



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 430 of 2001

FREDRICK OCHIENG OCHAN.....1ST PLAINTIFF

KENNETH O. OCHANJO2ND PLAINTIFF

VERSUS

MARITHA ODERA OCHANJO1ST DEFENDANT

JOASH N. NYATENG2ND DEFENDANT

CORAM

J. W. MWERA J.

MWAMU FOR PLAINTIFF

ODUNGA FOR THE DEFENDANTS

COURT CLERK RAYMOND- INTER/LUO/SWAHILI/ENGLISH

J U D G E M E N T

There are three plaintiffs here. The 1st plaintiff **Fredrick Ochieng Ochanjo** is said to have died during the pendency of this suit and the court heard that the 2nd plaintiff Kenneth Otieno Ochanjo took on the case on his own behalf and on behalf of his brother, the 1st plaintiff, presumably in the regular manner. It transpired during trial that the 3rd plaintiff Elizabeth Ochanjo was the 2nd wife of the deceased, Helekia Ochanjo Rombo, to whom the 1st defendant Martha Odero Ochanjo was the first wife. The other defendants (2nd to 10th) were said to have purchased parts of the late Helekia's land No. KSM/KORU/364

from the 1st defendant, Maritha. So the plaintiffs, suing as the legal representatives of Helekia, sought this court's orders to declare that the portions of land hived off the original parcel number 364 by the 1st defendant and sold to the rest of the defendants, were sold illegally and fraudulently, the 1st defendant having obtained a grant in KSU/SUCC/C/106/90, which grant was revoked on 1st August 2000. It was pleaded that even as the 1st defendant had been mandated by the 8 named beneficiaries to Helekia's estate, she had proceeded without their knowledge or consent to subdivide the said parcel and sell ten portions to the defendants. The 1st defendant's act was termed a breach of trust and the subdivisions in question were listed thus:

- (a) KSU/Koru/1035 to 2nd defendant**
- (b) KSU/Koru/1025 to 3rd defendant**
- (c) KSU/Koru/10124 to (same) 3rd defendant**
- (d) KSU/Koru/1020 to 4th defendant**
- (e) KSU/Koru/ 1021 to 5th defendant**
- (f) KSU/Koru/1033 to 6th defendant**
- (g) KSU/Koru/1034 to 8th defendant**
- (h) KSU/Koru/1032 to 7th defendant**
- (i) KSU/Koru/1031 to 10th defendant**
- (j) KSU/Koru/1026 to 9th defendant**

By the acts of the 1st defendant termed as fraudulent, which allegedly deprived the named 8 beneficiaries of their rights, the orders alluded to were sought so that the sub-division titles be cancelled and the recipient defendants (2nd to 10th) ordered evicted from the portions sold to them. That the purported transfers to them did not have the requisite land control consents and so were null and void.

There were 2 defences filed on behalf of the 1st defendant and then on behalf of the 2nd to 10th defendants by the firm of Mr. George Vincent Odunga Advocate. They were more or less similar in wording.

On behalf of the 1st defendant it was averred that she was the widow of Helekia Ochanjo and at some point held a grant to his estate. She denied that that grant was revoked in succession cause 106/90. Further, that the plaintiff did not give her consent to obtain the said grant making her a trustee for the beneficiaries of the estate of the late Helekia. The 1st defendant denied the listed/named beneficiaries and also that she fraudulently subdivided plot number 364 and sold portions to other defendants. Breach of any trust as the administratrix of Helekia's estate was also denied. The 1st defendant averred that while plots numbers KSU/KORU/1018 and 1031 and 1031 remained in her name, they were partly occupied by Jerry Onyango and Rose Ndiga and Moses Nyagaya respectively (Rose and Moses are the 9th and 10th defendants, Jerry Onyango not being a party here.) And that plot number 1019 was owned by Koru Grils School. It was added that plot No.1020 was owned by Derrick Odundo (4th defendant) while David Konje (5th defendant) had plot number 1021. Plot number 1023 was owned by the Diocese of Kisumu and plots number 1024, 1025 belonged to Julius Omolo (3rd defendant). The 1st defendant herself also owned plot number 1026 (not Rose Ndiga, the 9th defendant) while the 1st plaintiff (Fredrick Ochieng Ochanjo) owned plot number 1027, son of the deceased. Similarly other sons owned plot 1028, Omondi

Ochanjo, number 1029 Kenneth Otieno Rombo (the 2nd plaintiff?) and plot number 1030, Rombo Ochanjo. It was further pleaded that plot number 1032 was owned by Lucas Omolo Nyabindo (7th defendant), plot number 2033 by Philister Anyango Apol (6th defendant) and plot number 1034 belonged to Leonida Amolo (8th defendant. Joash Nyagaya Nyateng had plot number 1035 (2nd defendant). All this was to advance the 1st defendant averment that the plaintiffs claim to plot number 364 was misconceived. The suit ought to be dismissed.

For the rest of the defendants it was pleaded thus: They had nothing to do with any allegations made about the estate of Helekia, his beneficiaries whether the 1st defendant was their trustee or not. It was also denied that the subdivision of plot number 364 was in any fraudulent, leading to their obtaining invalid titles. They did not conspire in any alleged fraudulent acts and or that the plaintiffs were denied their rights in the estate of Helekia Ochanjo Rombo. They were innocent purchasers of their respective parcels of land for value without knowledge either of any trust and/or fraud. Their titles should not be challenged. This defence alluded to the incompetency of the plaintiff and the procedure adopted in filing the case.

The trial opened before Gacheche J on 10th April 2002. Then Warsame J also heard part of the case before the undersigned completed it. Many exhibits were produced.

Fredrick Ochieng Ochanjo (PW1), the son of the late Helekia Ochanjo told the court that Helekia died in 1994. Then the 1st defendant (Maritha) obtained a grant to administer Helekia's estate by agreement of the family, represented by four (Exh.P1(a) to (d). That those who consented were PW1 himself, Elizabeth Ochanjo (3rd plaintiff, the 2nd wife of Helekia, one Janes Omondi and Kenneth Peter Ochanjo (2nd plaintiff). The witness named the dependants, set out in the plaint all carrying the name Ochanjo: Elizabeth, PW1 himself, Jane, Judith, Margaret, William and Susan and of course Maritha (1st defendant). Helekia left behind property including parcel number 364 which was still in the deceased's name (Exh.P2 (a)(b). Thereafter the family agreed that this land be transferred into Maritha's (1st defendant) name (Exh.P3). The family also agreed that 3 acres of plot number 364 be sold and the proceeds used in sub-dividing the land. By that, each of David Konje (5th defendant), Julius Omolo (3rd defendant) and Joash Nyangaya (2nd defendant) bought an arce of the land. What they paid was given to PW1's mother, Maritha, 1st defendant) to apply to the land control board for a consent to sub-divide and get new titles. The land which was 120 acres initially had been disposed of leaving 75 acres only. The subdivision produced 18 parcels, numbers 1018 to 1037 (inclusive). The buyers on the ground were Julius Nyangaya – 1.5 acres (3rd defendant) David Konje – 1.25 acres (5th defendant) Julius Omollo – 2.5 acres (3rd defendant) – each with much larger land than what had been agreed by the family to be sold – 1 acre each. PW1 went to Muhara Lands (Muhoroni?) Office but he did not find entries of consent to sanction the transactions. This was in 1992/93. The 1st defendant told the witness that she would sell the rest of the land. Still holding the grant to the estate of Helekia, she sold more land to Rose Ndiga (9th defendant) on 18/12/99. The family was not amused by all this and on 19.5.2000 an application to revoke the grant held by Maritha was filed (Exh.P5). On 1st August 2000 Wambilyangah J revoked the grant (Exh.P6). But even after the revocation Maritha went on to sell plot number 1031 to Moses Nyangaya (10th defendant). He built on the plot. PW1 confirmed that transfers of plots had been as follows:-

Lucas Nyabinda – plot No.1032- 0.4 hectares

Maritha Ochanjo – plot No.1034 – 0.42 hectares

Julius Omolo Akelo – plot No.1024 – 0.1 hectares

Julius Omollo - plot No.1025 – 0.51 hectares

Joash Nyagaya - plot No.1035 – 0.5 hectares

Philista Anyango - plot No.1033 – 0.6 hectares

David Konja - plot No.1021 – 0.43 hectares

Derek Oure - plot No.1020 – 0.5 hectares

That the 9th defendant (Rose Ndiga) had no title but she claims plot number 1037. Official certificates of search for all the plots were produced (Exh.P7(a)-(b)) together with the registry index map (Exch.P8) with the noted series of subdivision. The witness maintained that he was only aware of the initial sale of 3 acres. All the rest were void for want of land control board consents. That Maritha (1st defendant) held the suit land on trust for all the beneficiaries and thus disposing of portions of it without their consent was in breach thereof. PW1 denied that any parcels of land e.g. number 1027, were in his name. It was in the name of the 1st defendant. She gave its title to PW1 but he protested (Exh.P9). That plot 1029 was not in the name of the witness either. It was in the 1st defendant's name (Exh.P.10). Similarly, plot number 1026 (Eh.P11). So Maritha (Martha) had lied on oath when she deposed in an affidavit sworn on 10th December 2001 that three plots (numbers 1026, 1027, 1020) were in this name of the witness. He prayed that all the subdivisions be revoked the sales and transfers declared illegal so that the subject plots revert to the estate of Helekia for the benefit of the beneficiaries. The defendants (2nd –10th) be evicted.

In cross-examination the court heard that Helekia died in 1984. He was the original owner of plot 364 although he did not have its title before he died,. The family consented to sales to 2nd, 3rd, and 5th defendants (Joash Nyangaya, Julius Omollo, David Konje). PW1 did not know how the other defendants got titles to portions of plot number 384. He was not aware that there were other purchasers e.g. the Catholic Diocese of Kisumu and Koru Girls High School. When family pressure mounted on the 1st defendant (Maritha), she gave Exh.P9, 10 and 11 to the witness in protest. Leonida Amolo (8th defendant), Rose Ndiga (9th defendant) and Moses Nyangaya (10th defendant) did not have titles. And that even as the requisite consents were not said to have been obtained, the plaintiffs had not sued the land registrar who effected transfers and issued titles. All this took place when Maritha was the administratrix of Helekia's estate – hence moving to revoke her grant. Shs.4500/= was paid to obtain the title to the whole plot number 364.

The second witness Elizabeth Anyango Ochanjo is marked on the records as PW3. She knew Helekia Ochanjo, her husband who died in 1984. The 1st defendant Martha, (or Martha) was the first wife. Martha took letters to administer the estate of Helekia by the consent of the family but then she proceeded to do things unlawfully. So the witness moved to court and the grant was revoked. The plaintiffs got a confirmed grant (Exh.P12) instead. This witness also agreed that Joash Nyagaya, Julius Omollo and David Konje each do buy one acre of the original plot number 304. However each ended up buying more than an acre. Elizabeth named her children and prayed that she be given a portion of the original plot number 364. The 3 buyers (above) agreed on by the family, had to pay money to facilitate subdivision of plot number 364 but from that point on, Martha did not revert to the family for further consultation/consent. The deceased was said to have sold some 30 acres to Koru Girls Secondary School and 15 acres to Koru Primary school, this witness said. The family was not claiming back this land at all. Elizabeth and group were aware of the 3 initial purchasers who should give up excess bought acreage but the other six ought to be ordered to give up all what they bought. The remaining land was hilly and probably unsuitable for settlement/farming.

This witness could not confirm that the 3 buyers the family agreed on bought larger portions than mandated. But they did. The 3 plots involved here were sold before revocation of Maritha's (or Martha) grant and the buyers had titles. The original parcel number 364 no longer existed. There was no title in this witness's name.

The next witness **Nancy Nyambura Njenga (PW3)**, the land registrar Kisumu, testified next. She told the court that the files regarding parcels number KORU 1032 and 1035 had transfer forms but no consent forms (Exh.P13(a)(b)). The land registrar did not have on her file transfer forms for plots number 1018 to

1035 (except for number 1032 and 1035 only). The witness had original registers for plots number 1018 to 1035 all-inclusive – 18 plots in number – (Exh.P14 (a) to (f)). For each of all these plots, no consent to transfer was obtained. Only that there was an application for consent for plot number 1035 while Martha Odera (1st defendant) was transferring it to one Joash Nyatike on 29th December 1993. The witness did not note that Martha was doing so as an administratrix. She got a title to this plot number 1035 on 22nd December 1995 and transferred it to Joash N. Nyatike on 29th December 1993.

As for the other plots, evidence had it that Martha (or Maritha) the 1st defendant, got the titles as follows and in some did transfer: (see the tabular form below.).

Plot Number Date Title Obtained Transferred/Not transfer

1033	22/12/93	To Felista Anyango on 18/3/93
1034	22/12/93	Still in 1st defendant's name
1032	22/12/93	To Luke Omollo on 20/1/94
1030	27/12/93	Still with 1st defendant
1028	27/12/93	Still with 1st defendant
1026	27/12/93	Still with 1st defendant
1027	27/12/93	Still with 1st defendant
1025	27/12/93	To Julius Omollo on 29.12.93
1024	27/12/93	To Julius Omollo
1023	27/12/93	Still with 1st defendant
1021	27/12/93	To David Konje on 20/1/94
1020	27/12/93	Derrick Odundo on 21/2/94
1019	27/12/93	To Koru Grils Sec School on 17/1/95
1018	27/12/93	Still with 1st defendant

The court heard that it was not indicated that the 1st defendant effected the above transfers as an administratrix

In cross-examination, PW3 replied that Phelista (or Pilista) Anyango was registered on 18th March 1993 as per the records.

All the parcels narrated were sub-divided from Plot number 364, initially registered in the name of the Settlement Fund Trustees, who transferred it to Martha Odera Ochanjo. The court heard that land control board consents would be obtained from Muhoroni Land Control Board.

In re-examination the court heard that a land control board consent was a supporting document for a transfer sought before issuance of a title. Thus a consent must accompany a transfer form before registration.

James Kegunde Mukankta (PW4?), the district land adjudication officer, Nyando, held records for land parcel number KORU 67/364. Its original allottee was Helekia Ochanjo. It was transferred to him on 31st October 1966 when he paid the loan to Settlement Fund Trustees on account number 067364. Then Helekia transferred the parcel to Koru Girls Secondary School Board of Governors. On 1990 and particularly, on 1st December 1991 Martha, got a confirmed grant for the entire plot number 364, Koru. On 14th October 1993 the Settlement Fund Trustees discharged the land and transferred it to Martha Ochanjo. 4.1 hectares of the land number 364 was hived off and transferred to Martha in 1995. A consent to this transaction was produced Exh P14(a) and the transfer, Exh.P14(d) (shown as (c) in typed proceedings). From the moment the land was transferred to Martha, it became her free freehold and private property. It needed no more reference to PW4's office. Martha was its first registered proprietor with effect from 14th October 1993. Any consent(s) to subsequent transactions could be found either at the D.O.'s office or the land registry. The plaintiffs' case closed.

Martha Odera Ochanjo (DW1 1st defendant) took the witness stand. She told the court that plot number 364 belonged to her husband Helekia who died in 1984 before obtaining its title from the Settlement Fund Trustees. She pursued it and got it. The plaintiffs were her 2 sons and a co-wife. In that pursuit because there was some tax due on the subject land, the whole family consented, and Martha was to sell a portion of the land to recover the land. So she obtained a grant, applied for the title deed and got one – after making all payments due on it. She got the money when she sold pieces to Rose Ndiga and other buyer/defendants. On obtaining the title, the land registrar informed DW1 that she was free to subdivide. The deceased had given parts of land to Koru Girls Secondary School and Koru Catholic Church, each of which got a title. She executed agreements to sale the portions to the school and the church as well as the co-defendants. All was known to the 1st plaintiff, Fredrick, her eldest son, and also her co-wife, the 3rd plaintiff. The 2nd plaintiff, Kennedy, was away in Nairobi. Fredrick participated in some of the sale agreements as one of the family members, who consented to Martha to do what she was doing. She then signed transfer forms and titles were issued. DW1 obtained consents from the land control board at Kisumu to effect respective transfers to the defendants.

The witness narrated how much each buyer/defendant paid and for what acreage. That told debt due on the land was about shs.100,000/=. The sale proceeds went to pay it off and DW1 used the balance to develop the remaining land for the benefit of the family. She had also provided for each of the plaintiffs – some 10 acres of which she had not given out titles yet. Only herself and the plaintiffs were beneficiaries of Helekia's estate and no more. To her, the sub-divisions to enable DW1 to transfer the bought portions to the purchasers need not be nullified.

In cross-examination, Martha said that she mentioned Elizabeth (3rd plaintiff) in her petition. The rest of the so called beneficiaries were her children, some dead, some alive and others married. Elizabeth had no children with the late Helekia but she had some from her inheritor.

DW1's grant was revoked on 1st August 2000 on the claim that she was destroying the estate. She did not produce any consent upon which the transfers were made. She held no sale agreement from any of

the buyers, but each had a copy. She got the grant to act as a trustee for the other family members – beneficiaries to Helekias estate. She received money from the buyers before a grant was issued to her.

All title deeds were in her names – not the beneficiaries. Some sale agreements had been made before advocates. Out of the whole plot number 364 of 120 acres, after sales, there – remained 75 acres for the family. The 1st plaintiff Fredrick signed some of the sale agreements.

Julius Omollo Akelo (DW2, 3rd defendant) told the court that he bought a piece of land from Martha (1st defendant) at Koru, which was registered in his name – plots number 1024, 1025. Martha had approached DW2, to buy the land so that she could raise funds to subdivide the land that her late husband had left, and also have it in her name. Two sale agreements (Exh.D1(a)(b)) were entered into, one on 21st October 1993 which the 1st plaintiff witnessed with one Japheth Onyango. In all DW2 paid shs.97,050/= . Mr. Aroka Advocate gave the title in the second agreement to the witness in the presence of the 1st defendant. DW2 produced the titles to plots numbers 1024, 1025 (Exh D2(a)(b)). When concluding the agreements, the witness was not aware of the dispute in the Ochanjo family about the land number 364 and Martha showed him its title in her name. He did not collude with the 1st defendant in the transaction and Fredrick, the 1st plaintiff was all the time aware of it. DW2 had occupied his 2 plots ever since.

In cross-examination DW2 said that the 1st defendant (DW1) told her that the land initially belonged to Mzee Ochanjo, somebody DW2 did not know because he lived far from Koru. Yes. 1st plaintiff only signed one agreement – to buy one acre. It was not signed by the 2nd and 3rd plaintiff to either. DW2 collected his titles from an advocate. He did not appear before any land control board at all. Referred to his transfers for the 2 plots, DW2 said that he paid shs.37,050/= for the first plot but only shs.20,000/= appeared in the transfer. For the second plot, he paid shs.60,000/= but shs.20,000/= is what was on the transfer form. And that there were discrepancies between (in acreage) as per the agreements and the title deeds. He refuted Martha's claim that she got shs.40,000/= in the deal. DW2 claimed that he paid her shs.60,000/=. DW2 built his house on plot 1024 in 1994.

DW2 maintained that he did not insert any acreage after the sale agreements and that the advocate told him that it was the seller to seek relevant consent from the board.

Next was **Herina Nyagaya (DW3)**. It was not easily clear to this court how she came in, but she told Warsame J that she was the widow of Joash Nyagaya, who died in 2000. She lived on his land, whose title number she could not remember. It was bought from Martha Ochanjo by Joash at a sum of shs.22,000/= an acre – after Ochanjo died.

Philista Anyango (DW4, 6th defendant), bought the land she stays on at Koru, from Maritha (1st defendant) – under an agreement, which she produced (marked?). One not able to read or write, DW4 said that she paid shs.55,000/= for the land. She did not know who signed the agreement on her behalf, and she did not see Fredrick Ochieng (1st plaintiff) at the time it was executed. What she paid is not what the transfer form showed (shs.23,000/=) or shs.20,000/= that Martha spoke of. DW4 bought 1 acre of land and built on it in 1997 – where she lives.

Then came **Leonida Amollo (DW5 8th defendant)** she entered in a sale agreement (Exh.D5) to buy from Martha one acre of land at shs.40,000/=. Martha gave her a title which is still in her name (Martha) – (Exh.D6). A promised transfer did not follow. All was stopped by a court order. DW5 was never aware of the family dispute over this land when she paid for her piece.

DW5 said in cross-examination that in fact it was her son, Francis Omwenga who bought the land comprising one and not two acres. He paid shs.40,000/= she paid the money (through her son?) and left everything to Francis and Martha to follow through. The case then came before the undersigned.

Dereck Odundo Oure (DW6, 4th defendant) said that he bought his plot number 1020 Koru, from the

1st defendant (Martha) and got registered over it (Exh.D8). This was by agreement of 11th August 1993 (Exh.D7), for an acre. The agreement was signed by himself and Martha and witnessed by Fredrick Ochanjo s/o Martha (the 1st plaintiff). Then in 2001, in the suit herein the witness was served with a summons. DW6 bought the land from Martha. She showed him the original title. He did not conspire with her to buy the land. Her witness was her own son. He had told DW6 that that land had a Settlement Fund Trustee's debt which needed to be paid. DW6 paid fully for his portion – then later the family dispute over it surfaced. His was thus a regular purchase that should not be disturbed.

In cross-examination DW6 said that he did not go before the land control board for a consent. The seller did and he signed the transfer form. The rest was done by Martha's lawyer. The agreement spoke of shs.24,000/= price – shs.20,000/= was for the plot and shs.4,000/= for survey. That although Fredrick did not append his signature to the sale agreement, he was present when it was executed. Indeed DW6 had visited the land office and noted that the original land was in the name of the Settlement Fund Trustees – not the deceased, Helekia or Martha, the witness got his title from the land office.

Moses Ochieng Nyagaya (DW7, 10th defendant) lived on plot number 1031 Koru, which he bought from Martha Ochanjo (1st defendant). However, it was still in the seller's name. He was offered to buy an acre for shs.30,000/=. DW7 first paid shs.15,000/=. The price was revised upwards and he paid a total of shs.40,000/=. Martha showed him the plot and he built there, awaiting a surveyor. This was in 1993/94 but then this suit came before the survey. All was done under written agreement (not produced) and the witness was awaiting his title. He should not be evicted by anybody else except, perhaps Martha.

The witness built on the house in 2001 – before an injunction order (issued?). He was yet to go before the land control board for consent and his purchase agreement was with his lawyer. DW7 was buying Martha's portion of the land long after her husband, Helekia, died.

On her part **Rose Achieng Ndiga (DW8, 9th defendant)** had this to say: On 11th November 1994 she with Martha entered into a sale agreement to buy an acre of land for shs.40,000/= (Exh.D9). The whole thing started in 1992. DW8 bought plot number 1018 she occupies but whose title is still in the seller's (Martha's) name.

In 1999 Martha informed the witness that the price had gone up to shs.50,000/=. She paid the total sum. The seller showed DW8 the portion on the ground and when she was about to start construction, a local chief summoned Rose and informed her that she was a trespasser. All along before this, Martha had come to see DW8 with Fredrick Ochieng (1st plaintiff) and that reassured Rose that all was well. She was later sued. She never got her title. The witness did not contemplate leaving the plot she bought.

The cross-examination the court heard that DW8 never appeared before any land control board. Martha had come to her with all relevant papers and intimated that the Ochanjo family was willing to sell the land. DW8 did not carry out a search at the lands office at all. She did not want a refund of the purchase price.

David Abla Konje (DW9, 5th defendant) had land at Koru. He bought his plot number 1021 Koru, from Martha Ochanjo between 1993/94 for shs.25,000/= (Exh.D11, agreement). He had confirmed that Martha had a title to the land (Exh.D10) and after the deal, he got title to his own parcel (Exh.D9) Fredrick Ochieng, the 1st plaintiff witnessed the agreement. Then Martha's lawyer processed the consent and a transfer was effected. DW9 showed receipts for payment in that regard to the land control board (Exch.D12, 13) and he attended its meeting at the D.O's office. There was no dispute over the land. No fraud was committed and DW9's title should thus not be cancelled.

In cross-examination, DW9 admitted that he did not have a consent form from the land control board. The witness knew Helekia Ochanjo who died, as the owner of the land in issue. Then he died and it was subdivided. He dealt with Martha, and also got to know Elizabeth (3rd plaintiff). The title he got from Martha however showed that he owned 0.4 hectares – while the agreement spoke of an acre.

Helekia was allotted the land by the Settlement Fund Trustees but he died before he took its title.

Lucas Omala Nyabinda (DW10, 7th defendant) lived on plot number Koru/1032 whose title he held (Exh.D14). Martha approached the witness to buy the plot because her late husband had Settlement Fund Trustees debts to clear. The two executed a sale agreement (Exh.D15) in December 1996. DW10 paid shs.65,000/= for an acre and a half. Martha had a title to the land and the two visited her lawyer's offices – Mr. Aroka. Forms were signed there and later Martha informed the witness that she had obtained a title for him. She gave it to him. He did not obtain the land by fraud. DW10 later came to know the 1st plaintiff (Fredrick); he did not know the 3rd plaintiff (Elizabeth) at all.

DW10 did not present himself before the land control board. He signed all relevant documents in the advocate's office, copies of which he did not have. He had not conducted a search at the lands office before buying the land. That closed the trial and both sides submitted.

Mr. Mwamu for the plaintiffs argued that the 1st defendant (Martha) sold parts of land number 364 in breach of trust when he held a grant to administer the estate of the late Helekia. The grant was revoked on 1st August 2000. Counsel seemed to be saying that the original title was in the name of Helekia and that the 1st defendant had no capacity to sell off parts of it by agreements entered into after she ceased to be the administratrix. This being a rather lengthy matter heard over a long period by 3 judges, probably it is pertinent to clear some issues before going far. The fact is that Helekia died in 1984 before he paid off the Settlement Fund Trustees to get the title. He was the allottee, yes, but it was after his death that Martha, armed with a grant, got the dues over the land number 364 paid off, and as per PW4 (Japheth Kegunde) she became the first registered proprietor. As for the agreements to sell to various purchasers/defendants, they were said to have been entered into in the 1990's that is to say when Martha was still a legal representative of Helekia and before the grant was revoked on 1st August 2000.

It was added that the 1st defendant held the land on behalf of the plaintiffs and she could not sell it or any part thereof, without their consent. So the co-defendants/buyers were said not to be bona fide purchasers for value without notice, even as they claimed that they knew that the land belonged to Martha. The court was urged to notice that the transfers herein were not backed by requisite land control board consents as per the law and thus judgment should be in favour of the plaintiffs.

On the other hand, it was argued for the defendants that the 1st defendant was the first registered proprietor of parcel number 364 - the mother of parcels numbers 2018 to 1065. Helekia was only its first allottee. The court was told to find that since the plot's first registered owner (as per Japheth Kegunde, (PW4) was Martha, then the defendants had no right and therefore, a cause of action against Martha. It does not quite appear so, if that issue can be disposed of at this point. The initial allottee, Helekia first made payments to the fund for this plot. He had not paid off all sums owing on it when he died. So this land had not been discharged in his favour yet. But then when his wife (Martha) came along with a grant and made due payments, the title was issued in her name and she conceded that she now held the property for the benefit of the family of the late Helekia. In fact she saw only herself and the 3 plaintiffs as the beneficiaries and no one else. She added that she earmarked portions of parcel number 364 to all of them and what remained was to give them titles. So it can be said that the plaintiffs had/have an interest and cause to argue in a matter concerning this land.

It was added that any subdivisions that gave apart of parcel number 364 to Koru Girls Secondary School (if it may be added, Koru Catholic Church) should not be cancelled because they were not parties in these proceedings. Several cases were cited on the tenet that the most elementary principle of justice is offended in the event a court issues orders against a non-party, who in that event was not heard in the proceedings that led to that order (see **Equipment & Builders Limited versus Nairobi City Commission {1999} KLR 243**)

On the status of the suit against Joash Nyaga (2nd defendant), Herina Nyagaya DW2, his widow said that he died in 200. The suit against him thus abated.

The other point was that if the subdivisions and transfers were nullified Plot number 364 would revert to the 1st defendant who in any event told the court she was intending to give titles to the defendants/buyers who paid money that got the land discharged, and some of it went into sub-division. That that order would be in vain because the defendants already had their portions.

On fraud, it was submitted that that was not proved i.e., that the defendants knew that there was a defect in the title the 1st held. Otherwise they ought to be treated as bona fide purchasers for value without notice.

On land control board consents, the plaintiffs failed to prove that none issued preceding the transfers. Attendance before the land control board was discretionary (see section 17 Land Control Act, Cap 302) and one's absence was not fatal to the transaction. Here it will be recalled that Nancy Nyambura Njenga (PW3), the land registrar said that the files she held on the subject subdivisions had transfer but not consent forms. Such forms were necessary to accompany transfers so that the same could be registered. However, it was not in dispute that transfers were accepted in the land office and registration effected. And as to who was the custodian of these consent forms Japheth Kegonde PW4 said:

“Any subsequent consent would be found with the District Officer or land registrar.”

The District Officer did not testify as to whether he had the consents alluded to here at all. Neither did Muhoroni Land Control Board testify here. So the defendants maintained that since the law (section 20 cap 302) required that the land registrar should ensure that a relevant consent was given for a transaction to be registered, and that PW3 (Nyambura Njenga) was not in Kisumu during the transactions in issue, it should be presumed that due consents were presented to the then land registrar who then registered the transfers.

Further, it was submitted that when the family gave consent to the 1st defendant to sell 3 acres of land some 3 people - one acre each, and David Konje was one of them (DW9). His title showed 0.43 hectares while computation of an acre came to 0.40 hectare – quite about the same. Thus the three first defendants bought heir portions with consent from the whole family including the plaintiffs and so they cannot disown the sales at all.

Counsel added that the defendants' were bona fide purchasers for value without notice.

Going back to the issue of fraud it was submitted that if any registered transactions questioned here, meant misleading or in other way getting the land registrar to effect them, the Attorney General and/or, the Commissioner of Lands ought to have been joined in these proceedings and that it was fatal to exclude that office – a matter well settled in the cases of **Sun Pal Limited versus PiereLaparte Limited Civil Application NO. NAI 242 OF 1997 (CA)** and **Town Council of Ol'Kalou versus Ng'ang'a General Store Civil Appeal No.269/1997**. It was imperative that when the plaintiffs claimed that there had been a wrongful transfer effected, the Commissioner for Lands be sued – not to call his local representative, the land registrar as a witness.

And lastly that under section 93 of the Law of Succession Act validity of a transfer of an interest in immovable property was not affected by revocation of grant.

To determine this case on the pleadings, evidence, submissions and case law and the law cited, this court is minded to begin by stating that evidence has it that Plot number 364 was allotted to Helekia Ochanjo, the husband of the 1st defendant and the 3rd plaintiff. He died before he got that land discharged by the Settlement Fund Trustees and transferred into his name. So the Ochanji family agreed and mandated Martha Odero Ochanji, first defendant and senior wife of Helekia to “get” the land and raise funds by selling some parts of the land to effect sub-division. To do so it was proposed to sell, it can be approximated – an acre to each, to raise money to pay off the dues to the Settlement Fund Trustees and effect sub-divisions. Up to this point all went on well. Martha got a grant by which she got registered over plot number 364. She drew sale agreements with the buyers, some of which agreements even the 1st

plaintiff (Fredrick) witnessed. Accordingly, the sale to Joash Nyagaya, Julius Omollo and David Konje (2nd, 3rd and 5th defendants) cannot be disturbed, all being equal. The issue of land control board consents was raised against them but that will be addressed later. However at this point it must be said right away that Joash Nyagaya passed on in 2000, so his wife Herina (DW2) stated here. It was not shown whether he was substituted. But from what is before the court it was not so done and so the case against him should be termed as having abated. The sale to him nonetheless remained.

After having said that the 1st defendant (Martha) had a grant to administer the estate of Helekia by the time he entered into agreements to sell parcels of land to the other defendants especially before 1st August 2000 when that grant was revoked, the Law of Succession Act says at section 93(1):

“93 (1) A transfer of any interest in immovable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted, shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2).....”

It was agreed all round that Martha held a grant of administration to the estate of Helekia all the time until it was revoked on 1st August 200. Accordingly any transfers or other transactions she effected during the existence of the grant she held, remain valid. Parliament in its wisdom saw the injustice and unfairness that would be visited upon the transferees involved like defendants here, let alone the loss and damages the transferors of a given estate would suffer – hence the passing of section 93(1) of the Act.

There is no evidence that Martha transferred or entered into agreements of sale after 1st August 2000. So what she did before the revocation of her grant, remains as per the Law of Succession. The issue of consents will be addressed presently.

It was pleaded and submitted that the transfers disputed here were effected but there were no land control board consents to back them up – a vital and fundamental document. On this Land Control Act enjoins the land registrar thus in section 20 of that Act:

“20. (1) The registrar shall refuse to register an instrument effecting a controlled transaction unless he is satisfied that any consent required by this Act to be obtained in respect of the transaction has been given, or that no consent is required.

(2)

The sub-divisions and transfers disputed here required land control board consents as per section 6 of Cap 302. The transfers were registered by the land registrar in office before Nancy Nyambura (PW3) arrived. He was is deemed to have been alive to section 20(1) above. He registered the transfers and the defendants who got titles displayed, got registered over their respective portions. It can only be assumed that the land registrar who effected the registration of those transfers was satisfied that due consents had been obtained. He must have seen them. The plaintiffs claimed that no such consents were obtained. They ought to have proved this by evidence from the Muhoroni Land Control Board office chaired by the Local District Officer. In fact at some stage Mr. Mwamu promised that the D.O. would be brought to testify. That did not materiliase. Consent forms could either be with the land registrar or the relevant control board, so Japheth Kegunde (PW4) said. The land registrar had none on her files to produce. The chairman Muhoroni Land Control Board was not brought in to say that he did not have copies of the said consents. Yet the transfers were registered. The only conclusion the court drew is that the necessary land control board consents were available and on sighting them, the registrar effected the questioned transactions.

Attendance before the board usually by the selling/applicant is not mandatory section 17(1) of the Act) and absence does not invalidate a transaction at all.

The question of fraud raised by the plaintiffs was not touched on in evidence or submissions. It was not shown that Martha got the title to the original plot number 364 or that she connived, colluded and conspired with the defendants and the land office to get the subdivisions and transfers questioned here effected. In any event even as misconduct was alleged against the land registrar or that he was misled, he was not joined in this suit to show or otherwise demonstrate his role. It was imperative in the circumstances and so the plaintiffs committed a fatal flaw by not jointing the Commissioner of Lands in these proceedings. In the **Sun Palm Case (Supra) Kwach J.A**, considering whether some parties issued with titles to certain parcels of land could be termed trespassers said thus, inter alia:

“I cannot see how the applicants can successfully impeach the respondent’s title without bringing the Commissioner of Lands on board.”

That answers the plaintiff’s omission by failure to sue the Commissioner’s of Lands for allegedly irregularly and unlawfully issuing titles to the defendants.

The court then considered whether the defendants were bona fide purchasers of their respective portions of plot number 364 for value without notice,. It thinks so. They gave evidence that Martha approached each of them holding title to that plot, and offering to sell a portion. She was in some instances accompanied by the 1st plaintiff (Fredrick). Agreements were drawn up and Fredrick even witnessed some of them. The defendants said here that they did not know of Ochanjo family dispute over this land at all. They paid whatever sums, this court is not here to determine whether consideration was sufficient or the exact acreage agreed as appeared to have been transferred. At no time, the court concluded, was evidence tendered to show that the defendants bought their portions with notice of dispute to the title the 1st defendant held. They were thus innocent and their purchases cannot be disturbed at all.

Then there are those who were not given titles for one reason or another e.g. that these proceedings intervened. They could still try the High Court if it can be satisfied to enlarge the time within which to petition the local control board for belated consents. It is not automatic and section 8 of the Land Control Act says in a proviso to thereto, when expiry of 6 months before a consent to a transaction, the agreement involved becomes void:

“8. (1)

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reasons so to do, upon such conditions, if any, as it may think fit.” igh court if it can be satisfied to ena

All in all this court is not minded to nullify the sub-divisions herein as that may mean title number 364 “reverting” only to Martha whom PW4 said was the first registered proprietor of that land. In any event that title is no more. It cannot go to the plaintiffs at all. They indeed say that they are only beneficiaries and Martha held the land in trust for them. Then we will be going over the same thing again with costs, time etc piling and to no benefit at all. It will be a futile order. Anyway, that Martha said then that she had 75 acres left for the benefit of the plaintiffs, who do not and did not hold title number 364 at all, not even under the grant they claim, she said that she had titles for them, the plaintiffs, and she would give them. May she give those titles to the plaintiffs and the matter rests there. That title number 364 no longer exists anyway.

In sum this suit is dismissed. This being an essentially a family matter each party to bear its own costs.

Judgment accordingly.

Delivered on 15th May 2009

J. W. MWERA

J U D G E

JWM/mk.