



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 31 OF 2014**

**ESTATE OF JI+M KIPTUM CHOGE (Suing through the Administrators)**

**EVA CHEPKURUI CHEROGONY.....1<sup>ST</sup> PLAINTIFF**

**NOREEN ALI SHARIFF.....2<sup>ND</sup> PLAINTIFF**

**BYRON KIPNGETICH GAWON CHOGE.....3<sup>RD</sup> PLAINTIFF**

**SOLOGO ENTERPRISES LTD.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SARAH MAKUNGU.....DEFENDANT**

**JUDGMENT**

By a plaint dated 30<sup>th</sup> January 2014, the plaintiff herein sued the defendant seeking for the following orders:

- a) An order for ejecting and evicting of the Defendant, her servants and agents from the parcel of land known as Eldoret Municipality Block 15 /2224.
- b) An order of permanent injunction restraining the Defendant, her agents and servants from entering, trespassing upon and remaining upon the said property known as Eldoret Municipality Block 15 /2224.
- c) An order of demolition of the structures on parcel of land known as Eldoret Municipality Block 15 /2224.
- d) General damages for trespass; and
- e) Costs of the suit and interests (d) and (e) above any other relief that the court may deem fit to grant.

The plaintiff contemporaneously filed an application seeking for temporary injunction restraining the defendant from continuing with any developments on the suit land and an order of inhibition.

The court heard the application and gave orders on 10<sup>th</sup> July 2014 that the status quo be maintained, that the defendant do not construct on the suit land, the plaintiffs not to interfere with the defendant's quiet possession and that an inhibition be registered on the suit land pending the hearing and determination of this suit.

**PLAINTIFFS' CASE**

PW1 one Byron Kipngetich Gawon Choge testified and stated that the suit land Eldoret Municipality Block 15/2224 is registered in the name of Solongo Enterprises Ltd of which he is one of the directors.

PW1 also stated that Solongo Enterprises Ltd is a duly registered company and produced a Certificate of Incorporation dated 25<sup>th</sup> July, 1994, a certified copy of a CR-12 form issued on 22<sup>nd</sup> March, 2018 which indicated that the Directors of Solongo Enterprises Ltd are Eva Chepkurui Cherogony, Noreen Ali Shariff, Byron Kipngetich Gawon Choge and Jim Choge and a director's resolution authorizing the filing of this suit.

PW1 testified that upon the demise of Jim Kiptum Choge, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs were appointed Administrators of the Estate of the late Jim Kiptum Choge in Succession Cause No. 934 of 2008 which he produced as an exhibit before the court.

It was PW1's further testimony that the defendant trespassed on the suit land and numerous attempts to remove her from the suit property have been unsuccessful. PW1 produced a copy of official search, copy of a white card where there was a restriction by the estate of Jimmy Choge and certificate of lease issued on 10<sup>th</sup> July 2009 in the name of Solongo Enterprises Ltd and Ezekiel Barngetuny confirming the registration of the suit land in the above names.

PW1 also gave evidence that the defendant is in occupation of the suit land and that they do not have any sale agreement with Aggrey Azelwa whom the defendant claims to have sold the land to her.

It was PW1's testimony that the letter from Rehema Self Help group was a forgery as Solongo Enterprises never gave such authority and further that at the time the authority was purportedly given Jimmy Choge PW1's father was already deceased.

PW1 also stated that the suit land belongs to Solongo Enterprises Ltd as an individual could not run the affairs of a company alone and therefore urged the court to enter judgment as prayed in the plaint.

On cross examination PW1 stated that he was a director of Solongo Enterprises Ltd before his father Jimmy Choge passed on 27<sup>th</sup> February 2008 and that the company was incorporated on 25<sup>th</sup> July 1994. PW1 also stated that the certificate of lease was issued on 2009 but there was another one which got lost.

PW1 stated that Aggrey Azelwa constructed illegal structures on the suit land which necessitated them to file complaint at the Police station. Further that PW1's late father did not receive Kshs 3.6 Million on 3<sup>rd</sup> April 2007 as alleged and that he did not give authority to Rehema Self Help Group.

PW2 Erick Kipkemboi Barngetuny testified and stated that he is one of the administrators of the estate of the Late Ezekiel Barngetuny and that his father owned  $\frac{1}{4}$  share of the suit land together with Solongo Enterprises Ltd who owns  $\frac{3}{4}$ . It was PW2's further evidence that his father did not sell the land to anyone.

On cross examination PW2 stated that he was not aware of Rehema Self Help Group and that the suit land belongs to Solongo Enterprises Ltd and Ezekiel Barngetuny. He further stated that he is in possession of  $\frac{1}{4}$  acre of the suit land and does not know the defendant.

### **DEFENCE CASE**

DW1 testified that she bought  $\frac{1}{8}$  acre of from Aggrey Azelwa at a consideration of Kshs. 350,000/ vide a Sale Agreement dated 15<sup>th</sup> February, 2013. DW1 stated that she took immediate possession, built a house and connected water and electricity.

It was DW1's evidence that before she bought the land she undertook due diligence and found that the land previously belonged to Solongo Enterprises Ltd who gave authority to Rehema Self Help Group to sell on their behalf.

On cross examination DW1 stated that there was an order of status quo to be maintained pending the hearing and determination of this suit. She admitted that the suit land belonged to two owners and that the agreement she produced was not signed by the representatives of Solongo Enterprises Ltd and Ezekiel Barngetuny. That she bought  $\frac{1}{8}$  acre of the suit land which was to be excised from the suit land.

The defendant also confirmed that she did not have any agreement between Aggrey Azelwa and Solongo Enterprises Ltd. The defendant did not carry out a search to confirm that the land belonged to Aggrey Azelwa. She also stated that she has not been paying rates for the suit plot.

DW2 Aggrey Azelwa gave evidence and stated that he bought Eldoret Municipality Block 15/2224 from Jim Choge having paid a deposit of Kshs. 400,000/ and subsequently Kshs. 3,6 Million.

It was his evidence that before Jim Choge's demise in 2008, he had appointed Jonah Mwaura trading as Rehema Self Help Group to be his authorized agent vide an undated letter and vide a letter dated 12<sup>th</sup> March, 2007 in which letter the late Jim Choge informed his agent Jonah Mwaura that Ezekiel Barngetuny is indebted to him to the tune of Kshs. 800,000/ and as such his shareholding in the suit property be considered to be Kshs. 100,000/ having deducted the aforementioned debt.

DW2 also stated that the suit land was registered in the name of Solongo Enterprises Ltd and Ezekiel Barngetuny and informed the court that he was given a letter dated 6<sup>th</sup> September 2007 by Rehema Self Help Group to pick the lease certificate from their offices.

DW2 further stated that the plaintiffs falsely stated that the original lease was lost and yet it was in the possession of DW2. He claimed that he was the registered owner of the suit land and therefore had authority to sell the land to the defendant.

On cross examination he confirmed that he neither had a sale agreement with Solongo Enterprises Ltd nor with Rehema Self Help Group. He also stated that the document that he produced indicates that Jim Choge collected Kshs 3.6 Million before the authority was given to Rehema Self Help Group. Further he admitted that the letter dated 4<sup>th</sup> September 2007 indicated that he paid Kshs. 400,000/ and was to pay a balance of Kshs. 3.6 Million yet the total purchase price was Kshs. 3.6 Million.

### **PLAINTIFFS'SUBMISSIONS**

Counsel for the plaintiffs submitted that nothing has been presented by the Defendant to prove that the Plaintiffs title is unlawful or that it was fraudulently acquired and relied on Section 24 (a) of the Land Registration Act, 2012 provides that: -

"The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. "

Mr Isiji further submitted that the registration of the Plaintiffs as proprietors of the suit land, gives them absolute proprietorship of the parcel that can only be subject to certain rights and privileges as are known to law.

Section 25 of the Land Registration Act provides states that;

25 (i) "The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;

(a) to teases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

It was counsel's submission that the fact that the Plaintiffs hold title is prima facie evidence that they are the proprietors of the suit land as provided for under Section 26 of the Land Registration Act, 2012, which states as follows .-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

Mr Isiji stated that the suit land was registered in the names of SOLONGO ENTERPRISES LIMITED <sup>3</sup>/<sub>4</sub> share and EZEKIEL BARG'ETUNY which position was not challenged by the Defendant or her witness.

Counsel relied on the case of **Dr. Joseph Arap Ngok... V.... Justice Moiwo Ole Keiwua & 5 others, Civil Appeal No.Nai.60 of 1997.** whereby the Court held that: -

*"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over a other alleged equitable rights of title. In fact the Act investment to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy".*

Further in the case of **Sai Office Supplies Limited vs. Rosemary AZivista Luseno & Another [2014] eKLR**, where Nyamweya J. held as follows: -

*"I find that since the Plaintiff's evidence of its ownership of the suit property is not contested by the Defendants, it is therefore entitled to the declaration sought of ownership and any consequential orders arising from such ownership. The shortcomings on the part of the 2<sup>nd</sup> Defendant clients in the due performance of their duties and responsibilities cannot be allowed to be an excuse or bar to any party desirous of asserting their rights through the due process of law, and indeed such dereliction of duty once proved must be appropriately reprimanded. "*

Counsel also relied on the case of **Crispus Thuku Kinene vs. Teresia Waithira Machua [2017] eKLR** wherein it was observed that;-

*"The Plaintiffs Certificate of Title can only be challenged if the same was acquired through fraud, misrepresentation, illegally or through corrupt scheme as provided by Section 26 (1) (a) & (b) of the Land Registration Act"*

It was the plaintiffs 'case that they neither sold 1/8 of an acre nor the entire parcels of land ELDORET MUNICIPALITY BLOCK 15/2224 to the Defendant or her witness Aggrey Azelwa as the purported letter of authority DEX2a that Aggrey Azelwa was shown by Jonah K. Mwaura giving the powers of sale to Jonah K. Mwaura through Rehema Self Help Group did not originate from Solongo Enterprises Limited and Ezekiel Barngetuny as such the same was null and void ab initio. That the company did not authorize Jonah K. Mwaura to transact on its behalf over the suit property and that the letter does not bear the company seal. or signatures of two (2) directors the required minimum number then.

Mr Isisji also contended that there is also no evidence that the co-owner Ezekiel Barngetuny had given his approval for the sale of the land too. PEX5 and PEX6(a) and (b) shows that there were 5 directors of Solongo Enterprises Limited at the time and no one was authorized by the Company Resolution to transact with anyone on the suit land.

Counsel cited the case of **East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR** whereby the learned Judge Emukule had this to say:-

*"It is of course trite law that so far as a corporation is concerned, its agent for purposes of litigation is an officer authorized under its seal. That is the requirements of Order III Rule 2 (c) of the Civil Procedure Rules. Where the authority of an agent is challenged like in this application, it behoves the corporation to show such authority; the mere fact of appointment as a director does not constitute one an agent for purposes of suit.."*

That from the precedents, it's clear that neither Jonah Kariuki Mwaura and/or Jim Kiptum Choge had authority from the company Solongo Enterprises Limited in form of a company resolution binding the company to transact any business on its behalf and as such they had no legal authority to purport to sale the parcel of land to Aggrey Azelwa who in turn had no legal authority to sale the same to the Defendant herein.

Counsel relied on the principle in *Salmon Vs Salmon* which provides that a company is essentially regarded as a legal person separate from its directors, shareholders, employees and agents. Therefore since Solongo Enterprises Limited is a company, it is a legal person, separate and distinct from the members or directors.

On the issue of the locus standi for the Plaintiffs to sue in this matter, counsel submitted that the plaintiffs had a Company Resolution PEX7 that authorized the Solongo Enterprises Limited to sue in this matter and authorizing the Plaintiffs to swear, sign and testify on behalf of the Company.

Further that the plaintiffs produced a copy of grant showing that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the administrators of the estate of the late Jim Kiptum Choge and relied on the case of **Bugerere Coffee Growers Limited vs. Sebaduka & Another [1970] EA 147** whereby it was held that:-

i) *when companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors; meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings;*

ii) *where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the. Defendants for the costs of the action.*

iii) *the advocates should be ordered to pay the costs. "*

To buttress this PW2 Eric Kipkemboi Barngetuny the administrator of the estate of the late Ezekiel Barngetuny produced PEX9, a copy of the grant of letters of administration intestate and stated that Solongo Enterprises Limited and/ or Ezekiel Barngetuny neither transacted nor sold the suit land to either the Defendant and/or anyone.

PW2 testified that he was the administrator of the estate of the late Ezekiel Barngetuny and that he never disposed and/or entered into any sale agreement with the Defendant and/or anyone over the suit land and reiterated that the suit land belongs to the estate of the late Ezekiel Barngetuny and Solongo Enterprises Limited.

Counsel relied on the case of **Moir vs. Wallersteiner [1975] 1 ALL ER 849 at p, 857, Lord Denning MR** stated as follows: -

*"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in Foss vs. Harbottle [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue".*

Therefore being Company property, the proper procedure to be followed for the disposal of the suit property ELDORET MUNICIPALITY BLOCK 15/2224 . Mr Isisji submitted that Section 3(3) of the Law of Contract Act and Section 38 (2) of the Land Act, 2012 as amended clearly stipulated that the requirement that contracts for disposition of an interest in land should be in writing and in the present suit, the Defendant ought to have demanded evidence of the sale agreement from Aggrey Azelwa to confirm in deed he had good title, right and/or interest over the suit land to pass it to her.

Similarly that Section 38(1) of the Land Registration Act, 2012 provides that no suit shall be brought upon contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.

Counsel also stated that from the Certificate of Lease Jim Choge had no authority to purport to sell the suit land to Aggrey Azelwa as the suit land belonged to two (2) registered owners Solongo Enterprises Limited and Ezekiel Barngetuny and relied of Section 91 of the Land Registration Act which provides;

1. In this Act, Co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

2. ....

3. ....

4. If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-

a) dispositions may be made only by all the joint tenants;

b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

c) each joint tenant may transfer their interest inter ViVOS to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

5. If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

6. No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

Counsel relied on the case of **Macfoy vs. United Africa Co. Ltd (1961)3All ER** where a transaction was declared null and void for lack of a co-owners consent.

Also in the case of **O K N vs. M P N [2017] eKLR**, the court stated as follows concerning joint tenancies: -

*"Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition. The presumption is however, rebuttable by either party showing that their contributions were not equal.... In determining the beneficial interest of cohabitantes who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union. See Stack vs. Dowden (supra) and Jones vs. Kernott, GissiEg V Gissing (1971) AC 866."*

It was counsel's submission that if at all the Defendant did pay for  $\frac{1}{8}$  of an acre then she can pursue her claim for refund of purchase price with interest from Aggrey Azelwa because she did not get a good title from him.

Mr Isiji therefore urged the court to find that the plaintiffs have proved their case against the defendant as prayed.

#### **DEFENDANT'S SUBMISSIONS**

Counsel for the defendant reiterated the evidence on record and cited the case in Eldoret High Court Judicial Review No. 76 of 2011. Republic –vs The District Land Registrar Uasin Gishu County, Jonah Kariauki Mwaura & Byron Kipngetch Chogwe Choge where the 3<sup>rd</sup> Plaintiff reported at the land office that the Certificate of Lease ELDORET/ BLOCK 12/ 404 got lost and moved the court to have the eviction against Jonah Mwaura c/o Rehema Self Help Group. That the court made orders as against the Estate of Jim Choge.

Counsel submitted that PW2 — Erick Kipkemboi Barneuny testified as an administrator of the estate of Ezekiel Barngeny but produced no grant of letter of administration in support of his contention.

Mr Omboto listed the following issues for determination

a) Whether or not the plaintiffs have capacity to sue on behalf of the Solongo Enterprise Co. Ltd by virtue of doctrine of perpetual succession under the company Act, 2015.

b) Whether the plaintiffs obtained another Title Deed in the pretense that it was lost to defeat the 1<sup>st</sup> Defendant's proprietary rights?

c) Whether or not there was privity of contract or agency relationship between the plaintiffs late father Jim Kiptum Choge, through its Company Solongo Enterprises Ltd and Rehema Self Help Project through its agent (Jonah Mwaura) and ( D W2) Aggrey Azelwa.

d) Whether the deceased Jim Choge received the consideration amount through his authorized agent before his demise?

e) Whether the Solongo Enterprises is holding the suit land in trust for the Defendant?

f) Whether or not there is non joinder of parties in respect of the suit land (ELDORET /MUN/BLOCK 15/2224.

g) Whether the plaintiffs are entitled to the orders sought in the plaint.

h) Who should bear the costs of the suit.

On the issue of locus standi to sue counsel submitted that the Plaintiffs filed this suit on behalf of the Estate of the Late Jim Choge, however the suit parcel ELDORET/MUN/BLOCK 15/2224 is registered in the names of Solongo Enterprise Limited (<sup>3</sup>/<sub>4</sub> share) and Ezekiel Barngetuny (<sup>1</sup>/<sub>4</sub> share). That Solongo Enterprises Limited is a company incorporated under the Companies Act whose certificate of Incorporation was produced to confirm its authenticity.

Mr Omboto therefore submitted that the Plaintiffs have no locus to file the present suit and sue the defendant in respect of the entire parcel of land namely ELDORET/MUN/BLOCK 15/2224 as the property never belonged to the Estate of the late Jim Choge but rather a legal entity which company has perpetual succession.

On the issue of the lost title Counsel submitted that the suit parcel in question has two Certificate of Leases issued in the same names and from the same Land Registry. That the first Certificate of Lease was issued on 13<sup>th</sup> November 2000 and that the DW2 Aggrey Azelwa upon purchase of the suit land, was given the original Certificate of lease. That the plaintiff had given evidence that the title got lost and was issued with another one.

Counsel relied on the Ruling by Honourable Justice Fred A. Ochieng delivered on 9<sup>th</sup> May .2013 that.

.....*The Replying Affidavit sworn by BYRON KIPNGETICH GAWON CHOGE*

*state, at the heading thereof, that it was filed pursuant to leave was granted by AZANGALALA J. (as he then was) on 17<sup>th</sup> January, 2012. I perused the whole record, but failed to trace any proceeding on the given date. In any event, the Replying Affidavit did not address the issues regarding whether or not the Ex-parte applicant was given an opportunity to be heard by the Land Registrar before the said Registrars made the decision on the legality of the title document. The Replying Affidavit also did not respond to the contention that the Respondent lacked legal authority to revoke or cancel a title document. Meanwhile, the Respondent did not make any submissions to justify how she obtained legal authority to revoke or cancel a title deed through a gazette notice. To my mind, there is no doubt that these proceedings do not provide the forum for the determination of the merits or otherwise of the proprietorship claimed by the Ex-parte application, on the one hand and the Estate of the late JIM KIPTUM CHOGE, on the other hand suffice to say Judgement was delivered against the Estate.*

Counsel relied on the 'Nemo dat quad non habet) an stated that an authorized agent has the capacity or authority to sell or pass a good title to a 3<sup>rd</sup>. party. That there is evidence of transaction between Solongo Enterprises through its then agents (Rehema Self Help Group), Aggrey Azelwa and thereafter the Defendant herein obtained ownership as she purchased the plot from a bonafide buyer/purchaser from the 4<sup>th</sup> plaintiff's authorized agent.

Counsel also submitted DW2 produced a receipt that shows that the late Jim Choge received the consideration (purchase price) before his demise and it was on this basis that he was given the original title documents. Counsel therefore urged that court to find that the late Jim Choge sold the suit land to DW2 who subsequently sold it to the defendant hence they are holding it in trust for the defendant.

Mr Omboto finally submitted that the plaintiff's ought to have enjoined Aggrey Azelwa, Jonah Mwaura T/A Rehema Self Help Group and also join the Estate of Ezekiel Barngetuny as co-plaintiffs hence the non-joinder is fatal to the suit.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case are as to whether there is any privity of contract between the plaintiffs, Rehema Self Help group, Aggrey Azelwa and the defendant, whether the late Jim Choge had authority of Solongo Enterprises Ltd to enter into a contract without the consent of the other directors of Solongo Enterprises and the Late Ezekiel Barngetuny, whether the defendant is a bona fide purchaser and whether the plaintiffs are entitled to the orders sought.

Counsel for the defendant raised the issue of locus standi that the plaintiffs could not sue as the estate of the late Jim Choge as the suit property belonged to Solongo Enterprises Ltd and Ezekiel Barngetuny.

Locus standi is defined under the **Bryan Garner, The Black's Law Dictionary Seventh Edition, 1999, St. Paul, Minn** as:

*"The right to bring an action or to be heard in a given forum".*

It is trite law that a company is a distinct legal person who can be sue and be sued in its name. In the case of **Omondi v National Bank of Kenya Limited and Others [2001] EA 177**, the court held:-

*"The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights."*

Counsel for the defendant raised this issue which worked against the defendant as what she relied on as a root to her claim as a bona fide purchaser would be tainted with illegality or irregularity as the suit land belonged to Solongo Enterprises Ltd which is a limited liability Company distinct from its shareholders and directors.

From the plaint it is evident that Solongo Enterprises Ltd is one of the plaintiffs and that there was a company resolution authorizing the filing of this suit. The Ugandan Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere case** was no

longer good law as it had been overturned in the case of **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998**. The latter case restated the law as follows:-

*“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”*

The decision has since been applied in Kenyan courts in the case **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR**. From the above authorities it is evident that there is no requirement for a company to present a resolution of a company indicating that a company has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it. It suffices for the deponent to state that he has authority to do such act.

On the issue as to whether there was privity of contract between the plaintiff Solongo Enterprises Limited, Rehema Self Help Group and Aggrey Azelwa, from the evidence on record, it is apparent that the Aggrey Azelwa and Rehema Self Help group did not enter into a sale agreement with the registered owners being Solongo Enterprises Ltd and Ezekiel Barngetuny. There was no agreement produced to show that there was a sale between the company or Barngetuny.

It should further be noted that the letters produced are not conclusive that there was any authorization by the company or Barngetuny to Rehema Self Help Group to sell land on their behalf. DW2 admitted that there was no agreement between him and Rehema Self Help Group for the sale of the suit land. The letters were neither authorized nor signed or sealed by Solongo Enterprises or Ezekiel Barngetuny. This shows that there was no privity of contract.

**Halsbury's Laws of England**, 4<sup>th</sup> Edn. Vol. 9 (1) Para. 749 quoted in the Court of Appeal decision in **Aineah Liluyani Njirah V. Aga Khan Health Services [2013] Civil Application No. 194 of 2009** states as thus:-

*“The general rule: the destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation.”*

Counsel for the defendant also submitted that the plaintiff was holding the suit land in trust for the defendant but the same was not pleaded. The facts of this case and having examined the agreement of sale between the Defendant and DW2 it does not disclose any clause to support any trust, agency, collateral contract or express or implied term on behalf or to include the plaintiff in the agreement.

The plaintiff proved that there was no principal/agent relationship between Jim Choge and Rehema Self Help Group. In **Bowstead and Reynolds on Agency Seventeen Edition, Sweet and Maxwell, at page 1-001** defines an agent-principal relationship as a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relationship with third parties, and the other of whom similarly consents so to act or so acts. This was not the case in the present case.

The Court of Appeal in the case of **DIAMOND TRUST BANK KENYA LTD V SAID HAMAD SHAMISI & 2 OTHERS [2015] eKLR** recognises the *nemo dat quod non habet principle* in the following terms:

*A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course.*

Aggrey Azelwa (DW 2) had no proprietary rights over the suit property he therefore cannot purport to have transferred any proprietary rights to the Defendant.

The defendant also admitted that she did not ask DW2 for proof that he had been sold to the suit land by Rehema Self Help Group. DW2 confirmed that there was discrepancy on the purported purchase price and the amount paid to Jim Choge. He stated that he had paid Kshs 400,000/ and later paid Kshs. 3.6Million and yet the purported total purchase price was kshs. 3.6Million. This anomaly was not satisfactorily explained.

The defendant claimed that she bought the land from Aggrey Azelwa therefore she is a bona fide purchaser for value. For a person to qualify to be a bonafide purchaser for value, he or she must satisfy the requirements as was held in the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

*“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:*

- a) he holds a certificate of title;
- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;

- d) he purchased for valuable consideration;
- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud.”

I find that the defendant and DW2 who sold to her the land together with the Rehema Self Help Group were not diligent as per the ingredients of **KATENDE V HARIDAR & COMPANY LIMITED (supra)** These were people who were literate and ought to have known about land transactions and the requirements to be in writing, with the authorized persons with signatures and proper attestations. Having found that the DW2 had no good title to pass to the defendant, it follows that the defendant cannot be deemed as a bonafide purchaser. The defendant’s remedy lies elsewhere with the person who sold to her the land.

On the issue whether the plaintiff is entitled to the orders sought, it is not disputed that the 4<sup>th</sup> Plaintiff is the registered owner of the suit land and is consequently the indefeasible and absolute owner. Therefore, it is entitled to all the rights and privileges appertaining to it as provided by Sections 24 and 25 of the Land Registration Act. In this regard, the Plaintiff therefore is entitled to the orders sought and make the following specific orders:

- a) There defendant to give vacant possession of the suit land known as Eldoret Municipality Block 15 /2224 within the next 45 days failure of which eviction orders to issue.
- b) An order of permanent injunction is hereby issued restraining the Defendant, her agents and servants from entering, trespassing upon and remaining upon the said property known as Eldoret Municipality Block 15 /2224.
- c) An order is hereby issued for the demolition of the structures on parcel of land known as Eldoret Municipality Block 15 /2224 within 45 days at the defendant’s cost.
- d) Costs of the suit to be borne by the defendant.

**DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF MARCH, 2021**

**M. A. ODENY**

**JUDGE**