



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 156 OF 2017

(FORMERLY NRB ELC 556 OF 2011)

GEORGE KAMAU NJONGE.....1<sup>ST</sup> PLAINTIFF

JANE NJERI MUKUNA.....2<sup>ND</sup> PLAINTIFF

VERSUS

PATRICK KAGOTHIO NJONGE.....1<sup>ST</sup> DEFENDANT

ERASTUS NJOROGE KIARIE.....2<sup>ND</sup> DEFENDANT

JUDGMENT

By a Further Amended Plaint dated **26<sup>th</sup> June 2019** the Plaintiffs filed the suit against the Defendants and averred that by virtue of the **Limuru Court Judgment**, made on **29<sup>th</sup> October 1974**, the 1<sup>st</sup> Plaintiffs as a sons of the late **Njonge Thayu**, became the owner of **0.50** acres for all that parcel of land known as **L.R Limuru /Bibirioni/551**. That pursuant to the said Judgments, the land was subdivided and the 1<sup>st</sup> Defendant was registered as proprietor of **L.R Limuru/Bibirioni/1310**, for himself and the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs. That the said Judgment was filed according to the **family decision** made by the elder sons of the registered proprietor who took it upon themselves to distribute the Estate, without due regard and consent of all beneficiaries. That as the last born the 1<sup>st</sup> Plaintiff was asked to give **uramati** as his land was being held in trust by his brothers and his share was reduced to half a share. Further that despite the reduction, the 1<sup>st</sup> Defendant tried to defraud the 1<sup>st</sup> Plaintiff.

It was further contended that the Judgment passed at **Limuru Law Courts** cannot be executed as **12 years** have lapsed and the Court should grant the 1<sup>st</sup> Plaintiff his share and that of the 1<sup>st</sup> Defendant as he has acquired it through **Adverse Possession**, as he has always been in possession for more than **30 years**. Further that the **Limuru Judgment** cannot be Appealed against as there are no records and the succession was done prior to coming into force of the **Succession Act**, and if the orders are to have the land distributed as per the Judgment, the same will be impossible.

That the Plaintiffs registered a caution in **September 2001**, while pursuing the process of subdivision and the 1<sup>st</sup> Plaintiff and his family duly occupied his share of **0.50 acres**, has built his matrimonial home and continue cultivating the remaining portion, while pursuing the formal issuance of the Title Deeds. That vide a letter dated **22<sup>nd</sup> July 2011**, the Plaintiffs learnt that the 2<sup>nd</sup> Defendant claimed to have bought the entire parcel of land vide a sale agreement dated **16<sup>th</sup> May 2011**, between the 1<sup>st</sup> & 2<sup>nd</sup> Defendants without the Plaintiffs knowledge .exercise

It was contended that the sale and transfer of the suit property was fraudulent, illegal and unlawful. The Plaintiffs particularized fraud and illegality by the Defendants as; illegally removing the caution; - selling the suit property by the 1<sup>st</sup> Defendant while aware he held it in trust; - 2<sup>nd</sup> Defendant buying the suit property while it was occupied; - Failing to obtain necessary documents of consent before transfer, failing to avail alleged sale agreement;- failing to take the Plaintiffs interest into consideration .

It was therefore the Plaintiffs contention that their families stand to suffer immeasurable and irreparable loss and damage in the event that they are evicted. They therefore sought for orders that;

**a. A declaration be issued that the alleged sale of L.R Limuru/Bibirioni /1310, by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was fraudulent, illegal null and void hence order the cancellation of the Title issued to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> May 2011.**

b. An Order directing that the Title Limuru/Bibirioni/1310 be subdivided and registered as follows;

**George Kamau Njonge 1.66 acres**

**Peter Mukuna Njonge 0.83 acres**

c. An Order for the 1<sup>st</sup> Plaintiff to refund the 2<sup>nd</sup> Defendant Kenya Shillings 800,000/= which was the purchase price money without interest

d. An Order of permanent injunction restraining the 2<sup>nd</sup> Defendant either by himself, his agents, servants nominees, representatives and or any other person claiming under him from evicting , erecting and or interfering with the 1<sup>st</sup> Plaintiffs occupation and use of their portion of 1.66 acres in L.R Limuru/Bibirioni/1310, and or selling transferring, alienating , leasing or in any other way dealing with the parcel of land herein

e. Kenya Shillings 43,000/- as Special Damages

f. Costs of the suit and interest thereof

g. Any other relief that this Honourable Court may deem fit and just to grant

The suit was contested and the Defendants filed their Amended statement of Defence dated **16<sup>th</sup> August 2019**, and denied all the allegations made in the Plaint. The 1<sup>st</sup> Defendant averred that he inherited the suit property from his father, the same having been excised from **L.R 551**, pursuant to a succession process that was completed and administered by his 3 brothers . That being a minor of tender years, he did not participate in the succession and distribution process and was only shown his parcel of land when he attained the age of majority and he processed the title documents and was issued with a **Title Deed** as the absolute owner . That he was granted the suit property as a sole beneficiary. He also contended that under **Kikuyu Customary Law**, it is not possible for the last born to give **Uramati** to an elder child. The 1<sup>st</sup> Defendant denied holding the suit property in trust and averred that his late father's Estate was distributed by the administrators and individual parcels subdivided from the original **L.R 551**, shared out to the respective beneficiaries .

That the 2<sup>nd</sup> Defendant was not aware of how the shares were arrived at and if the Plaintiffs have any claim, the said claim is against the administrators. The 2<sup>nd</sup> Defendant further averred that he leases the suit property to 3<sup>rd</sup> parties at a fee and the 2<sup>nd</sup> Plaintiff and the late **Peter Mukuna Njonge**, were also lessees and they cannot acquire any adverse rights . It was further contended that the Court is not a succession cause and it is incapable of granting the Plaintiffs the rights as sought .

That the 2<sup>nd</sup> Defendant purchased the suit property from the 1<sup>st</sup> Defendant vide a sale agreement dated **16<sup>th</sup> May 2011**, free from any encumbrance and there was no consent needed to be sought from the Plaintiffs. That the 1<sup>st</sup> Defendant is a stranger to any subdivision process or the Plaintiffs ownership as he only leased to the 1<sup>st</sup> Plaintiff . That the Plaintiffs have been aware that they do not have any ownership rights and the suit is aimed at frustrating the sale. He denied the particulars of fraud and illegality and that at the time of sale, the 2<sup>nd</sup> Defendant did his due diligence and confirmed that the 1<sup>st</sup> Defendant was the absolute owner and he therefore acquired a good title.

The Parties closed their pleadings and the matter proceeded by way of Viva voce evidence wherein the Plaintiffs called **three** witnesses and closed their case while the Defendants called **two** witnesses.

#### **PLAINTIFFS' CASE**

**PW1 George Kamau Njonge**, adopted his witness statement dated **13<sup>th</sup> October 2011**. He testified that they shared their ancestral land which was owned by their father being **L.R Limuru/Bibirioni /551**, and they were to subdivide the suit property amongst the **ten** of them, who are his brothers and his step brothers. Further that they subdivided the land amongst the ten of them and since their maternal mother was alive, they decided that their portion of land being **2.5 acres** was to be used by their mother . That she used the land until she fell ill in **1984**, and after subdivision their land was now **L.R Bibirioni/1310**. That their portion of land was amalgamated and the land was registered in the name of **Patrick Kagotho Njonge**. He produced the Judgment as Exhibit 1 and the Search as Exhibit 2.

That they applied for consent from at the **Land Control Board** on **7<sup>th</sup> February 1994**. He produced the Consent for partition as Exhibit 3. That **Patrick Kagotho Njonge** attended with his wife, and they were asked about the subdivisions and were happy about it and the land was surveyed. He produced Mutation form **Exhibit 4**, and mutation receipts **Exhibit 5** . That the 1<sup>st</sup> Defendant picked the original title deed in **1995**, after the subdivisions and went with the mother title to the Rift Valley. He further testified that when they conducted a further search, they noted that the land had been sold to the 2<sup>nd</sup> Defendant. Then PW 1 reported the matter to the District Officer, vide a letter from **DO exhibit 6**.

That upon further investigations they noted that there was an illegality in the transfer of the land as the **Land Control Board** was booked on **12<sup>th</sup> May 2011**, the agreement was done on **16<sup>th</sup> May 2011**, and the search indicated that the 2<sup>nd</sup> Defendant was registered as the owner on **24<sup>th</sup> May 2011**. That he received a letter from the 2<sup>nd</sup> Defendant dated **22<sup>nd</sup> July 2011**, requesting him and others to move out of the suit property, as the 2<sup>nd</sup> Defendant had purchased the suit property. That the 1<sup>st</sup> Defendant was to hold the land in trust for them as beneficiaries of the Estate of their father and he was to get his share of **L.R 1310** .He then urged the Court to order the subdivision as per the succession order given by the Court and cancel the 2<sup>nd</sup> Defendant's registration .

It was his further evidence that he was born in **1952**, and the land was subdivided in **1974**, when he was **22 years** old. That vide a Judgment of **Limuru in Succession Cause**, the beneficiaries were listed From No. 8 and **Patrick** was to get **1 acre**, **Peter Mukuna 0.9** acres and **George Kamau** was to get **0.5 acres**, and that their portions of land would be amalgamated and the 1<sup>st</sup> Defendant was to hold it in trust for them. It was his evidence that he was trying to implement it. However, he urged the Court that each one of them should get equal shares from the suit land. That the mutation form shows where he stays and that he uses the said property of Land. That he did not see the 2<sup>nd</sup> Defendant before he purchased the land and he was not summoned to the Land Board Control, before the land was sold.

He further testified that his father had land in **Gilgil** which was **5 acres** and plot in **Ngarariga** and shares in **Pyrtherum** and **Kentapu**. Further that the Title held by **Patrick Kagotho Njonge** does not have any other name and there is no indication of trust on the Title but there was a Customary trust. That **L.R 551** was **1 acres** and he lives in **L.R 1310** and **Mukuna** also lives there too. That **Grace Muchemi** who was a leasee did not give any rent money to **Patrick**. Further that they had given **Kagotho 0.5 acres**, which he was leasing out. He Later sold the land and disappeared. That they have shares on the said Land as that is their inheritance That they did not object to the sale of the land, to the 2<sup>nd</sup> Defendant who is the registered owner as they were not aware of the sale. However, but they have placed a caution on the suit land. He denied invading the 1<sup>st</sup> Defendant's inheritance. That the Succession Cause was **No.35/74**, and the Certificate of Succession was taken to the Land Registrar for subdivision of **L.R No. 551** and their names are missing from the list of the beneficiaries.

**PW2 Jane Njeri Mukuna** adopted her witness statement as her evidence in Court. She produced her list of documents as exhibit 1 (2<sup>nd</sup> Plaintiff's Exhibit). That she is the wife of **Mukuna** and has lived in the land that **Mukuna** inherited and the 1<sup>st</sup> Defendant has sold **Mukuna's** land without her consent. That after the case was filed, the person who had leased the land moved out. Further that her son was buried on the suit property without any objection and She denied that **Peter Mukuna** sold his inheritance which was in **Bahati**. She further testified that since she got married, the 1<sup>st</sup> Defendant has never told her to move out and that she has developed the land.

**PW3 Francis Ngugi Njonge** testified that **Joseph Mwaura Njonge** was his brother and he died in **January 2020**. That he was an administrator of their fathers' Estate and had sworn a Witness statement. He produced the witness statement as his evidence in Court. That the Succession cause was used to distribute their fathers Estate and the Certificate of succession is one of the succession order of the Court. That the land registered in the name of **Patrick Kagotho** was to be shared by **three brothers** and **Patrick K. Njoroge** was to hold it in trust for his brothers.

That they were all administrators and they were ten sons who were to share the Estate and they shared according to their father's wishes. That **L.R 1310** was for the 1<sup>st</sup> Plaintiff, **Peter Mukuna** and 1<sup>st</sup> Defendant. That there were five portions of land that were subdivided. He denied that his father had land in **Bahati** area. That he was not aware of Plot **T50** and **L.R 551**, was the one that was distributed. That the Plaintiffs and their family occupy **L.R 1310**. That some beneficiaries were joined together in the distribution but they later each got their Certificate of title.

## DEFENCE CASE

**DW1 Patrick Kagotho Njonge** adopted his witness statement dated **6<sup>th</sup> March 2018**, as part of his evidence. He further adopted his Further statement dated **26<sup>th</sup> March 2020**. He produced his list of documents as Exhibit 1. He acknowledged that the Plaintiffs are his relatives. That his father owned the suit property and the legal administrators distributed the land, but he did not take his title deed, but obtained it in **1995**. That his land was **L.R 1310**, as he confirmed the same from the lands Registry. Further that there is a green card that was opened on **4<sup>th</sup> March 1975**, and there was nothing indicated against it. Further that the Title Deed was issued in his name on **14<sup>th</sup> December 1995**, and there was no encumbrance and the administrators did not tell him he was **holding the land in trust** for anyone else. That from **1995**, he has been tiling the land but he lives in **Gilgil**.

It was his further evidence that he leased the land out to **Florence Mumbi** and **Jane Macharia**, the 2<sup>nd</sup> Plaintiff. That **Jane Njeri Macharia** refused to pay the rent for leasing out the land. That **Jane Njeri's** husband **Peter Mukuna** sued his other brothers who were Administrators as he wanted to inherit **L.R 1310**. That there was a suit that was filed when their father was Deceased, but the case file number is not given and the Judgment cannot be relied upon. Further that he sold the land to **Erastus**, the **2<sup>nd</sup> Defendant herein**, and they have a Sale Agreement which they both signed and that no encumbrance existed although there was a caution placed on the title afterward. That **Peter Mukuna** failed to appear when he was summoned by the Land Registrar.

That the Plaintiffs were given other parcels of land that their late father owned. That **George** the 1<sup>st</sup> Plaintiff herein had land in **Nyahururu** and **Peter Mukuna** was given land in **Subukia**. Further that the Succession Certificate is for five people. That the Judgment had distributed **L.R 551**, to the sons and in the Succession Certificates distribution was for five sons as some of their brothers chose to have the land registered in the name of other brothers. That the land in the name of **Patrick Kagotho**, **Peter Mukuna** and **George Kimani** was registered in the name of **Patrick Kagotho Njoroge**, that is why the Certificate from the land Registrar has 5 names. Further that **Njoroge Thiayu** had **10 sons** and they chose one person to stand in for the rest of the family members. That from the Judgment he got **1 acre** and he sold the land, but he was not living on the said land. That their mother lived on the suit property together with **George Kamau** and **Peter Mukuna**.

Further that in **1994**, he applied to subdivide the land and he signed because they were using the land. That **Erastus**, the purchaser 2<sup>nd</sup> Defendant lives in **Ngarariga**, and knows their family and knew that there were structures on the suit property. That **DW 1** sold the land even with the caution and did not inform the Plaintiffs of the sale. That he was never told that the two were to also inherit the land. That he was to give **Erastus**, 1<sup>st</sup> Defendant vacant possession, but did not do so as his brothers were on the suit property. That he sold the plot for **Kshs. 800,000/=** in **2011** and only went to the **Land Control Board** with **Erastus**. He further testified that vide notices dated **5<sup>th</sup> August 2011**, he notified his brothers to move out. That when **Peter Mukuna** had sued the administrators of their father's Estate, he did not identify **L.R 1310**, as the land that he was meant to inherit. That **Peter Mukuna** and **Jane Njeri** do not live together.

**DW2 Erastus Njoroge Kiarie** adopted his witness statement dated **16<sup>th</sup> March 2015**, as his evidence in Court . He further testified that he knows the Plaintiffs as they live in the same village . Further that he bought the suit property and there were people living on the said parcel of land when he bought it and they were told to move out. That he conducted a search and went to the **Land Control Board**. and **Consent** was given and he paid the purchase price . Further that there is no trust as against the original title and there was **no caution** when he purchased the suit property.

That he visited the suit property and the 1<sup>st</sup> Defendant informed him that the ten structures thereon were his structure. That the **Eviction Notice** is to persons who were farming on the suit property. That he did not inspect the suit property with **Mr. Patrick Kagotho** and that he learnt before he paid the money and that he obtained the Consent after paying for the agreement. That he did not tell the people on the ground that he had purchased the land, as he did not anticipate any resistance. However, he gave the people on the land **Notice** to vacate as he had purchased the suit property . That the land is **2 ½ acres** and he bought it for **Kshs. 800,000/=**.

The parties closed their case ,and the Court directed them to file written submissions. The parties herein through their Advocates complied with the directives and filed their respective written submissions, which the Court has carefully read and considered.

The Plaintiffs are claiming the suit property by virtue of the fact that the 1<sup>st</sup> Defendant was registered as the owner of the said land to **hold it in trust** for the 1<sup>st</sup> Plaintiff and his brother, who is the 2<sup>nd</sup> Plaintiff's husband vide a Succession Cause . The 1<sup>st</sup> Defendant has acknowledged that the Plaintiffs are his relatives. He has also acknowledged that he was the registered owner of the suit property, before he sold the same to the 2<sup>nd</sup> Defendant and that the suit property initially belonged to his father before the same was transferred to him vide a Succession Cause as his inheritance. That his other brothers got their own share of inheritance and are thus not entitled to his share, which he absolutely held and did not hold in trust as there was no indication on the title that the suit property was held in trust.

It is the 2<sup>nd</sup> Defendant's contention was that he is a purchaser owner of the suit property having conducted his due diligence and confirmed that the 1<sup>st</sup> Defendant was the owner of the suit property and given that there was no encumbrance registered against the Title, he saw no need to seek the **consent** of any other person. That they attended the **Land Control Board** and sought **Consent** which was granted, and thus he is a bonafide purchaser for value .

For Court this is to determine whether the Plaintiffs are entitled or not entitled to the prayers sought in the **Plaint**, it ought to make a determination on whether there was **a trust** and whether the 2<sup>nd</sup> Defendant was a bonafide purchaser for value.

The issues for determination therefore are;

- 1. Whether the 1<sup>st</sup> Defendant held the suit property in trust**
- 2. Whether the 2<sup>nd</sup> Defendant was a bonafide purchaser for value therefore acquired good title**
- 3. Whether the prayers sought in the **Plaint** are merited**
- 4. Who is to bear the costs of the suit**

#### **1. Whether the 1<sup>st</sup> Defendant held the suit property in trust**

As noted above, it is not in doubt that the 1<sup>st</sup> Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff's husband are blood brothers. It is the Plaintiffs' contention that upon the demise of their late father, and as the Succession Act had not been passed, the property was registered in the 1<sup>st</sup> Defendant's name on their behalf to hold it in trust and in the **Limuru Court Judgment**, the shares to be held had been apportioned to each one of them. The suit herein was filed in the year **2011**, before coming into force of the **Land Registration Act 2012**.

**Section 107 Land Registration Act** provides for transitional clauses as follows;

- (1) "Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."**
- (2) "Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act."**

The Law Applicable then in the instance case is the **Registered Land Act Cap 300**. The Defendants have submitted that there is no way that the suit property would have been held in trust as the trust was not noted in the title. There are various circumstances in which a party may be holding a property in trust for others but the same has not been noted or registered as against the Title . The provisions of **Section 27 & 28 of Registered Land Act Cap 300** (repealed) state that the rights of a registered proprietor of registered land under the Act are **absolute** and **indefeasible** and only subject to rights and encumbrances noted on the register or overriding interests which are set out under **Section 30** of the Act . **Section 30 (g)** provides for customary rights as follows;

- 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding**

interests as may for the time being subsist and affect the same, without their being noted on the register –

(a).....

**(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;**

Therefore it is evident that Customary rights is one of the overriding interest that need not be noted on the title, so that if a party is able to prove that they are entitled to the land and the land is held in customary trust, it matters not that the same was not noted in the register. The said provision of the **Registered Land Act** has been replicated under **Section 28 (b) of the Land Registration Act, 2012**, which specifically provide for overriding interests as may subsist on the land and affect it without it being noted on the register such as customary trusts.

For this Court to determine whether a customary trust has been proved, the Court takes guidance in the Supreme Court case Concerning proving customary trusts, in the case of **Isack M'inanga Kiebia ...Vs...Isaaya Theuri M'lintari & another [2018] eKLR** where the Court held that ;

**“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.”**

It is not in doubt that the suit property was family land before the 1<sup>st</sup> Defendant was registered as the owner. It is further not in doubt that the Plaintiffs belong to the said family. What is in contention is whether the Plaintiffs would have been registered as beneficiaries, but for some other intervening circumstances.

The Plaintiffs contend that the 1<sup>st</sup> Defendant was registered as an owner as the **Succession Act** had not come into place and therefore other persons were registered to hold the land in trust for other brothers. The Court has gone through the list of documents produced in evidence by the Plaintiffs. Specifically, the Court Judgment dated **29<sup>th</sup> October 1974**.

The Court notes the Defendants reservation in that the said Judgment did not have a case number and there was no way to know if the same was genuine. However, the 1<sup>st</sup> Defendant in his evidence testified that he acquired the suit property after the process of Succession. In his evidence, he acknowledges that there was a **succession cause** and he was to hold the suit property on behalf of his brothers and that he had agreed to subdivide the land. The

Defendants also produced in evidence an Affidavit by **Peter Mukuna Njonge**, which talked of a **Succession Cause No 35 /34 of 1974**, which indicated that the said file had been destroyed by the fire. The Court is therefore satisfied that the said Succession Cause existed and given that there has been no evidence to disapprove the Judgment produced in evidence by the Plaintiffs, the Court finds and holds that the same is proper evidence.

Having held that the Judgment is proper evidence as adduced, in the said Judgment **Patrick Kagotho, Peter Mukuna and George Kamau** were to be joined as proprietors and **Patrick Kagotho Njoro** would be registered as the proprietor for himself and in the interest of others. That alone is enough for the Court to find that the 1<sup>st</sup> Defendant was holding the suit property in trust for the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff's husband. The Court therefore finds and holds that the Plaintiffs have proved that there was a Customary trust that needed not to have been noted in the register.

## **2. Whether the 2<sup>nd</sup> Defendant was a bonafide purchaser for value therefore acquired good title**

To benefit from this principle, the 2<sup>nd</sup> Defendant would have to fit in the holding in **Lawrence P. Mukiri ...Vs... Attorney General & 4 Other (2013) eKLR** where the court cited with approval the holding of the Court of Appeal of Uganda in **Katende ....Vs... Haridar and Company Limited** and held as follows:

**"... A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not**

intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.

**A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner".**

There is no doubt that the 2<sup>nd</sup> Defendant holds a certificate of Title to the suit property having bought it from the 1<sup>st</sup> Defendant. It is further not in doubt that the 1<sup>st</sup> Defendant was the registered owner of the suit property and that though there was an overriding customary interest, no encumbrance had been noted in the register to enable him think otherwise. Further, there was a caution initially registered against the title in 2001, the search produced in evidence dated 2<sup>nd</sup> April 2009 did not reveal any encumbrance .

However, the principles as enumerated in the **Katende Case** provide that the purchaser needs to prove that he purchased the suit property in **good faith**.

Therefore, is this Court satisfied that the 2<sup>nd</sup> Defendant purchased the suit property in good faith?

DW2 who is the 2<sup>nd</sup> Defendant testified that he is a neighbor to the Plaintiffs who are in possession and occupation of the suit property. That even before he bought the suit property, he went to the ground and was taken to the suit property by **brokers**. He further acknowledged that though he met with the 1<sup>st</sup> Defendant, he never went with him to the suit property.

The 2<sup>nd</sup> Defendant having admitted that he knew the Plaintiffs family and that he lived in the area, it is the Court's considered view that at the very least, he would have inquired who were the owners of the suit property since there are homes on the suit property and people living thereon which possession was spanning for over several years. The fact that the 1<sup>st</sup> Defendant did not visit the suit property with the 2<sup>nd</sup> Defendant would in any reasonable persons mind raise eyebrows and thus red flags to warrant questions from the 2<sup>nd</sup> Defendant. The Court is not satisfied that the 2<sup>nd</sup> Defendant bought the suit property in good faith, given that the Plaintiffs who are entitled to the suit property by way of customary trust were in possession and occupation of the suit property and the 2<sup>nd</sup> Defendant only waited after the suit had been transferred to him to send out **eviction notices**.

Having been aware that the people in occupation were the 1<sup>st</sup> Defendant's family and given that he is a neighbor of the Plaintiffs, it would have been prudent for him do due diligence and seek information and clarification from the family members.

The Court therefore finds and holds that the 2<sup>nd</sup> Defendant did not purchase the suit property in **good faith** and thus he is not a bonafide purchaser for value.

As to whether 2<sup>nd</sup> Defendant acquired good title, having held that he was not a bonafide purchaser for value, the Court finds and holds that the (2<sup>nd</sup> Defendant) did not acquire a good title as the process of acquisition of title is material and in this case, he could not have acquired a title or a property that was being held in trust for other people. See the case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR** the Court held 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. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of Title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

### **3. Whether the prayers sought in the Plaint are merited**

The Plaintiffs have sought various orders in their further Amended Plaint. Though in their submissions and the evidence led in court, they sought to be registered as owners having acquired prescriptive rights, there was no such prayer in the statement of claim and the Court cannot grant that which was not sought for and therefore no consideration for the same can be made.

Further the prayer for special damages though Specifically pleaded, no evidence was adduced as to what the Special Damages were for. No receipts were produced to prove any backing and as special damages must be specifically pleaded and proved, the Court finds the same is not merited.

The Plaintiffs have further sought for cancellation of the 2<sup>nd</sup> Defendant's title and an order directing that the land be subdivided and registered as follows; **George Kamau Njonge 1.66 acres Peter Mukuna Njonge 0.83 acres**. The Court has relied on the Judgment dated **29<sup>th</sup> October 1974**, produced in evidence by the Plaintiffs to find that there existed a customary trust. In the said Judgment the manner as to how each of the brothers are to get their share has been enumerated with **Patrick Kagotho Njonge getting 1.0 acres, Peter Mukuna Njonge 0.90 acres and George Kamau Njonge 0.50 acres**. The jurisdiction of the Court is limited to land use and occupation. The distribution of the Estate of the Deceased is within the purview of the **Succession Court** which this Court has no jurisdiction over. Whether or not there ought to be equal shares is in itself debatable. This court will not be in a position to determine the shares as it is not equipped with the necessary jurisdiction and information. Thus the Court will not disturb the portions of the parties. Having held that the 2<sup>nd</sup> Defendant did not acquire a good Title, the Court therefore finds that the transfer was **null and void**. However, the 1<sup>st</sup> Defendant is entitled to his portion of land from the suit land and if he so wish he can sell it to the 2<sup>nd</sup> Defendant. For now, the 2<sup>nd</sup> Defendant's certificate of title stands cancelled.

#### **4. Who is to bear the costs of the suit**

Costs usually follow the event and though **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs, the Court can only deviate in special circumstances. In this instance, the Court finds none. The Plaintiffs being the successful parties are therefore entitled to the costs of the suit

The Upshot of the foregoing is that the Court finds that there existed a **customary trust** over the suit property in favour of the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff's husband and they are therefore entitled to a portion of the same. Consequently the Court makes the following orders;

**a. That a Declaration be and is hereby made that the alleged sale of L.R Limuru/Bibirioni /1310 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was null and void hence an order be and is hereby made for the order of cancellation of the Title issued to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> May 2011 on the register should be rectified accordingly.**

**b. That an order be and is hereby made directing that Title Limuru/ Bibirioni/ 1310 be subdivided and registered as follows Patrick Kagotho Njonge getting 1.0 acres,(which share if he so wish, he can sell to Erastus Njoroge Kiarie, the 2<sup>nd</sup> Defendant and or refund to the 2<sup>nd</sup> Defendant the purchase price of 800,000/=) Peter Mukuna Njonge 0.90 acres and George Kamau Njonge 0.50 acres.**

**c. That An order of permanent injunction be and is hereby made restraining the 2<sup>nd</sup> Defendant either by himself, his agents, servants nominees, representatives and or any other person claiming under him from evicting, erecting and or interfering with the 1<sup>st</sup> Plaintiffs occupation and use of their portion of 0.50 acres in L.R Limuru/Bibirioni/1310 and or selling transferring, alienating, leasing or in any other way dealing with the said portion. The same orders applies to 0.90 acres which is to be registered in favour of Peter Mukuna Njoroge.**

**d. The Defendants will bear the costs of the suit**

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27<sup>TH</sup> DAY OF JANUARY, 2022

L. GACHERU

JUDGE

Delivered online;

In the presence of

M/s Kinuthia for the 1<sup>st</sup> Plaintiff

Mr Mwangi for the 2<sup>nd</sup> Plaintiff

M/s Kimani H/B M/s Wambui for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Kuiyaki – Court Assistant

L. GACHERU

JUDGE