



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 753 OF 2015

MARGARET NGONYO GACHOKA (suing for and on behalf of the

Estate of GACHOKA KAGO -DECEASED) PLAINTIFF

VERSUS

STEPHEN GACHANJA GACHOKA.....1ST DEFENDANT

MICHAEL NDICHU MWAURA.....2ND DEFENDANT

GITHUNGURI RANCHING CONSTITUENCY

COMPANY LIMITED.....3RD DEFENDANT

JUDGEMENT

Background

1. The Plaintiff commenced this suit by way of a Plaint dated the 8th June, 2015 and filed in Court on the 31st July, 2015. The Plaintiff brought the suit in her capacity as the legal representative of the Estate of Gachoka Kago - deceased.
2. The Plaint was later on 30th June, 2020, amended with the consent of all the parties, substituting the name of Grace Wambui Ndichu with that of Michael Ndichu Mwaura as the 2nd Defendant. Grace Wambui Ndichu and Michael Ndichu Mwaura were jointly registered as the proprietors of the parcel of land known as Ruiru/Kiu Block 2/4042, the subject matter of this suit (hereinafter referred to as the suit property).
3. The Defendants' response to the Plaintiff's claim was by way of a joint statement of Defence dated 21st October 2015 filed in Court on the 22nd October 2015. The Defendants allege that the Deceased, Gachoka Kago was merely a shareholder of the 3rd Defendant Company who had allotted him the suit property. The Defendants deny that Gachoka Kago was an 'owner' of the suit property.
4. It was the Defendants' case that since the suit property had not been registered in the name of the Deceased, it was not subject to distribution through transmission.
5. The Defendants claim that upon the death or an allottee or shareholder, the constitution of the 3rd Defendant Company and the provisions of the Companies Act, Chapter 486 of the Laws of Kenya prevailed in regard to the distribution or transfer of the deceased's shares. What the Deceased had, according to the Defendants was not property but 'just an allotment'. Therefore, the Defendants allege that letters of administration were not necessary to effect the transfer of the share from the name of the deceased to that of the beneficiaries.
6. However, at paragraph 9 of the statement of Defence, in an apparent change of tune, the 1st Defendant alleges that the entire family of the Deceased Gchoka Kago had agreed to dispose of the suit property. He claims that the sons of the Deceased were mandated by the family to sell the suit property and the daughters of the Deceased consented to that arrangement.
7. While denying the particulars of fraud, illegality and or unlawfulness, attributed to them by the Plaintiff in her plaint, the Defendants accuse her of mischief, dishonesty and bad faith. The Defendants allege that the Plaintiff was at all times aware of the transactions involving the suit property and even shared the proceeds of the sale. Further that she brought the suit after over 8 years from the date of sale yet she never raised any protest when the 2nd Defendant was building a school on the suit property.

8. The 2nd Defendant on his part confirms that he purchased the suit property together with his now deceased wife for valuable consideration of Kshs.750,000/-. The said amount was paid in full to the 3 sons of the Deceased, John Kago Gachoka, Stephen Gachanga and Daniel Wanyeki Gachoka.

9. The 3rd Defendant states that it was duty-bound to transfer the shares of the Deceased to his heirs upon being presented with the documents confirming his death and introducing his heirs. Once it did its part, the heirs in turn sold the suit property to the 2nd Defendant.

10. The Defendants pray that the Plaintiff's suit be dismissed with costs as it discloses no reasonable cause of action, is frivolous and vexatious.

THE PLAINTIFF'S CASE

11. The Plaintiff's claim is for the cancellation of the title of the parcel of land known as Ruiru/Kiu Block 2/4042 registered in the name of the 2nd Defendant and the same to revert to the Estate of Gachoka Kago. The Plaintiff's case is that the suit property was fraudulently and illegally transferred to the 2nd Defendant by the 1st Defendant in collusion with the 3rd Defendant without the knowledge, authority and or consent of the other beneficiaries of the Estate of Gachoka Kago - deceased. Additionally, the 1st Defendant had not taken out letters of administration under the Law of Succession Act and therefore did not have the legal capacity to transact on behalf of the Estate of the deceased. The Plaintiff further seeks a declaration that the suit property belongs to the Estate of Gachoka Kago - Deceased, and for eviction of the 2nd Defendant from the suit property.

12. The Plaintiff testified in her case. Her testimony was that her late father, Gachoka Kago was the lawful and equitable owner of the suit property by virtue of being a shareholder of the 3rd Defendant Company. He had a share certificate that represented his entitlements being the suit property and two other parcels measuring ¼ of an acre and 1/8 of an acre.

13. The Plaintiff adopted her witness statement as her evidence in- chief. She also produced the documents on her list of documents dated the 8th June, 2015.

14. That the deceased died intestate leaving behind the suit property and the two other plots. The plaintiff affirmed that the deceased left behind 6 beneficiaries namely; John Kago Gachoka, Ann Nyambura, Stephen Gachanja Gachoka, Jane Wangui, Margaret Ngonyo and Daniel Wanyeki.

15. The share Certificate issued by the 3rd Defendant was the only proof of ownership of the suit property and the other two parcels since the deceased, Gachoka Kago had not obtained a certificate of title.

16. The 1st Defendant, one of the beneficiaries of the estate of the deceased through connivance and deceit secretly acquired a letter purported to be from an Assistant Chief, one Peter Kimotho, identifying him and his two brothers as the beneficiaries of the estate of the deceased, Gachoka Kago. The letter further alleged that the beneficiaries of the estate of the deceased had consented to sell the suit property. That is how the 1st Defendant managed to sell the suit property to the 2nd Defendant despite the fact that he had not even processed the death certificate of his late father. The Plaintiff therefore prays for the cancellation of the title issued to the 2nd Defendant, his eviction from the suit property amongst the other prayers in her amended plaint.

DEFENDANTS' CASE

17. The 1st Defendant in his testimony repeated the averments in the statement of defence. He alleged that all the family members, children of the deceased had a meeting where they agreed to dispose of the suit property. According to the 1st Defendant, the sons of the deceased were mandated to go ahead with the sale of the suit property. He confirmed that at the time of selling the suit property, they had neither had Letters of Administration to the deceased estate nor his death Certificate. The Sale Agreement dated the 5th November, 2007 was not signed by any of his sisters.

18. The 2nd Defendant on his part stated that he was shown the chief's letter that introduced the 3 sons of the Deceased as the true heirs of the Estate of the Deceased; and a share certificate and ballots in relation to the suit property. That is what convinced him to proceed with the transaction. After the purchase, the Deceased's share Certificate was surrendered to the Company (3rd Defendant) and the 2nd Defendant was subsequently issued with a share certificate in his name jointly with that of his wife by the 3rd Defendant. It is that certificate and the clearance certificate issued to him that he presented to the Lands office and had the title to the suit property processed accordingly.

19. The 2nd Defendant claimed that he paid a total of Kshs. 750,000/= being the purchase price for the suit property. The money was paid to the 3 sons of the deceased through the 1st Defendant. The 2nd Defendant confirmed that he never at any one time met the other two sons of the deceased.

20. In cross-examination, the 2nd Defendant confirmed that the sellers had informed his late wife that the land only had a share certificate not a title document and that the owner was deceased. He was only shown the share certificate and the chief's Letter but was never shown any Grant of Letters of Administration. The 2nd Defendant asserted that he was informed that since the land did not have a title, letters of administration were not necessary. Only the chief's letter was needed to confirm the beneficiaries of the deceased shareholder and the 3rd Defendant would then transfer to him.

21. The 2nd Defendant conceded that he was never at any one time shown the Death Certificate nor a Burial Permit. It is only the Burial Permit Number that was indicated in the Chief's Letter. Although the Agreement was made at the first meeting, the 2nd Defendant only

signed it when he brought the balance of the purchase price. He never asked for the consent of the other beneficiaries as he was informed that there was no dispute.

22. Finally, the 2nd Defendant affirmed that he followed the Company's procedures for transfer of the suit property as advised by the Chairman of the Company.

23. **DW 3, John Maina Mburu**, the Chairman of the 3rd Defendant also testified as a defence witness. He adopted his Witness Statement dated 29th June, 2017. He stated that the procedure of the Company is that where a shareholder is deceased, all that they require is an introduction letter from the chief introducing family members. Alternatively, the beneficiaries may even agree amongst themselves if they went to the Company's offices on how the shares should be transferred. It is only in cases where the land has a title that grant of letters of administration must be filed. Once the shares have been transferred, the company issues a Clearance Certificate that is used to obtain a title. That is the procedure that was followed when the 3 brothers went to the Company offices with a letter introducing them as beneficiaries of the estate of Gachoka Kago.

24. In cross-examination, the witness stated that though the Company required the Death Certificate of the Shareholder before transferring his shares, in this case none was presented. The Company relied on the chief's letter indicating that there were 3 beneficiaries and in his own words, it was sufficient.

DIRECTIONS

25. At the close of the hearing, the Court directed parties to file their respective written submissions. Both Parties complied. Though the Defendants' submissions were filed after the time given by the Court, the Court still considered them. No prejudice would be suffered by the Plaintiff as they were not expected to reply to the Defendants' submissions anyway.

The Plaintiffs Submissions.

26. The Plaintiff in her submissions identified a total of 6 issues which she has submitted on as follows:-

a) *Whether the suit is time barred*

27. On this issue, the Plaintiff submits that she brought her suit in 2015, 8 years after the fraudulent sale and transfer to the 2nd Defendant. Being a suit to recover land, it is not time barred. Further being a claim based on fraud, it is covered under section 26 of the Limitation of actions Act which provides that time does not begin to run until the Plaintiff discovered the fraud.

b) *Whether John Maina Mburu, 'DW 3' had the Authority to act for the 3rd Defendant.*

28. The said John Maina Mburu testified on behalf of the 3rd Defendant Company during the hearing presenting himself as an officer of the company. He did not provide any authorization as envisioned under order 9 Rule 2 of the Civil Procedure Rules. The evidence of the witness has therefore no basis and the Court should disregard it.

c) *Whether the suit property belongs to the Estate of Gachoka Kago.*

29. The Plaintiff's submissions is that, it is not in dispute that the Deceased was a shareholder of the 3rd Defendant Company. The suit property was one of his entitlements by virtue of his shareholding in the Company. Any dealings involving the property of the deceased was subject to the Law of Succession Act.

30. Section 45 of the Law of Succession Act is categorical on the issue - any dealings with the properties of a deceased person without a grant of letters of Administration constitutes intermeddling with the property of a deceased person.

31. Section 55 of the Law of Succession Act goes farther to state that only a confirmed grant shall confer power to distribute assets consisting of the estate of a deceased person.

32. The 1st Defendant did not have the legal capacity to sell or deal with the suit property. He was intermeddling. The plaintiff cites the case of **Benson Mutuma Muriungi Vs CEO Kenya Police Sacco & Another (2016) eKLR** to augment his submissions.

d) *Whether the sale of the suit property by the 1st Defendant to the 2nd Defendant was fraudulent and illegal.*

33. The plaintiff's submissions is that the 1st Defendant schemed to sell the suit property without the knowledge of all the beneficiaries of the Estate of Gachoka Kago - Deceased. He lied to their uncle who had the custody of the share certificate that all the family members had agreed and consented that he subdivides the land and share it equally amongst all. That is how he obtained the share certificate. The Deceased had entrusted the custody of the document to an uncle of the 1st Defendant.

34. Once the 1st Defendant had secured the share certificate, he in his own ways got a letter supposedly from the area chief. He somehow convinced this chief that he and his two brothers named in the said letter were the only children of the deceased and that they had agreed to sell the suit property. Armed with the two documents he went ahead and signed an agreement with the 2nd Defendant and his wife disposing off the suit property.

35. The 1st Defendant had the share certificate of his deceased father transferred to the 2nd Defendant. Although he did not have the death certificate of his father, the 3rd Defendant Company went ahead and effected the wishes of the 1st Defendant. The 3rd Defendant through their witness confirmed that a death certificate was one of the mandatory documents they required upon the death of a shareholder but in this case they still went ahead to effect the transfer without it. The Plaintiff submits that the 3rd Defendant was an active participant in the fraud.’

36. The Plaintiff’s submission is that ‘fraud’, consists of some deceitful practice or wilful device resorted to with intent to deprive another of his right or in some manner to cause him an injury or a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment (Black’s Law Dictionary).

37. The Plaintiff urges the Court to take action and ensure that fraudsters are not only brought to book but also permanently stopped from benefitting in any way from their con activities. She cites the case of **Alice Chemutai Too Vs Nickson Kipkurui Korir and 2 others (2015) eKLR.**

38. The 1st Defendant had no letters of administration and therefore had no power to deal, sell, and transfer or in any other way dispose of the Estate of the Deceased or any part of it. The 1st Defendant in his statement also agrees that they are in total 6 siblings, all children of the late Gachoka Kago – Deceased, and not 3 as stated in the purported chief’s letter. He did not have the consent of all the beneficiaries to sell the suit property.

39. No Court ought to enforce an illegal contract or make itself an instrument of enforcing obligations arising from such a contract as held in the case of, **Standard Chartered Bank (k) Ltd Vs Intercum Services Ltd & 4 Others (2014) eKLR.**

40. It is the Plaintiff’s submissions that the alleged agreement for sale doesn’t meet the threshold set under section 3(3) of the Law of Contract Act. In cross-examination, the 1st Defendant admitted that his brother Wanyeki Gachoka with whom he allegedly sold the land was at the time of the sale on the run somewhere in Laikipia. The 2nd Defendant who was the purchaser indeed confirmed that he never met the said Wanyeki at any one time. All through, he dealt with the 1st Defendant.

41. Further, the suit property was agricultural land. No consent was obtained from the Land Control Board in accordance with the provisions of the Land Control Act.

e) Whether the 2nd Defendant was a bona fide purchaser.

42. The plaintiff submits that the 2nd Defendant was not a bona fide purchaser for value without notice of any defect in title. She relied on the case of **LAWRENCE MUKIRI VS A.G & 4 OTHERS (2013) eKLR** where the Court observed that for a purchaser to successfully rely on the bona fide doctrine, he must prove amongst other things that he purchased the property in good faith.

43. The Plaintiff submitted that the doctrine of “***nemo dat quad non-habet***” is applicable in this case. The 1st Defendant had no title to the suit property; therefore, the 2nd Defendant could not have acquired a good title from him either. The Plaintiff cited the case of **Daudi Kiptugen Vs Commissioner of Lands & 4 Others (2013) eKLR** where the Court stated that,

“The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title.”

44. The Plaintiff too cited the case of **Zacharia Wambungu Gathimu & another Vs John Ndung’u Maina (2019) eKLR.**

Defendants Submissions

45. In their submissions the Defendants on their part identified three for determination in this case. They submitted on all the three as follows: -

A. Whether the entire family was aware of the sale and gave their consent

46. The Defendants submitted that in the 3rd Defendant Company, Githunguri Constituency Ranching Company Ltd, each shareholder had a shareholder certificate which entitled him to 3 portions of land; the first measuring 1 ¼ acres, the second measuring ¼ of an acre & the third one measuring 1/8 of an acre respectively. The suit property is the portion measuring 1¼ acres.

47. The Defendants submit that the family of the Deceased made a decision to share the property of the deceased comprising of the 3 portions of land. This, they did without filing a succession cause. So, they shared out the two portions measuring ¼ of an acre and 1/8 of an acre. They decided to sell the suit property.

48. The Defendants further submit that the procedure in case of the death of a shareholder in the 3rd Defendant Company was simple. That the beneficiaries were merely required to present to the Company the death certificate confirming the death of the shareholder, and a letter from their area chief introducing them as beneficiaries of the deceased shareholder. Once that was done, with the death certificate of the Company would proceed to transfer the share certificate into the name of the beneficiaries. That is what happened in this case but without a death certificate.

49. The Defendants’ case is that once the family was issued with the certificate they presented it to the 2nd Defendant who was subsequently

registered as the proprietor of the suit property.

50. The Defendants claim that the whole family was aware and consented to the sale otherwise the Plaintiff's would have included the other 2 portions of land.

51. The sale happened in 2007 and the 2nd Defendant built a school on the suit property immediately after acquiring the title in his name. The suit according to the Defendants was filed 9 years after the construction of the school. The Defendants argue that the Plaintiff cannot feign ignorance and should have raised her protests earlier.

B. Whether the Plaintiff has locus standi to file this suit.

52. The Defendants submit that the estate of a deceased person can only be represented in legal proceedings by a person who is authorized to do so by issue of grant of letters of administration in accordance with the succession Act, Cap 160, Laws of Kenya. They submit that the Plaintiff herein did not have letters of administration and the suit therefore is null and void ab initio.

C. Whether the 2nd Defendant was a bona fide purchaser.

53. The Defendants submit that the Plaintiff did not prove that the 2nd Defendant was aware of any alleged fraudulent dealings on the part of the 1st Defendant.

54. The Defendants cite the case of **SHIMONI RESORT VS REGISTRAR OF TITLES & 50 OTHERS** where the Court expressed the view that a property in the hands of a bona fide purchaser would be protected even if it is shown that at some point in the past before the bona fide purchaser acquired the suit property, the same had been fraudulently transacted.

55. The Defendant further relied on Section 26 of the Land Registration Act to support their arguments.

56. Finally the Defendants relied on the High Court Case of **ZEBAK LTD VS MADEM ENTERPRISES** which adopted the definition of a bona fide purchaser in the Ugandan case of **KATENDE VS HARIDAS & CO. LTD (2008) 2EA 173.**

57. The Defendants urged the court to use the discretion in section 73 of the probate and Administration Rules. It is the Defendant's case that the Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Issues for Determination.

58. Having analysed the pleadings in this matter, the evidence adduced by both sides and their respective submissions, it is the Court's opinion that the issues for determination in this matter are as follows:-

- i. Whether the Plaintiff had the capacity to file the suit as the legal representative of the Estate of Gachoka Kago – deceased.***
- ii. Whether the suit property formed part of the estate of Gachoka Kago - deceased.***
- iii. Whether the sale and transfer of the suit property was fraudulent and illegal.***
- iv. Whether the 2nd Defendant was a bona fide purchaser for value without notice of defect in title.***
- v. Whether the registration of the title to the suit property should be cancelled.***
- vi. Whether the Plaintiff is entitled to an order of eviction***
- vii. Who should bear the costs of the suit***

Analysis and Determination

i. Whether the Plaintiff had the capacity to file the suit as the legal representative of the Estate of Gachoka Kago – deceased

59. This is an issue that has been raised by the Defendants in their submissions. They argue that only a person who has been issued with a grant of letters of administration has the legal authority to represent the estate of a deceased persons. They claim that the Plaintiff does not have such legal capacity.

60. Amongst the 4 documents that the Plaintiff produced in evidence and that formed part of her list of documents was a limited grant of letters of administration Ad Litem issued by the High Court sitting at Nairobi on 2nd February 2015. In fact, this was the exhibit that was marked as "PE1".

61. This suit was filed in Court on 31st July 2015. It was filed together with the Plaintiff's list of documents dated 8th June 2015 including

the grant of letters of administration ad litem.

62. On this issue, the Court therefore finds that the Plaintiff had the legal capacity to file the suit as the legal representative of the estate of Gachoka Kago - Deceased.

ii. Whether the suit property formed part of the Estate of Gachoka Kago – Deceased.

63. I must point out that I find the Defendants' statement of Defence contradictory. At one point, the Defendants allege that the shares the Deceased owned in the 3rd Defendant Company did not qualify to be termed as property that was subject to the Law of Succession Act. At paragraph 5 of the statement of Defence, the Defendants claim that upon the death of an "*allotee*", the constitution of the 3rd Defendant Company and the provisions of Cap 486 (Companies Act) prevail.

64. This is the same position that was expressed by the Defendants' witness number 3, allegedly the chairman of the Company. That upon the death of a shareholder, the procedure was that persons claiming beneficial ownership were merely required to produce a copy of the death certificate of the shareholder and a chief's letter and the 3rd Defendant would proceed to fulfil their wishes.

65. Before discussing the validity or otherwise of the allegation by the Defendant's above, I wish to analyse the Defendants statement of Defence farther. As I stated earlier, I find it contradictory.

66. At paragraph 9 of the statement of Defence, the Defendants aver that family members (of Gachoka Kago - Deceased) agreed to dispose of the land. That the sons were mandated to sell the suit property. It also alleges that the daughters of the Deceased consented to the sale of the suit property.

67. Section 497 of the Companies Act , Cap 486 of the Laws of Kenya provide that a company may only register a transfer of shares if proper documents of transfer has been delivered to it, failure to which the said transfer is rendered void.

68. The Registration of the deed of transfer of shares confers upon the transferred proprietary rights over shares in a company. A share is a unit of ownership in a Company. Section 322 of the Companies Act provides that shares in a company are the personal property of the shareholder.

69. Upon the death of the shareholder, shares off course form part of the Estate of the deceased shareholder. So, even if the deceased merely owned shares, as the Defendants put it, the shares were the personal property of Gachoka Kago - Deceased. There was no way they were going to be transferred without the beneficiaries going through the process of obtaining letters of administration as provided for under the Law of Succession Act. Anything done contrary to the Law of Succession was void.

70. In their submissions, the Defendants however, explain that the share of Gachoka Kago in the Company was not merely a 'share'. It was representative of 3 portions of land of 1 ¼ acre, ¾ of an acre plot and 1/8 of an acre plot.

71. The 1 ¼ acre is the suit property the subject matter of this suit. I need not over-emphasize this point. The suit property was part of the estate of Gachoka Kago – Deceased. The documents produced in evidence, including the agreement for sale, and the chief's letter show that it was not in doubt that what was being sold was land.

72. The Court's finding in respect of this issue is that indeed, the suit property was part of the Estate of Gachoka Kago – Deceased.

iii. Whether the sale and transfer of the suit property to the 2nd Defendant was fraudulent and illegal.

73. The Plaintiff's case is that the sale, transfer and subsequent issuance of title to the 2nd Defendant was out rightly fraudulent and illegal.

74. The 1st argument by the Plaintiff in support of this contention is that the purported sale was marked by illegalities for the reasons that:

a. The purported sellers did not have the legal capacity to deal with the properties of the estate of Gachoka Kago – deceased.

b. The purported contract of sale did not conform to the mandatory provisions of section 3(3) of the law of Contract Act.

75. The 1st Defendant in the statement of Defence, evidence presented before the Court and in their submissions confirm that what he transferred to the 2nd Defendant was the share certificate of Gachoka Kago – deceased. This share certificate was representative of the deceased's entitlements in the Company, being the 3 portions of land.

76. Whether the land was in form of Company shares or a title makes no difference. Either of them would still form part of the estate of the Deceased.

77. Section 4 of the Law of Succession Act provides that succession of the movable property of a deceased shall be regulated by the Law of the domicile of that person at the time of his death.

78. The succession of shares owned by a person who died domiciled in Kenya is therefore regulated by the Law of Succession Act. Section 43 of the Law Act prohibits any dealings on the property of a deceased person without a grant of letters of administration. Whether he

transferred shares or the land, the 1st Defendant did not have the legal capacity to do so. He was not the authorized legal representative of the estate of Gachoka Kago - Deceased.

79. The Defendants have advanced another interesting argument which this court finds necessary to express itself on.

80. The Defendants in fact phrased it as an issue for determination - whether the entire family was aware of the sale of the suit property and gave their consent.

81. The Defendants allege that the family of the deceased, Gachoka Kago met and made a decision to sell the suit property. In their submissions, the Defendants concede that this was however done without filing a succession cause. The Plaintiff denies that any such meeting took place and that she and her sisters consented to the sale of the suit property.

82. Supposing that the family had met and agreed to sell the properties of the deceased without taking out letter of administration, would that have made the sale lawful?

83. This Court is categorical that any dealings with the estate of a deceased person without compliance with the provisions of the Law of Succession Act are not only unlawful but void. Whatever outcomes that may be result from such transactions will be null and void.

84. No evidence was produced by the 1st Defendant in rebuttal of the claim by the Plaintiff that she and her sisters did not consent and were not part of the illegal transaction for sale of the suit property anyway.

85. In regard to the provisions of section 3(3) of the Law of Contract Act, **a contract for disposition of an interest in land must be in writing, signed by all the parties thereto and the signature of each party signing must be attested by a witness who is present when the contract was signed by such party.**

86. The 2nd Defendant who was a party to the sale agreement that he presented to the Court as his evidence in his own words stated that he signed his part long after the others had signed. His signature was not therefore attested by a witness who was present when he was signing the agreement.

87. Finally, the 2nd Defendant conceded in Court during cross-examination that he was aware that the suit property at the time of the sale was agricultural land. As such, the sale transaction was subject to the Land Control Act. However, no consent was sought from the Land Control Board.

88. On this issue therefore, the Court's finding is that the sale of the suit property was not in accordance with the law, it was fraudulent and illegal.

iv. Whether the 2nd Defendant was a bona fide purchaser for value without notice of defect of title.

89. The Defendants submit that the Plaintiff did not prove that the 2nd Defendant was aware of any alleged fraudulent dealings on the part of the 1st Defendant. They submit that the 2nd Defendant deserves protection of the Court. The Defendants relied on the case of **ZEBAK LTD VS NADEM ENTERPRISES** which adopted the definition of a bona fide purchaser in the Ugandan case of **KATENDE VS HARIDAS & CO. LTD (2008) 2 EA 173**. The Katende case stated that for a purchaser to successfully rely on the bona fide doctrine, he must prove that :-

- i. He holds a certificate of title;**
- ii. He purchased the property in good faith;**
- iii. He had no knowledge of the fraud;**
- iv. The vendor had an apparent valid title;**
- v. He purchased without notice of any fraud;**
- vi. He purchased for value consideration;**
- vii. He was no party to any fraud.**

90. The Defendants seem not to be aware that in the case of **Mwangi James Njehia Vs Jannetta Wanjiku Mwangi & Another (2021) eKLR** the Court of Appeal reviewed the Katende case at the condition (iv) above and did away with the word "apparent" so that the condition should now read, **"the vendor had valid title"**.

91. This Court has already found that the 1st Defendant did not have a valid title to the land, neither did he have the legal capacity to sell and transfer the suit property. I agree with the Plaintiff's submissions that the 'Nemo dat' principle applies here. There was no way that a seller without title would have passed a good title to the purchaser.

92. Further, the Plaintiff has pointed out that the 2nd Defendant cannot feign ignorance of the facts. The agreement exhibited by the Defendants clearly states that the land being sold was “in our deceased father’s name”. The chief’s letter also produced as a Defence exhibit also states that the plot being sold “is registered in their father’s name, *Gachoka Kago*”.

93. The 2nd Defendant should have at that point in time demanded to be shown letters of administration authorizing the 1st Defendant and his brothers to act as the legal representatives of the estate of the deceased.

94. The 2nd Defendant in cross-examination stated that he is an engineer and he knows that letters of administration are necessary when handling the property of a deceased person. He still proceeded with the transaction despite the absence of letters of administration. Furthermore, he was not even shown the certificate of death of the deceased.

95. Guided by the Court of Appeal decision in the Mwangi James Njehia case (supra), this Court finds that the 2nd defendant was not a bona fide purchaser for value without notice of defect in title.

v. Whether the registration of the title to the suit property should be cancelled.

96. The law is extremely protective of title to land but the protection can be removed and title impeached, on two instances. The first instance is where the title is obtained by fraud or misrepresentation. The second instance is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

97. Justice M.C. Oundo in Zacharia Wambugu Gathimu & another v John Ndungu Maina [2019] eKLR while considering the import of Section 26 of the Land Registration Act cited with approval the case of Elijah Makeri Nyangwara vs- Stephen Mungai Njuguna & Another [2013] eKLR where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

‘First, it needs to be appreciated that for Section 26(1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.’

98. Justice Mwangi Njoroge while dealing with a similar position in the case of David Kamunya Kingori & another v Wambui Nderitu & 4 others [2020] eKLR held as follows:

“...From the provisions of Section 24 it is clear that the rights of the deceased’s estate were protected by law even after his and the defendants had no standing to interfere with the suit land unless they obtained letters of administration to the deceased’s estate which they never did.”

99. In view of the fact that the plaintiff has proved the fraudulent and illegal registration of the 2nd Defendant as proprietor of the suit land and the 1st Defendant’s disinheritance of other beneficiaries, the plaintiff is entitled to orders of cancellation of the title so that the land reverts to the estate of Gachoka Kago, deceased.

vi. Whether the Plaintiff is entitled to an order of eviction against the 2nd Defendant.

100. Going by the above Court’s findings, it goes without saying that the Plaintiff is entitled to an order of eviction against the 2nd Defendant.

vii. Who should bear the costs of the suit

101. The Plaintiff shall have the costs of this suit.

CONCLUSION

102. The conclusion is that the Plaintiff has proved her case on a balance of probabilities. Judgment is therefore entered in favour of the Plaintiff against the Defendants as prayed for in the Plaint. For the avoidance of any doubt, the Court makes the following orders:

i. A Declaration be and is hereby made that all the parcel of land known as Ruiru/ Kiu Block 2/4042 belongs to the Estate of Gachoka Kago – Deceased.

ii. The Land Registrar Thika is hereby ordered to cancel the title held by the 2nd Defendant and his registration as proprietor in relation to all the parcel of Land known as Ruiru/Kiu Block 2/4042 and any subsequent subdivisions or registrations therefrom and register the suit land in the name of the Plaintiff in trust for the Estate of Gachoka Kago - Deceased.

iii. An eviction order do issue against the 2nd Defendant and or his agents, employees, servants or any person claiming under him from all the parcel of land known as Ruiru/ Kiu Block 2/4042.

iv. The Defendants to bear the costs of this suit jointly and severally.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2022, 2021.

M.D MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR. KIROKO NDEGWA FOR THE PLAINTIFF

MR. WARUTERE H/B FOR KANYI FOR THE DEFENDANTS

COURT ASSISTANT: HILDA

M.D MWANGI

JUDGE