



**Ndiritu & 100 others v Ahmed & 3 others (Environment & Land Case 98 of 2010) [2022] KEELC 15613 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 98 OF 2010  
LN MBUGUA, J  
DECEMBER 8, 2022**

**BETWEEN**

**SIMON KIHOSHIA NDIRITU & 100 OTHERS ..... PLAINTIFF**

**AND**

**ABDI SHEIKH AHMED ..... 1<sup>ST</sup> DEFENDANT**

**TARAGURI LALITCHANDRA PANDIT ..... 2<sup>ND</sup> DEFENDANT**

**DHRUV LALITCHANDRA PANDIT ..... 3<sup>RD</sup> DEFENDANT**

**ABRAHAM MURIUKI MUNENE ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The Pleadings**

1. By a plaint dated 4.3.2010, the plaintiffs sued Abdi Sheikh Ahmed, Eco Development Bank Ltd and Akiba (Development) Ltd claiming that they purchased houses comprised in Akiba Belle Vue Estate, South C from Akiba (Development) Limited. That part of the purchase agreement was that parcel LR No.13324/92 contained in the said estate would be delineated to construct a nursery school for children of the said estate. It was further pleaded that the 1<sup>st</sup> Defendant claims to be the registered owner of the suit land by way of purchase from Akiba (Development) Limited, but such a sale amounted to a breach of contract between the plaintiffs and Akiba (Development) Limited.
2. An amended plaint dated 26.3.2010 was brought forth in which the alleged three directors of Akiba development limited were brought on board, while Eco Development Bank was removed. Another Further Amended plaint was filed on 25.9.2018 in which Akiba (Development) Limited was removed as a party herein. The orders sought in the final amended pleadings of the plaintiffs are;
  - a. An order of injunction to restrain the 1<sup>st</sup> Defendant, whether by himself, his servants or agents from entering into the said estate with the intent to construct any building on the said plot.



- b. A declaration that the said property belongs to the residents of the said estate or in the alternative the directors of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants be compelled to fulfill their contractual obligations to the Plaintiffs.
  - c. Possession of the said property.
  - d. Costs.
  - e. Further or other reliefs as this court may deem fit.
3. The 1<sup>st</sup> Defendant entered appearance on 21<sup>st</sup> April 2010 and opposed the Plaintiff's claim by way of a further amended statement of defence dated 14<sup>th</sup> November 2010. He contends that he purchased the suit property from the beneficial owner; one Hilda Ng'anga on 11<sup>th</sup> March 2009, who in turn had bought the land through from a public auction. He further contends that at the time of purchase, the suit land was registered in the name of AKiba (Developments) Ltd who executed the transfer, thus he is a bonafide purchaser for value without notice.
  4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants entered appearance on 16.6.2010 and opposed the Plaintiff's claim by way of an amended statement of defence dated 2<sup>nd</sup> November 2018. They contend that Akiba (Development) Ltd owned the suit land but it sold the same by auction in 2009 to one Hilda Wanjiru Ng'anga' who in turn sold the land to the 1<sup>st</sup> Defendant and instructed Akiba to transfer the suit land to the new owner (1<sup>st</sup> defendant).

### **The Evidence**

5. On the date of the trial, all the parties were represented in the morning of 1.3.2022 when the matter was given time allocation for the hearing at 11.30 am. However, there was no appearance for the 1<sup>st</sup> defendant when the trial commenced at 11.43am in open court. Counsel Khaemba appearing for the 1<sup>st</sup> defendant made his entry in the courtroom after the plaintiff had closed their case and he stated that he would proceed with the case from where it had reached.
6. PW1, Kennedy Ndung'o Muindi testified that he owns House No.57 at Akiba Bellevue Estate and that he is currently the treasurer, Akiba Estate Residents Association. His witness statement in the Trial Bundle dated 9<sup>th</sup> May 2017 was adopted as his evidence in chief and the Plaintiff's documents in the bundle of documents of even date were produced as Plaintiff Exhibits 1-15.
7. In his statement, PW1 stated that in year 2010, the 1<sup>st</sup> Defendant met Akiba Bellevue Estate's chairman one Simon Kihohia Ndiritu and informed him that he wanted to construct flats on the suit land and that he had acquired the necessary permits and was ready to bring his workmen into the estate to begin construction. Pw1 says he was shocked since the initial purchasers of houses in Akiba Estate had been promised a nursery by the sellers, Akiba Estate (Developers) Ltd, adding that no "change of user" had been placed on the suit premises.
8. He stated that the chairman was able to get the 1<sup>st</sup> Defendant to disclose that he bought the suit premises from one Hilda Wanjiru Ng'anga, who had in turn bought the land at an auction on 28<sup>th</sup> January 2009. He also stated that the chairman unearthed that the suit property has never been charged and that it was sold to the 1<sup>st</sup> Defendant on 2 occasions and for different amounts. He pointed out that on 11<sup>th</sup> May 2009, the 1<sup>st</sup> Defendant bought the land for ksh.3million from Hilda and on 3<sup>rd</sup> September 2009, he bought it at ksh.500, 000/= from the 2<sup>nd</sup> -4<sup>th</sup> Defendants acting as directors of Akiba (Developers) Ltd which had been dissolved by 3<sup>rd</sup> September 2009. He averred that it was



- fraudulent for the directors of Akiba (Developers) Ltd to execute documents as directors of a dissolved company.
9. Upon cross-examination by counsel for the 2<sup>nd</sup>-4<sup>th</sup> defendants, Pw1 averred that there was an agreement between the Plaintiffs and Akiba Developments Limited whereby the said company was to reserve a playground and a nursery School field in 1984 but he did not know how the said agreement was structured as he did not have it. He further stated that his personal title does not have the reservation of the suit plot.
  10. Pw1 recognized that the mother title LR No.13324, had been issued to Akiba (Development) Ltd.
  11. He also stated that he bought his house from another owner who had in turn bought from Akiba (Developers) Ltd as the mother title was subdivided to create subleases. Referred to Special Condition No.5 of the mother title which states “the land shall be used for residential purposes”, he stated that he would not have bought the house if he had seen the title and that there has not been a change of use of the said title.
  12. He also stated that while there is no law that states that a proprietor has to consult while dealing with his land, he is challenging the way the suit property was acquired as it was transferred illegally. He averred that before one starts constructing in the estate, it is fair that the residents be consulted.
  13. He challenged the valuation of the suit land and the manner in which the property was sold, averring that it was sold for less than its worth and according to them, the auction did not happen. Referred to a letter dated 15<sup>th</sup> October 2008 addressed to Wagly Auctioneers by AKiba (development) Ltd, he stated that its content show that Akiba developers limited instructed the said auctioneers to sell the suit land and that the auctioneers sold it to the highest bidder, one Hilda Wanjiru Ng’ang’a for ksh.500,000/= .He averred that the Plaintiffs were also interested to buy the suit land but they were not invited to the auction.
  14. Pw1 further challenged the transfer of the suit land to the 1<sup>st</sup> Defendant on the basis that the process was done when Akiba (Developers) Ltd had been dissolved.
  15. PW2, Lydia Njeri Waweru owns house No.17 in Bellevue Akiba estate and is an auctioneer trading as Purple Royals Auctioneers. She adopted her witness statement in their Trial Bundle as her evidence. In the said statement, she stated that it is her professional opinion that the Suit land was not sold by auction since for there to be a public auction, there must be a charge, a borrower/Chargor who defaults, compelling the lender/chargee to exercise his statutory power of sale and that the suit property was not charged.
  16. On cross examination by counsel for the 2<sup>nd</sup>-4<sup>th</sup> defendants, Pw2 stated that the purported auction of the suit property did not happen, adding that the letter dated 15<sup>th</sup> October 2008 addressed to Wagly Auctioneers by Akiba (Developers) Limited was forwarding documents to the said auctioneers but it does not instruct them to auction the suit land.
  17. Referred to the letter dated 16 October 2008 in which Wagly auctioneers were asking Akiba developers for a valuation report of the suit land, she stated that it means that they had instructions to auction the suit land. She was also referred to the letter dated 2<sup>nd</sup> February 2009 from Wagly auctioneers to Akiba (Developers) Ltd, where the auctioneers were stating that they had conducted the auction and the highest bidder was Hilda Wanjiru Ng’ang’a. However, Pw2 maintained that the auction did not happen.



18. She also stated that there is no law that prohibits one to sell their property by public auction even where the property is not charged but she cannot know when valuation was done, and there is no document showing that Hilda Wanjiru sold the suit land 6 months after the auction.
19. She also stated that since Paragraph 11 of the memorandum of sale dated 28<sup>th</sup> January refers to a chargee, the suit property must have been sold by a bank as it had a loan.
20. The case of 2<sup>nd</sup>-4<sup>th</sup> defendant was advanced by one Dhruv Laitchandra Pandit, the 3<sup>rd</sup> defendant who testified as DW1. He adopted his witness statement dated 20<sup>th</sup> September 2017 as his evidence. He also produced the documents in their bundle dated 20<sup>th</sup> September 2017 and a supplementary bundle dated 2<sup>nd</sup> November 2018 as exhibits 1-11.
21. In his witness statement, Dw1 stated that he is not aware of any agreement between Akiba (Development) Ltd and the Plaintiffs to construct a school on the suit land. He further stated that he was appointed a director of Akiba (Development) Ltd on 23<sup>rd</sup> October 1995 and as the alleged agreement was made between 1986-1987, he could not have breached any contractual obligations in relation to the dispute.
22. He also stated that the Plaintiffs are estopped from suing because by a Civil Case No.298 of 1997, Akiba Ltd sought to restrain the residents of Akiba Estate from obstructing them from building a nursery school on the said property and by a ruling of 25<sup>th</sup> November 1998, Justice Githinji (as he then was) restrained them from interfering with the Akiba Limited's enjoyment of the suit property.
23. DW1 also stated that by a transfer dated 1<sup>st</sup> April 2009, AKiba Limited validly transferred the suit property to the 1<sup>st</sup> Defendant on instructions of one Hilda Wanjiru Ng'ang'a and that he was acting as a director of Akiba Limited in the said transaction, which company has since ceased to exist as a legal entity and corporate veil has not been lifted and no reason had been put forward for lifting it.
24. When he was cross-examined by counsel for the plaintiff, and reference was made to a memorandum of sale dated 28<sup>th</sup> January 2009, Dw1 stated that while paragraph 11 reads "The chargee sells the property" the suit property was not charged thus he could not produce proof that it was charged.
25. Dw1 stated that there was no transfer of the land from Akiba to Hilder Wanjiru because Hilder had requested them to make the transfer in favour of the 1<sup>st</sup> defendant.
26. Referred to Gazette Notice No.8049, he stated that it relates to dissolution of Akiba (Developers) Limited on 5<sup>th</sup> August 2009 and that they had signed the transfer on 1<sup>st</sup> April 2009. He stated that directors of Akiba did not lodge the transfer themselves but it was signed when they were in office.
27. Upon cross examination by counsel for the 1<sup>st</sup> defendant. Dw1 reiterated that it is Hilder Wanjiru who requested them to transfer the land to the 1<sup>st</sup> defendant, but he did not know her personally. He also emphasized that there was no contractual agreement between Akiba and the plaintiffs that the suit property was set aside as a nursery school. Thus there was nothing wrong in the lawful owner of the land commencing construction on that land.
28. The 1<sup>st</sup> defendant Abdi Sheikh Ahmed advanced his own case, testifying as DW2. He adopted his witness statement dated 13<sup>th</sup> June 2017 as his evidence. He also produced the bundle of documents dated 13<sup>th</sup> June 2017 as his exhibits.
29. In his witness statement, he stated that he purchased the suit property from the beneficial owner, Hilda Wanjiru Ng'ang'a on 11<sup>th</sup> March 2009 at a purchase price of kshs.3 million. He further stated that the beneficial owner informed him that she bought the suit property at a public auction and that she



showed him a copy of advertisement of the sale and assured him that the property was still registered in the name of Akiba (Development) Ltd; That the latter proceeded to execute the transfer in his favour on 12<sup>th</sup> April 2009.

30. He stated that he is a bona fide purchaser for value without notice and has been issued with a certificate of title as proof of his registered proprietorship. He also stated that City Council of Nairobi advised that user for the suit property is residential and as such, there was no need to change the user since he intended to put up residential mainsonattes. He added that he received approval to put up mainsonattes through an agent he had instructed.
31. Upon cross-examination by counsel for the plaintiff, Dw2 reiterated that indeed he bought the suit land from the beneficial owner, Hilda Wanjiru, but he doesn't know her whereabouts. Referred to the sale agreement made between him and Hilda Wanjiru Ng'ang'a, he stated that it is true he paid Hilda sh.3 million for the suit land on 11<sup>th</sup> March 2009 as per the agreement, but Akiba were demanding a further sum of ksh.500,000/=.
32. He stated that Akiba Limited passed an interest in the suit land to him by way of transfer on 1<sup>st</sup> April 2009, but he does not know that its officials were laid off from 5<sup>th</sup> August 2009. He added that he does not know that directors of a company have no authority to do anything 12 months to being laid off.
33. He also stated that he has receipts for stamp duty and he can avail the same but he had no consent from the commissioner of lands and would not know whether he has the rent clearance certificate.
34. On cross examination by counsel for the 2<sup>nd</sup> -4<sup>th</sup> defendants, Dw2 stated that the sale agreement was between him and Hilder, but the transfer of the land to him was effected by Akiba, adding that Akiba had been indicated in the agreement as the owner of that land. He added that the transfer by Akiba was made on 1.4.2009, but he lodged the documents of transfer at lands office on 3.9.2009.

### Submissions

35. The Plaintiffs' written submissions are dated 1<sup>st</sup> July 2022 and 26<sup>th</sup> September 2022.They contend that the suit land was set aside for development of a nursery school. They relied on a letter dated 27<sup>th</sup> November 1995 from Daly and Figgis who were then advocates acting for Akiba (Development) Ltd which states in part "We act on behalf of Akiba (Development) Ltd, the registered proprietor of the above mentioned land (LR No.133224/92) on which it intends to develop a nursery school."
36. They further submitted that there was never a change of user of the suit land from a nursery school to a residential area which is contrary to Section 31-33 as well as section 56(1) of the *Physical and Land Use Planning Act* No.13 of 2019. They relied on the case of *Jimmy Gichuki Kiago & Another v The National Transitional Authority & 7 others* (2019) eKLR.
37. They also submitted that there is a letter from the City Council of Nairobi stating that the approvals that the 1<sup>st</sup> Defendant had were fraudulent and that there was no public participation in the conversion.
38. They argued that the transfer of the suit land from Akiba Limited was fraudulent. They pointed out that Akiba Limited was dissolved on 5<sup>th</sup> August 2009 and the suit land was transferred on 1<sup>st</sup> April 2009 contrary to Section 318(1) (e) of the then *Companies Act*-Cap 486 which barred directors from acquiring or disposing property of a company within 12 months of its winding up.
39. They also argued that since DW1 insisted that he bought the suit land from Hilda Wanjiru, the transfer from Akiba Limited should be struck off. They urged the court to take judicial notice of the fact that a transfer is effected the day it is lodged at the lands registry, in this case 3<sup>rd</sup> September 2009 and that by that time, Akiba Limited had been dissolved.



40. They submitted that the 2<sup>nd</sup> -4<sup>th</sup> Defendants have denounced The auction of the suit land and instead contended that they sold the suit land by private treaty yet they fail to provide evidence of such a sale. Adding that there is no explanation as to how the suit land reached Hilda. They pointed out that vide the letter dated 2<sup>nd</sup> February 2009, from Wagly Auctioneers, the suit land was sold at ksh.500,000/= yet the reserve price was ksh.1 million.
41. They relied on the case of *Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware & Another* (2018) eKLR as well as the case of *Alberta Mae Gacci v Attorney General & 4 others* [2006] eKLR to submit that they have proved an intricate web of deceit perpetuated by the Defendants thus title to the 1<sup>st</sup> Defendant should be impeached.
42. The 1<sup>st</sup> Defendant's written submissions are dated 26<sup>th</sup> July 2022, where he frames the following issues for determination;
- a. Whether the Plaintiffs have any legal right/interest in the suit property capable of being protected by this Honourable Court.
  - b. Whether there was a covenant to construct a nursery school on the suit property between the Plaintiffs and Akiba (Developments) Ltd.
  - c. Whether under the previous Company's Act-Cap 486, Akiba (Developments) Ltd could transfer the suit property within 12 months of its dissolution.
  - d. Whether the suit property could be sold, purchased and transferred between 3 parties as it was to the 1<sup>st</sup> Defendant.
  - e. Whether the 1<sup>st</sup> Defendant is a bonafide purchaser for value without notice.
  - f. Who should bear the costs of this suit and whether the 1<sup>st</sup> Defendant is deserving of general damages for loss of user of the suit property since the date of filing this suit.
43. It was the 1<sup>st</sup> Defendant's submission that the Plaintiffs have no locus standi as defined in the case of *Tazmin Shiffique Allibhai v Shaffique Allibhai & Another; I & M Bank Kenya Limited (Interested Party)* [2020] eKLR to bring this action against him since they have no evidence to justify that they have any legal right/interest in the suit property.
44. He argued that while the Plaintiffs bought houses at Akiba Belle vue Estate from Akiba (Development) Ltd, they don't claim that through any legal means, they have ever had a registrable right/interest in the suit property. He stated that they did not produce any contract in which they allege the existence of a clause to build a nursery school and that they did not produce any development plan of the estate to indicate that the suit property was reserved for the purposes for which they claim. In the event that there was such a contract, the remedy lies in a suit for damages against the 2<sup>nd</sup> -4<sup>th</sup> Defendants but cannot affect the 1<sup>st</sup> Defendant's title.
45. He pointed out that the Plaintiff's reliance on a letter dated 25<sup>th</sup> November 1995 from Dally and Figgis; the then Advocates of Akiba (Development) Ltd to prove that there was a covenant to construct a nursery school on the suit property only reveals a proprietor's desire of what it intends to do with its property. To this end, he relied on the case of *Leo Investment Ltd v Estruarine Estate Ltd* [2017] eKLR.
46. The 1<sup>st</sup> Defendant argued that the Plaintiffs' aim is to frustrate proprietors of the suit land from enjoying quiet possession. He pointed out that Akiba had filed a case Civil Case No. 298 of 1997 where an injunction was issued restraining them (plaintiffs) from interfering with the plans of Akiba



- Development Ltd of constructing a nursery school on the ground, by then, the plaintiffs were claiming that the suit land was meant to be open space.
47. It was also the 1<sup>st</sup> Defendant's submission that Section 318 (1) (e) of the previous *Companies Act* Cap 486 does not bar all kinds of disposal of assets by a company being dissolved /wound up but bars disposal that is meant to hide assets of the company from its creditors and aid the company in avoiding to settle its liabilities.
48. It was submitted that although the transfer was lodged at the lands registry in September 2009 after dissolution of Akiba (Development) Ltd, the same was executed on 1<sup>st</sup> April 2009 well before the dissolution of Akiba (Developments) Limited.
49. It was also submitted that the 1<sup>st</sup> Defendant satisfies the test of a bona fide purchaser for value without notice as it was laid by the court in *Katende v Haridar & Company Ltd* [2008] 2 E A 173 and cited by the Court of Appeal in *Joseph Muriithi Njeru v Mary Wanjiru Njuguna & Another* [2018] eKLR. He pointed out that he holds a valid certificate of title having purchased the suit property in good faith for valuable consideration without knowledge of any covenant /dispute between the Plaintiffs and Akiba (Development) Ltd.
50. On the issue of costs, the 1<sup>st</sup> Defendant submitted that this suit has been in court for over 10 years and the Plaintiffs have enjoyed an interim injunction against the 1<sup>st</sup> Defendant which forestalled his construction projects and effectively barred him from enjoying any form of use of his property, thus he should be awarded costs and damages for loss of user of the suit property. He relied on the Court of Appeal's decision in *Kenya Power and Lighting Company Limited v Philip A M Kimondiu* [2018] eKLR.
51. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant's submissions are dated 30<sup>th</sup> August 2022, where they have addressed the following issues:
- a. Whether the Plaintiffs have any proprietary rights on the suit property.
  - b. Whether there was a covenant between the Plaintiffs and Akiba (Development) Ltd (now dissolved) to build a nursery school on the suit property.
  - c. Whether Akiba (Developments) Limited (now dissolved) legally transferred the suit property to the 1<sup>st</sup> Defendant.
  - d. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have been properly sued in their capacities in the suit.
52. It is their submission that the plaintiffs lack locus standi to file this suit since they failed to produce any evidence to show that they are the registered proprietors of the suit property and or have any legal rights or interests over the suit property.
53. They further submitted that the plaintiffs have failed to satisfy the burden of proof as specified at Section 107 of the Evidence Act since despite them pleading existence of a contract between them and Akiba (Development) ltd, they never produced it. They relied on the case of *Lucy Mirigo and 550 others V Minister for Lands and 4 others* (2014) eKLR.
54. They also relied on the case of *Silver bird Kenya ltd v Junction ltd and 3 others* (2013) eKLR to submit that the letter dated 25<sup>th</sup> November 1995 from Daly and Figgs that the plaintiff attempted to rely on to prove that there was a contract to construct a nursery school between them and Akiba (Development) ltd does not create a contractual obligation. They further submitted that if the court upheld the said letter, then this suit would be time barred as the Plaintiff's right to sue would have lapsed in 2001.



55. They submitted that the suit land is private property thus they had the right to deal with it as they wished. They also argued that Section 318(1)(e) of the *Companies Act*, CAP 486 only bars a company from selling a company's asset fraudulently within 12 months of its dissolution.
56. It was also submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not directors of Akiba (Development) Ltd between 1986- 1987 and could not have sold houses and covenanted with the plaintiffs in their personal capacities as directors of Akiba (Development) Ltd as alleged as they became directors on 20<sup>th</sup> January 1990, 23<sup>rd</sup> October 1995 and 15<sup>th</sup> June 2006 respectively.
57. Relying on the case of *Multi choice Kenya Limited v Mainkam Limited and another* (2013) eKLR, they submitted that a director of a company is not personally liable for a breach of contract by the company.

### Determination

58. The issues falling for determination are; (i) Whether there was a contract between the Plaintiffs and Akiba (Development) Ltd to reserve the suit land as a nursery school, (ii) Whether the transfer of the suit property to the 1<sup>st</sup> Defendant was lawful/ regular, (iii) Whether the 2<sup>nd</sup> -4<sup>th</sup> Defendants have been properly sued. (iv) What relief is available to the parties.
59. It is not disputed that the Plaintiffs are residents and home owners within Akiba Bellevue Estate in South C. They purchased the said houses in 1984 from Akiba (Developments) Ltd which was dissolved in August 2009. They have sued its directors as the 2<sup>nd</sup> - 4<sup>th</sup> Defendants. The Plaintiffs' leases are derived from the mother title; known as LR No.13324. The property in dispute is known as LR No.13324/92, which is also a resultant subdivision from LR 13324 and it is undeveloped.
60. The provisions of Section 107 of the *Evidence Act* stipulate that:
  - “(1) (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
61. The Court of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR stated that:
 

“Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think its more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow”.



62. And in *Samson S. Maitai & another v. African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

63. What the above case law portends is that the burden of proving that the plaintiffs have an interests in the suit land capable of being protected by the courts lies with the plaintiffs. See; *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR. The plaintiffs cannot therefore shift this burden of proof upon the defendants. It is only after the plaintiffs have established their legal claim over the suit property that the defendants will come into the scene to defendant the transfer of the suit land from Akiba to the 1<sup>st</sup> defendant.

64. In paragraph 5 of the further amended plaint, it is pleaded that;

“By a clause in the contract, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants covenanted with the Residents of the said estate that the portion of land specifically delineated as LR. NO. 13324/92....would be used to construct a nursery school for the children of the estate.”

65. However, no evidence was adduced to support the aforementioned averment. PW1 told the court that he did not know how the agreement was structured as he did not have it. Pw2 did not mention the agreement at all. Thus the existence of the agreement, let alone the relevant clause has not been proofed.

66. Plaintiffs appear to rely on a letter dated 27<sup>th</sup> November 1995 addressed to their counsel by Akiba (Development) Ltd’s Advocates to buttress their claim. It states in part, “We act on behalf of Akiba (Developments) Ltd, the registered proprietor of the above mentioned land (LR No.13324), on which it intends to develop a nursery school”.

67. As rightly submitted by the defendants the said letter does not constitute a contract in the meaning of Section 3(3) of the law of Contract Act.

68. Back to the letter dated 27<sup>th</sup> November 1995, a thorough reading of the same reveals that Akiba development were registering their protest upon the actions of the plaintiffs (Akiba Residents Association). Apparently, Akiba were stating that they had embarked upon construction of a nursery school through Atlers Plumbers and builders, but the residents had apparently destroyed the property thereon and denied access to the contractor. This evidence is in tandem with the reason as to why Akiba filed the suit H.C.C.C 298 of 1997, where Akiba were claiming that they had intended to construct a school and even engaged contractors to undertake the tasks, but the plaintiffs were interfering with the said works. The current plaintiffs’ claim in the aforementioned suit was that the suit land was meant to be open space. (See the ruling availed on page 18 of the 2<sup>nd</sup>-4<sup>th</sup> defendants bundle of documents). What emerges from this evidence is that even if a school was meant to be built on the suit property, the plaintiffs are the ones who frustrated that process. They cannot now turn around and play victim for not having a school on the suit property.

69. Further, there was no evidence that the suit land had been planned and designated for use as a nursery school at any given time. I have keenly gone through the mother title of parcel LR No. 13324 availed at page 28 to 43 of the 1<sup>st</sup> defendant’s bundle of documents. Page one of the said document shows that the land was registered in the name of Akiba Development company on 1.4.1984. Entry no. 2 thereof is the certificate of subdivision of the large parcel into 158 plots and the other entries (save the last one) shows how various persons became the registered owners of the resultant parcels. Nowhere



in that document is it indicated that the suit parcel 13324/92 was reserved as a nursery school for the residents. Even Pw1 confirmed this information during cross examination when he stated that “ my personal title doesn’t have a reservation of a playground”.

70. The Estate’s registered plan was not placed before the court for consideration, thus there is no evidence to indicate that the suit plot was surveyed and demarcated as a school or even a playground.
71. This far, I find that the plaintiffs have not established any legal rights and or interests in the suit property. They therefore lack the locus standi to impeach the title held by the 1<sup>st</sup> defendant.
72. There is no evidence that the framework in the Physical and Land Use Planning statutes was contravened by DW1 2. After all, the area is apparently designated as residential. And the development the 1<sup>st</sup> defendant was to put up was apparently residential Maisonettes. In any event issues appertaining to nature and extent of land use and developments fall in the province of the physical and land use committees.
73. It follows that the owners of the land had the mandate to alienate the said land in the manner they deemed fit. It appears that after Akiba Development company encountered problems with the residents in building a nursery school, that is when they opted to sell the land through an auction. There is a memorandum of sale which indicates that the suit land was sold to Hilda Wanjiru by auction. Hilda then sold to the same to 1<sup>st</sup> Defendant and instructed Akiba Development Limited to transfer to him. The transfer was executed on 1<sup>st</sup> April 2009 when Akiba was in existence. Thus on the face of it, the sale was regular. The particulars of fraud set out in the plaint have not been proved.
74. The court is enjoined to take the 1<sup>st</sup> Defendant’s title over the Suit property as conclusive evidence that the 1<sup>st</sup> Defendant is the absolute and indefeasible owner of the Suit Property since no fraud or misrepresentation has been proved to impeach his title.
75. On the issue whether the 2<sup>nd</sup> -4<sup>th</sup> Defendant are properly joined, there is evidence that Akiba Development Limited which contracted with the Plaintiff was dissolved on 5<sup>th</sup> August 2009. The 2<sup>nd</sup>-4<sup>th</sup> Defendants are its directors. The 2<sup>nd</sup> -4<sup>th</sup> defendants raised the issue that the corporate veil had not been lifted in their pleadings and also in the statement of DW1, hence they were improperly joined to these proceedings.
76. The general rule as stated in *Salomon v Salomon* is that a company is a separate corporate entity from its directors. In *Multichoice Kenya Ltd v Mainkam Ltd & Anor (2013) eKLR* the court held;

“I agree that directors are generally not personally liable on contracts purporting to bind their company.

If the directors have authority to make a contract, then only the company is liable on it.”
77. The plaintiffs did not offer any rebuttal on the issue, nor did they invoke any exceptions to the rule in *Salmon v salmon* on lifting the corporate veil or piercing of the same. I therefore find that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were not properly sued.
78. On the claim for damages made by the 1<sup>st</sup> defendant, I find that as captured in a ruling dated 24.9.2010, the 1<sup>st</sup> defendant and others had been restrained from using the suit land until the case is finalized. Thus the 1<sup>st</sup> defendant has not been able to use the said land as a registered proprietor. However, the claim of the 1<sup>st</sup> defendant as pleaded in his further amended statement of defence is not framed as a counter claim. It is instructive to note that DW2 also did not adduce any evidence to support his claim of damages. In the circumstances, the said claim is disallowed.



## **Conclusion**

79. In the final analysis, I find that plaintiffs suit is not merited, the same is hereby dismissed with costs to the defendants from the date of the filing of the suit. Any injunctive orders given herein against the defendants are hereby discharged.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022  
THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Mbuthia for Plaintiffs

Thige for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants

Bulowa holding brief for Khaemba for 1<sup>st</sup> Defendant

Court assistant: Eddel/Vanilla

