



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 371 OF 2017

GRACE WAMBUI MUCHOKI.....1ST PLAINTIFF

PAUL NJUGUNA MUCHOKI.....2ND PLAINTIFF

VS

JOHN KARANJA MUCHOKI 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR,

MURANGA.....2ND DEFENDANT

SAMUEL NJOROGE NGUGI.....3RD DEFENDANT

CAROLINE WANJIRU NJOROGE..... 4TH DEFENDANT

JUDGMENT

1. The 1st Plaintiff is the mother of the 2nd Plaintiff and the 1st Defendant, being the wife and the sons of Daniel Muchoki Kingori, who died in 1989. The said Kingori was the registered proprietor of LOC6/GIKARANGU/191, the parent title measuring 11 acres. Upon subdivision, he sold 3 acres to Monica Njeri and the balance of 8 acres (LOC 6/GIKARANGU/2158) remained in his name. Further sub-division of parcel 2158 yielded parcel numbers 2894 and 2895 measuring 2 and 6 acres each. Parcel 2894 became registered in the name of John Mbugua Muhia the alleged son of the 1st Wife and parcel 2895 was registered in the name of the 1st Defendant allegedly for the benefit of the Plaintiffs and the 1st Defendant in equal shares. It is this parcel that is subject of the suit herein.

2. It is the case of the Plaintiffs that the 1st Defendant became registered as owner of the suit land in trust for himself and the Plaintiffs.

3. That in breach of the said trust the Plaintiffs aver that the 1st Defendant carried out further subdivisions of parcel 2895 and the resultant parcel was parcel 3634 (suit land) which was again subdivided into several portions namely LOC6/GIKARANGU/4311, 4313, 4458 and 4459 and sold portions to third parties, some of whom are the 3rd and 4th Defendants. The 3rd and 4th Defendants are said to be recipients of portions of land excised from the suit land allegedly fraudulently and illegally transferred to them during the pendency of the suit.

4. By a plaint filed on the 15/5/17 and amended on the 9/11/2017 the Plaintiffs sought the following orders against the Defendants;

a. An order and declaration that the sub-division of land parcel Number LOC.6/GIKARANGU/3634 into subsequent title numbers:

-LOC.6/GIKARANGU/4311

-LOC.6/GIKARANGU/4313

-LOC.6/GIKARANGU/4458

-LOC.6/GIKARANGU/4459

Was tainted by fraud and illegality and a further order that those titles be cancelled for the land to revert to its original status and registration as LOC.6/GIKARANGU/3634 in the name of the 1st Defendant, John Karanja Muchoki a trustee.

b. An order and declaration that the trust binding and encumbering land parcel LOC.6/GIKARANGU/3634 be dissolved and the land be shared out as follows;

- Grace Wambui Muchoki to get 2.0 Acres to hold in trust for herself and the daughters namely Eunice Njeri, Mary Muthoni and Felister Wanjiru.
- Paul Njuguna Muchoki – to get 2.0 Acres
- John Karanja Muchoki – to get 0.9 Acres

c. An order do issue empowering and authorizing the Court's Deputy Registrar to sign all documents and forms on behalf of the Defendant to facilitate the subdivision and transfer as above and the District Land Registrar, Murang'a be allowed and authorized to dispense with the production of the old title number LOC.6/GIKARANGU/3634 retained by the Defendant.

d. Alternatively, the first Defendant be ordered to transfer to each of the Plaintiffs a portion of 2.0 Acres of land from land parcel number LOC.6/GIKARANGU/4313 measuring 1.85Ha. Approximately 4.825 Acres (registered and reserved in his name).

e. The Defendants do pay the costs of this suit.

f. Any other or better relief the Honourable Court may deem fit to grant

2. The 1st Defendant denied that Plaintiffs claim and insist that he is the sole registered owner of the land devoid of any customary trust.

3. The 2nd Defendant despite service did not file any response to the Plaintiffs' suit.

4. The 3rd and 4th Defendants denied the Plaintiffs' claim and contend that they purchased the parcels without any knowledge of any dispute and that they acquired the parcels without any fraud or illegality.

5. At the hearing **PW1 – Paul Njuguna Muchoki** testified that he is the son of the 1st Plaintiff and the younger brother of the 1st Defendant. That his father, Daniel Muchoki Kinguri alias Muhia Kinguri had two wives (Wanjiku and Wambui) and that he died in 1989. That Wanjiku had one son namely John Mbugua Muhia while his mother Wambui had 5 children; 2 sons and 3 daughters. That during his lifetime his father subdivided his land parcel No 2958 measuring 8 acres into 2 portions; 2 acres was given to John Muhia to hold on behalf of the 1st House of Wanjiku and 6 acres was registered in the name of the 1st Defendant to hold for the house of the 1st Plaintiff. He explained the circumstances of the registration as thus; the 1st Defendant held an identity card then while he was only 16 years and further that he was the eldest of the house of Wambui, the 1st Plaintiff.

6. That the physical subdivision of the suit land by his father in 1989 into 4 portions still subsists today and the land is occupied by John Mbugua, the witness, the 1st Plaintiff and the 1st Defendant, each with 2 acres. That each has developed and cultivate their portions on the ground. That John Muhia holds a title to his portion.

7. The witness informed the court that the 1st Defendant sold about 1 acre of the lower portion of the land to the 3rd and 4th Defendants without their consent.

8. Asked whether the 1st Defendant redeemed the family land from Mararo, chege and other would-be buyers sold by their father in the 1980s, the witness denied that any land was sold by his father as in1988 he was too ill and weak to sell land whereupon he died in 1989. He refuted the 1st Defendants allegation that he sold 0.5 acres of land to him. He quipped that "how can I buy land that belongs to me".

9. He denied ever buying land from the 1st Defendant nor signing the agreement dated the 19/9/1997. Further that he was born in 1974 and raised on the land where he has lived most of his life. That his mother lives on the land and sometimes resides in Nyandarua , at her daughter Njeri's home but she owns no land in the said Nyandarua County. That he does not know the advocate by the name of Wandugu Mwaura who is said to have drawn the agreement. He denied the signature on the agreement belongs to him.

10. The witness stated that parcel 3634 measuring 6 acres was subdivided by the 1st Defendant in 2013 during the subsistence of the suit (JR) in Nyeri.

11. He testified that the 1st Defendant has sold some portion of his two-acre entitlement to Stephen Karanja and Kamande whom he did not enjoin in the suit because the area they purchased belonged to the 1st Defendant. That he enjoined the 3rd and 4th Defendants because the 1st Defendant sold them a portion of his 2 acre entitlement.

12. That the suit land is family land registered in the name of the 1st Defendant under customary trust in favour of the Plaintiffs and the 1st Defendant and the same was not available for sell to the 3rd and 4th Defendants. That the 3rd and 4th Defendants have not taken possession of the land.

13. **PW2-Grace Wambui Muchoki** testified and adopted her witness statement dated the 10/5/17 as evidence in chief. She stated that she is the 2nd wife of Daniel Muchoki. That her co-wife was called Wanjiku. That John Muhia is her step son, the son of Wanjiku. That she is the mother of the 2nd Plaintiff and the 1st Defendant. That her house is on the suit land but she currently resides in Nyandarua, the home of one

of her daughter namely Eunice Njeri.

14. She informed the court that parcel 2158 measuring 8 acres being the resultant subdivision of parcel 191 belonged to her husband. That John Muhia was given 2 acres (parcel 2894) on behalf of the 1st house of Wanjiku leaving 6 acres (Parcel 2895) registered in the name of the 1st Defendant to hold in trust for the 2nd house. That in his lifetime her husband had physically subdivided the suit land as follows;

- a. John Muhia – 2 acres
- b. Paul Njuguna Muchoki – 2 acres
- c. John Karanja Muchoki – 2 acres
- d. Grace Wambui Muchoki – 2 acres

15. That the land is now occupied and developed in accordance with the above arrangement on the ground with the exception that the 1st Defendant has sold some portions of their entitlement to third parties.

16. She informed the court that her 2 acre portion is to be held by herself in trust of her three daughters namely Eunice Njeri, Mary Muthoni and Felister Wanjiru.

17. That the land was registered in the name of the 1st Defendant to hold in trust for the 2nd house because he was the 1st born son, the 2nd Plaintiff was still young then. That at this time her husband was very ill and thirdly she had no money to process the transfers of the titles. That later the 1st Defendant became very uncooperative and sold some portions of the family land to third parties; Stephen Mwangi Kihara – 1.1 acres (parcel 2966) and Kamande – 0.1 acres (parcel 3633).

18. **PW3- John Mbugua Muhia** stated that the 1st Plaintiff is her step mother and the 2nd Plaintiff and the 1st Defendant is his step brothers. That he is the only child of Wanjiku, the 1st wife of Muchoki. That the 1st Plaintiff has 2 sons and 3 daughters.

19. He testified that his father Muchoki owned parcel 2158 measuring 8 acres out of which he was given 2 acres and the balance of 6 acres registered in the name of the 1st Defendant to hold in trust for himself and the Plaintiffs to be shared equally. That each of the parties are in occupation of their parcels and have developed them according to the demarcation on the ground. That it was agreed by the family that the suit land be registered in the name of the 1st Defendant because he was the eldest son; the 2nd Plaintiff was still young then; and due to financial constraints coupled with the old man's ill health they were unable to transfer the titles then. That since then the 1st Defendant has sold about 1.1 acres of his entitlement leaving him with a paltry 0.9 acres.

20. **Julius Ngigi Njuguna – PW4** testified and stated that he is 78 years old and a resident of Kinangop , Nyandarua County. That he knows the Plaintiffs and the 1st Defendant. That he is the sister of the 1st Plaintiff and the uncle of the 2nd Plaintiff and the 1st Defendant. He stated that Muchoki had two wives. That John Muhia was the only child of the 1st Wife who is deceased. That the 2nd wife, has 5 children; 2 sons and 3 daughters.

21. That in 1988 Muchoki, then sickly called him amongst his family members and where upon he subdivided his land into two portions and gave John Muhia 2 acres and the balance of 6 acres remained with the 2nd house but registered under the name of the 1st Defendant in trust. That the 2nd meeting was held in 1989 whereupon he subdivided the 6 acres equally between the Plaintiffs and the 1st Defendant. That the 1st Plaintiff was to hold her two acre portion for herself and her 3 daughters. That the land was physically subdivided on the ground which demarcations are still intact todate. That at no time did Muchoki sell the land his son the 1st Defendant.

22. **DWI – John Karanja Muchoki** testified and adopted his witness statement dated the 23/6/17 and list of documents dated the 12/7/17 and 11/12/17 as his evidence in chief. He admitted that his father Muchoki had two wives but stated that his 1st wife was childless and that John Muhia is not his step brother but a purchaser. That his mother had 5 children, 2 boys and three girls. That he is the 1st born son from his mother's house.

23. That his father owned the original parcel 191 measuring 11 acres which was subdivided in 1974 by his father to yield 2157 and 2158 measuring 3 and 8 acres. Parcel 2157 was sold to Monica Wanjeri.

24. That in 1988 his father went on a selling spree of the land and sold acre to Stanley Mararo and 5 acres to Satnley Kiamni Chege. That on learning of the sales he persuaded his father to refund the purchase monies which he did in the sum of approx. 312,500/- to the two purchasers. That Muchoki eventually sold two acres to John Muhia who is now masquerading as his step brother. That parcel 2158 measuring 8 acres was subdivided into 2 to yield parcels 2894 and 2895 . Parcel 2894 was registered in the name of John Muhia and 2895 was registered in his name in exchange of the refunds he made to the two purchasers. That it was deemed that he purchased the land from his father. He stated that he believes that his father used the proceeds of the land that the previous buyers and John Muhia paid him to buy land in Nyandarua where the Plaintiffs relocated. That the 2nd Plaintiff came back in 1997 and bought 0. 5 Acres from him at the costs of 150,000/- out of which he paid 50,000/-.

25. That he acquired the land for valuable consideration free from any family trust. Pressed to present any documents to support his position he stated that he had no such agreements.

26. That he subdivided the 6-acre land and sold 1 acre to Kihara and 0.1 acres to Kamande without the consent of the family. Later he sold 0.3 acres each to the 3rd and 4th Defendants. That the 1st Plaintiff has a residential house on the suit land and his brother the 2nd Plaintiff lives on the land as well. He admitted that he sold the portions of land to the 3rd and 4th Defendants while the suit was pending in Nyeri.

27. **DW2 – Stanley Kimani Chege** adopted his witness statement dated the 12/7/17 as his evidence in chief and stated that on the 8/1/1988 he entered into an agreement with the late Muchoki for the sale of 5 acres at the costs of 250,000/-. That his son the 1st Defendant refunded the purchase monies to him and the sale was not completed.

28. Under intense cross examination by the advocate of the Plaintiffs the witness stated that the details of the land he purported to have purchased is not disclosed in his witness statement. That he did not know the owner of the land nor that Muchoki had 2 wives. That he does not know the history of the suit land and only knew the 1st Defendant who refunded the monies to him.

29. The witness was showed the agreement dated the 8/1/88 and pressed further he recanted his evidence and stated that he did not see R N Kimani Advocate attest his signature. That the said agreement was not witnessed either. That he was not ware if the 1st Defendant purchased the suit land from his father.

30. **DW3 Samuel Njoroge Ngugi** stated that he purchased parcels 4311 and 4459 from the 1st Defendant. That the 4th Defendant is his daughter and registered owner of parcel 4458. That he purchased the land in 2013 -16 vide agreements of sale dated on various dates and paid the purchase price full. That land control board consent was obtained and all the legal processes were adhered to in the transfer of the title.

31. That he does not come from the locality of the suit land and was not aware of the suit. That he does not occupy the land as it is cultivated by the 2nd Plaintiff. That the 2nd Plaintiff has a house on the land he was sold to. That the Plaintiffs and the 1st Defendant live on the suit land. That the 1st Defendant represented to him that he is the sole registered owner of the suit land. He stated that in the event that the title is cancelled he will seek a refund from the 1st Defendant as contemplated in the agreement for sale.

32. **DW4- Caroline Wanjiru Njoroge** reiterated the evidence of DW3 and stated that she is the registered owner of parcel No 4458 which she acquired from the 1st Defendant for value after complying with all the legal processes. She informed court that she did not take possession of the land because it is occupied by family members of the 1st Defendant.

33. At the close of the hearing the parties through their counsels on record elected to file written submission which I have read and considered.

34. Having read considered and analyzed the Pleadings, the evidence and written submissions and all the materials placed before me in this suit, the issues for determination are; whether the Plaintiffs have proven customary trust; whether the resultant titles should be cancelled; who meets the costs of the suit.

35. Customary trust is a concept through which land may be acquired in Kenya. It is anchored in statute. It is an overriding interest in land which need not be registered. It subsists on and binds the land. Article 60 (1) (a) of the Constitution alludes to this concept when it refers to intergenerational and intra-generational equity. In the case of **Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000** the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.

36. Section **28 (b) of LRA** provides as follows;

- i. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- ii. (a).....
- iii. (b) trusts including customary trusts;

37. In the case of **Kanyi Vs Muthiora 1984 KLR 712 CA**, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land.

38. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.

39. Similarly in the case of **Peter Gitonga Vs Francis Maingi M’Ikiara Meru HC.CC NO. 146 OF 2000-** it was stated that:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).

40. Finally, the concept of customary trust has found firm approval in the Supreme Court of Kenya in the case of **Issack Kieba M’Inanga Vs Isaaya Theuri M’Linturi & Anor SCOCK No 10 of 2015** where the Lord Justices of the Supreme Court held as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”. (Emphasis mine).

41. Going by the SCOCK case above the following are critical to prove of the existence of a trust ;

a. The land in question was before registration, family, clan or group

land.

b. The claimant belongs to such family, clan, or group.

c. The relationship of the claimant to such family, clan or group is not

so remote or tenuous as to make his/her claim idle or adventurous.

d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

42. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral/ clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of **Issack Kieba** above.

43. In this case it is commonly accepted that the suit land was family land having been held by the family Patriarch, Daniel Kingori Muchoki. All the parties including the 1st Defendant admitted to the fact that the original land measured 11 acres was registered in the name of his father. Later he subdivided into two portions of 3 and 8 acres and sold the 3 acre portion to Monica Njeri.

44. Evidence was led by PW1-4 that in 1988/89 Muchoki called a meeting at his home and directed how the land should be subdivided. PW2 and PW4 led uncontroverted evidence that Muchoki gave his 1st son from the 1st House John Muhia 2 acres and the balance of 6 acres was to be shared equally between the Plaintiffs and the 1st Defendant. That the 1st Plaintiff was to hold 2 acres for herself and her 3 daughters.

45. The Plaintiffs posit that the suit land was registered in the name of the 1st Defendant because he was the eldest in the family; the 2nd Plaintiff did not have an identity card then, financial constraints given the ill health of the old man at that time prevented them from registering the land in their names.

46. The 1st Defendant admitted that he is the first born son of the 2nd house but that the land was registered in his name because he redeemed the family land from purchasers who had been sold the land by their father. He produced a number of agreements of sale and presented DW2 as a witness. The witness however recanted his testimony and stated that he did not know the history of the land in dispute. That he did not witness RN Kimani Advocate signing the agreement. At the risk of giving evidence from the bar, the 1st Defendants advocate (an officer of this court) confirmed to the court that the signature indeed did not belong to R N Kimani , an advocate whom he knew and was familiar with his signature.

47. With this evidence the testimony of DW2 was rendered untenable and the court finds that the agreements are forgeries which the 1st Defendant propped up for purposes of defeating the claim of the Plaintiffs. Further the 1st Defendant did not present any evidence to support payments to the would be purchasers or any agreement between him and his father Muchoki giving him the go ahead to purchase or for a better term redeem the land in his name in absolute terms. None was presented because none exists. The land though registered in the name of the 1st Defendant was encumbered with a customary trust for the benefit of the 2nd House of Muchoki.

48. Going by the Kieba case , the court finds that the root of the suit land is founded in the registration of their father Muchoki. The Plaintiffs and the 1st Defendant are related being mother and sons. The 1st Defendant being the eldest son of the 2nd House held the land as a “muramati” in accordance with Kikuyu customs. The 1st born child in the house of Wambui is a daughter namely Njeri while the 2nd born son was a minor (14 years) then having been born in 1974. The father was ill and weak at the time of the subdivision. The subdivision was carried out during the lifetime of their father and such demarcations still subsist on the ground. The parties consented to abandon the site visit on account that this fact existed on the ground and was not in dispute.

49. The root of the suit land is derived from parcel 191 registered in the name of Muchoki which was subdivided into 2157 and 2158. 2157 was sold to Monica and 2158 remained in the name of Muchoki Kingori as at 5/9/1974. On the 29/4/1988 it was closed on subdivision which resulted into parcels 2894 and 2895. Parcel 2894 measuring 2 acres was registered in the name of John Muhia and the on the 8/3/89. **Parcel 2895** was registered in the name of Muchoki on 29/4/88 and transferred to the 1st Defendant on the **17/5/88**. The said title was closed on the 9/10/89 on further subdivision which yielded parcels 2965 and 2966. Parcel 2965 was closed on subdivision on the 11/12/2001 which yielded parcels 3633 and 3634. Parcel 3634 was registered in the name of the 1st Defendant. It was closed on the 26/7/13 upon further subdivision into parcels 4311-4313. Parcel 4459 was registered in the name of the 3rd Defendant on the 27/8/15 while parcel 4458 was registered in the name of the 4th Defendant on the 12/6/17; 4313 in the name of the 1st Defendant on the 26/7/13; parcel 4311 was registered in the name of the 3rd Defendant on the 23/8/13.

50. It is trite that under section 28 of the Land Registration Act that customary trust is an overriding interest and it matters not how many times the land is subdivided; the resultant titles continue to be bound by customary trust. It is an interest that binds and moves with the land. In the same manner the many subdivisions carried out on the main title by the 1st Defendant did nothing to defeat the interest of the Plaintiffs based on customary trust which interest continued to subsist with the land. Clearly parcels nos. registered in the names of the 3rd and 4th Defendants are vitiated by an overriding interest in the nature of a customary trust.

51. From the evidence adduced in this case the court finds that the nature of the holding of the title is that it is family land held by the 1st Defendant with all intentions of a trustee for himself and the Plaintiffs. It is plain. It is clear.

52. Issue No a is therefore answered in the positive. The court finds that the 1st Defendant held parcel 2895 and all other subsequent and resultant subdivisions in trust for the Plaintiffs and himself in equal shares.

53. The 3rd and 4th Defendants have urged the court to dismiss the Plaintiffs case because they purchased the land for value without any notice of a dispute. That the 1st Defendant misrepresented to them that he owned the land absolutely. The Plaintiffs have averred and pleaded particulars fraud and connivance between the Defendants to defeat their customary trust interest in the land.

54. As admitted by the 1st Defendant, the court finds that the subdivision and sale of the land was done during the subsistence of the Judicial Review proceedings in Nyeri and therefore run afoul to the doctrine of *lis pendente* which provides as follows;

55. Black's Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending. *Lis pendens* is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

"It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."

56. In the case of **Mawji vs US International University & another [1976] KLR 185**, Madan, J.A. stated thus:-

"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

57. In the same case the court observed inter alia that:-

"Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendent lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

58. It is trite that the doctrine of *Lis pendens* is still applicable to our legal system through the application of section 3 of the Judicature Act read together with Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

59. It therefore follows that 1st Defendant continued to carry out subdivision during the pendency of J R cause No 9 of 2006 and LDT No 41 of 2009 . The 3rd and 4th Defendant did not acquire a title capable of protection by the court.

60. In the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

61. The 3rd and 4th Defendants have admitted that they have not taken possession of the land because it is occupied by the 2nd Plaintiff. It follows that had they carried out proper due diligence they would have discovered that the land was not available for sale after all. Going by their evidence the court does not find the 3rd and 4th Defendants as bonafide purchasers. Their remedy lies with what was contemplated in the agreement of sale between the parties subject to limitation. The 1st Defendant had no better or greater interest to convey to the 3rd and 4th Defendants than what he held in trust for himself in the suit land. Evidence was led that he sold them portions of the 2nd Plaintiff's land and that explains why they have not been able to gain entry and possession into the land. So they received nothing.

62. The whole transaction has been facilitated by the acts of the 1st Defendant intended to defeat the interest of the Plaintiffs.

63. In the end I find that the Plaintiffs have proven their case. I enter judgement in their favour against the Defendants as follows;

a. It is hereby declared that the sub-division of land parcel Number LOC.6/GIKARANGU/3634 into subsequent title numbers:

-LOC.6/GIKARANGU/4311

-LOC.6/GIKARANGU/4313

-LOC.6/GIKARANGU/4458

-LOC.6/GIKARANGU/4459

Was tainted by fraud and illegality and a further order that those titles be cancelled for the land to revert to its original status and registration as LOC.6/GIKARANGU/3634 in the name of the 1st Defendant, John Karanja Muchoki as trustee.

b. It is hereby ordered and declared that the trust binding and encumbering land parcel LOC.6/GIKARANGU/3634 be dissolved and the land be shared out as follows;

- Grace Wambui Muchoki to get 2.0 Acres to hold in trust for herself and the daughters namely Eunice Njeri, Mary Muthoni and Felister Wanjiru.
- Paul Njuguna Muchoki – to get 2.0 Acres
- John Karanja Muchoki – to get 0.9 Acres

c. The Deputy Registrar is this Court is hereby ordered and authorised to sign all documents and forms on behalf of the 1st Defendant to facilitate the subdivision and transfer as above and the District Land Registrar, Murang'a be allowed and authorized to dispense with the production of the old title number LOC.6/GIKARANGU/3634 retained by the Defendant if he does not cooperate.

d. The costs shall be in favour of the Plaintiffs.

67. It is so ordered.

DELIVERED, DATED & SIGNED IN OPEN COURT THIS 14TH DAY OF JANUARY 2021.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwangi Ben for 1st & 2nd Plaintiff:

1st Defendant: Kebuka Wachira HB Mwaniki Warima

2nd Defendant: No appearance

3rd & 4th Defendant: Ndegwa HB Kinuthia

Kuiyaki: Court Assistant