



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 84 OF 2018

ANNAH KIMITEI (As herself and as the Administrator

of the estate of the late Nyongio Kimitei).....PLAINTIFF

VERSUS

ISAACK KIPKETER TALAM 1ST DEFENDANT

ISAAC CHEPKENER 2ND DEFENDANT

BERNARD KIPTOO MAINA 3RD DEFENDANT

JUDGMENT

1. This suit was commenced vide the plaint dated 30th May, 2018 as amended on the 30th July, 2018 pursuant to the leave granted on the 23rd July, 2018. The plaintiff seeks for the following prayers:

(a) "A declaration that Annah Kimitei is the legitimate owner of Land parcel known as I.R. 15449, Land Reference number 9723.

(b) A declaration that the agreement for sale was null and void for lack of proper Land Control Board consent.

(c) An eviction order to issue against the Defendants, their agents, servants from entering, occupying, selling, transferring, encumbering, wasting or otherwise interfering with the Plaintiff's quiet possession, enjoyment of the suit land to the detriment of the Plaintiff's right as the proprietor of the same.

(d) A permanent injunction restraining the Defendants, their agent and/or servants from interfering with or in any other way dealing with the suit property to the detriment of the Plaintiff as the proprietor of the same

(e) Costs and interest of the suit.

(f) Any other relief this Honourable court deem fit and just to grant."

2. The plaintiff avers that she has brought the suit on behalf of herself and as the administratrix of the estate of the late Nyongio Kimitei, who died on the 19th June 1988, pursuant to a grant issued in **Nakuru High Court Succession Cause No. 185 of 1988**. That after to the said grant was issued, she got registered with land parcel I.R. 15449, Land Reference Number 9723, located at Kiplombe North, Eldoret Municipality, known as Sergoit River Farm, the suit property, measuring 769 acres. That the registration is for her benefit and that of the 13 children who are beneficiaries of the estate, but the distribution of the estate has not been done. That on the 5th March 2014, the plaintiff entered into an agreement to sell 13 acres out of the suit property to the 1st defendant for Kshs.10,000,000. That they had agreed that upon payment of the consideration, the plaintiff would seek the consents from the court and the beneficiaries of the estate for the sale. That the 1st defendant failed to pay the agreed purchase price contrary to the terms of their contract. That the sale agreement has been rendered illegal, invalid, null and void, for reason of absence of the said consents, lack of consideration, and failure to obtain the Land Control Board consent. That the 1st defendant has in collusion with the 2nd & 3rd defendants trespassed onto the 13 acres of the suit land without her authority, and their claim of ownership of the said land is illegal, fraudulent, malicious, null and void.

3. The 1st defendant opposed the suit through the statement of defence dated 10th July, 2018 and subsequently amended on the 7th August,

2018. He averred that he entered into a sale agreement dated 5th March, 2014 with the plaintiff for the purchase of 13.5 acres of from the suit land for a consideration of Kshs.10,000,000.00, which amount he has paid in full. That he subsequently sold the portion of the land he bought from the plaintiff to the 2nd & 3rd defendants and that they are therefore not trespassers.

4. The 2nd and 3rd defendants filed their statement of defence dated 14th June, 2018 in opposition to the plaintiff's claim. They averred that they had sought and obtained the clearance of the plaintiff and her family before buying the 1st defendant's interest in the 13.5 acres. That the plaintiff held the title over the 13.5 acres in trust for the 1st defendant, and now for them.

5. The plaintiff testified as PW1 on the 10th March, 2020. She adopted the contents of her witness statement and produced copies of her national identity card and grant as exhibits. It was her evidence that the suit land belonged to her husband who passed on in 1988, and that she has been appointed the administratrix of the estate. She told the court that she had borrowed Kshs.100,000.00 from the 1st defendant, at a monthly interest of Kshs.40,000.00 to pay school fees for her son, Kenneth Korir, who was schooling in Uganda, and to meet the expenses relating a court case in Nairobi. PW1 testified that after the 1st defendant had advanced a total of total of Kshs.800,000.00 to her son, Kenneth Korir, he approached her and asked for land in repayment of the sum advanced failing which he threatened to give her a coffin to be used to bury her son. The plaintiff agreed to make an agreement for sale of land, which she signed with the 1st Defendant on the road to save her son. She added that the 1st defendant had asked her to open a bank account where he would deposit the consideration of Kshs.10,000,000.00 but he did not do so. That 1st defendant gave her only Kshs.2000.00 for fuel upon signing the agreement, and not Kshs.10,000,000.00. That she has not challenged the sale agreement through any other way except this suit, and her prayers should be granted. During cross examination, PW1 confirmed that she put a thumb print on the sale agreement for 13.5 acres from the suit land, but added that the consideration of Kshs.10,000,000.00 therein was never paid to her. PW1 stated that though her sons, PW2 and James Mitei, were not present when she thumb-printed the sale agreement, they also signed it on the same date. That they had reported the 1st defendant's threat to harm her son unless he was given land in payment for the amount advanced, but had no documentary evidence to confirm it. That her son, James Mitei, was actually present when she signed the sale agreement, and that it was signed by the road side and not before Nyandoro advocate. That the amount received from the 1st defendant was Kshs.800,000.00 and not Kshs.600,000.00 contained in the statement of PW2. That the 2nd & 3rd defendants are not on her land and she has no claim against them. That she could remember signing a sale agreement before Nyandoro advocate, but it was not read over to her. That her sons, Kenneth and James who witnessed the agreement in her presence know how to read and write. That the agreement had provided that the 1st defendant was to take vacant possession on execution. That she never made a sale agreement with 3rd defendant or witnessed any between the 1st and 3rd defendant, but she remembers being asked to thumb-print the agreement in the presence of PW2. On further cross- examination, PW1 confirmed having sold three (3) acres of the suit land to the 3rd defendant. She also agreed having witnessed the sale agreement between the 1st and 3rd defendants, but added that she did not know its contents, and did not see any money being exchanged between the two. That she did not report the threat issued by the 1st defendant to any police station, but had told the police at Eldoret about it and asked her son to go and record a statement. Kenneth Kipkoech Korir testified as PW2 on the 23rd September, 2020 and adopted his witness statement dated 5th November, 2018 as his evidence. He testified that he had faced difficulties in raising school fees while at Kampala University, where he was pursuing law. That in March 2013, he met a friend, one Eric Kipkoech Korir, who introduced him to the 1st defendant, known by his alias Sonko, who lends money at 40% interest per month. That he subsequently introduced the 1st defendant to his mother, the plaintiff, as the 1st defendant needed security for the money he would advance. That through the 1st defendant's number 0721464376 and that of Samson Kirwa number 0722577406, he received a total of Kshs.640,000.00 by 2014. That the 1st defendant later started demanding payment of the money advanced and then issued threats to him. That the 1st defendant then told them that he had asked his lawyers to prepare a sale agreement and they should meet at Sirikwa Hotel to sign it. That they proceeded to the said hotel and Nyandoro Advocate brought the agreement for sale of 13.5 acres of the suit land for Kshs.10,000,000.00 at the parking and they signed it. That though the agreement indicated the consideration had been received, the plaintiff had not been paid. That they had signed the agreement before payment of the purchase price because the 1st defendant had told them he wanted to take it to his bank for approval. PW2 testified that PW1 had sold another portion of the suit land to the 3rd defendant. That he got to know the 2nd defendant after he came to fence a portion of the suit land that he claimed to have bought from the 1st defendant. That when they contacted the 1st defendant, he confirmed having sold the land to the 2nd and 3rd defendants. During cross examination, PW2 confirmed that he is yet to pay the Kshs.640,000.00 he had received from the 1st defendant between 2012 to 2014. That even though the 1st defendant had told them that he was taking the agreement to his bank, there was nothing on it to the effect that it required to be approved by the bank. That the Mpesa statement he produced as exhibit runs from 2012 to December, 2014. That his identity card number and his signature are as they appear on the sale agreement executed on 5th March, 2014. That the 1st defendant had forcefully surveyed and fenced off the 13.5 acres from the suit land in 2018. That the suit land was in his late father's name and not co-owned. That he was schooling at Kampala University between 2009 to 2014. That though the university had a fees bank account, he had no documentary evidence to confirm that he had paid fees through it with the money received from 1st defendant. That though he had initially objected to the plaintiff selling land to the 3rd defendant before confirmation of the grant, he later conceded. That the 1st defendant never acquired legal rights over the suit land as no Land Control Board consent was obtained. That the grant issued to the plaintiff has not been confirmed.

6. The 1st defendant testified as DW1 on the 18th May, 2021 and adopted his witness statement dated 24th September, 2018 as his evidence. It is his testimony that he bought 13.5 acres of the suit land from the plaintiff for Kshs.10,000,000.00, which he paid her in cash upon execution on the 5th March, 2014. That he took possession of the land and used it for about five (5) months after which he sold it to the 2nd defendant on the 1st August, 2014. That later, the 2nd defendant informed him that he could only pay for the 9.5 acres. That he therefore got the 3rd defendant who bought the four (4) extra acres on the 28th November, 2016. He produced the sale agreement under which he bought the suit land from the plaintiff as exhibit. He also produced as exhibits the sale agreements under which he sold the said land to the 2nd and 3rd defendants, with the plaintiff as a witness. That he paid the purchase price agreed with the plaintiff in instalments totalling about Kshs.800,000.00 sent through Mpesa to PW2 on various dates, and cash of Kshs.1,300,000.00, 1,300,000.00, 1,400,000.00, 2,000,000.00, 1,900,000.00, 1,100,000.00 and 350,000.00 to the plaintiff. That all the payments were made before execution of the sale agreement, under which it was acknowledged. That he is not a money lender, and that he was getting the money to pay the purchase price for the land from his agricultural activities and from his brother. DW1 denied threatening to harm PW2 if he was not given the land as payment for the money advanced.

7. Isaac Kiplimo Chepkener and Bernard Kiptoo Maina, the 2nd & 3rd defendants, testified on the 18th May, 2021 as DW2 and DW3 respectively. They told the court how they first bought portions of the suit land from the plaintiff which they are still using, and how they later bought 9.5 and 4 acres respectively from the 1st defendant, with the knowledge of the plaintiff and her family. That they bought the land from DW1 on the strength of the sale agreement he had entered with the plaintiff. That they used the portions of the land they bought from DW1 until the court stopped them in 2019. That in March 2018, PW2 went to the land with one Kulei, to excise one acre each from their portions, but they objected and reported to Kapsoya Police Station. That officers from that station visited the land, and directed that they all go to the station on 4th April, 2018. That the plaintiff failed to attend and instead lodged a complaint with police in Nairobi, and then filed this suit.

8. The learned counsel for the plaintiff, 2nd & 3rd defendants filed their written submissions dated the 22nd July, 2021 and 22nd September, 2021 respectively. No submissions had been received from the learned Counsel for the 1st Defendant by the time of preparing this judgment.

9. The counsel for the plaintiff submitted that the sale of land agreement dated 5th March, 2014 is vitiated or tainted with illegality, misrepresentation, undue- influence, coercion and/or fraud as has been elucidated in the evidence adduced by PW1 and PW2. That the consideration of Kshs.10,000,000.00 was not paid to the plaintiff, and the allegations by the 1st defendant that the aforesaid amount was handed to her in cash is not backed with evidence. The learned counsel cited the case of **CHARLES MWIRIGI MIRITI V THANANGA TEA GROWERS SACCO LTD & ANOTHER [2014] eKLR**. The counsel further submitted that the lack of a Land Control Board Consent vitiated the transaction between the plaintiff and the 1st defendant, and that it contravenes Section 6 and 8 of the Land Control Act. The counsel relied on the case of **DAVID SIRONGA OLE TUKAI VS FRANCIS ARAP MUGE & 2 OTHERS (2014) eKLR**, where the Court of Appeal held that the failure to obtain consent from the land control board as required by **section 6(1) of the Land Control Act** renders transactions void and unenforceable. The plaintiff's counsel submitted that the 2nd and the 3rd defendants' purported rights over the suit land cannot be sustained as they purchased land from the 1st defendant whose title was defective. The counsel cited the case of **KOYUMKEI MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED AND 17 OTHERS V RAEEL CHEPNG'ETICH KOECH [2019] eKLR**, where Sila Munyao J, held that;

“Given the above, the plaintiffs cannot therefore succeed in their quest to keep possession of the land. They have to vacate the land and cede possession forthwith for they have no right over the 6 acres that they claim to have purchased. I sympathise with those who moved in and developed their property, but they should have known better. They never held any title and simple prudence would have dictated that they await the settlement of the transaction between the 1st plaintiff and the vendors, or the conclusion of this case, before proceeding to embark on serious developments. I see some parties thinking that the court will be inclined to give them land because they have developed it. That is a notion that people need to get rid off. Rights over land are granted and guided by law, and these are not thrown away because one imagines that he can get an advantage by quickly developing the land. There is therefore not really much that I can do to help the 2nd – 18th plaintiffs. Maybe they can square out with the 1st plaintiff on how they will be compensated, if at all.”

The counsel went on to submit that the plaintiff had proved her case on a balance of probabilities and that she should be awarded the costs of the suit.

10. The learned counsel for the 2nd & 3rd defendants submitted that the sale agreement dated 5th March, 2014 between the plaintiff and 1st defendant complies with **section 3 of the Law of Contract Act**. The counsel relied on among others, the case of **JEREMIAH MUCHERU NDIBUI VS DAVID GICHURE (2019) eKLR**, where the court held that;

“A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.”

The counsel further submitted that there was no need for a Land Control Board consent for the subdivision of the suit land as the same is not agricultural land, but land situated within an urban centre, at Kiplombe within the former Eldoret Municipality. That the 2nd & 3rd defendants are bona fide purchasers for value without notice of any defects in title, and as such the court ought to uphold their rights. That the **Black's Law Dictionary, 9th Edition**, defines a *bona fide* purchaser as one who buys something for value without notice of another 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. The counsel urged the court to find favour for the 2nd & 3rd defendants, in spite of the defects in the 1st defendant's title. The learned counsel cited among others the case of **DAVID PETERSON KIENGO & 2 OTHERS V KARIUKI THUO [2012] eKLR**, where the court had this to say;

“They (the Thuos) did nothing wrong. They are merely victims of a fraudster in fact they are vicarious victims of a fraudster because they never saw nor dealt with him... It is the other parties to the case who were directly victimized yet through the operation of law these other parties have an upper hand in retaining possession and ownership of the properties in question.”

11. The following are the issues for the court's determinations;

(i) *Whether the sale agreement between the plaintiff and the 1st defendant was executed under duress;*

(ii) *Whether the terms of the sale agreement are unconscionable;*

(iii) *Whether the contract was null and void for lack of Land Control Board consent;*

(iv) *Whether the 2nd and 3rd Defendants are bona fide purchasers for value; and*

(v) *Who pays the costs of the suit?*

12. That having considered the pleadings, evidence tendered by the parties, the written submissions, and the superior courts decisions cited therein, I have come to the following determinations;

(a) That it is trite that three essential elements of offer, acceptance and consideration must be in place for a valid contract to exist. [See **Halsbury's Laws of England, Vol. 22, 5th Edition, paragraph 308**]. That from the parties' pleadings, and the evidence adduced, I am persuaded that the nature of the issues that present themselves in this suit can be aptly be described by the words of the critical legal philosopher and theorist, **Professor Louis Wolcher**, who holds the view that the ultimate task of law is to apportion human suffering. The plaintiff, an administratrix of her late husband's estate, courtesy of the grant issued in **Nakuru High Court Succession Cause No. 185 of 1988** on the 30th January 1988, which remains unconfirmed to date, approached the court to reassert her title to the suit land by having the sale agreement entered between herself and the 1st defendant invalidated. Simply put, the plaintiff had borrowed money from the 1st defendant to cover her son's school fees and court case expenses at 40% interest per month. That when she was unable to refund the money advanced to her, the 1st defendant threatened to harm her son unless he was paid in form of land. The plaintiff did not adduce any evidence that she had reported the aforementioned threats to the police or any other law enforcement agency. According to the plaintiff, the amount that was due to the 1st defendant was Kshs.800,000.00, but according to her son, PW2, the amount was Kshs.640,000.00. That notwithstanding the foregoing, the debt aforementioned, and the interest thereof, remains outstanding to date. It is the plaintiff's case that the 1st defendant coerced her to sign a sale agreement signifying the sale of 13.5 acres of the suit land, for a consideration of Kshs.10,000,000.00, which amount was never advanced to her. At the point of the execution of the said sale agreement, the plaintiff was with her two sons, one of whom was training in law at Kampala University and testified as PW2. That the two sons are literate and capable of reading and writing. That it was not disclosed whether the Plaintiff and 1st Defendant had computed the total accrued interest of the amount advanced by the time the sale agreement was executed.

(b) The 1st defendant's case is that he is a farmer, and that the plaintiff voluntarily entered into a sale of land agreement with him for the purchase of 13.5 acres of land for a consideration of Kshs.10,000,000.00. That though not all instalment payments he made to the plaintiff were documented, save for the final one of Kshs.1,700,000.00 paid on the date of execution of the sale agreement, he had paid the entire consideration price. That after taking possession of the 13.5 acres, he fenced, cultivated and planted wheat on it. That he thereafter sold the land to the 2nd defendant, vide a sale agreement dated the 1st August, 2014. That the 2nd defendant later surrendered four (4) acres after failing to pay part of the agreed purchase. That the 1st defendant then sold the four (4) acres to the 3rd defendant through the sale agreement dated 28th November, 2016. That the plaintiff and her sons were witnesses to the sale agreements between the 1st defendant and the 2nd & 3rd defendants, thereby assuring the buyers of the authenticity of the seller's interest to the land in question. The defendants confirmed that the agreed considerations in their respective sale agreements have been paid, acknowledged, and the buyers placed in possession.

(c) The 2nd and 3rd defendants' position are that they are *bona fide* purchasers for a value, without notice of any defect in the 1st defendant's title. That they were convinced that the 1st defendant's interests in the suit land were legitimate, by the fact that the plaintiff and her sons had no objections in witnessing their sale agreements with the 1st Defendant. That though no documentary acknowledgements of the purchase price were availed to the court, the 1st defendant had in his evidence confirmed having received the same. The 2nd & 3rd defendants confirmed having taken possession of the land they bought from the 1st defendant, and remained in possession until it was interrupted in 2018 when PW2, a son to the plaintiff, brought one Kulei, who sought to excise an acre of land from their respective parcels of land. That their use and occupation of the suit land was subsequently stopped vide a court order issued in 2019.

(d) That the plaintiff claims to have executed the sale agreement dated 1st August, 2014 under duress, in that the 1st defendant had threatened to harm and or kill her son. The term duress was defined by the court in the case of **KAZUNGU FONDO SHUTU & ANOTHER V JAPHET NOTI CHARO & ANOTHER [2021] eKLR** as follows:

The trial court, in addressing the meaning of the term duress made reference to the case of Jayantilala Lalji Gandhi & Another v Mavji Ruda [1986] eKLR, where the court quoted Chesire & Fifoot's Law of Contract, 8th Edition at page 281, thus:

"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e., threats calculated to produce fear of loss of life or bodily harm. It is a part of the law which nowadays seldom raises an issue. That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort..."

That duress was also defined in the case of **?MAMTA PEEUSH MAHAJAN [suing on behalf of the estate of the late Peeush Premlal Mahajan] V YASHWANT KUMARI MAHAJAN [sued personally and as executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR**, as follows:

"By duress is meant (sic) the compulsion under which a person acts through fear of personal suffering, as from injury to the body from confinement, actual or threatened: see Halsbury's Law of England 3rd Ed Vol 8 para 146.

Duress essentially occurs where a party to contract has coerced the other and exercised domination as to undermine the others independence of decision substantially. It is all about illegitimate or unlawful pressure. Where proven, the related contract is deemed voidable."

That the evidence adduced by PW1 and PW2, who are the plaintiff and her son respectively, leaves no doubt that their interactions with the 1st defendant from the 2012 to 5th March, 2014 when the sale agreement was executed allegedly under duress (threats), were in public places like roads, parking and hotel grounds. That during those interactions, the plaintiff was always with others including PW2 and another son, who are literate adults. That noting that the plaintiff conceded that she is yet to pay the advance that she had requested for and received from the 1st defendant between 2012 to 2014, her claim that she signed the sale agreement out of the fear that failure to do so would lead to her son being harmed, in the absence of any report having been made to the police, appear far-fetched. That had the 1st defendant forced her into the sale transaction as alleged, her and her sons' willingness to continue interacting with the 1st defendant months and years later, when he entered into sale agreements dated the 1st August, 2014 and 28th November, 2016 with the 2nd & 3rd defendants over portions of the suit land, subject matter of the agreement of 5th March 2014, in which she and her sons were witnesses, could not have happened without them raising objections. That this is especially so as there is no allegation that they were forced to be witnesses in the latter two agreements.

(e) That according to the plaintiff, the consideration of Kshs.10,000,000.00 under the sale agreement dated 5th March, 2014 was never advanced to her. She claimed that she had been told the amount would be deposited to her account once the 1st defendant took a duly executed copy of the sale agreement dated 5th March, 2014 to his bank. That it is common practice that when a customer seeks to withdraw a substantial amount of money from the bank, disclosure of where or purposes of the money is routinely required under the Proceeds of Crime and Anti-Money Laundering Act, among others. That while it could be probable that the 1st defendant had made the plaintiff believe that a signed copy of the sale agreement was required by his bank, the claim that the amount indicated in the sale agreement dated the 5th March, 2014 to have been acknowledged had not actually been received, and yet no formal complaint has been lodged with the police to date, sounds like a fairy tale. The plaintiff has therefore failed to establish reasonable basis of vitiating or invalidating the sale agreement that she entered into with the 1st defendant on the 5th March, 2014.

(f) That further to the foregoing, had the court found the sale agreement between the plaintiff and 1st defendant was an unconscionable contract, the court would have had the basis to declare that the plaintiff was not bound by its terms. That in the case of **PIUS KIMAIYO LANGAT V CO-OPERATIVE BANK OF KENYA LIMITED [2017] eKLR**, the Court made the following observations as relates to unconscionability of contract:

“Finally on unconscionability, this Court in the Margaret Njeri Muiruri case (supra) stated:

“Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black’s Law Dictionary, 9th Edition, Gardner, Ed.).

... We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503.

That in this instance, I find the plaintiff is bound by the terms of the sale agreement dated 5th March, 2014 between herself and the 1st defendant.

(g) That in the case of **DAVID SIRONGA OLE TUKAI V FRANCIS ARAP MUGE & 2 OTHERS [2014] eKLR**, the Court of Appeal held the view that section 6 of the Land Control Act is couched in mandatory terms, and as such the same cannot be overlooked and or done away with in observance of equitable rights. That therefore, the lack of a Land Control Board consent renders a sale agreement in relation to agricultural land null and void. But in the case of **WILLY KIMUTAI KITILIT V MICHAEL KIBET [2018] eKLR**, which is a latter decision, the same court held the view that in the absence of a Land Control Board consent, a constructive trust is established in favour of purchasers who have paid the consideration. The court held that where a Land Control Board consent is not sought within the statutorily required time due to no fault on the part of the purchaser, and where the purchaser has paid the full consideration price, an implied or constructive trust is established such that the vendor ought not be allowed to claim the land to the detriment of the bona fide purchasers for a valued consideration. That the two decisions being from the Court of Appeal are binding to this court, but the one that is more apt to the instant scenario is the **WILLY KIMUTAI KITILIT CASE (SUPRA)**, whose sentiments I associate myself with. That applying the findings in that case to the transactions between the plaintiff and the 1st defendant, and noting that their sale agreement confirmed the whole purchase price had been paid, and the purchaser placed in possession, I find a constructive trust over the 13.5 acres of the suit land has been established in favour of the 1st defendant, despite the failure to obtain the statutory consents. That it is important to note that at paragraph 10 of the amended plaint, the plaintiff had indicated that she was aware the transaction she had entered with the 1st defendant would require the concurrence of the succession court and that of the other beneficiaries of the estate. That further, clause 3 of the sale agreement dated 5th March, 2014 had specified the consent that was to be sought to be from the Commissioner of Lands, and not from the Land Control Board.

(h) That the pleadings, evidence and submissions proffered by the 2nd and 3rd defendants simply show that they are *bona fide* purchasers for a money consideration, with no notice as to any defect in title. That in the case of **WESTON GITONGA & 10 OTHERS V PETER RUGU GIKANGA & ANOTHER [2017] eKLR**, the court cited with approval the Ugandan case of **Katende v. Haridar & Company Limited [2008] 2 E.A.173** in which it was held that;

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongfully. For a purchaser to successfully rely on the bona fide doctrine,

(he) must prove that:

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud. [Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

That during the hearing of this matter it became apparent that the plaintiff and her sons witnessed the sale agreements dated 1st August, 2014 and 28th November, 2016 between the 1st defendant as vendor, and the 2nd & 3rd defendants respectively as purchasers, of portions of the land earlier sold to him by the plaintiff, without raising any objection and or opposition. The 2nd and 3rd defendants testified to the effect that their confidence to continue with the transactions was bolstered by the fact that the plaintiff and her sons consented to their respective transactions, and that they did not raise any objections when they took possession of the suit land. That it is noteworthy that the 2nd & 3rd defendants were persons well known to the plaintiff previously, having bought from her other portions of the suit land that they are in possession of to date. That if the plaintiff disputed the 1st defendant's claim to the 13.5 acres, she would at least have warned the 2nd & 3rd defendants of her claim over that land, as the two were persons she knew. That instead she and her sons went ahead to witness the agreements, thereby confirming their no contest to the 1st defendant's claim over the said land. The latter conduct of the plaintiff and her sons was indeed strange as no justification was advanced to this court to warrant their acquiesce to the subsequent sales of the suit land by the 1st defendant, if at all they held the view that he had no title. That had the plaintiff not received the entire consideration by the 1st defendant as she wants the court through this proceeding to believe, a reasonable person would have expected her to object to the sale, or at least seek to have the agreed purchase price from the 2nd & 3rd defendants to be paid to her, instead of the 1st defendant.

(i) That in the circumstances, I find that the conduct of the plaintiff and her son bolstered the confidence of the 2nd and 3rd defendants to purchase the suit land from the 1st defendant, and as such it would be unjust and unfair to disentitle the 2nd and 3rd defendants of the suit land. That indeed the 2nd & 3rd defendants are bona fide purchasers for value and without notice of any defect in the 1st defendant's claim of ownership. That I therefore find that the plaintiff has failed to prove her case against all the defendants to the standard required.

(j) That though the plaintiff has lost her claim, the court is of the view that the circumstances of this case it would be fair and just if each party bears their own costs.

13. That in view of the foregoing, the court finds and orders as follows;

(a) That the plaintiff has failed to prove her claim to the standard required of a balance of probabilities and her suit is hereby dismissed.

(b) That each party to bear his/her own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 10TH DAY OF NOVEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF: ABSENT

DEFENDANTS: ABSENT

COUNSEL: MR. RIOBA FOR THE PLAINTIFF

MR. NGIGI FOR 2ND AND 3RD DEFENDANTS

CHRISTINE: COURT ASSISTANT