Waningilo v Baraza & another (Environment & Land Case 2 of 2019) [2022] KEELC 3279 (KLR) (11 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3279 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 2 OF 2019

FM NJOROGE, J

AUGUST 11, 2022

BETWEEN

JOSEPH SAWENJA WANINGILO ..... PLAINTIFF

AND

SAMMY BARAZA ..... 1ST DEFENDANT

EDDAH BARAZA ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff instituted the present suit against the defendants by way of a plaint dated 3/1/2019 seeking reliefs against them jointly and severally as follows:

   (a) An order of permanent injunction be issued restraining the defendants, their servants, agents or employees or any other person acting under them from entering into, tilling, planting, leasing, selling off or doing an act on that parcel of land known as Trans-Nzoia/Koronga/11.

   (b) A declaration that the plaintiff is the bona fide and legitimate owner of that parcel of land known as Trans-Nzoia/Koronga/11.

   (c) The title deed issued in respect to that parcel of land known as Trans-Nzoia/Koronga/11 be revoked and or cancelled.

   (d) The register in respect of that parcel of land known as Trans-Nzoia/Koronga/11 be amended to reflect the name of the plaintiff as the proprietor.

   (e) Costs of this case.

   (f) Any other relief the court deem fit to grant.

Pleadings

The Plaint

2. In the plaint, the plaintiff states that the defendants are the legal administrators of the estate of the late John Barasa Khaoya; that sometime in January, 1985, he entered into a sale of land agreement with the said John Barasa Khaoya whereby he purchased 50 acres of land known as Goronga Settlement Scheme Plot No. 11 for consideration of Kshs.500,000/=;the plaintiff took immediate possession and control, use and occupation of the said land; that John Barasa Khaoya passed on in 1987; his widow Ruth Barasa Khaoya and the entire family were cooperative and allowed the Plaintiff quiet and peaceful possession for 33 years; that however, on 29th and 31st December 2018 persons unknown to the Plaintiff entered into the suit land claiming to have leased the same from Jimmy Baraza, Patrick Baraza and Aileen Baraza; that it has now transpired that the defendants are alleging that the arrangement between the Plaintiff and their late father was a lease and not a purchase agreement. The Plaintiff has also learned that the defendants have obtained a title deed to the suit land which action he claims is fraudulent. Particulars of fraud on part of the defendants have been set out in paragraph 10 of the plaint. The Plaintiff maintains that having bought the land for valuable consideration, he is entitled to exclusive use thereof and he risks considerable prejudice should the Defendants not be restrained from their actions which according to him amount to actionable trespass hence this suit.

The Defence and Counterclaim

3. The defendants denied the plaintiff's claim in their Defence and Counterclaim dated 11/2/2019 and filed on 12/2/2019. They stated that they legally obtained the title deed to the suit land; that the Plaintiff is neither a bona fide purchaser nor owner of the suit land as he had failed to pay the agreed purchase price for the same; that they are entitled to enter and use the suit land since they are the registered proprietors and the Plaintiff is not so entitled; they maintain that the Plaintiff has no cause of action against them.

4. In their counterclaim they reiterate that they are the duly registered proprietors of the suit land in their capacity as administrators of the estate of their late father; that the suit land was allotted to the deceased in 1973 but was registered in the names of the Defendants on 1/7/2016 when it was transferred by the Settlement Fund Trustee (SFT) to the defendants; that though on 7/2/1985 the Defendants' father and the Plaintiff executed a sale agreement, the Plaintiff paid only a deposit of Kshs.97,000/= on execution and took possession and he was to observe some other contractual terms as follows:

    a. The Plaintiff would transfer Plot No. 5 Site and Service Scheme situate in Kitale Municipality valued at Ksh. 175,000/=, to the Defendant's father in part payment of the consideration.

    b. The Plaintiff would pay the Defendant's father Kshs. 28,000/= on or before 28/2/1985 and

    c. The Plaintiff would pay the defendant's father the balance Kshs. 200,000/= on or before 30/3/1986.

5. Contrary to the sale agreement executed between parties the Plaintiff failed to transfer Plot No. 5 to the Defendant's father and the same is still registered in his name to date. He also failed to pay the sum of Kshs. 228,000 being balance of the purchase price. According to the Defendants, this default disentitles the Plaintiff from claiming ownership of the suit land. The Defendant also denies that the Plaintiff is entitled to be registered as owner by prescription since a twelve-year period has not accrued since the suit land was transferred by the SFT to the Defendants. The Defendants seek a declaration that they are the rightful proprietors of the suit land and the Plaintiff has no proprietary interest in

the same, an order of eviction against the Plaintiff as well as a permanent injunction restraining the Plaintiff and his agents from interfering with the suit land.

Reply to Defence and Defence to Counterclaim

6. On 13/8/2019 the plaintiff filed Reply to Defence and Defence to Counterclaim. He reiterates the contents of his plaint and prays that the counterclaim be dismissed.

Sevidence of the Parties

The Plaintiff's Evidence*

7. The hearing of the suit commenced on 2/7/2021 when PW1, Joseph Sawenja Waningilo (Plaintiff) testified. He adopted his witness statement dated 3/1/2019 as his evidence-in-chief. His evidence followed the contents of the plaint, with additional information as to how he paid the entire consideration sum. He stated that the land was sold to him by the Defendant's father for Kshs. 500,000 and that he had paid Kshs. 97,000 for it through Kapten, Advocates by the date of execution of the agreement on 7/2/1985; he paid Kshs. 61,200 on the 24/4/1984 by a voucher (PExh.2). He paid a further Ksh.20,000 through a receipt dated 17/1/1985 (PExh.3); Kshs.15,000 through a receipt dated 30/1/1985 (PExh.4); Kshs.15,000 through a voucher dated 7/2/1985 (PExh.5); Kshs.15,000 through receipt dated 19/2/1985 (PExh.6); Kshs.8,000 through a receipt dated 26/2/1985 (PExh.7); Kshs.23,000 through payment voucher dated 23/5/1985 (PExh.8); Kshs.300 through payment voucher dated 30/7/1985 (PExh.9); Kshs.1,000 through payment voucher dated 6/8/1985 (PExh.10); Ksh.3,000 through payment receipt dated 7/11/1985 (PExh.11); Kshs.800 through payment voucher dated 24/12/1985 (PExh.12) though indicated to be a "loan" on its face; Kshs.1600 through payment voucher dated 27/9/1985 (PExh.13); Kshs.5900 through payment voucher dated 16/4/1986 (PExh.14); Ksh.7,000 through a receipt dated 11/4/1986 (PExh.15); Ksh.3,000 vide a voucher dated 1/9/1986 (PExh.16).

8. PW1's further evidence was that three days after the demise of John Barasa Khaoya a traditional ceremony, "lufu" was conducted. The purpose of that ceremony is for any person to show if they are indebted to the deceased or if he was indebted to them; the deceased came from the Baliuli clan; PW1 attended the lufu ceremony and made his presentation stating that he had bought the suit land. According to PW1's evidence the clan said that they cannot go against the deceased's wish and action. The clan wrote a letter to him on 11/8/1989 in which they stated that he should help them with some other problems since the advocate Kapten had refused to give them any more money and they owed another advocate some money they needed to pay. That advocate had represented the family of one Dorcas Wanjala to whom the family had owed some money. The clan resolved that PW1 should pay monies to Kapten which would be applied to the settlement of that debt and so he paid Ksh. 80,000/= pursuant to the letter from the clan. According to PW1 the family did not specify how much was to be paid for the debts. As he had been close with John Barasa and he did not want his children to suffer PW1 paid the money to Kapten and Kapten paid the same to the other advocate and the receipt of Kshs. 80,000 (PExh.18) was issued. (However it is noted here that P.Exh 18 bears the date 10/5/1989, which is exactly 3 months earlier than the letter from the only letter alleged to be from the Balioli clan dated 11/8/1989 (PExh 19.)

9. PW1 also claimed that in January 1987 he also paid Kshs. 150,000 to the deceased as the latter was travelling to Nairobi. By that time the deceased had lost his job. PW1 stated that no acknowledgement was made for the Kshs 150,000/= since it was given on trust that when he came back both would visit advocate Kapten's office where they would get an acknowledgement. It was after that when PW1 heard that John Barasa Khaoya had died by reason of alleged assault by one of his children.

10. According to PW1 the clan knew him and it was aware of his possession of his suit land. PW1 stated further that he was summoned by a local administrator over a complaint by the children of the deceased to the effect that he had refused to vacate the land and his response to him was that he had bought the land. It was then that he was shown a copy of the title deed issued to the Defendants.

11. PW1 maintained that before 2019 he had never been asked to vacate the land; he had been leasing the land to James Muigai Thungu and Simon Mbugua Thungu earlier on; he produced in support of that allegation 2 lease agreements dated 30/11/1996 and 28/1/2003 respectively and stated that the Defendants' mother had been a witness to the lease agreements. The first lease was admitted in evidence as PEx.20 while the second one was not.

12. The plaintiff stated that after John Barasa died the family did not claim the land and communication of its claim initially came through the County Commissioner's office. he stated that the family had accused him of entering the suit land and refusing to vacate. He admitted however that in 1997, however the Defendants' mother had disturbed him regarding the suit land and he had resorted to going to Kapten Advocate who prepared a caution which he took to Eldoret for registration but which was not registered.

13. According to PW1, by 1997, he thought that he had already paid for the land in full and the Defendants had never come to demand to know how he had obtained access to the land. He further stated that he was not informed of the succession proceedings and that if there is any balance of the purchase price which remains unpaid he has not refused to pay and the matter can be discussed between the parties.

14. According the plaintiff, he had agreed to give the plot No. 5 to John Barasa but he had not conveyed it to him as at the time of his demise but the plot is still available. He wants the defendants' title deed to be cancelled and a title deed issued in his name.

15. Upon cross-examination by Mr. Samba he stated that PExh.1 was the only sale agreement over the suit land executed between him and the deceased; that it was true he was to surrender his plot Number 5 to the deceased as part of the consideration besides paying other the monies in the agreement but he had not surrendered the plot; he maintained that he had paid all the consideration required in the agreement through the Advocate's office. He stated that by 30/6/1986 he had paid Kshs. 28,000; that by the date of the agreement only Ksh.97,000 had been paid for the land; that in 1984 he was leasing the land before he bought it.

16. Concerning the Kshs. 150,000 which the plaintiff claimed to have paid to the deceased, he stated that they met at Kitale Hotel after the deceased asked to meet him. He had carried with him Kshs 150,000/=, Kshs. 50,000/= of which had been borrowed from his brother-in-law; the money was in denominations of Kshs 200 and Kshs 20; he carried the Kshs 100,000/= and his brother-in-law carried Kshs. 50,000/=; they took about an hour in the hotel over the transaction. However, he admitted that the hotel is close to the Advocate's office. He admitted to having failed to mentioning Kshs. 150,000 or his brother-in-law's role in his statement filed in the suit.

17. His further evidence was that the deceased's widow had claimed that the land did not belong to the Plaintiff and in 2012 she was arrested and incarcerated in the police cells at Endebess for having taken a tractor and started ploughing the land.

18. The plaintiff denied collecting any rent from Plot No. 5 but admitted that it is still registered in his name. He visited SFT to establish that John owned the land; he knew that the land was charged to SFT and that was the reason why the caution (PExh.22) was not registered. He repaid the loan. He asserted that he has paid more than Kshs. 500,000 in total for the suit land; that at the time of transaction the defendants were mere children.

19. Under re-examination by Mr. Karani he asserted that he began paying for the suit land even before execution of the agreement and that it was he who preferred paying through the Advocate; except for the Kshs 80,000/= the rest of the consideration was paid in cash and John Barasa Khaoya would receive the money in cash. He admitted that he did not witness the preparation of the vouchers produced in evidence; he stated that the deceased would sign the vouchers in acknowledgement. According to PW1, he had considered the entire consideration as paid and awaited succession proceedings. The deceased had never requested for the transfer of plot No.5 to him and neither did the administrators to his estate. PW1 has also never been sent any letter or notice rescinding the agreement.

20. PW2, Peter Kisiangani Wafula, testified on the same date as PW1. He adopted his witness statement filed on 9/6/2021 as his evidence-in-chief in this suit. His evidence is that in February 1985 the Plaintiff informed him that he and the deceased had agreed on the sale of the suit land to the Plaintiff for the sum of Kshs 500,000/= payable in instalments and that a plot at the Site and Service Scheme was to be involved; that he helped the Plaintiff pay for the land. In 1987, the Plaintiff informed him that the deceased had an urgent need and needed to travel to Nairobi and that the agreement regarding the Site and Service Plot was to be altered and the value be paid in cash. He went to his business and withdrew Kshs 40,000/= and obtained a further Kshs 10,000/= to make it Kshs 50,000/= and took the sum to the Plaintiff. The Plaintiff sold his maize and got Kshs 100,000/= and aggregated it with the Kshs. 50,000/= produced by PW2. The money was in denominations of Ksh.500/= and Ksh.200/=. PW1 and PW2 met at Kitale Hotel with the deceased and the deceased received the money. It was agreed that the deceased would acknowledge receipt of the money when he returned from Nairobi but he died before he acknowledged the receipt. According to PW2 after the demise of John Khaoya the family asked for money and PW2 lent the Plaintiff a further Kshs. 80,000 from his account for which a cheque was prepared in the name of Khaminwa and Khaminwa but the family lawyer Mr. Kapten declined. A second cheque was drawn in the family lawyer's name and the Kshs. 80,000/= was therefore paid.

21. According to PW2, the money was received by John Baraza Khaoya's family in respect of the land. When cross-examined by Mr. Samba, PW2 stated that the Plaintiff is his brother-in-law as he had married his sister. He asserted that he has share in the suit land. He admitted that he is like a second Plaintiff due to his deep interest in the transaction, having been invited by the Plaintiff and having paid Kshs. 155,000/= regarding the transaction. However, he confirmed that he had never spoken with John Barasa before the Kitale Hotel meeting. He knew George Kapten, the Advocate whose office was about 200 metres away from Kitale hotel.

22. PW2's further evidence was that he had worked for the Criminal Investigations Department and he used to earn Kshs. 12,000/= salary per month from that employment; he insisted that Kshs. 150,000/= was not a lot of money such as would require security while dealing with it. The witness expressed surprised to learn that PW1 had stated in his evidence that the Kshs. 50,000/= he supplied him with was a mere loan.

23. Upon re-examination by Mr. Karani PW2 stated that the deceased was uncomfortable with informing Mr. Kapten, advocate the advocate that he had withdrawn the Site and Service plot form the agreement. He only heard from the Plaintiff and from no other source regarding the withdrawal of the Site and Service Scheme Plot from the agreement. No agreement was written down between him and the Plaintiff regarding the Kshs. 50,000/= that changed hands between them as it was given on the basis of trust to the Plaintiff. According to the witness he and the Plaintiff were involved in the payment of the consideration through the advocate. PW2's evidence marked the close of the Plaintiffs' case and DW1 took to the witness stand on the same date.

The Defendants' Evidence

24. DW1, Sammy Barasa Khaoya, the 1st defendant in this suit testified on 21/7/2021. He adopted his witness statement filed on 21/1/2020 as his evidence-in-chief in the case. DW1's evidence is that he is the first born son to the deceased; that the last installment provided for under the agreement (PExh.1) was due on 30/3/1986 but it was not paid by that date; neither was the Site and Service Scheme plot surrendered to the deceased or his family and it is still in the possession on the Plaintiff.

25. DW1 stated that he has never seen any agreement varying the original agreement (PExh.1); he is a co-administrator of the estate of the deceased and the certificate of confirmation of grant (DExh.1) was issued on 10/3/2015; the suit land has a title in the name of the defendants (DExh.2) issued on 1/7/2014; before that, the land was in the name of his father and it was discharged via a discharge dated 18/4/2016 (DExh.3); DW1 was not aware of payment of Kshs. 50,000/= at the Kitale Hotel. He stated that on the date that that Kshs 150,000/= was said to have been paid, his father was ailing and in a Nairobi hospital.

26. The 1st defendant's further evidence was that the plaintiff is still in possession of the land and that no grant had been taken out in respect of the deceased's estate in 1999; the Plaintiff did have any authority to pay any debts on behalf of the family. DW1 was not aware of the purpose of the money paid to Khaminwa & Khaminwa Adcocates. No payment vouchers or other evidence exists in his father's records save evidence to the effect that Kshs. 97,000/= was paid to his late father.

27. Under cross-examination by Mr. Karani, the 1st defendant admitted that the late Tom Barasa was his step brother; that they have not had possession of the land since the title was issued; that they have not had possession of the Site and Service Scheme Plot; that though 1986 was the final year of payments for the suit land other payments appear to have been made as per the payment vouchers made after that date but there is no evidence that the payments therein were paid to his father.

28. DW1 admitted that the Plaintiff has had possession of the land since 1985 and that his mother had attempted to take possession of the land and conduct development thereon but she was unsuccessful. He stated that they have not had access to the land though they had attempted to enter it and they had no demand addressed to Plaintiff to vacate.

29. According to the 1st defendant, the grant of letters of administration to his late father's estate was not obtained clandestinely; it was applied for in Nairobi purely for convenience since he worked at Nanyuki; no notification was given to the Plaintiff that the land would be registered in the administrator's names but the witness insisted that by the time of registration, the agreement was null and void; he also admitted that they have never consulted the plaintiff to ascertain the status regarding the sale and said that they are not interested in the Site and Service plot.

30. DW1 was not aware of the PExh.19, the clan's letter. His mother passed on in September 2012. The witness was also not aware that she witnesses a lease to Simon Mbugua Thungu. DW1 admitted that no refund has been made by the defendants to the Plaintiff and there was no consent of the Land Control Board, and he averred that it is rather late to say that the transaction should be completed.

31. According to the 1st defendant, the ceremony held three days from the date of demise of his father was not "lufu" but "esinini" and at that meeting his mother opposed the agreement and said the money should be refunded. However, she could not go to court over the issue as she was financially handicapped.

32. On re-examination by Mr. Samba DW1 stated that the agreement did not state that the money was to be paid through Kapten Advocate and that since there was no consent of the Land Control Board there

was no agreement to be nullified. He stated that his mother had been arrested for accessing the land without following due process. The clan had no grant of letters of administration over the deceased's estate. The plaintiff has never sought out the family over the issue and the Plaintiff has never taken the family to the Site and Service Scheme Plot.

33. With the conclusion of DW1's evidence the defendants' case was marked closed.

Submissions of the Parties

34. The plaintiff filed his written submissions on 19/8/2021 and supplementary submissions on 21/8/2021. The defendants filed their written submissions on 2/9/2021.

Determination

Issues for determination

35. I have considered the plaint, the defence and counterclaim, the evidence of the parties and the filed submissions. The main issues for determination in this matter are as follows:

    a. Who breached the sale agreement made between the plaintiff and John Barasa Khaoya over the suit land?

    b. Should the title deed issued in the names of the defendants be cancelled for fraud and the register be rectified to reflect the plaintiff as the owner of the suit land?

    c. Is the plaintiff entitled to specific performance?

    d. Are the defendants entitled to orders of possession of the suit land?

    e. What Orders should issue?

The issues are addressed as hereunder.

36. The agreement executed between the plaintiff and the defendant's late father is not denied. It is obvious that the transaction was not completed between the parties and the land was not formally transferred to the plaintiff though he took possession thereof. The question that arises is whether the plaintiff breached the agreement as alleged by the defendants.

37. The backbone of the defendants' defence and counterclaim is that the plaintiff failed to abide by the terms of the sale agreement regarding payment. In his plaint, the plaintiff does not plead that he paid the entire consideration sum in cash to the defendants' father. He stated that he paid that he paid Kshs.97,000 through Kapten, advocate, before the execution of the agreement and the rest in instalments as follows: Kshs.61,200 on the 24/4/1984; Ksh.20,000 17/1/1985; Kshs 15,000 on 30/1/1985; Kshs.15,000 on 7/2/1985; Kshs.15,000 on 19/2/1985; Kshs.8,000 on 26/2/1985; Kshs.23,000 on 23/5/1985; Kshs.300 on 30/7/1985; Kshs.1,000 on 6/8/1985; Ksh.3,000 on 7/11/1985; Kshs.800 on 24/12/1985; Kshs.1600 on 27/9/1985; Kshs.5900 on 16/4/1986; Ksh.7,000 on 11/4/1986 and Ksh.3,000 on 1/9/1986. The total sum allegedly paid by the plaintiff in cash is Kshs 276,800/=.

38. The terms of the plaintiff's agreement with the deceased as to payment of the consideration were as follows: that the deposit of Kshs 97,000/= was to be paid (and had been so paid) before the execution of the agreement; that the plaintiff would transfer a plot to the deceased to represent Kshs 175,000/= of the purchase price; that of the balance, Kshs 28,000/= would be paid on or before 28/2/1985 and Kshs 200,000/= would be paid on or before 30/3/1986. The whole sum of the above arrangement would be

Kshs 500,000/= as required by the agreement. Further, the lease agreement between the plaintiff and the deceased would cease being in force as at the date of execution of the sale agreement, and it must be assumed that is what actually happened.

39. The sale agreement therefore required a deposit of Kshs 97,000/= by the execution date; it also required the transfer of Plot No 5 Site and Service Scheme, Kitale as the next step in the sequence. The next cash instalment, that is Kshs 28,000, was to be paid by or on 28/2/1985. After these three provisions, the agreement clearly states that the final balance of Kshs 200,000/= was to be paid by 30/3/1986. The purchaser was to be given possession of the suit land at the execution of the agreement; in return the plaintiff would put the vendor in possession of Plot No 5 Site and Service Scheme Kitale and he would receive all the rents therefrom with effect from 1/2/1985 (execution was on 7/2/1985.) The consent of the land control board was to be sought by the parties by 28/2/1985.

40. The entire agreement does not state the exact date by which the plaintiff was to transfer Plot No 5 Site and Service Scheme Kitale to the deceased. By what date then was the plaintiff obligated to perform that contractual duty? It must be logically assumed that the events in clauses no. 1-5 of the sale agreement would sequentially follow one another. By the language of the agreement and the sequence of events as listed therein, it can be deduced that the date of such transfer would occur between the date of execution of the agreement and the date of payment of the next cash instalment, that is 28/2/1985.

41. In the transaction, the plaintiff failed in one major respect though; he never transferred the Plot No 5 to the deceased and up to the date of his demise the deceased he never put the deceased in possession of that plot as intended by the agreement. He also never granted the administrators of the deceased's family in possession too though he knew the members of that family very well and interacted with them. In this court's view therefore, a large portion of the value of the purchase price represented by Plot No 5 Site and Service Scheme Kitale, and possibly income and other benefits the deceased was entitled to derive from the plot upon taking up possession was not paid to the deceased and has never been paid to the administrators of his estate to date.

42. The main conundrum about full payment surrounds two significant sums, one of Kshs 150,000/= allegedly paid while the deceased was alive and the second one of Kshs 80,000/= allegedly paid after his demise.

43. The plaintiff's averment that that in January 1987 he paid Kshs 150,000/= in cash to the deceased as further consideration in lieu of the transfer of plot no 5 is totally uncorroborated by way of independent evidence or documents. If it had been proven, the payment of this sum would have gone a long way in proving that more than Kshs 276,800/= was in fact paid to the deceased as part of the consideration. However, there were glaring gaps in the evidence surrounding the payment of the figure of Kshs 150,000/= that made the claim lack credibility.

44. First, the plaintiff and his chief witness PW2 admitted that the hotel at which the plaintiff paid the money to the deceased was just a few metres away from the office of the advocate dealing with the transaction yet they never went to his office for the preparation of an acknowledgment of receipt of the funds by the deceased.

45. Secondly, no credible reason was given as to why they would not appear before the advocate yet the sum transacted was quite a large amount of money carried in cash. PW2 gave the reason that the deceased did not want his advocate to learn that he had withdrawn Plot No 5 Kitale Site and Service Scheme from the sale agreement. I hardly think that the plaintiff would have been so imprudent as to pay the cash value of the plot to the deceased without obtaining formal acknowledgment that the transfer of the plot was to be excluded from the agreement, thus subjecting himself to double jeopardy. PW2 also

stated that he used to earn Kshs. 12,000/= salary per month but he insisted that Kshs. 150,000/= was not a lot of money such as would require security while they were dealing with it.

46. Thirdly, the then substantial sum of Kshs 150,000/= and the details about his brother appeared to have escaped his memory at the time he was recording a witness statement in this case, which is quite implausible. It only emerged in his oral evidence.

47. Fourthly, the plaintiff and PW2 differed on some very mundane issues; for example, that the plaintiff testified that the Kshs 50,000/= that he gave for transmission to the deceased was merely a loan while PW2 testified that it made him acquire an interest in the land to the extent that he considered himself as a second plaintiff in the present suit. It is improbable that the plaintiff would not have known by the time of the giving of evidence that PW2 considered himself a co-proprietor of the suit land. This conflict of evidence rendered the evidence of both witnesses regarding the payment of Kshs 150,000/= subject to doubt as to its veracity.

48. Lastly, there was no evidence that the agreement dated 7/2/1985 had been varied either orally or in writing, to authorize the payment of the balance of the purchase price in cash. The defendants cited the case of Kukal Properties Development Ltd vs Maloo & 3 others 1993 eKLR for the proposition that where a contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add or detract from it.

49. In this court's view, the agreement dated 7/2/1985 was in the plainest language possible regarding payment and no written variation of the contract was presented in evidence by the plaintiff. PW1 admitted that P. Exh 1 was the only written agreement in respect of the suit land. Any alteration of its terms would require a consensus ad idem between the parties, yet this court finds no evidence of such consensus. In the case of *Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999, it was held as follows:

> "...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

50. If the plaintiff was so keen to have the payments of tiny sums recorded as demonstrated by the payment vouchers and receipts he produced, the vexing question that arises is why he would neglect to have the most significant instalment of the purchase price recorded, even informally, between him and the deceased. In this court's view, the evidence of the plaintiff that he paid Kshs 150,000/= to the deceased as part of the consideration for the suit land lacks the credibility that would satisfy this court that it was paid. In brief, the plaintiff has failed to prove on a balance of probabilities that he paid the Kshs 150,000/=.

51. Similar gaps exist in the plaintiff's attempts to demonstrate that he paid Kshs 80,000/= to the deceased's clan as further consideration for the suit land. First, it is to be remembered that there is no explanation given by the plaintiff as to why P. Exh 18, the receipt for the said sum, bears the date 10/5/1989, which is exactly 3 months earlier than the letter from the only letter alleged to be from the Balioli clan dated 11/8/1989 which apparently elicited that receipted payment by the plaintiff (P. Exh 19.) The logical implication arising from that observation is that that document is not genuine. Secondly, there is no evidence that there was any one holding a grant of letters of administration to the deceased's estate such

that perchance this court had found that payment was made, it bound that estate. Any payment of such monies must have been made to unauthorized persons which goes contrary to the provisions of section 45 of the *Law of Succession Act* Cap 160 which provides as follows:

> "(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> (2) Any person who contravenes the provisions of this section shall—
>
> (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
> (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

52. The failed attempt to convince court regarding the payment of the sum of Kshs 150,000/= and the sum of Kshs 80,000/= leaves this court dissatisfied, and it hereby dismisses his claim that he had paid the consideration for the suit land in full. This court further finds that by reason of his failure to pay the entire consideration and in the manner stipulated in the sale agreement, the plaintiff was in breach of a fundamental condition in the sale agreement dated 7/2/1985.

53. Is the plaintiff entitled to orders of specific performance? The defendants, citing Reliable Electrical Engineers Ltd Vs Mantrac Kenya Ltd 2006 eKLR, correctly aver that specific performance is an equitable remedy to be granted not only where the claimant has fully met his obligations but also at the court's discretion.

54. The submission by the plaintiff is premised on the doctrine of constructive trust which as stated herein before, was not pleaded. Parties are bound by their pleadings see the cases of: *Ayub Ndungu V Marion Waithera Gacheru* [2006] eKLR, *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR and *Raila Amolo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR and *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR. They can not be permitted to supply evidence not in accord with their pleadings.

55. Nevertheless, even if it had been pleaded, the evidence of the plaintiff also failed to support that doctrine in that though he proved possession, he failed to prove full payment of consideration so as to become entitled to the orders of specific performance which is an equitable remedy.

56. In the cases of *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* 2014 eKLR and *Willy Kimutai Kitilit vs Michael Kibet* 2018 eKLR cited by the plaintiff, the respective courts dealt with situations where constructive trust was expressly claimed and the full purchase price had been paid contrary to the situation in the present suit. I am not persuaded in the least that the doctrine of constructive trust applies in the instant case. I find that in the circumstances of the instant case the plaintiff is not entitled to an order of specific performance.

57. The next issue to be addressed is whether the defendants' title deed ought to be cancelled for reason of fraud and the register be rectified to reflect the plaintiff as the owner of the suit land. fraud must be pleaded and proved.

58. In *Mutsonga vs. Nyati* (1984) KLR 425, the Court of Appeal held as follows:

> " Whether there is any evidence to support an allegation of fraud is a question of fact".

59. In the case of *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others* [2013] eKLR the Court of Appeal held as follows:

> " It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court."

60. *In R. G. Patel vs. Lalji Makani (1957) E.A. 314*, the court held as follows:

> " Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

61. Do the facts in the present case reveal fraud on the defendants' part and to the standard set out in the decision in R. G. Patel (supra)?

62. It was DW1's uncontroverted evidence that the defendants were registered as the proprietors of the suit land by virtue of their status as administrators of the estate of the deceased, the grant thereto having been confirmed on 10/3/2015.

63. The plaintiff claimed that the grant was obtained clandestinely. DW1 gave evidence, which in this court's view is plausible, that he sought the grant at Nairobi for his own convenience since it was nearer to Nanyuki where he worked. The plaintiff not being the registered owner and his rights to the suit land having not been declared in his favour in a court of law beforehand, there was nothing to restrain the defendants from having the land registered in their names as administrators. Indeed, any other method of acquisition of the title other than through a grant to the defendants under succession law may have been considered as intermeddling. While addressing this issue, it should also not be presumed that the suit land is the only asset of the deceased's estate that was bound to be administered through the grant. The documentation at the Settlement Fund Trustees' office showed that the land belonged to the deceased and the defendants had merely stepped into his shoes by virtue of the grant as administrators, and it was just natural that the land and other assets should be transferred to them. SFT was not joined to the instant suit. In any event, the defendants appear to have acted out of the knowledge that the plaintiff had not paid the entire purchase price to the deceased. They were of the view that he had no interest in the suit land. the upshot of the foregoing is that this court does not find any evidence on record to persuade it to hold that the acquisition of a grant of letters of administration in Nairobi rather than in Kitale amounts to fraud. There is also no other evidence of fraud for that matter. That the defendants were registered as proprietors as administrators of their late father's estate per se is not evidence of fraud;

64. The upshot of the foregoing is that in the circumstances of this case, this court is unable to find that the defendants are culpable of any fraud in the manner in which they acted in respect of the land in this suit.

65. The defendants have counterclaimed for a declaration that they are the rightful owners of the suit property and orders of eviction and a permanent injunction to restrain the plaintiff from interfering

with their quiet possession thereof. The provisions of section 25 and 26 of the *Land Registration Act* provide as follows:

> " 25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
>
> (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
>
> 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
>
> (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

66. The rights of the defendants as proprietors are therefore protected by the provisions of the *Land Registration Act* cited above.

67. Having regard to the fact that the plaintiff was not successful in his attempt to establish fraud on the part of the defendants, this court has only one option, to uphold their title to the suit land. The defendants are in this court's view entitled to the orders that they seek in the counterclaim.

68. Consequently, I hereby dismiss the plaintiff's claim in the plaint dated 3/1/2019 and I allow the defendants' counterclaim dated 11/2/2019 and I issue the following final orders:

a. An order of declaration is hereby issued declaring that the defendants are the rightful proprietors of the suit land comprised in Title No Trans Nzoia/Goronga/11 and the Plaintiff has no proprietary interest in the same.

b. The plaintiff shall remove himself from the suit land Title No Trans Nzoia/Goronga/11 within 90 days of this judgment in default of which he will be forcibly evicted therefrom.

c. An order of permanent injunction is hereby issued restraining the Plaintiff and his agents, after removing himself or after the eviction ordered in (b) above, from interfering with the suit land Title No Trans Nzoia/Goronga/11 or the defendant's quiet possession thereof in any manner.

d. The plaintiff shall bear the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU BY WAY OF ELECTRONIC MAIL ON THIS 11TH DAY OF AUGUST, 2022

MWANGI NJOROGE

JUDGE,

ENVIRONMENT AND LAND COURT, NAKURU.