Mwirebua v Mutonga (Environment and Land Appeal E023 of 2024) [2025] KEELC 2965 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2965 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E023 OF 2024

JO MBOYA, J

MARCH 28, 2025

BETWEEN

SAMSON MURIUNGI MWIREBUA .... APPELLANT

AND

SILAS KIMATHI MUTONGA .... RESPONDENT

(Being an appeal from the judgment of Eric Otieno Wambo (Principal Magistrate) delivered on 29th February 2024 at the Nkubu Principal Magistrate's Court)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the Subordinate Court] filed the Plaint dated 26th August 2019] and wherein the Appellant sought various reliefs namely:

   i. A declaration that the Defendant is legally estopped from reneging on the Sale Agreement dated 30th May 2014 as revised on 29th November 2014 and that the Defendant remains registered as the owner of the suit land in trust for the Plaintiff;

   ii. An order for the immediate transfer of land parcel number Nkuene/L-Mikumbune/1821 in favour of the Plaintiff and in default the executive officer of this court be empowered to sign all the necessary documents to facilitate the transfer.

   iii. An order of permanent injunction restraining the Defendant, his agents, and servants from interfering with the Plaintiff's occupation and user of the suit land.

   iv. In the alternative, an order for immediate refund of the consideration price paid being Kenya Shillings Seven Hundred and Ninety-Nine Thousand only together with interest at court rates from 30th May 2014 plus payment of the agreed liquidated damages assessed by the parties at Kenya Shillings One Million Five Hundred and Ninety-Eight Thousand Only plus interest.

v. Costs of the suit and interest.

2. The Respondent filed a Statement of Defence dated 24th September 2019 and wherein the Respondent denied the averments contained at the foot of the Plaint. In addition, the Respondent contended that same had neither entered into nor executed any sale agreement with the Appellant over the suit property. Furthermore, the Respondent also contended that the signatures affixed on the two sale agreements being relied upon by the Appellant are not his [Respondent's] signatures. For good measure, the Respondent impleaded forgery as pertains to the impugned signatures.

3. The suit by the Appellant was heard and disposed of vide judgement rendered on 29th February 2024 whereupon the learned trial court found and held that the Appellant had failed to prove his claim. In this regard, the trial court proceeded to and dismissed the Appellant's case with costs to the Respondent.

4. Aggrieved by and dissatisfied with the judgement and decree of the trial court, the Appellant approached this court vide a Memorandum of Appeal dated 28th March 2024 and wherein the Appellant has highlighted the following grounds of appeal.

   i. That the Learned Trial Magistrate erred in law and fact in dismissing the suit on account of the Appellants failure to prove the case on a balance of probabilities against the weight of the evidence;

   ii. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent signed the agreements whereas the Respondent did not prove that the agreements were forged;

   iii. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent holds the suit land in trust for the Appellant by virtue of the existence of a constructive trust arising out of the transactions between the parties herein;

   iv. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had fully paid the purchase price whereas there is overwhelming evidence to support the same;

   v. That the Learned Trial Magistrate failed to reasonably and adequately evaluate the evidence and exhibits relied on by the Appellant, thereby arriving at a decision that is unsustainable in law;

   vi. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent in showing commitment to the transaction with the Appellant voluntarily and freely offered the original title to the Appellants;

   vii. That the Learned Trial Magistrate erred in law and in fact by failing to consider the evidence and statements of the Appellant hence arriving at a decision that was without merits.

5. The Appeal came up for directions on 7th October 2024 and 31st October 2024 respectively, whereupon the court confirmed that the record of appeal was complete. Furthermore, the court proceeded to and directed the parties to file and exchange written submissions. In addition, the court circumscribed the timelines for the filing and exchange of the written submissions.

6. The Appellant filed written submissions dated 25th October 2024 whereas the Respondent filed written submissions dated (sic) 12th February 2024 but which essentially should be 12th February 2025 taking into account the fact that the subject appeal was only filed on 28th March 2024 and hence it was inconceivable that any written submissions would have been filed prior to the lodgement of the appeal itself.

7. Additionally, it is also worthy to recall that the directions pertaining to and concerning the filing and exchange of written submissions were given in October 2024. Suffice it to state that the written submissions by the Respondent are equally on record.

8. The Appellant raised and canvassed three salient issues at the foot of the written submissions. The issues raised by the Appellant are namely; whether there exists a constructive trust in favour of the Appellant; whether the Respondent breached the constructive trust; and whether the Appellant is entitled to the prayers sought at the foot of the Plaint.

9. Regarding the first issue, namely, whether there exists a constructive trust in favour of the Appellant, learned counsel for the Appellant has submitted that the Appellant and the Respondent entered into and executed a land sale agreement and wherein the Respondent covenanted to sell to and transfer the suit property to the Appellant. Furthermore, it was contended that pursuant to the sale agreement, the Appellant paid to and in favour of the Respondent the entire consideration of KShs. 799,000/- only.

10. It was the further submission of learned counsel for the Appellant that the purchase price/ consideration was duly received and acknowledged by the Respondent. To this end, learned counsel for the Appellant cited and referenced the two agreements dated 30th May 2014 and 29th November 2014 respectively.

11. Moreover, learned counsel for the Appellant has submitted that the Respondent proceeded to and handed over the certificate of title in respect of the suit property to the Appellant. Besides, it was posited that the Respondent also placed the Appellant in occupation of the suit property. For good measure, it was contended that it is the Appellant who has been in occupation of the suit property.

12. Despite the foregoing, it was submitted that the suit property remains registered in the name of the Respondent. Nevertheless, it has been submitted that even though the suit property remains registered in the name of the Respondent, same [suit property] is held by the Respondent in trust for the Appellant. To this end, learned counsel for the Appellant has submitted that the Appellant demonstrated and established the existence of constructive trust.

13. In support of the foregoing submissions, learned counsel for the Appellant has cited and referenced various decisions including Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri 2014 eKLR and Willy Kimutai Kitilit vs Michael Kibet 2018 eKLR.

14. In respect of the second issue, learned counsel for the Appellant has submitted that even though the Respondent continues to hold the suit property in trust, the Respondent has breached his obligations and has thereby failed to facilitate the transfer and registration of the suit property to the Appellant. In any event, it has been contended that the Respondent received the entire purchase price and which purchase price the Respondent has retained to date.

15. On the other hand, learned counsel for the Appellant has submitted that by retaining the purchase price yet failing to effect the transfer, the Respondent herein has breached the constructive trust and thus same ought to be compelled by the court to perform his part of the bargain. In any event, it was posited that the conduct of the Respondent constitutes and amounts to unjust enrichment which ought not to be countenanced by a court of law.

16. Respecting the third issue, learned counsel for the Appellant has submitted that the contention by the Respondent that his signature was forged is misconceived and erroneous. Furthermore, it has been submitted that it was incumbent upon the Respondent to prove and demonstrate that the signatures complained of were indeed forged.

17. It was the further submissions of learned counsel for the Appellant that the Respondent failed to subject the impugned signatures to forensic document examination to authenticate that indeed the signatures were not his. In this regard, counsel has submitted that the Respondent therefore failed to prove the claim of forgery.

18. Arising from the foregoing, learned counsel for the Appellant has submitted that the sale agreements were therefore lawful and valid and thus the trial court ought to have proceeded to grant the reliefs sought at the foot of the Plaint. Simply put, learned counsel for the Appellant has posited that the Appellant duly proved his claim before the subordinate court and is therefore entitled to judgement as against the Respondent.

19. The Respondent filed written submissions (sic) dated 12th February 2024 but which essentially should be 12th February 2025. The Respondent has raised three pertinent issues, namely; whether or not the suit before the trial court was barred by the doctrine of res judicata; whether or not there exists a constructive trust between the Appellant and the Respondent; and whether the appeal is merited.

20. Regarding the first issue, namely, whether the suit before the trial court was barred by the doctrine of res judicata, learned counsel for the Respondent has submitted that the Appellant herein had previously filed a Petition namely, Meru ELC Petition No. 2 of 2018 and wherein same impleaded the sale agreement beforehand. Furthermore, it was submitted that the Appellant had contended that the section of the *Land Control Act* that bars transactions over and in respect of agricultural land without the land control board consent is unconstitutional. In addition, it was submitted that the Appellant had also sought to have the terms of the sale agreements performed by the Respondent.

21. It was the further submissions by learned counsel for the Respondent that the Petition under reference was heard and disposed of vide a decision of the court which dismissed the Petition. In this regard, it was contended that the Appellant's suit was therefore barred by the doctrine of res judicata.

22. In support of the submissions that the Appellant's suit in the lower court was barred by the doctrine of res judicata, learned counsel for the Respondent has cited and referenced various decisions including I.E.B.C vs Maina Kiai & 5 Others 2017 eKLR; Henderson v Henderson 1843 All ER 378; and Mbeyu Wangome & Another vs Patani Virpal & 2 Others 2013 eKLR.

23. The second issue that was raised by learned counsel for the Respondent was to the effect that the suit property lawfully belongs to the Respondent and that same is not held by the Respondent in trust for the Appellant. To this end, counsel has cited and referenced the provisions of Sections 24 and 26 of the *Land Registration Act* 2012, to vindicate the contention that the suit property belongs to the Respondent.

24. It was the further submissions by learned counsel for the Respondent that the Respondent herein had taken a loan facility from one Evangeline Nkatha, who is a shylock, and wherein the Respondent pledged the title of the suit property as security. Furthermore, the Respondent has submitted that subsequently, same paid the loan but the title of the suit property was never returned to him.

25. Additionally, it has been submitted that the Respondent only learnt of the fact that the Appellant was in possession of the certificate of title of the suit property when the Appellant forcefully took over the developments on the suit property.

26. Be that as it may, it has been submitted that the Respondent did not enter into and/or execute any sale agreement with the Appellant over and in respect of the suit property or at all.

27. Arising from the foregoing, it has been submitted that the impugned sale agreements are therefore illegal, fraudulent and cannot found a claim for constructive trust. In any event, it has been contended that it was incumbent upon the Appellant to prove the validity of the sale agreements and by extension the claim for constructive trust.

28. In respect of the third issue, learned counsel for the Respondent has submitted that the Appeal beforehand is devoid of merits and thus same ought to be dismissed. In particular, it has been submitted that the issues being raised by the Appellant had hitherto been canvassed and disposed of vide ELC Petition No. 2 of 2018.

29. Furthermore, learned counsel for the Respondent has also submitted that the sale agreements being relied upon by the Appellant are fraudulent and therefore incapable of underpinning the claim before the court.

30. Additionally, it was also submitted that the claims by and on behalf of the Appellant touch on and concern transactions over an agricultural land. In this regard, it has been posited that the transaction could not and cannot be undertaken without the requisite land control board consent having been procured and obtained within the prescribed timelines. To this end, learned counsel for the Respondent has cited and referenced Sections 6 and 8 of the *Land Control Act* Cap 301 Laws of Kenya.

31. In view of the foregoing, learned counsel for the Respondent has contended that the appeal is devoid and bereft of merits and thus same ought to be dismissed with costs to the Respondent.

32. Having reviewed the record of appeal; the pleadings that were filed before the trial court; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by the respective parties, I come to the conclusion that the determination of the appeal turns on four salient issues; namely, whether the Appellant proved and/or established the existence of a valid sale agreement or otherwise; whether the Appellant is entitled to the refund of (sic) the purchase price and the liquidated damages or otherwise; whether the Appellant has proven the existence of constructive trust or otherwise; and whether the suit before the trial court was barred by the doctrine of res judicata.

33. Before venturing forward to address the issues which have been highlighted in the preceding paragraph, it is important to underscore that by virtue of being the first appellate court, this court is seized of the statutory jurisdiction to undertake exhaustive scrutiny, evaluation, appraisal and analysis of the evidence that was tendered before the trial court and thereafter to arrive at an independent conclusion.

34. Furthermore, it is imperative to observe that this court is not necessarily bound by the conclusions of facts, which were arrived at and/or reached by the trial court. Nevertheless, it is worthy to state and reiterate that whereas this court is at liberty to depart from and or arrive at a different conclusion from the one arrived at by the trial court, the court is called upon to exercise caution and circumspection taking into account that the court did not see or hear the witnesses testify. Simply put, the court is called upon to defer to the trial court on matters pertaining to factual findings, unless a compelling reason arises.

35. The scope of the jurisdiction and/or mandate of this court while entertaining an appeal from the court of first instance is circumscribed by the provisions of Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya.

    78.

    (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

36. Furthermore, the jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

37. Likewise, the extent and scope of the jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

> We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:
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> "Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
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> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"
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> Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
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> "It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses."

38. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in

the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court held as hereunder;

> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words:
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> "Whilst 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 circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

39. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the first appellate court, I am now disposed to revert to the subject matter and to discern whether the Learned Trial Magistrate correctly appraised, analysed and evaluated the evidence tendered by the parties and in particular, the Appellant [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.

40. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavour to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at were perverse to the evidence on record.

41. Regarding the first issue, namely, whether the Appellant proved and/or established the existence of a valid sale agreement or otherwise, it is imperative to state that the Appellant's claim before the subordinate court was predicated on two sale agreements dated 30th May 2014 and 29th November 2014, respectively.

42. The Appellant contended that same had entered into a land sale agreement with the Respondent on 30th May 2014. In addition, it was contended that pursuant to the said sale agreement, the Respondent covenanted to sale and transfer the suit property to the Appellant albeit upon payment of the agreed purchase price.

43. Moreover, the Appellant contended that same proceeded to and paid the Respondent the entire purchase price. Besides, it was contended that the payment of the purchase price was duly acknowledged by the Respondent.

44. It was the further contention by the Appellant that arising from the entry into and execution of the sale agreement dated 30th May 2014, the Respondent proceeded to and handed over the original certificate of title unto him [Appellant]. In addition, it was also contended that the Respondent also placed the Appellant in possession of the suit property.

45. It was the further contention by the Appellant that on or about 29th November 2014 the Respondent and himself entered into yet another agreement namely, renewal agreement in respect of the suit property and that pursuant to the said agreement, the Respondent acknowledged receipt of the purchase price.

46. Other than the foregoing, it was submitted that the Respondent facilitated the entry of the Appellant onto the suit property. For good measure, the Appellant contended that it is same who is in occupation of the suit property.

47. Suffice it to state that the sale agreements dated 30th May 2014 and 29th November 2014, respectively, were duly tendered and produced before the court as exhibits on behalf of the Appellant.

48. On the other hand, the Respondent herein disputed the veracity, validity and legality of the two sale agreements. In particular, the Respondent contended that the signatures alluded to be his [Respondent's] are a forgery and therefore invalid. To this end, the Respondent contended that the sale agreements being relied upon are not only fraudulent and illegal but also constitute and endeavour by the Appellant to defraud the Respondent of the suit property.

49. Having considered the rival submissions by the parties on the question of the validity or otherwise of the sale agreements, it is important to underscore that the burden of proving the sale agreements laid on the shoulders of the Appellant and not on the Respondent. It is the Appellant who had contended that same entered into and executed lawful and valid sale agreements with the Respondent. [See Sections 107-109 of the *Evidence Act* Cap 80 Laws of Kenya].

50. The legal position that the burden of proof rests on the claimant and not otherwise has been highlighted in various decisions. To this end, it is imperative to recall and reiterate the holding in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR) where the court stated thus:

> It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

51. The burden and standard of proof in civil matters was also elaborated upon by the Supreme Court of Kenya in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) where the court stated as hereunder:

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
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> 50. This Court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:
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> ...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

52. Bearing the principles highlighted in the decisions supra, it is now apposite to revert to the subject matter and discern whether the Appellant proved the existence of valid sale agreements entered into and executed between same and the Respondent or otherwise.

53. The Appellant tendered and produced the two sets of the sale agreements dated 30th May 2014 and 29th November 2014, respectively, before the court. Nevertheless, there is no gainsaying that the execution of the sale agreements was denied by the Respondent. In any event, the Respondent contended that the signatures affixed at the foot of the impugned sale agreements did not belong to him. For good measure, the Respondent contended that the signatures were a forgery.

54. It is also worthy to recall that when the Appellant herein file ELC Petition 2 of 2018, the Respondent herein filed a Replying Affidavit sworn on 18th January 2018 and wherein the Respondent sated that the impugned signatures were a forgery. Furthermore, the issue as to whether or not the signatures affixed on the sale agreements by the Respondent was also part of what the learned judged referenced at paragraph 29 of the judgement rendered in ELC Petition 2 of 2018.

55. Instructively, the learned judge while delivering the judgement stated that the Respondent herein had denied ever selling the suit properties to the Appellant. Furthermore, the learned judge found and held that the question as to the validity or otherwise of the sale agreements that underpinned ELC Petition 2 of 2018 could only be resolved before the appropriate and upon production of evidence in the conventional manner.

56. Moreover, the Respondent herein repeated the same averments at the foot of the Statement of Defence that was filed in the lower court. In this regard, the Appellant was duly warned that the validity of the two sale agreements was in question. Pertinently, the Appellant was duly notified that the Respondent was contending that the impugned signatures were forgeries.

57. Arising from the foregoing, it was therefore incumbent upon the Appellant to call witness and bring forth evidence to demonstrate that the impugned sale agreements were/are valid and authentic. For good measure, the burden laid on the Appellant and not on the Respondent.

58. To prove that the impugned sale agreements were lawful, valid and thus legal, the Appellant was obliged to summon and call at least one of the attesting witnesses. In this respect, it is not lost on this court that the impugned sale agreements were (sic) attested by advocates who are still alive and in existence.

59. To start with, the sale agreement dated 30th May 2014 is said to have been attested by one Mugambi Mithega of P. O. Box 612-600 Meru. In any event, it is worth noting that the said Advocate is a partner in the firm of M/S Mithega & Kariuki Advocates, who are the advocates for the Appellant herein. As to whether the law firm of M/S Mithega & Kariuki Advocates who drew the sale agreement in question can act for the Appellant in a dispute arising out of the said sale agreement is another matter.

60. However, the concern of this court relates to whether or not an attesting witness was called in a bid to prove the legality and validity of the sale agreement. The answer is clearly in the negative insofar as the Appellant's case before the trial court was predicated on the evidence of one witness, namely, the Appellant himself.

61. Was the validity of the sale agreement dated 30th May 2014 proven? To answer this question, it is imperative to take cognisance of the provisions of Section 71 of the *Evidence Act* Cap 80 Laws of Kenya.

62. For ease of appreciation, the provisions of Section 71 of the *Evidence Act* are reproduced as hereunder:

    71. Proof of execution of document required by law to be attested.

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

63. My understanding of the import and tenor of the provisions of Section 71 of the *Evidence Act* supra drives me to the conclusion that even though the sale agreement was tendered and admitted before the subordinate court as an exhibit the admission of the said sale agreement by and of itself did not constitute proof of its validity in the eyes of the law. Suffice it to state that even though same was produced it could not be used and evidence until and unless one of the attesting witnesses was called before the court to testify and vindicate the execution thereof.

64. Moreover, it is important to underscore that the mere production and/or admissibility of a documents as an exhibit before a court of law does not constitute proof of the document. Neither does production nor admission of a document confer such a document with probative value. Simply put, proof of a document and probative value if any are different from production.

65. In the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] KECA 334 (KLR) the Court of Appeal stated thus:

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted

into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

66. Instructively, the Appellant was under the legal duty and obligation to summon and call the attesting witness. However, it is curious that the attesting witness was indeed the advocate that was acting for the Appellant. As to whether that witness was competent to act as an advocate in the matter is also a story for another day. Nevertheless, it is apposite to reference the provisions of Rule 9 of the Advocates (Practice) Rules.

67. In respect of the second agreement, namely, the agreement dated 29th November 2014 it is shown that same was drawn by the firm of M/S Mwirigi Kaburu & Co. Advocates. Furthermore, the advocate Mwirigi Kaburu is shown to be the one who attested the execution of the said agreement.

68. Suffice it to state that Mwirigi Kaburu Advocate is alive and well. Same is one competent and compellable witness. In this regard, it behoved the Appellant to call same in an endeavour to prove execution attestation and validity of the latter agreement.

69. There is no gainsaying that the said attesting witness was also not called. I repeat that the Appellant's case in the subordinate court was premised on the evidence of one witness.

70. From the foregoing analysis, it becomes apparent that the Appellant herein did not meet and/or satisfy the legal threshold highlighted by the provisions of Section 71 of the *Evidence Act* Cap 80 Laws of Kenya.

71. In the circumstances, I come to the same conclusion as the learned trial magistrate that the Appellant did not establish and/or prove the validity of the sale agreements, even though the learned trial magistrate did not reference the provisions of Section 71 of the *Evidence Act* Cap 80 Laws of Kenya.

72. Next is the issue of whether the Appellant is entitled to the refund of (sic) the purchase price and the liquidated damages or otherwise. The Appellant contended that if the Respondent was not willing to concede to the transfer and registration in his [Appellant's] name then it was incumbent upon the Respondent to refund the entire purchase price that was paid to him [Respondent] as well as the liquidated damages in the sum of KShs. 1,598,000/-.

73. It is common ground that the claim for refund of the purchase price of KShs. 799,000/- and the liquidated damages of KShs. 1,598,000/- are predicated on the two sets of the sale agreements that are claimed to have been executed by the Respondent.

74. Nevertheless, while discussing issue number one elsewhere herein before, this court has found and held that the two sets of sale agreement were neither proven nor authenticated. It then means that the foundation upon which the claim for refund of the purchase price and payment of the liquidated damages is founded does not exist in the eyes of the law. To this end, it suffices to state that the claims under reference are actually built on quick sand.

75. Simply put, the Appellant herein also did not establish that same is entitled to the refund of the purchase price or the liquidated damages.

76. Similarly, I do come to the conclusion that the Appellant did not prove this limb of the claim. Consequently, the final position that was arrived at by the learned trial magistrate is correct, even though the trial magistrate deployed another route in coming to his conclusion.

77. Regarding the third issue, namely, whether the Appellant has proven the existence of constructive trust or otherwise, it is imperative to underscore that constructive trust does arise by operation of the law. Suffice it to state that a court of law uses and/or deploys the evidence and the obtaining circumstances to discern whether constructive trust arises or otherwise.

78. The law as pertains to constructive trusts has received judicial pronouncements in a number of decisions. Nevertheless, it is important to cite and reference just but a few. In the case of Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] KECA 713 (KLR) where the Court of Appeal stated thus:

> In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.

79. In the case of Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] KECA 592 (KLR) where the Court of Appeal highlighted the ingredients underpinning a claim for constructive trust. The court stated as hereunder:

> 31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:
>
> > "The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

80. The ingredients that underpin a claim for trust and in particular constructive trust have also been adverted to and elaborated upon by the Supreme Court in the case of Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR)

66. The *Trustee Act*, cap 167 Laws of Kenya defines a "trust" and "trustee" as extending to implied and constructive trusts. The Black's Law Dictionary, 9th edition defines a trust as:

> "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)."

67. It further defines a constructive trust at pg 1649 as:

> "An equitable remedy that a court imposes against one who has obtained property by wrong doing.

68. Halsbury's Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts:

> "A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property."

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in Soulos v Korkontzilas, [1997] 2 SCR

217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

> "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."

70. Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in Murdoch v Murdoch [1975] 1 SCR 423 stated as follows:

> "As is pointed out by Scott, Law of Trusts, 3rd 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 ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property 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."

71. The United States Supreme Court in Harris Tr & Sav Bank v Salomon Smith Barney Inc, 530 US 238, 250–51 (2000) citing Moore v Crawford, 130 US 122, 128 (1889) stated thus:

> "Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same.."

72. As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

73. From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

81. Bearing in mind the principles espoused in the foregoing decision, what becomes crystal clear is to the effect that the Appellant herein bore the burden of placing evidence before the court to establish the existence of trust. Furthermore, the Appellant was obligated to prove the circumstances that would warrant the discernment of a constructive trust.

82. Back to the evidence that was tendered and placed before the trial court. It was the contention by the Appellant that same entered into and executed a sale agreement with the Respondent. However, there is no gainsaying that the existence of the said sale agreement was not proven.

83. Additionally, the Appellant had contended that same paid the purchase price to and in favour of the Respondent and that the purchase price has never been refunded. Similarly, the issue of payment of the purchase price was neither proven nor established.

84. In the circumstances, I come to the conclusion that the Appellant did not lay before the trial court plausible, cogent and credible evidence to warrant the inference of constructive trust taking into account the obtaining circumstances.

85. Before departing from this issue, it is however important to correct the impression created by the learned trial magistrate that constructive trusts cannot arise between a purchaser and a vendor. This perception is not only misconceived and erroneous but similarly contrary to the established position of the law.

86. The last issue relates to whether the suit before the trial court was barred by the doctrine of res judicata. Learned counsel for the Respondent submitted that the Appellant herein had previously filed ELC Petition 2 of 2018 and which petition was heard and determined by the court and thus the issues that were raised by the Appellant at the foot of the suit in the subordinate court were barred by the doctrine of res judicata.

87. Nevertheless, it is important to recall and reiterate that the issue of whether the suit in the subordinate court was barred by the doctrine of res judicata was raised and canvassed by the Respondent herein during the hearing of an application for temporary injunction culminating into the ruling delivered on 31st October 2019. Additionally, it is important to underscore that arising from the said ruling, the Respondent herein filed an appeal namely ELC Appeal No. 131 of 2019.

88. Moreover, it is important to point out that the appeal under reference was indeed heard and determined by Lady Justice L. N. Mbugua vide judgement dated 21st July 2021. At paragraphs 13-21, the learned judge found and held that the suit filed before the subordinate court was not barred by the doctrine of res judicata. The contents of paragraph 21 of the judgement are imperative. Same are reproduced as hereunder:

> "(21) What resonates from the above analysis is that not only was the dispute on ownership not dealt with in the Meru Petition No. 2 of 2018, but the court gave guidance on the route to be taken, such that parties needed to present their case in a forum where evidence would be adduced. What better place to do so than in an ordinary suit. I conclude that the trial court arrived at a correct determination in holding that the doctrine of res judicata was not applicable."

89. To my mind, the question of res judicata had been raised and canvassed before the trial court during the interlocutory proceedings. Same was heard and determined by the trial court. Thereafter, the Respondent felt aggrieved and filed an appeal which was heard and determined.

90. Suffice it to state that the appeal namely Meru ELC Appeal No. 131 of 2019 was heard and disposed of vide judgement rendered on 21st July 2021 and wherein the judge dismissed the plea of res judicata.

91. In my humble view, if the Respondent was aggrieved and/or dissatisfied with the findings of the judge on the question of res judicata it was incumbent upon the Respondent to file a further appeal to the Court of Appeal. The Respondent cannot by sidewind revert to the question of res judicata and deploy same in the instant appeal.

92. The invocation and reliance on the ground of res judicata by the Respondent herein constitutes and amounts to an abuse of the due process of the law. [See the holding in Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] KECA 453 (KLR)].

93. Having dealt with the thematic issues that were highlighted in the body of the judgement, it must have become crystal clear that the appeal by the Appellant herein is devoid and bereft of merits.

94. Nevertheless, there is one more perspective that remains outstanding and therefore worthy of consideration. The perspective relates to whether the Appellant ought to be allowed to retain the certificate of title in respect of the suit property which is illegally held by himself. Furthermore, there is also the issue as to whether the Appellant should be allowed to remain in occupation and possession of the suit property albeit with no colour of rights or at all.

95. I am aware that the Respondent herein did not file a counterclaim before the subordinate court. I am also aware that the parties are indeed bound by their pleadings and so are the courts.

96. Nevertheless, the dispute beforehand is likely to continue rearing its ugly head in the corridors of justice. To this end, there is no gainsaying that the Respondent may very well revert to court with another suit for recovery of the certificate of title and eviction of the Appellant from the suit property.

97. Is the court powerless in the circumstances? I think not. The provisions of 13(7) of the Environment and Land Court clothes this court with the mandate, authority and jurisdiction to issue appropriate orders taking into account the obtaining circumstances.

98. Additionally, there is no gainsaying that the court is also seized of the inherent/residual/intrinsic jurisdiction to ensure that the ends of justice are achieved and to avert grave injustice being occasioned. The scope of inherent jurisdiction was highlighted and underscored by the Supreme Court in the case of Narok County Government & another v Ntutu & 4 Others (Petition 3 of 2015) [2018] KESC 11 [see paragraphs *para_99 99* and *para_100 100*].

99. In the circumstances, I hold the view that it is apposite to bring the entire matter to a close by making consequential and/or incidental reliefs whose details shall be highlighted hereinafter.

Final Disposition

100. For the reasons highlighted in the body of the judgement, I come to the conclusion that the appeal beforehand is devoid of merits and thus courts dismissal. In the circumstances, the final orders that commend themselves to this court are as hereunder:

    i. The appeal be and is hereby dismissed.

    ii. The judgement of the trial court be and is hereby affirmed.

    iii. Costs of the appeal be and are hereby awarded to the Respondent

    iv. The Respondent shall also have the costs in the subordinate court.

v. Pursuant to the provisions of section 13(7) of the Environment and *Land Act* 2011, the Appellant be and is hereby ordered to release and hand over the certificate of title in respect of land parcel number Nkuene/L-Mikumbune/1821 to the Respondent forthwith and in any event within thirty (30) days from the date hereof.

vi. The Appellant shall also vacate and hand over vacant possession of the suit property to the Respondent within ninety (90) days from the date hereof.

vii. In default to comply with clause vi, the Respondent shall be at liberty to levy eviction against the Appellant; and to this end, an eviction order shall issue.

101. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 28 TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma Court Assistant

Ms. Victoria Gitari for the Appellant

Mr. Gikunda Kiautha for the Respondent