



**Ochieng (Suing as the Legal Representative of the Estate of Elkana
Ochieng Wire) v Oduor & 4 others (Environment & Land Case
17 of 2021) [2023] KEELC 21040 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21040 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 17 OF 2021
AY KOROSS, J
OCTOBER 26, 2023**

BETWEEN

**ALFRED VICTOR OCHIENG (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF ELKANA OCHIENG WIRE) PLAINTIFF**

AND

HESBON ODUOR 1ST DEFENDANT
LUCAS ONYANGO OTIENO 2ND DEFENDANT
AGGREY WIRE ODUOR 3RD DEFENDANT
**HESBON ODUOR & AGGREY WIRE ODUOR (SUED AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF JANE ACHIENG
ODUOR) 4TH DEFENDANT**
DAVID OKONGO OPIYO 5TH DEFENDANT

JUDGMENT

Background of the case

1. The plaintiff filed a plaint dated 8/03/2021 which he amended vide an amended plaint dated 28/09/2022. He held a limited grant of letters of administration authorizing him to institute suit on behalf of the estate of his deceased father Elkana Ochieng Wire ('Elkana') who died on 5/12/1973.
2. The 1st and 3rd defendants are close relatives of the plaintiff and are the children of Erasto Oduor ('Erasto') who was the elder brother of Elkana. He is deceased. The 1st and 3rd defendants were also sued in their capacities as the legal representatives of their mother Jane Achieng Odour ('Jane') who was Erasto's wife. Limited grant was issued to them on 5/12/2022.



3. The parcel of land in dispute was originally Siaya/Yenga/1539 ('mother parcel') that was originally registered in Erasto's name. It was transferred to Jane who subdivided it into North Ugenya/Yenga/1890 and 1891. On sale, Jane transferred 1891 to the 2nd defendant while 1890 was subdivided to create North Ugenya/Yenga 1894 and 1895. 1895 was transferred by Jane to one Benter Auma Oduory ('Benter') who sold it to the 5th defendant.
4. The plaintiff alleged 1894 was still registered in Jane's name. All these parcels of land that emanated from the mother parcel shall jointly be referred to as 'subdivisions' but any reference to individual parcels shall henceforth be referred to by their respective last registration nos.

Plaintiff's case

5. In the amended plaint, the plaintiff averred at adjudication, Erato as the 1st born son, was registered as the owner of the suit property and he was to hold it in customary trust for Elkana.
6. However, upon Erasto's death, Jane at the instigation of the 1st and 3rd defendants transferred the mother parcel to herself before the 1st and 3rd defendants wantonly subdivided it to create the subdivisions. Their acts were fraudulent for the reason the mother parcel was transferred bereft of a confirmed grant and without consents and was conducted without the plaintiff's knowledge or that of his family.
7. The plaintiff alleged the 2nd defendant had commenced construction with the intention of evicting him and family members from the suit property.
8. He sought several reliefs; inter alia; a declaration the transfer of the mother parcel without a grant and the subdivisions were fraudulent, null and void and the suit property do revert to the mother parcel, a declaration Erasto held the suit property in trust for Elkana and the mother parcel be transferred to Elkana, permanent injunction, costs and interests.

1st, 3rd and 4th defendants' case.

9. The 1st and 3rd defendants who were then acting in person before M/s Omedo Leah & Associates came on record for them, filed a defence dated 10/08/2021.
10. Whether by oversight or otherwise, instead of counsel filing an amended defence in respect of the 1st and 3rd defendants and filing an original defence in respect of the 4th defendant, she filed an original defence dated 5/12/2022 in respect of the 1st, 3rd and 4th defendants. The defence by the 1st and 3rd defendants subsequent to the one dated 10/08/2021 is incompetent and will be disregarded.
11. In their defence dated 10/08/2021, the 1st and 3rd defendants denied the plaintiff's assertions and put him to strict proof. They contended the plaintiff had his own parcel of land which he had built a home and the issue of eviction did not suffice. They denied the plaintiff was the administrator of the estate of Erasto. They urged the court to dismiss the plaintiff's case.
12. In the 4th defendant's defence dated 5/12/2022, it was denied the 1st and 3rd defendants were administrators of Jane's estate and the assertions contained in the amended plaint were denied and the plaintiff was put to strict proof.
13. It alleged, Jane acquired the mother parcel by transmission and she had a right to deal with it in a manner she deemed fit including subdividing and selling it. It was asserted the plaintiff was greedy and was guilty of material non-disclosure since he had failed to disclose Elkana was registered as the owner



of North/Ugenya/Yenga/ 818 ('818') which to an extent belonged to the plaintiff. They prayed for the suit to be dismissed with costs.

2nd defendant's case.

14. The 2nd defendant who was represented by the firm of M/s Nyatudo & Co. Advocates filed a defence dated 15/04/2021 which he amended on 5/12/2022.
15. He denied the assertions made in the amended plaint and put the plaintiff to strict proof. He asserted he was a bonafide purchaser for value of 1891 which was registered in his name on 21/05/2012. He asserted he had developed it, established a home thereon and had lived peacefully on it since 2012. He contended the plaintiff's allegation that he wanted to evict him and his family was fictitious. He urged for dismissal of the suit with costs.

5th defendant's case

16. The 5th defendant who was represented by the firm of M/s JDOK Advocates filed his defence dated 9/11/2022. He denied the assertions made in the amended plaint and put the plaintiff to strict proof.
17. In the alternative, he averred he was an innocent purchaser of 1895 for value without notice of fraud having paid the full purchase price to the then registered owner Benter and followed due process towards having himself registered.

Plaintiff's evidence

18. The evidence of the plaintiff who testified as PW1 was contained in his written and oral testimonies and documentary evidence. It was his evidence at adjudication, Erasto was registered as the owner of the mother parcel and land parcel nos. Siaya/Yenga/1962, 848, 1891, 1893, 1894 and 1895 which belonged to Erasto and Elkana and they had both occupied these parcels peacefully.
19. His family resided on the mother parcel and Elkana and Erasto were buried on these parcels of land. On noticing the 2nd defendant's construction, he reported the case to the area chief to no avail. The defendants were out to evict him and his family.
20. On cross examination, it was his testimony he did not have prove 1962, 848 and 1893 were registered in Erasto's name. He was not aware Elkana was registered as the owner of 818. The mother parcel and 818 were not registered on the same date. He did not know if Elkana was buried on the suit property. He had built a home on land parcel no. 848 which was a distinct parcel from the mother parcel or its subdivisions. He was not being evicted from the suit property. The 5th defendant did not conduct due diligence when purchasing 1895.
21. On re-examination, he testified it was feasible for 818 to be registered in Elkana's name since at the time of 1st registration, Elkana was already deceased. PW2 had mediated over 848.
22. Michael Oduor Osoldo who was the chief of Ukwala location testified as PW2. It was his evidence when he tried to mediate between the plaintiff, Jane and 1st defendant, the plaintiff informed him during adjudication, Elkana was residing in Uganda and Erasto was the only one present hence did not register Elkana's name. Eventually, the parties agreed to resolve the dispute amongst themselves.
23. On cross examination, he testified his mandate had been to resolve disputes on land parcel nos. 848, 1539, 1962, 1893, 1891, 1895 and 1894 but the main parcel of land in contention was 848. Elkana was alive during adjudication and one could be registered in absentia. The plaintiff and 2nd defendant



were not neighbours and Erasto's and Elkana's graves were not on the mother parcel and he could not verify issues concerning the mother parcel.

24. On re-examination, it was his testimony during resolution of the dispute, the plaintiff only informed him of 848. Adjudication took place between 1970 to 1974 and during this period, Elkana was in Uganda. Although he knew where Erasto and Elkana were buried, he did not know the parcel no. of their interment.

1st, 3rd and 4th defendants' evidence

25. The 1st defendant testified as DW2. His evidence was composed of written and oral testimonies and documents he produced in support of his case. It was his testimony before adjudication, his grandfather owned the mother parcel and 818 which were subsequently respectively registered in Erasto and Elkana's names on 6/04/1977.
26. Jane conducted probate proceedings on Erasto's estate before transferring it to herself and subsequently subdividing it and disposing off the subdivisions. The plaintiff had built and resided in 818. On cross examination, it was his testimony Elkana died in 1973.

2nd defendant's evidence

27. The 2nd defendant testified as DW1. His evidence was contained in documentary evidence and oral and written testimonies. It was his case after conducting a search, he entered into an agreement for sale with Jane on 10/12/2011. He paid the purchase price of ksh.180,000/= and she thereafter conducted the subdivision of the mother parcel and transferred 1891 to him. He put up structures on it in 2011 and produced photographs evidencing this.
28. On cross examination, he testified an official search showed Elkana owned 818. He had obtained a land control board (LCB) consent before the transfer by Jane was executed and he even paid stamp duty but did not have them in court.

5th defendant's evidence

29. The 5th defendant testified as DW3. His evidence was contained in documentary evidence and oral and written testimonies. It was his testimony during the process of purchase of 1895 from Benter, he conducted an official search, entered into an agreement for sale and paid full consideration in 2 instalments of kshs. 190,000 and 60,000/-. The plaintiff and defendants were strangers to him.
30. On cross examination, it was his case when he bought 1895 in 2017, it was fenced and vacant.

Plaintiff's submissions

31. The plaintiff's counsel filed written submissions dated 12/06/2023. Counsel identified 4 issues for this court's consideration; (a) whether Erasto held the mother parcel in customary trust (b) whether the 1st and 3rd defendants unlawfully transferred the mother parcel to Jane before she transferred it to the 2nd and 5th defendants (c) whether the 2nd and 5th defendants were bonafide purchasers for value and, (d) who will bear costs of the suit.
32. On the 1st issue and relying on the apex's court's decision of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR, counsel submitted the plaintiff had satisfied the ingredients of customary trust.



33. On the 2nd issue, counsel submitted the 1st and 3rd defendants' actions of transferring the mother parcel to the 4th defendant without conducting probate proceedings on Erasto's estate contravened Section 45 of the *Law of Succession Act*.
34. On the 3rd issue, counsel submitted the 2nd defendant did not produce evidence to show he followed due process towards registration of the suit property to his name. Counsel submitted the 2nd and 5th defendants did not conduct due diligence when they bought their respective portions. Counsel placed reliance on the case of Tum & 2 others v Towett & 5 others (Environment & Land Case 501 of 2017) [2022] KEELC 13790 (KLR) (25 October 2022) (Ruling) where the court stated;
- “Land transactions especially where land is acquired through purchase involves two parties: the seller and the purchaser. The risk in the property as is the norm passes on to the buyer and in my view, the buyer ought to exercise due diligence and caution when buying land.”
35. On the 4th issue, counsel sought for costs.

1st, 3rd and 4th defendants' submissions

36. In their submissions dated 19/06/2023, counsel identified 2 issues for determination; whether the plaintiff proved his allegations of fraud and whether customary trust was proved.
37. On the 1st issue, counsel submitted the plaintiff did not substantiate his claim and failure to join the land registrar to the proceedings was fatal. Counsel submitted it was settled law fraud must not only be specifically pleaded but must be proved to the required standards and relied on the Court of Appeal decision of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000).
38. On the 2nd issue and relying on Isack M'inanga Kiebia v Isaaya Theuri M'lintari (Supra) and Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, counsel submitted the plaintiff's evidence was contradictory and at adjudication, the intention was made clear that trust was not conferred on Erasto.

2nd defendant's submissions

39. In the submissions dated 19/06/2023, counsel identified 3 issues for determination; (a) whether the claim of fraud was time barred (b) whether customary trust was proved and, whether the 2nd defendant was an innocent purchaser for value.
40. On the 1st issue, counsel submitted under Section 26 of the *Limitation of Actions Act*, the plaintiff's suit was time barred since he was required to institute suit 3 years from when he discovered fraud which was 3 years from when the plaintiff discovered the 2nd defendant had constructed on the suit property. He relied on the case of Edward Moonge Lenguuranga v James Lanaiyara & another (2019) eKLR.
41. On the 2nd issue, counsel submitted the plaintiff did not prove trust to the required standards and cited the Court of Appeal decision of Salesio M' Itonga v. Mithara & 3 Others (2015) eKLR.
42. On the 3rd issue, counsel submitted Section 25 of the *Land Registration Act* upheld sanctity of title and the 2nd defendant was the absolute and indefeasible owner unless the plaintiff proved otherwise. Counsel asserted the 2nd defendant was an innocent purchaser for value and cited the Court of Appeal decision of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR which cited with



approval the Ugandan Court of Appeal decision of *Katende v Haridar & Company Limited* [2008] 2 E.A.173.

5th defendant's submissions

43. His counsel also filed his written submissions dated 19/06/2023 in which he identified a single issue for determination; whether the 5th defendant was the lawful owner of 1895. Counsel submitted the 5th defendant conducted due diligence before he purchased the subject property.

Analysis and determination

44. I have considered the pleadings, evidence adduced by the parties as well as counsels rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and conceivably the issues for determination are;
- a. Whether the suit was competent against the 4th defendant.
 - b. Whether customary trust over the mother parcel was proved.
 - c. Whether the claim of fraud was statutory barred and if not, whether illegality and fraud were proved.
 - d. Whether the 2nd and 5th defendants were innocent purchasers for value.

I. Whether the suit was competent against the 4th defendant

45. Section 2 of the *Civil Procedure Act* has defined a 'legal representative' as: -

'a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.'

46. Section 82 of the *Law of Succession Act* provides as follows: -

"Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b)

47. Section 80 (2) of the *Law of Succession Act* further states: -

"A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."

48. In the case of *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017] eKLR where Mutungi J was dealing with circumstances similar to this case, the learned Judge stated as follows:-

"A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently."



49. The plaintiff in the amended plaint which was filed on 22/09/2022, instituted suit against the 1st and 3rd defendants in their capacities as the administrators of Jane's estate. The limited grant that was produced by DW2 demonstrated the 1st and 3rd defendants were appointed as such administrators on 5/12/2022.
50. At the time of filing the amended plaint, the 1st and 3rd defendants did not have letters of administration to clothe them with capacity or locus to represent Jane's estate.
51. They were subsequently issued with limited grant which could not cure the anomaly since the grant for purposes of being sued could only take effect from 5/12/2022 which was the date the grant was issued. The issue of locus standi is a cardinal principle in law. If one lacked locus standi in a civil suit, then a suit could not be instituted or maintained against them. I find the suit was a nullity and incompetent against the 4th defendant and I hereby strike it out.

II. Whether customary trust over the mother parcel was proved

52. Section 24 (a) of the [Land Registration Act](#) states the registration of a person as the proprietor of land shall vest in that person absolute ownership together with all such rights and privileges thereto. Within Section 25 of this Act, a registered proprietor holds title subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights and interests including overriding interests which have been recognised by Section 28 (b) of the same Act to include customary trusts.
53. As rightfully submitted by both counsels, the apex court in *Isaack M'Inanga Kiebia v. Isaaya Theuri M'Lintari* (Supra) settled the principle of customary trust. In this decision, the court analyzed previous decisions, repealed provisions of the Registered [Land Act](#) and those of the subsisting [Land Registration Act](#) and in paragraph 52 held as follows: -

“...we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor...The categories of a customary trust are therefore not closed. ...Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.” Emphasis added.



54. The Court of Appeal in the case of Juletabi African Adventure Limited & another v Christopher Michael Lockley (Supra) held: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See Gichuki vs. Gichuki [1982] KLR 285 and Mbothu & 8 Others vs. Waitimu & 11 Others [1986] KLR 171.’

55. The 1st and 3rd defendants have never been registered as the proprietors of the mother parcel or its subdivisions. Taking into account the suit against the 4th defendant was struck out, it is my view, this claim cannot fall against the 1st and 3rd defendants in their individual capacities. I do not know how the plaintiff could have proved his claim against the 2nd and 5th defendants in the absence of Erasto’s or Jane’s estate being properly joined in these proceedings. See Isaack M’Inanga Kiebia v. Isaaya Theuri M’Lintari (Supra).
56. Be that as it may, I will proceed to establish if customary trust was proved. On application of the settled principles of Isaack M’Inanga Kiebia v. Isaaya Theuri M’Lintari (Supra), it was undisputed the mother parcel was before registration customary land, Elkana and Erasto being brothers, were from the same family and their relationship was not tenuous.
57. The dispute was whether there were any intervening circumstances that led to the registration of Erasto as the proprietor of the mother parcel at the exclusion of Elkana or his immediate descendants.
58. From the plaintiff’s evidence and his counsel’s arguments, the plaintiff was adamant the mother parcel was held in customary trust while the 3rd defendant who put up a stringent defence asserted the intention of Elkana and Erasto was made apparent during 1st registration; the mother parcel was to belong to Erasto while Elkana was to have 818.
59. In my view, an interrogation of registration under the *Land Adjudication Act* is paramount. It provided an elaborate public process for registration of customary land which included demarcating, surveying and recording. The eventual process was registration. The process took years.
60. PW2 testified adjudication in the area took place between 1970 and 1974. It was not disputed Elkana died in 1973 and that at the time of adjudication, he was alive and in Uganda.
61. From the evidence adduced, Elkana was registered as the proprietor of 818. An official search of this property was produced which demonstrated it was registered on the same date as the mother parcel. Albeit the plaintiff alleging the search was a forgery, onus shifted on him to prove so, however, he did not dislodge DW2’s evidence that at 1st registration, 818 was registered in Elkana’s name.
62. PW2, testified it was feasible for someone to be registered in his absence. This line of evidence is lent credence by Section 13 (2) of the *Land Adjudication Act* which allowed an agent to represent a party during the process of recording, adjudication or demarcation. Under Section 13 (2) thereof, the recording or demarcation officer could exercise discretion and recognize the interests of a person even if he had not expressed such an interest.
63. As earlier stated, adjudication was a public process. The process started during the lifetime of Elkana. In my considered view, the intention of the two brothers whether they were both present at adjudication or not was that each one of them was to have their respective parcels of land; Erasto the mother



parcel and Elkana 818. No evidence was produced to show that Erasto and Elkana were registered as proprietors of any other parcel of land apart from this two. I find the plaintiff did not prove his claim of customary trust.

III. Whether the claim of fraud was statutory barred and if not, whether illegality and fraud were proved

64. On the 1st limb, I agree with the 2nd defendant's counsel that by Section 26 of the *Limitation of Actions Act*, fraud could only start running after the plaintiff discovered fraud and once he did so, time stopped running and he had to file his claim within 3 years from the date of such discovery. The question that begs to be answered is when did time start running?
65. The plaintiff did not submit on this issue but the 2nd defendant submitted time started running in 2011 which was when the 2nd defendant built on the suit property.
66. I respectfully differ with the 2nd defendant's counsel. The plaintiff's pleadings and evidence were that the 2nd defendant had "now" moved into the suit property. It is my understanding he discovered the 2nd defendant's structures existed in the suit property in the recent past and this may explain his visit to PW2's offices and pursuing grant of letters of administration on Elkana's estate.
67. For purposes of computing time, I will take the letter stamped 23/05/2019 by PW2 to the land registrar as the date time started to run. The suit was filed 8/03/2021 which was within the statutory period. I find the plaintiff's claim was not statutory barred.
68. On the 2nd limb, the legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the *Land Registration ACT*. Section 24(a) recognises the registered owner as the absolute owner of land. This section provides as follows;
- "The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".
69. This absolute right is limited by Section 25 and by Section 26, courts prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
70. Order 2 Rule 10 (1) (a) of the *Civil Procedure Act* provides as follows: -
- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
71. It is trite law fraud must be proved on parameters beyond a balance of probability but below reasonable doubt. This principle of law was well elucidated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar* (Supra) as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of



course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

72. In contending fraud and illegality, the plaintiff particularized fraud against the defendants on grounds inter alia; transferring the mother parcel without a confirmed grant, subdividing the mother parcel without consent of the occupants, failure to obtain valid consents to transfer the mother parcel and unlawfully attempting to evict the plaintiff and his family from the mother parcel. The plaintiff made vague and general allegations. See *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR.
73. Looking at these particulars, the plaintiff did not postulate which defendant allegedly committed what fraudulent conduct. The only person whom the mother parcel was transferred to was Jane.
74. From the register, she acquired it by transmission. No credible evidence was led on the participation of the 1st and 3rd defendants in the transaction. The existence of the transfer by transmission was also not dislodged. It would have been prudent if the plaintiff had called an officer from the lands office to testify and affirm his allegations. The suit against Jane has been struck out and the plaintiff did not prove culpability of any of the defendants on the transfer of the mother parcel to Jane.
75. As to occupancy, the plaintiff’s evidence was contradictory and untruthful. Despite testifying he resided on the mother parcel. It emerged from his testimony that he had never lived on the suit property but on land parcel 848 hence the issue of eviction could not suffice.
76. On the issue of consent, it was uncertain the type of consent the plaintiff was alluding to. Was it a spousal consent or LCB consent? The mother parcel had been subdivided and changed hands severally so at what point in the various transactions were the consents which were not disclosed not obtained? All these were grey areas and left a lot to be desired. The court is restrained from inferring from the facts. See *Vijay Morjaria v Nansingh Madhusingh Darbar* (Supra). On this limb, I find the plaintiff did not prove his claim to the required standards.

IV Whether the 2nd and 5th defendants were innocent purchasers for value

77. 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.”

78. The decision of *Moses Parantai & Peris Wanjiku Mukuru* suing as the legal representatives of the estate of *Sospeter Mukuru Mbeere* (deceased) v *Stephen Njoroge Macharia* (Supra) cited with approval the decision of *Katende vs Haridar & Company Limited* (Supra) which defined a bona fide purchaser thus:

“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.”

79. From adduced evidence, the 2nd defendant is registered as the owner of 1891 while the 5th defendant that of 1895. It is therefore prima facie evidence they are absolute and indefeasible owners as envisaged by Section 26 of the [Land Registration Act](#) subject to their titles being challenged or such overriding rights. Their titles are also shielded by Section 25 unless proved otherwise.
80. They respectively purchased them from the then registered owners; the 2nd defendant from Jane while the 5th defendant from Benter. They all produced agreements for sale which showed the 2nd defendant had paid the full purchase of ksh.180,000/- to the vendor on 10/12/2011 while the 5th defendant paid the full purchase price of ksh. 250,000/- to his vendor.
81. They testified that they conducted due diligence by conducting a search. From the produced documents, the green card showed Jane acquired the suit property by transmission meaning she was allegedly the administrator of Erasto’s estate unless proved otherwise.
82. The plaintiff did not prove fraud or illegality over the mother parcel or in its subsequent subdivisions or that the 2nd and 5th defendants had any notice of an illegality or fraud. The only allegation made against the 2nd defendant was that he had constructed on the suit property.
83. There was no prove the mother parcel was ever occupied by any party before occupation by the 2nd defendant. The 5th defendant’s testimony that he purchased 1895 when it was vacant was not controverted. In my view, it was not feasible for the 2nd and 5th defendants to have suspected any fraud or illegality. I am satisfied the 2nd and 5th defendants were innocent purchasers for value without notice.
84. It is my ultimate finding the plaintiff did not prove his case to the required standards. It is trite law costs follow the event. The plaintiff and the 1st, 3rd and 4th defendants are close relatives and to foster reconciliation, there shall be no orders as to costs as between them. However, the plaintiff shall bear the 2nd and 5th defendants’ costs. I hereby issue the following disposal orders: -
- a. The plaintiff’s suit against the 4th defendant is hereby struck out with no orders as to costs.
 - b. The plaintiff’s suit against the 1st, 2nd, 3rd and 5th defendants is hereby dismissed.
 - c. There shall be no orders as to costs as between the plaintiff and the 1st and 3rd defendants.
 - d. The plaintiff shall bear the 2nd and 5th defendants’ costs of the suit.
85. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

26/10/2023

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Miss Akinyi for the plaintiff



Miss. O. Omedo for the 1st, 3rd and 4th defendants

Miss. O. Omedo h/b for Mr. Nyatundo for the 2nd defendant.

Mr. Ochanyo for 5th defendant

Court assistant: Ishmael Orwa

