Mangana v Gwaro & 3 others (Environment and Land Case 69 of 2015) [2023] KEELC 18434 (KLR) (29 June 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE 69 OF 2015

M SILA, J

JUNE 29, 2023

BETWEEN

ELIAS MABEYA MANGANA ..... PLAINTIFF

AND

GRACE NYANCHAMA GWARO ..... 1ST DEFENDANT

ANGELA NYANGANYI GWARO ..... 2ND DEFENDANT

EAST AFRICA UNION LIMITED ..... 3RD DEFENDANT

THE CHIEF LAND REGISTRAR, KISII COUNTY ..... 4TH DEFENDANT

JUDGMENT

(Plaintiff having purchased land from the 1st and 2nd defendants in the year 2006; agreement providing for payment of deposit and thereafter balance to be settled by instalments but no indication of how and when the instalments would fall due; plaintiff paying in instalments and paying purchase price in full by March 2008; transfer however not effected to him; instead, 1st and 2nd defendants entering into another sale agreement with the 3rd defendant in October 2009 after the plaintiff has made full payment; 3rd defendant obtaining transfer in her name and now being the registered proprietor of the land; plaintiff suing for cancellation of title of the 3rd defendant and specific performance on his agreement; 1st and 2nd defendants contending that the plaintiff delayed in making instalments and they were thus entitled to sell the land to the 3rd defendant; 3rd defendant urging that she is an innocent purchaser for value without notice; payments by plaintiff were properly made as 1st and 2nd defendants never made time to be of essence and never gave notice to the plaintiff to complete payment by a certain date; second contract being entered after plaintiff had made full payment hence the 1st and 2nd defendants acted fraudulently; 3rd defendant not demonstrating that she is an innocent purchaser for value, *inter alia*, not showing how payments were made to the 1st and 2nd defendants, and also agreement showing that it was made after the 3rd

defendant had already obtained title in her name; plaintiff inter alia entitled to the order to nullify the title of the 3rd defendant and the order of specific performance)

A. Introduction And Pleadings

1. The parcel of land which is the centre of this dispute is the land parcel Nyaribari Chache/BB/Boburia/7754 hereinafter simply described as 'the suit land' or 'the suit property.' This property was first registered on 8 November 2005 in the sole name of the 1st defendant. For reasons that are not clear, but not relevant to the circumstances of this case, on 29 August 2006, the 1st defendant caused this land to be jointly registered in her name and that of the 2nd defendant, her daughter, who was then a minor. Through a sale agreement dated 7 September 2006, the suit land was sold to the plaintiff for a consideration of Kshs. 850,000/=. That sale agreement provided for a down payment of Kshs. 160,000/= at execution, which was paid and duly acknowledged, and for the balance of Kshs. 690,000/= to be paid by instalments, though the manner of payment of the said instalments was not specified in the sale agreement. The plaintiff contends that he did pay the instalments as contemplated in the agreement, and took possession, but the 1st and 2nd defendants failed to transfer the suit land to him. Instead, the 1st and 2nd defendants, transferred the suit land to the 3rd defendant on 15 October 2009 and entered into a sale agreement with the 3rd defendant dated 28 October 2009. It is the view of the plaintiff that this second sale was fraudulent inter alia for reasons that the 1st and 2nd defendants transferred the suit property to the 3rd defendant after receiving full value from him and unfairly enriched themselves, and that the 3rd defendant abused its position as a predominant religious entity in Ksii to purchase the land knowing that the land had already been sold to the plaintiff. In his plaint, filed on 18 February 2015, the plaintiff seeks the following orders :-

    a. A declaration that the registration of the 3rd defendant was fraudulent and thus ought to be cancelled.

    b. A declaration that the plaintiff is entitled to be registered as the proprietor of the suit property.

    c. Deletion of the names of the 3rd defendant from the register of the suit property and entry of the name of the plaintiff as proprietor and issue of title deed to him.

    d. Alternatively transfer of the title to the plaintiff.

    e. General damages against the 1st and 2nd defendants for breach of contract.

    f. Costs of the suit.

    g. Any other relief the court may deem fit to grant.

2. The 1st and 2nd defendants filed a joint statement of defence. They admitted entering into the sale agreement of 7 September 2006 with the plaintiff. The 1st defendant also admitted receiving the purchase price with the last payment being made on 7 March 2008. However, it was contended that the plaintiff took an unreasonably long period to complete payment which culminated in the 1st defendant terminating the sale agreement before 15 August 2007. It is pleaded that the sale agreement was terminated before completion of payment of the purchase price and the plaintiff is thus not entitled to a transfer of the property. It was denied that the plaintiff took possession. It is pleaded that the sale was subject to consent of the Land Control Board which was never procured and the sale agreement became null and void for want of consent. It is also pleaded that the suit is time barred.

3. The 3rd defendant (also herein sometimes referred to as 'the Church') also filed defence. She pleaded that she had no notice that the plaintiff had purchased the suit property as alleged and that she is a

bona fide purchaser for value. She also pleaded that the transaction was subject to consent of the Land Control Board and similarly raised the defence of limitation.

4. The plaintiff filed a reply to defence where he denied that the agreement was terminated on 15 August 2007 as the 1st defendant continued receiving payment up to 7 March 2008 before the same was sold to other parties. It is pointed out that the agreement provided for payment by instalments without specifying the length of time. It is denied that the *Land Control Act* is applicable as the suit property is within the Kisii Municipality and the claim of limitation is also denied.

B. Evidence Of the Parties

5. In his evidence, the plaintiff testified that he made full payment on 7 March 2008 after making several instalments in between. He added that he took possession and planted napier grass and pine trees. He denied that the land was not transferred to him for want of consent of the Land Control Board. He stated that he instituted criminal proceedings against the 1st defendant, on the charge of obtaining money by false pretences, but the charges were dismissed with the court holding that the same was a civil dispute. He denied delaying the payments and stated that he paid according to schedule. He questioned how the 3rd defendant obtained transfer on 15 October 2009 yet the agreement displayed is dated 28 October 2009. Under cross-examination, he conceded that he had nothing to demonstrate that he had planted napier grass. He had also not put up any structure. He did receive a letter (dated 18 November 2010) from the 1st defendant where the 1st defendant wished to refund the money but he did not respond to it. Instead he filed the criminal charges. He insisted that the 3rd defendant was aware that he had earlier purchased the property. He was aware that they were in possession of neighbouring property which they had purchased from the same family of the 1st and 2nd defendants. He asserted that he was still in possession and that he has never been evicted from the land. According to him, his agreement still stands and was never revoked.

6. The 1st defendant testified on her behalf and that of the 2nd defendant who is her daughter and lives abroad. The 1st defendant is a retired civil servant. She admitted the sale agreement dated 7 September 2006 wherein she sold the suit property for the sum of Kshs. 850,000/= and admitted that the plaintiff was to pay in instalments after making the initial deposit of Kshs. 160,000/=. According to her, the balance was to be paid in three instalments as she wanted the money to pay school fees for her children. She stated that she had two children in university who desperately needed university fees. She testified that the plaintiff did not pay the instalments as they had agreed as he took two years to pay. She outlined that the instalments were paid as follows :-8 September 2006 – Kshs. 160,000/=16 October 2006 – Kshs. 50,000/=7 February 2007 – Kshs. 40,000/=14 May 2007 – Kshs. 100,000/=15 August 2007- Kshs. 450,000/=7 March 2008 – Kshs. 50,0000/=

7. She testified that she called the plaintiff on phone and informed him not to continue depositing money into her account as she had gotten another buyer. She stated that after getting a new buyer she wrote two cheques, of Kshs. 450,000/= and Kshs. 400,000/=, to refund the plaintiff in the year 2010, but the plaintiff declined the refund insisting that he wants his land and not the money. He then lodged the criminal charges in the year 2011 but she was acquitted under Section 210 of the *Criminal Procedure Code*. Upon her acquittal she filed suit for malicious prosecution which is still pending.

8. She acknowledged that she transferred the property to the 3rd defendant on 15 October 2009 as they were ready and willing to help her clear her fee balances. She denied that the plaintiff was in possession. She stated that she is ready to refund the plaintiff but in monthly instalments of Kshs. 5,000/=, which according to her, is what she can afford. Her parting shot was that it is the plaintiff who breached the agreement by not making payments as agreed.

9. Cross-examined, she asserted that the transaction was subject to the *Land Control Act* which she alleged requires payment to be within 6 months. She added that the plaintiff knew that she was selling the land to pay school fees. She however acknowledged that there was no clause in the agreement stating the manner of payment of the instalments. She stated that she notified the plaintiff that he had a new buyer and had rescinded the agreement. She mentioned that she did this through a phone call made in the year 2007. She testified that she informed the Church that she had earlier sold the property and that the Church held several meetings with the plaintiff but the plaintiff still declined a refund. The last payment by the plaintiff was in the year 2008 but the sale to the 3rd defendant was in the year 2009. She wrote to the plaintiff a letter dated 18 November 2010 which had copies of banker's cheques. On the sale to the 3rd defendant, she testified that she was first paid a sum of Kshs. 500,000/= in cash which she received on 28 October 2009. The balance was paid by the Church depositing money into her account. She did not avail evidence of how this was paid.

10. Re-examined, she testified that they had agreed that the plaintiff will make full payment after 3 months.

11. DW-2 was Joseph Nyamwange Nyakundi. He is a retired Teachers' College tutor now serving as a church elder at Mwembe Seventh Day Adventist (SDA) Church. He acknowledged knowing the plaintiff as he comes from Mwembe area. He stated that he was not privy to the transaction between the plaintiff and the 1st defendant. He testified that it was him and other leaders of the Church who arranged to purchase the suit property around the year 2009-2010. They saw the land, did a search which showed no encumbrance, discussed with the Church Board, negotiated the price, and paid the 1st defendant. They then moved into the land and developed it. He stated that in it there was a house which they took over and now serves as a board room and they also built a shed and toilets. He testified that the 1st and 2nd defendants never told them that they had a previous transaction over the same land and that they only came to learn this in the year 2015. They wrote an agreement dated 28 October 2009 and paid all the money by 31 December 2009. He did not personally go to the Land Control Board for the transaction. The title deed came in the name of the East African Union Limited. He stated that the 1st defendant was not a member of Mwembe SDA although she does worship in an SDA Church in Nairobi.

12. Cross-examined by counsel for the 1st defendant, he testified that no third party was claiming the land when they purchased it and the title did not show any encumbrance. The land was also vacant. On the issue of the house, which he had stated in examination in chief was on the land, he explained that this was actually on neighbouring land owned by a sister in law of the 1st defendant which the Church had purchased. They paid the 1st defendant in instalments over a three-month period. On the issue of the Land Control Board, he stated that there were some people appointed to deal with that and he was not one of them.

13. Cross-examined by counsel for the State, he testified that apart from the sale agreement, he was not aware of any other document procured and did not know what documents were taken to the Lands Office to effect the transfer. He was not in the team that took the documents to the Lands Office.

14. Cross-examined by counsel for the plaintiff, he acknowledged that the purchase price was Kshs. 2.2 million and that the Church paid the money by cheques. He knew the plaintiff as they stay in the same community but he was not aware that he had earlier purchased the suit land and he did not know if other church members were aware of this. It was in 2013/2014 that they started developing the land. Re-examined, he emphasized that payment was made in cheque as the church does not pay in cash.

15. DW-3 was Samson Gitamo Makori. He is a teacher and an elder of Gekomu II SDA Church. He knows the plaintiff well and claimed that he is his close friend. He elaborated that SDA Mwembe Church

was birthed out of Gekomu II SDA; it was previously a Sabbath school. He was involved in the sale transaction and that Gekomu II SDA Church was the purchaser. They were using the abutting land and they heard that the suit property was on sale. The land was then plain. This was around August 2009 and they engaged the 1st defendant. She stated that she was pressed for school fees and they immediately released the sum of Kshs. 500,000/= to her in early October before they eventually wrote the agreement on 28 October 2009. He was one of the signatories to the sale agreement on behalf of the Church. He was aware that the title deed was obtained on 15 October 2009 and that it came before the sale agreement. He explained that this was because the 1st defendant was desperate for school fees and they had released some money to her in advance. The 1st defendant came to a Church Board meeting and stated that she has faith in the church and could transfer the title even before being paid (in full). He testified that when they started negotiating the purchase in the year 2009, there was no mention of somebody else having purchased the land and they were not aware of the plaintiff's interest when they transferred the land. He testified that if he had known of this, he would have shared with the plaintiff as he knew him very well. They were in the same Masters class at Kisii University from 2009 to 2012. He testified that they came to know of the previous sale when they were making the second instalment. The 1st defendant indicated to them that somebody had made part payment and she wanted to refund him. She mentioned that she needed to refund him Kshs. 850,000/= and disclosed who it was. It is then that he realised that it was a person they knew. He informally engaged the plaintiff but he insisted he wants the land and not the money. The church then did two banker's cheques through the instructions of the 1st defendant. These are the two cheques of Kshs. 400,000/= and Kshs. 450,000/=, respectively dated 16 November 2010 and 17 November 2010. The Church had hoped that this will settle the issue as the church already held the title deed in their name. He testified that at the moment, the Mwembe SDA Church is now fully fledged and is on the suit land. They have some structures on it.

16. Cross-examined by counsel for the 1st defendant, he reiterated that when they bought the land, they were not aware of the sale agreement with the plaintiff and that it was after they got the title deed that the 1st defendant mentioned the sale to the plaintiff. There was no restriction on the title. The 1st defendant informed them that she wished to refund and they helped in drawing the banker's cheques. He denied any conspiracy.

17. Cross-examined by counsel for the plaintiff, he testified that at the time the land was transferred to the Church, the sale agreement had not yet been drawn. On the consent of the Land Control Board, he stated that they engaged one Mr. Masese Advocate, who attended the Board on behalf of the Church. He testified that the church already had title when they were making the second payment and that the 1st defendant did not have money to refund. They agreed that the Church would refund the plaintiff on her behalf. The refund cheques were done in 2010 after the church had settled on the land and in between, they informally engaged the plaintiff.

18. Re-examined, he stated that if the church had known of the earlier sale, the church would not have proceeded to purchase the land.

19. With the above evidence, the defendants closed their case.

C. Analysis And Disposition

20. I invited counsel to file submissions, which they did, and I have taken these into account before arriving at my decision. There had been pleading in the defence that the plaintiff's suit is time barred but this was not pursued in the submissions and I take it that the same is dropped. I think the following issues are open for determination:

    1. Whether the sale was a controlled transaction.

2. Whether the plaintiff performed his part of the bargain.

3. Whether the land available for sale to the Church and whether the 1st and 2nd defendants acted fraudulently in entering into the second sale.

4. Whether the Church was an innocent purchaser for value.

5. Whether the title of the church is liable to be cancelled.

6. What remedies are available to the plaintiff.

Issue 1 – Whether the sale was a controlled transaction

21. In his plaint, the plaintiff did plead that the sale herein was for sale of land that was not agricultural and it is his contention that it did not therefore fall within the ambit of the *Land Control Act*, Cap 302, Laws of Kenya. Section 6 of the *Land Control Act* requires transactions over agricultural land, including sales of such land, be subject to grant of consent by the Land Control Board. Under Section 8, the application for consent needs to be lodged within six months of the making of the sale agreement. It is common ground that no application for consent was applied for and no consent of the Land Control Board was issued in respect of the transaction between the plaintiff and the 1st and 2nd defendants. The 1st and 2nd defendants press the point that the transaction of the plaintiff is therefore void for want of consent. I am not persuaded.

22. The onus of proving that the transaction was one that was subject to the *Land Control Act* was upon the 1st and 2nd defendants for it is them who assert that this was a transaction over land that was subject to the said *Act*. And this would have been proven easily by the 1st and 2nd defendants demonstrating that the sale of the land to the Church was blessed by issue of consent by the Land Control Board. Without there being exhibited a consent of the Board for the transaction between the 1st and 2nd defendants and the Church, then we cannot conclude that the suit land was subject to the *Land Control Act*. In essence, the Church now has title without any consent of the Land Control Board, and if this transaction was not subjected to the *Land Control Act*, then I wonder on what basis it is being argued that the sale of the same land to the plaintiff required the consent of the Land Control Board.

23. In her submissions, Ms. Ochwal, learned counsel for the 1st and 2nd defendants, urged that because the land was freehold then consent of the Land Control Board was a must. This argument is clearly misplaced as you can have freehold land within a Municipality, or which is a town plot, and you can also have leasehold land that is agricultural land. The fact that land is freehold does not automatically make it subject to the *Land Control Act*. It can be freehold land within a Municipality and it will be exempt from the *Land Control Act*, for the Act exempts inter alia, land within a Municipality.

24. In our case, as I have mentioned before, the best way for the defendants to have proved that the transaction was controlled was by display of consent of the Board with regard to the sale of the land to the Church. None was provided and the only conclusion I can reach is that none was applied for and none granted because the land did not fall within the *Land Control Act*. Moreover, I have looked at both sale agreements, that of the plaintiff and of the 3rd defendant. In none of them is there a clause which provides that the sale is subject to consent of the Land Control Board.

25. My holding therefore is that there is no proof that the transaction between the plaintiff and the 1st and 2nd defendants needed to be subjected to the *Land Control Act* and I therefore uphold the contention of the plaintiff that his transaction was not subject to consent of the Land Control Board. The argument that the only remedy of the plaintiff, for want of consent, is a refund, thus falls flat.

Issue 2 – Whether the plaintiff performed his part of the bargain

26. The position of the plaintiff is that he fully performed his part by paying the purchase price in accordance with the sale agreement. The contention of the 1st and 2nd defendants is that the plaintiff did not pay the purchase price of Kshs. 850,000/= as agreed. There was allegation, when the 1st defendant testified, that it was agreed that payment would be made within 3 months, although again there was other insinuation that it was to be paid within 6 months.

27. To analyse whether payment was properly made, we need to get back to the terms recorded in the sale agreement on payment of the purchase price. Clause 3 is the operative clause and it provides as follows :-

> 3. The sum of Kshs. 160,000/= has been paid as a deposit and the balance of Kshs. 690,000/= will be paid by instalments.

That is all about the payment clause. Nowhere in the agreement does it stipulate how many instalments are to be made, how much is to be paid for the instalments, and when this should be done. The agreement is completely silent on this. It was certainly not a very elegant agreement, and I in fact observe that it was homemade by the parties without the benefit of an advocate. I need not emphasise the need to seek out professionals when getting into transactions over land. It is the advice of this court that parties need to consider engaging advocates when transacting over land and need to have the input of an advocate in drawing up sale agreements over land.

28. It will be recalled that the 1st defendant claimed that the land was being sold so as to enable her pay school fees and that the plaintiff was aware of this thus he needed to make payment urgently. That, I am afraid, is not indicated in the agreement, and we cannot, at this stage, import terms that were not in the written agreement. There is even no proof of any payment of university fees at around that period of time that was tendered by the 1st defendant to support her allegation that the money was needed to pay school fees. We will therefore have to work with what we have, which is Clause 3 of the agreement as copied above.

29. The said Clause 3 did not of course stipulate any time for the payment of the instalments. In the case of *Sagoo v Dourado* 1983) KLR 365, at pg 372, the Court of Appeal cited with approval the *Halsbury's Laws of England*, 4th Edition, paragraph 481 that states as follows:

> " The modern law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of essence unless:
>
> (1) The parties expressly stipulate that conditions as to time must be strictly complied with;
>
> (2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;
>
> (3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence".

30. From the above, it will be discerned that where a party is of opinion that he has been subjected to unreasonable delay, he ought to give notice to the other party and make time of essence. A case that is illustrative is that of *Nyamunyu v Nyaga* (1983) KLR 282. In this case, the appellant purchased some land from the respondent. The agreement provided for payment of a deposit and the balance to be paid to the vendor "on any time completion that is the date the consent of the Divisional Land Control Board/Appropriate Authority is obtained to subdivision and transfer." It will be observed that no time

was provided in the agreement for payment of the balance, only that the balance was to be paid after issuance of consent of the Land Control Board. Consent was duly issued on 19 February 1976 and the vendor demanded payment which was not forthcoming. He then returned the money so far paid on 24 July 1976. The purchaser subsequently purported to pay all the money under the contract on 6 April 1977 and sued for specific performance. The Court of Appeal was not persuaded that he had any reasonable claim since in this instance the vendor had subsequently made time to be of essence. Madan JA, provided the following dictum at pg 288:

> " Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it."

31. The above principle was buttressed in the case of *Elijah Kipkorir Barmalel & Another v John Kiplagat Chemweno & 3 Others* (2010) eKLR where the Court of Appeal pronounced the following dictum:

> " ...although the parties to a sale agreement upon which a consent has been obtained may choose to terminate it in the absence of an express agreement on time being of essence, notice must be served on the defaulting party before any assertion can be made that time was of essence."

32. In the case at hand, time for payment of the instalments was never provided, and it cannot be said that time was therefore of essence. As noted above, if one party felt that there was unreasonable delay, then he/she ought to have given notice to the party in default, making time of essence, before proceeding to terminate the contract. There is no evidence that at any point did the 1st and 2nd defendants, as vendors, ever notify the plaintiff that he has delayed in paying the instalments and there is no evidence that they gave the plaintiff any time period within which to ensure that full payment is done. There is certainly no proof of any notice being sent by the 1st and 2nd defendants to the plaintiff, decrying that the plaintiff has delayed in making payment of the balance and invoking a time period within which the balance needed to be paid. To the contrary, the 1st and 2nd defendants continued receiving payments without any complaints. Although the 1st and 2nd defendants pleaded that they terminated the contract on 15 August 2007, there is absolutely no evidence of this, and in fact, it will be observed that they continued receiving money even after this date and it cannot be the case that the contract was terminated on 15 August 2007 as alleged.

33. My analysis is that the plaintiff made payment as prescribed in the agreement and the conduct of the 1st and 2nd defendants demonstrates that they were comfortable with the manner in which the plaintiff effected payment of the balance of the purchase price. In essence, I find that the plaintiff fully performed his part of the bargain in accordance with the sale agreement. I dismiss the contention of the 1st and 2nd defendants that the plaintiff failed to pay the balance of the purchase price as agreed or that the contract was terminated.

Issue 3: Whether the land available for sale to the Church and whether the 1st and 2nd defendants acted fraudulently in entering into the second sale

34. The short answer to this is that without rescinding the first agreement, the 1st and 2nd defendants could not lawfully enter into a second agreement to sell the same land. Parties are bound by the contracts in which they enter into and they have a duty to perform them. In our case, the plaintiff had in fact fully performed his part of the bargain when the vendors re-sold the land to the 3rd defendant. The only issue pending between the plaintiff and the 1st and 2nd defendants was for the 1st and 2nd defendants to proceed and effect transfer of the land to the plaintiff. Instead, the 1st and 2nd defendants opted to transfer the land to the 3rd defendant and entered into another sale agreement with her. The 1st and 2nd

defendants ought not to have entered into the second agreement with the 3rd defendant or transfer the land to her, knowing very well that the first agreement had fully been performed by the purchaser. It was an act of fraud for them to do so.

Issue 4 – Whether the Church is an innocent purchaser for value without notice

35. It is the contention of the Church that she did not know of the first sale to the plaintiff and that she is a bona fide purchase for value without notice. The Court of Appeal in the case of *Moses Parantai & Another v Stephen Njoroge Macharia*, Civil Appeal No. 411 of 2018 (2020) eKLR had this to say on the concept of an innocent purchaser for value:

> " As to whether the respondent was a bona fide purchaser for value without notice, the *Black's Law Dictionary* 9th Edition defines a bona fide purchaser as:
>
> > "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
>
> In *Katende v Haridar & Company Limited* [2008] 2 E.A.173 the Court of Appeal in Uganda held that:
>
> > "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine ... (he) must prove that:
> >
> > a. he holds a certificate of title;
> >
> > b. he purchased the property in good faith;
> >
> > c. he had no knowledge of the fraud;
> >
> > d. he purchased for valuable consideration;
> >
> > e. the vendors had apparent valid title;
> >
> > f. he purchased without notice of any fraud;
> >
> > g. he was not party to any fraud."

36. I think the above dictum properly describes who an innocent purchaser for value is and I need not elaborate any further. In our case, the 3rd defendant does hold title, but so as to fit within the description of an innocent purchaser for value, she needs to show inter alia, that in good faith, she purchased the land for valuable consideration and that she purchased the land without any notice of fraud. The 3rd defendant of course asserts that she did buy in good faith but I think the evidence shows otherwise as I demonstrate below.

37. It will be recalled that the sale agreement between the plaintiff and the 1st and 2nd defendants was entered into on 7 September 2006. The plaintiff paid the last instalment of Kshs. 50,000/= on 7 March 2008. The sale agreement displayed by the Church is dated 28 October 2009 which is more than a year and a half after the 1st and 2nd defendants had been fully paid. That sale agreement states that the suit land is being sold for the sum of Kshs. 2,200,000/= which will be paid as follows :-

a. A banker's cheque for Kshs. 500,000/= made in one of the vendor's name i.e Grace Nyanchama Gwaro upon execution of this agreement (Receipt whereof is hereby acknowledged).

b. A further cheque for Kshs. One Million shall be paid to the vendors on or before 31st December 2009.

> It also states at Clause 9 that the vendors shall cause to transfer the sold parcel of land and have the same registered in the name of the purchaser 'as soon as is practicable.' Clause 13 of the agreement goes further to state that 'the vendors shall surrender the title deed to the purchasers on the signing of this agreement.'

38. Despite the above clauses, the fact of the matter is that the property had actually already been transferred to the 3rd defendant on 15 October 2009 and title deed issued to her on the same day. This clearly, is a complete contradiction of the terms of the sale agreement exhibited, which agreement purports to state that the title deed will be surrendered at the time of the agreement and that the vendors will cause transfer of title to the purchaser as soon as practicable. All this had already been done.

39. There is also a question mark as to whether the 3rd defendant paid any money to the 1st and 2nd defendant, and if at all money was paid, how and when it was paid. This is important in order to demonstrate that title was received upon consideration and that the transaction was in good faith. There is in fact no proof whatsoever of payment of the purchase price by the 3rd defendant. Significantly, the alleged banker's cheque of Kshs. 500,000/= noted in the sale agreement was never exhibited. The 1st and 2nd defendants were careful to exhibit payments made by the plaintiff and I wonder why they never exhibited any payments made by the 3rd defendant if at all they did receive money from them. Neither did the 3rd defendant display any receipt, any cheque, or any acknowledgement of payment by the vendors.

40. There is also contradiction in the evidence of DW-2 and DW-3 in the manner in which the money was allegedly paid. In his evidence, DW-2 testified that all money was paid before 31 December 2009 as agreed. His evidence was that it took about three months to make full payment. He also testified that all payments were made through cheques and in fact asserted that the church does not pay in cash. DW-3 on the other hand testified that they released a sum of Kshs. 500,000/= to the 1st defendant before they signed the sale agreement as she was desperate to pay fees. He testified that they came to know of the first sale when they were paying the second instalment but he did not state when this was. He also acknowledged that at the time the land was transferred to the Church, they did not have a written agreement. He stated that it is the Church which made the banker's cheques to refund the plaintiff, which cheques were drawn in the November 2010, meaning that they still had not fully paid, which flies in the face of the evidence of DW-2 that full payment was made within 3 months. There is also no demonstration that when the banker's cheques were not cashed the money was paid to the 1st and 2nd defendants to clear any balance of the purchase price. In addition, and I have said this before, despite the 1st and 2nd and 3rd defendants asserting that the 1st and 2nd defendant was pressed for school fees, nothing was exhibited to show any payment of university fees.

41. It would have greatly helped the 3rd defendant to demonstrate that she was purchasing the land in good faith and for consideration, if the 3rd defendant had exhibited the manner in which she paid the 1st and 2nd defendants. I am not on my part persuaded that an institution such as that of the 3rd defendant can release money to a person without there being some sort of acknowledgement indicating the purpose that the money is being given. I in fact doubt if an institution such as that of the 3rd defendant can release Kshs. 500,000/= to a person for purchase of land without first having a sale agreement. I am

also not convinced that the 1st and 2nd defendants were comfortable transferring the land to the Church because they had confidence that the church would pay later. It simply doesn't add up.

42. My own conclusion is that the 1st and 2nd defendant were hurriedly transferring land to the 3rd defendant so as to try and defeat the claim of the plaintiff to the same land and the 3rd defendant was an eager accomplice. I am not persuaded that the 3rd defendant fits the bill of an innocent purchaser for value as outlined in the above case of *Katende v Haridar*. The conduct of the Church in not being open as to the manner in which payments were made demonstrates to me that they have something to hide and that they have been economical with the truth. In those circumstances, the only conclusion I can reach is that the Church conspired with the 1st and 2nd defendants to have the land transferred to her so as to defeat the plaintiff's claim to the land. In short, the evidence does not show the 3rd defendant to be an innocent purchaser for value without notice.

Issue 5 – Whether the title of the Church is liable to be cancelled

43. The matters herein took place during the regime of the Registered *Land Act* (repealed in 2012) and I believe that this is the operative law. Section 143 of the said *Act* provided as follows :-

143

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

44. What we have is not a first registration and therefore subsection (2) applies. The title of a person in possession is capable of being nullified if the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused the omission, fraud or mistake or substantially contributed to it by his act, neglect or default. I have already held that the 3rd defendant was not an innocent purchaser for valuable consideration and I have already found that she was complicit and indeed conspired with the 1st and 2nd defendant to have the land registered in her name. Her title is thus subject to cancellation. The issue of whether or not the plaintiff had taken possession, in the circumstances of this case, is irrelevant.

45. Even assuming that it is the modern law in the *Land Registration Act*, 2012, which applies, I will still come to the same result. Section 26 of the *Land Registration Act*, provides as follows :-

(26)

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

46. It will be observed that under Section 26 (1) (a) the title of a proprietor is not liable to protection if it was procured through fraud or misrepresentation to which the person is proved to be a party and I have found that the 3rd defendant was party to the fraud. Her title is therefore subject to cancellation.

47. This case is indeed not too dissimilar to the situation that arose in the case of *Chauhan v Omagwa* (1985) KLR 656. In that case, the registered proprietor of land sold the same land to two persons, first to the respondent who immediately entered into possession, and then, about a year later, to the appellant who became the registered proprietor and was issued with a certificate of title. The respondent filed suit against the vendor and the second purchaser (the appellant). The respondent succeeded before the High Court and obtained an order nullifying the title of the second purchaser. The second purchaser's appeal to the Court of Appeal was dismissed. In the court's assessment of the evidence, the appellant could not have been an innocent purchaser for value. It is more or less the same conclusion that I have reached in this case, that the 3rd defendant, cannot be considered an innocent purchaser for value and her title is liable to be cancelled.

Issue 6 : What remedies are available to the plaintiff

48. In his plaint, the plaintiff did indeed ask for the cancellation of the title of the 3rd defendant and entry of his name in the register, or alternatively, compel the transfer of the title to him. I am alive to the fact that this is an order in the nature of specific performance which is an equitable remedy within the discretion of court upon taking into account the surrounding circumstances of the case. In the case of *Ngaira v Chengoli*, Civil Appeal No. 387 of 2017 (2022) KECA 80, the Court of Appeal announced itself as follows :

> " ... the threshold for sustaining a plea for specific performance has now been crystallized by case law numerously enunciated both by the predecessor of this Court and this Court. We take it from the decision in the case of *Thrift Homes Limited v Kenya Investments Limited* [2015] eKLR in which it was stated, inter alia, that "the remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy."

49. Importing the foregoing into our case, the contract between the plaintiff and 1st and 2nd defendant was valid. There was no defect in it. I have asked myself whether there can be an alternative remedy that will do justice to the plaintiff and I find none. When the 1st defendant testified, she stated that she does not have money at the moment to refund the plaintiff, and offered to refund him at the rate of Kshs. 5,000/= per month. Even if it was the purchase price of Kshs. 850,000/= being refunded, that will take more than 14 years for the plaintiff to get his money. But we also have to be alive to the fact that land prices have risen exponentially, and a refund of what was paid in the year 2007 cannot adequately compensate the plaintiff, even if it was to be paid at once at this moment in time. Maybe if the defendants had offered to make prompt and full compensation to the plaintiff, in a sum comparable to the current value of the land, I would have considered whether this would be an alternative remedy to specific performance

but no such offer has been made. On the facts of this case, I see no other way of the plaintiff getting justice other than having the land registered in his name.

50. The evidence shows that the plaintiff fully performed his part of the bargain and paid in full the purchase price. This was before the second contract with the 3rd defendant. I have found that the 3rd defendant was not an innocent purchaser for value. I am persuaded that the plaintiff is entitled to the prayer in his plaint that the title of the 3rd defendant needs to be nullified and that he deserves to have the property transferred into his name. I hold the view that the plaintiff has made a compelling case that he is entitled to be registered as proprietor of the suit property having performed his part of the bargain. I will proceed to order the Land Registrar to forthwith cancel the title of the 3rd defendant. I also make an order compelling the 1st and 2nd defendants to transfer the title to the suit property to the plaintiff forthwith and no later than 30 days from the date of this judgment. If they do not do so, the Deputy Registrar and/or other authorized court official to proceed and execute the transfer in favour of the plaintiff and the plaintiff to proceed and register the said transfer and get title in his name. Alternatively, the plaintiff be registered as proprietor without need of a transfer instrument subject to paying stamp duty and other charges that he would otherwise pay on an ordinary transfer. In addition to the above, I issue an order compelling the 3rd defendant to give vacant possession of the land to the plaintiff within 30 days from the date hereof. In default, the plaintiff is at liberty to apply for the eviction of the 3rd defendant from the land. After lapse of this 30-day period, the 3rd defendant is hereby permanently restrained from causing its members or other people acting at her behest or agency from entering, being upon, or utilizing the suit property.

51. There is a prayer in the plaint for damages for breach of contract but I think with the above order, the plaintiff ought to be settled for he has received what he purchased.

52. The last issue is costs. The parties in the wrong were the 1st, 2nd and 3rd defendants. I have not found any fault on the part of the 4th defendant. I award costs to the plaintiff payable jointly and/or severally by the 1st, 2nd and 3rd defendants. I make no orders as to costs in favour of or against the 4th defendant.

53. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 29 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII