



**Shira v Maritim (Environment and Land Appeal 18 of 2020)  
[2023] KEELC 22635 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 22635 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 18 OF 2020  
JM ONYANGO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**MARGARET OYANDA SHIRA ..... APPELLANT**

**AND**

**MUSA K. MARITIM ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Charles Obulutsa CM  
delivered on the 24th July 2020 in Eldoret CMELC Case No. 7 of 2018)*

**JUDGMENT**

1. Margaret Oyanda Shira the Appellant herein filed suit against the respondent in the Chief Magistrate's Court in which she alleged that she had entered into an agreement with the Respondent for the sale of land parcel number Cheptire/Kapkoi /Block 7 (SEIYO)/456 at an agreed purchase price of Kshs 180,000. The Respondent paid a deposit of Kshs 110,000 after which he occupied the suit property in June 1999. He thereafter refused to vacate the suit property despite being requested to do so. The Appellant therefore prayed for an order of permanent injunction to restrain the Respondent from remaining on or continuing in occupation of the suit property and an order of possession.
2. The Respondent filed a statement of Defence and Counterclaim denying the Appellant's claim. He denied that he failed to pay the balance of Kshs 70,000 and stated that it was the Appellant who refused to accept the balance of the purchase price and reduced the acreage of the suit property. In the Counterclaim, he stated that he had undertaken massive developments on the suit property and had been in occupation thereof with the full knowledge and authority of the Appellant since 1999. He thus prayed for a declaration that he was a *bona fide* purchaser of the suit property and for an order of specific performance compelling the Respondent to transfer the suit property to him.



3. In her Reply to Defence and Defence to Counterclaim, the Appellant denied the Respondent's Counterclaim and stated that the Respondent's occupation and development of the suit property did not confer any rights to him.
4. The suit was set down for hearing and both parties testified and called their witness. In his judgment delivered on 24<sup>th</sup> July, 2020 the trial magistrate dismissed the Appellant's case and entered judgment for the Respondent on her counterclaim. He ordered the Appellant to accept the balance of the purchase price and facilitate the transfer of the suit property to the Respondent failing which the Executive Officer of the court would execute the transfer documents in favour of the Respondent.
5. Being aggrieved by the said judgment, the Appellant filed this appeal citing the various grounds. The court directed that the appeal be canvassed by way of written submissions and both parties filed their submissions.

### **Appellant's Submissions**

6. After summarizing the evidence in the lower court, learned counsel for the Appellant submitted on each of the 9 Grounds of Appeal. On the first ground he submitted that the judgment was delivered in the absence of the plaintiff contrary to order 21 rule 1 of the *Civil Procedure Rules*.
7. With regard to grounds 2 and 3 it was counsel's contention that the suit was not based on trust or adverse possession as the Respondent had been in possession of the suit property for a period of less than twelve years. He added that the Chief Magistrate had no jurisdiction to hear and determine matters relating to trust as such jurisdiction was vested in the High Court. He relied on Order 37 rule 1 (1) of the *Civil Procedure Rule* and the *Trustees Act* Cap 167 of the Laws of Kenya. He also relied on the case of *Situma v Cherongo* 2007 KLR 84.
8. Counsel faulted the trial court for making a finding that the Appellant had refused to accept the balance of the purchase price as the evidence on record indicated that the Respondent's advocate had written a letter to the Appellant claiming that that Appellant had reduced the size of the suit property by half an acre. This was however found to be untrue when the surveyor who testified as the Respondent's witness confirmed that the size of the land had not changed and that the Respondent was in occupation of the entire parcel of land.
9. It was further submitted that the learned trial magistrate's finding that the Appellant's case was based on contract and therefore the claim ought to have been filed within 6 years was erroneous as the Appellants suit was for recovery of land. He argued that the limitation period for a claim to recover land is 12 years as provided by section 7 of the *Limitation of Actions Act*.
10. It was counsel's submission that the pleadings before the court were not related to a trust and the court was wrong in conferring a relief that was not sought by the plaintiff thereby contravening the provisions of Order 4 rule 6 of the *Civil Procedure Rules*. He contended that the defendant was not given a chance to defend the issue of a trust and that the judgment was not based on the pleadings.
11. He submitted that the Respondent's failure to pay the balance of the purchase price and the failure to obtain the consent of the Land Control Board in respect of the transaction which involved agricultural land invalidated the sale.

### **Respondent's Submissions**

12. On her part, learned counsel for the Respondent submitted that the judgment was delivered virtually pursuant to a Notice of delivery of judgment circulated on the LSK WhatsApp group as the trial



- magistrate had been transferred. She explained that it was during the Covid -19 pandemic when court operations had been scaled down and matters were being handled virtually.
13. On the question as to whether magistrates had jurisdiction to deal with trusts counsel submitted that the 2010 constitution had elevated equity as a constitutional principle and the courts were in the exercise of their judicial authority required to protect and promote such principles among others. It was her contention that according to section 7 of the Magistrates Courts Act, the Chief Magistrate had the power to deal with trusts subject to the limit of his pecuniary jurisdiction.
  14. It was counsel's contention that the trial court was right in inferring a trust as the Appellant had received part of the purchase price and put the Respondent in possession with the intention of transferring the suit property to the Respondent. She submitted that the lack of consent of the Land Control Board did not invalidate the sale. She relied on the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR where the Court of Appeal held that the 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.
  15. Additionally, she relied on the case of *Twalib Hatayan & another v Said Saggat Ahmed Alherdy & others* (2015) eKLR where the court expounded on the concept of trust and contended that in the instant case a constructive trust arose in favour of the Respondent after he paid the purchase price and was put in possession of the suit property. She therefore argued that the Appellant could not renege on the agreement in 2010 demanding that the Respondent be evicted from the suit property.

#### **Issues, Analysis And Determination**

16. This being a first appeal I have evaluated the evidence on record and considered the Grounds of Appeal and I am of the view that the appeal turns on the following questions:
  - i. Whether the magistrates Courts have jurisdiction to hear and determine issues relating to trusts.
  - ii. Whether the issue of trust was pleaded and if not, whether the court should have based its finding on it.
  - iii. Whether the trial magistrate erred in dismissing the Appellant's case.
17. With regard to the first issue, section 26 of the *Environment and Land Court Act* provides as follows:

Subject to Article 169(2) of the *Constitution*, the Magistrate appointed under subsection (3) shall have jurisdiction and power to handle

  - a. Disputes relating to offences defined in any Act of Parliament dealing with environment and land and
  - b. Matters of a civil nature involving occupation, use and title to land provided that the value of the subject matter does not exceed the pecuniary jurisdiction set out in the magistrates Court Act.

Section 7(a) sets the pecuniary jurisdiction of a Chief magistrate at Kshs 20 million.

Section 9 of the Act provides that:

A magistrate shall in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* and subject to the pecuniary limits under section 7(1) hear and determine claims relating to



- i. Environment planning and protection, climate issues land use planning, title, tenure, boundaries, rates rent, valuation mining minerals and other natural resources;
  - ii. Compulsory acquisition of land
  - iii. Land administration and management
  - iv. Public private and community land and contracts, choses in action or other instruments granting enforceable interests in land
  - v. Environment and land generally.
18. From the above mentioned provisions it is clear that Magistrates courts have wide powers to deal with land matters subject to the limit of their pecuniary jurisdiction. Although the *Trustee Act* provides that the court means High must Court, it is important to note that unlike most of the key land statutes which were amended to align them with the 2010 Constitution, the *Trustee Act* was not amended.
19. Furthermore, by dint of Article 10 of the *Constitution*, the Magistrates' Courts just like the superior courts are enjoined to apply national values and principles of equity (such as the equitable doctrine of constructive trust) in interpreting the law.
20. The Appellant's main complaint is that the trial magistrate based his decision on the finding that there was constructive trust between the Appellant and the Respondent even though the issue of constructive trust was not pleaded by the defendant. He relied on the case of *Kenyanga v Ombwori* [2001] KLR 103 for the proposition that a claim based on trust must be specifically pleaded.

Order 2 Rule 4 (2) of the *Civil Procedure Rules* provides as follows:

“Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

Order 2 Rule 10 further provides that :-

- “(1) Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
  - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

21. In the instant suit, the respondent made the following averments in his Defence and Counterclaim:
10. The defendant avers that he has been in occupation of the suit land since 1999 with the full knowledge and authority of the plaintiff.



11. The defendant further avers that he has undertaken massive developments on the suit land openly, uninterrupted and or without interference from the plaintiff since 1999 as a *bona fide* purchaser for value.
- The defendant claims for:
- a. A declaration that the defendant is a *bona fide* purchaser for valuable consideration of the parcel of land known as Chepterit/Kapkoi/block 7(Seiyo)456 measuring 2.5 acres and
  - b. An order for specific performance compelling the plaintiff to facilitate transfer of ownership of the said land.
22. Clearly the defendant did not use the word trust in his Defence and Counterclaim as required by Order 2 rule 4(2) and Order 2 rule 10 of the [Civil Procedure Rules](#). However, he averred that he had been in occupation of the suit land from 1999 with the knowledge and authority of the plaintiff. In his witness statement which he relied on as his evidence, he stated that he paid the plaintiff Kshs 110,000 out of the agreed purchase price of Kshs 180,000 but the plaintiff declined to take the balance of Kshs 70,000.
23. The fact that the plaintiff allowed the defendant to occupy and develop the suit land for more than ten (10) years without any interference shows she had the intention of transferring the land to him. Her claim that he refused to pay the balance of Kshs 70,000 was refuted by the defendant who stated that he had made arrangements to pay her through the chief but she declined. She then filed this suit claiming that the sale agreement was unlawful and void as it had not been sanctioned by the Land Control Board.
24. It is on the basis of the above pleadings and evidence that the trial magistrate made the finding that a constructive trust existed in favour of the defendant. This is because, though not specifically pleaded, the evidence that was adduced by the parties brought the issue of trust into play thus inviting the court to make a decision on it.
25. In the case of [Maingi Mutisya Nzioka v Kisayi](#) [2014] eKLR the Court of Appeal held as follows:
- “On the issue of trust, the learned Judge took the view that it should have been specifically pleaded, particularized and proved, but was not. For this default she lay the blame upon the respondent’s legal advisors who prepared the plaint. Our own reading of the pleadings and the record shows that the issue of trust was a live one. The first prayer in the plaint was for a declaration that the appellant held the land in trust for the respondent. The narration in the plaint, though not headed as particularization of trust, nevertheless sufficed to bring constructive trust into operation. We take the view that once the respondent pleaded and testified that she had requested the appellant to assist her in registering the land under her name but he converted that brief fraudulently to his benefit and her detriment, the issue of trust became live for the court’s adjudication. We think that this is a case where the principle enunciated in *Odd Jobs v Mubia* and *Vyas v Diocese Of Meru* (supra) should have applied namely
- “The court may base its decision on an unpleaded issue [and we would add, an imprecisely or inadequately pleaded issue] if during the course of the trial the issue has been left for the decision of the court. In this instant, the issue was left to the court’s decision when the appellant addressed the court and led evidence on the issue.”



The facts of the case clearly invited a finding of trust.”

26. In the instant case, the trial magistrate observed that the facts were on all fours with the cases of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *William Kipsoi Sigei v Kipkoech Arusei* 2019 eKLR. In the case of *Willy Kimutai Kitilit* (*supra*) the Appellant sold his land to the Respondent, put him in possession and later turned around and claimed that the sale agreement was void for lack of consent of the Land Control Board. The Court of Appeal relied on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR and held that the doctrine of constructive trust and proprietary estoppel applies to contracts which are void for lack of Land Control Board Consent especially where the parties in breach of the *Land Control Act* have unreasonably delayed in performing the contract.

27. In the case of *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR the Court of Appeal had this to say about the doctrine of constructive trust:

“In this matter the respondent submitted that there is no place for the equitable doctrines of constructive trust and proprietary estoppel in light of the express provisions of section 8(1) of the *Land Control Act*. We disagree. As was stated in *Willy Kimutai Kitilit v Michael Kibet* (*supra*) under Article 10(2) (b) of Constitution of Kenya, equity is one of the national values which binds the courts in interpreting any law (Article 10 (1) (b)). We hold that the *Constitution* through Article 10 (2) (b) that provides the legal framework that underpin the application of equity in dispute resolution. The contestation that equity cannot override the express provisions of statute is an anachronism inconsistent with Article 10 (2) (b) of the 2010 *Constitution*.”

28. Guided by the above decisions of the Court of Appeal, I am satisfied that the trial magistrate was right in basing his decision on the doctrine of constructive trust and proprietary estoppel as the courts are enjoined to apply the doctrines of equity in interpreting the law.

29. The next issue for determination is whether the trial magistrate erred in dismissing the Appellant’s suit. In his judgment, the trial magistrate observed that the Appellant’s case was that the Respondent was in wrongful occupation of the suit property as the Respondent had not paid the full purchase price and no consent had been obtained from the Land Control Board. He wondered why the Appellant had purported to rescind the contract for sale of land after 20 years of occupation by the Respondent. It is in this context that he stated that the Appellant’s claim based on contract ought to have been filed within 6 years. By delving into the issue of constructive trust, he clearly appreciated that the suit could not be determined on the basis of what the Appellant claimed to be a rescinded contract.

30. In the case of *Macharia Mwangi Maina & 87 others* (*supra*) where a vendor sought to evict purchasers after he had received the purchase price and put them in possession the court invoked the doctrine of constructive trust and observed as follows;

“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v Steadman* [1976] AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.



- 31. I agree with learned counsel for the Appellant that the Appellant’s suit was not just based on contract but it was also for recovery of land and the same was not filed outside the limitation period of 12 years. Nonetheless, the trial magistrate arrived at the correct decision in dismissing the Appellant’s claim which sought to have the contract declared unlawful and to have the Respondent restrained from occupying the suit property after allowing the Respondent to occupy and develop the suit property for a period of more than 10 years.
- 32. Having considered the record of appeal, the rival submissions parties and the case law cited by both parties, I am not persuaded that there are good grounds to interfere with the judgment of the trial court. Consequently, I find no merit in the appeal and I hereby dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

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**J.M ONYANGO**

**JUDGE**

In the presence of:

- 1. Mr. Njuguna for the Appellant
- 2. Ms Isiaho for the Respondent

Court Assistant: Antony Oniala

