



REPUBLIC OF KENYA



**Odongo v Wanyama & 3 others (Civil Case 150 of 2017)  
[2022] KEELC 2364 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
CIVIL CASE 150 OF 2017**

**AA OMOLLO, J  
JULY 7, 2022**

**BETWEEN**

**PETER OLAKHI ODONGO ..... PLAINTIFF**

**AND**

**EGESA ODUORI WANYAMA ..... 1<sup>ST</sup> DEFENDANT**

**DOMITILLA MAERO ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, BUSIA COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit vide a plaint dated on the 22<sup>nd</sup> August, 2017 which he later amended on the 20<sup>th</sup> of February, 2020 where he impleaded the Defendants in this suit and prayed for judgement against them for:
  - a) A declaration in terms of paragraph 17 of the Plaint;
  - b) An order for revocation of title in terms of paragraph 19 of the Plaint;
  - c) An order for a prohibitory injunction in terms of paragraph 21 of the Plaint;
  - d) An order for a mandatory injunction in terms of paragraph 22 of the Plaint or in the alternative a refund of Kshs.1,008,000 together with interest at court rates;
  - e) An order for leave to issue in terms of paragraph 23 of the Plaint;
  - f) An order in terms of paragraph 24 of the Plaint directed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants;
  - g) Any other relief/further order that comments itself to the Court and that may further the interests of justice in this matter;



- h) Costs and interests at Court rates.
2. The Plaintiff avers that vide an agreement dated 31<sup>st</sup> July, 2013 he agreed to purchase and the 1<sup>st</sup> Defendant agreed to sell 8 acres out of the land known as L.R. Samia/wakhungu-odiado/487 at a consideration of Kshs.125,000 per acre. That upon signing of the agreement he paid a deposit of Kshs.880,000 leaving a balance of Kshs.120,000 which the parties agreed would be cleared once the necessary process at the Land Control Board and after the survey process was undertaken to alienate a parcel of 8 acres out of the Title Number Samia/wakhungu/odiado 487. The Plaintiff avers further that he completed the payment of purchase price, took possession of the land and facilitated the 1<sup>st</sup> Defendant to procure the Land Control Board consent to subdivide the land into two parcels measuring 3.2Ha and 0.96Ha. That a surveyor was appointed as soon as the consent to subdivide was procured and the actual subdivision was carried out on the ground.
  3. That despite obtaining the consent to subdivide, the Plaintiff avers that the 1<sup>st</sup> Defendant was evasive and dodged the issues of procuring the Land Control Board consent to transfer the land to him. That this notwithstanding, the Plaintiff has been enjoying quiet possession of the property, has fenced off the 8 acres and has been undertaking economic activity thereon without any interference whatsoever. The Plaintiff stated that he learnt that the 1<sup>st</sup> Defendant sold the suit land to the 2<sup>nd</sup> Defendant and he proceeded to place a caution on the property at two different instances and during both times, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in collusion with the 3<sup>rd</sup> Defendant's office interfered and removed the cautions. The Plaintiff pleads fraud against the Defendants jointly that:
    - a) The 1<sup>st</sup> Defendant has declined to take step to perform his part of the agreement dated 31<sup>st</sup> July,2013 and instead transferred the property to the 2<sup>nd</sup> Defendant;
    - b) The 1<sup>st</sup> Defendant has transferred the property to the 2<sup>nd</sup> Defendant while knowing that he has entered into a binding contract with the Plaintiff and had been paid in full for the property;
    - c) The 1<sup>st</sup> Defendant repeatedly in collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants removed caveats that had been placed on the property by the Plaintiff and thereby made entries in the register the effect of which would be to defeat the Plaintiff's entitlement; and
    - d) The Defendants have hijacked a subdivision that was made in favour of the Plaintiff and used it to alienate the parcel in favour of the 2<sup>nd</sup> Defendant.
  4. The Plaintiff urged the Court to extend the time within which the LCB consent forms are to be presented to the Land Control Board given that the forms had already been executed the 1<sup>st</sup> Defendant to enable him obtain consent to transfer.
  5. The 1<sup>st</sup> Defendant did not file his defence despite service.
  6. The 2<sup>nd</sup> Defendant filed her amended Statement of Defence on the 24<sup>th</sup> of July, 2020. She denied all the allegations contained in the amended plaint contending that there is no cause of action against her.
  7. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their joint statement of defence on the 17<sup>th</sup> November, 2017. They stated that there was no caution/caveat or restriction placed on land parcel no. Samia/wakhungu-odiado/1948 and denied the allegations that the 3<sup>rd</sup> Defendant colluded with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to remove the caution placed by the plaintiff. They put the Plaintiff to strict proof as to the said allegation and urged this Court to exonerate them from any liability.



8. The hearing commenced on the 7<sup>th</sup> of April, 2021 with the Plaintiff testifying as PW1. He adopted his witness statements dated 22<sup>nd</sup> August, 2017 and 17<sup>th</sup> September, 2017 as his evidence. He also produced the documents on his list of documents and supplementary list as PEx1-13. PW1 stated that at first he expressed interest in buying 4 acres of the land at Kshs.125,000 per acre and that upon the understanding of parties he paid Kshs.125,000/- on the 13/5/2012 leaving a balance of Kshs.375,000/=. That on the 29<sup>th</sup> of May, 2012 he went to make further payment when the 1<sup>st</sup> Defendant informed him that he was desirous of adding 2 acres of the portion of the agreed land instead of the initially agreed 4 acres at the same price, which he agreed. He then paid Kshs.375,000 leaving a balance of Kshs.250,000 for the additional two acres which he cleared on the 22<sup>nd</sup> of October, 2012. That on the said date he had paid a total of Kshs.750,000/=.
9. Pw1 continued that on the 31<sup>st</sup> of July, 2013, the 1<sup>st</sup> Defendant approached him again, this time informing him that he had bought land in Mumias and was planning to relocate there and he offered him the remaining 2 acres of the land at the same price which amount he paid and was acknowledged by the 1<sup>st</sup> Defendant. That he paid for all land he bought from the 1<sup>st</sup> Defendant at a total consideration of Kshs.1,000,000 and he obtained title. That the agreement was prepared in the presence of the local chief, Lawrence Pamba and one Raphael Ambuka Kwoba acted as his agent in the transaction.
10. PW1 stated further that after the payment of Kshs.880,000, the 1<sup>st</sup> Defendant signed the agreement that he would facilitate the process at the Land Control Board so as to alienate a parcel of 8 acres out of Title No. Samia/Wakhungu-Odiado/487 to be registered in his favour. That the 2<sup>nd</sup> Defendant eventually procured consent to subdivide the property and the same was subdivided in parcels number 1948 measuring 3.32 hectares and parcel number 1949 measuring 0.88 hectares. That after the subdivision, the 1<sup>st</sup> Defendant was to procure consent for transfer of his portion of the land and the forms were duly filled by both parties, only awaiting a date for the Land Control Board hearing. That he booked a date for the hearing on the 31<sup>st</sup> of September, 2014 through his agent but the 1<sup>st</sup> Defendant did not show up for the same. That it was during the search for the 1<sup>st</sup> Defendant that PW1 discovered that the land had been sold to another person.
11. PW1 continued in evidence that he approached the Land Registrar for records of the land as soon as he had someone claiming the same land and even sent summons to the claimant. That he proceeded to put a caution on the land despite being informed that the green card was not available at the Lands office. That after the sale, the 1<sup>st</sup> Defendant moved to Mumias together with his mother but when she died he wanted to bury her on the land, something the Plaintiff injuncted but rescinded after the 1<sup>st</sup> Defendant sister begged him to allow the bury her thereon. That although he was not involved in the subdivision process, he gave the Surveyor, Mr. Okinda the documents to process on his behalf. That the lady buying the land was informed that the Plaintiff had bought the land.
12. PW1 stated that he has been in possession of the land, fenced it and even engaged in economic activities thereon, unlike the 2<sup>nd</sup> Defendant who although being the registered owner of the suit land has never had possession of the land. That he had instructed Messrs Geomatics Services to conduct and survey and put beacons on the land at a total cost of Kshs.8,000/= Upon cross-examination by counsels for 2<sup>nd</sup> to 4<sup>th</sup> Defendants, PW1 confirmed that he bought the land in bits beginning in the 29<sup>th</sup> of May, 2012 and that his last payment was on the 21<sup>st</sup> of July, 2013. That he was purchasing 8 acres out of Samia/Wakhungu-Odiado/487. That he has not obtained consent to transfer and admitted that although his name did not feature in the meeting of consent to subdivide, they appeared before the Land Control Board for subdivision on the 4<sup>th</sup> of November, 2013. That after subdivision, new numbers came out. That the 1<sup>st</sup> Defendant's name was Manasse Egesa before they entered into an agreement and the 1<sup>st</sup>



- Defendant deposed an affidavit for the changing of his name. He conceded further that he registered a caveat on the land on the 20<sup>th</sup> of June, 2017 after the 2<sup>nd</sup> Defendant got her title.
13. PW1 continued to state further that the search indicated that the 2<sup>nd</sup> Defendant was registered on 5<sup>th</sup> December, 2013 while he completed payment of the land on the 31<sup>st</sup> of July, 2013. That despite summons by the Registrar, the 2<sup>nd</sup> Defendant did not attend to the same. He confirmed that although, L.R No. Odiado/1949 is registered in the 1<sup>st</sup> Defendant's name someone else is staying on the land hence his alternative prayer for the refund but his main prayer is an order be given the land he bought. He agreed that the subdivision was conducted by the 1<sup>st</sup> Defendant through the mutation form dated 8<sup>th</sup> October, 2013 and approved on the 22<sup>nd</sup> of October, 2013. With regards to the issue of the removal of cautions, PW1 elaborated that he was not sure that the Land Registrar removed the cautions as the Registrar said he did not know how the same was removed. That he placed the caution when he heard rumours about the second sale. He confirmed that the restriction place on land parcel number Odiado/1949 was done by his agent, Raphael Ambuka while the restriction placed on parcel number Odiado/1948 had lapsed.
  14. Lawrence Pambate testified as PW2. He stated that he was a retired assistant chief of Odiado sublocation. He adopted his witness statement dated 17<sup>th</sup> September, 2020 as his evidence in chief. He confirmed that he indeed signed a change of name form for the 1<sup>st</sup> Defendant from Oduori Manasse to Egesa Oduori Wanyama and that the signature on the form is his and he signed it on behalf of the chief at that time. He stated further that the 2<sup>nd</sup> Defendant approached him in 2013 at his home and informed him that she was desirous of purchasing the same land the Plaintiff had purchased and he advised her not to pay any money to the 1<sup>st</sup> Defendant but he eventually learnt that she had disregarded his counsel and paid for the land. He concluded by stating that the Plaintiff was the first to enter into the agreement for sale of the suit land.
  15. On cross-examination, PW2 stated that when buying land there is always a sale agreement in writing and that his role was limited to being informed of the sale transaction. That he did not participate in the rests of the transaction and neither does he know who the current owner of the land was.
  16. Jack Oundo Asudi testified as PW3. He confirmed that he is married to the 1<sup>st</sup> Defendant's sister and he knew the Plaintiff and was aware that there was a sale transaction over land with the 1<sup>st</sup> Defendant. He adopted his witness statement dated 17<sup>th</sup> of September, 2020 as his evidence in chief. In the statement he confirms that he was aware that the 1<sup>st</sup> Defendant entered into various agreements with the Plaintiff for the sale of 8 acres out of the land known as Samia/Wakhungu-Odiado/487 in 2012. That he signed the agreements dated 13<sup>th</sup> May, 2012 and 29<sup>th</sup> May, 2012 as a witness for the 1<sup>st</sup> Defendant and confirmed that the agreements produced in Court are authentic copies of the agreements he signed. He also confirmed that he saw the 1<sup>st</sup> Defendant affixing his signature to the various agreements for sale after receiving payments from the Plaintiff or his representative and that the Plaintiff was the first purchaser of the land.
  17. Upon cross-examination, PW3 reiterated that he witnessed the 1<sup>st</sup> Defendant sell land to the Plaintiff and that he was not aware that the land was sold to another person. This marked the close of the Plaintiff's case.
  18. The 2<sup>nd</sup> Defendant, Domitilla Awuor Maero testified as DW1. She adopted her witness statement dated 15<sup>th</sup> of September, 2021 as her evidence in chief. She produced the documents on the list of documents as Dex 1-8. She stated that the 1<sup>st</sup> Defendant sold him a portion of land measuring 8 ½ acres and that after the meeting they visited the Lands Office and did a search which did not show any encumbrance on the said land. That they then agreed on the purchase price with respect of Samia/



Wakhungu-Odiado/487. That the 1<sup>st</sup> Defendant then subdivided the land into the 1947 and 1948 and then transferred parcel number 1948 to her. She stated that she has never met the Plaintiff. That she is currently using the land she bought despite the threats she got initially. She urged this Court to give her the orders of injunction so as not to experience any problems in the future together with costs. That the Plaintiff can cut his trees on the land.

19. Upon cross-examination, DW1 stated that she was informed of the land by the brokers called Geoffrey Mero & Another. That she conducted the search and the same is dated 3<sup>rd</sup> December, 2013 while the agreement of sale is dated 6<sup>th</sup> September, 2013. That at that time the land had not been subdivided but the subdivision was done by the 1<sup>st</sup> Defendant. That before the search there were two names in the ID so the search done revealed 3 names and having an issue with the rectified name, she visited the Assistant Chief's office to inquire about the land but the Assistant Chief never informed her that the land had been sold. That she never visited the Land Registrar before she made the payments but only went to conduct a search. She concluded that she has a caretaker's house and planted some crops. This marked the close of the Defence case.
20. Parties were directed to file and exchange written submissions. The Plaintiff filed his submissions on the 31<sup>st</sup> January, 2022. He reiterated the parties' pleadings and stated that the 1<sup>st</sup> Defendant did not file a defence while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file their witness statements. He submitted on the following issues for determination: whether the Plaintiff entered into an agreement with the 1<sup>st</sup> Defendant to which question his answer was in the affirmative. He stated that he had called witnesses to confirm the sale occurred, produced documents relating to the sale of the land known as Samia/Wakhungu-Odiado/1948, undertook the process of subdivision and had the consent to transfer forms executed for the transfer process. The second issue he submitted on was: whether he performed his part of the agreement. He stated that he paid the entire purchase price as indicated by the last agreement dated 31<sup>st</sup> July, 2013.
21. On the issue of whether the Defendant acted in concert to defeat the interest of the Plaintiff in the land, the Plaintiff submitted that he paid the surveyor to subdivide the land, he had the Defendant sign the consent to transfer forms, placed caveats on the land and went to court to prevent the 1<sup>st</sup> Defendant from burying his mother on the land. While relying on the Ugandan case of *Katende Haridar & Company* which cited with authority the case of *Lawrence Mukiri & Attorney General & 4 others* (2013) eKLR, he refuted the 2<sup>nd</sup> Defendants' aversions that she was an innocent purchaser for value because she did not purchase the property in good faith, had knowledge of the fraud, was party to the fraud by the 1<sup>st</sup> Defendant and that the Vendor had no valid title as he had already sold the property. He referred the Court to its own judgement in Busia ELC No. 157 of 2014 - *Francis Ambeko Nyagambi vs. Angeline Moraa Amukoya* where this court held that;

In the current case, the plaintiff has shown indeed that there was fraud in the transfer and registration of the defendant as the owner of the suit land. It was incumbent upon the defendant to demonstrate that she was not a party to the fraud nor was she aware of the fraud. Although counsel for the defendant during cross-exam stated that two different people can share bear similar names, the plaintiff confirmed he was not the person mentioned in the transfer documents produced by the defendant. The defendant did not call evidence to contradict the plaintiff's ownership claim over the suit land. This would have been easily done by calling the person who sold her the land to exclude her from the accusation of being party to the fraud. Section 112 of the *Evidence Act* stipulates that "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him." The defendant



cannot allege being an innocent title holder without discharging the burden of proof of her innocence.

22. On the issue of this being a controlled transaction, the Plaintiff submitted that although this was a controlled transaction, he had provided oral and documentary evidence that he signed the Land control board forms but the 1<sup>st</sup> Defendant failed to procure the consent. In stating that he is entitled to the suit portion despite the lack of Land Control Board consent, he relied on the holding in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR where the Court of Appeal stated thus;
- “It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”
23. The 2<sup>nd</sup> Defendant filed her submissions on the 26<sup>th</sup> of January, 2022 and filed a reply to the Plaintiff’s submissions on the 17<sup>th</sup> of February, 2022. She submitted that she is a bonafide purchaser for value without notice, having been approached by the 1<sup>st</sup> Defendant’s agents in her home. That she viewed the property and was encouraged to invest in the land. That when she carried out a search and discovered that the names on the title were not the same as those on the seller’s ID, she requested the 1<sup>st</sup> Defendant to go for name verifications and he presented a letter from the local administration for the harmonisation of the names at the lands registry. That she then entered into an agreement for the sale of the land for a consideration of Kshs.1,105,000/= which amount she fully paid, the land control board consents were signed, consent obtained and the land was transferred to her.
24. She relied on the decision of Nicholas Kioko Muoki & Another vs. Omar Feizal Mohammed (2021) eKLR which set out the parameters of who an innocent purchaser is, contending that she falls within that category. That the Plaintiff admitted that he has never obtained consent to transfer and that he never entered into an agreement with the 1<sup>st</sup> Defendant with regards to parcel number 1948 hence he lacks privity of contract to the suit title. The 2<sup>nd</sup> Defendant submitted that the Plaintiff does not qualify for order of specific performance because the title he is claiming is no longer in existence having been subdivided and therefore closed. That the transaction between the Plaintiff and the 1<sup>st</sup> Defendant is null and void ab initio for non-compliance with section 8 of the Land Control Act.
25. In the reply to the Plaintiff’s submissions, the 2<sup>nd</sup> Defendant sought to differentiate the facts in the case of Francis Nyagambi (supra) where the Plaintiff had shown that there was fraud in the transfer and the registration of the defendant as the owner of the suit land. That her facts are similar to those in the case of Peris Wanjiku Mukuru (suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Samuel Njoroge Macharia (2020) eKLR, where the Court held that the Respondent being the absolute and indefeasible owner as provided under section 26 of the Land Registration Act then his title is shielded from being defeated by section 25 of the Land Registration Act unless proved otherwise.
26. She concluded by submitting that her application for consent, the consent and the transfer form establish the absoluteness of her title and therefore, she has the right to seek a restriction placed on her



title removed and the Plaintiff be permanently restrained from any use of her land. That the Plaintiff should be ordered to remove the trees he planted on the suit property.

27. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants in their submissions filed on the 18<sup>th</sup> of February, 2022 submitted on the following headings: whether the Plaintiff entered into an agreement with the 1<sup>st</sup> Defendant for the sale of Samia/Wakhungu-Odiado/1948; whether the Plaintiff performed his part of the agreement; and whether the Plaintiff is entitled to the prayers sought against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant. They submitted jointly on the aforementioned issues and stated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are not privy to the agreement between the 1<sup>st</sup> Defendant and the Plaintiff and as such they cannot oversee the performance or implementation of the said transaction. That the said transaction was a controlled transaction and consent was required as provided under section 6 of the *Land Control Act*. While relying on the case of *Willy Kimutai* (supra) the Defendants submitted that the circumstances of this case are different from those in the present case and that the Plaintiff is guilty of laches for the inordinate delay he took in seeking to extend time to apply for the Land Control Board consent.
28. In answer to the allegations of the fraud levelled against the 3<sup>rd</sup> Defendant, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submit that the Plaintiff has failed to prove that there were caveats on the suit title and the said Defendant can not be faulted for the omissions on the Plaintiff's part. That the placement and removal of a caveat can not be sufficient proof of an allegation of fraud as the same cannot subsist indefinitely. They urged this Court to dismiss the suit with costs to them.

### Determination

29. I have considered the parties' pleadings, evidence, submissions and the applicable law. The issues which in my opinion arise for determination are as follows:
- a) Whether there exists a valid sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant;
  - b) Whether there exists a valid sale agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant;
  - c) Whether the transaction between the Plaintiff and the 1<sup>st</sup> Defendant is void for the lack of the LCB consent;
  - d) Whether the Defendants acted fraudulently;
  - e) Who bears the costs of this suit?
30. This case is premised on an alleged botched contract for sale of land between the Plaintiff and the 1<sup>st</sup> Defendant. The two parties entered into several agreements for the sale of a portion land title Samia/Wakhungu-Odiado/487. The copies of the agreement produced by the plaintiff are:
- a) The agreement dated 13<sup>th</sup> May, 2012 for sale of four acres of land out of number Samia/Wakhungu-Odiado/487 at a consideration of Kshs.500,000/- receipt which the 1<sup>st</sup> Defendant acknowledged;
  - b) The agreement dated 29<sup>th</sup> May, 2012 for 6 acres of land out of land parcel number Samia/Wakhungu-Odiado/487 at a consideration of Kshs.125,000/- per acre. The 1<sup>st</sup> Defendant acknowledged receipt of Kshs.500,000 leaving a balance of Kshs.250,000/-. An addendum to the agreement on the 29<sup>th</sup> of September, 2012 reflects that the 1<sup>st</sup> Defendant acknowledged receipt of Kshs.105,000/- paid to him for the sale of the land leaving a balance of Kshs.145,000/-;



- c) On 22<sup>nd</sup> October, 2012 the parties entered into another agreement to confirm payment of Kshs.750,000 being the consideration for the 6 acres agreed upon;
  - d) The agreement dated 27<sup>th</sup> March, 2013 for purchase of 8 acres out of land parcel number Samia/Wakhungu-Odiado/487 at a consideration of Kshs.125,000 per acre and the Purchaser acknowledged the payment of Kshs.800,000/= leaving a balance of Kshs.200,000/=. An addendum to the agreement dated the 20<sup>th</sup> of May, 2013 reflects that Kshs.50,000 to the 1<sup>st</sup> Defendant and on the 3<sup>rd</sup> July, 2013 an extra Kshs.40,000/- was paid to him;
  - e) The agreement dated 31<sup>st</sup> July, 2013 was for Kshs.880,000/= leaving a balance of Kshs.120,000/-;
  - f) The agreement dated 3<sup>rd</sup> July, 2013 was for Kshs.1,000,000 out of which Kshs.880,000/= was paid.
31. Thus the agreements between the Plaintiff and the 1<sup>st</sup> defendant were in writing and were executed by both parties and witnessed. All these agreements comply with the provisions outlined for a sale of contract in land as provided for under section 3 of the Law of Contracts Act which provides thus:
- “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) The contract on which the suit is founded –
    - (i) is in writing.
    - (ii) is signed by all parties thereto; and
  - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
32. PW1 averred that despite fulfilling his part of the contract, the 1<sup>st</sup> Defendant declined to do his part of the contract thus he was guilty of breach of the same. All the Plaintiff’s witnesses who were the witnesses to the agreements for sale as well confirmed that the Plaintiff had paid the entire purchase price to the 1<sup>st</sup> Defendant and that they were present during the various payments. There is no evidence from the 1<sup>st</sup> defendant contrasting the evidence offered by the Plaintiff.
33. The next issue is the validity of the agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. DW1 presented a sale agreement dated 6<sup>th</sup> September, 2013 which was produced as Dex 1. The agreement was for the sale of 8 ½ acres of land to be excised from land parcel number Samia/Wakhungu-Odiado/487 at a consideration of Kshs.1,105,000/- payable in three installments. The installments were all paid according to Dex 2. However, unlike the Plaintiff situation, the 1<sup>st</sup> Defendant fulfilled his obligations under this second agreement for sale. On the face of the documents presented by the 2<sup>nd</sup> defendant, she also has a valid contract as between her and the 1<sup>st</sup> defendant.
34. To the third issue which is partially key in determining the dispute herein relates to the effect of lack of the LCB consent to the Plaintiff’s transaction. All the parties in their respective submissions have highlighted this as an integral issue that this Court has to deal with. The entire defence case is hinged on the fact that failure to obtain consent from the Land Control Board rendered the agreement for sale between the 1<sup>st</sup> Defendant and the Plaintiff null and void as it contravened the provisions of section 6 of the Land Control Act, CAP 302.
35. PW1 during cross-examination stated that he had on several occasions sought to indulge the 1<sup>st</sup> Defendant to obtain the consent but his efforts proved futile. He stated that he only managed to get



him to sign the application for consent forms for the subdivision which forms he produced as PEx 2 and the mutation forms dated 8<sup>th</sup> October, 2013. The Funyula Land Control Board issued the consent to subdivide the said land on the 15<sup>th</sup> of October, 2013. PW1 also produced the application for consent to transfer the suit land together with the transfer form executed by both parties as PEx 7. He confirmed that although the forms had been duly signed by the 1<sup>st</sup> Defendant he could not present them to the Board in the absence of the said Defendant hence his predicament. He confirmed that his efforts to trace the 1<sup>st</sup> Defendant have thus far been futile. The Plaintiff added that he took possession of the sold land by fencing it and planted trees on it. The 2<sup>nd</sup> defendant confirmed that the Plaintiff's trees were on the land and she asked an order from this court to direct the plaintiff to remove his trees.

36. The Court of Appeal in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR stated as follows:

“A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The *Land Control Act* prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the *Land Control Act* for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.”

37. PW1 has proved that he took the necessary steps within his limits to enable the obtaining of the consent but the said efforts were frustrated by the unavailability of the 1<sup>st</sup> Defendant. Does the inaction by the 1<sup>st</sup> defendant render their agreement void given that the parties can be granted an extension of time within which to seek the consent? As held in the case cited above, the transaction does not automatically become void as the doctrines of equity protect the victim of such inaction and the statute law equally allow for seeking of extension of time which the Plaintiff has done. Consequently, the lack of LCB consent alone does not strip the Plaintiff of interests in the suit land. It is subject to proof of whether the defendants are guilty of fraud and whether or not the doctrine of constructive trust is available to him.

38. Now on the question of whether the Defendants acted fraudulently, the Plaintiff has pleaded fraud on the part of all the Defendants in paragraph 20 of his amended Plaint. The *Black's Law Dictionary*, 10<sup>th</sup> edition defines fraud as,

“As knowing misrepresentation or know concealment of a material fact made to induce another to act to his/her detriment.”

39. The Court of Appeal stated in the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, that fraud is a question of evidence and the burden of proving fraud being on the person alleging the same (see *Paul Muira & Another v Jane Kendi Ikinyua & 2 others* [2014] eKLR).

40. PW1 stated that the 1<sup>st</sup> Defendant declined to take steps to perform his part of his agreement dated 31<sup>st</sup> July, 2013 and proceeded to transfer the suit land to the 2<sup>nd</sup> Defendant while knowing that he had entered into a binding contract with him and had been paid fully for the property. From the documents



produced by both the Plaintiff and the 2<sup>nd</sup> Defendant, it is evident the 1<sup>st</sup> Defendant entered into two separate agreements over the same parcel of land with both parties. He however only completed the transaction with the 2<sup>nd</sup> Defendant and declined to follow through with the Plaintiff's agreement. This is sufficient proof of his intention to defraud the Plaintiff and as such the allegation of fraud against the 1<sup>st</sup> Defendant is proved beyond a balance of probabilities.

41. The Plaintiff alleged fraud against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and stated that they had colluded to remove the caveats placed on the property by him and made entries on the registry that would defeat the Plaintiff's entitlement. However, during cross-examination, the Plaintiff stated that he placed a caveat or restriction on the suit title on 20<sup>th</sup> June, 2017 after the 2<sup>nd</sup> Defendant had gotten the title in her name. He stated further in cross-examination that:

“I am not saying that it is the Land Registrar who removed the caution. The Land Registrar said he did not know who removed the caution.... I had a complaint on removal of caution on 487....Restriction on 1948 lapsed...”

42. From the aforementioned the Plaintiff does not specifically point out how the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were involved in the removal of the restrictions. This court therefore does not place any blame on the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

43. DW1 on her part stated that she conducted a search on the suit land before purchasing it and it was only after she confirmed the title was clean that she entered into the agreement for sale. She stated that she was an innocent purchaser for value and that the 1<sup>st</sup> Defendant went ahead to give her possession of the land which she has been using to date. She cited the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR where the Court defined what amounts to bonafide purchaser for value, thus:

... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

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

44. The question here is whether the Plaintiff has not provided any evidence to confirm that the 2<sup>nd</sup> Defendant had knowledge of the 1<sup>st</sup> Defendant had sold this land to him. At the time the 2<sup>nd</sup> defendant was purchasing the land, there was no restriction placed on the original title number Odiado/487, at least none was produced in evidence. However, the chief for the area where the land is giving evidence as PW2 stated thus in paragraph 6 & 7 of his written statement dated 17<sup>th</sup> Sept 2020;

“Later on in the year 2013 or thereabouts, the 2<sup>nd</sup> defendant visited me at my home and informed me that she wishes to purchase the same land that the Plaintiff had purchased and I advised the 2<sup>nd</sup> Defendant that she should not pay any money to the 1<sup>st</sup> Defendant as he had already sold the parcel to the Plaintiff and as such, she would be conned”.



45. Mr Ashioya learned counsel for the 2<sup>nd</sup> defendant did not test the content of the above quoted statement of PW2 during cross-examination. The 2<sup>nd</sup> defendant in cross-examination admitted visiting the assistant's chief office to find out if the assistant chief knew anything about the suit land. According to her, the A/chief told her the land had not been sold. PW2 stated that he was the assistant chief who signed for the 1<sup>st</sup> defendant documents for correction of his name. The possibility is that he is the same person the 2<sup>nd</sup> defendant met and advised the 2<sup>nd</sup> defendant that the land had been sold. PW2 gave evidence under oath and no evidence was laid by the defence that the witness had advised the 2<sup>nd</sup> defendant against paying for the land which had been sold to the Plaintiff. Further, the 2<sup>nd</sup> defendant stated in her written statement (paragraphs 4 & 5) that she facilitated the 1<sup>st</sup> defendant to carry out the subdivision of parcel No. Odiado/487. The 2<sup>nd</sup> defendant produced the mutation form used in the subdivision as Dex2 which document if compared with that produced by the Plaintiff, appears to be the same document. For instance, the date of signing by the owner of the land is the same, the serial number for receipt of payment for the form is the same i.e. C251016, same reference number for Land Control Board consent and date the surveyor signed the form. The Plaintiff produced copies of the receipt issued by the surveyor confirming he paid their fee for the subdivision but the 2<sup>nd</sup> defendant did not produce any.
46. It appears that the 2<sup>nd</sup> defendant obtained the mutation form already prepared as well the letter of consent to subdivide from the 1<sup>st</sup> defendant so that it is not true that she facilitated the subdivision process. From the evidence adduced, it is my considered opinion and I so find that even though no restriction had been registered on the suit title prior to the 2<sup>nd</sup> defendant executing an agreement for sale of the suit portion in L.R. 487, she was made aware by PW2 that the same parcel had been sold by the 1<sup>st</sup> defendant. Consequently, the decision taken by the 2<sup>nd</sup> defendant to proceed with the transaction with the 1<sup>st</sup> defendant was indication that she cheered the 1<sup>st</sup> defendant in his intention to defraud the Plaintiff. This made her become a party to the fraud and cannot hide under the guise of innocent purchaser for value without notice.
47. In light of the foregoing, I am satisfied that the Plaintiff has successfully proved his case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for breach of contract and fraud on a balance of probabilities. In the exercise of my discretionary powers under the law, I apportion liability between the 1<sup>st</sup> & 2<sup>nd</sup> defendants in the ratio of 60:40 respectively. However, given that the land which was the subject of the sale agreement has since been transferred to the 2<sup>nd</sup> defendant who has not only title but possession, an order of specific performance does not suffice in the present circumstances. The Plaintiff made an alternative prayer for refund which prayer if granted will result in justice to both parties.
48. In conclusion, I enter judgement in favour of the Plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally as follows:
- a) The 1st Defendant is in breach of the sale agreement dated 31st July, 2013;
  - b) The 1st and 2nd Defendants are ordered to refund to the Plaintiff in the ratio of 60:40 within a period of sixty (60); the purchase price in the sum of Kshs.1,000,000 together with the survey fees of Kshs.8,000/= plus interests at court rates from the date of filing of this suit until payment is made in full. In default execution to issue; and
  - c) Costs of this suit awarded to the plaintiff.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 7TH DAY OF JULY, 2022.**

**A. OMOLLO**



**JUDGE**

