



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 275 OF 2017

(FORMERLY NAIROBI HCCC NO. 162 OF 2005)

PETER NYAGA KAIRU.....PLAINTIFF

VERSUS

ESTHER WANJIKU NJAU.....DEFENDANT

LUCY NJOKI NJAU.....1ST THIRD PARTY

JUJA SUPERHIGHWAY WELFARE GROUP.....2ND THIRD PARTY

DINARA VESTURE LIMITED.....3RD THIRD PARTY

SCHOLASTICA WAMBUI KIBATHI.....4TH THIRD PARTY

PAUL KAMAU KIBATHI.....5TH THIRD PARTY

BALCON HOUSING CO. LIMITED.....6TH THIRD PARTY

JUDGMENT

Background & Identity of the parties

1. The brief history of this case is that Plaintiff **Peter Nyaga Kairu** is a brother to **Joseph Njau Kairu** (Deceased-died in 1999). **Joseph Njau Kairu** was the husband to the Defendant **Esther Wanjiku Njau** and the 1st third party, **Lucy Njoki Njau**. It is alleged that one **Mary Wahito** who testified as **P.W.3** was also a wife of **Joseph Njau Kairu**. For ease of reference, I will strive to identify the individual persons by one name, i.e **Nyaga, Njau, Wahito, Wanjiku, Njoki etc.**

2. At the heart of the dispute are expansive parcels of Land known as No. **4148/2012** which measures **47.5 acres** or there about and parcel No. **4148/13** which at some point **WAS** measuring **157 acres** or there about. These parcels of Land were originally owned by one **Hannah Wanjiru (P.W.3)**, but they were eventually bought by **Njau**. Parcel no. **4148/13** was sub divided to yield Parcel nos. **4148/16 and 4148/17**. By the time the suit was being filed, the suit parcels had been further subdivided to yield many other parcels which were sold to other parties (**Known as third parties**).

3. The area of the suit land is what is generally known as **Kenyatta road**, opposite the road leading to **Gatundu** from **Thika super Highway**. The portions of land taken by third parties were sold in form of 18 parcels running from parcel no's **4148/494** all the way up to no.**4148/511**, which parcels appear to be subdivisions from NO. **4148/16**. The area is developed and is occupied by many people who bought plots from the third parties.

4. Apparently **Njau** had taken a Loan with **Agricultural Finance Corporation (AFC)** whereby he had used parcel **No. 4148/12** as the security. It is alleged by **Nyaga** that the Loan from **AFC** was used to purchase the parcel **No. 4148/13**. **Joseph Njau** died before he could finalize the payment of the Loan and **Nyaga** paid the remaining balance. **Nyaga** claims that he participated in the acquisition of these properties and therefore his brother **Joseph Njau** held these parcels of Land in Trust for him.

The pleadings

5. The initial claim was filed on **15th February, 2005** whereby **Nyaga** sued **Wanjiku** as an administrator of the estate of **Njau**. **Nyaga**

discovered that the suit parcel **4148/13** had been subdivided into many other parcels necessitating the amendment of the Plaintiff on **5th July, 2005**. Paragraph 8 of this amended Plaintiff captures these smaller parcels namely **4148/494** all the way up to **4148/511**. A further amended Plaintiff was filed on **27th February, 2012** whereby third parties were enjoined in this suit as follows;

- a) *Lucy Njoki Njau 1st third party.*
- b) *Juja Super highway group welfare group 2nd third party.*
- c) *Dinara Venture Ltd 3rd third party.*
- d) *Scholastica Wambui Kibathi 4th third party.*
- e) *Paul Kamau Kibathi 5th third party.*
- f) *Balcon Company Ltd 6th third party.*

6. A statement of Amended Defence was filed on **13th March 2012** for the Defendant. She admits to having obtained the grant in respect of her husbands' estate (**Njau**), but she denies the claim of the plaintiff (her brother in law). The **1st third party**, (**Njoki**) did not file any statement of defence (or rather, I have not seen any in this court file). However, she was represented by an advocate who actively participated in the proceedings during the trial. She appears to be on the same side of the coin with her co-wife, **Wanjiku**.

7. The **2nd third party** **Juja Super highway** filed its statement of defence on **20th March 2012**. They have identified themselves as a welfare group, which is a composition of all the people who bought the suit parcels from the rest of the other third parties that is **Dinara Ventures**, (**3rd third party**), **Scholastica Wambui** (**4th third party**) and **Balcon Housing Company LTD** (**6th third party**).

8. **Dinara Ventures**, the **3rd third party** filed a statement of defence on 27.3.2012. However, they did not participate in the trial.

9. The **4th and 5th third parties** **Scholastica Wambui Kibathi and Paul Kamau Kibathi** are a mother and son team. They filed their joint Statement of Defence on **22nd March, 2012**. They aver that they bought various plots namely **4148/501, 505, 506, 50, 508 and 509** from defendant/**Wanjiku**, and that these plots emanated from parcel no.**4148/16**.

10. **6th third Party** (**Balcon Co. Ltd**) filed their statement of defence on **16th March 2012**. They claim that the parcels they bought from defendant are **4148/494-500**, then **502, 504, and 512** all of which had yielded from parcel **4148/16**.

11. All these parties participated in the proceeding during the trial through their Advocates except the **3rd third party**, **Dinara Ventures**.

The Record/ Conduct of the case

12. The court file is rather bulky which necessitated some house-keeping management, whereby the court retrieved all the pleadings, the statement of the witnesses and documents relied on by the parties which were put in a second file identified as **VOLUME 2**, leaving the rest of the documents and hand written proceedings in file **Volume 1**.

13. The plaintiff availed all the 6 witnesses in his list of 20.5.2015. He also relied on his list of documents dated 20.5.2015 item 1 to 11. Defendant had filed two bundles containing statements of witnesses and documents to be relied on. The first bundle was filed on 14.11.2018 while the other was filed on 20.11.2018. Both were disallowed by the court as they were filed after the scheduled date of hearing. **Wanjiku** was however allowed to testify and to rely on her Replying Affidavit of 9.3.2005 plus the two annexures thereof. **Juja Highway** did not file any list of documents or statements of witnesses. They however relied on the affidavit of **Fredrick Gatathwa Ndungu** filed in court on 12.6.2012. The **4th and 5th third parties**, **Wambui** and her son **Kamau (the Kibathis)**, relied on their list of statement of witnesses filed on 6.12.2017, and their list of documents filed on same date. They appear to have filed another list of witnesses on 15.11. 2018, but I believe, this list must have encountered the same fate which befell defendant. The **6th third party**, **Balcon** did not file any list of statements of witnesses or documents. Instead, like **Juja Highway**, they relied on the Replying affidavit of **Francis Njoroge Munge** filed on 12.6.2012 which has two annexures.

14. As regards the conduct of this case, it emerged that the case was consuming more than its allocated fair share of time during the service week. However, I commend all the advocates for conducting themselves in a manner that embraced case and court management for efficient and effective conduct of the trial. This entailed a strict adherence to timelines as well as compliance with directions given by the court including filing not more than 15 pages of reasonable font submissions. I also appreciate and commend the said advocates for their input in availing resourceful jurisprudence in their submissions.

The Evidence

Plaintiff's case

15. **PW1, PETER NYAGA KAIRU**, gave a detailed account of his case in his recorded statement. In summary he stated that him and his brothers, **Njau** and another one called **Wainaina** used to operate joint motor vehicle business but in 1982, he set up his own motor spare

parts business.

16. In 1984, Nyaga's late brother, *NJAU* wanted to buy a piece of Land at Thika Road and requested him to accompany him to go and meet the broker **Mr. KIMUNDIA GAKUNJU**. They met the broker **Mr. KIMUNDIA GAKUNJU** who showed them the land and told them that the portion which was for sale was **10 Acres** being part of Land Reference **No. 4148/13** owned by **Mrs. WANJIRU (PW3)**. *Njau* Had difficulties paying installments for the said **10 acres** out of land No. **4148/13**. So Nyaga remembers that on a few occasions, his late brother, *Njau* and **Mrs. Wanjiru** would come to his shop and he would give **Wanjiru** the money. Other times, **Nyaga** remembers that **Mrs. Wanjiru** would sometimes go to **Mary Wahito Njau's (PW2)** shop to also collect money to pay the installments for the balance of the purchase price.

17. In **1985**, *Njau* again approached **Nyaga** at the latter's shop and he was with the same broker, **Kimundia Gakunju**, who said that he knew a man called **Stephen Kamithi** who wanted to sell land at Thika Road. *Njau* had informed **Nyaga** that he did not have enough money to buy the land and that is why he thought of telling **Nyaga** to buy it. Later on, the broker called **Nyaga** and informed him that he had arranged a meeting with the owner of the land called **Stephen Kamithi** at his shop. They later met with **Stephen Kamithi, Kimundia Gakunju, Njau, Nyaga** and one of **Mr. Stephen Kamiithi's** employee and they agreed on the terms of the sale. As part of the terms of sale, **Mr. Stephen Kamithi** and **Nyaga** agreed that the land being sold was **42.5 acres** from Land Reference **No. 4148/12** which was **47.5 acres** at a sum of **Kshs. 1,657,500/=**. It was agreed that **Mr. Stephen Kamithi** was to keep the balance of the land being 5 acres. After that meeting **Nyaga** went to his bank and had a bankers cheque for the deposit being **Kshs. 300,000** prepared in the name of **Mr. Stephen Kamithi**. As **Nyaga** was very close to his brother *Njau*, and had a lot of trust and faith in him, he gave him the banker's cheque to take it to **Mr. Stephen Kamithi**, which he did. Later on *Njau* had informed **Nyaga** that as he paid the said bankers cheque to **Mr. Stephen Kamithi** in the presence of the broker, **Mr. Stephen Kamithi** insisted that an agreement be written out and signed to reflect that he was only selling **42.5 acres** of Land Reference **No. 4148/12** whilst the balance of 5 acres was to be his. That is how *Njau* apparently proceeded to sign the agreement on behalf of **Nyaga**. **Nyaga** then paid the balance of the purchase through various installments, sometimes by making direct cash payments to **Mr. Stephen Kamithi** and sometimes by paying the money into the bank account and he therefore took just over a year to complete paying for the said parcel of Land.

18. Much later, *Njau* had informed **Nyaga** that **Mrs. Wanjiru** had offered to sell to him the balance of the land known as Land Reference **No. 4148/13**, and that **Mr. Stephen Kamithi** had also approached him and offered to sell to him the **5 acres** remaining from Land Reference **No. 4148/12**. *Njau* however, did not have money to pay for these parcels of land and he wanted to borrow some money from **Nyaga**. **Nyaga** too did not have enough money. So **Nyaga** told his brother that he could give him the **42.5 acres** of Land Reference **No. 4148/12** he had just bought to use as security. They agreed that since **Mr. Stephen Kamithi** was yet to complete the transfer of the said **42.5 acres** of Land Reference **No. 4148/12** into **Nyaga's** name, the said title could be issued in **NJAU'S** name **ONLY**, to allow him to use the title as security for a loan.

19. **Nyaga** contends that this how his brother *Njau* went to **Agricultural Finance Corporation (AFC)** and applied for a loan with the said title for the said **42.5 acres** of Land Reference **No. 4148/12** which said loan he was granted. The loan that was given by **AFC** to *Njau* went towards payment of part of Land reference Number **4148/13** and the said remaining 5 acres of Land reference **No. 4148/12**.

20. **Nyaga** further testified that around 10 years after Land Reference Number **4148/13** was issued in the name of *Njau*, the latter decided to subdivide the same into two parcels, 10 acres in the name of **Jasho Motor Spares** and the remaining acres into his name (*Njau*s).

21. Around **1998 to 1999** *Njau's* health deteriorated and he was unable to service the loan he had with **AFC**. He then passed on. Defendant, **Wanjiku** had apparently called **Nyaga** informing him that **AFC** was making demands for the loan arrears and the land title held as security could be sold. **Nyaga** agreed to pay the loan so long as the title for Land Reference **No. 4148/12** was returned back to him.

22. **Nyaga** proceeded to make the first payment of **Kshs. 124,000/=** to clear the loan arrears and then instructed his bankers to do a monthly standing order of **Kshs.20,000/=** to *Njau's* loan account at **AFC**, which was done. The monthly standing order of **Kshs. 20,000/=** continued to be paid by his bankers until **AFC** informed him that he had actually over paid, and was refunded the said overpayment. He was also informed that **Wanjiku** had already collected the title and discharge documents for Land Reference **No. 4148/12**.

23. In his evidence in chief, plaintiff stated that he did not want to oppress his brother's wife, that is why he was claiming to get parcel no. **4148/12**, but for parcel **4148/13**, he can get what the court deems fit or land which is equivalent to what he had paid.

24. Plaintiff produced the documents in his list of 20.5.2015 item 1-11 as his exhibits 1-11.

25. While being cross examined by **Mr. Irungu**, counsel for the **Balcon, Nyaga** identified the title documents availed by the 4th and 5th third parties as titles for parcels no.s **4148/16** and **17**, although he said the documents were not very legible. He however stated that *Njau* had not sub divided the parcel of land no. **4148/13** during his life time.

26. **P.W.2 MARY WAHITO NJAU** introduced herself as a widow of **Joseph Njau Kairu**. Her evidence is more or less like that of **Nyaga**. In particular, she averred that **Nyaga** and *Njau* were always very close, that they did everything together and even worked closely together as they were running the same type of motor spares business. She knows that **Mr. Stephen Kamithi** sold 42.5 acres of his land no. **4148/12** to **Nyaga**. She remembers that herself and her husband *Njau* would go to **Nyaga's** shop to collect money to take to **Kamithi** in payment of the purchase price. She knows that **Nyaga** allowed her husband, *Njau* to have and use title no. **4148/12** as security to get a loan from **AFC** in order to complete payment for land **no.4148/13**. She is aware that 10 years after *Njau* became the registered owner of parcel **4148/13**, he proceeded to sub divide the same into two, one parcel with 10 acres was registered in the name of **Jasho motors**, the other 157 acres was registered in *Njau's* name. When her husband died in 1999, it is **Nyaga** who paid the **AFC** loan arrears, which amounted to over sh.900,000.

27. **P.W.3 HANNAH WANJIRU KAMAU** states she was the original owner of the combination of Land Reference Number **No. 4148/12** and **4148/13 (the entire suit parcels)**. Around **1980/1981**, she sold **47¹/₂ acres** of land to **Mr. Stephen Kamithi** in order to pay off her loan with **AFC**. This necessitated the subdivision of the big chunk of land into two, where by **Kamithi** got parcel **no.4248/12** (47.5 acres). The balance of the land became parcel **4148/13**. Much later she found that **Kamithi** had sold Land reference Number **No. 4148/12** to **Nyaga Kairu**.

Later she agreed to sell to **Njau Kairu** 10 acres from part of Land Reference Number **4148/13**. However, **Njau Kairu** had difficulties in paying for it, so he took her to his brother **Nyaga Kairu** who had a shop and told her that whenever she needed money she could just go to **Nyaga's** shop and collect money from him. Sometimes **Wanjiru** and **Njau** would go to **Wahito Njau's** shop to also collect money. Later on she agreed to sell the balance of parcel **4148/13** to **Njau**. Apparently, **Njau** and **Nyaga** went to her house where **Nyaga** said he had agreed to give his title to **Njau** to enable the latter to purchase **4148/13**. She avers that **Njau** did clear all the payments in respect of parcel **4148/13** (for both the 10 acres and the balance).

28. **P.W.4 MR. JOSEPH NGORU KIMUHU** stated that he used to work with **Agricultural Finance Corporation (AFC)** in the Loans Department. He knows that the late **Joseph Njau Kairu** applied for a loan with AFC and used Land Reference Number **4148/12** as security. He knows that Land Reference Number **4148/12** was actually bought by **Nyaga Kairu** from one **Stephen Kamiithi** through his own means and evidence of such payments made were part of the records in the file at AFC. He avers that even though Land Reference Number **4148/12** was bought and paid for by **Peter Nyaga Kairu**, it was not registered in his name but was registered in the name of his late brother to enable **Njau** to take a loan with AFC and use it as security.

29. When **Njau** passed on, it is **Nyaga** who made a standing order to clear the loan balance. This was after **Wanjiku** and **Nyaga** had gone to the AFC office to discuss how the arrears could be cleared so that **Nyaga Kairu** could get his title back. He avers that the loan was fully paid by **Nyaga**.

30. **P.W.5 GEORGE MURURI NGUGI** stated that in **1984**, he was working at **Japex Motor Spare** owned by **Nyaga Kairu** as a Sales person/Cashier. He knows that **Mr. Stephen Kamithi** would sometimes come to the shop with **Mr. Njau Kairu**, to collect money from **Mr. Peter Nyaga Kairu**. He doesn't know why money was being given to **Mr. Stephen Kamithi**.

31. **P.W. 6 ROSE WANJIRU KAIRU** is a sister of **Nyaga** and late **Njau Kairu**. She avers that until the death of **Njau**, these two brothers were always very close, did everything together and even worked closely together as they were running the same type of motor spares business. Her evidence is also more or less similar to that of **Nyaga** and **Wahito**.

Defence case

32. **ESTHER WANJIKU NJAU** identified herself as a widow of the late **Joseph Njau Kairu**, who died in the year **1999**. She avers that her late husband **Joseph Njau Kairu** solely bought the Land Reference Number **L.R 4148/12** and **L.R 4148/13** and the same was registered under his name from his own savings.

33. When **Njau** passed on, the **Agricultural Finance Corporation** wrote to her and her co-wife (**Njoki**) a condolence letter in which they gave them an account of the outstanding loan that **Njau** had with the Corporation and the mode of payment. The letter did not mention the Plaintiff. Deceased, **Njau** had paid off the loan advanced to him by the **Agricultural Finance Corporation** to the tune of **Kenya Shillings Nine hundred and seventy three thousand, eight hundred (Kshs. 973,800/=)** and had an outstanding balance of **Kenya shillings Eight Hundred and thirty Six Thousand, two Hundred (Kshs. 836,200/=)**. **Nyaga** then agreed to clear the loan on the basis of family ties and he was not claiming for any land.

34. In a sudden turn of events, later on when **Wanjiku** went to discuss with **Nyaga** on the modalities of repaying his money, she was shocked to hear him (**Nyaga**) claim half of Land Reference Number **L.R NO. 4148/12** i.e. **23.75 acres**.

35. **Wanjiku** avers that Land reference Number **4148/13** had been subdivided by **Njau** during his life time to yield **L.R 4148/16** and **L.R 4148/17**. Therefore, there was no such property known as **4148/13** as part of the estate of deceased (**Njau**) during the succession proceedings. **Wanjiku** further stated that these properties were subsequently divided into **17** units as follows: **4148/494, 4146/495, 4148/496, 4148/497, 4148/498, 4148/499, 4148/500, 4841/501, 4148/502, 4148/503, 4148/504, 4148/505, 4148/506, 4148/507, 4148/508, 4148/509, 4148/510, 4148/511**. These parcels were then sold to various third parties who were bona-fide purchasers for value. **Wanjiku** avers that Plaintiff cannot stake a claim over the Deceased's estate and therefore the entire suit should be dismissed with costs.

Case for 1st third party (Njoki)

36. No evidence was tendered for this party. She opted to associate herself with the evidence of defendant (**Wanjiku**).

Case for 2nd third party (Juja Super Highway Welfare group)

37. **FREDRICK GATATHWA NDUNG'U** testified as chairman of the aforementioned group. He avers that their group consists of individual members who bought plots of land for various reasons, particularly to build homes. Most of their members have already built such homes. The members never dealt with the Plaintiff and the Defendant in buying the property. Instead, they bought the suit plots from 3rd, 4th and 6th third parties. About 400 members bought parcels from **Dinara ventures**, then 600 persons bought from **Scholastica Wambui (4th third party)**, while about 800 persons bought from **Balcon**. According to **Fredrick Gathatwa**, the suit land is developed with both commercial and residential buildings, and that in terms of investments, the land is now worth about **4 billion Kenyan shillings**.

38. The purchasing of land begun from the year **2005** to the year **2011** as none of the parties had any knowledge of any impediment on the land. There was no caution, restriction or caveat lodged in any Land registry in the country to inform them that there was a dispute. There were no developments on the land save a coffee mill which was near Theta River but there were no coffee bushes. That to the best of their knowledge, the property was fit to be alienated and to be subdivided for sale by the various Land Selling Companies (the 3rd, 4th and 6th Third parties here in). **Juja Super Highway Welfare group** members contend that they are bona fide purchasers for value.

Case for 4TH and 5th THIRD PARTY

39. This is the Mother and son team of the **Kibathis. Wambui** who is the **4th Third Party** relied on her statement filed on 6.12.2017 as her evidence. She also produced the documents in her list of 6.12.2017 item 1-4 as their exhibit 1-4 respectively. **Wambui** stated that **Nyaga** had not proved that there was actual or constructive trust and that he is clearly guilty of laches and indolence. She also states that Title **No. L.R 4148/13** was subdivided into **L.R 4148/16** and **4148/17** and new titles issued in the year 1991 long before the death of Defendant's husband clearly showing that no consultations were made to the Plaintiff.

40. **Wambui** stated that they entered into a sale agreement with **Wanjiku** and **Njoki** for the sale of 35 Acres out of land no. **4148/16**. That subsequent to the sale agreement mentioned above, the 4th and 5th Third parties paid the entire consideration and were given all the completion documents by the defendant. Further and after the payment due to the defendant was made, the 4th and 5th third parties proceeded to have title No. **L.R 4148/501, 4148/505, 4148/506, 4148/507, 4148/508** and **4148/509** in the names of the 4th third party. The 4th and 5th third parties aver that the titles mentioned above were excised from L.R. No. **4148/16** and not L.R No. **4148/12** or **4148/13**. The 4th and 5th third parties aver that subsequent to the sale agreement for the purchase of the land, they caused to be subdivided into various plots which plots have since been sold to other 3rd parties. **Wambui** made reference to her exhibit one, a document also availed by **Balcon**, which is the title deed for parcel no. **4148/16** showing how she became registered owner of this land in year 2008 (though she bought the land in 2003). She started selling the land in 2004 after dividing it into various plots.

41. The **Kibathis** contend that **Njau** (deceased) passed away in the year **1999** and the Plaintiff filed this case **six (6) years** later in the year **2005**, which clearly indicates that this case is an afterthought. That if at all a trust relationship existed between the Plaintiff and the Deceased, the Plaintiff would have filed this case within reasonable time and not after **six (6) years** in order to narrow down the issues of trust he is raising. That further, if the Deceased had any trust relationship with the Plaintiff, he would have consulted the Plaintiff before subdividing Plot No. **L.R. 4148/13** into **L.R. 4148/16** and **L.R. 4148/17**. That it is obviously very odd that plot No. **L.R. 4148/13** was subdivided in **1991** by the Deceased yet the Plaintiff doesn't seem to have been aware of this even at the time of death of his brother **8 years after** in **1999**, despite the claims of very close trust relationship. That it is quite odd that the Plaintiff who obviously seemed learned and well informed would have failed to do an agreement to show the trust relationship and wait for nineteen (**19**) **years** before confirming the fate of his share after purchasing the property in **1986**.

Case for the 6th third party

42. **FRANCIS NJOROGE MUNGE** is the one who testified for and on behalf of this party. He relied on his Replying affidavit filed on 12.6.2012 which has three annexures which he produced as exhibits. He states that he is the General Manager of the **6th third party**. In the year 2004, their company bought from **Wanjiku** and **Njoki** about 51 acres amounting to the following parcels of land; **L.R No.4148/494-500, 4148/502, 504** and **512**, which were sub divisions emanating from **L.R. No. 4148/16**. They then further sub divided the parcels and sold them to members of the public including **2nd third parties**. The land they bought had a clean title with no restrictions.

43. **Balcon** contends that the Title to **L.R. No. 4148/13** under which the Plaintiff purport to be litigating upon got extinguished during the lifetime of his brother **Njau**. It is also averred that **Nyaga's** claim is time barred by the statute.

44. During his testimony in Court **Njoro** Stated that he learnt that there was a Court Order stopping the sale of the suit Land through a newspaper Advertisement in year **2012**. This prompted the **6th third party** to apply to be enjoined in the suit.

45. **Njoro** further stated that the area has a commercial section and a residential section and it is fully developed.

Submissions

Plaintiff's submissions

46. Plaintiff framed the issues for determination as follows;

a) Whether Deceased, **Joseph Njau Kairu** held part of the suit properties, **L.R NO 4148/12** and **L.R NO. 41448/13** in trust for the Plaintiff?

b) Whether Defendant and 1st Third Party passed good title to the 2nd to 6th Third parties

Whether Deceased, Joseph Njau Kairu held part of the suit properties, L.R NO 4148/12 and L.R NO. 41448/13 in trust for the Plaintiff?

Parcel no.4148/12

47. It has been submitted that the Plaintiff paid the purchase price for **L.R No 4148/12** to **Stephen Kamithi**, that the Plaintiff has exhibited bank leafs for bankers cheques issued in favor of **Stephen Kamithi** and that there is a sale agreement to confirm how this land was bought. At the time of the sale agreement, an initial sum of Kshs.300,000 had already been paid by way of Banker's cheque from Kenya Commercial Bank, River Road Branch, Nairobi, which sum was acknowledged by the Plaintiff and **Joseph Njau Kairu** on the one hand, and the Vendor of the property, on the other hand.

48. Reference has been made in Paragraph 2 of the sale agreement which allegedly states that **Stephen Kamithi** had already received Kshs.300,000 from both **Joseph Njau Kairu** and **Peter Nyaga Kairu**. At the very least therefore, the Plaintiff, had already contributed Kshs.150,000 as at the execution of the sale agreement. Going by the purchase price of Ksh.39,000 per acre indicated in the said sale agreement, this already amounts to 3 acres out of **L.R 4148/12**.

Parcel no.4148/13

49. With reference to **L.R No. 4148/13** the court has been urged to find that, had there not been in existence a trust relationship between **Joseph Njau Kairu** and the Plaintiff, the plaintiff would not have undertaken to make payments for the loan after the demise of his brother based only on request by the Defendant. Even the very fact that the Defendant approached the plaintiff and not any other family member goes to show that the Defendant was well aware of the relationship between her late husband and the plaintiff.

50. It is further submitted that the amount of **Kshs. 1,024,000** paid by the plaintiff sometime in 2002 is a very substantial amount for it to be paid under any other circumstances other than the existence of a trust relationship. From the sale agreement produced as an exhibit by the plaintiff, the market value at the time of purchase of **L.R No 4148/12** was Kshs.39,000 per acre. Thus, the plaintiff effectively paid for approximately 27 acres of the L.R No **4148/13** after the demise of his brother Joseph Njau Kairu.

51. In respect of both parcel no **4148/12** and **4148/13**, the court has been urged to find that plaintiff and his brother Njau had a very close relationship as is evident from the evidence of plaintiff's witnesses.

52. The court has also been invited to note that at no point during the life of the Plaintiff's deceased brother, did the latter sell any of the suit properties, even after it emerged that he was having financial difficulties repaying the loan. If indeed the property was not held by him in trust for the Plaintiff, he would have sold even part of the **L.R 4148/13** to clear the loan. At the time of his demise, **Joseph Njau Kairu** was already in arrears of Kshs.124,000.

53. Plaintiff has made reference to the **Black's Law Dictionary, 9th Edition** where trust is defined as;

"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

54. Reference has also been made to the **Trustee Act**, Chapter 167 Laws of Kenya, where the expressions **"trust"** and **"trustee"** extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...". **The provisions of section 28 of the Registration of titles Act (Repealed) and section 25 of the Land registration act** have also been relied on.

55. Plaintiff has proffered the following citations in support of this trust relationship;

1) **Dyer vs Dyer [1788] Cox Eq at 93** where it was stated as follows:-

....."The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor.

2). **Twalib Halayan Twalib Hayata & Another vs. Said Saggas Ahmed Al Hady & Others**[2015] eKLR where the court observed that:-

'A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.....

... Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial"

3) **Rose Naswa Masinde vs. Lillian Nekesa Simiyu Mukopi, Eldoret ELC NO. 985 OF 2012**, where the court found thus:-

"...as mentioned earlier, the defendant did not in any way demonstrate that she contributed a cent towards the purchase of the suit land. I am inclined to believe the version of the plaintiff that the suit land was to be held by the defendant on the understanding that she will later transfer the same to her sister in law..."

4) **Halsbury's Laws of England 4th Edn, vol 20, Sweet & Maxwell p. 24**);

"Where a person buys property and pays the purchase money, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child nor wife, prima facie, there is no gift, but a resulting trust for the person paying the money".

56. Plaintiff concludes this point by stating that he has demonstrated that he paid the purchase for L.R NO. 4148/12 and that his claim for half of L.R No.4148/13 is clearly supported by uncontroverted evidence.

Whether Defendant and 1st Third Party passed good title to the 2nd to 6th Third parties?

57. It has been submitted that having found that the Defendant and 1st third party held the suit properties in trust for the plaintiff, then Defendant and 1st third party did not hold good title at the point of sale of subdivisions of **L.R 4148/13** to the named third parties.

58. It is further submitted that the sale of land to **Juja Super Highway** began from the year 2005 to the year 2011, yet there was a court order in 2005, and another in 2007, prohibiting any sale and/or transfer of the suit properties pending the determination of this suit.

59. The 3rd and 4th third parties also confirmed that the transfers to them of the parcels they bought were done on 24th July 2008.

60. The 6th third party has also given evidence that after purchasing the suit property, they are yet to be issued with titles. No evidence has been adduced to demonstrate evidence of sale and transfer of title in regard to the properties allegedly purchased by the 6th third party.

61. The court has been urged to question the conduct of the Defendant and the 1st Third party in disposing the suit properties while they were well aware of the existence of the said court orders. To this end, the court has been urged to apply the doctrine of ***lis pendens*** to this case. Reference has been made to The ***Black's Law Dictionary, 9th Edition***, which defines ***lis pendens*** as the jurisdiction, power or control acquired by a court over property while a legal action is pending. ***Lis pendens*** is a common law principle which was incorporated under section 52 of the **repealed Transfer of Property Act**, which provided that:-

“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

62. Other citations proffered by plaintiff on this point are

1) **Mawji -vs- International University and another (1976-80)1 KLR 250**, which was quoted with authority in the case of **Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another, Nairobi Civil Appeal No 44 of 2014** where the court observed inter alia that:-

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

2) **Bernadatte Wangare Muriu -vs- National Social Security Fund Board of Trustee & 2 others [2012] eKLR** where it was stated that the doctrine binds not only parties to the litigation, but also 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of the litigation or not.

62. In conclusion, the court has been invited to revoke the said titles in respect of the suit parcels and award the plaintiff the prayers in the plaint.

Defendant's submissions

63. Defendant has framed the issues for determinations as follows;

- a. Whether the Sale Agreement dated 28th May 1985 is invalid, null and void.
- b. Whether there was a trust relationship between the Plaintiff and the Defendant's husband, **Joseph Njau Kairu**.
- c. Whether the Plaintiff has proved ownership of the parcel of land known as **L.R 4148/12, 4148/13** and subsequent subdivisions therein.

Whether the sale agreement dated 28th may 1985 is invalid, null and void

64. Defendant has submitted that the sale agreement dated 28th May 1985 and presented by the Plaintiff before this Honourable Court purportedly relating to sale and purchase of **L.R 4148/12** is indeed invalid, null and void. It is averred that the document purported to be the sale agreement drafted in the purchase of land parcel **L.R 4148/12** and produced as an exhibit by the Plaintiff is a forged document as the real Sale Agreement for the sale of the said parcel of land and annexed in the Defendant's list of documents has always been under the custody of the Agricultural Finance Corporation. It is further averred that said Sale Agreement reveals the fact that land parcel no. **L.R 4148/12** was sold to one **Joseph Njau Kairu** by one **Stephen Kamithi** through a loan facility obtained from the A.F.C and that the Defendant during the hearing of the Defence case pointed out to the Court that the signature appended on the Sale Agreement did not belong to her husband, the Late **Joseph Njau Kairu**.

65. It is submitted that the alleged sale agreement does not meet the requirements set forth under the **law of Contract Act**. Reference has been made to **Section 3(3) of the Law of Contract Act** which provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is; In writing, is Signed by all the parties thereto and the signature of each

party signing has been attested by a witness who was present when the contract was signed by such a party.

66. It is averred that the alleged sale agreement only exhibits a date at the point of execution by the vendor, one **Stephen Kamithi**. It is also submitted that the agreement is alleged to have been entered into in the year 1985 while the Plaintiff filed this suit in year 2005. Defendant avers that it is trite law that contracts/or Agreements for sale and disposition of an interest in land automatically lapse 6 years after they are made and/or after the said interest in land has been registered in a Transfer document or a Title Deed. After lapse of this period, the interest of land ought to be effectively registered in a transfer instrument or in a Title deed.

67. The Transfer Documents and Title deeds relating to the sale and purchase of **L.R 4148/12** was only registered in the name of the deceased, **Joseph Njau Kairu** and did not indicate the Plaintiff as a joint owner of the said parcel of land. Plaintiff cannot purport to have been a joint purchaser of the said parcel of land by virtue of the fact that the said agreement mentioned his name but he did not append his signature on the document as a purchaser

68. Defendant therefore avers plaintiff has no claim on the basis of the aforementioned agreement, stating that the provisions of section **3(3) of the Contract Act** must be strictly followed.

69. To this end defence has cited the case by Justice Eboso in **Leo Investments Ltd vs. Estruane Estate Ltd (2017) eKLR** where it was held that;

“.....The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity ab initio”

Whether the plaintiff and the defendant’s husband, Joseph Njau Kairu had a trust relationship

70. It is submitted for the defendant that Courts of Law are tasked with interpreting and construing trust relationships alleged to exist between parties, that a trust relationship cannot be implied or imposed by a Court of law to effect or to aid a party to perpetuate or carry out an illegality or an injustice and that in the instant case, plaintiff is unjustly trying to enrich himself.

71. Further, it has been submitted that the trust relationship alluded to by the plaintiff ought to have been registered as per the law. On this point ,defendant has relied on **Section 28 of the registered lands Act (repealed)**, which provided that where a party is holding a parcel of land in trust for another, the same must be registered. **Section 6 (1) (2) of the Land Control Act Cap 302** has also been quoted.

72. Defendant has proffered the following authorities in support of the issue at hand;

1) **PAULINE WAMBUI NGARI –VS- JOHN KAIRU & ANOTHER [1997] eKLR** wherein it was held that ***“In my opinion, the Plaintiff has not succeeded in proving the truth she claims apart from the evidence, see also the requirements in section 28, the proviso, as read with Section 126 (1) of the Registered Land Act. The two sections must be read together. The words “as trustee” must be entered in the land register although particulars of that trust should not be entered in the register. Of course such particulars would be kept safely in the relevant parcel box as evidence of the basis of the entry made in the land register”.***

2). **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where it was reiterated that ***“However, in our view, the phrase “declaration of a trust of agricultural land” refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by Section 36 as read with Section 66 of the Land Registration Act or Section 126 of the repealed Registered Land Act, and not a constructive trust or trust created by operation of the law.”***

3). **Ayub -VS- Standard Bank of S.A (1963) E.A 619** quoted with authority in **Solomon Amian VS. Salome Mutenyo Otunga (2016) eKLR** where it was held that ***“courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties must be clearly determined before a trust can be implied”.***

4) **Twalib Hatayan & Anor. -VS- Said Saggar Ahmed & 5 others (2015) eKLR** where it was stated that ***“.....an imposition of a constructive trust is thus to guard against unjust enrichment....”.***

5) **Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others (19 of 2007) eKLR** wherein the Learned Justice M.S.A Makhandia stated that:- ***“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”***

Whether the plaintiff has proved ownership of the parcel of land known as L.R 4148/12, 4148/13 and subsequent subdivisions therein

73. It is submitted for the defendant that plaintiff never challenged the Title held by the late **Joseph Njau Kairu** for both **L.R 4148/12** and **L.R 4148/13** or any subdivisions thereto during the lifetime of **Njau**, after his death and even when defendant and her co-wife **Njoki** obtained a grant of letters of administration for the estate of **Njau**. It is averred that it was an afterthought for the plaintiff to file suit 10 years after the death of **Njau** and after the aforementioned grant had been issued and therefore, plaintiff’s claim is aimed at disinheriting the family.

74. Defendant contends that it is trite law that a sale agreement alone is not proof of ownership of land and must indeed be accompanied by other documents namely the Transfer document and a Title Deed.

75. Defendant submits that plaintiff appears to be on a wild goose chase as in the first instance, he claims to be entitled to the entire land parcel **4148/12** by virtue of having been its sole purchaser and having allowed his brother **Joseph Njau Kairu** to charge the Plaintiff's title to enable him purchase land parcel **4148/13**. In other instances the Plaintiff claims half of **L.R 4148/12** by virtue of having completed payment for the charge facility at the A.F.C.

76. As regards land parcel **L.R 4148/13**, defendant submits that it is crystal clear that the Plaintiff is not only not entitled to any part thereof, but that the Plaintiff does not have the slightest idea of when the same was purchased, when the same was subdivided, when the same was sold and when the same stopped existing.

77. Defendant avers that the only conclusion to be made is that Plaintiff is engaging the Court in a game of sorts hoping that if the court does not find him to be entitled to the entire property, **L.R 4148/12** of the said property, the same Court will rule that he be compensated with half of the suit property by virtue of having completed payment on the charge facility at the A.F.C.

78. Defendant has also relied on the provisions of section 26 of the **Land Registration Act No.3 of 2012** which provides that :-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....”.

79. Defendant submits that she is alive to the fact that the matter for determination before the Court arose before the new regime of Land Laws which came into force in the year 2012. She however avers that section 26 of the Land Registration Act is a direct import of the Registration of titles Act (repealed) of which the titles no. **4148/12** and **4148/13** were registered under.

80. The authority relied on by defendant to buttress this point is the case of **Crispus Thuku Kinene v Teresia Waithira Machua [2017] eKLR** wherein it was observed that;

“The Plaintiff's Certificate of title can only be challenged if the same was acquired through fraud, misrepresentation, illegally or through corrupt scheme as provided by Section 26(1) (a) & (b) of the Land Registration Act”

81. In conclusion, defendant avers that it is trite law that he who alleges must prove, and that plaintiff has failed to prove that he has any claim of ownership to the land parcels **4148/12 and 13** or their subdivisions thereof. The only concession made by defendant is that Plaintiff is indeed a creditor of the estate of the late **Joseph Njau Kairu** by virtue of the amounts paid by him to the A.F.C to help the family of his late brother to offset the loan facility at the A.F.C. and as such his only claim and/or entitlement is that of **Kenya Shilling seven hundred and thirty six thousand, nine hundred shillings (Kshs. 736,900/=)** being the money he paid to the A.F.C.

Submissions of 2nd third party (Juja Super Highway...)

82. The issues framed for determination are;

a. Whether the sale and transfer of LR No.4148/13(which became 4148/16 and 4148/17) and the further subdivisions onto plots to wit LR No.4148/494 to 4148/511 to third parties herein was void and irregular;

b. Whether the Plaintiff's purported claim of interest in LR No.4148/13(which became 4148/16 and 4148/17) and the further subdivisions onto plots to wit LR No.4148/494 to 4148/511 on the basis of the clearance of loan of Kshs.836,500 is misplaced.

c. Whether the 2nd third party should be condemned to pay costs.

Whether the sale and transfer of LR no.4148/13(which became 4148/16 and 4148/17) and the further subdivisions onto plots to wit LR no.4148/494 to 4148/511 to third parties herein was void and irregular

83. **Juja Super Highway** have submitted that the 2nd to the 6th third party obtained the ownership of the plots to wit **LR No.4148/494 to 4148/511** for value and without knowledge of any interest that the Plaintiff may have had over the said plots. At the very least, at the time of purchase the Plaintiff had not placed any caveats, restrictions, cautions or a charge in his favour forbidding the Defendant and the 1st third party from transferring the suit parcels to willing purchasers or better still warning willing purchasers from buying the said parcels of land. What is more, there was no order at the time of purchase that prevented the sale, subdivision or transfer of the property in question.

84. With the successful sale and transfer of the said parcels of land to third parties herein, the court is then left to consider whether they are bona fide purchasers for value or whether they are party to the fraud alleged by the Plaintiff. It is then that the court can move and make the appropriate orders.

85. It is trite law that in fraud cases, fraud must not only be specifically pleaded and proved but that the proof of the existence of such fraud must be on a standard higher than on a balance of probability though not as high as proof beyond reasonable doubt. Moreover, it fell on the Plaintiff to demonstrate to the Court the involvement of the third parties herein to any form of fraud perpetuated by the Defendant and the 1st third party.

86. It has been further submitted that the **newspaper advertisement of 12.2.2012** containing the **court order of 15.3.2007** was of no effect as far as the third parties are concerned since the sale of the suit property occurred between years 2003 and 2005.

87. **Juja Super Highway** therefore submits that Plaintiff has no legal basis for claiming a superior right as against the purchasers of **LR No.4148/13** (which became **4148/16** and **4148/17**) and the further subdivisions onto plots to **wit LR No.4148/494 to 4148/511**.

88. Reference has been made to **Section 23 of the Registration of Titles Act** Cap 281 Laws of Kenya (now repealed) which stipulates that a certificate of title is conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner.

89. **Juja Super Highway** have also relied on the following authorities in support of their claim that they are bonafide purchasers and that there was no fraud in the sale of the properties as far as the third parties are concerned;

1) *Zebak Limited v Nadem Enterprises Limited [2016] eKLR.*

2) The Ugandan case of the Court of Appeal *Katende –vs- Haridas & Company Ltd [2008] 2 E A 174* where the judges of appeal defined a bona fide purchaser thus:

“A bonafide purchaser 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 bonafide doctrine he must prove the following:

i. He holds a certificate of title;

ii. He purchased the property in good faith;

iii. He had no knowledge of the fraud;

iv. He purchased for valuable consideration;

v. The vendors had apparent good title;

vi. He purchased without notice of any fraud;

vii. He was not party to any fraud.

3) *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Versus Attorney General and 4 others (2017) eKLR*

4) *Arthi Highway Developers Limited Versus West End Butchery Limited and 6 others (2015) eKLR*, where the Court of Appeal did not find in favour of the parties who claimed to have been bona fide purchasers for value. Having failed to enter into Sale Agreements, the Court did not shy away from registering their suspicion in the impugned transactions that led to the transfer of the disputed properties.

Whether the plaintiff’s purported claim of interest in LR no.4148/13(which became 4148/16 and 4148/17) and the further subdivisions onto plots to wit LR no.4148/494 to 4148/511 on the basis of the clearance of loan of Kshs. 836,500 is misplaced.

90. It is submitted that Plaintiff’s claim over the Kshs. 836,500 may be legitimate, the same is however a debt to be recovered from the estate of deceased. The Court is invited to consider whether it can be used as leverage in the current case or how best the Plaintiff can realize it without necessarily jeopardizing the rights of others.

91. On this point, the court has been invited to consider the provisions of the Law of Succession Act, Cap 160, particularly Section 83 which provides:

“Personal representatives shall have the following duties-

a. To pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

b. To ascertain and pay, out of the estate of the deceased, all his debts.

92. Section 82 further provides that :

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

a) To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

Whether the 2nd third party should be condemned to pay costs.

93. It is the 2nd third party's submission that costs follow the events, but are purely a matter of the court's discretion. However, such discretion must be exercised judiciously so much so that the right to access to justice as encapsulated under **Article 48 of the Constitution, 2010** does not lose its meaning and purpose. Reference has been made to paragraph 14 of the Plaintiff's Plaint dated the 27th day of February, 2012, where it is stated that;

“Despite demand and notice of intention to sue, the Defendant has refused to comply therewith hence this suit.”

94. It is submitted that this excerpt above is simply an implied admission by the Plaintiff that he never bothered to inform the third parties herein of an impending conflict that would later find itself before court. It is on the strength of the aforesaid argument that the 2nd third party prays for costs against the Plaintiff. It is only then that the Plaintiff will cherish alternative dispute resolution mechanism before he can think of dragging people to court.

Submissions of 4th and 5th Third Parties

95. The 4th and 5th third parties submitted on the following points.

- (i) Who are the Third parties?
- (ii) Whether there was collusion between the 4th and 5th third parties with the defendant to defeat the interests of the plaintiff in the suit properties.
- (iii) Whether purchase of portions of L.R no. 4148/16 by the 4th and 5th third parties was lawful.
- (iv) Who should bear the costs of the suit.

Who are third parties?

96. The Kibathis have submitted that suing the named third parties, as third parties is fundamentally bad in law, since such parties, as parties to civil proceedings, are brought into proceedings by defendant(s), such that the defendant blames and seeks contribution or indemnity from the third party in respect of the claims made by the plaintiff. On this point reference has been made to the provisions of **Order 1, rule 15** of the **Civil Procedure Rules**, which provides that;

“(1) Where a defendant claims as against any other person not already a party to the suit (herein after called the third party) –

(a) That he is entitled to contribution or indemnity; or

(b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief of remedy claimed by the plaintiff; or

(c) That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party, or between any or either of them,

he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect....”

97. These third parties therefore aver that there is no law permitting the plaintiff to sue third parties as there is no contractual or trust relationship between the plaintiff and the third parties. Such third parties can only be brought into the suit by the defendant. This situation where the plaintiff sues additional parties as “Third parties” instead of co-defendants and prosecutes the suit presents a legal dilemma that this court, being a court of record, must refuse to wade into. On that account, the Kibathis submit that all the third parties are non-suited.

98. The Kibathis have also made reference to **The Black's Law Dictionary** where a non-suit is defined as follows;

“A court's dismissal of a case or of a defendant because the plaintiff has failed to make out a legal case or to bring out sufficient evidence”.

Whether there was collusion between the 4th and 5th third parties with the defendant to defeat the interests of the plaintiff in the suit properties.

99. The Kibathis have invited the court to look at paragraph 11J of the Further Amended Plaint, where in reference to 4th and 5th third parties, it is pleaded as follows;

“The plaintiff claims as above that the 4th and 5th third parties colluded with the defendant to enter into agreements whose net effect was to defeat the plaintiffs claim”.

100. The Kibathis contend that no particulars of the alleged collusion is pleaded and no substantiation was made in evidence –in-chief. They therefore submit that the allegations of collusion, being void of particulars are unsustainable and do not lie.

101. The 4th and 5th third parties have further submitted that they were candid in their evidence. They bought the portions of **L.R no. 4148/16** measuring 35 acres in total and they paid the full consideration. They have attached the agreement for sale in the list of documents filed on 6th December 2017.

102. Before purchasing the said portions, they testified that they did proper due diligence on the title. They confirmed that the **defendant** and the **1st third party** were the registered proprietors of the property. No court order or other encumbrance was registered on the title that would hinder them from proceeding with the transactions.

103. In the further list of documents filed on 15th November 2018, they attached a copy of the title in respect of L.R No. **4148/16** at pages 1-2 of the list. The title showed clearly that the defendant and 1st Third party were the registered proprietors as tenants in common in equal shares. They also attached evidence of payments made to the sellers and the transfers executed in favour of the 4th third party. They obtained value for money and further testified that they went onto the ground and caused further subdivision of the portions which they sold to hundreds of plot buyers.

104. **Bonafide Purchasers;** The **Kibathis** contend that they have demonstrated that they were bonafide purchasers for value and the plaintiff has not shown any wrong doing on their part. They claim that plaintiff had testified that he was not claiming any part of the properties occupied by the third parties’ purchasers but he would wish to have the remaining unsold portion of **4148/13** to compensate himself money allegedly owed to him by the estate.

105. The **Kibathis** have again made reference to **The Black’s Law Dictionary** where a bonafide purchaser is defined as follows:

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

106. The case of **Weston Gitonga & 10 others vs Peter Rugu Gikanga & another (2017) eKLR**, has been cited where the court of Appeal applied the definition of bonafide purchaser set in the **Ugandan case of Katende vs Harida & Company Limited (2008) 2 E.A 173**.

107. The **Kibathis** have submitted that their actions fit the standards in the above mentioned legal definition and ought to be declared as such bonafide purchasers.

108. **Contract;** The Kibathis have submitted that the law is very clear when it comes to contractual transactions. They contend that though plaintiff had allegedly purchased L.R no. **4148/12** but agreed to have it registered in the name of his deceased brother to enable him secure finance from AFC to buy **4148/13**, no agreement was supplied to the court to confirm this transaction with his brother, yet he (plaintiff) is asking the court to take away **4148/12** from his deceased brother’s family.

109. Reference has been made to **Section 3 (3) the Law of Contract Act**, which provides that ;

“No suit shall be brought upon a contract for the disposition of an in interest in land unless:-

(a) The contract upon which a suit is founded

- Is in writing.

- Is signed by all the 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.

110. The **Kibathis** submit that from the aforementioned provisions of law, a court cannot be asked to enforce an agreement or contract in land unless such agreement is in writing, signed by the parties and is attested.

111. The **Kibathis** have further submitted that the above position also applies in respect of L.R no. **4148/13** and its subdivisions. They aver that plaintiffs claim that he advanced some money to the estate of **Njau** to settle the deceased’s balance of bank loan, whereby, he (plaintiff) was to be compensated with land is a claim which is a departure from his prayers in the plaint. Further, he produced no written, signed and attested agreement to back his claims. The **Kibathis** submit that plaintiffs claim must fail and he is only at most, entitled to refund of his money.

Whether purchase of portions of L.R.N0.4148/16 by the 4th and 5th third parties was lawful.

112. The **Kibathis** have submitted that the law is clear on the sanctity of registered title to land, citing **Section 26(1) of the land registration Act, No. 3 of 2012** which stipulates that **Certificate of title is to be held as conclusive evidence of proprietorship**. Thus, courts shall regard the person named on title to land as the absolute owner save in instances where there is fraud, misrepresentation or illegal acquisition through a corrupt scheme. **Kibathis** aver that no evidence was led by the plaintiff to show any illegality in the acquisition of the suit properties by the deceased or his personal representatives.

113. The **Kibathis** have also cited **Section 80** of the **Land Registration Act** which provides instances when the court may interfere with title. It provides as follows;

“Rectification by order of court

(i) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(ii) The register shall not be rectified to affect the title or a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.

114. The **Kibathis** contend that a registered proprietor’s interest cannot be interfered with unless there is proof he had knowledge of omission, fraud or mistake in respect of which rectification is sought. Thus even if there is proof, which the 4th and 5th defendant have denied, that the vendors had a bad title, they can only bear responsibility if they had such knowledge.

Who should pay costs?

115. The 4th and 5th third parties submit that they have proved to the required standards that they were bonafide purchasers for value. They bought and sold the land and went on with their lives until they saw their names in the Daily Nation issue of February 2012. They testified that by this date, they had long sold the land but had to comply with the court process and defend the claims against them. They testified that they are business people who deal in buying and selling of land. They have been embarrassed and inconvenienced by this litigation and to add salt to injury, the plaintiff has not substantiated any claim against them. The plaintiff has not provided a shred of evidence of their wrongdoing. They therefore urge the court to find that the circumstances reveal a case where the 4th and 5th third parties are entitled to an award of costs.

Submissions of the 6th 3rd party

116. The summary of the issues framed by the 6th third party are as follows:

(a) Whether the plaintiff and the deceased jointly but in unequal shares bought LR no. **4148/12** from **Stephen Kamithi**?

(b) Was the property no. **4148/12** charged with the Agricultural Finance Corporation with a view of acquisition LR. **Nos 4148/16 and 4148/17 (“4148/13”)**.

(c) Did there exist any trust relationship of the deceased’s registration as owner of the parcels of land above?.

(d) What is the plaintiff’s assistance in the loan repayment to be treated as? Is he a creditor to the defendant or the deceased’s estate or does it entitle him to inheritance of the deceased’s estate?

(e) Did the defendant and 1st third party have the legal capacity to sell any property to the 3rd parties?

Whether the plaintiff and the deceased jointly but in unequal shares bought LR no. 4148/12 from Stephen Kamithi?

117. **Balcon** has submitted that the answer to this 1st issue is in the negative. The plaintiff has not presented to court any written contract between him, the deceased and **Stephen Kamithi**. The handwritten piece of paper is signed by the deceased as purchaser and **Stephen Kamithi** as vendor. The unclear forms at his page 18 – 22 of documents do not exhibit any bank stamp nor do they have any deletion of the alternative bank services applied for and therefore cannot vouch for any payment by the plaintiff to **Stephen Kamithi**.

Was the property no. 4148/12 charged with the Agricultural Finance Corporation with a view of acquisition LR. Nos 4148/16 and 4148/17 (“4148/13”).

118. In answer to this issue, **Balcon** states that the plaintiff has deliberately failed to exhibit the page in his exhibit 4 showing the date of acquisition of the property known as **4148/12** for a close comparison with the date of **26/9/91** when parcel **4148/16** was first registered in the name of the deceased. Without such evidence **the claim of any trust under the 3rd issue in relation to the land parcel 4148/12 and 4148/16 and 17 must fail.**

What is the plaintiff’s assistance in the loan repayment to be treated as? Is he a creditor to the defendant or the deceased’s estate or does it entitle him to inheritance of the deceased’s estate?

119. **Balcon** has submitted that evidence adduced reveal that the assistance in the loan to redeem LR. No. **4148/12** was voluntarily granted by the plaintiff. The plaintiff therefore was clearly a creditor to the defendant and should have sued for the sum, since he had even agreed in cross examination that he needed a repayment of the sum of Kshs.1,024,000.

Did the defendant and 1st third party have the legal capacity to sell any property to the 3rd parties?

120. **Balcon** has submitted that the defendant having been issued with a confirmation of grant to the estate of the deceased, acquired the legal capacity to deal with the property of deceased as she deemed fit and the disposition she has done have all the protection to a purchaser thereof accorded by **section 93** of the **Law of Succession Act**.

121. In conclusion, **Balcon** contends that all the probabilities of undisputed proprietorship of the estate of the deceased are in favour of the defendant and not the plaintiff, who if he had any right of recovery of the property in LR. No. **4148/16**, the same expired under the Law of Limitation of Actions Act in year 2003. They therefore urge this court to dismiss the plaintiff's claim against the 6th third party with costs.

Determination

122. Having carefully analyzed the pleadings, the evidence adduced herein and the rival submissions of the parties, I find that there are some issues which are not in dispute, there are issues for determination and there are issues in dispute that cannot be determined by this court.

Issues not in dispute

123. **The relationship:** It is not disputed that defendant (**Wanjiku**) and 1st third party (**Njoki**) are the widows of Joseph **Njau Kairu** and that the two obtained a grant in respect of the estate of **Njau** sometime in the year 2001. PW2, **Mary Wahito Njau** also identified herself as a widow of deceased (**Njau**), but this appeared to be a contested issue which this court shall not determine for want of jurisdiction and the court was also not invited to determine the same. It is also not disputed that deceased (**Njau**), the plaintiff (Nyaga) and PW6, **Rose Wanjiru Kairu** are siblings.

124. **Proprietorship.** It is not disputed that by the time Njau passed on (in 1999), the suit properties **4148/12** and **4148/13** (or its subdivision status- **4148/16** and **4148/17**) were registered in the names of **Joseph Njau Kairu** (deceased).

125. **Status of the suit properties.** It is also not disputed that the suit land in particular, what was originally **4148/13** has since been subdivided into various smaller and even smaller portions and that the land is occupied by the third party buyers who have developed the land.

126. **The AFC Loan.** It is not disputed that by the time **Njau** passed on, the title to the suit land no.**4148/12** was charged with Agricultural Finance Corporation in respect of a loan advanced to deceased. There was an outstanding amount about shs.836,500 which undisputedly was cleared by the plaintiff.

Issues for determination

127. I hereby summarize the main issues for determination as follows;

- 1) Whether Joseph Njau Kairu (deceased) held part of the suit land properties L.R No. 4148/12 and 4148/13 (or the subdivisions thereof) in trust for the plaintiff.*
- 2) Whether the sale of the suit land, to be precise 4148/13 (which became 4148/16 and 17) by defendant and 1st third party and the further subdivision and alienation of the land to other parties was void/irregular/fraudulent.*
- 3) Whether the third parties are properly sued in this case.*
- 4) How should the court treat the AFC Loan?*
- 5) Who should pay costs of the suit.*

Whether Joseph Njau (deceased) held part of the suit land 4148/12 and 4148/13 (or 4148/16 and 17) in trust for the plaintiff.

128. The title availed on page 23 of plaintiffs bundle is for parcel no. **4148/12** registered under the registration of titles Act cap 281 laws of Kenya. The other title availed by 6th third party as their exhibit 1 (same document availed by 4th & 5th third parties), is for **4148/16** and it is also registered under the registration of titles Act. Thus the legal regime governing the suit properties during the various transactions was the **Registration of Titles Act Cap 281 laws of Kenya (Repealed)**. Section 23 of the said Act provides that;

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.....”.

129. Having set out the law applicable, the next step is to analyze the circumstances under which trust could possibly have arisen in respect of the suit properties.

130. For parcel no. **4148/12**, plaintiff's rights and interests are hinged on the sale agreement which **Nyaga** produced as P. Exhibit 2 (see page 17 of plaintiff's bundle). A look at the said document clearly reveals that it doesn't meet the requirements set out in **section 3 (3) of the law of contract Act** which provides that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded— (i) is in writing;(ii) is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party....”.

131. Plaintiff did not sign this agreement and he admits that much. The agreement certainly fails to meet the requirements of the law.

132. That notwithstanding, the court has to determine if plaintiff's claim falls under the exceptions provided for under the sub section 4 of section 3 of the law of contract where it is stipulated that;

“Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust”.

133. In the recent Court of Appeal case of **Willy Kimutai Kitilit vs Miachael Kibet Civil Appeal No. 51/2015 Eldoret**, it was held that;

“The doctrines of equity are part of our laws although section 3 of the Judicature Act subordinates common law and the doctrines of equity to the constitution and written law in that order. Section 3(3) of the law of Contract Act and section 38 (2) of the land act as amended clearly stipulate that the contracts from disposition of an interest in land should be in writing does not affect the creation of a resulting trust, implied or constructive trust”.

134. The court went to state that; *“Equity is law and section 6 (2) (in reference to the land control Act), does not prohibit a court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity”.*

135. In the case of **Yogendro purshottam Patel vs Pascale Mireille Baksh (nee Patel) and two others H.C.C No. 617/195**, the court did deal with the issue as to;

“Whether a grant or a title under the Registration of Titles Act is subject to unregistered equitable rights”.

136. The court made reference to the case of **Doge vs Kenya Cannors Ltd (1989) KLR 127** where the high court applied equitable principles (promissory estoppel) to land registered under the **Registration of Titles Act**. That the registration of a person as a proprietor of land under R.T.A does not relieve him of any duties imposed on him as a trustee. The court further stated that;

“The English doctrines of equity are part of our laws and are applicable to land registered under Registration of titles Act so long as they are not inconsistent with the provisions of the statute”.

137. The defence have advanced a theory, that **in imputing a trust relationship, the party so alleging must prove that the land in question is either ancestral land or family land**. The case of **Susan Wambui Waititu vs. Mukuru Ndata & 4 others (19 of 2007) eKLR** has been cited to buttress this point. However, it is notable that the claimants in **Susan Wambui** case were basing their case on ancestral/Family land and thus they had to prove that such Trust existed.

138. I find that there are other situations where trust can be implied especially in the purchase of property arena as can clearly be seen in the **Willy Kimutai Kitilit (supra)**, also see- **Macharia Mwangi Maina &87 Others vs. Davidson Mwangi Kagiri COA at Nyeri (2014) eKLR, Rose Naswa Masinde vs. Lilian Nekesa Simiyu ELC NO 985 /2012 ELDORET (Munyao J)**.

139. Despite the foregoing, **TRUST**, any **TRUST** be it customary, resulting or constructive trust is a question of fact and must be proved. It cannot be imputed. This was the emphasize which the court was making in **Susan Wambui** case (supra).

140. The main issues to consider in respect of whether a trust relationship between Njau and Nyaga existed are;

(1) Whether there was any consideration that flawed from the claim and

(2) The common intention of the parties.

Consideration

L.R No.4148/12

141. The minute details of how Nyaga came to allegedly acquire the interests in parcel No. **4148/12** are captured in paragraph 13 to 19 of his statement filed on 20.5.2015. In paragraph 13, he mentioned the year 1985 as the year when the intention to buy land **4148/12** cropped up.

He thereafter paid a deposit of Shs.300,000 through a banker's cheque which means that the money was paid on or before 28.5.1985 - the date in the sale agreement.

142. There is no evidence of such payment by plaintiff. The explanation given by plaintiff as to why he didn't sign the agreement (P Exhibit 1) is captured in paragraph 18 of his statement as follows;

“Later on my late brother informed me that when he paid the said bankers cheque to Mr. Stephen Kamithi in the presence of the broker, Mr. Stephen Kamithi insisted that an agreement be written out and signed to reflect that he was only selling 42.5 acres of land reference no.4148/12 whilst the balance of 5 acres was to be his. Since my late brother knew that I trusted him he proceeded to sign the agreement on my behalf”.

143. The explanation by **Nyaga** implies that he was caught off guard by Kamithi's demand. If **Stephen Kamithi** is the one who had insisted on an agreement being made without the knowledge of **Nyaga**, then **what prevented Nyaga from having a proper agreement written thereafter?** **Njau** lived on this earth for the next 14 or so years and there is no evidence to indicate that **Nyaga** ever took steps to have another agreement written especially to reflect the amount of contribution allegedly made by each of the brothers.

144. **Kamithi** apparently died in 1994, so he too lived many years, about 10 years from the time the agreement was made. During **Njau's** life time, **Nyaga** had all the opportunity to ensure that the factual situation of joint proprietorship or tenant in common were captured. Again there is not the slightest evidence to indicate that **Nyaga** took steps to ensure that an agreement reflecting the alleged true state of affairs was ever written.

145. As regards the balance of instalments which were made for 4148/12, **Nyaga** has stated that these were made at various time, through cash payments to **Kamithi** and sometimes payments into the bank. While being cross examined by **Mr. Mbiu** (for 1st third party) **Nyaga** had stated that;

“I had given money to Kamithi. For the money I was giving Kamithi, it was not written anywhere as to what the money was for We were not writing any agreement”.

146. While being cross examined by **Mr. Omari** (counsel for 2nd third party), **Nyaga** stated thus;

“The agreement between Njau and seller for L.R 4148/12 was around 1986”.

147. And in responses to cross examination by **Mr. Wamboi** (another counsel for 2nd third party), **Nyaga** stated that;

“The court cannot know the amount I was making. The court cannot know how much money we were giving Njau”.

148. However, on being cross examined by **Nguru** advocate for defendant, **Nyaga** had stated that;

“I was giving money to Stephen Kamithi. I was getting money from my shop. I could get even Shs.200,000. I have banker's cheque I have copies on my bundle page 18-20”.

149. I have keenly perused plaintiff's bundle of documents which runs from page 1 to page 33. The document on page 18 doesn't indicate what the Shs.100,000 was for, while those on page 19 and 20 are not legible. The agreement on page 17 shows that the total purchase price was shs.1,657,500. If shs.300,000 had already been paid by 28.5.1985 balance would have been 1,357,500. That must have been a tidy sum in the 80's yet plaintiff doesn't have even a single document to show how he effected payment despite the fact that he was a young man (of 30 years as per his evidence) who was already having a thriving business of his own.

150. It is also not lost to this court that the land parcel on **4148/12** is quite a huge chunk of land measuring 47.3 acres or so. The land is in a prime area, hugging the **Thika Super Highway**. Even if plaintiff was apparently buying just 42.5 acres thereof, still this was a huge investment by any standard. It is not fathomable that a young man, knowledgeable in business would enter into such land dealings in a very cavalier manner all because of trust for his brother. I am not persuaded by plaintiff that he participated in the acquisition of the property **4148/12**.

151. What about the consideration in respect of loan payments made to **AFC**? It is not disputed that plaintiff is the one who cleared the **AFC** loan after the death of **Njau** in 1999 where the title number **4148/12** had been held as security. Considering that the payments are not disputed, then what the court will consider is the intention of the parties.

152. An argument has been advanced by plaintiff's side in their submissions that defendant has not shown any document whatsoever to prove that the late **Joseph Njau** made any payments for the parcel no. **L.R 4148/12**. However, it is trite law that he who alleges must prove. See-**Eunice Wayua Munyao vs. Mutilu Beatrice and 3 Others Makueni High Court Civil Appeal No 53 of 2017**, where the court cited the case of **East Produce (K) Limited vs. Christopher Astiado Osiro Civil Appeal No. 43 of 2001** where it was held that ;

“It is trite law that the onus of proof is on he who alleges....”

153. Section 107(1) of the Evidence Act provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist”.

154. Thus it was not open to plaintiff to shift this burden of proof upon the defendant. Plaintiff had over 14 years to sort out all these issues during the life time of his brother (deceased). The Latin phrase **“Mortui non mordent”**, which means **dead men don’t tell tales, dead men don’t bite** is very much applicable in this case. Plaintiff cannot now turn to act like a victim of his sister in law’s machinations.

Parcel 4148/13

155. Compared to parcel **4148/12**, **4148/13** was the bigger portion of land which was allegedly 157 acres still at the area known as Kenyatta road. According to plaintiff his brother Njau initially bought 10 acres of **4148/13** sometime in 1984. He assisted him in payments. **Nyaga** and **Wanjiru** (PW 3, original owner of the suit land) contend that Njau later on decided to buy the balance of the land **4148/13** whereby he used **4148/12** as security to get a loan from AFC. Nyaga doesn’t seem to be claiming to have bought this land. His claim is based on making the AFC loan payments. However, it has emerged that this land did not exist by the time Nyaga was making the loan payments. It had long been subdivided into **4148/16** and **4148/17** sometime in 1991 (see **certificate of title availed by 6th third party**). The fact that Nyaga was not aware that parcel **4148/13** had ceased to exist in 1991 reveals that no such trust existed between him and his brother **Njau**. **Nyaga** doesn’t even have a copy of the title to this land.

156. The 6th third party has submitted that plaintiff has deliberately failed to exhibit the page in his exhibit 4 (title of parcel **4148/12** found on page 23 of plaintiff’s bundle) showing the date of acquisition of the property in **4148/12** by plaintiff for a close comparison with the date of 26/9/91 when **4148/16** was first registered in the name of the deceased. I cannot agree more. The entries availed by plaintiff regarding registrable dealings with this parcel run from entry number 8 (bearing the date of 23.6.1999). Thus one cannot even tell when this land was charged. I would therefore also agree with defendants submissions that Plaintiff does not have the slightest idea of when the land parcel **4148/13** was purchased, when the same was subdivided, when the same was sold and when the same stopped existing.

157. It is rather perplexing for PW 3 **Hannah Wanjiru Kamau** to give false testimony by stating that title No. **4148/12** was used to buy parcel **4148/13** when she is the very person who had actually sold parcel no. **4148/13** to Njau, long before Njau had purchased **4148/12** from **Stephen Kamithi**.

158. The conclusion I make is that plaintiff has not demonstrated that he gave any form of consideration in the acquisition of the suit properties.

Common intention

159. This court is called upon to consider whether a common intention of sharing the property **4148/12** and **4148/13** between **Nyaga** and **Njau** can be discerned. Was there a meeting of the mind between **Nyaga** and **Njau** with regard to the acquisition of the suit properties?. Was there a meeting of the mind between **Nyaga** and **Wanjiru** in 1999 – 2000 to the effect that **Nyaga** was to have a share of the suit land?.

160. The evidence of plaintiff’s witnesses is that **Njau** and **Nyaga** were very close and that they trusted each other. If the common intention between the two brothers was to share the land then there ought to have been a solid manifestation of such intention after the making of the agreement in 1985 in respect of parcel no **4148/12** and at the time the AFC loan was acquired (since the loan was allegedly facilitating the sale of **4148/13** according to plaintiff). For instance, one manifestation of acquisition of beneficial interest is the occupation of the land in question.

161. In **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri court of appeal Civil Appeal No. 69 of 2011 Nyeri** the court cited the case of **Yaxley – vs- Gotts & Another, (2000) Ch 162**, where it was held;

“That an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them”.

162. From 1985, when parcel **4148/12** was acquired to 1999 when **Njau** passed on, there is nothing to indicate that **Nyaga** ever took over possession or control of any portion of that land. It is only during cross examination that Nyaga had made a feeble attempt to claim that he used to cultivate the land.

163. Likewise, there is not the slightest evidence to show that plaintiff took possession of any portion of land no **4148/13**. This is the parcel which was divided in 1991. How comes that plaintiff did not take part in its sub division and alienation thereafter yet his brother lived on until 1999!.

164. I find that the suit parcels nos. **4148/12** and **4148/13** were huge tracks of land, and there is no evidence to show how this expansive land was to be shared between the two brothers all the time that **Njau** breathed.

The AFC Transactions;

165. **Can a common intention be discerned from the transactions appertaining to the AFC LOAN?** The first limb to consider is the transaction of loan advance. Why did AFC advance the loan to **Njau**? Certainly, Njau was alive when he took the loan from AFC! **Nyaga** has stated that they agreed with his brother that **Kamithi** was to issue the title of **4148/12** in the name of **Njau** to allow the latter to get the

AFC loan. The question is how comes again this agreement was not reduced into writing. It is not lost to this court that **Nyaga** has stated that they were buying 42 ½ acres out of 47 ½. The balance of the five acres were however acquired by **Njau**. In paragraph 23 of his statement, plaintiff has even emphasized the purpose of getting the loan. **“The title could be issued in my late brother’s name ONLY to allow him to use the title as security for a loan”**. It is not fathomable that even for such a transaction, where **Njau** and **Nyaga** were sharing this land allegedly in an equal shares, plaintiff still did not find it necessary to reduce these intentions into writing.

166. I have also considered the fact that **Nyaga** did not avail the paper trail in respect of registration of interests in L.R 4148/12 and in **4148/13**. On page 23, of his bundle, **Nyaga** has availed a certificate of title under Registration of Titles Act for parcel **4148/12** issued to **Kamithi** on 10.11.1991. Any transfer of land under this legal regime is reflected in the same document and not in the issuance of a fresh title. **Nyaga** availed the entries of transfer from entry no. 8 to 12 (from 1999 to 24.8.2011). Is it a case of inability to get those entries? How comes he could acquire these entries and not those appertaining to the transfer of the land from **Kamithi** to **Njau** and the subsequent charge to AFC? As the matter stands now, there is no evidence as to when **Njau** took the AFC loan. For someone who was so close to his brother, plaintiff lacks very crucial information regarding how his brother **Njau** was dealing with the properties in issue. His witness, PW 4 the AFC officer didn’t fill this gap. He offered no evidence regarding when the loan was advanced and the particulars appertaining to the transaction. Is it a question where PW4 had no access to the paper trail or what? In absence of particulars as to when **Njau** became the registered owner of **4148/12** and when the land was taken up as security for a loan, **Nyaga** cannot claim that he gave the title to **Njau** to get the loan to purchase parcel **4148/13**.

167. It has also emerged that parcel no. **4148/13** had been acquired by **Njau** before he bought **4148/12**, - see paragraph 9, 10 and 11 of plaintiff’s statement. Indeed **Njau** had subdivided his huge parcel of land no. **4148/13** into parcel **4148/16** and 17 by 1991, since the title for **4148/16** was issued in 1991. Therefore, it is not true and it is not logical that the AFC loan was being acquired to buy parcel no **4148/13** as plaintiff would want this court to believe.

168. I therefore conclude that there is no trace of a common intention between **Nyaga** and **Njau** to share the suit parcels.

169. The second limb to consider is with regard to the loan arrears payments made after the death of **Njau**. **Nyaga** avers that they went with **Wanjiku** to AFC offices where after discussions he agreed to pay the loan balance so that he could get back the title for 4148/12. **PW 4, Ngaru**, the AFC officer avers that they advised the parties (**Nyaga** and **Wanjiku**) to clear the outstanding arrears which were fully paid by plaintiff.

170. As stated earlier on, Trust has to be proved and it cannot be left to the court to impute trust. As rightly submitted by defence **“A trust relationship cannot be implied or imposed by a court of law”**. So if there was such an oral agreement, then what was in it for **Nyaga**. How much of the land **4148/12** and **4148/13** was he to get after its discharge.

171. In his rather detailed further amended plaint of 27.2.2012, plaintiff is claiming for half of parcel no. **4148/12** and half of the land the subdivisions arising from **4148/13**. In his statement recorded on 20.5.2015, he is claiming 42.5 acres out of parcel **4148/12**. While being cross examined by **Mr. Mbiu**, plaintiff stated that the indication of a half share of **4148/12** in the amended plaint was in error. He wanted the land he had bought, the 42.5 acres in **4148/12**. Had there been an intention that **Nyaga** was paying the loan in order to get his land back, then certainly there would have been a further clarification of what land he was to get considering that title no. **4148/12** consisted of 47.5 acres and not 42.5 acres. Further, such an agreement would have clarified the basis upon which he was claiming the subdivisions arising out of parcel no. **4148/13**.

172. On the other hand, the explanation given by defendant as to why plaintiff effected payments of the loan is rather plausible. **Wanjiku** and her co-wife (**Njoki**) were freshly widowed when they got the letter from AFC demanding payment of the loan instalments. She (defendant) avers that they resulted to seeking help from the family. I may ask; Wasn’t **Nyaga** an appropriate family member to give assistance? I am not persuaded to accept the claim that the agreement was for **Nyaga** to pay the loan so that he would get the land back.

173. Further, even if **Nyaga** could not make agreements with his brother **Njau** ostensibly because of their closeness, certainly he cannot claim to have had such a trust relationship with **Wanjiku** or with AFC.

174. There is also nothing to indicate that **Nyaga** ever took possession, control or occupation of any of the parcels no **4148/12** or the subdivisions of **4148/13** from the time he started effecting loan payments to AFC as a manifestation of his assertion of rights and interests in the suit properties.

175. If the court was to allow persons to stake claims in the estate of deceased persons solely on the basis that such parties have rescued the estate from some imminent misfortune, that would be a recipe for disaster. How would unscrupulous persons eyeing the properties of deceased persons be stopped on their tracks? My conclusion on this point is that plaintiff cannot claim the suit parcels on the basis of paying the AFC loan arrears.

176. In concluding this issue of TRUST, I must point out that **Nyaga** doesn’t appear to know much about parcel no. **4148/13**. Hear what he stated while being cross examined by Advocate **Nguru** for defendant;

“The land stroke 12 had been hived off from the larger no. 13, so number 16 and 17 and 12 had been hived off from no. 13. It is Njau who had done that. This subdivision was done in year I can’t recall. I had not known that Hannah had subdivided this land before she sold it. I and my brother were very close. Sometimes he (Njau) would tell me about his land transactions. I had not known he bought land no. 13 before 12”.

177. This piece of evidence puts the matter in a clearer perspective. That **Nyaga** knew very little about parcel 4148/13. The alleged very close relationship between **Njau** and **Nyaga** is but a sham claim. Had such a relationship existed, **Nyaga** would have known that his brother had already subdivided **4148/13** to yield **4148/16** and 17, during his life time.

Whether the sale of the suit land 4148/13 which became 4148/16 and 17 by defendant and 1st third party and the further subdivision and alienation of the said land to other parties was void/irregular/fraudulent.

178. Did Wanjiku and Njoki have a good title to pass on to the third parties? It is pertinent to note that L.R No. **4148/12** is intact. All the alleged subdivisions of plots **4148/494 – 511** emanate from parcel **4148/16** and perhaps **4148/17**. I have already ruled that these are parcels of land which **Nyaga** doesn't appear to have known about their existence during the life time of his brother. So how does he stake a claim on these properties after the demise of his brother?

179. From the certificate of title for parcel **4148/16** availed by 6th third party, defendant and 1st third party became the registered owners of this land as tenants in common through transmission as they had acquired the grant of letters of administration in respect of the estate of their husband, **Njau**. The effect of such registration was captured in section 23 of the Registration of titles Act (Repealed) which provides that;

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

180. Note that this proviso echoes the current provision in **section 26 of the Land Registration Act**. No evidence has been adduced to suggest that there was fraud or collusion as is alleged by **Nyaga** in so far as the alienation of this land is concerned.

181. I am inclined to find that defendant and 1st third party had good title to pass on to the land buying companies like **Dinara ventures, Balcon** and the **Kibathis** who subsequently sold the suit parcels to other parties like **Juja Super Highway** group.

182. It should not be a concern of plaintiff whether the third parties have titles or not. That is an issue between the said third parties and the defendant and 1st third party.

183. **Doctrine of Laches**; I find that land is a precious commodity in Kenya, more so when it is located in prime areas in the vicinity of the capital city as it is in the present case. Transactions appertaining to such land cannot be dealt with in a sloppy cavalier manner. If **Nyaga** at all had a claim against his brother, he had all the time in this world to actualize the same during the lifetime of **Njau**. I therefore find that this is a suitable case to invoke the doctrine of laches; **“Equity aids the vigilant and not the indolent”**. **A key element of this doctrine is in ensuring that legal claims are brought in a reasonable and timely period.**

184. Plaintiff is guilty of acquiescence in this situation. Why is it that he never asserted his alleged rights when **Kamithi** and **Njau** breathed? Even when he realized that his brother was ailing in 1998, he did nothing. Equity will not lean in his favour as he filed this suit in 2005, 20 years after he allegedly acquired 42 ½ acres of land (in 1985) and 14 years after the land parcel no **4148/13** had ceased to exist in that status (in 1991)!

185. Finally, on this doctrine of laches, I have considered the change of circumstances. The land no. **4148/16** and perhaps **4148/17** was not just subdivided into 18 plots and sold to 3rd, 4th and 6th 3rd parties, but it had been divided even further and sold to other parties. The number given by 2nd third parties of their members who bought plots is 1800 (400+600+800) and they are not only in occupation of the land but have developed it and are in control of the same. Plaintiff confirmed this state of affairs when during cross examination by Mr. Wamboi, he stated that he can see from the road that parcel **4148/16** has been subdivided into smaller plots. I invoke equity to apply what is fair and just. And it is unjust to subject the current occupants of the land who could be in their thousands to unending litigation yet plaintiff could have asserted his claims before the change of circumstances.

186. I must point out that this is a case where plaintiff appears to be taking chances, otherwise he is not certain on what he is claiming. In his pleadings, latest amended plaint, he wants half of the two parcels of land, and this is repeated when he was being cross examined by **MR. Irungu** for the 6th third party. However, in his evidence, he was claiming the whole of parcel no. **4148/12** while it is not very certain as to what he wanted from parcel **4148/13**. I conclude that plaintiff lacks the moral and the legal basis to claim the aforementioned suit parcels.

Whether the third parties have been properly sued in this matter

187. It is the **Kibathis** who have advanced this claim, that it is only a defendant who can take out third party proceedings and not the plaintiff. To this end, the **Kibathis** cited the provisions of **Order 1, rule 15 of the Civil Procedure Rules**. I am in agreement with this legal position. The question however is; **Did the third parties come on board this ship via order 1 rule 15 of the civil procedure rules?** I have perused the records which reveals that Plaintiff had filed an application on 4.10. 2011 seeking orders of injunction against **Dinara Ventures** and one **Francis Wachira**. By then, the only parties who were in this suit were plaintiff and defendant. Most likely, this is when all these other third parties got wind of what was going on. When the matter came up before the court on 14.2.2012, all these third parties (save Njoki) just jumped on board the ship via **consent orders** issued in the presence of their advocates namely **Mr. Irungu for Balcon, Mr. Gachao for Dinara Ventures, Mr. Kagura for the Kibathis, and Mr. Omari for Juja Highway Welfare group**. Further, the consent also gave leeway for any other interested party to be enjoined in the suit, and perhaps this is how **Njoki** also came to be in the matter, though I am unable to establish how and when she was enjoined in the suit. Perhaps the third parties ought to have insisted on being referred to as interested parties and not third parties. The bottom line is that the third parties came into the picture with their eyes wide open and the **Kibathis** cannot be heard to say that they are not boarding!

How should the court deal with the payments made to AFC by plaintiff?

188. It is not disputed that plaintiff is the one who voluntarily paid the outstanding AFC loan amounting to a figure of Kshs. **836,500** or there

about. Section 13 of the Environment and Land Court Act states that; “The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the constitution and with the provisions of this act or any other law applicable to environment and land. (2) in exercise of its jurisdiction under article 162 (2) (b) of the constitution, the court shall have power to hear and determine disputes;

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining minerals and other natural resources.

(b) Relating to compulsory acquisition of land

(c) Relating to land administration and management

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and

(e) Any other dispute relating to environment and land.

189. As rightly submitted by 2nd third party, plaintiff cannot recover the said monies in form of land, neither can the court order for the refund as that is a debt he is owed by either the estate or by **Wanjiku and Njoki**. Hence, the court has no jurisdiction in that arena. Thus the issue of the monies paid to AFC is one that this court will not determine.

Costs

190. Costs follow events. Costs are in the discretion of the court, save that they will normally follow the event, unless the court or judge shall for good reason otherwise order. See **Rufus Njuguna Miringu and another vs Martha Murithi and 2 others (2012) eKLR** and **John Kamunya and another vs John Nginyi Muchiri and 3 others court of appeal Civil Appeal no. 123 of 07 Nakuru**. This is a case which I feel could have benefited immensely from Alternative Dispute Resolution. I did attempt to subject the parties to this process mid trial but it was the proverbial 11th hour, rather too late in the day as the court was on service week and time was limited for such diversion.

191. I have considered that the parties particularly plaintiff and defendant have been in the litigation arena for the last 13 or so years, which period may have taken a toll on their financial and mental status. I have also considered that plaintiff and defendant and 1st third party are family (in laws to be precise). And finally, I have taken into account the fact that there are now very many third parties or interested parties in the picture. If I condemn plaintiff to pay costs, since he is the loser, there may be an avalanche of unending claims against him, yet it is my hope that this Judgment will bring to an end the odyssey of litigation in this matter. In the circumstances, I direct that each party bears their own costs of the suit.

192. Final orders

1) Plaintiffs claim is hereby dismissed.

2) Any orders of injunction or inhibition that may be subsisting in respect of the suit parcels no: 4148/494, 4146/495, 4148/496, 4148/497, 4148/498, 4148/499, 4148/500, 4841/501, 4148/502, 4148/503, 4148/504, 4148/505, 4148/506, 4148/507, 4148/508, 4148/509, 4148/510, 4148/511 or any other suit parcel are hereby discharged.

3) Each Party to bear their own costs of the suit.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

M/s Ouko Counsel for Plaintiff

H. Kago Counsel for Defendant

Mbiu Counsel for 1st Third Party

J. Kouna H/B for Omari Counsel for 2nd Third Party

Mr. Ngeru H/B for J. Thongori Counsel for 4th & 5th Third Party.

Nguru H/B for Maina Irungu Counsel for 6th Third Party.

Plaintiff: Present

Defendant: Present