



Kamande & another (Suing as the Secretary and Treasurer of Kiamura Self Help Group and in representative Capacity on behalf of 9 other Plaintiffs as per authority to file suit filed Herewith) v Alldays Limited & 3 others (Environment & Land Case 454 of 2017) [2022] KEELC 3695 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 454 OF 2017**

**CA OCHIENG, J
JULY 26, 2022**

BETWEEN

MINNIE WAHU KAMANDE 1ST PLAINTIFF

ELIZABETH WANJIRU NGATIA 2ND PLAINTIFF

SUING AS THE SECRETARY AND TREASURER OF KIAMURA SELF HELP GROUP AND IN REPRESENTATIVE CAPACITY ON BEHALF OF 9 OTHER PLAINTIFFS AS PER AUTHORITY TO FILE SUIT FILED HEREWITH

AND

ELIZABETH MUENI NGOTHO (SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY ATHANUS NGOTHO) 1ST DEFENDANT

ALLDAYS LIMITED 2ND DEFENDANT

BERNICE KANINI NGOTHO (SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY ATHANUS NGOTHO) 3RD DEFENDANT

JAMES MUINDI NGOTHO (SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY ATHANUS NGOTHO) 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated the 15th November, 2017, the Plaintiffs pray for Judgment against the Defendants jointly and severally for:
 - a) A permanent injunction order restraining the Defendants whether by themselves or through their agents, kin, servants, workers and/or anyone claiming under them from trespassing, harassing, evicting, disposing off, selling, double allocating, charging and/or in any other



manner interfering with the Plaintiffs' quiet use, possession and occupation of Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 And Mavoko Town Block 2/1396.

- b) A Declaratory Order that the Defendants are under a duty to give effect and to transfer the suit premises to the various Plaintiffs as follows:

NAMES OF OWNERS	PLOT/TITLE NUMBERs
BENTER ATIENO	MAVOKO TOWN BLOCK 2/1392
BENTER ATIENO	MAVOKO TOWN BLOCK 2/1483
ELIZABETH WANJIRU NGATIA	MAVOKO TOWN BLOCK 2/1378
ELIZABETH WANJIRU NGATIA	MAVOKO TOWN BLOCK 2/1379
ELIZABETH WANJIRU NGATIA	MAVOKO TOWN BLOCK 2/1380
MARGARET MWEMBU MACHARIA	MAVOKO TOWN BLOCK 2/1361
JOLLY WOMEN	MAVOKO TOWN BLOCK 2/1359
KIAMURA WOMEN GROUP	MAVOKO TOWN BLOCK 2/1362
KIAMURA WOMEN GROUP	MAVOKO TOWN BLOCK 2/1363
MARY NYAMBURA NJENGA	MAVOKO TOWN BLOCK 2/1360
SUSAN WAITHERA WARUI	MAVOKO TOWN BLOCK 2/1440
KIJABE 1967/68	MAVOKO TOWN BLOCK 2/1481
KIJABE 1967/68	MAVOKO TOWN BLOCK 2/1482
JAMES WAWERU KAMANDE	MAVOKO TOWN BLOCK 2/1486
THE LADIES OF THE MOUNT	MAVOKO TOWN BLOCK 2/1394
THE LADIES OF THE MOUNT	MAVOKO TOWN BLOCK 2/1395
THE LADIES OF THE MOUNT	MAVOKO TOWN BLOCK 2/1396

- c) Mandatory Order compelling the Defendants to make the said transfers in favour of the Plaintiff.



- d) In the alternative to Prayer (c) above, an order authorizing the Deputy Registrar of this Honourable Court to execute all the necessary consents and conveyance documents to give force to the effectual transfer of the suit premises and registration of each parcel of land in the name of the respective Plaintiff.
 - e) General and punitive damages and interest thereon until payment in full.
 - f) Costs of this suit and interest thereof.
 - g) Any other relief that the Honourable Court may deem fit to grant.
4. The Defendants filed a Statement of Defence dated the 12th February, 2018 denying the averments in the Plaint except the descriptive and jurisdiction of the court. They contend that the entities referred to as Kiamura Self Help Group, Jolly Women, Kiamura Women Group, Kijabe 1967/68 and Ladies of the Mount have no capacity in law to sue in the manner presented before this court. Further, no authority to sue is presented on their behalf. They aver that no Power of Attorney has been presented to sue on behalf of other individuals being Benter Otieno, Margaret Mwembu Macharia, Mary Nyambura Njenga, Susan Waithera Warui and James Kamau Kamande respectively. Further, that no Verifying Affidavit has been filed in court by majority of the Plaintiffs and the suit is statute barred by dint of Section 4 of the *Limitation of Actions Act*. They contend that the 1st Defendant is non-suited while the 2nd, 3rd and 4th Defendants are wholly insulated by the provisions of the *Trustee Act*. They admit that the deceased Anthony Ngotho (deceased) was at one time the registered owner of the following properties: Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396 hereinafter referred to as the 'suit lands'. They deny that the Plaintiffs are owners or purchasers of the suit lands and claim the said suit lands are registered in the names of third parties. Further, that they never entered into any Sale Agreements in respect to the suit lands with the Plaintiffs either in their personal capacity or as administrators of the estate of the deceased. They deny receiving any consideration in respect to the suit lands and state that the evidence of receipts of the alleged payments are forgeries. They further deny appending their signatures to any receipts purportedly issued by the deceased either prior to or post his death. They admit that some of the purchasers were allocated their purchased property through the succession cause after verification and validation of documents issued in support of their claim. They highlight certain elements of the transaction in respect to the dispute herein, admit the deceased wrote a letter of authority dated the 18th March, 2015 forwarding certain receipt books to a Ms. Minnie Gitau but insist the receipts produced in support of the Plaintiffs claim are fraudulent. Further, that no authority of the administrators was obtained so as to issue the said receipts. They deny that the Plaintiffs have been in quiet possession and or occupation of the suit lands and insist the Plaintiffs' claim are not genuine.
5. The Plaintiffs filed a reply to Defence reiterating their averments and insisting that they were entitled to the orders as sought. They explain that the rectified Certificate of Confirmation of Grant dated the 28th January, 2014 creates no trusts over the suit lands and as such the Respondents are not protected by the *Trustees Act*. They contend that the Plaintiffs are purchasers of the suit lands and confirm that one of the Administrators issued a Letter of Authority to Joseph Wamugu to collect the outstanding balances. Further, that the receipts presented were not forgeries and any registration of the suit lands to third parties was done to defeat their interest.



6. The matter proceeded for hearing where the Plaintiffs called six witnesses while the Defendants had two witnesses.

Evidence of the Plaintiff

7. The Plaintiffs testified that they purchased the suit lands from the estate of Anthony A. Ngotho. They commenced the process of purchase before the deceased died in 2007. They stated that after the deceased demise, they continued to pay the purchase price through PW1 and PW6 who had been appointed as agents to sell the suit lands on behalf of the deceased. PW1 and PW6 confirmed that the deceased gave them receipt books to issue to purchasers who paid their respective purchase price for the suit lands. Further, that PW1 and PW6 transmitted the balance of the purchase price to the 1st Defendant that was a company formed by the deceased children after his demise. It was PW1 and PW6's testimony that the children of the deceased who later became administrators of his estate advised them to forward the purchase price to the 1st Defendant's account. PW6 explained that prior to the deceased demise, the deceased used to prepare Sale Agreements, transfer as well as consent after receipt of the full purchase price from the purchasers. The Plaintiffs claimed the deceased children who are administrators promised to transfer to them their respective portions of the suit lands after they concluded the succession process in respect to the deceased estate but they failed to do so. Further, that they had taken possession of their respective portions of the suit lands. The Plaintiffs produced the following documents as exhibits: Copy of letter of authority dated 18th March, 2005; Copy of letter of authority dated 31st August, 2007; Copies of receipts issued by the Defendants; Copies of Title Deeds; Copies of acknowledgements of payment; Copies of bankers cheques; Copy of demand letter dated 30th April, 2013 from Messrs Gichuru & Gichuru Advocates; Copy of demand letter dated 9th May, 2017 from Messrs Wachira Maina & Co. Advocates; Copy of letter dated 7th September, 2011 from Kijabe 1967/68 to Messrs Gichuru & Gichuru Advocates; Copy of letter dated 26th November, 2010 from Plaintiff to F. Gitau Advocate; Copy of letter dated 29th October, 2010 from Plaintiff to F. Gitau Advocate; Copy of letter dated 3rd November, 2009 from Plaintiff to 1st Defendant and attached schedule of payments; Copy of letter dated 19th October, 2009 from 1st Defendant to Plaintiff; Copy of letter dated 16th October, 2009 from Plaintiff to 1st Defendant; Copy of letter dated 17th August, 2009 from 1st Defendant to Plaintiffs; Copy of letter dated 13th April, 2005 from Anthony Ngotho to Plaintiff; Copy of Certificate of Registration of Kiamura Women Group dated 29th January, 2002 and any other document that may become necessary at the hearing.

Evidence of the Defendants

8. The Defendants disputed that the Plaintiffs had paid the full purchase price for the respective portions of the suit lands they were claiming. DW1 however confirmed that she was aware their deceased father had appointed PW1 and PW6 as agents to sell the suit lands to respective buyers. Further DW1 was aware her late father gave receipt serial numbers 501-550 to PW1. DW1 further testified that she was aware PW1 and PW6 were given a letter dated the 31st August, 2007 to conclude the sale and collect the balances on behalf of the deceased estate. Further, that the 1st Defendant undertook to issue titles to the Plaintiffs' upon payment of purchase price. However, the Defendants contended that the Plaintiffs had not finalized the payment of the purchase price. Further, that they received many receipts from PW1 but could not confirm why payments were made as there were no Sale Agreements. They insisted that they were not satisfied with the documentation and decided to transfer the suit lands into the names of the deceased beneficiaries. On cross-examination, DW1 confirmed seeing evidence of payments in the 1st Defendant's statement including copies of bankers' cheques. She agreed that they received monies from the Plaintiffs and stated that the



receipts presented were not a forgery. The Defendants insisted that for the purchasers who were correctly identified, they managed to transfer to them their respective portions of the land *vide* the Succession Cause. The Defendants confirmed having meetings with the purchasers herein but insist the documentation sought was not forthcoming. They averred that the letter dated the 31st August, 2007 could not bind all the administrators of the deceased Estate as it was only written by Elizabeth Mueni Ngotho. The Defendants produced the following documents as exhibits: Certified copy of the Death Certificate of Anthony Athanas Ngotho dated 14th July, 2007; Grant of Letters of Administration Intestate (Nairobi Succession Cause No. 553 of 2007 – In the matter of the Estate of Anthony Athanas Ngotho) dated 2nd July, 2007; Rectified Certificate of Confirmation of Grant dated 28th January, 2014; Search on Certificate of Registration of Self-Help Group/Organisation of Kijabe 67/68 (KISSE) dated 26th February, 2018; Search on Certificate of Registration of Self-Help Group/Project for Kiamura Women Self-Help Group dated 26th January, 2018; Application for official search in respect of Mavoko Town Block 2/1392 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1392 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1483 dated 8th June, 2018; Certificate of official search in respect of Mavoko Town Block 2/1483 dated 13th August, 2018; Certificate of official search in respect of Mavoko Town Block 2/1378 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1379 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1379 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1361 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1361 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1359 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1359 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1362 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1362 dated 7th March, 2018; Application for official search in respect of Mavoko Town Block 2/1363 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1363 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1360 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1360 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1440 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1440 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1481 dated 5th March, 2018; Application for official search in respect of Mavoko Town Block 2/1481 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1482 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1482 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1486 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1486 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1394 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1394 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1395 dated 5th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1395 dated 6th March, 2018; Application for official search in respect of Mavoko Town Block 2/1396 dated 8th March, 2018; Certificate of official search in respect of Mavoko Town Block 2/1396 dated 13th June, 2018 and Land Sale Agreement dated 24th August, 2006.



Submissions

Plaintiffs' Submissions

9. The Plaintiffs in their submissions reiterate their claim including evidence presented and contended that they were bona fide purchasers for value of the suit lands as they purchased the same from Anthony Ngotho who was their owner prior to his demise. However, the deceased died before effecting the transfers to them. They aver that the Defendants transferred some of the suit lands to the beneficiaries as well as third parties to defeat justice. They state that the Defendants were holding the suit lands in trust for the Plaintiffs. Further, that an element of constructive trust had been created. They reiterate that they are hence entitled to the orders as sought. To buttress their averments, they relied on the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR.

Defendants' Submissions

10. The Defendants in their submissions rely on their Defence including evidence presented. They insist that the Plaintiffs claim cannot be sustained as there were no Sale Agreements. They deny receipt of consideration for the suit lands, dispute the receipts produced by the Plaintiffs and insist that the same were for other parcels of land. Further, that receipts of payment tendered on pages 16, 17 and 18 were issued by the 1st Plaintiff contrary to the letter of authority dated the 17th February, 2006. They contend that the Plaintiffs have not produced any deposit slips to confirm payment nor tendered any evidence on the ascertained purchase price as well as the respective properties. They deny that a constructive trust exists between the Plaintiffs and them. They further submit that the administrators of the deceased Estate have no contractual nor legal obligation to transfer any titles in favour of the Plaintiffs as there was no contractual relationship between them. They further reiterate that the letter dated the 31st August, 2007 was issued contrary to Section 24 of the *Trustees Act* as it was issued by Elizabeth Mueni Ngotho in her capacity as one of the directors of the 1st Defendant and not as a personal representative of the Estate of the deceased. Further, that the 2nd, 3rd and 4th Defendants never endorsed the said letter as administrators of the deceased Estate. They contend that the Plaintiffs are hence not entitled to the reliefs sought as there is no proof that deposits were made into the deceased Standard Chartered Account as pleaded by the Plaintiffs. To support their arguments, they relied on the following decision: *Heartbeat Limited Vs Ngambwa Heartbeat Community Children's Home & Rescue Centre* (2018) eKLR.

Analysis and Determination

11. Upon consideration of the Plaint, Defence, testimonies of the witnesses, exhibits including submissions, the following are the issues for determination: Whether the Plaintiffs commenced purchasing their respective portions of the suit lands from the deceased Anthony A. Ngotho prior to his demise. Whether the Defendants received the purchase price from the Plaintiffs. Whether the Defendants are entitled to transfer the said portions of the suit lands to the Plaintiffs.

I will deal with all these issues jointly.

12. It is not in dispute that the 2nd, 3rd and 4th Defendants are the administrators of the estate of Anthony Anthanus Ngotho *vide* a Certificate of Confirmation of Grant issued on 11th September, 2009 and rectified on 28th January, 2014. What is in dispute herein is the Plaintiffs' claim that they purchased portions of the suit lands as itemized above and to date the Defendants have failed to effect the transfers to them. According to the testimonies of all the Plaintiffs' witnesses, they commenced purchasing the suit lands prior to the deceased demise as evident in the receipts produced as exhibits which were



issued from the year 2005 upto 2007. I note as per the letter dated the 18th March, 2005 from the deceased addressed to the 1st Plaintiff, he had given her receipts ranging from numbers 501-550 in respect to sale of his plots Mavoko Block II (Katani). The Defendants disputed the receipts but PW6 explained the discrepancies in the said receipt by making reference to a letter dated the 17th February, 2006, which indicated that the receipt books were ranging from Nos. 2251 to 2230. PW1 and PW6 admitted that the Plaintiffs paid the purchase price for their respective plots through them, after which they forwarded the amounts to the deceased and later paid monies to the 1st Defendant after the deceased demise. It emerged in evidence that the 2nd Defendant *vide* a letter dated the 31st August, 2007, authorized PW1 and PW6 to finalize the transactions in respect to the suit lands. I will proceed to reproduce the contents of the said letter hereunder:

“ Authority is hereby granted by the family of the late Mr. A. A. Ngotho to conclude sales of Mavoko Town Block II and collect on our behalf the remaining balances of the already sold plots.”

13. I note thereafter several payments were made in the name of the 1st Defendant and the Plaintiffs have produced some bankers' cheques including a receipt of Kshs. 90,000 dated the 22nd June, 2009 from the 1st Defendant to prove payments for land at Katani. Further, there are also bank statements produced by one of the Plaintiffs to confirm that the 1st Defendant indeed received monies from them. I note as per a letter dated the 26th November, 2010 addressed to Messrs F. Gitau Advocate, PW1 and PW6 confirmed that it was the 2nd Defendant who had referred them to him and forwarded the details of the receipts indicating the payments the Plaintiffs had made in respect of the suit lands. DW1 initially denied that they did not grant instructions to PW1 to send a letter to the said lawyer in respect to the transaction herein, but upon cross-examination she admitted that he was their lawyer. Further, I note PW1 and PW6 wrote a letter dated the 29th October, 2010 to the Defendants' lawyer F. Gitau, where they provided a history of the dispute herein, and I will reproduce an excerpt hereunder:

“ Sometime in March 2005, Mr. Ngotho approached Omega Commercial Services Ltd with a request to sell land on Mavoko Block II. His authority dated 18th March, 2005 to sell, issue receipts to the buyer and bank the total purchase price into his personal account is hereby attached. The buyers paid in instalment of unspecified amount. At the end of payment Mr. Ngotho and the buyers signed the application forms for consent which culminated into a Sale Agreement to be approved by the Land Board. All the plots sold by us were transferred except the following 17 plots which were not transferred due to balance owing and the death of Mr. Ngotho. 1392, 1483, 1378, 1379, 1380, 1361, 1359, 1362, 1363, 1360, 1440, 1481, 148, 1486, 1394, 1395, 1396. (A Copy showing the owners is attached). ...Balances were collected and forwarded to All Days Ltd. Where Mr. Francis and Mr. Joseph ratified the receipt issued by signing them at the back and rubber stamping them with All Days Ltd rubber stamp.... The last payment of Kshs. 90,000/= was received by Elizabeth Ngotho who issued a copy of which is attached. All the transfer forms and required attachments were signed by the buyers and forwarded to All Days Ltd office to await the letter of administration to be issued to the estate administrators. A letter requesting the buyers to wait and promising to transfer the land is also attached. Most of the balances were paid by bankers cheques.”

14. The Plaintiffs contended that the Defendants promised to effect transfers to them upon receipt of the Certificate of Confirmation of Grant and produced a letter to that effect, but the Defendants failed to do so. From the evidence of PW1 and PW6 including DW1, it emerged that PW1 and PW6 were



agents of the deceased in respect of Sale of the suit lands. PW6 explained in his testimony that it is the deceased who used to prepare Sale Agreements, Transfer and Consent once he received the full purchase price for the respective suit lands. DW1 and DW2 insisted they failed to transfer the suit lands to the Plaintiffs, as the documentation was not authentic. In cross-examination, DW1 admitted that after the death of their father, the 1st Defendant received monies from the Plaintiffs. DW1 further confirmed that there were payments made to their accounts but contended that she did not know the reasons for the said payments since there were no Sale Agreements. The Defendants' witnesses further admitted that their late father gave receipt books to PW6. The Defendants denied that the Plaintiffs had not taken possession of the suit lands but the Plaintiffs insist they have done so. The Defendants in their submissions contend that since there were no Sale Agreements, the Plaintiffs are not entitled to the orders as sought.

15. First and foremost, I note that the deceased commenced selling the suit lands to the Plaintiffs prior to his demise and even received funds to that effect but the Defendants failed to inform the Court during Succession proceedings that the Plaintiffs were creditors to the estate. Further, that there was an agency arrangement between the deceased as well as PW1 and PW6. The Defendants in their defense insist parts of the suit lands have been transferred to third parties and not available. I have had a chance to peruse the Certificate of Confirmation of Grant and note that the same was obtained after the Plaintiffs had continued to pay for the suit land. Further, the Directors of the 1st Defendant indeed received monies from the Plaintiff and to my mind, they are not being candid when they claim they did not know what the monies were for while they wrote a letter dated the 19th October, 2009 to PW6, seeking land transaction documents, payment account details and receipts for Katani plots since the year 2007. I find that as per the provisions of the [Law of Succession Act](#), the suit lands were not available for distribution to the Defendants and Third Parties as there were already creditors over them. The Defendants have insisted that since there were no sale agreements, the Plaintiffs claim cannot stand.
16. In the case of [Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mobammed Investments](#) [2014] eKLR, the Court of Appeal held that:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the [Law of Contract Act](#) is one such provision.”
17. While Lord Clarke in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, observed that:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”



18. Further, Lord Reid in *Steadman v Steadman* (1976) AC 536, 540 stated that:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

19. See also the decision of *Ali Abdi Mohamed v Kenya Shell & Company Limited* [2017] eKLR.

20. Based on the facts as presented while associating myself with the decisions I have cited above, insofar as there were no Sale Agreements, I find that there indeed existed an implied contract between the Administrators of the deceased Estate herein and the Plaintiffs. Further, I find the Defendants defence amounted to mere denials as they continued to receive the balance of the purchase price from the Plaintiffs and even issued a Certificate of title to PW1 after their father’s demise. I also hold that the agency agreement PW1 and PW6 had with the deceased to sell the suit lands to the Plaintiffs is valid and indeed the Defendants who are administrators of his Estate could not escape from it. The Defendants contended that since the Plaintiffs failed to furnish the deceased bank statements to prove payments, the claim cannot stand. However, at this juncture, I wish to shift the burden of proof to them as I note it is the 2nd to 4th Defendants who are the administrators of the deceased estate and have the benefit of obtaining the deceased bank statements as opposed to the Plaintiffs who cannot be issued with the same. Further, that it was the Defendants duty to furnish court with the bank statements for the 1st Defendant. Since the Plaintiffs confirmed that they are in possession of the suit lands, while associating myself with the findings in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR I hold that an element of constructive trust was created between the Plaintiffs and the deceased Estate. I opine that the Defendants are entitled to transfer the respective portions of the suit lands to the Plaintiffs. I however find that the Plaintiffs failed prove their claim for general as well as punitive damages plus interest and will decline to award it.

Who should bear the costs of the suit.

21. Since the Plaintiffs have been inconvenienced with the Defendants’ failure to effect transfer of the suit lands to them, they are entitled to costs of the suit.

22. It is against the foregoing that I find the Plaintiffs have proved their case on a balance of probability and will enter Judgment in their favour as against the Defendants. I will proceed to make the following final orders:

- i. A permanent injunction be and is hereby granted restraining the Defendants whether by themselves or through their agents, kin, servants, workers and/or anyone claiming under them from trespassing, harassing, evicting, disposing off, selling, double allocating, charging and/or in any other manner interfering with the Plaintiffs’ quiet use, possession and occupation of Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 And Mavoko Town Block 2/1396.



- ii. The Defendants be and are hereby directed to effect transfer of the aforementioned suit lands to the various Plaintiffs as itemized above, within ninety (90) days from the date hereof, failure of which the Deputy Registrar of the Environment and Land Court do execute all the necessary consents including conveyance documents to give force to the effectual transfer of the suit lands as well as registration of each parcel of land in the name of the respective Plaintiffs.
- iii. Costs of this suit is awarded to the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2022

CHRISTINE OCHIENG

JUDGE

