Wanjiku (Suing as the Heir and Administrator of the Estate of Stephen Juma Sapaya) v Kobana Binti Salim Khamis Kombo & 2 others (Land Case 165 of 2014) [2023] KEELC 16341 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16341 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

LAND CASE 165 OF 2014

LL NAIKUNI, J

MARCH 10, 2023

BETWEEN

VALENTINE WANJIKU (SUING AS THE HEIR AND ADMINISTRATOR OF THE ESTATE OF STEPHEN JUMA SAPAYA) ..... PLAINTIFF

AND

KOBANA BINTI SALIM KHAMIS KOMBO ..... 1ST DEFENDANT

REGISTRAR OF TITLES ..... 2ND DEFENDANT

FRANCIS KOMBA NZAI ..... 3RD DEFENDANT

RULING

I. Introduction

1. Through a Notice of Preliminary Objection dated 8th November, 2022 filed by Jaco Jan & Serah Fok Ndumbu the intended Defendants, (hereinafter referred to as "The Intended Defendants") whereby the following grounds of objection were raised: -

    a. That as per the Plaintiff's claim in the Further Amended Plaint dated 16th December,2004, under Paragraphs 3 and 4, the suit property was agricultural land and the sale was subject to the Land Control Board Consent which was never obtained within Six months of 5th August, 1989 or at all, in total contravention of the Lard Control Act Cap. 302 and rendering the alleged sale and purchase transaction void for all purposes and the suit fatally defective.

    b. That the identity of the suit property cannot be ascertained as the sale agreement and the application for Land Control Board consent talks of different properties and plot numbers.

c. That the Plaintiff in Paragraph 3 of the Further Amended Plaint admits that only the Land Control Board consent application were filed and no Land Control Board consent was obtained within six (6) months of the alleged Agreement for Sale or at all, in total contravention of the *Land Control Act* CAP 302 rendering the transaction the basis of this suit void for all purpose.

d. That the property the Plaintiff purchased cannot be identified for the reason that:-

   i. The application for the Land Control Board talks of Sub-Plots 10 and 11 on Sub - division number 633/II/M

   ii. The agreement of 5th August,1989 talks of two residential plots on Plot No. 633/II/MN.

   iii. The titles in question talk of plot 3717 (Original Number 539/405) and 3715 (Original Number 539/405) hence no mention of Plot No.633/II/MN.

e. That the only nexus between the Plaintiff and the suit property is the 1st Defendant, Kobana Binti Salim, which then renders the said 1st Defendant a necessary party to these proceeding and considering that the said Defendant has since passed on and the suit against the 1st Defendant has since abated the subject suit herein is unsustainable in its entirety.

2. Prior to dealing with the issue of the objection raised herein, it is critical and for ease of reference, that the Honorable Court provides a brief background to this matter. Although fashioned as an objection, but the presentations and submission seem to be getting indepth of the testimonial facts of the case. From the onset, I dare say that there are sketchy information here and there. Additionally, it is instructive to note that it is rather a convoluted matter which seem to have had a series of unfolding issues in the course of time. These includes the filing of the case in the lower court, high court and transfer to this court. There has also been incidences of the disappearance of the Court file leading to re – construction of the file by parties.

3. To begin with, on 9th April, 2003, the Plaintiff – Valentine Wanjiku - in her legal capacity as the heir and duly appointed Legal Administratix of the Estate of Stephen Juma Sapaya (Hereinafter referred to as "The Deceased") instituted this suit before the Chief Magistrate Court through a Plaint dated even date. There had been amendment of the Plaint on several occasions essentially causing the joinder to the 2nd and 3rd Defendants herein. Eventually, the Plaintiff caused this suit to be filed before the High Court being HCCC. No. 94 of 2014. Through a letter dated 4th June, 2014 by the Deputy Registrar Environment & Land Court to High Court acknowledging receipt of the High Court file arising from the transfer of the suit there.

4. From the filed pleadings, the Plaintiff claimed that by a Sale agreement dated 5th August, 1989, the deceased bought two (2) Plots namely Land Reference Numbers 3715 (Original number 539/405 Section II/Mainland North as delineated on land survey Plan Number 237291/III/MN Mtwapa and 3717 (Original numbers (Original number 539/405 Section II/Mainland North as delineated on land survey Plan Number 237291/III/MN (hereinafter referred to as "The Suit Properties") from one Kobana Binti Salim Khamis Kombo, the 1st Defendant herein. According to the Plaintiff, the deceased made full payment of the purchase price and even the application form to obtain Letters of Consent from the Land Control Board were prepared by the 1st Defendant herein.

5. However, sometimes in January, 2003, the Plaintiff found out that the 1st Defendant had illegally sold the suit properties to some third party and who were trying to fence them off claiming ownership. The Plaintiff tried engaging the 1st Defendant over the matter but the efforts were unsuccessful which led to the institution of this suit. From the suit she sought for an order restraining the Defendant from transferring the suit properties and registration of Caveat by the Registrar of Titles, general damages, cost and interest of the suit. The 1st and 3rd Defendants filed a Defence and Counter Claim to the Amended Plaint dated 3rd February, 2005 upon the 3rd Defendant claimed to be the legal owner the suit properties.

6. After such a long duration before this Court, on 16th March, 2022 the hearing commenced with the Plaintiffs case. On 4th July, 2022 the Plaintiff closed their case three (3) witnesses having testified. Subsequently, the Defendants commenced their case. It was from the evidence of the Land Registrar, Mombasa, Mr. Samwuel Kariuki Mwangi, that it was revealed that according to the records at the lands offices, the suit properties were legally registered in the names of the Intended Defendants. It was based on this revelation, and guided by the principles of natural justice, fair hearing under Article 25 (c) and 50 (1) and (2) of *the Constitution* of Kenya, 2010, the Court felt it necessary for the Intended Defendants be informed and if possible joined in these proceedings in order for the Court to eventually make determination and arrive at an informed decision on the real matter in dispute. Resultantly, on 18th October, 2022 the Plaintiff's Advocates, the Law firm of Jengo Associates served the Intended Defendants with a notice dated 13th October, 2022 and filed on 17th October, 2022. Further, they received a mention notice of the matter for 8th November, 2022. The said notice stated as follows:-

   Notice

   > "Take Noticethat the above case has been pending in Court and we have information that while the case is pending you have obtained title over the subject matter property being Plot number 3715/III/MN and Plot number 3717/III/MN.
   >
   > The Judgement and/or decree that is to emanate from this matter is likely to affect your title and or interest in the said land.
   >
   > We annex hereto a copy of the further amended Plaint, a Court order for the registration of inhibition, the inhibition itself and a Mention notice for 8th November, 2022.
   >
   > Take Further Noticethat in default of your non – appearance by either yourself or somebody authorized by Law, the matter will proceed ex – parte and such orders made as the Court may deem fit and just".

7. On 7th November, 2022 having been served with the above stated documents the Intended Defendants engaged an Advocate and who filed a notice of appointment. On 8th November, 2022 they not only filed a notice of Preliminary Objection but also appeared in Court and sought to be formally joined in the matter. The Honorable Court gave further orders as follows:-

   a. 'That the firm of Messrs. Mulwa Nduya & Company Advocates granted 7 days leave to file and serve written submission on preliminary objection.

   b. That the Plaintiff, the 1st , 2nd and 3rd Defendants herein granted 7 days leave to file and serve written submissions.

   c. That the matter be mentioned for compliance and for ruling date be taken on 2nd December 2022 and other direction.

8. It is from this detailed background that the Intended Defendants appointed an Advocate who not only filed a Notice of appointment but also the Preliminary objection which is now the subject matter of this ruling.

II. Submissions

9. When this matter came up for directions on 7th December, 2022, the parties agreed to canvass the said preliminary objection by way of written submissions. Pursuant the said directions by the Court, both parties complied accordingly. Thereafter, the Honorable Court proceeded to write this ruling.

A. Written Submissions by the Intended Defendants

10. On 15th November, 2022, the Law firm of Messrs. Mulwa & Co. Advocates for the Intended Defendants filed their written submissions dated 14th November, 2022. Mr. Mulwa Advocate commenced by observing that, the intended Defendants were not yet joined in this suit as parties.

11. From the Preliminary objection, the Learned Counsel submitted on the following issues for Court's determination:-

    a. Whether the Plaintiff's claim was void in the absence of a Land Control Board Consent in terms of the provision of Section 6 of the *Land Control Act* Cap 302.

    b. If the reliefs sought could be an issue or if the Plaintiff was only entitled to damages from the vendor.

    c. Whether the current suit could be sustained when the suit against the Vendor, Defendant had Abated thereby lacking any nexus to the suit property.

    d. Whether the identity of the suit had been ascertained and if in the presence of contradictory pleadings and documents, the suit could be sustained.

    e. What orders to make if the preliminary objection was not upheld with regard to the amendment of the Plaint, filing of statement of Defence and recalling of witnesses for cross-examination by both the Jaco Fok & Serah Ndumbu Fok.

12. On the issue of whether the Plaintiff's claim was void in the absence of a Land Control Board Consent in terms of Section 6 of the *Land Control Act* Cap. 302, the Learned Counsel submitted that the Plaintiff's claim under Paragraph no. 3 of the further amended claim states as follows:-

> "…….by a sale agreement dated 5th August 1989, the deceased bought two plots (the suit properties) from the 1st Defendant and paid part of the purchase price and the balance was paid by the Plaintiff herein and in turn the Land Control Board Application Forms for obtaining consent to transfer were prepared and executed by the 1st Defendant."

13. Additionally, the Learned Counsel submitted that the contents of Paragraph 4 of the further Amended Plaint states that:-

> "……..in all the sixteen transactions sold by the Defendant herein, were conducted by her son Mohamed Sheikh Ali Kenny who is now deceased as an authorized agent with implied power and/or express authority from the Defendant"

14. The Learned Counsel submitted that it was without contention that the suit property was an agricultural land, and whereupon any controlled transaction as provided for under Sections 6 (1) and

8 (1) of the LCB Act, Cap. 302, a Letter of Consent from a Land Control Board was necessary. This included the transfer in terms of the suit land was concerned herein. The provision of Section 6(1)(a) the *Land Control Act* Cap 302 provides:-

> " ....Each of the following transactions that is to say-
>
> (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area.....is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

15. While the provision of Section 8(1) of the *Land Control Act* Cap 302 provides that:-

> " .....An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within Six (6) months of the making of the agreement for the controlled transaction by any party thereto....."

16. The Learned Counsel submitted that from the pleadings and for the purposes of this suit:-

a. The alleged agreement is dated 5th August 1989 between the plaintiff's husband and one Mohamed Kenny (Not the registered owner KOBANA BINTI SALIM the 1st defendant).

b. Land Control Board Consent Applications were filed and allegedly executed by the plaintiff's husband and one Mohamed Kenny (Not the registered owner KOBANA BINTI SALIMI the 1st Defendant).

c. There is no pleading that anything else was done other than filling and signing the land control board consent.

d. There is no pleading or evidence from the plaintiff that the application for Land Control Board Consent was made to the appropriate land control board within six (6) months of the making of the agreement i.e 5th August 1989.

e. The Titles for Pot 3715/III/MN (original Number 539/405) and 3715/III/ (original Number 539/404) were issued on 23rd April 2003, and hence they did not exist on 5th August in 1989 when the agreement was made and hence NO LAND BOARD CONSENT WOULD or was capable of being ISSUED in 1989.

f. No land board consent would have been applied for or issued for Titles which were Non - Existent in 1989.

17. The Learned Counsel averred that the provision of Section 22 of Cap. 302 made it a criminal offence for any party to continue in actions in furtherance of a void transaction under S.6 of Cap. 302. Thus, the Counsel held that what the Plaintiff was seeking was the protection of the Court in furtherance of commission of a criminal offer. According to the Counsel, the Plaintiff's remedy only rested in damages and refund of the purchase price from the seller of the land from the 1st Defendant and not in the cancellation of the Titles and the forcible transfer to herself without following the due process of the mandatory provision of the *Land Control Act* Cap. 302. On account of this ground alone, then this

suit as drawn was bad in law and fatally defective. This was the case as the basis of the agreement for sale on which in purports to stood was void for all purposes.

18. The Learned Counsel contention was that they relied on the numerous case law on this matter. Hence, the Counsel urged the Court to take judicial notice of these situation. For instance, she cited the persuasive Judgment delivered by Justice Munyao Sila in the case of:- "ELC NO.182 of 2014 at Nakuru Willy Kiplagat Kirui – Versus - Kipkoech Arap Mate where the Hon. Judge held that:-

> "…….the position of the Plaintiff is that he has an agreement which has been declared VOID by operation of the law. His remedy lies in refund of the purchase price which is provided for under Section 7 of the *Land Control Act* Cap. 302……..Section 22 (of the ACT) does not help the Plaintiff as it provides for an offence where a person continues with a VOID transaction…"

19. The Learned Counsel argued that on 2nd December 2021, this Court reiterated and ordered that the suit against the 1st Defendant had abated. It was noted that the Plaintiff made no attempt within one (1) year of the demise of the deceased neither enjoin in this suit nor substitute the 1st Defendant with her personal representatives. The Counsel observed that the provision of Order 24 Rule 4 (3) of the Civil Procedure Rules, 2010 provides that:

> "Within one year if no application is made under sub rule (1), the suit shall abate as against the deceased Defendant".

20. The Learned Counsel submitted that if the suit against the alleged seller of the property had abated and there was no action taken by the Plaintiff within a period of one (1) year from the time of the demise, then there would be no nexus or connection of the suit property. The suit must fail. It was held that for the Plaintiff to succeed in this suit, her suit against the 1st Defendant must succeed. Unfortunately, the suit against the 1st Defendant had abated and therefore according to the Counsel there was nothing that remained of the Plaintiff's claim. Further the Plaintiff pleaded in Paragraph 4 of the further Amended Plaint that the property belonged to the 1st Defendant, but that the agreement for sale was allegedly signed by one Mohamed S. Kenny. The agreement dated 5th August 1989 was clearly signed by the said Mohamed S. Kenny (who was allegedly the 1st Defendant's son) for SUB - PLOT 10 & 11 of PLOT 633/III/MN.

21. The Learned Counsel averred that the questions to be asked were:

    a. Where was the evidence that Mohamed S. Kenny was the 1st Defendant's son?

    b. Whether the mere fact of being a son of the 1st Defendant, the said Mohamed Kenny had power to sign and confer any right to land to any party including the Plaintiff?

    c. Whether without a validly registered Power of Attorney, none of which had been shown by the Plaintiff, the said Mohamed Kenny had no power to sign and confer any right to land to any party including the Plaintiff?

22. The Learned Counsel argued that in view of the foregoing and in the absence of any legal nexus or connection through a duly registered Power of Attorney, the alleged sale agreement dated 5th August 1989 was entered into by a stranger who held no interest in the land and who could not confer any interest to the land and consequently the Plaintiff's claim must fail and dismissed with costs.

23. It was the contention by the Learned Counsel that there was no certainty on the identity of the property in question as the documents produced and in support of the claim were at Cross - purposes or contraction with the pleadings in the following respects:-

    i. The Agreement for sale dated 5th August 1989 talked of:....two (2) residential Plots on Plot No. 633/III/MN.... (Paragraph 1 of the agreement)

    ii. The Land Control Board Application Paragraph 5 talked of....SUB - PLOT NO.10 & 11 ON SUBDIVSION 633/III/MN...

    iii. The Certificates of Title talked of different sub - division numbers 3715/III/MN (original number 539/404) & 3717/III/MIN (original number 539/405).

    iv. The plot numbers have mutated from the original agreement to the Certificate's titles with no explanations how the change in plot numbers from the original agreement are related to the totally different plot numbers of the title. Are we dealing with the same plots or two different and distinct plots?

    v. This QUESTION becomes even more pertinent since:-

        a. The Plaintiff alleges to have built a 2BR house where she stays with her kids.

        b. Whereas the new parties - JACO FOK & SERAH NDUMBU FOK allege...they are in possession of the Plot No. 3717 & 3715/III/MN and had been carrying on a CAR WASH BUSINESS...

    vi. It appeared that the Court was dealing with several distinct properties and it makes it impossible for any orders to issue curtailing an interest to land in the circumstances of such confusion or uncertainty on how Two residential plots on 633/III/MN became SUB - PLOT 10 & 11 OF 633/III/MN and then became Plot 3715/III/MN (original number 539/404) & 3717/III/MN (original number 539/405) and how the original number plot 633/III/MN became Original Number 539/404 & 405).

24. The Learned Counsel concluded that in view of the foregoing submissions and the grounds of the Preliminary objection dated 8th November, 2022, the Plaintiff's suit as drawn was bad in law, fatally defective, unsustainable and should be dismissed with costs. In the unlikely event that the Court did not uphold the preliminary objection, the Intended Defendants sought the following directions and orders:-

    i. Jaco Fol and Serah Fok Ndumbu be added into this suit as the Defendants and to be served with all pleadings herein and to fully participate in the suit.

    ii. The Plaintiff to further amend their claim and serve it to the Applicants.

    iii. The Applicants to file and serve their statement of Defence and necessary replies.

    iv. All witnesses who have testified to be recalled and cross examined by the said Applicants.

v. The said Applicants do have leave to tender their evidence.

B. The Written Submissions by the Plaintiff.

25. On 24th November, 2022, the Law firm of Messrs. Jengo & Co. Advocates for the Plaintiff filed their written submissions dated 23rd November, 2022. Mr. Jengo Advocate commenced his submission by stating that the suit was instituted in Court on 9th April 2003 against the 1st , 2nd and 3rd Defendants herein. He stated that on 9th April 2003, the Honorable Court granted an injunction orders in the following terms:-

a. "THAT the 1st Defendant by herself, agent, servants or otherwise are hereby restrained by induction from transferring Plot number 3715 and 3717 Original Number 633/13/III/MN to any other person for fourteen (14) days.

b. That the Registrar of titles to extend the Caveat registered against Plot numbers 3715 and 3717 for fourteen days.

c. That the application be heard inter parties on the 23rd day of April 2003."

26. The Learned Counsel held that on 23rd April, 2003, when the mattercame up for "inter parties" hearing of the application in the presence of Mr. Mulwa Nduya Advocate, the orders given by the Court were extended in the following terms:-

" 1. That the application be heard inter parties on 21st May 2003.

2. That the interim orders granted on 9th April 2003 restraining the Defendant by herself, agent, servants or otherwise from transferring Plot numbers 3715 and 3717 original numbers 633/13/III/MN to any other person and that the order compelling the Registrar of titles to extend the Caveat registered against plot numbers 3715 and 3717 be extended to 21st May 2003."

27. The Learned Counsel submitted that the first order was served on the 1st Defendant and registered on the suit title and on 23rd April 2003 entered an appearance through Mr. Mulwa then operating as Messrs. Rukaria Mulwa & Company Advocates. On the same day, he facilitated a transfer while there was a Court Order and caveat against transfer and transferred the property to the 2nd Defendant. Mr. Mulwa was the Advocate of the current registered owner. While the order of injunction was pending, Mr. Mulwa as the Advocate of the 1st Defendant facilitated a transfer to the 2nd Defendant. From the evidence that by the Land Registrar, Mr. Mulwa then went to Court again while aware of this case in court and filed a miscellaneous application wherein the Registrar was directed to remove the caveat. Mr. Mulwa then undertook another conveyance while these proceedings were pending and did the current transfer to the current owner.

28. The Learned Counsel submitted that and today he was before the Court contemptuously telling the Court that he saw nothing wrong with all the transactions. That despite the brazen impunity and outright contempt and attempt to defeat due process the Court should look the other side. He opined that the day the Courts would allow that to happen then the justice system would have collapsed completely.

29. On this aspect, the Learned Counsel relied on the Court of Appeal in the case of:- "Commercial Bank of Africa Limited Isaac v Kamau Ndirangu [1992] eKLR had this to say about such a situation.

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" ..... this Court should not lose sight of the fact that a valid order of the Court had been flouted in a most contemptuous and callous manner.... The Bank should not be allowed to take advantage of its own contempt. This ground of appeal therefore fails. "

30. The Court further stated:-

" I would like to commend the Judge for taking the course he did. It is only by acting swiftly and firmly when an order of the Court is flouted that dignity and authority of the Court can be upheld."

31. The Court penultimately stated:-

" Instead of following the laid down steps to obtain the remedy the Bank flouted both the order to which it had consented and the stay of execution order that was granted by Court clearly to protect the suit land from being sold in execution for recovery of the Judgment sum which step would have defeated the purpose of the consent order which was to protect the suit land from being sold until further orders of the Court. The Learned Judge, in my view, was justifiably outraged at such a blatant flouting of the Court's order. I reject submissions made by Mr. Gaturu under this head."

32. The Honorable Court continued:-

" Rules of natural justice are the foundation of a judicial system. Their observance is universal. But, at the same time, a flagrant disobedience of a Court order, if allowed to go unchecked will result in the onset of an erosion of judicial authority.....It is imperative that orders of the Court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the Courts. The blatant disobedience of the Court's consent order in this case renders any transactions in breach of the order to be void and the learned Judge was fully justified in making the orders complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court. The second proposition above is in the affirmative. "

33. The Court then concluded;-

" The Learned Judge was fully justified in annulling the sale and canceling registration thereof notwithstanding that the interested party had not been heard. The answer to 3 above is in the negative. The sale of the suit land in breach of the court order was a nullity and of no effect."

34. The Learned Counsel averred that with the clear order on injunction, they were violated by the 1st Defendant while selling the suit properties to the 2nd Defendant. The fact that the Land Registrar never had any difficulty in availing the title that was about the subject matter plot and the fact that Mr. Mulwa at some point had acted for the 1st Defendant, 2nd Defendant and the current owner it could not be prudent to take him seriously when he submitted that the land subject matter was different from the one his clients had and if at all it was different then his clients should simply keep off since they would not be affected by the Court's final orders.

35. The Learned Counsel contended that on the issue of the Section 6 of the Lands Control Act, the Plaintiff came to court for specific performance of the agreement. By the time she came to court, the six (6) months required to get the Letter of Consent from the Land Control Board had not lapsed and the 1st Defendant was attempting to re – sale the suit properties. From the agreement, once an order of specific performance was obtained then the process of enforcing the agreement would go back to the age of the agreement when the case was filed. In any event a party could not be allowed to benefit from and use its own breach or illegal act of purporting to sell land to a second person while he had a subsisting agreement with the Plaintiff. He cited the case of: "Kiplagat Kotut v Rose Jebor Kipngok [2019] eKLR where the Court of Appeal held:

> "…..The trial Judge correctly held that the Respondent is estopped from reneging on the sale agreement. We agree with the Judge and add that the doctrine of proprietary estoppel and Constructive trust are applicable in the instant case and the Respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in Llyods Bank Plc v Rosset, [1991] 1 AC 107,132, a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by a claimant.
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> 28. In the instant case, the appellant is the claimant and there was a common intention between the Appellant and the Respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the Appellant from relying upon the doctrine of constructive trust created by the facts of the case. The Respondent all along acted on the basis and represented that the Appellant was to obtain proprietary interest in the suit property. As was stated by Lord Reid in Steadman v Steadman [1976] AC 536, 540,
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> "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable."

36. The Court went on to conclude: -

> "24. We hasten to state that the *Land Control Act*, Cap. 302 of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never mean to exempt a mala fide Vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.
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> 25. Comparatively, in the Canadian cases of "Pettkus v Becker,[1980] 2 S.C.R.834 and Soulos v Korkontzilas, [1997] 2 S.C.R. 217), it was held constructive trust may be imposed where three elements are present: (a) the enrichment of the Defendant; (a) the corresponding deprivation of the Plaintiff; and (a) the absence of a juristic reason

for the enrichment. Constructive trust holds persons in different situations to high standards of trust and probity and prevent them from retaining property which in good conscience they should not be permitted to retain. It is in this regard that in this matter we find the respondent must be held to a high standard of trust and probity and in good conscience should not be allowed to keep the suit property."

37. The Learned Counsel was of the view that that penultimately the issues raised as preliminary objections were not purely legal issues. They were a mixture of law and facts over which parties were not in agreement. He cited the case by the Supreme Court being:- "Independent Electoral & Boundaries Commissions v James Cheperenger & 2 Others [2015] eKLR where it was held:-

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"(14) As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

"To restate the relevant principle from the precedent - setting case, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696:

'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an abjection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion',"

(15) The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the

Court further stated [paragraph 15]:

"Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See the case of Hassan Nyanje

Charo v Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR)."

38. The Learned Counsel relied on "the doctrine of Lis Pendens" whereby a party could not and was not allowed to transfer a property to another party so as to defeat the interests of a party that's litigating. The net effect of this principle was that any transfer done while the property was the subject of litigation was subservient to any final order on ownership that the court would ultimately make. In the case of "Carol Silcock v Kassim Shariff Mohamed [2013] eKLR the Court held:-

> " 34. As I stated in Malindi HCCC No. 63 of 2013, Abdalla Omar Nabhan v The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, the purposes of the principle of lis pendens is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of lis pendens is founded on public policy and equity.

35. In "Manwji v U.S. International University and Another (1976-80) KLR 229 Justice Madan, while addressing the purpose of the principle of lis pendens adopted the finding in Bellamy v Sabine [1857] 1 De J 566,584_where Turner L J held as follows: -

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

36. In the same case, Cranworth L Jobserved as follows:

"Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end..."

37. The doctrine of Lis pendens has also been discussed in the Treaties by Mulla & Gour on the Indian Transfer of Property Act. In Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579, the two authors state as follows:

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

39. The Court went on to state:-

"

"40. The Provisions of Section 23 of the RTA viz-a-viz Section 52 of the Indian Transfer of Property Act was considered at length in the case of Fredrick Joses Kinya_(Supra). The Learned Judge held as follows:

"I am of the view that the Registration of Titles Act is a statute dealing only with the registration of titles to the properties under the same. It lays down the procedure regarding registration of titles. On the other hand the doctrine of lis pendens under section 52 of the ITPA is a substantive law of general application. Apart from being on the statute, it is a doctrine equally recognised by common law. It is based on expediency of the court. The Doctrine of Lis Pendens is necessary for final adjudication of the matters before the court and in general interest of public policy and good and effective administrative of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.

41. I entirely agree with the above passage. It will be a mockery of justice for the Court to subject the Plaintiff to another rigor of litigation as against the Intended Interested Party and prove fraud as against the said party."

40. The Learned Counsel asserted that the Court of Appeal the case of:- Naftali Ruthi KinyuaPatrick Thui v ta Gachure & Another[2015] eKLR held that the doctrine is applicable even today. It expressed itself thus:-

"Furthermore, Lis Pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, Section 3 (1) of the *Judicature Act* Cap 8 stipulates that,

"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

a. *the Constitution*;

b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part / of the Schedule to this Act, modified in accordance with Part II of that Schedule;

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. "

Similarly, in the light of this provision, the doctrine of lis pendens would remain applicable to this case."

41. In conclusion, the Learned Counsel stated that theupshot of all this was that a party such as the Applicants of the preliminary objection herein who not only acted in contempt of court

but also undermined "the doctrine of Lis Pendens" should not take back the proceedings. The Court should proceed with the final submissions.

C. The Reply by the Intended Defendants to the Plaintiff's Submissions.

42. On 2nd December, 2022, the Law firm of Messrs. Mulwa & Co. Advocates for the Intended Defendants filed their written submissions dated 1st December, 2022. The Learned Counsel argued that they invited the Court to note that the Preliminary Objection was limited to three points of law. They felt they were simply missed out by the Plaintiff in its submissions. The Counsel felt this was done on purpose as according to him, the Plaintiff's suit was unsustainable. The first point of law was the mandatory and statutory obligation while in the transaction of the purchase of controlled property. In the instant case, the Letter of Consent from the Land Control Board was never obtained within Six (6) months of 5th August, 1989 contrary to the provisions of Section 6 (1) as read together with Section 8 (1) of the *Land Control Act*, Cap. 302. Clearly the statutory limit could not be extended by the mere fact that the Plaintiff filed a suit seeking specific performance. Hence this being a controlled transaction, the moment six (6) months lapsed before the Plaintiff could apply for the Letter of Consent herein, the said transaction became and illegal transaction. Therefore, the same was unenforceable even by way of suit seeking specific performance.

43. The Learned Counsel argued that the second point of law was the lack of a proper cause of action by the Plaintiff subject to the provision of Order 1 Rule 1 of Civil Procedure Rules, 2010. According to the Counsel, the Preliminary objection sought to raise issue with the pleadings and documents relied upon by the Plaintiff as they seem to identify three different sets of suit properties. Hence, he invited the Court to note that a suit was not sustainable without proper identification of a cause of action.

44. The Learned Counsel submitted that the third issue was on the abatement of the suit between the Plaintiff and the principal Defendant. He observed that this honorable Court declared that the suit as against the 1st Defendant abated by operation of the law. A quick perusal of the subject amended Plaint herein would reveal that the entire suit narrowed down to the alleged transactions between the Plaintiff and the Defendant. Therefore, the entire suit was unsustainable without the Plaintiff involving the 1st Defendant.

45. The Learned Counsel held the view that the Plaintiff had allowed the suit as against the 1st Defendant yet the claim against the 1st Defendant abated. Hence, for that reason, the entire suit also must fail by operation of the law at the same point when the suit against the 1st Defendant abated. In the given circumstances, the Intended Defendants ought to be given an opportunity to participate in the matter. They should be allowed to file pleadings and heard in the matters. That opportunity was yet to be given or granted to them. It ought to be granted if this preliminary objection was not allowed for one reason or the other.

46. In conclusion, therefore, the intended Defendants prayed that the subject suit herein brought by way of Further Amended Plaint dated 16th December, 2004 by the Plaintiff be dismissed with costs in the first instant. Otherwise, should the Court not allow the preliminary objection, they urged it to make necessary orders to the Joinder of parties and amendment of the pleadings to allow the intended parties properly participate in the proceeding and take out necessary 3rd party proceedings if need be.

III. Analysis and Determination

47. I have considered the filed Notice of Preliminary Objection dated 8th November, 2022 raised by the Intended Defendants herein, the rival submissions by the Plaintiff and the cited authorities, the appropriate and relevant provision of *the Constitution* of Kenya, 2010 and the statutes herein.

48. For the Honorable Court to reach an informed, reasonable and just decision, the following four (4) issues have been framed for its determination:-

a. Whether the Preliminary Objection brought by the Intended Defendants - Jaco Jan & Serah Fok Ndumbu herein meets the threshold of an objection?

b. Whether the suit abated after the death of the Defendant?

c. Whether the parties are entitled to the relief sought.

d. Who will bear the Costs of the raised objection.

ISSUE No. a). Whether the Preliminary Objection brought by the Intended Defendants - Jaco Jan & Serah Fok Ndumbu, herein meets the threshold of an objection?

49. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

50. A Preliminary Objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of Preliminary Objection. In the case of Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Ltd [1969] EA 696, the locus classicus on Preliminary Objections in this region, Law JA stated:-

> " So far as I'm aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

51. Still in the same case, Sir Charles Newbold JA, stated:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

52. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. It is the Court's humble opinion that the Preliminary Objection has met the prerequisite threshold of an objection hence proceeds to deal with the other issues objected by the Applicants.

53. I make reference to the case of "James Karuga Macharia v Jessee Mwangi Njoroge [2020] eKLR where the court held that:-

> " Going by the definition of a Preliminary Objection as given in paragraphs 11 and 12, for the Court to answer the issue it has to be availed evidence as to whether or not the Land Control Board consent was obtained or not within 6 months. This is a question of evidence which should be reserved for trial and cannot be determined in a Preliminary Objection. The fact that it requires evidence to be adduced means that the Preliminary Objection ceases to be a point of law."

54. For these reasons, upon critical assessment for the issues raised from the Preliminary Objections raised by the Intended Defendants and based on the Legal principles enshrined herein, I fully concur with the submissions advanced by the Counsel for the Plaintiff, that by and large, the raised objections are clothed with both a hybrid of law and facts. They are not pure matters of law. It demands for the Honorable Court to undertake further interrogation of the said objections. This is best undertaken during a full trial of the matter. Hence, as stated before, the facts of the case are rather convoluted. I find that it is premature to end the suit at this stage purely on account of the unsubstantiated breach of the provisions of Sections 6 (1), 7 and 8 (1) of the *Land Control Act*, 302. There is need for prove based on the provision of Section 107 of the *Evidence Act*, Cap. 80 to wit its he who alleges has to prove. Therefore, I will proceed examine the other issue.

IssueNo. b). Whether the suit abated after the death of the 1st Defendant

55. Under this Sub – title, it is a fundamental legal principle that that death of parties in any matter ordinarily causes adverse effect to the said proceedings. This may call for the substitution of the party by duly appointed legal representatives or obtaining of Limited ("Ad Litem") Grant from the deceased's estate or full Grand Letters of Administration leading to the appointment of Legal Administrators to continue with the proceedings thereafter if there exists a cause of action. The provision of Order 24 Rule 4 provides as follows :-

> 4. Procedure in case of death of one of several Defendants or of sole Defendant [Order 24, Rule 4.]
>
> (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.
>
> (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.

56. According to the Intended Defendants herein, the 1st Defendant, who is a necessary party to the suit had since passed on. In effect, according to them, the suit against the 1st Defendant had since abated making the subject suit herein unsustainable in its entirety. It is clear, from my own understanding of the law - the afore said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. Ideally, all facts remaining constant, this suit ought

to abate against the 1st Defendant and thus the entire suit. However, under the provision of Order 24 Rule 7 (2) provides a window to reinstate a suit that has abated as follows:

> " The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt Plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."

57. From this provision of the law, a Court has unfettered and free discretion to revive an abated suit. That provision of law is drawn as follows:-

> " (2) The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."

58. Additionally, I am also guided by the cited cases of: "Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR where the Court of Appeal held that:-

> " .....If no application for substitution is made within a year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.....The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes places on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the Legal Representative of the deceased Plaintiff....."

59. The occurrence of the death of the 1st Defendant is not disputed by the Plaintiff. Evidently, from the record, there has been no application done to substitute the deceased - 1st Defendant. Thus, for this very reason and based on the principles and operation of law, it is my considered opinion that the suit against the 1st Defendant has abated.

Issue No. d). Who will bear the Costs of the Objection

60. It is well established that issues of Costs are at the discretion of the Court. Costs means the award that a party is a granted after the conclusion of any legal action, proceedings, and process of any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act* Cap. 21 holds that costs follow the events (See the Supreme Court decision of "Jasbir Rai Singh Rai – Versus Tarlochan Singh (2014) eKLR; and Mary Wambui Munene – Versus – Ihururu Dairy Co – operative Societies (eKLR) (2014).

61. In the instant case, the Preliminary objection only partially succeeds. Besides, taking that the matter will still be proceedings for full trial as stated, the costs of the objection will be in the cause.

VI.Conclusion & Disposition

62. In conclusion, and upon conducting an indepth analysis of the framed issues herein, I find and hold that the only substantive and meritorious issue of law raised from the filed Notice of Preliminary

Objection dated 8th November, 2022, by the Applicants is founded under the provision of Order 24 (4) of the Civil Procedure Rules, 2010 to the effect that the case against the deceased 1st Defendant abated.

63. As regarding the rest of the grounds in the preliminary objection, the Honorable Courts discern that contrary to the laid down legal rationale ("Ratio decidendi") founded in the case "Mukisa Biscuits (Supra) are not purely on law but a hybrid of facts and law. Thus, in the interest of natural justice, Conscience and equity that the objectors be joined in the matter to enable them adduce these empirical evidence and have the Court fully adjudicated the case during a full trial from an informed point of view. For avoidance of doubt, the Honorable Court makes the following findings:-

a. That the Preliminary Objection dated 8th November, 2022 raised by Intended Defendants herein, Jaco Jan & Serah Fok Ndumbu, being a hybrid of facts and law, fails to meet the threshold of an objection and hence it is disallowed.

b. That an order be made that by the operation of Law, the suit against the 1st Defendant abated pursuant to the provision of Order 24 Rule 4 (3) of the Civil Procedure Rules, 2010.

c. That an order of this Honorable Court and based on the principles of natural justice, fair hearing, inclusiveness, the rule of law, the discretion and the inherent powers of this Honorable Court founded under Articles 10 (2) (b), 25 (2), 50 (1) and (2) and 159 (1) and (2) of *the Constitution* of Kenya, 2010, Sections 1, 1A, 3 & 3A of the *Civil Procedure Act*, Cap. 21, Sections 3 and 13 of the Environment & Land Court Act, 2011 and Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012 and Order 1 Rule 10 (1), (2), (3) & (4) of the Civil Procedure Rules, 2010 do hereby grant both Jaco Jan & Serah Fok Ndumbu leave to be joined in this proceedings as the 4th and 5th Defendants herein.

d. That leave be granted to the Plaintiff herein within the next 14 days:-

   i. Under the provision of Order 8 Rule 3 of the Civil Procedure Rules, 2010 to amend and serve its Amended Plaint upon all the parties herein.

   ii. To serve the 4th and 5th Defendants will all the filed pleadings.

e. That upon being served, the Defendants herein be granted leave of 14 days for:-

   i. The 1st, 2nd and 3rd Defendants to file and serve Amended Defence; and

   ii. The 4th and 5th Defendants to fully comply with the provisions of Order 6, 7 and 11of the Civil Procedure Rules, 2010 by filing their Defences and/or Counter Claim if they so did fit and suitable and fully comply with Order 11 of the Civil Procedure Rules, 2010;

f. That upon service by the Defendants herein, the Plaintiff be granted 14 days leave to file and serve Reply to the Amended Defence and the Defence by the 4th and 5th Defendants herein, any further documents should they deem it fit and suitable arising from the filed documents by the Defendants herein.

g. That for expediency sake this matter which is part heard an order be and is hereby made that:

   i. The suit be disposed off within the next One Hundred and Eighty (180) days from this date commencing from 7th June, 2023 from where it had reached.

   ii. The 4th and 5th Defendants shall have the right to re call the Plaintiff and any other witnesses who has already testified exclusively for Cross examination under the

provisions of Order 18 Rule 10 and Section 147 of the *Evidence Act*, Cap. 80 of the Laws of Kenya.

iii. There be a further Pre – Trial Conference held on 15th May, 2023 to confirm and ascertain full compliance of the orders of this Court.

h. That each party to bear their own Costs.

It Is So Ordered Accordingly.

RULING DELIEVERED, SIGNED AND DATED AT MOMBASA THIS 10TH DAY OF MARCH, 023.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumna, Court Assistant;

b. M/s Jullu holding brief for Mr. Jengo Advocate for the Plaintiff.

c. Mr. Mulwa Advocate holding brief for M/s. Mulwa Advocate for the Defendant