

PAID IN FULL, IN POSSESSION, AND PROTECTED:

THE COURT OF APPEAL AFFIRMS THAT A CONSTRUCTIVE TRUST CAN DEFEAT A REGISTERED TITLE



There are decisions that do not merely settle a dispute between two litigants; they recalibrate the balance between the letter of a statute and the conscience of the law.

One such decision is the Court of Appeal's judgment in **Agnes Ngeki Mutie v Jeremiah Kiilu Maitha (Civil Appeal No. 66 of 2020)**, which places equity squarely alongside statute. The Court of Appeal (the CoA) held that a purchaser who paid the full purchase price for agricultural land and was let into possession acquires a constructive trust in his or her favour, notwithstanding the absence of the consent of the Land Control Board (**the LCB**). That trust is an overriding interest capable of defeating a title subsequently registered in the name of the vendor.

Put plainly: a vendor who takes the money, hands over the land, and then retreats behind section 6 of the Land Control Act to reclaim the very property he sold will find no refuge in that statute.

THE CASE THAT SPARKED IT ALL

On 9th August 1991, Jeremiah Kiilu Maitha (**the Respondent**) sold L.R. No. Kibauni/Malunda/190 (**the suit land**) to Ngeki Mutie for Kshs 45,000.00. The purchase price was paid in full, and the purchaser took possession of the suit land that same year. The consent of the LCB was never obtained. In 1998, the Respondent registered the suit land in his own name.

In 2003, some twelve years after the sale, the Respondent went to court seeking the nullification of the very sale agreement he had authored, on the ground that it lacked LCB consent, and offering to refund the purchase price. The purchaser resisted, counterclaimed for specific performance

and pleaded adverse possession. He died during the pendency of the suit and was substituted by his widow, Agnes Ngeki Mutie (**the Appellant**).

The trial magistrate dismissed the Respondent's suit, holding that he had not proved that the suit land lay within a controlled area, and allowed the counterclaim. On first appeal, the Environment and Land Court (Angote, J.) reversed that finding, held the suit land to be agricultural land, declared the sale null and void for want of LCB consent, rejected the plea of adverse possession, and ordered a refund of Kshs 45,000.00 with interest. Against that decision, the widow mounted this second appeal.

THE APPELLANT'S CASE

The Appellant's complaint was not merely legal; it was deeply human. Her family had lived on and developed the suit land for more than seventeen years. A refund of Kshs 45,000.00 in today's money, she argued, was no remedy at all for land that had appreciated many times over, a fact the Respondent himself conceded in his testimony. She invoked the court's power under section 8 of the Land Control Act to extend time for seeking consent, and contended that, having received the full purchase price, the Respondent held the suit land in trust for the buyer and was estopped from registering it in his own name.

Notably, there were no submissions on record for the Respondent.

THE LEGAL TURNING POINT

Sitting on a second appeal, and therefore confined to matters of law, the CoA took as its starting point not the prohibition in section 6(1) of the Land Control Act, but the proviso to section 28 of the repealed Registered Land Act, Cap 300, which preserves the obligations of a registered proprietor who is subject to the duties of a trustee.

From that foothold, the Court reasoned that registration is not a shield behind which a trustee may hide. The judgment then traced a now-settled line of authority: the decision of the same Court in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, that a constructive trust relating to land subject to the Land Control Act is enforceable; *George Chaguya Aliaza v Zephania Khisa Saul* [2022] KECA 583 (KLR); and *Diasproperty Limited & 5 Others v Githae & 10 Others* [2024] KECA 318 (KLR), where the Court held in terms that the Land Control Act is not a statute that aids unconscionable conduct. In *Aliaza*, the Court had put the principle this way:

"Equity and fairness, the guiding principles in Article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant."

The CoA also anchored itself on the Supreme Court's pronouncement in *Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others* [2023] KESC 106 (KLR), where the apex court confirmed that a constructive trust arises where a party conducts himself so as to deny another the beneficial interest in property acquired, and concluded, at paragraph 78, that a constructive trust can indeed be

imported into a land sale agreement to defeat a registered title.

Applying those principles, the CoA found that the Respondent had received the purchase price in full, had put the purchaser and his widow into possession with the intention of transferring the suit land to them, and had led no evidence that he remained in occupation after the sale. A constructive trust was thereby created, and, in the Court's words, the Respondent could not renege.

The result was emphatic. The appeal was allowed, the judgment of the Environment and Land Court was set aside, the title issued to the Respondent was cancelled, a new title was ordered to issue to the Appellant, and she was awarded the costs of the appeal.

WHY THIS JUDGMENT MATTERS

For decades, section 6(1) of the Land Control Act has operated with almost mechanical severity: no consent within six months, no transaction. The provision was designed to protect agricultural land and the families who depend on it. In practice, it has too often been turned on its head and deployed by vendors who, years after pocketing the purchase price, discover that the land they sold is now worth a great deal more.

This judgment confirms that the courts will not lend themselves to that manoeuvre. The significance lies in four propositions:

- i. the absence of LCB consent does not, by itself, extinguish every interest a purchaser may hold in the land;
- ii. payment of the full purchase price coupled with possession gives rise to a constructive trust in favour of the purchaser;

iii. such a trust operates as an overriding interest and may defeat a title later registered in the vendor's name; and

iv. the Land Control Act must be read through the prism of Article 10 and Article 159 of the Constitution, which demand substantive justice over procedural technicality.

Equally important is what the judgment says about remedies. The reflexive order for a refund of the historical purchase price, made decades after the sale and without regard to the intervening appreciation of land or the improvements made upon it, is exposed for what it frequently is: a remedy in name only. Equity detests unjust enrichment, and a refund of Kshs 45,000.00 for land occupied and developed for a generation would have enriched the wrongdoer handsomely.

IMPLICATIONS GOING FORWARD

For purchasers of agricultural land:

i. possession taken upon payment of the full purchase price is now of decisive evidentiary value, so take it, document it, and hold it;

ii. evidence of development, occupation and uninterrupted use should be preserved, as it underpins both the trust and the equity; and

iii. a failure to obtain LCB consent is not necessarily fatal, but it remains a risk that is far better avoided than litigated.

For vendors and registered proprietors:

i. you cannot receive the purchase price, surrender possession, and later invoke the Land Control Act to unwind the bargain;

ii. registration of title in your own name will not cleanse conduct that equity regards as unconscionable; and

iii. an offer to refund the historical purchase price is unlikely to satisfy a court where the land has appreciated and been developed.

For practitioners:

i. plead constructive trust and proprietary estoppel in the alternative in every controlled-transaction dispute;

ii. lead evidence of possession and of the vendor's departure from the land, as the absence of such evidence weighed heavily against the Respondent here; and

iii. where a refund is the only realistic remedy, press for a valuation at current market value rather than the nominal historical price.

A NECESSARY CAUTION

The judgment should not be read as an invitation to disregard the Land Control Board. Section 6(1) remains on the statute book, and the safest transaction is still the one where consent is sought and obtained within the statutory six months. What the CoA has done is to confine the provision to its proper purpose. It is a shield for agricultural land and the families who depend on it, not a sword in the hands of a vendor seeking to profit from his own default.

CONCLUSION

Agnes Ngeki Mutie v Jeremiah Kiilu Maitha is a reminder that Kenyan courts sit as courts of both law and equity. Thirty-five years after a sale agreement was signed in Machakos, and after a journey through three levels of the judicial hierarchy, the widow of the purchaser has her title. The message to the market is simple and overdue. Where money has changed hands and possession has been given, the law will look to the substance of the bargain and not merely to the paperwork that was never completed. Equity suffers no wrong without a remedy, and no one may profit from his own wrongdoing.

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