



REPUBLIC OF KENYA



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**Amos v Kirika & 2 others (Environment and Land Appeal E017 of 2024)  
[2024] KEELC 7453 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7453 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E017 OF 2024  
CK NZILI, J  
NOVEMBER 6, 2024**

**BETWEEN**

**CHRISTOPHER GITONGA AMOS ..... APPELLANT**

**AND**

**JOTHAM MBAE KIRIKA ..... 1<sup>ST</sup> RESPONDENT**

**NK (SUING ON HER BEHALF AND AS NEXT FRIEND TO YN, SK, AND  
BM ..... 2<sup>ND</sup> RESPONDENT**

**JEGLAND MUTHUNGUMI MWITHIRWA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. S.K  
Ng'etich - SPM in PMC Nkubu dated 24.2.2024)*

**JUDGMENT**

1. The appellant, who was the 1<sup>st</sup> defendant at the lower court, had been sued by the 1<sup>st</sup> & 2<sup>nd</sup> respondents as the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs together with the 3<sup>rd</sup> respondent, as the 2<sup>nd</sup> defendant. The complaint was that the appellant unlawfully entered into a sale agreement with the 3<sup>rd</sup> respondent who was the husband to the 2<sup>nd</sup> respondent and took possession of L.R No. Abogeta/U-Kithangari/xxxx measuring 1 acre for Kshs.550,000/=
2. It was averred that the subject land, which was part of the estate of the deceased, with the legal administrator being the 1<sup>st</sup> respondent as per the certificate of grant issued and confirmed in Meru H.C Succession Cause No. 17 of 2008 on 16.5.2008 and 9.12.2008, respectively, was dwelt with without the involvement of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the beneficiaries of the estate.
3. The 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that they had placed a caution over the title to the suit land on 15.11.2013, of which the appellant raised a purchaser's claim, which was dismissed by the land registrar on 28.9.2015. The 1<sup>st</sup> & 2<sup>nd</sup> respondents further averred that the 3<sup>rd</sup> respondent could not deal with



the subject land without the express authority and consent of his wife; hence, they had warned the appellant not to buy the same but instead to cede possession of the suit land. To the contrary, the respondents averred that the appellant continued to occupy and develop the suit land illegally, to the detriment of the rights and interests of all parties, whom the 3<sup>rd</sup> respondent had a fiduciary relationship with, especially the 2<sup>nd</sup> respondent.

4. The 1<sup>st</sup> & 2<sup>nd</sup> respondents prayed for a declaration that the 3<sup>rd</sup> respondent held L.R No. Abogeta/U-Kithangari/xxxx in trust for the 2<sup>nd</sup> respondent, an eviction order against the appellant and the lifting of a caution registered over the suit land by the appellant on 16.4.2019.
5. The appellant opposed the claim with a statement of defense dated 29.4.2019. He admitted that the 1<sup>st</sup> respondent was the legal administrator of the estate of the late Mwithirwa Mbwiria, out of which the 3<sup>rd</sup> respondent was a beneficiary of 1 acre thereof, which he lawfully and procedurally bought from him in 2012, paid part of the agreed consideration and took vacant possession of the same being a resultant subdivision No. L.R No. Abogeta/U-Kithangari/xxxx, from August 2012, where he has exclusively, peacefully occupied and developed.
6. The appellant admitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents and other family members had purported to lay claim on his land, including lodging Nkubu Criminal Case No. 1384 of 2013, to which he was acquitted, with the sole intention of having him imprisoned so that they could dispose of his land to third parties.
7. The appellant averred that if the 1<sup>st</sup> & 2<sup>nd</sup> respondents wanted to repossess the land, he was entitled to a refund of all costs of the developments that he had made on the land as well as the consideration paid, plus interest from the year 2012. The appellant termed the suit as incompetent, bad in law and filed before a court without jurisdiction to grant the reliefs sought.
8. The 3<sup>rd</sup> respondent opposed the suit vide a statement of defense dated 29.7.2019. He admitted that he was a beneficiary of an acre of land out of the estate of Mwithirwa Mbwiria (deceased), which was registered in the name of the 1<sup>st</sup> respondent as a trustee of the initial L.R No. Abogeta/U-Kithangari/xxxx.
9. Further, the 3<sup>rd</sup> respondent admitted that the 2<sup>nd</sup> respondent was his biological child and beneficiary to the said estate. The 3<sup>rd</sup> respondent averred that it was the appellant who misled him to sell him a share of the ancestral land and move to another area. However, after a family meeting, he averred that it was resolved that since the land was ancestral, it should remain that way.
10. Further, the 3<sup>rd</sup> respondent averred that since he had received Kshs.100,000/= as a deposit and given that the appellant had been utilizing the one acre for more than six years, the occupation was enough for him to recoup his money. The 3<sup>rd</sup> respondent denied that he was liable against the 1<sup>st</sup> respondent being a trustee of the 2<sup>nd</sup> respondent. He urged the court to allow the claim against him and the appellant to the extent that be registered as a trustee of L.R No. Abogeta/U-Kithangari/xxxx for the 2<sup>nd</sup> respondents.
11. At the trial, Jotham Mbae Kirika testified as PW 1. He relied on a witness statement dated 5.3.2019, as his evidence in chief. He told the court that the deceased was his uncle and the registered owner of L.R No. L.R Abogeta/U-Kithangari/xxxx, to which he had appointed him as a caretaker of his family. PW 1 said that when his uncle passed on on 22.6.1989, he was appointed as the legal administrator by the court on 17.1.2008. He termed the 3<sup>rd</sup> respondent as a son of his late uncle and as one of the three children who wanted to transfer portions of the suit land.
12. PW 1 said that after realizing that the 3<sup>rd</sup> respondent had dependant children whom he was not taking care of, he declined to effect a transfer to him after family members raised reservations about his



intention to dispose of the land to third parties so that the right and interests of his family could be protected. PW 1 told the court that he later on learnt that the 3<sup>rd</sup> respondent had married a second wife with a child while the first wife had three children, all of whom depended on him. He said that he later learned that the appellant was illegally on the land out of an illegal sale agreement with the 3<sup>rd</sup> respondent and had placed a caution.

13. Again, PW 1 said that the 3<sup>rd</sup> respondent could not sell the portion and the Kshs.100,000/= deposit paid was assumed to be a lease charge, due to the illegal occupation since 1.8.2012, otherwise, the 2<sup>nd</sup> respondent and her family had nowhere else to call home due to the actions of the appellant and the 3<sup>rd</sup> respondent.
14. Similarly, PW 1 stated that the 3<sup>rd</sup> respondent had never sought or obtained his consent or approval to sell the property as the legal administrator of the estate.
15. He urged the court to remove the caution and evict the appellant to enable the 2<sup>nd</sup> respondent to move into their land. PW 1 relied on a copy of certificates of confirmation of grant issued on 10.12.2008, a sale agreement dated 21.7.2012, an acknowledgment receipt dated 20.8.2012, an official search certificate for L.R No. Abogeta/U-Kithangari/xxxx; objection letter; proceedings before the land registrar ruling on the object, and a demand letter as P. Exh No's. 1-8, respectively. PW 1, in cross-examination, told the court that the beneficiaries of the estate, as per the grant, were the five children of the deceased. He could not tell the date of entry or construction on the land by the appellant.
16. Christopher Gitonga Amos testified as DW 1, relying on a witness statements dated 21.7.2020 and 8.9.2022 as his evidence in chief. He told the court that he learned from Moses Mwiti, a chair of Ofcam Church of the lessor(s) of the land, that the 3<sup>rd</sup> respondent was selling the land. He said that he refunded the three tenants their money following confirmation from the 3<sup>rd</sup> respondent's uncle that the land belonged to the 3<sup>rd</sup> respondent.
17. DW1 said that he ascertained the status of the land registration as free of any encumbrances and proceeded to a land surveyor Mr. Koome, who showed him mutation form on the two subdivisions P. No. xxxx and xxxx. DW 1 said that he also saw the certificate of confirmation of the grant showing the 3<sup>rd</sup> respondent as the beneficiary.
18. Again, DW 1 told the court that the 3<sup>rd</sup> respondent sold him one acre of land as per a sale agreement dated 27.7.2012 for Kshs.550,000/=, as a beneficiary of the estate of Mwithirwa Mbithira that had been distributed to him. DW 1 said that he followed up on the matter and obtained a copy of the mutation form from the said land surveyor. DW 1 told the court that he also visited the seller's uncle George Kiirgia at his home alongside his neighbor Moses Mwiti, and on 27.7.2012, he gave the 3<sup>rd</sup> respondent Kshs.80,000/= and again on 20.8.2012, another Kshs.20,000 in the presence of his uncle one Mbae.
19. DW 1 said that the terms of the sale agreement were that the balance would be paid upon the successful transfer of the land to him. He said that he took over vacant possession of the suit land on 1.8.2012 and embarked on developing it where he has a permanent house, planted assorted crops, cash crops and nappier grass.
20. Similarly, DW 1 said that when he bought the land, there was a church structure which he repaid the chairman for its development. DW 1 produced a copy of the green card, sale agreement dated 27.7.2012; acknowledgment receipt dated 20.8.2012, search certificate; caution dated 11.11.2013, certificate of confirmed grant issued on 10.12.2008, sale agreement dated 7.12.2011 and a green card as D. Exh No. 1-8, respectively. Further, DW1 relied on a judgment in Nkubu PMC Cr. Case No. 1384 of 2013 Republic vs. Christopher Gitonga Amos of the charge sheet and proceedings in the objection proceedings as D. Exh No. 9 & 10, respectively.



21. In cross-examination, DW 1 told the court that he bought the land from the 3<sup>rd</sup> respondent and only paid Kshs.100,000/= deposit since he admitted that the legal administrator of the estate of the late Mwithirwa, PW 1 was not part of the sale agreement.
22. D.W. 1 was unable to verify if the seller had a wife or children; otherwise, he only consulted the 3<sup>rd</sup> respondent's uncle, George Kiria, neighbors and a brother of the seller who equally was not a party to the sale agreement. DW 1 denied that he conducted no due diligence before the sale to establish the immediate family of the seller or that he was out to disinherit them. As to the objection proceedings, DW 1 admitted lodging a caution on the land and appearing before the land registrar as per P. Exh No. (6) or D. Exh No. (10), claiming a purchaser's interest.
23. George Kirai testified as DW 2. He adopted as his evidence in chief a witness statement dated 21.7.2020. his evidence was that the 1<sup>st</sup> respondent was his nephew and the 3<sup>rd</sup> respondent a stepbrother. DW 2 said that he was the one who subdivided the land under the instruction of the late Mwithirwa in favor of his sons; the 3<sup>rd</sup> respondent obtained 2 acres, Silas Muthuri, 2 acres and ½ acres. He said that the 3<sup>rd</sup> respondent came to his home alongside his brother Moses Bedan and the appellant, on account of the sale of the land. DW 2 said that he informed the appellant that the 3<sup>rd</sup> respondent had an alternative land to settle on in Timau.
24. DW2 said that he was not a signatory to the sale agreement. Similarly, he could not confirm if the 1<sup>st</sup> & 2<sup>nd</sup> respondents and other family members were involved in the sale agreement.
25. Moses M. Bedan testified as DW 3. He relied on a witness statement dated 21.7.2020 as his evidence in chief. He told the court that he had leased the suit land for his Ofcam Church for ten years from the 3<sup>rd</sup> respondent until 22.6.2012 when the 3<sup>rd</sup> respondent informed him of his intention to sell it. Since he was not in a position to buy the land, DW 3 said that the appellant came to his home willing to buy the land from the 3<sup>rd</sup> respondent.
26. DW 3 said that DW 2, as a family member, was the one who gave the appellant the go-ahead to purchase the land. DW 3 said that he never saw the land ownership documents in the custody of the 3<sup>rd</sup> respondent, save that he would tell them it was an inheritance from his late father. DW 3 confirmed that the appellant was his cousin but was never involved in the land negotiation upon linking him with the seller.
27. At the close of the appellant's case, it appears that the 3<sup>rd</sup> respondent, as the 2<sup>nd</sup> defendant, did not tender any evidence in support of his statement of defense. The trial court proceeded to deliver its judgment on 21.2.2024, now appealed against before this court by a memorandum of appeal dated 6.3.2024.
28. The trial court is faulted for:
  - i. Failing to consider the appellant's defense.
  - ii. Failing to strike out the suit.
  - iii. Applying wrong principles of law, yet the respondents knew of the sale agreement; hence it should not have entered judgment in favor of the respondents.
  - iv. Failing to give weight to the appellant's evidence.
  - v. Finding the customary trust existed in favor of the 1<sup>st</sup> & 2<sup>nd</sup> respondents.



- vi. For entering judgment based on remote claims without any legal basis and sufficient material and evidence to reach such conclusions.
  - vii. For making a bad judgment in law.
29. This appeal was canvassed by way of written submissions as directed by the court. The appellant relied on written submissions dated 2.10.2024 and isolated three issues for the court's determination. On proof of customary trust, the appellant submitted that the respondents failed to discharge the burden of proof and establish the ingredients of customary trust as set out in *Juletabi African Adventure Ltd & another vs Christopher Michael Lockely* (2017) eKLR, *Gichuki vs Gichuki* (1982) KLR 285, *Mbothu & others vs Waitimu and others* (1986) KLR 171 and *Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & another* (2018) eKLR.
  30. The appellants submitted that the 1<sup>st</sup> & 2<sup>nd</sup> respondents, as the 3<sup>rd</sup> respondent's spouse and children, were never disclosed to him by the seller; they were not in occupation of the land at the time of purchase and were not direct beneficiaries of the estate of the late Mwithirwa Mbwiria, hence were not entitled to any inheritance after all grandchildren can only inherit from their parents and if not, directly from the grandparents if their parents pass on. Reliance was placed on *Cleopa Amutala Namayi vs Judith Were* (2015) eKLR.
  31. As to the 2<sup>nd</sup> respondent, the appellant submitted that being a spouse of the 3<sup>rd</sup> respondent, there was no provision in the Succession Cause No. 17 of 2008 for an in-law, given in-laws had no right of inheritance from the estate of their father-in-law, except approaching the estate of the person (spouse), on whose account they claim. In this case, the appellant submitted that such a claim or stake to the parents in Law's estate would not be in their own right but rather on behalf of the estate of their dead spouse. Reliance was placed on the *Re-estate of Luhitse Paul (deceased)* (2021) eKLR.
  32. Additionally, the appellant submitted that the 2<sup>nd</sup> respondent and her children could not lay a claim on the land as direct beneficiaries of the estate of Mwithirwa Mbwiria; hence, the claim remained unsubstantiated and premature; otherwise, the 3<sup>rd</sup> respondent had all the powers and privileges to deal with the land as he wished. Reliance was placed on *Peter Ndungu Njenga vs Sophia Watiri Njenga* (2000) eKLR.
  33. The appellant submitted that the burden of proof was on the respondents who failed to discharge it under Sections 107, 109 of the *Evidence Act* as read together with *Miller vs Minister of Pension* (1947) 2 ALL ER 372. The appellant submitted that he was a bonafide purchaser for value without notice from the 3<sup>rd</sup> respondent, whose right should be protected since he undertook due diligence. Reliance was placed on *Katende vs Harindar and Co. Ltd* (2008) 2 E. A 173 and *Lawrence Mukiri vs Attorney General & others* (2013) eKLR and Article 40 of *the Constitution*.
  34. The 1<sup>st</sup> & 2<sup>nd</sup> respondents relied on written submissions dated 11.10.2024. They isolated three issues for the court's determination. On whether the customary trust was proved, the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that trust as per Section 28 of the *Land Registration Act* and in *Kiebia vs M'Lintari* (supra), is not registered in the register of the title since they are overriding rights or interests running with the land.
  35. In this appeal, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the fact that the suit land was part of the estate of the deceased to be inherited by his children, qualifies as family land, to which the 1<sup>st</sup> & 2<sup>nd</sup> respondents were part of the family.
  36. The 2<sup>nd</sup> respondent submitted that her claim was on behalf of the minor children of the 2<sup>nd</sup> respondent and grandchildren of the registered owner of the suit land; hence, their claim cannot be termed as



- remote or adventurous. The 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that the minors could have been registered as owners of the land.
37. Regarding the bonafide purchaser, the 1<sup>st</sup> & 2<sup>nd</sup> respondents submitted that, going by the definition in Black's Laws Dictionary 9<sup>th</sup> Edition, the appellant did not qualify since he does not meet the seven elements as set out in *Dima Management Ltd vs County Government of Mombasa and others* (2023) KESC 30 (KLR), *Katende vs Harindar & Co. Ltd* (supra) and *Samuel Kamere vs Land Registrar Kajiado* (2015) eKLR.
38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that given that the appellant bought the land when he knew that the 3<sup>rd</sup> respondent was not the registered owner, he had failed to conduct proper due diligence to establish the interest or rights of the 1<sup>st</sup> & 2<sup>nd</sup> respondents and that the sale agreement alone between him and the 3<sup>rd</sup> respondent who was a mere beneficiary of the estate was not enough.
39. The primary role of this court is to evaluate the evidence tendered before the trial court and come up with its findings and conclusions, bearing in mind that the court below saw and heard the witnesses testify. See *Abok James Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR.
40. The issues calling for my determination are:
- i. If the trial court had jurisdiction to hear and determine the suit.
  - ii. If the 3<sup>rd</sup> respondent could sell and transfer the suit land to the appellant.
  - iii. If the sale of the land to the appellant was subject to any overriding rights of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - iv. If the 1<sup>st</sup> & 2<sup>nd</sup> respondents pleaded and proved the existence of a breach of the trust and illegality in the sale of the suit land to the appellant.
  - v. If the respondents were entitled to the reliefs sought.
  - vi. If the appellant pleaded and proved justification to be on the land.
  - vii. Whether the appeal has merits.
  - viii. What is the order of costs?
41. It is trite law that parties are bound by their pleadings, and issues of the court determination flow from the pleadings. A court of law has no business to determine issues, pronounce, and or grant reliefs that have not been pleaded and proved by the party's pleadings, which are the means through which parties raise their claims, counterclaims and defences.
42. Evidence is, therefore, tendered based on pleaded facts. See *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd* (2018) eKLR, *IEBC vs Mutinda Mule & others* (2014) eKLR and *Peter Kariuki vs A.G. & another* (2018) eKLR.
43. In *Vishvastones Supplies Co. Ltd vs RSR Stone* (2006) Civil appeal application E308 of 2020 (2024) KECA 978 (KLR) (July 28th, 2024) (Judgment), the court observed that pleadings are formal written statements filed by the parties to a lawsuit outlining their respective claims, defenses and responses to each other's claim and do not include evidence which a litigant intends to prove his claim. The court restated the holdings of *IEBC vs. Stephen Mutinda Mule* (supra) that the duty is upon the parties to formulate their case in their way, subject to the rules on pleadings; otherwise, they cannot raise a different or fresh case without notice to the other or and amendment.



44. In this appeal, the primary pleadings were the plaint dated 16.4.2019 and the statements of defense by the appellant and the 3<sup>rd</sup> respondent dated 29.4.2019. The 1<sup>st</sup> respondent had brought the claim as the legal representative of the registered owner's estate. In contrast, the 2<sup>nd</sup> respondent described herself as a wife and next friend of minors who are the children of the 3<sup>rd</sup> respondent and daughter-in-law and grandchildren of the initially registered land owner, respectively.
45. The 1<sup>st</sup> respondent, as the holder of a certificate of grant, averred that he was not consulted and did not consent to any occupation of part of the estate in which he was administering dwelt with by the appellant and the 3<sup>rd</sup> respondent. The 1<sup>st</sup> & 2<sup>nd</sup> respondents pleaded that the suit land was subject to trust in favor of the 2<sup>nd</sup> plaintiff, her children, whose consent approval or overriding rights based on customary trust were valid. The 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the appellant knew or ought to have known of their overriding rights or interests and was warned to cease dealing with or occupying the suit land. The 1<sup>st</sup> & 2<sup>nd</sup> respondents, therefore, prayed for declaratory orders that the suit land was trust property and for vacant possession.
46. On his part, the appellant admitted that the 1<sup>st</sup> respondent was a legal administrator of the estate to which the 3<sup>rd</sup> respondent was a beneficial owner of 1 acre of land, which he legally and procedurally acquired for value, took vacant possession on 1.8.2012, has extensively developed to the exclusion of the respondents.
47. The appellant termed the claims by the respondents as invalid, unsubstantiated, unsustainable and the suit incompetent; otherwise if there was to be any re-possession, he should be refunded the consideration paid and costs incurred to develop the land. The appellant denied that the court had jurisdiction to hear the suit.
48. On his part, the 3<sup>rd</sup> respondent admitted that the 1<sup>st</sup> respondent was the legal administrator of the suit land and blamed the appellant for misleading him to dispose of family land, where the 2<sup>nd</sup> respondent and his children were equal beneficial owners of the ancestral land. He termed the Kshs.100,000/= paid as a deposit by the appellant as fully utilized on account of the extended use of the suit land for over six years.
49. From the pleadings, it is clear that the 1<sup>st</sup> respondent's sole and exclusive capacity to administer the suit land was not denied by the appellant. Under Sections 45,76, and 82 of the *Law of Succession Act*, it is only a legal administrator who can enter into and transact on the assets of the estate of a deceased person.
50. In this appeal the appellant dwelt with a beneficiary to the estate of the deceased. The claim by the appellant to the suit land is that of a third party to the estate. The 1<sup>st</sup> & 2<sup>nd</sup> respondents were all in unison that the estate of the deceased had been distributed to the three sons of the deceased, among them the 3<sup>rd</sup> respondent, who was yet to be transferred a portion of the suit land by the time he is alleged to have sold it to the appellant.
51. The dispute between the appellant and the 3<sup>rd</sup> respondent was not about the distribution of the estate of the deceased but on whether the 3<sup>rd</sup> respondent had failed to honor the sale agreement, even though he had received a deposit and put him into vacant possession. Such a dispute, therefore, fell within the jurisdiction of the Environment and Land Court and not the probate and administration court.
52. The next issue is whether the 3<sup>rd</sup> respondent could enter into a valid sale agreement with the appellant. Courts of law do not rewrite contracts but only enforce them unless they are illegal, invalid, lack the capacity to transact, there was undue influence or was entered through duress or fraud. See National



- Bank of Kenya vs Pipeplastic Samkolit (K) Ltd & another (2001) eKLR, PM Kimaiyo Langat vs Co-operative Bank (K) (2017) eKLR.
53. The sale agreement dated 27.7.2012 was made when the 1<sup>st</sup> respondent was the personal representative of the estate of the deceased. The 3<sup>rd</sup> respondent made an admission of that fact in his pleadings clause No. 3 of the sale agreement referred to Meru H.C Succession Cause No. 17 of 2008. The certificate of confirmation of grant had already been issued on 10.12.2008. So, there was nothing pending completion in the probate and administration court.
  54. The appellant opted to deal with the 3<sup>rd</sup> respondent and not the 1<sup>st</sup> respondent, who was the bonafide legal representative of the deceased's estate. It does not matter that the probate and administration court distributed the estate to the three beneficiaries on 9.12.2008. The suit property had not passed to the 3<sup>rd</sup> respondent so that the appellant may be heard to say that he dwelt with the beneficiary who had the legal capacity to pass any valid title to him.
  55. A nullity is a nullity as held in *Macfoy vs United Africa Co. Ltd* (1961) 3 ALLER 1169. In *Zacharia Wambugu Gathimu & another vs John Ndungu Maina* (2019) eKLR, the court observed that the seller had no interest, which he could pass under Section 45 of the [Law of Succession Act](#). In the Estate of *Jamin Inyanda Kadambai (deceased)* (2021) eKLR, the court said that a valid sale of estate property can only be by those to whom the assets vest by virtue of Sections 76 and 82 of the [Law of Succession Act](#). Any other dealing with the estate property would amount to intermeddling, as was held in *Morris Mwiti Mburugu vs Dennis Kimanthi M'Mbuurgu* (2016) eKLR. Therefore, my findings are that the sale agreement between the 3<sup>rd</sup> respondent and the appellant was illegal and incapable of passing the test of Section 3 (3) of the [Law of Contract Act](#), Section 38 of the [Land Act](#), and was offensive of Sections 45, 76 and 83 of the [Law of Succession Act](#).
  56. By extension, the appellant would be incapable of being described as a bonafide purchaser for value without notice. Clause number (3) of the sale agreement was precise that the appellant knew and the 3<sup>rd</sup> respondent described himself as a beneficiary to the estate of his late father. The appellant, in his evidence and pleadings, admitted knowledge of that fact and that he perused the certificate of confirmed grant and the register of the title. It was not enough to peruse, visit the land, and deal only with DW 2 and DW 3. The appellant gave no explanation why he did not consult the personal representative and deal with him directly other than DW 2 and DW 3 whose names were not in the certificate of grant. The copy of the record and search showed the registered owner as the 1<sup>st</sup> respondent and not the 3<sup>rd</sup> respondent.
  57. The appellant took the risk of dealing with a beneficiary of the land instead of the personal representative and the registered owner. A court of law may not enforce an illegal contract or allow itself to be made an instrument of enforcing obligations arising out of an illegal contract or where a defendant is implicated in an illegality. See *Mapis Investment (K) Ltd vs Kenya Railways Corporation* (2006) eKLR. *Titus Laisa Waliuba vs Calistus Barasa Khisa & others* (2018) eKLR and *Standard Chartered Bank vs Intercom Services Ltd* (2004) eKLR.
  58. Similarly, in *Iqbal Singh Rai vs Mark Lechini & Registrar of Titles C.C No. 1054 of 2021*, the court held that the failure to deal with the registered owner to obtain the transfer could not confer protection to the purchaser. Again, in *DTB (K) Ltd vs Said Hamad Shamisi & others* (2015) eKLR, the court said that no one could give a better title than what he possessed.
  59. Coming to the issue of trust, there was an admission by the 3<sup>rd</sup> respondent in his pleading that the 1<sup>st</sup> & 2<sup>nd</sup> respondents were the legal representatives of the estate of his wife and children who were entitled to ancestral or family land. The sale agreement entered between the appellant and the 3<sup>rd</sup> respondent had



acknowledged that the land was subject to a succession process, the 3<sup>rd</sup> respondent being a beneficial owner. Admission of facts in law is governed by Order 13 Rule 2 of the Civil Procedure Rules. In *Choitram vs Nazari* (1984) eKLR the court held that admissions can be expressed or implied either on the pleadings or otherwise. They must be plain and obvious. See *Synergy Industrial Credit Ltd vs Oxyplus International Ltd & others* (2021) eKLR.

60. There is no legal provision in the law on the number of witnesses to a suit. A single witness to a case may prove facts in the claim. The exhibits produced by the respondents were in line with Section 64 of the *Evidence Act*, to show the circumstances of the registration of the suit land. Trust is a matter of facts. Customary trust, as held in *Kiebia vs M'Lintari* supra has to pass the five conditions. There is no dispute that the land belonged to the uncle of the 1<sup>st</sup> respondent. The respondents belonged to that family. The circumstances of the possession, occupation and use of the land before the sale agreement by the respondents were not disputed.
61. Customary trust is an intergenerational equity flowing from ancestors to the successors or those who belong to that family. The land is passed from one generation to the other. It is true that under Section 35 of The *Law of Succession Act*, grandchildren, as held in *Tao Katungi vs Margarethe Thorning Katungi and another* (2014) eKLR and *Cleopa Amutala Namayi vs Judith Were* (supra), can only inherit from their parents and not directly from their grandparents unless the parents are deceased.
62. A claim based on customary trust involves generations. It is not about inheritance but intergenerational equity. Trust is proved through evidence. In this appeal the respondents were able to tender evidence which the appellant did not rebut that there was an intention to establish and found a trust. The 3<sup>rd</sup> respondent had admitted in his pleadings that the land was family or ancestral land. The appellant was unable to discount the clear evidence that he ignored the overriding rights or interests of the beneficial owners of the suit land, whose legal representative was the 1<sup>st</sup> respondent.
63. The upshot is that I find no merits in the seven grounds of appeal before this court. The appeal is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6<sup>TH</sup> NOVEMBER, 2024**

In presence of

C.A Kananu

Appellant

**HON. C K NZILI**

**JUDGE**

