



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 125 OF 2014

DAVID SIKUKU KONES.....PLAINTIFF

VERSUS

BASHIR TOWET CHEMASUET.....1ST DEFENDANT

VINCENT WASAMA KIRUNYI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff filed a plaint dated **30/7/2014** which he later amended on **16/9/2014**. In that amended plaint the plaintiff seeks judgment against the defendants jointly and severally for:-

(a) A declaration that there arose a binding agreement between the plaintiff and the 1st defendant for the sale of the remaining half (½) acre portion pursuant to the negotiations leading to the agreement dated 3/3/2014 as a result of which the plaintiff took possession of the house built thereon and that the same be transferred to the plaintiff upon payment of the agreed purchase price of **Kshs.175,000/=**

(b) Orders of permanent injunction restraining the defendants either by themselves or through their agents, employees and/or servants from encroaching, trespassing onto, wasting, ploughing, growing crops, fencing, erecting structures or otherwise interfering with the plaintiff's use and quiet possession of that land parcel known as Plot No. 1014 within that parcel of land known as Kitalale Settlement Scheme measuring 2.5 acres or thereabouts.

(c) Costs of the suit and interest thereon at court rates.

(d) Any other relief this honourable court deems fit and just to grant.

PLEADINGS

The Amended Plaint

2. In his claim, the plaintiff averred that on or about **15/10/2013**, he entered into a land sale agreement with the 1st Defendant for the sale 2 acres of land out of Plot **No. 1014 Kitalale** Settlement Scheme at an agreed consideration of **Kshs. 700,000/=** which he paid in full; that that agreement was further to the another agreement dated **4th July, 2013** in the name of **Everlyne Yeko Musani**, the Plaintiff's wife; that again on **3/3/2014**, the Plaintiff agreed with the 1st Defendant to purchase another half (**0.5**) of an acre out of the same parcel of land together with developments erected thereon at an agreed consideration of **Kshs. 205,000/=** being **Kshs. 175,000/=** for the Land and **Kshs. 30,000/=** for the developments; that the Plaintiff paid **Kshs. 30,000/=** for the house and the 1st Defendant was to formally communicate the specific date he would require the Plaintiff to conclude payment; that the Plaintiff contends that a valid and binding agreement to sell the remaining ½ acre arose for which the 1st Defendant is under a duty to complete; that the Plaintiff took immediate possession of the land in **October, 2013** and placed a caretaker on the parcel of the land; that in **June 2014**, the Defendants went to the parcel of land and re-surveyed it in a bid to reduce the size of the land and give a portion to the 2nd Defendant; that the 2nd Defendant alleges that he purchased one (**1**) acre from the 1st Defendant; that from the Letter of Allotment dated **18/08/2000** the parcel of land is **one (1) Hectare** i.e. **2.5 Acres** so there would be no land left to sell to the 2nd Defendant; that the 2nd defendant has severally visited the parcel and threatened to forcefully occupy the same; that the 1st Defendant insists that the land is **4.2 acres** when it is not; that the 2nd Defendant confirmed that he had been defrauded by the 1st Defendant and made a complaint to the police and the 1st Defendant was arrested and charged on **19/6/2014** at Kitalale Law Courts for obtaining money by false pretence from the 1st Defendant; that later the 2nd defendant on the **15/8/2014** without any color of right forcefully

entered into the his land and started fencing a large portion thereby sealing off his maize crop growing on the farm; that on **8/9/2014** the 2nd Defendant withdrew his criminal case complaints against the 1st Defendant on the ground that he had been given his land by the 1st Defendant; that the withdrawal of the criminal case by the 2nd Defendant against the 1st Defendant was an act of fraud on their part; that there was collusion by the defendants to forcefully and illegally take possession of the land from the plaintiff by withdrawing the criminal case complaint with a view of granting the 2nd Defendant possession of the land lawfully sold to the plaintiff; that they fenced the plaintiff's land and sealed off his maize plantation without any lawful justification or excuse and sought to cover up for the illegal act of selling the same parcel of land to two different people by purporting to evict the plaintiff; that the 2nd Defendant on **11/9/2014** started ferrying building materials to the suit property and begun to construct illegal structures thereon; that the actions of the defendants have interfered with the plaintiff's peaceful use and possession of the land and their actions are illegal and unlawful hence the suit.

The 2nd Defendant's Defence

3. The 2nd defendant filed his defence on **3/3/2015**. He denies the contents of the amended plaint. His defence is that he purchased **2 acres** part of **Plot No. 1014 Kitalale Settlement Scheme** from the 1st Defendant on **3rd July, 2013** at an agreed consideration of **Kshs. 700,000/=** which he paid in full; that he took immediate possession of the land and has developed it by fencing and constructing a semi-permanent house; that all the developments on that parcel of land belong to him and not the plaintiff or any other third party; that it is the 1st Defendant who defrauded the Plaintiff and the plaintiff ought to sue the 1st defendant for a refund of his consideration; that the Plaintiff is a trespasser and has no right whatsoever over the suit property and that the plaintiff has never taken possession of the suit land; he prays that the plaintiffs suit be dismissed with costs.

The 1st Defendant's Defence

4. The 1st defendant filed his defence dated **29/11/2018** on **6/2/2020**. In his defence he denied all the contents of the Plaint. His defence is that he owned **1.5 acres** adjacent to **Plot No. 1014** making his land a total of **4 acres**; that the plaintiff's suit is bad in law and ought to be dismissed with costs.

The Plaintiff's Evidence

5. **PW1, David Sikuku Kones**, the plaintiff, testified on **20/11/2019** and on **6/2/2020**. He adopted his statement dated **30/7/2014** as evidence-in-chief. He stated that the first transaction in relation to the suit land was on **4/7/13** between his wife and Bashir for the purchase of 2 acres part of **plot No. 1014 Kitalale Settlement Scheme**; for a consideration of **Kshs. 700,000/=** and she paid **Kshs.200, 000/=** in cash and they agreed that final payment be paid on **15th October 2013**.

6. After some procedural issues were resolved, the hearing proceeded on the **6/2/2020** when **PW1** testified that the first agreement is dated **4/7/2013**; he produced it as **P. Exhibit 1**. He said that he was not present at its execution; that Bashir said that he wanted the balance paid in **October 2013**; that he came on **15/10/2013** and another agreement was made where he paid cash; he produced the agreement as **P. Exhibit 2**; that he asked Bashir if he could sell the half-acre remaining; he (Bashir) said he would consider it; that he later called him (the plaintiff) he told him that if he was ready, he would sell him the house; a semi-permanent house for **Kshs. 30,000/=** and the balance of **Kshs. 175,000/=** he would pay later to refund Vincent; that he heard that Vincent had bought the land on **11/7/2013**; he produced the agreement dated **3/3/2014** as **P. Exhibit 3**; that he paid the balance of **Kshs. 500,000/=** on **15/10/2013** and the next day called in surveyors; that he paid the surveyor **Kshs. 5,000/=**; he produced a surveyors' receipt as **P. Exhibit 4**; that the allotment letter showed that Bashir is the allottee; that he was informed that Vincent had complained that 1st Defendant had obtained money from him by false pretence; the charge sheet in the **Criminal Case No. 2398/2014** was marked as **PMFI 6** during his testimony; that Bashir and Vincent agreed to go and negotiate between themselves at home; that the plaintiff was shown the same land a second time; that another meeting took place at which the dispute was discussed and at which Bashir was present; that the plaintiff produced documents and it was found that his agreement preceded Vincents'; that they then went to Saboti; that Vincent accused the plaintiff of backdating his **July** agreement; that Vincent had entered the land often-but only after the plaintiff had taken possession; that he fenced the land and planted 1 acre of maize in **2014**; that in the year **2014** he planted maize for sale; that when it was almost ready, Vincent went many times and disturbed his caretaker; that there was no fence on the land but Vincent later went and planted a fence in the middle of the land which this court ordered removed; that the plaintiff has not used the land since **2015**; that Vincent went with chemicals and sprayed the maize and it dried up prompting the plaintiff to go to the chief who sent him to the agricultural officer who visited the land and did an assessment of damage; that he build a semi-permanent house on the **2 acres**; that after a while Vincent went, demolished the house and took away the iron sheets and the door; that he reported to the chief and wrote to the D.C.I.O on **13/7/2015**; he produced the letter to D.C.I.O. as **P. Exhibit 7**; that Highland Valuers made a valuation report (**PMFI.8**). The plaintiff prayed the court do order the return of his land as per the agreement and award him damages as Vincent has no right in the land.

7. **PW2, Everline Yeko Musali** testified on **6/2/2020** and adopted her statement dated **16/12/2019** as evidence-in-chief. Her evidence is that she stays in Dubai; that **David Sikuku** is her husband; that on the **4/7/2013** she entered into an agreement (**P. Exhibit 1**) with Bashir at Risper Arunga's Office over **Plot No. 1014 Kitalale Settlement Scheme**; that David was then in Dubai; that she bought the land on her family's behalf; that the same was to be concluded in October; that she wrote an authorization Letter (**P. Exhibit 9**) that allowed the title to be issued in the plaintiff's name; that they took the land in **2014**; that someone came and took **2 acres** and left them with only half an acre; that they met Bashir and his wife before buying the land and they even visited the lands office; that they did not know of Vincent before and they first heard of him in **June 2014**; that they had a caretaker who abandoned the land due to threats; that the half acre has a semi-permanent house; that they paid **Kshs. 30,000/=** on **3/10/2014**; that they were to pay **Kshs. 175,000/=** but they never paid because they could not put more money on disputed land;

8. On cross-examination by Mr. Ngeiywa counsel for the 1st Defendant, she confirmed that on **4/7/2013**, she bought **2 acres**; she bought for her family; that she personally paid the money; that she has not sued Bashir; that she went to Dubai after buying the land on **9/7/2013**; that she came back to the country about **December 2014**; that she was not in the country between **July 2013** to **December 2014** and during the making of the two agreements of **15/10/2013** and **3/3/2014**; she confirmed that there was a house built by Vincent on the land and that the land borders other portions on all sides.

9. On cross-examination by Mr. Okile, counsel for the 2nd Defendant, she confirmed that she did not have a marriage certificate in court; that her agreement does not mention the plaintiff; that the completion was to be **10/10/2013** but it did not occur that date, but it occurred on **15/10/2013**; she never signed the agreement; that she confirmed that she negotiated the transaction and that it changed into his name but that the land would belong to them as a family; she admitted that Vincent has been occupying the land from **2015** till the date of hearing of her evidence; that she was never taken to the Land Control Board.

10. On the **11/3/2020 PW3, Stephen Omuse**, Court Administrator Kitale Law Courts testified; it was his evidence that he had file **Cr. No. 2398/2014**; that the accused was **Bashir Towet Chemaswet**; that the charge was obtaining by false pretenses; that the result was that the matter was withdrawn under **Section 204** of the **CPC** as the complainant withdrew the case on **8/9/2014**; he produced the file as **P. Exhibit 10**.

11. On cross-examination by Ngeiwa advocate for the 1st Defendant, he confirmed that the charge sheet mentioned no plot number.

12. PW4, John Kiberas Murumet also testified on **11/3/2020** and adopted his statement dated **12/4/2018** as his evidence-in-chief. His testimony was that David Sikuku Kones is his father; that Everline is his mother; that Bashir went to him and sought to know if he could get someone to buy land; that he was the third witness in the agreement (**P.Exhibit 1**) written at advocate Risper Arunga's office;; that he was the 1st witness in **P. Exhibit 3** the agreement between Bashir and the Plaintiff; that when the parties were almost completing the transaction he found that the maize had been cut and the semi-permanent house demolished; that he cannot know who demolished it as the caretaker who was living there had been chased away and Vincent had claimed to have bought the land.

13. On cross-examination by Ngeiywa; he confirmed that the plot was No. 1014; that it was 2.5 acres but David bought 1 acre; that he went to Bashir to view the land; that the land has other parcels bordering it on 3 sides and a road on one side; that the house was demolished due to this case; that they bought the land on **2/7/2014**; that he was present and her mother was buying; that David is brother to his father; that he does not know if Pius Ngeiywa is their neighbor.

14. On cross-examination by Mr. Okile for the 2nd defendant; he confirmed that he alerted the plaintiff that the land was on sale; that he came on **4/7/13**; that the plot was number **114**; that one acre was on sale at **Kshs.350,000/=**; that after the house was demolished Vincent went and ploughed the land; that the house belonged to David Sikuku Kones; that Vincent was sold the extra area they had been sold about one acre; that he only saw the first crop of maize and he never went back there after Vincent went to the land.

15. That marked the close of the Plaintiff's case.

The Defendants' Evidence

16. DW1, Bashir Towett Chemaswet, the 1st defendant, testified on **11/11/2020** and adopted his written statement dated **10/2/2020**. He stated that he knows David Sikuku and Vincent Kirunyi, the 2nd Defendant; that he has land at Kitalale; that the Government gave him **2.5** acres; that he bought **1.5** acres from a person called John Maasai in **2009**; and his land became **4** acres; that he knows David Sikuku Kones; that he sold him **2 acres** of land and showed him the boundaries; that however, Vincent was the first one to purchase **2 acres** out of his land; that the **1.5** acres he bought from John Maasai is in **Plot No. 1068**; that his land is **No. 1014**; he produced a certified copy of the map as **D.Exhibit 2**; that plot **No. 1014** is **2.5** acres; that he sold Vincent **2** acres in plot **No. 1014** ; that **1014** then had half an acre left which he sold to David; that **1.5** acres of David's land was in plot **No. 1068**; that in **1068**, he bought land at the middle; that David took possession and farmed then he fenced off the whole plot he bought in **1068**; that John had land on either side of his land but he had left a way of access near the river between the two portions; that when David closed the path, they quarreled with John Maasai; that Kones took John to the Police at Kitale which irked John Maasai who therefore called **DW1**, rescinded their agreement and refunded him the cash for **1.5** acres; that **DW1** then called David and he told him that he wanted to refund him his money; that David's land remained to be **0.5** acres after the refund; that David took the refund and bought land elsewhere. When shown **DMF1 1** he stated that it was made in **2013** and that Vincent paid all the money; that he had entered into an agreement with one Everline; that he does not know her relationship with the plaintiff; that she went on **7/4/2013** and paid him some money and said she would bring more money; that he did not show her any land; that David went to him later after he had shown Vincent the land; that he made an agreement with David for **2** acres; that he showed David the two acres being **1.5 acres** in Masai's land and **0.5 Acres** in plot **No. 1014**; that they made an agreement over the house on plot No. **1014**. When shown **P. Exhibit 3** he stated that they never made any other agreement for **0.5** acres. When shown **P. Exhibit 6** he said that David entered Vincent's portion and that Vincent withdrew the complaint against **DW1**; that **David** is still on the **0.5** acres and that he (the 1st defendant) should refund David his money.

17. Upon cross-examination, he confirmed that David bought land from him; that Kiperes (also known as John Kiperes Murumet) took David to him; that they had made an agreement with Everline on **4/7/2013** for **2** acres; that he was paid **Kshs. 200,000/=** and **Kshs. 500,000/=** was to be paid on **10/10/2013** and that he was to give the vacant possession immediately; that he gave vacant possession of **2 acres** to her; that they made an agreement with Kones as he paid the balance on **15/10/2013**; that he was paid the balance; that he had shown him the boundary; that the plaintiff had built a toilet and placed a person in the house he (DW1) had been living in; When shown **P. Exhibit 3** he confirmed that they spoke only of the house in that agreement not of land; that he did not sell him half an acre; that he was not to add him **0.5** acres; that the agreement was in respect to plot No. **1014**; that all the agreements are in respect plot No. **1014** and that they state so; however he maintained that he had land in plot No. **1068**; he confirmed that there is a boundary between the plots **1068** and **1014**; that he had sought consolidation but the same was not done; that he purchased plot no. **1068** from Maasai but Maasai took the land back after a quarrel with David; that he does not recall when he sold the land to Vincent as Tigogo & Co, his advocates dealt with the matter; he however admitted that that his agreement with Everline was made on **4/7/2013**, but that he informed them that he had sold Vincent land first; that he was arrested on **18/6/2014** it is not true that he was arraigned in court on charges of obtaining money by false pretence and that it is not true that he sold the same land twice; however he confirmed that he never took a surveyor to the ground and that for now he only owns **2.5** acres there; that Vincent stays on **2** acres; that David is left with **0.5** acres and he prayed that he be allowed to refund David his money; that he had called David for his refund but he had declined.

18. Upon cross-examination by Mr. Okile; he confirmed that Vincent is still in possession and that the court should help him refund David

his money; he stated that he did not take any of the two purchasers to the Land Control Board; that he showed David the land; that his land was in both plots **1014** and **1068**.

19. On re-examination, he stated that David's land was from the road upto the river; that Vincent's land was only in plot No. **1014**; that Everline never took possession immediately after the agreement.

20. **DW2, John A. Maasai**, testified on **11/11/2020** and adopted his witness statement recorded on **10/2/2020** as his evidence-in-chief. He stated that Bashir Chemaswet bought from him **1.5 acres** in plot No. **1068** in Kitalale Settlement Scheme in **2009**; that he knows David Sikuku; that Bashir later sold the plot to David; that David exceeded the boundary they had agreed with Bashir and fenced the entire land and he (DW2) lacked access to his land; that he told Bashir that he would refund him as he was not ready for a quarrel and he got David out of his 1.5 acres of land and that if David had not quarreled him he would not have rescinded the agreement.

21. Upon cross-examination by Mr. Wanyonyi counsel for the 1st Defendant; he confirmed that he does not have any title deed for the Plot No **1068**; that the allotment letter is still in another persons' name; that he has nothing to show that he sold Bashir any land; that he never witnessed David's agreement with Bashir or Bashir's with Vincent they never showed him the agreements; that it was Bashir who showed David the boundary; that Bashir sold David apportion of plot No. **1068**; that **P. Exhibit 1** and **P. Exhibit 2** refer to plot No. **1014** and not his land plot No **1068**; (shown) and that he confirmed that he knew David had bought plot No. 1068 only when he went to fence; that he was refunded **Kshs. 200,000/=** but he does not remember if they made an agreement with DW1.

22. Upon re-examination by Mr. Ngeiywa; he clarified that plot No. **1068** is his land; that Samuel Lopokoit sold him the land; that he sold **1.5 acres** from plot no. 1068 and that is what David bought from Bashir.

23. **DW3, Vincent Wasama Kitunyi**, the 2nd defendant, testified on **11/11/2020** and adopted his statement filed on **20/11/2019** as his evidence-in-chief. His evidence is that he entered into a sale agreement between himself and the 1st Defendant for sale of land; he produced the sale agreement as **D. Exhibit 1**; that he is named as purchasers with his wife; that Janet is his wife; that he paid **Kshs. 700,000/=** he produced the receipt from Tigogo Advocates as **D. Exhibit 3**; that after the agreement the 1st Defendant gave him the allotment letter for **plot No. 104 Kitalale Settlement Scheme** which he produced as **D. Exhibit 4**; that he also gave him his identity card which he produced as **D. Exhibit 5**; that he also gave him copies of receipts he used to pay at the lands office for **Kshs. 1,500/=** and **Kshs. 3,000/=** respectively; he produced the receipts as **D. Exhibit 6 (a)** and **6 (b)**; that he took possession of the land after the agreement; that he planted trees and build a house; that he later became aware of the Plaintiff; that he (plaintiff) went and demolished his house and uprooted the fence; that he then looked for Bashir and the latter was arrested; that he had paid **Kshs. 700,000/=** in full; that he is in occupation of the land; that he has not rebuilt the house since it was demolished; that he checked at the lands office to ascertain the land was Bashir's; that Bashir told him that he is not claiming anything from him; that he is in occupation of the land; that he prays that the suit be dismissed.

24. Upon cross-examination by Mr. Wanyonyi advocate for the 1st Defendant; he confirmed that he went to lands on **11/7/13** together with his witnesses; that they were only given the file, they were not given any letter to show the title is okay; that he does not believe the land had been sold before he bought it and he did not have knowledge that the land had been sold; that the land has no title but only allotment letters; that he build a semi-permanent house in January, **2014** and he planted trees; that the house was demolished and iron sheets taken to the chief's office; that David Kones demolished the house; that police never arrested David or prosecuted him; that he went to report Bashir as he had an agreement with him; that police wrote "obtaining by false pretence" on the charge sheet by mistake; that he is named a witness in the charge sheet; that he withdrew the case and returned his fence and that he did not enter the land forcibly.

25. On cross-examination by Mr. Ngeiywa advocate for the Plaintiff, he confirmed that he knew John Andiemaa Maasai; that he is his neighbor; that he has land near where he stays; that his plot is No. **1068**; that while he was farming on his land, David was farming next to him into plot No. **1068**; that when he was buying the land he did not know the extent of David's land; that David was farming while extending his activity into plot No. **1068** and that David Kones interfered with his boundary.

26. On re-examination by Mr. Okile, he clarified that he was shown the land and given possession; that he did not use force to enter into the land; that he stays on the land.

27. **DW4, Janet Cheseput** also testified on **11/11/2020**. She stated that she is the wife of Vincent Wasama Kirunyi; that on **11/7/13**, they bought land from Bashir Chemaswet; that the land was plot No. **1014 Kitalale Phase III**; that they did an agreement at Tigogo & Co. Advocates for **Kshs. 700,000/=** which they paid in full and were given a receipt; she produced the receipt as **D. Exhibit 3**; that the seller gave them an allotment letter **D.Exhibit 4** and a copy of his ID **D. Exhibit 5**; that after the agreement they took the land, farmed on it and built a semi-permanent house and fenced; that they are in possession of the land to date; that they have planted maize and potatoes and are harvesting them; that David Sikuku entered their land alleging he had also purchased it yet by the time they entered the land paid for it in full, nobody was in possession; she prayed that the case be dismissed with costs.

28. Upon cross-examination by Mr. Wanyonyi for the Plaintiff, she confirmed that they went by themselves to Mr. Tigogo's Office; that Bashir had not sold the land before they bought it; that at the lands there was no indication that it had been sold and the lands office personnel told them that he had not sold it; that when they went to see his file and only DW1's names appeared thereon; that they believed no one has purchased the land; that they built the house thereon in 2014; that there was no house on the land; that Bashir was arrested over boundaries in 2014; that her husband was the complainant in Bashir's criminal case and that Bashir's land was **2.5 acres**;

29. **DW5, Ambrose Cheres Nyeywo** testified on **11/11/2020**. He adopted his witness statement filed on **20/11/2019** as his evidence-in-chief. His evidence is that he knows the parties in this suit; that he knows David Sikuku Kones; that on **11/7/2013** they were together with Vincent and Bashir; that he witnessed an agreement between Bashir and the 2nd Defendant and Janet; that the plot was **No. 1014 in Kitalale Phase 3**; that it was bought for **Kshs. 700,000/=** cash; that his signature is in the agreement (**D. Exhibit 3**); that they were issued with a receipt (**D. Exhibit 3**); that he called Vincent to buy the land; that they went to the lands office to confirm and found that it was unsold; that they took a copy of the agreement to the Settlement Office file; that Bashir gave them a copy of the allotment letter; that he had half an acre (shown **D.**

Exhibit 4) he confirmed that he gave them the photocopy and gave them his photocopy and that of his wife; that after being shown the land and planting trees and a fence and building a semi-permanent house, a dispute arose when PW1 went and claimed to have bought the land and demolished Vincent's house; that Bashir showed them **2 acres**; that David went to claim the land in **October** when they had been in the land for **3 months**; that Vincent is still in possession and farms the land and that David lives on **0.5 acres** and has a toilet thereon.

30. On cross-examination by Mr. Ngeiywa, she confirmed that when they went to see the land, it was unfenced.

31. On cross-examination by Mr. Wanyonyi she stated that if there is any one at fault it is Bashir; that no surveyor visited the land; that elders went and curved out 2 acres; that she is not aware of any court order injuncting Vincent from the land; that she does not know that Bashir was arraigned in court; On re-examination; he clarified that he witnessed the agreement and the taking of possession; that he (Vincent) is still in possession.

32. At that point the 1st and 2nd defendants were closed.

SUBMISSIONS

33. Submissions were filed on behalf of the plaintiff on **18/1/2021**. The 1st and 2nd defendants' submissions were filed on **25/1/2021**. I have considered those submissions.

DETERMINATION

Issues for determination

34. The main issues for determination in this matter are:

a. Whether a declaration that there arose a binding agreement between the plaintiff and the 1st defendant for the sale of the remaining half (½) acre portion pursuant to the negotiations leading to the agreement dated 3/3/2014 and whether the same should be transferred to the plaintiff upon payment of the agreed purchase price of Kshs.175,000/= should issue?

b. Whether an Order of permanent injunction restraining the defendants either by themselves or through their agents, employees and/or servants from encroaching, trespassing onto, wasting, ploughing, growing crops, fencing, erecting structures or otherwise interfering with the plaintiff's use and quiet possession of that land parcel known as Plot No. 1014 within that parcel of land known as Kitalale Settlement Scheme measuring 2.5 acres or thereabouts should issue?

c. Who bears the Costs of the suit?

The issues are addressed as hereunder:-

35. In respect to the 1st issue, it is not in dispute that the 1st Defendant sold 2 acres of his land to the Plaintiff at an agreed consideration of **Ksh.700,000/=** which was paid in installments till payment in full. The first agreement in respect to the sale of the suit property was entered into by the parties herein on the **4/7/2013**; I note that in that agreement, the purchaser was the plaintiffs' wife when she paid **Kshs. 200,000/=**; the 1st Defendant acknowledges that he received the money from her in respect to the sale of land known as **Plot No. 1014 Kitalale Settlement Scheme** belonging to the plaintiff. The 1st Defendant does not dispute that the purchaser Everline (then) is the wife of the Plaintiff. As the plaintiff's wife she must be deemed to have been acting as an agent of the family or of her husband; she confirmed on cross-examination that she was buying land for her family.

36. Secondly, the Plaintiff lives in Dubai and on the **15/10/2013** he went to the Advocates' Office to clear the remaining balance in respect to the sale agreement dated **4/7/2013** when the earlier agreement was amended to read his name as the purchaser. The agreement was sealed by paying the last installment in respect to the **2 acres**. All along, the 1st Defendant did not disclose to the Plaintiff that he had sold the suit land to the 2nd Defendant on the **11/7/2013**.

37. Evidence shows that **P. Exhibit 1** and **2** and **D. Exhibit 1** are sale agreements in respect to the same parcel of land that is Land known as **Plot No. 1014 Kitalale Settlement Scheme**. According to **P. Exhibit 5** (the allotment letter) the land is 2.5 acres and nothing more.

38. From the evidence on record, the 1st defendants' conduct in regard to how he dealt with the property is wanting. Why would he sell the same property to two different purchasers in a span of one week? Accordingly, the first sale agreement dated **4/7/2013** had a completion date of **10/10/2013**. This agreement was eventually completed on **15/10/2013** when the 1st Defendant had already sold the same property to the 2nd defendant on the **11/7/2013**, that is, before the completion date.

39. The agreement between the 1st Defendant and the Plaintiff was never rescinded though the 1st Defendant had proposed to refund the money to the plaintiff but he did not. As it is, the sale agreement between the Plaintiff and the 1st Defendant stands and the 1st plaintiff has all along been aware of that fact.

40. The 2nd Defendant also bought land-the suit property- from the 1st Defendant vide a sale agreement dated **11/7/2013** which agreement also stands.

41. What am therefore left to determine is who is supposed to be declared the proper owner of the suit property considering that the property has been sold to two sets of purchasers.

42. It is not in dispute that the 1st defendant sold the suit property to the plaintiff vide sale agreements dated **4/7/2013** and **15/10/2013** and he also sold it to the 2nd defendant vide sale agreement dated **11/7/2013**. The 2nd defendant received the whole purchase price from the two purchasers being **Kshs. 700,000/=** each totaling to **Kshs. 1,400,000/=** for the two acres of land comprised of plot **1014** Kitalale Settlement Scheme.

43. A close look at the agreements shows that it was an express term of the agreements that the Vendor shall give vacant possession to the purchasers. The plaintiff told the court that he took possession of the land which he had already surveyed though and he put a caretaker on the land; however the caretaker received threats from the 1st and the 2nd Defendants and vacated the land.

44. The 2nd defendant commenced criminal proceedings against the 1st Defendant for obtaining money by false pretence when he realized that the 1st defendant had earlier on sold the land to the plaintiff. The case was later withdrawn when the 1st defendant promised the 2nd defendant that he was going to give him land. Apparently, the caretaker was not in the suit property since he had been threatened and his life was at risk. The 2nd defendant then settled on the land giving rise to the instant suit.

45. At the interim stage, my brother Hon. Justice E. Obaga gave orders for the demolition of the houses belonging to the 1st defendant; that the houses were demolished and if there are any structures erected by the 2nd defendant on the suit property, then they were erected illegally.

46. In his defence, the 1st Defendant stated that he bought land from one Maasai being land plot **No. 1068** measuring **2 acres** adjacent to **Plot No. 1014** he alleges that it enlarged his land to **4.5 acres**, and that the land that he sold to the plaintiff was in plot no. **1068**.

47. I note that there is no sale agreement between the 1st Defendant and the said Maasai which was adduced by the 1st defendant to support his assertion. The 1st Defendant cannot amend the agreement dated **4/7/2013**, that dated **15/10/2013** and the one dated **11/7/2013** orally. Notably, the 1st defendant did not disclose to the purchasers that the land sold formed part of **Plot No. 1068** at the time of sale or any other time at all.

48. Given the facts of this case, it is fair to uphold the first sale between the 1st defendant and the plaintiff and set aside the second sale between the 2nd defendant and the 1st defendant. I concur with the plaintiffs' submissions that between equal equities, the first in order of time shall prevail.

49. I now turn to the agreement dated **3/3/2014** between the 1st defendant and the plaintiff. I note that this agreement is a further agreement to that dated **4/7/2013** and that dated **15/10/2013** which were for the sale of land belonging to the 1st defendant; that house was apparently erected on the **0.5 acres** which remained after the sale of the **2 acres** of the suit property. This agreement was transacted way after the 1st defendant received payment from the 2nd defendant on the **11/7/2013**. It is obvious that the 1st defendants' intention was to sell the remaining **0.5 acres** to the Plaintiff but they did not agree on the consideration. The agreement remained uncompleted.

Clause 3 "of the said agreement states "...the purchaser intends to purchase half (1/2) and the same to be agreed upon later...."

50. My understanding of this clause is that the Plaintiff was making an offer to purchase the remaining half an acre of that land whereof the 1st defendant was under the obligation to communicate back to the plaintiff to agree on the consideration and conclude payment. This never happened. Instead, the 1st defendant frustrated the Plaintiff by failing to give him vacant possession as agreed.

51. The 1st defendant did not give the plaintiff a chance to conclude the agreement but the 1st defendant confirmed that the Plaintiff is in occupation of the **0.5 acres**. I find that time was not of essence in that agreement since it was not specific on when the agreement would be concluded. He agreement only states *"...to be agreed upon later....."* My understanding is that time had not been specified on when to agree and conclude the transaction. The plaintiff is now praying this court to grant him the chance to complete the transaction.

52. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In **Rufale vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592 Scrutton L.J** held that:

"the first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

53. It is clear from **Clause 3** that the parties intended to complete the contract on a later date which is not specified. This is after the 1st defendant sold the house which stands on the **0.5 acres** which was part of plot **No. 1014**.

54. I find that the agreement is binding upon the parties.

55. I have had the chance to go through the submissions of parties.

56. The 2nd defendant on his defence and submissions has raised the issue that the transaction/agreement between the 1st defendant and the plaintiff has been rendered void for lack of consent of land control board. Counsel submitted that the dispute in this matter is agricultural

land therefore it has been rendered void for lack of consent from the land control board. Relying on **Section 7 of the Land Control Board Act**, he submitted that the only available remedy for the plaintiff is to seek for recovery of consideration paid to the 1st Plaintiff.

57. This issue is coming at submission stage. No evidence was tendered at trial that the subject land was agricultural and subject to the consent of **Land Control Act**. One cannot tell by mere reading of the allotment that the land is agricultural land. It was upon the 2nd defendant to table evidence that the land was subject to land control act. If that was so, then I would agree that the only remedy available for the plaintiff is a refund. However, the 2nd defendant has not demonstrated that he has obtained consent of the land control board.

58. Both the plaintiff and the 2nd defendant have not obtained consents from the land control board if it was to be obtained. If I were to find so, then both agreements would be void for all purposes in respect to the suit property for lack of consent from the land control board.

59. The 2nd defendant further submitted that he is an innocent bonafide purchaser for value without notice. He submits that he was not aware of any earlier sale of land regarding the suit property. In **Joseph Muriiti Njeru vs Wanjiru Njuguna and Another (2018) e KLR** the court held that:

“.....for a purchaser to successfully rely on the bonafide doctrine as was held in the case of Hunnington Njuki v William Nyunzi High Court Civil Suit No. 434 of 1996, must prove that:

- 1. He holds a certificate of title**
- 2. He purchased the property in good faith**
- 3. He had no knowledge of the fraud**
- 4. He purchased for valuable consideration**
- 5. The vendors had apparently valid titles**
- 6. He purchased without notice of any fraud and**
- 7. He was not a party to the fraud.**

60. From the facts herein, it is evident that the 2nd defendant does not hold a certificate of title. If that was so, then he would have been protected by law as a proprietor unless his registration was tainted by fraud. **(See Chauhan v Omagwa (1985) KLR 656).**

61. I find that the allotment letter in respect of the suit property is still in the name of the **1st Defendant**. It has not changed hands. If the same was in the name of the 2nd defendant, then he could succeed with his claim as an innocent purchaser for value without notice. The 2nd defendant cannot succeed on the doctrine. Equity cannot come to his aid.

62. The dilemma that the court finds itself in is that the agreement dated **3/3/2014** did not specify the consideration for the ½ acre. However, the 1st defendant's act of purporting to sell the land to two persons implies that he intended to part with possession for the same. This court has already found that the 2nd defendant could not acquire any interest in the suit land since it had already been sold to the plaintiff. In the absence of a specified price in the agreement, this court must examine the circumstances of the sale in order to determine the fair consideration for the ½ acre parcel which the plaintiff has never paid for. The only development on the ½ acre portion that is the 1st defendant's old house had been paid for by the plaintiff. Only the value of the ½ acre remained outstanding. Both transactions occurred between a short duration of time and it has not been shown by the defendants whether there was any significant fluctuation in land value in the area. This court will therefore hold that the land value remained constant within the period. The plaintiff paid **Kshs.350,000/=** for each acre and therefore the price of ½ an acre must be deemed to be half the price, that is, **Kshs.175,000/=**, that is the price the plaintiff must pay to have the entire parcel being **LR. No. 1014**. The plaintiff must therefore pay the sum of **Kshs.175,000/=** in order to merit a transfer.

63. Having said that, I find that the Plaintiff has proved his case on a balance of probabilities and enter judgment in his favor against the defendants jointly and severally for the following orders:

- a. An order that the agreement dated 4/7/2013 which was later amended on 15/10/2013 is upheld whereas that dated 11/7/2013 is hereby set aside.**
- b. A declaration that there arose a binding agreement between the plaintiff and the 1st defendant for the sale of the remaining half (1/2) an acre portion of land pursuant to the negotiations leading to the agreement dated 3/3/2014.**
- c. That the 1st defendant shall transfer to the plaintiff the whole parcel of land measuring 2.5 acres upon payment by the plaintiff of Kshs.175,000/= being the outstanding consideration for the ½ acre portion subject matter of the agreement dated 3/3/2014.**
- d. A mandatory injunction compelling the 2nd defendant to remove himself and anyone claiming under him from the suit land forthwith.**

e. The defendants by themselves,through their agents, employees and /or servants are injuncted from encroaching, trespassing onto, wasting, ploughing, growing crops, fencing, erecting structures, or otherwise interfering with the plaintiffs' use and quiet possession of the whole of that land parcel known as Plot No. 1014 within that parcel of land known as KITALALE SETTLEMENT SCHEME measuring 2.5 acres or thereabouts.

f. The costs of the suit are to be borne by the defendants jointly and severally.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALALE VIA ELECTRONIC MAIL ON THIS 15THDAY OF APRIL, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALALE.