



REPUBLIC OF KENYA



**Were & another v Ongaro (Deceased) & 7 others (Land Case
13 of 2013) [2022] KEELC 3829 (KLR) (11 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE 13 OF 2013
FM NJOROGE, J
AUGUST 11, 2022**

BETWEEN

ABEL ODHIAMBO WERE 1ST PLAINTIFF

PRAXIDES ASENDWA ODHIAMBO 2ND PLAINTIFF

AND

MARGARET AUDI ONGARO (DECEASED) 1ST DEFENDANT

EVERLINE AKINYI ONGARO 2ND DEFENDANT

SELLAH ACHIENG ONGARO 3RD DEFENDANT

SHAH NEMCHAND 4TH DEFENDANT

PREMCHAND GULABCHAND GUDHKA 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

LAND REGISTRAR, TRANS-NZOIA COUNTY 7TH DEFENDANT

ATTORNEY GENERAL 8TH DEFENDANT

JUDGMENT

1. The plaintiffs filed their initial plaint dated 30/1/2013 on 7/2/2013. They later amended that plaint on 22/12/2014. In the amended plaint they seek the following orders against the defendants, verbatim:
 - (a) A declaration that the 1st and 2nd defendants had no power and/or authority to sale lease, transfer and/or in any other way deal with land parcel Kitale Municipality Block 11/52, the suit land at the time of the alleged sale.
 - (b) A declaration that the 1st and 2nd defendants had no power and/or authority to sale lease, transfer and/or in any other way deal with the suit land at the time of the alleged sale.



- (c) A declaration that the 1st and 2nd defendants had no power and/or authority to transfer the suit land to the 4th and 5th defendants.
 - (d) A declaration that the sale and/or transfer of the suit land, to the 4th and 5th defendants was illegal null and void ab initio.
 - (e) A declaration that the plaintiffs are the bona fide beneficial owners of land parcel known as Kitale Municipality Block 11/52 the suit land herein formerly known as land parcel Kitale Municipality L.R. 2116/260(1.3679).
 - (f) An order of cancellation of title to land parcel Kitale Municipality Block 11/52.
 - (g) An order for rectification of the Land Register, directed at the 6th and 7th defendants, to effect registration of the plaintiffs as the registered owners of land parcel known as Kitale Municipality Block 11/52 [formerly described as Kitale Municipality L.R. 2116/260(1.3679)].
 - (h) An order directed at the Land Registrar, Trans Nzoia County to effect transfer of land parcel Kitale Municipality Block 11/52 into the name of the plaintiffs herein.
 - (i) In the alternative and without prejudice to the foregoing the 1st, 2nd, 3rd and 4th defendants do refund the plaintiffs the current value of the suit land.
 - (j) There be an order for mesne profits.
 - (k) The 1st, 2nd, 3rd, 4th and 5th defendants to pay the value of the developments that were on the suit property.
 - (l) Cost of this suit and interest at court rates.
 - (m) Any other or further relief that this court may deem fit to grant
2. The 4th and 5th defendants filed their amended defence on 12/1/2017; the 3rd defendant filed her defence on 12/5/2015; the 6th, 7th and 8th defendants filed their defence on 21/9/2015 and the 2nd defendant filed her defence on 7/10/2019. On 29/4/2017, Mr Kiarie for the 2nd and 3rd defendants informed the court that the 1st defendant was deceased.

Pleadings

Amended Plaintiff

3. The plaintiffs' claim in this matter is that they entered into a sale agreement with the 1st and 2nd defendants on or about 12/4/2010 for the sale to the plaintiffs of LR NO 2116/260 (currently known as Kitale Municipality Block 11/52); that the plaintiffs discharged their obligations in the sale agreement and took possession of and developed the suit land but the defendants, without any justifiable cause, refused to sign the transfer forms and honour their obligations under the sale agreement; that the plaintiffs then obtained injunctive orders against the 1st and 2nd defendants; that on 6/12/2013 the 1st -5th defendants attempted to evict the plaintiff from the suit land, whereupon they were informed of pending litigation and an injunction over the suit land and they abandoned the eviction attempt until 19/12/2013 when they successfully effected eviction; that the eviction is unlawful and in breach of the sale agreement between the plaintiff and the 1st and 2nd defendants and that the 1st and 2nd defendants had no capacity to transfer the land to the 4th and 5th defendants, hence the suit.



Defence

4th & 5th Defendants' Amended Defence

4. In their amended defence, the 4th and 5th defendants denied the claim and stated that they were not aware of any injunctive orders in respect of the suit property and they became aware of the suit upon service of the summons; that they are bona fide purchasers for value without notice; that they purchased the suit land for Kshs 10,000,000/= which they paid to the 1st and 2nd defendants and that they are now the registered proprietors in accordance with the Land Registration Act; that a certificate of lease was issued to them after the necessary procedures were followed; that they never had any privity of contract with the plaintiffs and that the suit is an abuse of the court process and the orders it seeks are unobtainable.

The 3rd Defendant's Defence

5. In her defence the 3rd defendant denied the plaintiffs' claim entirely and stated that it is bad in law; that she was not involved in the attempted or actual eviction of the plaintiffs and that her joinder in the suit is wrong and it ought to be dismissed.

The 6th, 7th & 8th Defendants' Defence

In their defence, the 6th, 7th and 8th defendants denied each and every allegation in the amended plaint. They denied knowledge of the agreement between the plaintiffs and the 1st and 2nd defendants or any breach thereof and stated that the suit is incompetent, frivolous, scandalous and vexatious and does not disclose any cause of action against them; that after conversion from the RTA to the RLA regime, the suit land was transferred to the 4th and 5th defendants after all documents prerequisite to the transfer had been obtained and registration and statutory fees and duties paid; that as at 9/12/2013 (that being the date of the transfer) there were no encumbrances on the property and the 6th and 7th defendants acted in good faith and within their statutory mandate in making entries to the title based on the submitted completion documents.

2nd Defendant's Defence

6. In her defence, the 2nd defendant denied the claim and stated that the suit land was registered in the name of Henry Goro Akum until 10/10/2013 when the same was transferred to the 1st and 2nd defendants; that Henry died on 16/11/1989; that by an agreement dated 18/1/2006 one Seth Nyawaro Omamo (now deceased) purported to sell the suit land to the 1st plaintiff on behalf of one Tom Ongaro who had never owned the property and who could not therefore have had capacity to give Seth any power of attorney for the purported sale; that the 1st plaintiff never exercised any due diligence over the purported sale; that the agreement of 18/1/2006 was to be completed within 90 days but the 1st defendant failed to pay the agreed consideration of Kshs 3,000,000/=; that the 1st plaintiff was given possession in January 2006 and he earned annual rental income of Kshs 200,000/= for 8 years and the claim for refund at the current land value is untenable; that on 12/4/2010 another agreement was executed between the plaintiffs and the 1st and 2nd defendants for the sale of the suit land for Kshs 3,000,000/=; that the latter agreement was void and incapable of enforcement for the reasons that by then the property did not belong to the 1st and 2nd defendants and was not being sold by administrators of Henry's estate; that the Kshs 1,000,000/= acknowledged as paid by that latter agreement had not been paid to the defendants; that the 2nd plaintiff never executed the same and that by the time of the filing of the instant suit the property did not belong to the defendants; that the foregoing matters were



well within the knowledge of the plaintiffs or could have so been with exercise of due diligence; that the grant over the estate of Henry Goro Akum was confirmed and on 7/12/2012 the suit property was properly transmitted to the 1st and 2nd defendants and subsequently sold to the 4th and 5th defendants who then took possession thereof.

Reply to 4th & 5th Defendants' Defence

7. On 22/4/2015 the plaintiffs filed their Reply to Defence to the 4th and 5th defendants' defence. They reiterated the contents of the amended plaint and denied that the 2 defendants are bona fide purchasers for value without notice or that they did not have notice of the plaintiff's claim in the property. They also denied that Kshs 4,000,000/= was paid as consideration or that the requisite stamp duty was paid.

Reply to 6th 7th & 8th Defendants' Defence

8. On 3/3/2016 the plaintiffs filed their Reply to Defence of the 6th 7th & 8th Defendants. The plaintiffs reiterated the contents of the amended plaint and stated that the suit against the 3 defendants was necessitated by their act of causing of transfer to third parties without what the plaintiffs call "consideration as to the plaintiff's interest in the land" and without adhering to due procedure despite the plaintiffs' purchasers' interest in the property; that the 3 defendants thus failed to exercise due diligence; that the 1st and 2nd defendants had no clean title to pass on to the 4th and 5th defendants owing to the existence of the plaintiff's claim and that the conversion of the land from RTA to RLA regime was riddled with mischief.

Reply to 3rd Defendant's Statement of Defence

9. In reply to 3rd defendant's statement of defence the plaintiffs filed a reply to defence on 4/11/2016. The plaintiffs averred that the 3rd defendant being the eldest daughter in the family of the late Tom Ongaro was charged with the responsibility and was authorized by the 1st and 2nd defendants to receive from the plaintiffs the consideration sum, and she can not therefore feign ignorance of the receipt of the said money and her role in the agreement.

The Evidence of the Parties

Plaintiffs' Evidence

10. PW1, Abel Odhiambo Were, the 1st plaintiff testified on 7/10/2019 and on 21/1/2020. He adopted his statement as his evidence-in-chief in this case; the 2nd plaintiff is his wife. The 1st plaintiff's evidence is that he first dealt with Tom Ongaro, son of Henry Goro Akum, the latter who was the registered proprietor of the suit land; that the witness was introduced to Tom Ongaro by Seth Omamo, his company secretary; that Seth Omamo was given a power of attorney by Tom Ongaro; that Tom Ongaro was son to Henry Goro; that in January 2006 Seth informed PW1 that Tom was very ill and his wife had come for some assistance from Kenya Seed Co Ltd who had declined to purchase the land as it was in Henry's name; the 1st plaintiff became traumatized when he saw Tom Ongaro ailing and so he spoke with one C. Onditi, Tom's lawyer and in Seth's presence and they agreed that the plaintiff could facilitate Tom's admission to hospital; that some money was paid to C. Onditi, the lawyer; that PW1 also spoke with Tom who was seeking help so that he may be taken to hospital; that in February 2006, PW1 spoke with Tom again and the latter sent the 1st defendant to PW1 who paid her Kshs 200,000/=; that Tom's health worsened and PW1 paid him a further Kshs 600,000/= into Tom's account. Tom finally passed on.



11. The 1st plaintiff testified that he also dealt with the 1st and the 2nd defendants who are widows to Tom Ongaro as well as the 3rd defendant who is the daughter to the 2nd defendant; that after the 1st and 2nd defendants asked for financial assistance, he paid the money that the 1st and 2nd defendants required in various ways, including bank deposits and mobile money deposits as well as settlement of hospital fees for the late Tom Ongaro as consideration; that the 1st and 2nd defendants sold the suit land to the plaintiffs; that he paid Kshs 1,500,000/= so that the 1st and 2nd defendants obtain a grant of letters of administration and then process title in his name; and the balance was to be paid after the transfer of the suit property into his name; that the grant over the late Henry's Estate was issued on 25/2/10; the 1st plaintiff took possession of the suit land, expended money on renovations thereof and rented it out but title was not transferred to him; that he made a demand through his lawyer dated 28/11/12; that an injunction order was issued by this court on 19/2/2013 and served on the defendants before the land was transferred to the new purchasers; that the defendants ignored the plaintiffs' sale agreement, the demand letter and the injunction order and resold the land to the 4th and 5th defendants and the 1st and 2nd defendants were then punished by the court for contempt; that by the date of the transfer to the 4th and 5th defendants, the plaintiffs were not in possession; that the 4th and 5th defendants hired goons to chase the plaintiffs' caretaker out of the land; according to the witness he sued the 1st and 2nd defendant since they had a grant over the estate and were the persons in charge of administering the land; that the Land Registrar must have been aware of the court order since the plaintiff's lawyer had lodged a caution over the title; that the plaintiffs lost earnings after the eviction; that the 1st plaintiff further paid monies to the 1st and 2nd defendants and they have never refunded it; that they stopped receiving his calls; that the plaintiffs have paid 80% of the value of the consideration in the agreement; that the defendants utilized the consideration the plaintiffs paid in terms of school fees and medical fees while the succession proceedings were underway but later sold the land to third parties. PW1's wish is to repossess the suit land.
12. Upon cross-examination by Mr Kiarie, PW1 stated as follows: that Seth had a power of attorney from Tom and not from Henry, the proprietor; that he and Seth entered into an agreement on 18/1/2006; that PW1 trusted Seth; that he never saw the power of attorney at all; that Kenya Seed Co Ltd had refused to buy the suit land as it was in the name of Henry Goro deceased and not in Tom's name; that PW1 had confirmed that title was in the name of Henry; that the title was never at any time transferred to Tom; that the date of death in the grant is 16/11/1989; that he paid Kshs 100,000/= on account of Tom Ongaro; that the balance was to be paid in 3 months that is by April 2006; that he paid Kshs 200,000/= in February 2006; that by 17/4/2006 nothing more had been paid; that in May and June he paid 600,000/=; that Tom died in 2006; that he has never seen any grant for Tom's estate; that he took possession in July 2006 before Tom died; that before he was evicted in 2012 he was getting Kshs 15,000/= per month from the property which translated to Kshs 180,000/= per year; that the parties executed a fresh agreement in 2010; that by then both Seth and his advocate C. Onditi had died; that he was the sole surviving person among those named in the agreement; that it is not true that Richard Chesebe his tenant was paying him Kshs 24,000/= per month as stated by his caretaker; he insisted that his caretaker was evicted in 2012 and not 2014; that by the time he executed the second agreement P.Exh 1A it was 4 years after the first agreement and by then he had only paid Kshs 1000,000/= only pursuant to the agreement of 2006; that of that amount Tom Ongaro only received Kshs 900,000/=; he agreed that by 12/4/2013 the sellers were the registered owners of the property; that he had ascertained that succession proceedings were in progress; that he never conducted a search to establish ownership of the suit property by 12/4/2010; that he was purchasing the land from the estate of the late Henry and that though not indicated in the agreement, the defendants were signing the agreement in their capacity as administrators of the estate of Henry; that he had inquired into who was the likely inheritor of the estate of Henry and found that it was Tom; that he was not named in the grant when it was obtained



- two years later; that though the agreement was that he was to pay the money to the sellers directly, he had paid money directly to the 3rd defendant without any acknowledgment; that the agreement did not call on PW1 to pay the outgoings; that he was aware that one can not transfer a property not in their name and that he is aware that the instant suit is not filed against Tom Ongaro.
13. Upon cross-examination by Mr. Samba for the 4th and 5th defendants, he stated as follows: that he had filed suit against the heirs of the late Tom Ongaro's estate; that the agreement with the 1st and 2nd defendants was made before the confirmation of grant; that after 13/3/2012, he never signed any other agreement with the sellers; that there was no caveat lodged at the time of the agreement; that his lawyers registered no caveat over the suit property; that he has no documents to show that the 4th and 5th defendants were involved in the eviction; that he is not certain whether the 4th and 5th defendants were served with the injunction order or whether they were cited for contempt and that his wife never executed any agreement.
 14. In re-examination by Ms. Odwa for the plaintiff, he stated that the suit property was listed in the grant obtained by the 1st and 2nd defendants; that he fulfilled his obligations under the agreement dated 12/4/10; that the 4th and 5th defendants were present at the time of his eviction; that the 1st and 2nd defendants already had a grant issued on 25/2/2010 in respect of Tom's estate before the date of the execution of the agreement that is 12/4/2010; that the suit property was sold to the 4th and 5th defendants while there was an injunction order in force issued on 19/12/13; that the lands office was notified of the injunctive order; that no monies have been refunded to him by the defendants and he wants the suit land to revert back to him.
 15. PW2, James Oduor Otiang, testified on 21/1/2020. He adopted his statement recorded on 4/11/2016 as his evidence-in-chief in this case. His evidence is that he was employed as a caretaker by the plaintiffs on the suit property in 2012; that he lived in the servants' quarters; that Richard Chesebe came to live on the property in August 2012 after PW2 was employed; that it was the 1st plaintiff who put Richard into the premises; that in 2013, two Asians and 2 policemen and other persons who were armed with crude weapons invaded the property; that the police produced some papers and stated that the land belonged to the Asians and that vacant possession should be given; that upon calling the 1st plaintiff the latter advised him to report to the police and he made a report at Kitale Police Station; that the invaders, while saying the land did not belong to the 1st plaintiff, broke the gate open and began works on the land, cutting down trees and bringing down an iron sheet house; that PW2 took photographs while the demolition was still going on. He stated that there had been no claim laid on the land by any other person before the demolition.
 16. The plaintiffs' case was marked closed after PW2 completed his testimony.

The Defendants' Evidence

17. DW1, Everline Akinyi Ongaro, the 2nd defendant, testified on 21/1/2020 and on 12/5/2021. She adopted her statement dated 2/7/2019 as her evidence-in-chief. Her evidence is that the 1st defendant who died in 2016 was her co-wife and they were both widows to the late Tom Ongaro who was son to Henry Goro, who died in 1989; that Henry owned the suit land from 9/3/1972; that she is aware of the agreement between Seth and Tom; that by the date of that agreement the land still belonged to Henry; that Tom has never owned the land; that by 2006, no succession proceedings had been taken out in respect of Henry's estate and thus Tom had no capacity to sell the property then; that in any event the balance of the purchase price was not paid within 90 days as stipulated by the agreement; that she has never seen any power of attorney given to Seth; that neither she nor the 1st defendant executed that agreement of 2006; that however she and the 1st defendant executed the agreement dated



12/4/10 between them and the plaintiffs in respect of the suit land; that by that time, the title was still in Henry's name; that the Kshs 1000,000/= mentioned therein was not received by the 1st and 2nd defendants or by any person under their authorization; that that Kshs 1,000,000/= was paid in respect of the first agreement of 2006; that the 1st and 2nd defendants never asked the plaintiffs to pay any outgoings including the land rates for the suit land; that as the 1st and 2nd defendants were not registered owners they could not transfer the suit land to the plaintiffs; that the 2nd plaintiff never executed the agreement; that Tom Ongaro died in July 2006 and no person has ever taken out any grant of letters for his estate; that succession proceedings were lodged in Kisumu HC Succession Cause 235 Of 2009 and a grant was issued in the names of the 1st and 2nd defendants in respect of the estate of Henry Goro Akum on 26/2/2010; that the grant was confirmed on 13/3/2012 and the suit land was vested in her and the 1st defendant; that the grant was registered in the title on 10/10/2013 and an assent and a transfer were registered the same day; that she was not served with any order restraining the sale; that she was not aware of the contempt proceedings; that in her view, the Henry's estate never sold the plaintiffs any land.

18. Under cross-examination by Mr. Samba for the 4th and 5th defendants, she admitted that by an agreement dated 30/11/2012 she and the 1st defendant sold the suit land to the 4th and 5th defendants.
19. Upon cross-examination by Mr. Odongo for 6th, 7th and 8th defendants, she stated that they conducted a search before the sale to the 4th and 5th defendants which showed that the land was registered in their names; that there was no encumbrance on the title; that there was nothing registered to show that the land had been sold to the plaintiffs; that the land was transferred, stamp duty was paid and there was nothing to prevent the Land Registrar from registering the transfer; that even if there had been any cause he would not have known of it; that the Land Registrar was only involved at the registration of the transfer.
20. On cross-examination by Ms. Odwa for the plaintiff, DW1 stated that Tom had intended to sell the suit land to the 1st plaintiff and so the 1st plaintiff took possession of the suit land; that Tom died in 2006; that a grant of letters of administration was issued to them on 26/2/2010; that the 1st and 2nd defendants entered into an agreement dated 12/4/2010 between them and the plaintiffs; that the 3rd defendant was her daughter with Tom; that one Bruce Odeny, advocate made the agreement dated 12/4/2010; that the agreement never stipulated who would receive the money; that the agreement acknowledges receipt of Kshs 1000,000/=; that the balance was to be paid before 22/6/2010; that the suit property was not transferred to the plaintiffs after receipt of the money stated in clause 3(a); that confirmation of grant was obtained on 13/3/2012; that after that they never transferred the land to the plaintiffs but instead, they signed an agreement with the 4th and 5th defendants and transferred the suit land to them on 6/3/13; that they never refunded the plaintiff the money he had paid; that she did not know of the existence of the injunctive order; that she was found in contempt and she never appealed; that DW 1 was not then aware that the matter had been taken to court; that she did not know that the 1st plaintiff was in possession of the suit land till 2012; that she is not aware that the plaintiff's tenants were evicted and that she never notified them of the need to vacate.
21. Upon re-examination by Mr Kiarie she reiterated that the estate of the late Henry Goro Akum was not involved in the 2010 agreement; that Kshs 1,000,000/= had been paid to her late husband under the 2006 agreement. She stated that they signed the agreement dated 12/4/2010 in their own capacity as individuals, and that the grant to Henry's estate had not been confirmed by 12/4/2010 but was confirmed on 13/3/2012. With the testimony of DW1, the 2nd and 3rd defendant's respective cases were marked closed.



22. DW2, Premchand Gulabchand Gudhka, the 4th defendant, testified on 11/2/2021. He adopted his 2 statements in this matter, dated 6/4/2016 and 24/12/2016 respectively. His evidence is that the 1st and 2nd defendants sold the suit land to him vide an agreement made on 30/11/2012; that he paid Kshs 10,000,000/= as consideration for the land; that he obtained possession of the suit land after payment of consideration and is still in such possession to date; that he was not aware of any dispute pending in court over the land until after the purchase; that he is not aware that the plaintiffs were evicted from the land and that he conducted a due diligence exercise and no interest of the 1st plaintiff cropped up during the exercise.
23. Upon cross-examination by Mr. Kiarie, he stated that the names of the 1st and 2nd defendants were on the title at the time of purchase.
24. Upon cross-examination by Ms. Odwa, he stated that upon his visit to the suit land he found no one in occupation of the house thereon.
25. DW3, Geoffrey Yabuna, testified on 12/4/2021. He adopted his statement recorded on 6/4/2016 as his evidence-in-chief in this case. He stated that he was present at the making of the agreement and the price paid for the suit land was Kshs 10,000,000/=.
26. Upon cross-examination by Ms Odwa he stated that he signed the agreement as a witness; the agreement was signed on 25/11/2012; that he took the 4th defendant to the land and there were no tenants thereon and that he was then in possession of the gate key.
27. DW4, Nelson Otieno Odhiambo, Land Registrar, Trans Nzoia County, testified on 30/6/2021. His evidence is that he has records of the suit land in the land registry; that the 1st and 2nd defendants were registered as owners of the land on 10/10/2013 prior to its transfer to the 4th and 5th defendants; that the registration of the grant over the estate of Henry Goro Akumu was also done on 10/10/2013; that the suit land was converted from RTA to RLA and a green card was opened on 9/12/2013 in the names of the 4th and 5th defendants as entry no 1 thereon; that vide entry no 2, a certificate of lease was issued to them; that the vesting instrument is dated 6/3/2013 just like the transfer to the current owners. At the time of the registration of transfer there was no encumbrance on the land. DW4 was unaware that the plaintiffs had purchased the land before the current title holders did; that in his opinion, it is the purchaser who moves the court for registration of a restriction to protect his interest; that in the case of the suit land, he was not asked to register a restriction and he was not served with any order inhibiting the disposal of the suit land.
28. Upon cross-examination by Ms Ruto, DW4 stated that he was posted to Trans Nzoia in 2018; that a transfer can take one day to register it if all the requisite documents are available; that it is possible to make 3 entries on the same grant in one day too; that the consideration declared was Kshs 4,000,000/=; that Kshs 160,000/= was paid for stamp duty; that he was not aware that the consideration could have been more than that; that the transfer was presented for registration on 16/12/13 and that a court order must be registered by the person in whose favour it has been made.
29. Upon cross-examination by Mr. Kiarie, DW4 stated that there is no evidence in his records that the land was ever registered in the name of Tom Ongaro; that the court order was not registered against the conversion record or the grant and all the entries nos 6,7 and 8 on the green card were regularly made.
30. Upon re-examination by Mr. Odongo DW4 stated that the agreement for sale is not a requirement for registration and he relies on the consideration stated in the transfer; he has not received any complaint that lower stamp duty was paid for the suit land than was required; he stated that the anomaly, if any,



can be cured by placing a restriction on the title. The 6th, 7th & 8th defendants' case was closed at that juncture.

Submissions

31. On 30/6/2021 the court gave directions that the plaintiffs should file submissions within 14 days and the defendants should respond thereto within 14 days of service. Upon perusal of the court file record, I found no submissions filed on behalf of the plaintiff in this case. The 6th, 7th and 8th defendants' written submissions were filed on 29/7/2021. The 2nd and 3rd defendants filed submissions on 15/9/2021 while the 4th and 5th defendants filed their submissions on 3/12/2021.

Determination

Issues for Determination

32. I have considered the pleadings, the evidence tendered in support thereof as well as the submissions filed. The principal issues for determination in this matter are as follows:

- (a) Whether the agreement dated 12/4/2010 is valid and enforceable against the 1st and 2nd defendants;
- (b) Whether the sale and transfer of the suit land to the 4th and 5th defendants is illegal, null and void and whether it ought to be cancelled and an order be issued that the land be transferred to the plaintiffs;
- (c) Whether the 1st 2nd 3rd and 4th defendants ought to refund the plaintiffs the current value of the suit land;
- (d) Whether the plaintiff is entitled to mesne profits;
- (e) Whether the 1st 2nd 3rd 4th and 5th defendants should pay the value of the developments that were on the suit property;
- (f) Who should pay the costs of the suit.

The issues are discussed as hereunder:

(a) Whether the agreement dated 12/4/2010 is valid and enforceable against the 1st and 2nd defendants;

33. The plaintiff's suit is premised on the agreement dated 12/4/2010. The 2nd defendant does not deny that she and the 1st defendant executed that agreement. It transpired at the hearing that there was an earlier agreement dated 18/1/2006 by virtue of which the plaintiffs had taken possession of the suit land, which named a different seller. The 1st and 2nd defendants were therefore not parties to that agreement. What power if any would have been deemed to have enabled the 1st and 2nd defendants to enter into an agreement for the disposal of the suit land? It can be clearly seen in this suit that Tom Ongaro who was their husband has never been the registered owner of the land. Thus, they could only be deemed to be able to sell the land if they were administrators of the estate of the late Henry Goro Akum who was the indubitably the registered owner of the suit land. So, were they administrators to the late Henry's estate as at the date of the agreement? Henry died on 16/11/1989. A grant of letters of administration (PEX4(a)) was taken out in HC Succession Cause No 235 of 2009 in respect of his estate on 26/2/2010 and it named the two defendants as administrators. The agreement dated 12/04/2010 which the plaintiffs rely on was therefore executed between them and the two defendants



after they became administrators to the estate of the proprietor of the suit land but before confirmation of the grant they held, and it named them as the proprietors of the suit land. The grant of letters obtained by the two defendants was registered against the grant to the suit land on 10/10/2013 and an assent was registered on the same date vesting in them the title to the suit the land.

34. It is therefore the case that the grant was not confirmed by the time the defendants executed the agreement dated 12/4/2010. Section 55 of the *Law of Succession Act* states as follows:

“55. No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

35. The suit land fell under the description of “capital assets constituting a net estate” within the meaning of Section 55 of the Act. The grant was confirmed on 9/3/2012 after the execution of the sale agreement on 12/4/2010. Having regard to the provisions of the Act quoted herein above, it is therefore clear that the 1st and 2nd defendants, having not had the grant in their name confirmed before the date of the agreement dated 12/4/2010 with the plaintiffs, had no power to sell the suit land to anyone by then.

36. In the case of *In Re Estate of Paul M'Maria (Deceased)* [2017] eKLR, the court also agreed with this position and observed as follows:

“As at the date of the agreement of sale of land, the deceased had died and the suit property stood in his name. As at that date also, no grant of representation had been applied for leave alone being issued or confirmed, in respect of the deceased. These facts impels a re-statement of what courts of law have boldly stated; that, it is axiomatic under section 55 and 82 of the *Law of Succession Act*, no immovable property of the deceased shall be sold before confirmation of grant ... The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law.”

37. Does the fact that another agreement had been entered into before the agreement of 12/4/2010 between the plaintiffs and Tom Ongaro the husband to the 1st and 2nd defendants affect the above position in any manner? I would think not, for the reason that Tom never had a grant of letters over the late Henry's estate taken out or confirmed, and he also never became the registered owner of the suit land; even if he had done so, no grant of letters of administration to his estate were taken out or confirmed in the names of the two defendants. The agreement dated 12/4/2010 was thus illegal, null and void ab initio and unenforceable.



(b) Whether the sale and transfer of the suit land to the 4th and 5th defendants is illegal, null and void and whether it ought to be cancelled and an order be issued that the land be transferred to the plaintiffs;

38. Regarding the second issue, the only basis on which the plaintiff impugns the sale agreement dated 6/3/2013 and transfer of the suit land to the 4th and 5th defendants is, as stated in paragraph 9A of the amended plaint, that at the time of the sale or transfer, the two defendants had no power to effect those transactions.
39. No particulars are given in the amended plaint by the plaintiffs as to how the 1st and 2nd defendants could have lacked such power, and the plaintiff's main pleading therefore lacks clarity. The plaintiffs' replies to the defences of the 3rd, 4th and 5th defendants do not shed more light on the nature of objection raised by the plaintiff.
40. It is in the reply to the defence of the 6th, 7th and 8th defendants that the plaintiffs may find succour, for therein they plead at paragraph 4 in respect of the agreement that the 1st and 2nd defendants lacked title or clean title to pass on to the 4th and 5th defendants owing to the plaintiff's claim over the land which was within their knowledge. Regarding the alleged impropriety of the transfer to the 4th and 5th defendants, the plaintiff states in the same pleading that it was effected unprocedurally and in total disregard of the plaintiffs' purchaser's interest in the land.
41. It is alleged that the action of the 1st and 2nd defendants was intended to defraud or deny the plaintiffs of their right to the suit property. It is also claimed that the 6th - 8th defendants failed to exercise due diligence to ascertain the status of the suit land. It is further stated that the conversion of the land from the RTA regime to the RLA regime and the registration of the 4th and 5th defendants as proprietors was riddled with mischief.
42. Finally, the plaintiffs pointed to the discrepancies between the consideration quoted in the sale agreement and that in the registered transfer and rely on the claim that the relevant dues in terms of registration fees, stamp duties and other charges were not paid to the government.
43. What is the truth of the claim that the 1st and 2nd defendants lacked title or clean title to pass on to the 4th and 5th defendants owing to the plaintiff's claim over the land? And do the above claims, if true, warrant the cancellation of the 4th and 5th defendants' title and registration in favour of the plaintiffs?
44. In examining what kind of rights the plaintiffs may have acquired in the suit land it is necessary to examine the issue whether he complied with the contractual terms thereof. Did the plaintiff establish payment of the full purchase price?
45. The 1st and 2nd defendants admitted that the 1st plaintiff paid Kshs 1,000,000/= to their late husband Tom Ongaro under the old agreement dated 18/1/2006. That was the money acknowledged in their agreement with the plaintiffs dated 12/4/2010.
46. What other evidence was produced by the plaintiff as to payment of consideration?
47. It was the plaintiff's evidence that he paid the 1st and 2nd defendant more than was required under the agreement. He assessed the payments made at 80% of the total consideration. While producing original documentary evidence in support, he cited the following sums as having been paid to the 1st and 2nd defendants in respect of the sale:

H13/9/2011-Kshs 200,000/= vide P. Exh 2A (a).

29/6/2011- Kshs 123,000/= vide P. Exh 2A (b)



2/6/2011 – Kshs 39,000/= vide P. Exh 2A (c)
8/5/2011 – Kshs 40,000/= vide P. Exh 2A (d).
22/6/2010 –Kshs 700,000/= vide P. Exh 2A (g)
25/2/2011- Kshs 202,000/= vide P. Exh 2A (f)
22/6/2010 –Kshs 20,000/= vide P. Exh 2A(f)
24/5/2010 – Kshs 4800/= vide P. Exh 2A (h)
11/5/2006 – Kshs 600,000/= vide P.Exh 2A (i)
TotalKshs 1,102,000/=.

48. Further, mobile money payment records show that the 3rd defendant and her lawyer received a total of Kshs 467,650/= from the 1st plaintiff between 12/4/2010 and 12/6/2012. The first date (12/4/2010) is significant because it is on that date that the agreement between the plaintiffs and the 1st and 2nd defendants was executed. That renders it to be credible, and indeed true, the plaintiffs' evidence that the 3rd defendant was deputed to collect monies by the 1st and 2nd defendants on their behalf pursuant to the agreement.
49. By the time the 4th and 5th defendants purchased the suit land, the plaintiffs had paid a substantial sum of the consideration stated in the agreement. The agreement of 12/4/2010 stated that Kshs 1,000,000/= had been paid, Kshs 500,000/= would be paid by 22/6/2010, and that Kshs 1,500,000/= would be paid upon successful registration of title in the plaintiff's names. P. Exh 2A(g) alone shows that on 22/6/2010, was a bankers cheque worth Kshs 700,000/= was drawn in favour of the 3rd defendants against the 1st plaintiff's account. This compliance by the plaintiff through payment to the 3rd defendant on the deadline in the agreement, as well as her admitted daughter-mother relationship with the 2nd defendant, reinforces the 1st plaintiff's evidence that the 3rd defendant was acting as an agent of both the 1st and 2nd defendants. Bruce Odeny is named as the advocate who witnessed the agreement dated 12/4/2010 and he appears to have received Kshs 186,300/= between 20/1/2012 and 23/5/2012 from the plaintiff through mobile money payments.
50. That was not all. The plaintiffs produced evidence of payment of land rent, Kshs 4800/= (P. Exh 4) land rates payment Kshs 105,080/= (P. Exh 6) land rent on 25/2/2011- Kshs 202/=; further land rates Kshs 22,832/= on 24/9/2012 and rates clearance certificate fees Kshs 1500 on 23/11/2012. The plaintiff having performed his part of the contract and only awaiting the transfer of title so that he may pay the balance of the consideration, this latter category of payments totaling to Kshs 134,414/= was apparently in preparation for that transfer of title to the suit land into the plaintiffs' names. That is how close to obtaining title the plaintiff was before the 4th and 5th defendants came onto the scene.
51. From the foregoing observations I am content that the plaintiff was misled by misrepresentations by the 1st, 2nd and 3rd into believing that the contract between them would be completed and so he paid more than the contract had provided for and even became involved in seeking completion documents.
52. However, the sale agreement between the 1st and 2nd defendants and the 4th and 5th defendants was executed on 6/3/2013, long after the confirmation of the grant of letters of administration over the estate Henry Goro Akum which was issued to the two defendants. In line with the provisions of Section 55 set out herein before, the defendants had power to sell the deceased's land by that date. That agreement between them and the buyers can not therefore be faulted on the basis of lack of confirmation of a grant as was in the plaintiffs' case. Therefore, notwithstanding such substantial performance of the plaintiff's part of the bargain, the agreement between the plaintiffs and the 1st and



2nd defendants remains irredeemable, null and void and unenforceable for lack of capacity on the part of the defendants; no rights of proprietorship over the land accrued to them. This court can not in the circumstances of this case cancel a transfer made pursuant to the valid agreement dated 30/11/2012 and especially because if it does so, the agreement between the plaintiff and the 1st and 2nd defendants would still not be enforceable thereafter.

53. Regarding the alleged irregularity of the registration of transfer by the 6th- 8th defendant the evidence of the Land Registrar was that no inhibition or restriction was registered in the plaintiffs' favour against the grant while it was still under the RTA regime and his office would therefore have known that the plaintiffs had purchasers' interest in the suit land; In this court's view this appears to be quite a reasonable defence.
54. Concerning the allegation of impropriety in the registration of the transfer occasioned by alleged shortchanging of the government in the payment of registration charges, stamp duty and other fees, this court notes that there is truth in the claim by the plaintiffs that the amount of consideration quoted in the transfer on which the computation of the stamp duty was based differed from that in the agreement. However, the Land Registrar explained in his evidence that sale agreements are normally not lodged in the land registry in land transactions and so he had no way of knowing its contents; he added that the transfer is assessed for stamp duty by the government valuer, rendering it unlikely in his opinion that any monies were lost; he finally stated that in the event a complaint was lodged that any revenues were lost in the transaction, then it would be possible to register a restriction on the 4th and 5th defendant's title till the same was recovered.
55. It appears that the present question of whether stamp duty or the right amount thereof has been paid, or whether it affects the validity of a registered transfer, is not an isolated occurrence. In *Joseph Karua Ngareh v Mary Gathoni Kibara & 2 others* [2018] eKLR, Waithaka J found that the defendant could not show that the title she held could lawfully be issued to her before the requisite stamp duty had been paid in respect thereof, and that it was unprocedurally obtained and as such, incapable of being accorded the protection envisaged under Section 26 of the *Land Registration Act, 2012*.
56. In the case of Nicholas *Thuo Kabaiku v Serah Njeri Mbatia* [2021] eKLR, Bor J was faced with a situation where evidence was given that the Plaintiff remitted the full sum required for stamp duty to the advocate who acted for both parties in the sale and where there was nothing to prove that the Plaintiff participated in getting the transfer documents lodged at the lands office. His advocate lodged the transfer at the lands office for registration and was responsible for the underpayment of the stamp duty due on the transfer by understating the value of the land.
57. I find persuasive the Land Registrar's explanation, and I therefore find that the irregularity alleged is not of the kind that would invalidate the agreement or the transfer between the 1st and 2nd defendants and the 4th and 5th defendants. In the light of the foregoing this court finds no legal basis upon which the transfer of title to the names of the 4th and 5th defendants can be cancelled, or upon which an order for transfer of the suit land to the plaintiffs may be made.

(c) Whether the 1st 2nd 3rd and 4th defendants ought to refund the plaintiffs the current value of the suit land.

58. This court has already found that the agreement between the plaintiffs and the 1st and 2nd defendants was unenforceable. Regarding the issue under discussion, the plaint as drawn presents a problem in that they seek a refund not of the purchase price but the current value of the suit land. I do not find any evidence of the current value before me. However, the main observation here is that refund has



been sought. This court will therefore assume that the part-consideration actually paid to the 1st and 2nd defendants forms part of the current value of the land, and that it is thus the sum refundable.

59. The 1st plaintiff and the 2nd defendant agree that the consideration sum of Kshs 1,000,000/= was paid to Tom Ongaro before the execution of the agreement dated 12/4/2012. It is obvious that the person who received the money is not a party to the instant suit and is deceased and neither he nor his estate is joined to the instant suit. It is also now clear that Tom was not acting as the administrator of the estate of the late Henry Goro Akum and so he lacked capacity to receive consideration for the sale of the suit land to the 1st plaintiff. In so far as the plaintiffs and the 1st and 2nd defendants agree that 1st and 2nd defendants were not joined to the suit as the administrators of the estate of the late Tom Ongaro, and that they never received the consideration under the agreement that they executed on 12/4/2012, this court is not convinced that the plaintiffs are entitled to any refund of that sum from them.
60. Though under the contract made on 12/4/2012, the 1st and 2nd defendants lacked capacity to dispose of the suit land to the plaintiff on behalf of the estate of the late Henry Goro Akum and the agreement was null and void, they later obtained payment of a higher purchase price from the 4th and 5th defendants and failed to refund the plaintiffs. The plaintiffs did not describe the 1st and 2nd defendants as having been joined as administrators of the estate of Henry Goro Akum, but they received monies from the plaintiff on the strength of sale of property of the estate. Some of the money was received through the 3rd defendant while some was received through Bruce, their lawyer. The 2nd defendant's evidence was that she and the 1st defendant never used the 3rd defendant or anyone else to collect money on their behalf regarding the sale. I have found that credible evidence was adduced which satisfactorily established that the 3rd defendant received Kshs 1,102,000/= as part of the consideration from the plaintiffs in her capacity as the 1st and 2nd defendants' agent and in connection to the suit land as follows:
- 13/9/2011 – Kshs 200,000/= vide P. Exh 2A (a).
29/6/2011- Kshs 123,000/= vide P. Exh 2A (b)
2/6/2011 – Kshs 39,000/= vide P. Exh 2A (c)
8/5/2011 – Kshs 40,000/= vide P. Exh 2A (d).
22/6/2010 –Kshs 700,000/= vide P. Exh 2A (g)
TotalKshs 1,102,000/=.
61. The 3rd defendant never gave evidence to deny the plaintiff's allegation that he had paid her the said sum in connection with the suit land. In this court's view the 3rd defendant's conduct must be deemed to be an admission that she received money from the plaintiff in respect of the suit land. She acted in concert with the 1st and 2nd defendants. Having failed to deny receipt of the money, I find that she must participate, alongside the 2nd defendant, in the refund if ordered, of the total sum paid by the plaintiff in respect of the failed contract.
62. No refund order has been sought against the 5th defendant.
63. The 4th defendant was a purchaser from the administrators of the estate of the late Henry. No evidence was led to establish the fact that he was aware of the agreement the plaintiff had entered into regarding the purchase of the suit land. this court has already found that he was a bona fide purchaser. There was no privity of contract between him and the plaintiffs and he received no monies from them. In cross-examination the 1st plaintiff stated that he is not certain whether the 4th and 5th defendants were served with the injunction order or whether they were cited for contempt. I find that the plaintiffs' claim



against the 4th defendant has not been proved, and that he is a bona fide purchaser for value without notice. For those reasons the claim for refund against him must fail.

(d) Whether the plaintiff is entitled to mesne profits;

64. In the case of *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR (NBI CIVIL APPEAL NO. 208 OF 2018) the Court of Appeal held as follows:

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black’s Law Dictionary 9th edition). Mesne Profits must be pleaded and proved.”

65. Mesne profits are awarded to a registered proprietor of land on the basis of illegal occupation of the land by a trespasser. It is observable that the plaintiff’s claim for mesne profits faces a serious hurdle in that first, they have failed to plead specifically the defendants from whom they claim mesne profits and that, second, the plaintiffs never established their registered proprietorship of the suit land. The claim for mesne profits must therefore fail.

(e) Whether the 1st 2nd 3rd 4th and 5th defendants should pay the value of the developments that were on the suit property.

66. While addressing this issue it is noted that firstly, the developments erected on the suit land by the plaintiffs, if any, were illegal for the reason that legal estate in the land had not and could not have passed to them by dint of lack of authority on the part of the sellers. Both the plaintiffs and the sellers were intermeddlers at the time of the execution of both agreements dated 18/1/06 and 12/4/2010.

67. Secondly, the value of the developments alleged to have been destroyed falls under the category of special damages and not general damages. Special damages must be specifically pleaded and proved.

68. In *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 the Court of Appeal stated as follows:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

69. In the case of *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho* HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury



claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses.”

70. In the case of *Herbert Hahn v Amrik Singh* [1985] eKLR the Court of Appeal upheld the trial court’s dismissal of a claim for depreciation in the value of a car, stating that it had not been proved since the appellant did not reveal what consideration he sold it for. The court stated as follows:

“Now the next two grounds of the memorandum concern special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”

71. Paragraph 6 of the amended plaint states that the plaintiffs took possession of and made improvements or carried out developments on the land without stating the value thereof. Paragraph 9 alludes to demolition of certain houses thereon. The only other part of that pleading that mentions the alleged developments on the suit land is prayer no. (k). It is therefore evident that the value of the alleged developments has not been expressly pleaded. No expert damage assessment report was produced by the plaintiffs in their evidence.

72. In the circumstances outlined above, I find that the special damages claimed in this case have neither been pleaded nor proved and on the strength of the case law cited the claim for special damages must fail.

(f) Who should pay the costs of the suit.

73. The 1st, 2nd and 3rd defendants occasioned this litigation by receiving money from the plaintiff under the misrepresentation that they would transfer the suit land to him as per the written contract only to sell the land to third parties. In the circumstances of this case I find it proper to order that the 2nd and 3rd defendants shall bear the costs of the suit of the plaintiff and the 4th 5th 6th 7th and 8th defendants.

Conclusion

74. The upshot of the foregoing is that the plaintiffs’ suit in the amended plaint dated 22/12/2014 has partial merit. The suit against the 1st defendant has abated. I therefore issue the following final orders:

- a. The plaintiffs’ claim against the 4th 5th 6th 7th and 8th defendants is hereby dismissed.
- b. Judgment is entered in favour of the plaintiffs against the 2nd and 3rd defendants in terms of prayer no (i) of the amended plaint to the extent that the 2nd and 3rd defendants shall refund and pay to the plaintiffs the sum of Kshs 1,890,364/= in full together with interest thereon calculated at the rate of 18% with effect from 22/6/2010 until payment in full.
- c. The 2nd and 3rd defendants shall bear the plaintiffs’ costs of the suit and also of the 4th, 5th, 6th, 7th and 8th defendants with interest at court rates until paid in full.

75. It is so ordered.

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



MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU

