



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO.689 OF 2016**

**SHIRON ANASTACIA NYAYIEKA.....PLAINTIFF**

**VERSUS**

**1. SAMMY NYARANGI**

**2. BECKIE BOYANI NYARANGI (both sued as the administrators of the estate of**

**James Onyiego Nyarangi).....DEFENDANTS**

**JUDGMENT**

**Background:**

James Onyiego Nyarangi (hereinafter referred to only as “the deceased”) died on 4<sup>th</sup> May, 1991. The deceased left as part of his estate all that parcel of land known as L.R No. 13874, Grant No. 88273 measuring 2.288 hectares situated within the City of Nairobi (hereinafter referred to only as “the main title”). Grant of Letters of Administration in respect of the estate of the deceased was issued to Margaret Nyarangi and Beckie Boyani Nyarangi, his wife and daughter respectively in Nairobi High Court Succession Cause No. 1092 of 1991. The said Grant of Letters of Administration was confirmed on 12<sup>th</sup> July, 1999. According to the certificate of confirmation, all the properties forming part of the estate of the deceased including the main title were to be registered in the name of Margaret Nyarangi to hold in trust for the children of the deceased. Following the confirmation of the said Grant of Letters of Administration, the main title was registered in the sole name of Margaret Nyarangi as administrator of the estate of James Onyiego Nyarangi on 8<sup>th</sup> March, 2002.

Margaret Nyarangi also known as Margaret Nyarangi Moragwa died on 25<sup>th</sup> October, 2008. Application for Grant of Probate in respect of her estate was filed by the executors of her will, Ratemo Nyarangi Moga and Jephther Osoro Opande on 10<sup>th</sup> March, 2009 in Milimani High Court Succession Cause No. 565 of 2009. Following the death of Margaret Nyarangi, Sammy Nyarangi, the 1<sup>st</sup> defendant herein was appointed as an administrator of the estate of the deceased, James Onyiego Nyarangi in her place. The said Sammy Nyarangi joined Beckie Boyani Nyarangi, the 2<sup>nd</sup> defendant herein who was an administrator of the estate with Margaret Nyarangi. The certificate of confirmation was amended accordingly on 8<sup>th</sup> April, 2015 to include the name of Sammy Nyarangi as an administrator of the estate of the deceased.

**The suit before the court.**

The plaintiff brought this suit against the defendants as administrators of James Onyiego Nyarangi (deceased) on 22<sup>nd</sup> June, 2016. The plaintiff averred that by an agreement for sale dated 23<sup>rd</sup> September, 2004 between her and Margaret Nyarangi as administrator of the estate of the deceased, Margaret Nyarangi (hereinafter referred to only as “the vendor”) sold to her a portion of the main title measuring 0.50 acres that was described and delineated in a sub-division site plan at a price of Kshs. 2,250,000/-. The plaintiff averred that the vendor was in the process of subdividing the main title into various portions in accordance with the said site plan.

The plaintiff averred that pursuant to the said agreement, she paid to the vendor a sum of Kshs. 2,240,000/- leaving a balance of Kshs. 10,000/- that she was ready and willing to pay to complete the transaction. The plaintiff averred that the vendor acknowledged receipt of the said payment in her will dated 15<sup>th</sup> February, 2008. The plaintiff averred that after paying the said amount, she took possession of the said portion of the main title that was sold to her and developed the same. The plaintiff averred that the vendor died on 25<sup>th</sup> October, 2008 before completing the said agreement after which the defendants took over the administration of the estate of the deceased. The plaintiff averred that the defendants completed the subdivision of the main title in accordance with the site plan referred to above and the portion of the main title that was sold to the plaintiff by the vendor was given Land Reference Number 13874/9, I.R 169847(hereinafter referred to as “the suit property”).

The plaintiff averred that despite the fact that the defendants were in a position to complete the agreement that she entered into with the vendor, they had unreasonably and unlawfully failed and refused to transfer to her the suit property thereby exposing her to grave risk of being fraudulently dispossessed of the property and the investments that she had made thereon. The plaintiff sought judgment against the defendants for; a declaration that the plaintiff was a lawful purchaser and beneficial owner of the suit property and an order of specific performance directing the defendants to transfer the suit property to the plaintiff forthwith.

#### The defence and counter-claim.

The defendants filed a statement of defence and counter-claim on 1<sup>st</sup> February, 2017. The defendants admitted that the main title was registered in the name of the vendor as administrator of the estate of James Onyiego Nyarangi (deceased). The defendants contended however that the registration was incomplete as the vendor should have been registered together with the 2<sup>nd</sup> defendant, Beckie Boyani Nyarangi with whom she the vendor held the main title as trustees of the children of the deceased. The defendants denied that the vendor entered into an agreement for sale of the suit property with the plaintiff on 23<sup>rd</sup> September, 2004. The defendants averred that in any event, the vendor had no capacity acting alone to dispose of the suit property or to confer any rights upon the plaintiff in respect thereof.

The defendants averred that the vendor held the main title as a trustee of the beneficiaries of the estate of the deceased and that the vendor was bound in law to act jointly with Beckie Boyani Nyarangi, the 2<sup>nd</sup> defendant in any dealing pertaining to the estate of the deceased. The defendants averred that the plaintiff acting together with persons unknown to the defendants set in motion a fraudulent scheme aimed at defrauding the estate of the deceased of the main title by taking advantage of the poor health of the vendor in her last days. The defendants averred that the documents that were produced by the plaintiff in court in support of her claim were manufactured in furtherance of the said fraudulent scheme. The defendants averred further that the will of the vendor dated 15<sup>th</sup> February, 2008 was declared inoperative by the court to the extent that the vendor purported through it to dispose of the properties forming part of the estate of James Onyiego Nyarangi(deceased). The defendants averred that the purported agreement for sale that the plaintiff entered into with the deceased was irregular, illegal and incapable of being completed or enforced by a court of law. The defendants averred that the plaintiff's occupation of the suit property was illegal and that the same was obtained forcefully in furtherance of the fraud against the estate of the deceased.

In their counter-claim, the defendants reiterated the contents of the defence and urged the court to issue an order compelling the plaintiff to demolish the illegal structures and other developments she had put up on the suit property and to surrender vacant possession of the property to the defendants. The defendants sought judgment against the plaintiff for a mandatory injunction compelling her to vacate the suit property, remove all improvements she has put up thereon and to restore the property to its natural state. The defendants also sought damages for trespass and illegal possession of the suit property by the plaintiff.

#### The evidence adduced by the parties.

At the trial, the plaintiff adopted her witness statements dated 22<sup>nd</sup> June, 2016 and 21<sup>st</sup> February, 2017 as her evidence in chief. The plaintiff also produced her list and bundle of documents filed in court on 22<sup>nd</sup> June, 2016 as exhibits in support of her case. In her witness statement dated 22<sup>nd</sup> June, 2016, the plaintiff reiterated the contents of her plaint that I have highlighted at length at the beginning of this judgment. In her statement dated 21<sup>st</sup> February, 2017, the plaintiff stated that initially she entered into an oral agreement with the vendor for the purchase of the suit property. The agreement was made in 2004 when she was introduced to the vendor by the vendor's nephew one, Dan Obwadho. The plaintiff stated that after agreeing on the purchase price, she made a down payment of Kshs. 1,500,000/- to the vendor on 28<sup>th</sup> September, 2004. The plaintiff stated that she paid the balance of the purchase price to the vendor in instalments over a period of time. She stated that the payments were made in cash and at times by cheque. The plaintiff stated that she did not have some of the documents relating to the transaction as she lost the same when she moved out of her matrimonial home following a divorce. She stated that when she dealt with the vendor, the vendor was in a good state of health and was of sound mind. The plaintiff stated that the undated agreement for sale that they entered into in 2017 was made for the purposes of enabling her obtain approvals from the City Council of Nairobi for her building plans and electricity connection to the suit property.

The plaintiff stated that the defendants were aware of the transaction between her and the vendor and that she took possession of the suit property openly and developed the same over a period of time without any objection from the defendants. The plaintiff stated that the consideration that she gave for the suit property was used for the benefit of the estate of the deceased and that she was an innocent purchaser of the suit property for value. The plaintiff averred that she was led to believe by the defendants through their words and deed that they had approved the sale of the disputed property to her. The plaintiff stated that the defendants were estopped from denying the validity of the transaction.

The 1<sup>st</sup> defendant testified on his own behalf and on behalf of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant adopted his witness statement dated 27<sup>th</sup> January, 2017 as his evidence in chief and produced the documents attached to the defendants' list of documents dated 27<sup>th</sup> January, 2017 as exhibits. In the statement, the 1<sup>st</sup> defendant stated that after the death of the vendor who was his mother there was a battle to seize the assets belonging to the estate of his parents lodged by various people one of whom was the plaintiff herein. He stated that the battle mainly targeted the main title which is situated within Karen area of Nairobi. The 1<sup>st</sup> defendant stated that it was in the course of the confusion that ensued during this period of scramble that the plaintiff managed to take possession of the suit property and proceeded to partially develop the same.

The 1<sup>st</sup> defendant reiterated the contents of their statement of defence that the vendor had no capacity to sell the suit property. The 1<sup>st</sup> defendant stated that the vendor was only a trustee of the suit property and could not sell the same without the authority of her co-administrator of the estate of the deceased who was the 2<sup>nd</sup> defendant and of the court. The 1<sup>st</sup> defendant stated that the plaintiff purportedly entered into an agreement for sale with the vendor in 2007 while the payments of the purchase price were allegedly made in 2004. The 1<sup>st</sup> defendant stated that the mode of payment set out in the agreement of 2007 was at variance with the payments allegedly made by the plaintiff. The 1<sup>st</sup> defendant stated that this was evidence of fraud and foul play. The 1<sup>st</sup> defendant stated further that due to the vendor's frail health in her last days, she was taken advantage of by various parties who influenced her decisions. The 1<sup>st</sup> defendant stated that the plaintiff had on many occasions represented to the defendants that she was willing to pay the market price for the suit property only to turn around

and file the present suit. The 1<sup>st</sup> defendant urged the court to grant the reliefs set out in the counter-claim.

### The submissions.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed submissions and further submissions on 13<sup>th</sup> June, 2019 and 20<sup>th</sup> November, 2019 respectively while the defendants filed their submissions on 13<sup>th</sup> November, 2018. The plaintiff submitted that she had proved that the main title was registered in the name of the vendor as administrator of the estate of the deceased and that the vendor sold the suit property which is a portion of the main title to her. The plaintiff submitted that she had also proved that she paid the full purchase price less Kshs. 10,000/-. The plaintiff submitted that the vendor's will dated 15<sup>th</sup> February, 2008 in which she acknowledged the sale of the suit property to the plaintiff and receipt of Kshs. 2,240,000/- on account of the purchase price was not invalidated by the court.

The plaintiff submitted that other persons such as Hellen Kemunto Ratemo who had purchased a portion of the main title from the vendor in the same circumstances as the plaintiff had her portion of the main title transferred to her. The plaintiff submitted that the defendants were estopped from denying the transactions that were entered into by the vendor only as they relate to the plaintiff. The plaintiff cited the text, Law of Estoppel and Res-Judicata, 4<sup>th</sup> Edition by M.Monir and A.C Moitra and submitted that the defendants could not be allowed to approbate and reprobate or in other words, to blow hot and blow cold by on the one hand approving the sale of a portion of the main title to Hellen Kemunto Ratemo and on the other hand denying the sale of the suit property to the plaintiff.

With regard to the defendants' contention that the vendor was a trustee of the suit property and as such she required consent of the court pursuant to section 37 of the Law of Succession Act, Chapter 160 Laws of Kenya to dispose of the same, the plaintiff submitted that the requirement for a consent is permissive and that in this case, the sale was necessary for the maintenance of the vendor who held a life interest in the property. The plaintiff averred further that such consent can be sought and given by the court at any time before or after the agreement for sale. The plaintiff urged the court to grant the consent as part of prayer 1 of the plaint. The plaintiff cited the cases of In Re Estate of Francis Waita Mbaki (deceased) [2018] eKLR and In Re Estate of Nason Musembi Musomba (deceased) [2018] eKLR in support of this submission. The plaintiff submitted that the defendants had failed to prove allegations of fraud on which their counter-claim was based. The plaintiff submitted that she had proved her claim against the defendants to the required standard and that to hold otherwise would be to confer upon the estate of the deceased unjust riches.

In their submissions in reply, the defendants submitted that there was no valid agreement for sale between the estate of the deceased, James Nyarangi Onyiego and the plaintiff in respect of the suit property. The defendants submitted that the purported agreement between the plaintiff and the vendor did not satisfy the requirements of section 3 (3) of the Law of Contract Act, Chapter 23 Laws of Kenya. The defendants submitted that in her pleadings, the plaintiff based her claim on an agreement for sale dated 23<sup>rd</sup> September, 2004 between her and the vendor. The defendants averred that the purported agreement was not produced in evidence. The defendants averred that in the absence of such agreement, the plaintiff's claim is not maintainable.

The defendants submitted further that the vendor had no capacity to sell the suit property to the plaintiff. The defendants submitted that it was plain in the certificate of confirmation of grant of letters of administration dated 12<sup>th</sup> July, 1999 on the strength of which the suit property was sold to the plaintiff by the vendor that the vendor held the main title in trust for the children of the deceased. The defendants submitted that under section 37 of the Law of Succession Act, the vendor who only had a life interest in the suit property had no capacity to sell the same without the consent of the court. The defendants submitted that no evidence was placed before the court in proof of the fact that the sale of the suit property to the plaintiff was sanctioned by the court. The defendants submitted that in the absence of such consent, the sale was null, void and unenforceable in law. The defendants averred further that the vendor was not the sole administrator of the estate of the deceased as she had the 2<sup>nd</sup> defendant as her co-administrator. The defendants submitted that any agreement for sale that was executed by the vendor solely without the involvement of the 2<sup>nd</sup> defendant was a nullity and was not capable of disposing of an interest in the estate of the deceased.

The defendants submitted further that the plaintiff did not prove that she paid the purchase price for the suit property. The defendants submitted that there was no evidence that payments allegedly made by cheque to the vendor were received by the vendor. The defendants averred further that in the absence of an agreement for sale, it was also not possible to ascertain what the payments if any were intended for. The defendants submitted that the agreement that was produced by the plaintiff dated 2007 that did not also comply with section 3(3) of the Law of Contract Act indicated that the plaintiff had paid Kshs. 2,200,000/- by cheque to the vendor. The defendants submitted that the alleged cheque was not produced by the plaintiff in evidence and was not even mentioned by her in her testimony. The defendants submitted that the purported payments that were made by the plaintiff in 2004 were not supported by any agreement while the agreement for sale dated 2007 was not supported by any consideration. The defendants averred further that even if any payment was made as alleged, the same was made to the personal account of the vendor and not to the estate of the deceased. The defendants averred that the plaintiff did not demonstrate payment of consideration that would entitle her to the reliefs sought.

In support of their submissions on sections 35 and 37 of the Law of Succession Act, the defendants cited In the matter of the estate of Rosemary Mukwanjeru Kiria [2016] eKLR, In the matter of the estate of PSK(deceased) [2017] eKLR, and Irene Wanjiru Mithamo v Simon Kuyiki Karungaru & Another[2015] eKLR. As concerns non-compliance with section 3(3) of the Law of Contract Act, the defendants cited Omar Guled v Sahal Alaso & Another[2018]eKLR and Joram Yator v Titus Kangogo[2018]eKLR.

The defendants submitted that the will of the vendor which the plaintiff also relied on to prove her purchase of the suit property had not been proved by the executors thereof. The defendants submitted further that the 1<sup>st</sup> defendant was always out of the country in the United States of America and as such could not have consented to the sale of the suit property to the plaintiff. On the plaintiff's contention that the defendants were approving other transactions by the vendor and disputing others, the defendants submitted that there was no evidence placed before the court by the plaintiff showing the similarities between her agreement with the vendor and the agreements that the vendor entered into with the third parties that she had mentioned. The defendants submitted further that the plaintiff's allegation that the sale of the suit property by the vendor was necessary for her maintenance was not supported by any evidence. The defendants submitted further that the provisions of section 37 of the Law of Succession Act was mandatory and not permissive as submitted by the plaintiff and that the consent required under

section 37 of the Law of Succession Act cannot be given posthumously as urged by the plaintiff. The defendants submitted in conclusion that the evidence on record shows that the plaintiff is a trespasser on the suit property. The defendants urged the court to dismiss the plaintiff's suit and to enter judgment in their favour as prayed in the counter-claim.

In her further submission dated 19<sup>th</sup> November, 2019, the plaintiff responded to some of the issues of law raised in the defendants' submissions. On the defendants' contention that the agreement between the plaintiff and the vendor did not comply with the provisions of section 3(3) of the Law of Contract Act, the plaintiff submitted that although the agreement did not comply with section 3(3) of the Law of Contract Act, from the plaintiff's dealings with the vendor, a constructive trust was created in her favour against the estate of the deceased which trust was legally enforceable against the estate.

On the issue of non-compliance with the provisions of sections 35 and 37 of the Law of Succession Act, the plaintiff admitted that the vendor did not obtain consent of the court to sell the suit property to the plaintiff. The plaintiff submitted however that that omission did not defeat the constructive trust that was created in favour of the plaintiff as aforesaid which bound the estate. In support of this submission, the plaintiff cited William Kipsoi Sigei v Kipkoech Arusei and Another [2009] eKLR. The plaintiff urged the court to find that although the transaction between the plaintiff and the vendor was not sanctioned by the court, a constructive trust was created in favour of the plaintiff against the deceased's estate which is enforceable against the defendants. The plaintiff pleaded with the court to grant the reliefs sought in the interest of substantive justice in accordance with Article 10(2) of the Constitution.

I have considered the pleadings, the evidence tendered by the parties in proof of their respective cases and the submissions of counsels. The parties did not file in court a statement of agreed issues. From the pleadings, the following in my view are the issues arising for determination in this suit and counter-claim;

1. Whether the plaintiff entered into a valid agreement for sale of L.R No. 13874/9, I.R 169847("suit property") with Margaret Nyarangi ("vendor") who was one of the administrators of the estate of James Onyiego Nyarangi ("deceased").
2. Whether the defendants have breached the said agreement if any.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the plaintiff is a trespasser on the suit property.
5. Whether the defendants are entitled to the reliefs sought in the counter-claim.
6. Who is liable for the costs of the suit?

Whether the plaintiff entered into a valid agreement for sale of L.R No. 13874/9, I.R 169847("suit property") with Margaret Nyarangi ("vendor") who was one of the administrators of the estate of James Onyiego Nyarangi ("deceased").

The vendor was a co-administrator of the estate of the deceased. When the grant of letters of administration in respect of the estate of the deceased was confirmed on 12<sup>th</sup> July, 1999, it was ordered that all the properties forming part of the estate of the deceased were to be registered in the name of the vendor to hold in trust for the children of the deceased. The main title a portion of which was sold to the plaintiff was part of the estate of the deceased and was registered in the name of the vendor to hold in trust for the children as aforesaid. Under section 35(1)(b) of the Law of Succession Act, the vendor had a life interest only in the main title. Under the proviso to section 37 of the Law of Succession Act, the vendor could only sell the main title or portion thereof with the consent of the Court. The agreement for sale between the vendor and the plaintiff was for the disposal of an interest in land. In the circumstances, the same had to comply with section 3(3) of the Law of Contract Act.

From the evidence that was adduced by the plaintiff, I am satisfied that the plaintiff entered into some form of agreement with the vendor for the purchase of the suit property and that the plaintiff paid a substantial part of the purchase price to the vendor. I am however in agreement with the defendants that the said agreement did not comply with the provisions of the law. It was admitted by the plaintiff in her submissions that the vendor did not obtain consent of the court before selling the suit property to her as required under section 37 of the Law of Succession Act aforesaid. I am in agreement with the defendants that failure to comply with section 37 of the Law of Succession Act rendered the agreement between the plaintiff and the vendor illegal and unenforceable.

With regard to compliance with section 3(3) of the Law of Contract Act, again, there was no dispute that the purported agreement that was entered into between the plaintiff and the vendor did not measure up to the requirements of this section. In her pleadings, the plaintiff referred to an agreement for sale dated 23<sup>rd</sup> September, 2004 while in her testimony, the plaintiff referred to the said agreement of 2004 and another agreement of 2007. In her evidence in cross-examination, the plaintiff stated that the 2004 agreement was not reduced into writing. The plaintiff stated that in 2004, the vendor just gave her a piece of paper in which she stated that she was selling land to her. The plaintiff stated that the piece of paper got lost when she was changing residences. With regard to the agreement dated 2007, she stated that the same was prepared to enable her have her building plans approved and electricity installed in the suit property. The signature of the vendor in the agreement of 2007 was not witnessed. It is clear from the foregoing that neither the agreement of 2004 nor that of 2007 complied with section 3(3) of the Law of Contract Act. Failure to comply with section 3(3) of the Law of Contract Act does not render a contract void. However, it bars any suit being brought to court for the enforcement of such contract. The plaintiff's suit as pleaded is seeking to enforce the contract that she entered into with the vendor on 23<sup>rd</sup> September, 2004. Since the said contract which is sought to be enforced through this suit did not comply with section 3(3) of the Contract Act, the suit is not maintainable.

From the forgoing, it is my finding that the purported agreements for sale that were entered into between the plaintiff and the vendor violated the provisions of the Law of Contract Act and the Law of Succession Act and as such the agreements were not only void but also

unenforceable by a suit. The plaintiff had urged me to find that due to the nature of her dealings with the vendor in relation to the suit property, a constructive trust was created in her favour against the defendants which should be satisfied by the transfer of the suit property to her notwithstanding the invalidity and unenforceability of the agreement for sale between the parties.

I have considered this plea and the authorities cited in support thereof. I am unable to accede to it for two reasons. First, the plaintiff's suit was brought for the enforcement of an agreement for sale dated 23<sup>rd</sup> September, 2004. In her plaint, the reliefs sought are a declaration that the plaintiff was a lawful purchaser of the disputed property and an order for specific performance of the said agreement for sale. The plaintiff neither pleaded constructive trust nor sought enforcement of a trust. This court cannot convert a claim for an enforcement of an agreement for sale to one for an enforcement of a trust. In Hemed Kassim Hemed v Fatuma Sheikh Abdalla [2014] eKLR, the court stated as follows:

**"4. The Court of Appeal in the case INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER – Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-**

**"... the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998] MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-**

**'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....**

**In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'**

..... Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-

**"ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;**

**'.... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'**

The proviso to section 3(3) of the Law of Contract Act save the creation of resulting, implied or constructive trust from the ambit of the section. However, such trust must be pleaded. The plaintiff did not plead trust. The issue of trust was raised for the first time in the plaintiff's further submissions. The defendants did not even have the opportunity to respond to the same. Since the issue of constructive trust was not pleaded, the court cannot determine the same in these proceedings. The court cannot consider whether in the circumstances of this case a constructive trust can be said to have been created in favour of the plaintiff which is enforceable against the defendants.

Secondly, I am of the view that trust cannot be raised to override the express provisions of the law. Unlike section 6 of the Land Control Act that was considered by the Court of Appeal in the case of William Kipsoi Sigei v Kipkoech Arusei and Another (supra), which is to some extent procedural, section 37 of the Law of Succession Act is substantive law. The doctrine of constructive trust is a creature of equity. It is a principle of equity that equity follows the law. In my view, equity cannot be called upon to aid in violation of substantive law. For the foregoing reasons, I reject the plaintiff's constructive trust and estoppel arguments.

Whether the defendants have breached the said agreement for sale if any.

I have held above that the agreement that the plaintiff entered into with the vendor was void for failure to comply with the law. A void agreement cannot be enforced. It follows therefore that the defendants did not breach the said agreement when they failed or refused to complete the same by transferring the suit property to the plaintiff.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

I have set out at the beginning of this judgment the reliefs sought by the plaintiff in the plaint. Having held that the agreement for sale that the plaintiff entered into with the vendor was void, the plaintiff is not entitled to a declaration that she is a lawful purchaser and beneficial owner of the suit property. The plaintiff is also not entitled to an order for specific performance. Section 3(3) of the Law of Contract Act bars the court from enforcing an agreement for sale of land drawn in violation of the section. Furthermore, a void agreement for sale cannot not be enforced through an order of specific performance. In Chitty on Contract, 30<sup>th</sup> edition, volume 1 at paragraph 27-003 the authors have stated

as follows:

**“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”**

Whether the plaintiff is a trespasser on the disputed property.

The 1<sup>st</sup> defendant’s counter-claim against the plaintiff is based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page, 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. It is not disputed that the defendants are now the registered owners of the suit property. It follows therefore that although they are not in possession of the property, they are entitled to possession. The question that the court needs to answer is whether the plaintiff who has developed the suit property partially and who is in possession thereof has any justifiable cause for continuing to be in possession of the property. I am not in agreement with the defendants that the plaintiff entered the suit property forcefully. I am satisfied from the material on record that the plaintiff was given possession of the suit property by the vendor. The court having held that the agreement for sale under which the plaintiff was given possession of the suit property is null and void and unenforceable, I am of the view that the continued occupation of the suit property by the plaintiff is not justified. The only remedy available to the plaintiff is to recover from the defendants the sum of Kshs. 2, 240,000/- that she paid to the vendor under the void contract. I am satisfied from the evidence on record that the plaintiff paid the said amount to the vendor for the suit property and that the payment was made to the vendor as administrator of the estate of the deceased. I am not in agreement with the defendants that the plaintiff should pursue the recovery of the said amount from the estate of the vendor. In the circumstances, it is my finding that the plaintiff’s continued occupation of the suit property amounts to trespass.

Whether the defendants are entitled to the reliefs sought in the counter-claim.

From what I have held above, I am satisfied that the defendants have proved their claim against the plaintiff to the required standard. The defendants are entitled to the injunctive reliefs sought in prayers (a) and (b) of the counter-claim. To do substantive justice in the matter and to bring the dispute between the parties to a close, the said injunctive reliefs shall issue subject to the defendants refunding to the plaintiff the sum of Kshs. 2,240,000/- that the plaintiff paid to the vendor under the agreement for sale that the court has declared to be void. Such order is appropriate to ensure that the defendants are not unjustly enriched. The defendants had also sought damages for trespass. This claim has not been proved. As I have held above, the plaintiff did not enter the suit property forcefully. The plaintiff took possession with the permission of the vendor who at the material time was registered as the owner of the suit property and who believed that she could sell the same. Prior to the filing of this suit, no demand had been made upon the plaintiff to vacate the property. I am of the view that in the circumstances, there is no basis for the damages sought by the defendants.

Who is liable for the costs of the suit?

I am of the view that in the circumstances of this case each party should bear its own costs of the suit and the counter-claim. I would have condemned the plaintiff to pay the costs having lost the suit. I have noted however that the plaintiff bought the suit property in good faith and that she cannot be blamed for the findings that the court has arrived at in this matter. I have also noted that the plaintiff is bound to suffer loss running into millions of shillings as a result of this judgment having regard to the current market value of the suit property that she has partially developed and which she will have to vacate.

In conclusion, I hereby enter judgment for the defendants on the following terms:

1. The plaintiff’s suit is dismissed.
2. The plaintiff shall vacate and handover to the defendants, possession of all that parcel of land known as L.R No. 13874/9, I.R 169847 within 150 days from the date hereof.
3. The plaintiff shall remove all the structures that she has erected on the suit property within the same period of 150 days from the date hereof failure to which the defendants shall be at liberty to either remove the same or to take possession of the property together with the same.
4. The defendants shall refund to the plaintiff the sum of Kshs. 2,240,000/- that was paid by the plaintiff to Margaret Nyarangi for L.R No. 13874/9, I.R 169847 within 90 days from the date hereof.
5. Each party shall bear its own costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 5<sup>th</sup> Day of May 2020**

**S. OKONG’O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

Mr. Mungla for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant