REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC APPEAL CASE NO. 03 OF 2020

JOHN MUTHEE KAITHUNGU ....1ST APPELLANT

JULIUS MURITHI MBERIA..2ND APPELLANT

ASHFORD NYAGA KAITHUNGU..3RD APPELLANT

VERSUS

JOHNSON MUGAMBI KIRAITHE ....RESPONDENT

JUDGMENT

1. The Memorandum of Appeal in this suit reads as follows:

MEMORANDUM OF APPEAL

The appellants being dissatisfied with the findings, holding and judgment of J.M NJOROGE-CM in Civil Suit NO. 67 of 2013 delivered on 25th February 2020 appeals to this court and set forth the following grounds of appeal:

1. The trial magistrate fell into error by failing to make a finding and hold that the respondents' case was predicated on the agreement dated 23rd may 2003 which was time barred and therefore unenforceable in law.

2. That the trial magistrate erred in law and fact by failing to make a finding and hold that the agreement dated 23rd may 2003 upon which the respondents' case was premised was clearly altered fraudulently by the respondent in respondents' favour and detriment of the appellants and that the 1st appellant could not have altered the agreement to his detriment and disadvantage.

3. That the trial magistrate fell into error both in law and fact by failing to make a finding that the respondent did not pay the full consideration as agreed between the 1st respondent and the appellant in the agreement dated 23rd May 2003 consequently it was wrong, unlawful and illegal for the respondent to enjoy full benefits of an agreement that he did not specifically perform.

4. That the trial magistrate fell in error both in law and fact by failing to make a finding and hold that the agreement dated 23rd may 2003 upon which the respondents' case was predicated was null and void in that the vendor -1st appellant lacked capacity to dispose his deceased fathers' land before the confirmation of grant courtesy of section 55(1) and 82b(2) of the law of succession act.

5. That the trial magistrate erred in law and fact by delivering a judgment that was in contravention of section 6 and 7 of the land control act cap 302 laws of Kenya.

6. That the trial magistrates judgment was manifestly in contravention of the law and in particular the law relating to control of agricultural land which requires that a consent by the land control board should be obtained if such a sale will be lawful.

7. That the trial magistrate erred in law and fact by delivering a judgment that was not supported by the evidence on record and the relevant law.

8. That the trial magistrate erred in law and fact by failing to be guided by the cited authorities including that of the court of appeal and which authorities were binding on the trial magistrate.

9. The trial magistrate erred in law and fact by failing to make a finding and hold that the 2nd appellant was a bornafide purchaser for value without notice and therefore his proprietory right in LR:MWIMBI/CHOGORIA/5680 was protected by the law.

10. The trial magistrate erred in law and fact by failing to hold that the 3rd appellant proprietary right to LR:MWIMBI/CHOGORIA/ 5682 was his beneficial share out of LR:MWIMBI/CHOGORIA/560 that he and the 1st appellant shared after a succession cause in the estate of their late father and the 1st appellant consequently meaning therefore that the 3rd appellants land had nothing to do with the agreement between the 1st appellant and the respondent and the only connection with the original suit was that the respondent inhibited and injuncted the 3rd appellants land parcel LR:MWIMBI/CHOGORIA/5682.

11. That the trial magistrates grossly erred and rendered injustice to the appellant by awarding the respondent all the prayers as prayed in the plaint.

REASONS WHEREFORE: The appellant will propose to the honorable court that;

a) This appeal be allowed.

b) The judgment of the trial magistrate dated 26th February 2020 and any other subsequent orders set aside or be vacated.

c) That the trial magistrates judgment dated 26TH FEBRUARY 2020 be substituted by an order of this court dismissing the respondents' case with costs in CMCC NO 67 OF 2013.

d) Cost of this appeal and the proceedings in the lower court be borne by the respondent.

DATED AT CHUKA THIS ………11TH……DAY OF ……MARCH…….2020.

2. This appeal was canvassed by way of written submissions.

3. I opine that there is no more efficient way to ensure that all issues raised by the parties in matters canvassed by way of written submissions are accorded attention than reproducing in full those written submissions.

4. The appellants' submissions are reproduced in full, without any alterations whatsoever herebelow:

THE 1ST ,2ND AND 3RD APPELLANT FINAL SUBMISSIONS

1. Your lordship the three appellants herein are before this court to challenge and fault the findings and judgment of honorable J.M NJOROGE CM in CHIEF MAGISTRATES CIVIL SUIT NO. 67 OF 2013 which was delivered and signed on 25th February 2020,see judgment at page 81 to 87 of record of appeal (ROA). The appellants have preferred 11 grounds of appeal . we shall submit on each and every ground of appeal safe for instances where grounds are repetitive , we shall consolidate such grounds and submit on them together.

2. That according to the memorandum of appeal dated 11th march 2020 page 2 to 4 ROA, the appellant first ground of appeal is as follows; the trial magistrates fell into error by failing to make a finding and hold that the respondents' case was predicated on the agreement dated 23rd may 2003 which was time barred and therefore unenforceable in law. there is no doubt that the respondent the plaintiff case was premised on an agreement dated 23rd may 2003 . the agreement therefore was subject to the law of contract cap 23 laws of Kenya and equally it was subject to the limitation of action act cap 22 laws of Kenya. section 4 (1) a of limitation of actions act cap 22 provides as follows' 4 (1) (a) the following actions may not be brought after the end of six years from the date on which the cause of action accrued.

(a) actions founded on contact

(b) ……………….

(c) ……………..

Obviously by operation of section 4 (1) (a) of the limitation of actions act afore quoted the plaintiff suit was statute barred. The trial magistrates therefore had no jurisdiction to try a time barred suit. The agreement on which the suit was predicated was entered into on 23rd may 2003, and the suit was filed and received in court on 2nd August 2013. This was ten years and three months down the line. The trial magistrates felled into error by entertaining ,hearing and determining the canvassed issues thereon which were in relation to an agreement of 23rd may 2003 which was statute barred . The appeal should be allowed on this one ground alone.

There are many judicial pronouncement from high court and court of appeal relating to statute barred cases , suffice it for now to say that we are guided by the following decision… **ELC CASE NO.525 OF 2014 LANA KATUMBI KIIO VERSUS REUBEN MUSYOKI MULI by JUSTICE MUTUNGI**.

That ground one is enough by itself to have this court allow the appeal and we so pray.

3. That the trial magistrates erred in law and fact by failing to make a finding and hold that the agreement dated 23rd may 2003 upon which the respondents' case was premised was clearly altered fraudulently by the respondent in respondents' favour and detriment of the appellants and that the 1st appellant could not have altered the agreement to his detriment and disadvantage. The agreement in question is at page 20-21 of ROA.one does not require rocket science to see that the agreement in question was indeed altered in favour of the plaintiff and

to the detriment of the appellant. The appellant could not have altered the document to his disadvantage. The trial magistrates however fell into error by shifting the burden of prove of the agreement to the defendant . the respondent case was premised on the agreement in question. It was the respondent who ought to have proved the document and not the appellant. The trial magistrate fell into error by holding that the defendant ought to have called the chief who retrieved the document from the respondent, the advocate who drew the agreement and a forensic expert to show who actually altered the document. One would wonder how then the trial magistrates formed the opinion that the respondent had proved his case on the balance of probability if the defendants did not prove the documents, which was so pivotal to the suit. We submit that the trial magistrates ought to have made a finding that the documents the respondent was heavily relying on had clear alteration and it was incumbent upon the respondent to explain the alteration, once the defendant pointed out in their defence that the same document had been ordered. That we also invite this court to note that the agreement of 23rd may 2003 was not very cleverly altered or forged. Paragraph 2 which was in print remained clear that the land that was being sold was 0.25 acres **NOT 0.75 ACRES**. there was no basis of trial magistrate to hold that the land that was being sold was 0.75 acres which was altered when in print the land being sold was 0.25 acres. Ground two of the appeal should be allowed by this court.

4. That the trial magistrate fell into error both in law and fact by failing to make a finding that the respondent did not pay the full consideration as agreed between the 1st respondent and the appellant in the agreement dated 23rd may 2003 consequently it was wrong, unlawful and illegal for the respondent to enjoy full benefits of an agreement that he did not specifically perform. Looking at the total evidence and the documents presented by the plaintiff in support of his case , the respondent was only able to proof that he paid the 1st appellant ksh.56,500 leaving a balance of ksh.33,500. The respondent did not demonstrate to court by documentary evidence that he paid the 1st appellant ksh.30,000 the obtaining balance. The trial magistrates erred in both law and fact by holding that ksh.30,000 was paid by the respondent by financing the succession cause, by the 1st appellant and 3rd appellant who are brothers. The 1st appellant denied having been paid ksh. 30,000 and the burden of prove of payment was on the respondent, after all he who alleges must proof. The trial magistrate however sifted the burden of prove of payment of ksh.30,000 by the respondent to the 1st appellant , when he reason in the judgment that the 1st appellant did not explain how the succession cause was finance. We submit that this was an application of extremious matters by the trial magistrates and by so doing he arrived at the wrong decision. On the balance of probability the respondent did not pay the 1st appellant ksh.33,500 the obtaining balance of the purchase price. The judgment extended an olive branch to the respondent who benefited from his wrong and illegal actions. The respondent did not come to court with clean hands and he who comes to equity must come with clean hand. Ground three should be allowed by this court.

5. That the trial magistrates fell in error both in law and fact by failing to make a finding and hold that the agreement dated 23rd may 2003 upon which the respondents case was predicated was null and void in that the vendor-1st appellant lacked capacity to dispose his deceased father's land before the confirmation of grant courtesy of section 55(1) and 82 b (2) of the law of succession act. Both in the proceeding and in the judgment , it is clear that there is no dispute that when the 1st appellant entered into a sale of land agreement with the respondent , the suit land LR.MWIMBI/CHOGORIA/256 was in the name and style of the late KAITHUNGU NJARA, section 82 b (2) of the succession act is clear that a legal representative of a deceased person cannot dispose the deceased immovable properties until the grant of representation is confirmed . the purported sale of land belonging to the deceased by the 1st appellant to the respondent was null and void for all intent and purposes. The sale was in breach of a clear statute and the respondent cannot legitimately expect to benefit from the illegality that he has participated in. We urge this court to be persuaded by the judgment of JUSTICE R.K LIMO judge in High Court succession cause no.519 of 2015 (highlighted).

The trial magistrate over emphasized that the 1st appellant had created a constructive trust for the benefit of the respondent. The trial magistrates however made this observation and finding based on the wrong principles . the trial magistrates held that the 1st appellant had put the respondent into the suit land and that the 1st appellant had been paid 90,000 being the total consideration or purchase price. One cannot understand where the trial magistrate got the evidence that the 1st appellant had put the respondent on the suit land. When it is clear from the respondent evidence on cross examination that he is not on the land. The payment of ksh.33,500 by the respondent to the 1st appellant was not proved. The principles established under MERU C.A NO.6 OF 2011 MACHARIA MUNGA MAINA & 87 OTHERS VS DAVIDSON MWANGI KAGIRI is not applicable and it can be clearly distinguished for the instant suit. See page 113 to 114 of ROA and page 82 and 83 of RAO JUDGEMENT.

6. That the trial magistrate erred in law and fact by delivering a judgment that was in contravention of section 6 and 7 of the land control act cap 302 laws of Kenya. A provision of a statute can only be amended or repealed by parliament alone. Even equity cannot amend or ameliorate the ''harshness'' of a statute law. in our present appeal , the trial magistrate completely overlook the provisions of section 6 (1) of the land control act cap 302 laws of Kenya. the respondent admitted in cross examination that he had not gotten the requisite land control consent for the sale of 0.25 acres or 0.75 acre whichever the case. This omission made the agreement between the 1st appellant and the respondent to be null and void for all intent or purposes upon expirely of 6 months from the date the agreement was drawn and executed. The trial magistrate fell into error by ordering and directing for specific performance of an agreement that was statute barred and in contravention of section 6 (1) of the land control act. It is for this reason my lord that ground number no.6 of this appeal read ''That the trial magistrate judgment was manifestly in contravention of the law and in particular the law relating to control of agricultural land which requires that a consent by the land control board should be obtained if such a sale will be lawful''.

7. The trial magistrate trying to justify the reasons as to why he breached section 6 (1) of the land control act in his judgment by invoking what he referred to as the doctrine of tracing and constructing trust as equitable remedies.. The respondent had not pleaded to be given land by the 1st appellant by reason of tracing and constructive trust. A litigant cannot be awarded by court what he has not prayed for. More seriously the doctrine of constructive trust is not applicable in this case ,particularly noting that the respondent has never settled or lived on the suit land afact that he openly admitted in his evidence. we are guided by the famous court of appeal case **NAIROBI CIVIL APPEAL NO76 OF 2014 DAVID SIRONGA OLE TUKAI VERSUS FRANCIS ARAPE MUGE** where their lordship rejected a sale of land that was not blessed with the land control board , we attach the said case for reference. This appeal should be allowed even on ground 5 and 6 alone.

8. that the trial magistrate erred in law and fact by failing to be guided by the cited authorities including that of the court of appeal and which authorities were binding on the trial magistrates. One of the cases that the appellant quoted in their final submissions was that of court

of appeal sitting at **NAIROBI CIVIL APPEAL NO76 OF 2014 DAVID SIRONGA OLE TUKAI VERSUS FRANCIS ARAPE MUGE-** this case is dealing with a sale of land agreement without the requisite land control consent. Where their lordship after quoting many authorities from the high court and the court of appeal pronounced themselves that a sale of land agreement without consent is null and void and the purchasers remedy is return of the consideration and not damages. It is this case that provided that equity cannot amend a statute. The defendant also sited ELC CASE NO.525 OF 2014 LANA KATUMBI KIIO VERSUS REUBEN MUSYOKI MULI . this case was dealing with a suit founded on contract that was statute barred. Justice Mutungi sitting at Nairobi dismissed the case for being tempered.

9. That the trial magistrate erred in law and fact by delivering a judgment that was not supported by the evidence on record and the relevant law. we submit that the evidence on record did not support the respondent case. Even on the balance of probabilities, the trial magistrates shifted the burden of proof of the plaintiff case to the appellant. The evidence on record is in full support of the appellant defence and preposition. It was incumbent upon the plaintiff to satisfy the court that he deserved the prayers sought. Once more your lordship we repeat that the contract that the respondent suit was premised was statute barred. We also repeat that the sale of land agreement between the respondent and the 1st appellant was null and void for want of the requisite land control board consent. The trial magistrates judgment was in contravention of section 4 (1) (a) of the limitation of action act and section 6 (1) of the land control act cap 202 laws of Kenya. the respondent remedy as per law established could only be found at section 7 of the land control act cap 302. The trial magistrates misdirected himself as to the evidence on record and the applicable law. we pray that the appeal be allowed on this ground.

10. That the trial magistrate erred in law and fact by failing to be guided by the cited authorities including that of the court of appeal and which authorities were binding on the trial magistrates. Your lordship ground 8 is a reason good enough to make the court allow this appeal and we so urge the court to allow the appeal.

11. The trial magistrate erred in law and fact by failing to make a finding and hold that the 2nd appellant was a bornafide purchaser for value without notice and therefore his proprietory right in LR.MWIMBI/CHOGORIA/5680 was protected by the law. the 2nd appellant one JULIUS MURITHI MBERIA purchased LR.5880 from the 1st appellant for valuable consideration and without notice. The 1st and 2nd appellant entered into a sale of land agreement obtained the requisite land control board consent and the 2nd appellant acquired legally ,lawful and procedurally MWIMBI/CHOGORIA/5680. He came to know about the agreement between the 1st appellant and the respondent after he had acquired MWIMBI/CHOGORIA/5680 and registered with it ,he did not partake in any fraudulent scheme if any where the respondent did not get what was buying from the 1st appellant. Section 25 (1) (a) of the land registration act no. 6 of 2012 provide that ‘’ the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this act, and shall be held by the proprietor , together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -…………

> There is no doubt that the 2nd appellant acquired LR.MWIMBI/CHOGORIA/5680 for valuable consideration and without notice, his interest therefore should not be defeated. See page 12 (ROA)

12. The trial magistrate erred in law and fact by failing to hold that the 3rd appellant proprietory right to LR.MWIMBI/CHOGORIA/5682 which was his beneficial share out of LR.MWIMBI/CHOGORIA/560 that he had the 1st appellant shared after succession cause in the estate of their late father meaning therefore that the 3rd appellants land had nothing to do with the agreement between the 1st appellant and the respondent and the only connection with the original suit was that the respondent inhibited and injuncted the 3rd appellants land parcel LR.MWIMBI/CHOGORIA/5682. The 3rd and 1st appellant are brothers. After petitioning court for letters of administration in respect of their late father KAINTHUNGU NJARA , the 1st and 3rd appellant shared equally their fathers land LR.MWIMBI/CHOGORIA/256 whereby each of them took an acre each. The 1st appellant took two parcels MWIMBI/CHOGORIA/5680 AND 5681 measuring half acre each. The 1st appellant disposed his acre first to the respondent (but the agreement was repudated) to the 2nd appellant MWIMBI/CHOGORIA/5680 and the other half to RUFUS GITONGA MARETE (not a party to this appeal although the 4th defendant in the lower court case) the other half acre .

The 3rd appellant land parcel MWIMBI/CHOGORIA/5682 had no connection whatsoever with the agreement between the 1st appellant and the respondent and the 1st appellant had the 2nd appellant had one RUFUS GITONGA MARETE . the respondent herein then the plaintiff did not sue the 2nd and 3rd appellant rather it was the 2nd and 3rd appellant themselves who sought to be enjoined as defendant granted that the respondent had cost an encumbrance in the nature of court order lodged against their land parcels MWIMBI/CHOGORIA /5680 for 2nd appellant and MWIMBI/CHOGORIA/5682 for the 3rd appellant. Your lordship we are submitting that the trial magistrates erred in law and fact by ordering the 3rd appellant land parcel MWIMBI/CHOGORIA/5682 ,reconstituted with 5680 and 5681 into its original parcel MWIMBI/CHOGORIA/560. The 3rd appellant parcel of land should not have been touched by the court judgment because the agreement between the respondent and the 1st appellant , 2nd appellant and RUFUS GITONGA MARETE had nothing to do with the 3rd appellant parcel of land parcel of land 5682 . my lord even if the other part in the appeal does not succeed (which is unlikely in our humble view) this ground should succeed and consequently the court do allow the appeal so that the 3rd appellant parcel of land remain an affected by an agreement that he was not privy to.

13. That the trial magistrate grossly erred and rendered injustice to the appellant by awarding the respondent all the prayers as prayed in the plaint. We submit that the trial magistrates rendered gross injustice to the appellant through his judgment. The magistrates by awarding the respondent 0.75 acres from the 1st appellant (when the 1st appellant had no land), had not been paid full consideration was an error and omission on the part of trial magistrate , that served injustice rather than justice . The trial magistrate enabled the respondent to benefit from an agreement that had been fraudulently altered in his favour and which was statute barred and which the respondent did not pay full consideration and which judgment was in contravention of the law and in particularly section 4 (1) (a) the limitation of action act and section 6 (1) the land control act cap 302 and section 82 b(ii) law of succession act cap 160. The judgment of the trial magistrate made the 2nd appellant to loose land that he had bought for valuable consideration and without notice and which was a contravention of section 25 of the land registration act no.6 of 2012. Finally the judgment was grossly unfair to the 3rd appellant. As we have noted above the 3rd appellant land had no nextures with the agreement between the respondent and the 1st appellant, the 2nd appellant and the 1st appellant and the

agreement between RUFUS GITONGA MARETE and the 1st appellant. The 3rd appellant land parcel MWIMBI/CHOGORIA/5682 ought not to have been touched or affected by the judgment of the trial magistrates for justice to be done and be seen to be done , the 3 rd appellant parcel of land MWIMBI/CHOGORIA/5682 was his share out of his fathers estate MWIMBI/CHOGORIA/256 which their had shared with the 1st appellant after filing a succession cause in High court in Meru. This appeal should be allowed and the judgment of the trial magistrate be overturned and set aside or vacated.

14. That in light of the foregoing submissions the appellant proposes to this honorable court that ;

(a) This appeal be allowed

(b) The judgment of the trial magistrate dated 26th February 2020 and any other subsequent orders set aside or be vacated.

(c) That the trial magistrate judgment dated 26th February 2020 be substituted with an order of this court dismissing the respondents' case with cost in CMCC NO.67 OF 2013.

(d) Cost of this appeal and the proceedings in the lower court be borne by the respondent.

15. We rest our submission and pray.

DATED AT CHUKA THIS…29TH ….DAY OF…OCTOBER,…2020

DRAWN AND FILED BY

M/S I.C. MUGO & CO ADVOCATES

ADVOCATES FOR THE APPELLANTS

5. The respondent's submissions are reproduced in full, without any alterations whatsoever, herebelow:

RESPONDENT'S SUBMISSIONS

My Lord,

The Appellant filed the instant Appeal against the judgement of Honourable J.M Njoroge in Chuka Civil Case No. 67 of 2013 raising the following grounds of Appeal:-

1. The trial Magistrate fell into error by failing to make a finding and hold that the Respondents' case was predicated on the agreement dated 23rd May 2003 which was time barred and therefore unenforceable in law.

2. That the Trial Magistrate erred in law and fact by failing to make a finding and hold that the agreement dated 23rd May 2003 upon which the Respondents'' case was premised was clearly altered fraudulently by the Respondent in Respondents' favour and detriment of the Appellants and the 1st Appellant could not have altered the agreement to his detriment and disadvantage.

3. That the Trial Magistrate fell into error both in law and fact by failing to make a finding that the Respondent did not pay the full consideration as agreed between the 1st Respondent and the Appellant in the agreement dated 23rd May 2003 consequently it was wrong, unlawful and illegal for the Respondent to enjoy full benefits of an agreement that he did not specifically perform.

4. That the Trial Magistrate fell in error both in law and fact by failing to make a finding and hold that the agreement dated 23 rd May 2003 upon which the Respondents' case was predicated was null and void in that the vendor – 1st Appellant lacked capacity to dispose his deceased father's land before the confirmation of grant courtesy of section 55(1) and 82b (2) of the law of succession act.

5. That the trial magistrate erred in law and fact by delivering a judgement that was contravention of section 6 and 7 of the Land Control Act Cap 302 laws of Kenya.

6. That the Trial Magistrate judgement was manifestly in contravention of the law and in particular the law relating to control of agricultural land which requires that a consent by the land control board should be obtained if such a sale will be lawful.

7. That the trial magistrate erred in law and fact by delivering a judgement that was not supported by the evidence on record and the relevant law.

8. That the trial magistrate erred in law and fact by failing to be guided by the cited authorities including that of the court of appeal and which authorities were binding on the trial magistrate.

9. The trial magistrate erred in law and fact by failing to make a finding and hold that the 2 nd appellant was a bonafide purchaser for value without notice and therefore his property right in LR MWIMBI/CHOGORIA/5680 was protected by law.

10. The trial magistrate erred in law and fact by failing to find that the 3rd appellant proprietary right to LR MWIMBI/CHOGORIA/5682 which was his beneficial share out of LR MWIMBI/CHOGORIA/560 that he and the 1st appellant shared after a succession cause in the estate of their late father meaning therefore that the 3rd Appellants land had nothing to do with the agreement between the 1st appellant and the respondent and the only connection with the original suit was that the respondent inhibited and injucted the 3rd appellants land parcel LR MWIMBI/CHOGORIA/5682.

11. That the trial magistrates grossly erred and rendered injustice to the appellant by awarding the respondent all the prayers as prayed in the plaint

Your Lordship,

Ground one (1) of the Appeal the Appellant avers that the Appeal is time barred which is not based on any section of the Law. **Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides;** "*An Action may not be brought by any person to recover land after the end of twelve (12) years from the date on which right of action accrued to him or if it is first accrued to some person through whom he claims to that person*".

The Agreement was recorded in 2003. Therefore the Respondent was within the timelines.

GROUND 2

Your Lordship, the learned magistrate rightfully observed that the sold portion was 0.75 Acres. Although the agreement was altered the same was regularized by signing at the altered part by both the 1st Appellant and the Respondent who were party to the agreement and attested to by stamping by the advocate who drew and witnessed the Agreement. The learned Magistrate rightfully addressed the issue by observing that the 1st Appellant should have reported the issue to the police or produce the Attesting advocate to confirm otherwise. The Appellant intended to use the error and consequent legitimate rectification as a scape goat but made no effort to dispense the burden of proof.

GROUND 3

My Lord, the Respondent clearly explained how he paid the deposit of the purchase price and expended the balance to the 1st Appellant to institute and prosecute the succession cause at Meru. The 1st Appellant is an untruthful person who is trying to go to any length to deny the respondent his suit land.

GROUND 4

My Lord, the 1st Appellant entered into a contract of sale of land with the Respondent while in full knowledge that under the law of succession Act he had no right to sell as alleged in the appeal. He placed the respondent on the Suitland, his mind was clear when doing so. If at all he knew his sole intention was to cone the Respondent this court should not allow the 1st Appellant who acted in bad faith and who has appeared in court with unclean hands to benefit from his own wrong doing.

GROUND 5 & 6

My Lord, the trial magistrate correctly observed as follows:- " *The 1st defendant having entered into a sale of land agreement, having placed the plaintiff in possession of the parcel purchased and having received the purchase price, then he is estopped from claiming otherwise or stripping the vendor the property rights*".

This was the same holding in the case of; **Macharia Munya Maina & 87 others –vs- Davidson Mwangi Kagiri Meru C.A NO. 6 OF 2011 and Yaxley –vs- Gults & another [200] Ch162.** This clearly shows that the Learned Chief Magistrate was not only guided by case law but also married the law and facts appropriately for the interest of justice.

Your Lordship, the Appellant cannot fault the trial Magistrate for relying on the Respondents Authorities and not the Appellants authorities. Therefore ground 7 and 8 of the Appeal are baseless and unfair to the learned court.

GROUND 9, 10 & 11 of the Memorandum of Appeal.

Your Lordship, the Learned Magistrate in page 86 of the record of Appeal observed as follows:

> "*The 1st Defendant caused the land to be registered into three (3) different titles, what next*?" and he found answers in the court of Appeal decision in the case of; **Macharia Mwangi Maina &87 others –vs- Davidson Mwangi Kagiri Nyeri C.A 6 of 2011** where the justices of Appeal held; "If *at all the character and nature of the said property changed, it was changed by the Respondent. A party cannot change the nature and character of the suit property and then plead the changes as a defence to an action in relation to the suit property; this moreso when party had actual knowledge of existing claims to the property. We hold that the registration of LR NO. 6324/10 in the name of the Respondent under Registered Land Act cannot be used to defeat away claims that existed prior to the creation and registration of this title. Tracing is an equitable remedy and equity shall trace the suit property for ends of justice to be saved*".

CONCLUSIION

Your Lordship, the 1st Appellant received purchase price from the Respondent, utilized the same for his own good. He placed the Respondent on the Suitland thereby creating a constructive trust. Thereafter and to benefit twice (2) he sold to other parties to defeat the Respondent's interest.

In the case of; **Mwangi Maina Supra the court of Appeal held**; "*this court is a court of equity; Equity shall suffer no wrong without remedy' no man shall benefit from his own wrong doing, and equity detests unjust enrichments this court is bound to deliver substantives rather that technical and procedural justice*".

Your Lordship, we pray for the dismissal of the Appellants suit with costs to the Respondent.

Our humble prayer!

DATED AT CHUKA THIS…..27TH…..DAY OF …NOVEMBER….2020

FOR: KIJARU, NJERU & CO.

ADVOCATES FOR THE RESPONDENT

6. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their veritably and diametrically incongruent assertions. I opine that all the authorities proffered by the parties are good authorities in their facts and circumstances. For example whereas in the case of ***Macharia Mwangi Maina & 87 Others versus Davidson Mwangi Kagiri, Nyeri CA 6 of 2011***, the court ruled that it was in order to apply the doctrine of tracing as an equitable remedy, the facts in that case should be juxtaposed against other rulings of the same court where there were different facts and circumstances. For example in the case of ***David Sironga Ole Tukai versus Francis Arape Muge, Nairobi Civil Appeal No. 76 of 2014,*** the Court of Appeal voided a land agreement for sale of land where the requisite Land Control Board consent had not been obtained. In this case the court upheld the integrity of statutory law. What I am saying is that all circumstances surrounding a case must be taken into account.

7. I do note that the respondent does not deny that when he entered into an agreement with the 1st appellant on **23rd May, 2003**, the 1st appellant lacked capacity in that he could not sell his deceased father's land before the confirmation of grant had taken place.

8. The respondent does not deny that the requisite Land Control Board had not been obtained within the time stipulated by statutory law by Limitations of Actions Act.

9. The Appellant submits that the agreement dated **23rd May, 2003** was invalid by dint of section 4(1) of the Limitation of Actions Act which states:

"(1) The following actions may not be brought after the end of six years from the date on which the cause of actions arise:

> ***(a) actions founded on contract***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) …***
>
> ***(e) …***

10. The respondent answers that under section 7 of the Limitation of Actions Act, an action can be brought to court within 12 years. Section 7 of the Limitation of Actions Act states:

> ***"7. An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."***

11. Blacklaws Dictionary, Tenth Edition, describes ***"recovery"*** as: "***The regaining or restoration of something lost."*** Surely the suit land had not initially belonged to the respondent. Section 7 of the Limitation of Actions Act does not cover a situation such as the one contained in the circumstances and facts of this case.

12. In this case, the respondent's claim was not for recovery of land. It was for a claim to land pursuant to an agreement between him and the 1st appellant. It was, therefore, a claim founded on contract. I, therefore, uphold ground 1 of the appellants' Memorandum of Appeal.

13. I find it necessary to comment on one issue. In the conclusion to his submissions, the respondent's advocate quotes the Court of Appeal in the Case of Macharia Maina & 87 others versus Davidson Mwangi Kagiri, Nyeri CA 6 of 2011 as having opined: ***"this court is a court of equity; Equity shall suffer no wrong without remedy, no man shall benefit from his own wrong doing, and equity detests unjust enrichments…."*** This is a sound finding.

14. Where the circumstances and the facts are different from those in the case of Macharia Mwangi Maina (supra), a court of law considers if or if not there are statutory provisions that can be used to frown upon unjust enrichment. In the circumstances and facts of this case, I opine that recourse can be had to a statutory provision. This is section 7 of the Land Control Act. It states as follows:

> ***"7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."***

15. I find that grounds 1, 4, 5 and 6 in the Memorandum of Appeal raise statutory stipulations which the respondent does not deny were ignored. Courts of law must respect statutory law. The authorities proffered by the appellant are good ones. There was no Land Control Board consent and the respondent and 1st appellant entered into a land sale agreement before a confirmation of grant had been issued. On these grounds alone, I find that this appeal has merit and I will, therefore, allow it.

16. I find it unnecessary to delve into the other grounds of appeal. It will only amount to a pyrrhic exercise.

17. In the circumstances, I enter judgment for the Appellants against the respondent in the following terms:

a) This appeal is allowed.

b) The judgment of the trial magistrate dated 26th February, 2020 and any other apposite orders are set aside and, therefore, vacated.**EXCEPT** for any possible cause of action based on section 7 of the Land Control Act and which action should be duly adjudicated through a proper judicial process **AS** the claim by the respondent in the lower court was couched in a rather nebulous way.

c) The trial magistrate's judgment dated **26th February, 2020** is hereby substituted with an order of this court dismissing the respondents' case in **CMCC No. 67 OF 2013**.

d) Costs are awarded to the appellants and are to be paid by the respondent.

Delivered in open Court at Chuka this 23rd February, 2021 in the presence of:

CA: Ndegwa

John Muthee Kaithungu – 1st Appellant

Johnson Mugambi Kiraithe - Respondent

HON. JUSTICE Dr. P. M. NJOROGE,

ELC JUDGE.