



REPUBLIC OF KENYA



**Ndegwa & 3 others v Kipngetich & 2 others (Environment and Land Appeal E028 & E032 of 2023 (Consolidated)) [2024] KEELC 13566 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13566 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND APPEAL E028 & E032 OF 2023 (CONSOLIDATED)**  
**CA OCHIENG, J**  
**DECEMBER 4, 2024**

**BETWEEN**

**JAMES KIGATHI NDEGWA ..... 1<sup>ST</sup> APPELLANT**

**HUMPHREY MBUGUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EVANS KIPNGETICH ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND APPEAL E032 OF 2023**

**BETWEEN**

**MICHAEL LUCHU OWEN NAGERI ..... 1<sup>ST</sup> APPELLANT**

**CHRISTINE ITEYA MASILO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EVANS KIPNGETICH ..... 1<sup>ST</sup> RESPONDENT**

**JAMES KIGATHI NDEGWA ..... 2<sup>ND</sup> RESPONDENT**

**HUMPHREY MBUGUA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal of the whole Judgment delivered on 18th October, 2023 by the Honourable E. Kimaiyo Suter (PM) in Civil Suit E044 of 2020: Evans Kipngetich vs James Kigathi Ndegwa, Humphrey Mbugua, Michael Luchu Owen and Christine Iteya Masiolo)*



## JUDGMENT

1. Through two Memoranda of Appeals dated the 1<sup>st</sup> November, 2023 and 6<sup>th</sup> November, 2023, filed in ELC Appeal No. 28 of 2023 and ELC No. 32 of 2023, respectively, the Appellants appealed against the Judgment delivered by Hon. E. Kimaiyo Suter (PM) in Civil Suit E044 of 2020. The genesis of this Appeal is the Judgment in the Chief Magistrate's Court at Mavoko in Civil Suit No. E044 of 2020 by the Hon. E. Kimaiyo Suter (PM), delivered on 18<sup>th</sup> October, 2023 where the trial court entered Judgment in favour of the Plaintiff therein.
2. The Appellants being dissatisfied with the whole of the said Judgment filed their respective Memoranda of Appeals dated the 1<sup>st</sup> November, 2023 and 6<sup>th</sup> November, 2023.
3. The grounds contained in the Memorandum of Appeal dated the 1<sup>st</sup> November, 2023 in ELC Appeal No. E028 of 2023 are as follows:-
  1. That the Learned Magistrate erred in law and in fact by making a finding that the Appellants had acted fraudulently even though evidence was tendered that the Plaintiff/Respondent is the one who introduced the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the intention to have the suit premises sold to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  2. That the Learned Magistrate misdirected herself in reaching a conclusion that the Defendants colluded or acted fraudulently and completely ignored the Plaintiff's role in breaching the contract and procuring the 3<sup>rd</sup> & 4<sup>th</sup> Defendants to buy out the property after he was unable to complete on time.
  3. That the Learned Magistrate misdirected herself in granting equitable remedies to the Plaintiff who had not come to court with clean hands.
  4. That the Learned Magistrate misdirected herself in failing to observe the principle of proportionality in granting the orders she made that the title to the property be transferred to the Plaintiff even when the title to Mavoko Town Block 3/3994 has passed and the 3<sup>rd</sup> & 4<sup>th</sup> Defendants who already built upon and have been occupying the said premises.
4. While the grounds set out in the Memorandum of Appeal dated the 6<sup>th</sup> November, 2023 in ELC Appeal No. E032 of 2023 are as follows:-
  1. That the Honourable trial Magistrate erred in law and in fact in failing to apply proper legal principles regarding innocent purchaser without notice and thus arriving at a wrong decision.
  2. That the Learned Magistrate erred in law and fact in finding that the 1<sup>st</sup> Defendant's right to rescind the sale agreement over Mavoko Town Block 2/3994 had not crystallized despite the fact that the sale agreement provided for completion date as 60 days from 10<sup>th</sup> October, 2017 and that the Plaintiff completed payment outside the completion period.
  3. That the Learned Magistrate erred in law and fact by misconstruing Clause 18 of the Sale Agreement and failing to appreciate that the letter dated 11<sup>th</sup> June, 2018 was sufficient notice of intention to rescind the agreement as contemplated under the said Clause 18 and if at all the purchaser (1<sup>st</sup> Respondent) was keen on completing the transaction he could have completed payment immediately the said letter was served upon him.



4. That the Learned Magistrate erred in law and fact by failing to recognize that under the Sale Agreement time was of essence in respect of all obligations of the purchaser (1<sup>st</sup> Respondent herein) and that when he failed to complete payment within the agreed timelines even after being served with the letter dated 11<sup>th</sup> June, 2018 which expressly communicated the vendor's (2<sup>nd</sup> Respondent) intention to rescind the agreement, the transaction between the parties stood rescinded and or cancelled.
5. That the Learned Magistrate erred in law and fact by failing to appreciate that since the purchaser (1<sup>st</sup> Respondent herein) had failed to honour his contractual obligations within the stipulated timelines, the Vendor (2<sup>nd</sup> Respondent) was within his right to rescind the agreement and offer the suit property Mavoko Town Block 2/3994 to Third Parties as it did without reference to the purchaser (1<sup>st</sup> Respondent).
6. The Honourable Trial Magistrate grossly erred in law and in fact in failing to find that the 1<sup>st</sup> Respondent had not proved any fraud on the part of the Appellants.
7. That the Learned Magistrate erred in law and fact in finding that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Appellants colluded to defeat the 1<sup>st</sup> Respondent's interest in the suit property when no evidence of such collusion was tendered before her.
8. That the Learned Magistrate erred in law and fact in finding that the transaction between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein and the eventual transfer of the suit property to the Appellants by the 3<sup>rd</sup> Respondent was marred with illegality and fraud yet no evidence of the alleged fraud and illegality was tendered before her.
9. That the Learned Magistrate erred in law and fact by failing to appreciate the Appellants acquired the suit property from the 2<sup>nd</sup> Defendant (3<sup>rd</sup> Respondent herein) and if at all there was fraud or illegality in the transaction between 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, they were not aware neither were they a party to it.
10. That the Learned Magistrate erred in law and fact by failing to appreciate that Appellants followed the due process and conducted proper due diligence which included but was not limited to conducting a Search at the Land's Registry which revealed that the suit property was registered to Humphrey Mbugua and were thus innocent purchasers for value without notice deserving protection of the law.
11. That the Learned Magistrate erred in law and fact by failing to recognize the Appellants, having not been a party to any fraud or illegality, if any, that may have been attended to the acquisition of the suit property by the 3<sup>rd</sup> Respondent were the absolute and indefeasible owners of the suit property as espoused under section 26(1) of the *Land Registration Act*.

It is proposed to ask the Honourable for orders that:-

1. This Appeal be allowed.
2. The entire judgement of Hon. E. Kimaiyo Suter (PM) in Mavoko Civil Suit E44 of 2020: Evans Kipngetch v James Kigathi Ndegwa, Humphrey Mbugua, Michael Luchu Owen and Christine Iteya Masiolo delivered on 18<sup>th</sup> October, 2023 and the subsequent Decree be set aside.
3. The costs of this Appeal be borne by the Respondent.
4. The Court grant such other orders as it may deem necessary.



5. The consolidated Appeals were canvassed by way of written submissions.

## **Submissions**

### **Appellants' Submissions**

6. The Appellants in their submissions provided a background of the dispute herein and contended that the 2<sup>nd</sup> Respondent's right to rescind the contract between the 1<sup>st</sup> Respondent and himself had crystallized as the 1<sup>st</sup> Respondent failed to pay the purchase price within the stipulated period in the Sale Agreement dated the 10<sup>th</sup> October, 2017. They submitted that they acquired a good title from the 3<sup>rd</sup> Respondent who was the registered proprietor of the suit land hence they can be deemed as bona fide purchasers for value without notice on the defect in the title. Further, that all documents from the Land Registry confirmed that the 3<sup>rd</sup> Respondent was the proprietor of the suit land. They sought for the Appeal to be allowed with costs. To buttress their averments, they relied on the following decisions: *Kiai t/a High Flyer Services and Publishers & another v Gichuki t/a High Flyer Publishers & another* (Civil Appeal E003 of 2021) [2024] KECA 842 (KLR) (12 July 2024) (Judgment); *Kammins Ballrooms Co. Ltd vs Zenith Investments (Torquay) Ltd* (1971) AC 850, 844; *Republic vs the Business Premises Rent Tribunal & 2 Others* (2008) eKLR; *Francis Wahiu v Monica Njeri* (2012) eKLR; *Jane Muthini Matikilu vs Veronica Makau* (2022) eKLR; *Eviline Karigu (suing as Administratrix of Estate of Late Muriungi M'chuka alias Muriungi M' Gichaga vs M'chabari Kinoro* (2022) eKLR; *Kinyanjui Kamau vs George Kamau* (2015) eKLR; *Gladys Wanjiru Ngaacha vs Teresa Chepsaat & 4 Others* (2013) eKLR; *Lawrence P Mukiri v Attorney General & 4 Others* (2013) eKLR; *Samuel Kamere vs Land Registrar, Kajiado, Civil Appeal No. 20 of 2005* (2015) eKLR; *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* (2014) eKLR and *Republic vs Rosemary Wairimu Munene, Ex parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd*.

### **Respondent/ 1<sup>st</sup> Respondent's Submissions**

7. The Respondent/1<sup>st</sup> Respondent in his submissions highlighted the proceedings in the lower court and contended that the James Kigathi Ndegwa with full knowledge of the existence of a valid Sale Agreement dated the 10<sup>th</sup> October 2017, between them, in regards to the suit land, proceeded to transfer the suit land to Humphrey Mbugua, who subsequently transferred the said land to Michael Luchu Owen and Christine Iteya Masiolo. He argued that James Kigathi Ndegwa had received the full purchase price from him, despite the fact that the transaction period exceeded the time stipulated within the sale agreement. Further, that James Kigathi Ndegwa did not issue any cancellation notice to him but continued to receive payments of the purchase price and purported to issue a notice rescinding the sale agreement for Mavoko Town Block 2/3995 before the transfer had been effected to Humphrey Mbugua. He submitted that the Agreement was varied by virtue of acquiescence wherein the Appellant continued to receive part of the purchase price outside the completion period; thus, the agreement therein remained valid and enforceable. He reiterated that the Court should maintain that the trial Court rightfully found in her judgment that the James Kigathi Ndegwa had not properly rescinded the sale agreement in issue herein on grounds of failure to issue the twenty one (21) days' notice of completion. He further submitted that the Appellants could not be deemed to be bona fide purchasers for value since the vendor did not have a proper title to pass to them. He insisted that the trial court properly found that there was collusion between the Appellants to defeat his interest. To buttress his averments, he relied on the following decisions: *Panras Hinga Karuri v Sammy Maina Kamau* (2021) eKLR; *Anne Murambi v John Munyao Nyamu & another* (2018) eKLR; *Gichuhi & Another v Kilundo* (2024) KEELC 1272 (KLR); *Margaret Mukami Macharia (Administrator of the Estate of Esther Wangu Macharia) v Jessie Maina Gitau* (2022) eKLR; *Mwangi James Njehia v Janetta Wanjiku*



Mwangi & Another (2021) eKLR; Mangana v Gwaro & 3 others (2023) KEELC 18434 (KLR) and Chogi & 2 others (Personal Representatives of the Estate of Simon Chogi Gatuma – Deceased) v Kiragu (2024) KEELC 3999 (KLR).

### **Analysis and Determination**

8. Upon consideration of the two Memoranda of Appeals, Records of Appeal and rivalling submissions, the following are the issues for determination:-
  - a. Whether the Sale Agreement dated the 10<sup>th</sup> October, 2017 between Evans Kipnetich and James Kigathi Ndegwa was properly rescinded.
  - b. Whether Michael Luchu Owen Nageri and Christine Iteya Masiolo can be deemed as bona fide purchasers for value without notice.
  - c. Whether the Appeals are merited.
9. This being a first Appeal, the role of this court is to subject the materials presented before the lower court to a fresh analysis so as to reach an independent conclusion and at the same time evaluate whether or not the conclusions arrived at by the trial Magistrate were justified. The Appellate Court will not unnecessarily interfere with the findings of the trial court. See the decision of *Selle vs. Associated Motor Boat Co.* [1986] EA 123.

As to whether the Sale Agreement dated the 10<sup>th</sup> October, 2017 between Evans Kipnetich and James Kigathi Ndegwa was properly rescinded.

10. It is not in dispute that there were two Sale Agreements dated the 10<sup>th</sup> October, 2017 between Evans Kipnetich (Respondent) and James Kigathi Ndegwa (2<sup>nd</sup> Respondent) for the sale of two properties being Mavoko Town Block 2/3994 and Mavoko Town Block 2/3995 respectively. Further, that the total purchase price for the two properties was Kshs. 5,300,000; being Kshs.2,650,000 per property. The Respondent/1<sup>st</sup> Respondent claims he paid the full purchase price but the Appellants insist that the said purchase price was paid outside the sixty (60) days period.
11. From the proceedings in the lower court, I note on the 11<sup>th</sup> October 2017, the Respondent paid the first deposit of Kshs. 530,000. Further, on 23<sup>rd</sup> October 2017, Co-operative Bank of Kenya issued an offer letter issuing a loan facility to the Respondent for payment of the balance of Kshs 4,080,000. While on the 11<sup>th</sup> December 2017, the Advocate for Cooperative Bank of Kenya issued a professional undertaking for the payment of the Kshs. 4,080,000. It emerged that on the 23<sup>rd</sup> January 2018, the Respondent paid Kshs. 290,000, while on the 12<sup>th</sup> February 2018, Co-operative Bank of Kenya Limited released the payment of Kshs. 4,080,000 into the account of James Kigathi Ndegwa as payment of the purchase price.
12. It further emerged in evidence that on the 11<sup>th</sup> June, 2018, the Advocate messrs Sudi & Associates, that had represented both the Respondent and James Kigathi Ndegwa in respect to the Sale Agreement dated the 10<sup>th</sup> October, 2017, issued a termination letter rescinding the said sale agreement in respect to title number Mavoko Town Block 2/3995. I note on the 7<sup>th</sup> August 2018, after the issuance of the rescission notice, the Respondent paid the last deposit of Kshs. 400,000 into the account of James Kigathi Ndegwa.
13. On rescission of the Sale Agreement, I wish to reproduce an excerpt from the impugned Sale Agreement on completion:-

“7. Completion



The completion date shall be within sixty (60) days from the date of this Agreement or such other date as the parties may agree in writing. Completion shall take place at the offices of the Vendor's Advocates unless otherwise agreed in writing between the parties. On completion and in exchange of the completion documents with the payment of the balance of the purchase price, the vendor's Advocates shall release the following documents to the Purchaser's financiers.....

18. Time shall be of the essence in respect of all the obligations of the purchaser hereunder. If on the completion date the purchaser is not ready, able or willing to pay the balance of the purchase price as required under the provisions of Clause 6, the Vendor shall issue the Purchaser with a twenty one (21) days' notice in writing to comply with the obligations and such notice shall specify the default ('the Completion Notice') and the Purchaser shall be obligated to remedy the default within the period of the Completion Notice (time being of essence) and if the Purchaser then fails to comply with the Completion Notice in full, then without prejudice to any other rights or remedies available to the Vendor, the Vendor shall in his sole discretion have the right to either:-

(a) rescind this Agreement..."

14. Which brings me to the question as to whether the letter dated the 11<sup>th</sup> June, 2018 amounted to a rescission notice as envisaged under Clause 18 of the aforementioned Sale Agreement. As per the contents of the said letter, there was no indication whether the Respondent/1<sup>st</sup> Respondent as Purchaser had been granted the twenty-one (21) days notice, to complete the payment of the purchase price as had been agreed upon in the impugned Sale Agreement. Further, I note after the end of the sixty (60) days, the Vendor vide his letter dated the 2<sup>nd</sup> February, 2018 addressed to Cooperative Bank of Kenya, had requested the bank to expedite the release of the balance of Kshs. 4,080,000 which the bank did, on 18<sup>th</sup> February, 2018.

15. On rescission of contract, in the case of *Ann Mumbi Hinga v William Mwangi Gathuma & another* [2017] eKLR the Learned Judge had this to say:-

"Rescission arises where one party in a contract is in default. The party which is not in default gives notice to the party in default to perform the contract. On the failure to so perform the contract is then rescinded. In this case for the Plaintiff to rescind this contract she must show that the Defendant was in default. Secondly, that she gave notice of default and the Defendants were unable to remedy the default by performing their part of their contract. The letter aforesaid does not give notice to the Defendants nor fault them for being in default. In the contract the Defendants' obligation was to pay the purchase price. The Plaintiff did not place any evidence on record that the Defendants defaulted in that obligation. If anything the evidence is that the Defendants paid the Plaintiffs the full purchase price. There is therefore no evidence on record to show that there is a valid ground for rescission of the contract."

16. While in the case of *Anne Murambi Vs John Munyao Nyamu & Another* (2018) eKLR the Court stated that:-

"Secondly, if the estate of the deceased vendor wished to terminate or rescind the contract for any valid reason, they were required to terminate or rescind the contract in accordance with



the law. What was the law? The law was and still is that, the party exercising the option to terminate or rescind the contract was required to do so in accordance with the terms spelt out in the contract. The material contract did not have an express clause on termination or rescission. It however incorporated the Law Society Conditions of Sale (1989 Edition). Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty one days' notice requiring the purchaser to complete the contract."

17. Further, in the case of *Mangana v Gwara & 3 others* (Environment & Land Case 69 of 2015) [2023] KEELC 18434 (KLR) (29 June 2023) (Judgment) the Judge held that:-

"From the above, it will be discerned that where a party is of opinion that he has been subjected to unreasonable delay, he ought to give notice to the other party and make time of essence. A case that is illustrative is that of *Nyamunyu vs Nyaga* (1983) KLR 282. In this case, the appellant purchased some land from the respondent. The agreement provided for payment of a deposit and the balance to be paid to the vendor "on any time completion that is the date the consent of the Divisional Land Control Board/Appropriate Authority is obtained to subdivision and transfer." It will be observed that no time was provided in the agreement for payment of the balance, only that the balance was to be paid after issuance of consent of the Land Control Board. Consent was duly issued on 19 February 1976 and the vendor demanded payment which was not forthcoming. He then returned the money so far paid on 24 July 1976. The purchaser subsequently purported to pay all the money under the contract on 6 April 1977 and sued for specific performance. The Court of Appeal was not persuaded that he had any reasonable claim since in this instance the vendor had subsequently made time to be of essence. Madan JA, provided the following dictum at pg 288: "Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it."

See also the case of *Panras Hinga Karuri v Sammy Maina Kamau* [2021] eKLR.

18. Based on the facts before me while associating myself with the decisions cited above, I am of the view that since the vendor even sought for the balance of the purchase price after the sixty (60) days period for completion, had lapsed and continued to receive portions of the purchase price from the purchaser including the bank, which he had not refunded even at the point the lower court suit was heard, the purported rescission notice was null and void. Even if we were to invoke the Law Clause 4 (7) of the Law Society Conditions of Sale (1989 Edition), which requires a vendor who willing to complete a sale and is aggrieved by the purchaser's default in completing the contract, within the stipulated period, to issue a twenty one days' notice requiring the purchaser to complete the said contract, I find that the Vendor failed to adhere to the same. I opine that that due to the actions of the Vendor James Kigathi Ndegwa (Appellant) the Sale Agreement dated the 10<sup>th</sup> October, 2017 was varied by virtue of acquiescence and hence remained valid and enforceable.

As to whether Michael Luchu Owen Nageri and Christine Iteya Masiolo can be deemed as bona fide purchasers for value without notice.

19. Michael Luchu Owen Nageri and Christine Iteya Masiolo who are Appellants in the Appeal No. E032 of 2023 contend that the Learned Magistrate erred in ordering cancellation of their title since they were bona fide purchasers for value without notice of defect in title. They argued that they undertook a search before purchasing the suit land and confirmed, it belonged to the vendor Humphrey Mbugua



(3<sup>rd</sup> Respondent). Further, they proceeded to purchase it and paid the full purchase price, procured consent of the land control board and acquired their title.

20. Black's Law Dictionary 10<sup>th</sup> Edition defines a "bona fide purchaser" as follows:-

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

21. From the evidence tendered in the lower court, I note the Appellants purchased the suit land from Humphrey Mbugua (3<sup>rd</sup> Respondent) and paid the full purchase price, after which they acquired their title. They testified that they were aware the 1<sup>st</sup> Respondent had purchased the suit land but had difficulty in paying for it. However, it is worth noting that, the Appellants who claim to be friends of the 1<sup>st</sup> Respondent indeed purchased the suit land from 3<sup>rd</sup> Respondent, after the 1<sup>st</sup> Respondent had actually paid the full purchase price to the initial owner of the suit land James Kigathi Ndegwa (2<sup>nd</sup> Respondent). Humphrey Mbugua (3<sup>rd</sup> Respondent) testified that he was given the suit land as a gift by James Kigathi Ndegwa but never produced any documents to that effect. I note by the time James Kigathi Ndegwa was giving the suit land to Humphrey Mbugua as a gift, he had already received the full purchase price and never refunded it nor expressed interest to do so.

22. Since I have already found that the Sale Agreement between Evans Kipngetch and James Kigathi Ndegwa was not properly rescinded and remained enforceable, it brings me to the question whether the Appellants (Michael Luchu Owen and Christine Iteya Masiolo) indeed acquired a good title from Humphrey Mbugua to be deemed as a bona fide purchasers for value without notice.

23. From the evidence tendered in the lower court, on the 16<sup>th</sup> August 2018, the title to the suit land was given to DW2 Humphrey Mbugua Ng'endo who procured consent of the Land Control Board on 6<sup>th</sup> June 2019 to transfer the suit land. The Appellants Michael Luchu and Christine Iteya who testified as DW3 and DW4 respectively claimed that they conducted a search on the suit land, which revealed that the said land was registered in the name of DW2 – Humphrey Mbugua as a title deed had been issued to him on the 16<sup>th</sup> August 2018. They confirmed that on the 8<sup>th</sup> July 2019, they entered into a sale agreement with DW2 Humphrey Mbugua for the sale of the suit land after which on the 23<sup>rd</sup> August 2019, they paid stamp duty for the said land, which was then transferred to them, with a title deed issued on the 29<sup>th</sup> August 2019.

24. On legitimacy of a title, Sections 26 (1) (b) of the [Land Registration Act](#) states that:-

"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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."

25. In the case of *Arthi Highway Developers Limited V West End Butchery Limited & 6 others* (2015) eKLR the Court of Appeal held that a party cannot invoke indefeasibility of title where the process of



acquisition of the title is irregular. They favourably cited the Ugandan case Court of Appeal Case of Katende V Haridar & Company Ltd, where the Court defined what amounts to a bona fide purchaser for value and stated thus:-

“...a bona fide purchaser for value is 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 the following:

- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

26. While in the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others (2017) eKLR the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title to pass to them.

27. Further, in *Munyu Maina Vs Hiram Gathiba Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

28. Based on the facts which I have analyzed above, while associating myself with the decisions cited, I find that since the Sale Agreement between James Kigathi Ndegwa and Evans Kipngetich was not properly rescinded and was hence enforceable, and that by the time the said Vendor was gifting the land to Humphrey Mbugua, he had already received the full purchase price, the vendor’s act of gifting the said land was void ab initio. From the actions of the vendor James Kigathi Ndegwa and Humphrey Mbugua, it is my considered view that they actually colluded to fraudulently deny Evans Kipngetich the land, he had legally purchased and even procured a loan to do so.

29. Further, through the action James Kigathi Ndegwa, he acquiesced on the terms of payment and was estopped from later sending a letter claiming he was rescinding the Agreement. I opine that Section 26(2) of the *Land Registration Act* does not offer the Appellants protection over their title. Insofar as I sympathize with their plight, I find that the vendor Humphrey Mbugua did not pass a good title to them as he had obtained it irregularly.

30. In the circumstances and relying on the facts as presented as well as the various judicial decisions cited above, I find that the Appellants cannot be deemed as bona fide purchaser for value without notice and it was proper for the trial Magistrate to order for the cancellation of the said title and for the same to be registered in the name of Evans Kipngetich, who had initially purchased the land.



31. In the foregoing, I find that the trial Magistrate did not err in law and fact by finding that the Sale Agreement dated the 10<sup>th</sup> October, 2017 was not properly rescinded and that the Appellants were not bona fide purchasers for value without notice. I find that it was proper for the Learned Magistrate to enter Judgment in favour of the Respondent/1<sup>st</sup> Respondent Evans Kipngetich.
32. I hence find no reason to interfere with Judgment delivered on 18<sup>th</sup> October, 2023 by the Honourable E. Kimaiyo Suter (PM) in Civil Suit E 44 of 2020 and will proceed to uphold it.
33. The upshot is that I find the consolidated Appeals E028 of 2023 and E032 of 2023 unmerited and will proceed to dismiss them with costs to the Respondent/1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Rombo for Appellant in No. 28 of 2023

Samora for Appellant in 32 of 2023

Ms. Okumu for Respondent in 28 of 2023 and

1<sup>st</sup> Respondent in 32 of 2023

Court Assistant - Simon

