and he is estopped from claiming the suit land. He claims that the plaintiff holds the land for him in constructive trust. In the alternative to his prayers he seeks compensation in the sum of Kshs 9,020,000/- for all the developments on the suit property on the suit land including crops, trees and structures. He specifically prays for the following orders:
  - a. A declaration that the plaintiff having relinquished all his rights in the suit property in the year 2003 and having given possession to the defendant before the registration and issuance of title the registration of title in the plaintiff's name rendered the plaintiff a constructive trustee for the defendant and he thus holds the title constructive trust for the defendant;
  - b. An order compelling the plaintiff to transfer the suit land to the defendant and in default this court do effect the transfer;
  - c. Special damages of Kshs 9,020, 000/-;
  - d. Costs of and incidental to the suit;
  - e. Interest on (c) and (d) above at court rates;
  - f. Further or other relief that the court may deem fit and expedient to grant.
6. The plaintiff's motion dated 2/7/14 seeking to injunct the defendant from dealing with the suit land was dismissed by this court on 15/5/2015.

#### **Reply to Amended Defence and Counterclaim.**

7. This pleading was filed on 30/5/2018, more than three years after the amendment of the defence and counterclaim. In it, the plaintiff joins issue with the defendant, reiterates the contents of the plaint, and avers further as follows: that the trespass began as early as year 2003; that the plaintiff instituted Mombasa civil suit no 368 of 2013 for trespass but later withdrew it and lodged the present suit. Specifically, in response to the counterclaim, the plaintiff averred as follows: that he denies consenting to the defendant's taking of possession and development of the suit land which were done without his knowledge; that the said Husuni is a stranger to him and he does not know of the alleged debt to him; that he is a stranger to the alleged sale agreement or understanding regarding giving of possession



to the plaintiff and the defendant's claim should be against Husuni; that the agreement has not been produced before the court as put in writing as per the *law of contract act*; that the plaintiff's objections if any ought to have been raised during adjudication and not by way of suit, and his is a first registration, and his title lacks any vitiating factors as those provided for under the *Land Registration Act 2012*, and is protected from challenge; he denied relinquishing his rights to the suit land. He denies being liable for compensation for developments on the land, which he admits have been conducted, but which he terms as illegal, and that the defendant is estopped from benefiting from his own wrongdoing.

### **Evidence.**

Evidence for the plaintiff.

8. The plaintiff testified in his case and called one witness. The plaintiff's evidence both oral and in his witness statements dated 29/5/2018. His evidence is as follows: he applied for the suit land through the Lamu District Plots Selection Committee; he got a letter of offer dated 31/1/1997 stating his application had been accepted; he wrote a letter of acceptance of the charge, dated 11/11/2009; he repaid the charge debt to completion. In his workplace, he was transferred to Mombasa and he went away, leaving one Collins Komora as caretaker of the land. He stated that while in Mombasa, in 2003, Komora informed him that the defendant had encroached on the suit land; he talked to the defendant to persuade him to vacate. In 2006 titles were issued. He received his title on 28/8/2006. He wrote several demand letters to the defendant to ask him to vacate in vain and so he filed suit; that the plaintiff has planted trees and built a house on the land.
9. Under cross-examination by Mr. Kariuki he averred that it is he who took possession of the suit land; that he did not owe Husuni any money; that the defendant took possession in 1999; in 2010 he obtained a court order to evict the defendant;
10. The evidence of PW 2 Mohamed Ali M'maka is that he was appointed chief of Mkunumbi where the suit land is situate, in 2010; that with the division of the location into two the suit land now falls within Majembeni location; that the plaintiff came to him in 2013 alleging that the defendant had trespassed on the suit land and was planting casuarina trees and had already constructed a house thereon, and he had occupied about three quarters of the land. He summoned the defendant but the defendant never turned up. That the plaintiff had a caretaker named Collins Komora on the land.
11. On cross-examination PW 2 stated that he is still the chief as at the time of his giving evidence; that the defendant was not in occupation of the suit land in 2010; that a structure on the suit land went up in flames and the caretaker fled for his safety. He stated that casuarina trees on the land had been harvested, and that others had been planted again.
12. PW3 Collins Komora testified and adopted his written witness statement dated 17/8/18. His evidence is that he was employed by the plaintiff as caretaker of the suit land in 2002; that he built a hut on the land for living in; he cultivated on a portion of the land. In 2003 he realized that unknown persons were cutting grass on a portion of the land and were in the process of erecting a semi-permanent house. Upon his inquiry the said strangers informed him that were under instructions of the defendant who they alleged had purchased the suit land; that he asked the strangers to leave and bring the defendant; the defendant came. He claimed purchase of the whole plot from Husuni. PW3 then reported to the plaintiff, who talked to the defendant and referred the matter to the chief.
13. On cross-examination PW3 stated that he stayed on the suit land for two years, but was evicted by the defendant. He averred that there are no developments on the suit land. His evidence marked the close of the plaintiff's case.



## Evidence for The Defence.

14. Francis Chege, the defendant testified orally as DW1 and adopted his witness statement dated 7/5/2014 and produced documents. His evidence is that he has never been charged with trespass and he has never seen the plaintiff on the suit land; that he is a farmer and a politician in Mpeketoni; that the plaintiff works with the Physical Planning Department in Lamu and having been a Councillor for 25 years, he knew the plaintiff well; that in 2003, Husuni owed the defendant money. Husuni also said he was owed money by the plaintiff; that the plaintiff had offered him the land in settlement of the debt as he was not interested in agricultural land. The three met and held discussions; the plaintiff agreed that the defendant take over the land immediately as an outright purchaser the consideration being the offsetting of the debt the plaintiff owed to Husuni. The plaintiff gave him a letter of allotment, a letter from the settlement office threatening repossession of the suit land on grounds of non-occupation; and it was agreed that the defendant take immediate occupation and utilization to forestall the repossession. The plaintiff cleared the land of bushes and built a three-bedroomed semi-permanent house on the land; he also planted cashew nut trees and bixa as well as subsistence crops. Bixa and cashew never did well and he changed to casuarina Merina and eucalyptus trees on the suit land though the land had no title. In 2006, in preparation for the general elections, the government issued titles including that of the suit land; however, it issued in the name of the plaintiff and he promised to transfer the suit land to the defendant. The plaintiff requested that he be given back the letter of allotment to enable him process the discharge of charge from SFT and the defendant trustingly obliged. The plaintiff disappeared after receiving the said document and failed to transfer the suit land to him. In the year 2013 the plaintiff resurfaced and started claiming the suit land and filed a suit in the lower court. He however has been in uninterrupted possession since 2003, and that the sale and taking of possession created a constructive trust in his favour. He stated that the plaintiff has never occupied the suit land. He produced a report placing the value of the developments at Kshs 9,020,000/-.
15. Upon cross-examination by Mr. Kilonzo DW1 stated that he was a councillor from 1979 to 2013. He was given the suit land documents by Husuni who had been given them by the plaintiff; that he gave the plaintiff Kshs 50,000/= but no agreement for sale was written; Husuni was the witness. He never found Komora on the land; the Chief PW2 has never summoned him to his office. That after the plaintiff obtained the title deed he sought to be paid more money.
16. In re-examination, he stated that the plaintiff has never asked him to vacate the land. He was still in occupation.
17. DW2, Johnson Munene Ngure gave evidence and adopted his witness statement dated 2/5/2014. His evidence is that he is employed by the defendant and he lives on the suit land; that he was engaged in 2003 and cleared the land and the defendant built a semi-permanent house; growing bixa and cashew nuts on the land was adversely affected when buffaloes attacked those crops regularly and the defendant resorted to tree growing. The trees are now mature. He also planted subsistence crops. No person has ever come to the land to claim it is his. He has been in occupation of the land continuously since 2003. In particular, the plaintiff has never been on the suit land.
18. On cross-examination he stated that he was a casual labourer; he had no evidence of salary payments; he was shown beacons by the defendant; he knows Komora but he never found him on the suit land;
19. DW3 Gichira Karogoi Munga testified and adopted his witness statement dated 7/5/2014. His evidence is that he is the village elder/headman at Majembeni; he has known the defendant since 2004; by the time DW3 purchased his suit land in the vicinity in 2004, the defendant was already in



occupation of the suit land and was utilizing it; since 2004 the defendant has had workers on the land and has extensively developed it. As a headman, he has never received any complaint from the plaintiff.

20. DW4 Husuni Alawi Husuni Mohamed testified and adopted his witness statement dated 7/5/14. His evidence is that the plaintiff worked in the Physical Planning Office in Lamu and owed him money; he offered to settle that debt by giving DW4 the suit land. DW4 was not interested in farming and sought the defendant who purchased the land from the Plaintiff. In those circumstances the money the plaintiff owed DW4 would be paid by the defendant as consideration for the suit land. The plaintiff then gave the defendant the letter of allotment in recognition of the defendant's new ownership of the land. The defendant then took up possession and developed the land.
21. Upon cross-examination by Mr Kilonzo DW4 stated as follows: when the parties met, all were in agreement and so none of them sought an advocate. He asserted that if the arrangement was not put in place, the plaintiff would not have gotten the land.
22. DW5, Cyrus Maganju Kiama testified and produced the valuation report. He stated that he is a registered valuer and the defendant contracted him to prepare the valuation report. He visited the suit land on 16/5/2016. According to him the value of the land was Kshs 4,000,000/-, the building Kshs 80,000/- and the trees Kshs 4,940,000/=.
23. Upon cross-examination by Mr Kilonzo DW5 stated that he is not a crops inspection officer but his training allows him to value crops.

### **Submissions**

24. At that juncture, the defence case was closed and parties were ordered to file submissions. The plaintiff filed submissions dated 12/9/24. The defendant's submissions were not in the file by the time of preparation of this judgment. I have considered the pleadings the evidence and the filed submissions

### **Determination.**

25. It is not in controversy that the suit land is registered in the name of the plaintiff, that the defendant lacks paper title but is in occupation of the suit land for a lengthy period and has extensively developed the same.
26. The issues for determination are as follows:
  - a. Did the debt settlement and sale transactions occur among the three persons named, the plaintiff, the defendant and Husuni?
  - b. If the answer to (a) is in the positive did the transaction result in the plaintiff relinquishing his rights and interest in the suit land to the defendant and is the plaintiff holding title to the land in trust for the defendant?
  - c. What orders should issue, including orders as to costs?
27. Regarding the first issue, the plaintiff avers that there were no such transactions, contrary to the assertions of DW1 and DW4. It is noteworthy that the plaintiff testified that he applied for the land in the year 1996 and got a letter of offer in 1997. In his written witness statement, there is a great dearth of details of what happened in the period between 1997-2006 and between 2006-2013. All he states is that while in Mombasa his caretaker informed him that the defendant was encroaching on his land. the only details coming to the fore are therefore the application for the land, the receipt of the offer and its acceptance, and the information that his land was being encroached on, and the lodging of suit. The other details are filled in by the other witnesses in the suit. PW3 asserted that he was employed



as a caretaker in 2002 but availed no evidence of either his employment with the plaintiff or of his occupation of the land then on the plaintiff's behalf. DW2, the defendant's employee on the suit land to date, testified that he has known PW3 but he never met PW3 on the land working as the plaintiff's labourer or otherwise. DW2 orally averred that he was engaged on the land by the defendant in 2002 which date conflicted with the year in his written witness statement (2003). The defendant avers that he took up possession in 2003. In his sworn affidavit in the lower court case the plaintiff had earlier alleged that the defendant's trespass commenced in 2007. In the reply to defence and counterclaim, the plaintiff averred that the trespass began in the year 2003. In that suit the defendant himself alleged that by 2013 he had been in possession for 13 years, placing by simple computation, his date of entry to be about the year 2000. Of all the witnesses I am inclined to believe the plaintiff and the defendant's evidence, not in the previous suit but in the present suit, that the plaintiff's occupation began in 2003. However, for the period 2003-2013, there is no written record of complaints of trespass comprising of demand letters to the defendant or to the local administration or the law enforcement offices or even the settlement office, or even record of proceedings of the dispute before such offices, but only deafening silence from the plaintiff. According to the evidence of the plaintiff's own witness, during the defendant's occupation, at least one crop of casuarina trees has been harvested and a new one replanted. Now the defendant is not just some illiterate from the rurals but a man accustomed to land matters, he being a worker in the Physical Planning office in Lamu at the time of allocation of the land to him. It is presumed that he continued working for that office even in Mombasa where he was transferred on an unknown date. It is doubtful that he could work in such an office that deals with land matters and not be knowledgeable about the manner in which he could defend his land from trespass by the defendant, to the extent that the defendant could harvest trees worth millions from the land without any protest. There are no blood relations between him and the defendant that could have been presumed to have precipitated the plaintiff's forbearance of the alleged trespass.

28. The suits that PW1 has filed have found the defendant in occupation of the suit land. This court refused the plaintiff an injunction against the defendant on that account. In the light of the foregoing analysis, I am persuaded that the plaintiff was aware of, and permitted the defendant's taking up of possession of the suit land. As for the defendant's extensive developments, they could not have been carried out without any demur on the part of the plaintiff if the defendant had not entered into the suit land by way of an arrangement that the plaintiff was privy to. Indeed, it appears from the evidence of the parties that in their rural setting people's words were often their bond and written agreements were rare. Take for example the evidence of DW4 under cross-examination by Mr Kilonzo:

“Kshs 50,000/- is what Dabasa owed me. We never wrote of the debt. Dabasa was my friend. We never wrote of the exchange of the debt for the land. Chege is the one I owed Kshs 60,000/-. He had given me wood to build my house. Nothing about it was written. I gave Chege the letter of offer. I told him to go take the land as Dabasa had given me the land and our debt was offset by that. Nothing was written but we three all agreed. I do not know all transactions must be in writing regarding land.”

29. I find the evidence of the defendant and DW4 to be credible, and I therefore find that there was a meeting between the plaintiff, the defendant and Husuni at which debts were settled and a sale transaction occurred which granted the defendant possession of the land. The plaintiff's consent was obtained for the defendant to attain possession and utilization of the suit land, and that consent is the only logical explanation why the plaintiff remained inert with regard to any claims to the suit land for ten long years between 2003 and 2013. In this court's view, the entire consideration for the suit land was settled by the defendant.



30. The next question is whether the debt settlement and sale transaction between the three gentlemen resulted in the plaintiff relinquishing his rights and interest in the suit land to the defendant and if the plaintiff holds title to the land in trust for the defendant.
31. It is the case that the plaintiff never leased the land to the defendant yet the defendant occupied and utilized the entire parcel of land unrestrictedly as his own massively benefiting therefrom without objection from the plaintiff. The evidence of DW3, which I find credible, is that the plaintiff gave a letter of allotment to the defendant in recognition that the defendant was the new owner of the suit land. That letter, according to the defendant, was taken away from him by the plaintiff ostensibly for the purpose of obtaining title to the land with the promise of transfer of the title to the defendant which never happened.
32. It is the case that the plaintiff holds title to the suit land. Section 25 and 26 of the [Land Registration Act](#) provide as follows:
26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- 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.
33. The plaintiff in his submissions relies on inter alia the cases of *Muchendu Vs Waita* 2003 eKLR and *Arap Ngok Vs Justice Moiyo Ole Keiwua & 5 Others* NBI CA No 60 Of 1997 as he submits on the effects of Sections 23 and 26 of the [Land Registration Act](#).
34. This court agrees with the plaintiff that title of the plaintiff is prima facie evidence that he is the absolute and indefeasible owner of the suit land; however, that clause in Section 26 of the act is qualified by several things: fraud or misrepresentation to which the person is proved to be a party; illegality, unprocedurally procurement thereof, a corrupt scheme. In this case the plaintiff's title to the suit land is not under challenge for fraud misrepresentation or illegality or a corrupt scheme. The defendant knew better than plead those particulars. Instead he relied on the transactions between the parties which gave him possession of the land and on that basis claimed that the plaintiff now holds the title to the suit land under a constructive trust. That takes the matter out of the purview of Section 26 (1) (a) and (b) of the [Land Registration Act](#) and redirects this court's attention to Section 25 of the same Act which provides as follows:
1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
35. Under Section 25, (1) (b) a title whether issued on a first registration or otherwise is still subject to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register. Section 28 provides as follows:
- “28. Overriding interests Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- a. deleted by [Act No. 28 of 2016](#), s. 11(a);
  - b. trusts including customary trusts;
  - c. (c)rights of way, rights of water and profits subsisting at the time of first registration under this Act;
  - d. natural rights of light, air, water and support;
  - e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
  - f. deleted by [Act No. 28 of 2016](#), s. 11(b);
  - g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
  - h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
  - i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
  - j. any other rights provided under any written law.
  - k. Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.” Emphasis mine.
36. From a reading of Section 28 any trust as long as it subsists and affects registered land is an overriding interest. This court’s understanding of “overriding interest” means that the holder of the paper title holds it subject to that interest to the fullest extent that it affects the land, and any dealings with the land must take cognizance of and defer to that interest. Where a constructive trust with respect to an entire parcel is claimed, the implication is that in the event that constructive trust is proved, the paper title holder lacks any substantive interest in that realty, and must give way to the dissolution of such trust and registration of title in the name of the claimant proving the same.
37. In *Willy Kimutai Kitilit v Michael Kibet* [2018] KECA 573 (KLR) the facts were that the respondent averred that he had paid the entire purchase price of Kshs. 300,000/=, that entry and possession were undertaken with the appellant’s full consent and knowledge but the seller relied on lack of a Land



Control Board consent to declaim the transaction. The appeal was premised on the ground that the judge misdirected himself in law in failing to find that the agreement was null and void for lack of Land Control Board consent. The Court of Appeal noted the provisions of Section 25 of the Act stating as follows:

“(11) By Section 25 of the [Land Registration Act](#), the rights of a proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of a court shall not be liable to be defeated except as provided in the Act. However, Section 25 (2) of LRA provides that the provisions of the section does relieve a proprietor from any duty or obligation to which the proprietor is subject to as a trustee.

Under Section 28 of the [Land Registration Act](#), all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.”

38. The Court of Appeal went on to hold as follows in the case:

“(18) 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.”

39. The plaintiff has submitted on the lack of a written and attested agreement as a ground to reject the defendant’s counterclaim. The requirements of statute are in certain instances subject to equity and the court of appeal held as follows in the *Willy Kitilit* Case supra:

“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the [Land Control Act](#) where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.

26. For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the *Macharia Mwangi Maina* decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the [Land Control Act](#), though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

27. Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant



created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2-acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”

40. In *William Kipsoi Sigei v Kipkoech Arusei & John Tunge* [2019] KECA 446 (KLR) it was held as follows:

“20. Taking into account the *Macharia Mwangi Maina* decision and the *Willy Kimutai Kitilit* decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in *Macharia Mwangi Maina* decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.”

41. In yet another case *Kiplagat Kotut v Rose Jebor Kipngok* [2019] KECA 921 (KLR) the court held as follows:

“27. We have deliberated on the reasoning by the trial court on validity of the consent of the Land Control Board. Certain pertinent facts are evident and proven from the record. “It is indisputable that the sale agreement was entered into between the appellant and the respondent; pursuant to the agreement, the respondent received the purchase price of Ksh. 700,000/= from the appellant. The trial judge correctly held that the respondent is estopped from reneging on the sale agreement. We agree with the judge and add that the doctrine of proprietary estoppel and constructive trust are applicable in the instant case and the respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity.”

42. I find that in the circumstances of this case it would be quite onerous to apply the demands of the *Law of Contract Act* to the purely trust based tripartite relations of the transacting parties, and I find that this is the approach that rhymes well with the court of appeal’s handling in *Willy Kimutai Kitilit* and *Kiplagat Kotut* (supra) of the formidable and mandatory provisions of Section 6 of the *Land Control Act* requiring application for a land control board consent.



43. The upshot of the foregoing is that this court finds that it has been established that the plaintiff holds the land under constructive trust for the benefit of the defendant. The plaintiff's claim fails while the defendant's counterclaim succeeds. I therefore enter judgment for the defendant and order as follows:
- a. The plaintiff's claim is hereby dismissed;
  - b. Judgment is entered in favour of the defendant on his counterclaim;
  - c. A declaration is hereby issued declaring that the plaintiff's acts of having relinquished all his rights in the suit property Title No Lamu/ Lake Kenyatta 11/379 in the year 2003 and giving possession to the defendant before the registration and issuance of title the registration of title in the plaintiff's name rendered the plaintiff a constructive trustee for the defendant and he thus holds the Title No Lamu/ Lake Kenyatta 11/379 under a constructive trust in favour of the defendant;
  - d. An order is hereby issued determining the constructive trust and compelling the plaintiff to transfer the suit land Title No Lamu/ Lake Kenyatta 11/379 to the defendant and in default the Deputy Registrar of this court shall execute all documents requisite to effect the transfer of the suit land i.e. Title No Lamu/ Lake Kenyatta 11/379 from the plaintiff's name to the defendant's name;
  - e. The plaintiff shall bear the costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

