



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 41 OF 2007 (OS)

KENYA IHENYA COMPANY LIMITED.....PLAINTIFF

=VERSUS=

1. RUTH NYAMBURA CHUCHU

2. ZIPPORAH WANGUI CHUCHU

3. FLORENCE NJERI CHUCHU

(Sued as the Administrices of the estate of the late SOLOMON

CHUCHU WATAKU aka CHUCHU WATAKU GITHIBA alias

CHUCHU WATAKU alias WATAKU.....DEFENDANTS

AND

JACKTON OSEWE AGWET & I SAAC

NYONGOINA & 146 OTHERS.....INTERESTED PARTIES

URUTAGWO MWIRUTI WOMEN GROUP.....NECESSARY PARTY

JUDGEMENT

1. By an originating summons dated 16th April 2007 the Plaintiff seeks Judgment against the Defendants for orders:-

a) That as at the time of the death of late Solomon Chuchu Wataka a.k.a Chuchu Wataku Githiba alias Cucu Wataku (hereinafter referred to as "the deceased") on 5th March 2006 he held the land parcel number 7340/91 in trust for the Plaintiff Kenya Ihenya Company Limited.

b) That the Defendants do abstain from distributing the said parcel namely Land Reference No. 7340/91 otherwise than to the Plaintiff, the said Kenya Ihenya Limited.

c) That the Plaintiff, Kenya Ihenya Company Limited be registered as proprietor of all that parcel of land known as Land Reference No. 7340/91 in place of the deceased and /or his(the deceased's) personal representative, administrices or trustees by virtue of the provisions of Section 38 of the Limitation of Actions Act, chapter 22, Laws of Kenya.

d) That the costs of this suit be provided for.

2. The grounds are:-

(a) That the late Solomon Chuchu wataku a.k.a Chuchu Wataku Githiba alias Cucu Wataku alias Chuchu Wataku (deceased) had in 1989 sold the land know as LR NO 7340/91 (the said land) to the Plaintiff.

(b) That the Plaintiff paid the entire purchase price to the deceased.

(c) That the deceased handed over possession of the suit land to the Plaintiff in 1989.

(d) That the Plaintiff has been in continuous uninterrupted adverse possession of the suit land ever since 1989.

(e) That the deceased surrendered the original documents of title to the Plaintiff.

(f) That the deceased is therefore presently registered as proprietor of the suit land but only as a trustee for the Plaintiff.

3. The Originating Summons is supported by the affidavit of James Gitau Magu, a director of the Plaintiff sworn on the 16th April 2007.

4. The Plaintiff's case is that it bought the suit land from the deceased Solomon Chuchu sometimes in 1989 and since then it has been in uninterrupted adverse possession of the suit land.

5. James Gitau Magu deponed that on 12th September 1989, Solomon Chuchu Wataku (deceased) sold to the Plaintiff the suit property then represented by 20 shares in a company known as Githunguri Njiru Farm (1966) Limited at kshs.1,260,000/= which the Plaintiff paid to the deceased within one year of the date of the sale agreement and took vacant possession immediately on execution. He added that the Plaintiff has been in open continuous and uninterrupted adverse possession and has therefore acquired title by operation of law.

6. He further deponed that at the time of selling the suit property, the deceased was awaiting issuance of a grant and in 1996, he was issued grant (No.70427) and he immediately delivered it to the Plaintiff who has been in possession of it since 1996.

7. Mr. James Gitau Magu deponed that the grant was issued under the Registration of Titles Act, Chapter 281 and is governed by the Government Lands Act, and as such Sections 37 & 38 of the Limitation of Actions Act apply thereto.

8. He also deponed that the Plaintiff being a land buying company has allocated segments of the entire suit land to each of its shareholders each of whom has taken possession. He added that the deceased died on 5th March 2006 before transferring the suit land to the Plaintiff and his administrators have refused to acknowledge the transaction between the deceased and the Plaintiff.

9. He deponed that since the deceased had surrendered possession of the suit land and the documents of title to the Plaintiff, he had created a trust in favour of the Plaintiff in respect of the same wherefore the Plaintiff is now a beneficiary of the land.

The Defendants' response.

10. The Defendants entered appearance on 23rd April 2007 through a Memorandum of appearance filed by M/S Kange'the & Company Advocates. The Defendants' case is that the deceased never sold the suit land to the Plaintiff Company and that the alleged sale agreement is a forged document as the deceased signature is forged. They contended the Plaintiff never took possession of the suit land as alleged.

The Interested Party's response.

11. They are opposed to the Plaintiff's claim over the suit property. They Filed the affidavit sworn on 6th September 2019 through their representative; Jackson Osewe Agwet.

12. He deponed that the Interested Parties are residents of Zebra, Utawala area and in actual possession of plots measuring 40 by 60 feet created by subdivision of **L.R NO.7340/91** having purchased their respective plots from Uturagwo Mwiruti Women Group on diverse dates from the year 2006-2013.

13. He deponed that they learnt of this matter in December 2015 when they found copies of the court order issued on 23rd September 2015 dropped on the ground. He added the Interested Parties have heavily invested on the suit land after assurances from Uturagwo Mwiruti Women Group that that there was no dispute in respect of the suit property.

14. He deponed that having purchased their land in good faith, they are bona fide purchasers for value without notice therefore this court should uphold their proprietary ownership of their respective plots being subdivisions of the suit property since they have legitimate rights over it.

The Plaintiff's evidence

15. PW1, James Gitau Magu, the Plaintiff's director testified on 16th November 2011. He was cross-examined on 5th May 2014. He told the court that the Plaintiff is a land buying company that buys land and distributes it to shareholders. He produced the original title to the suit land and stated that it was given to the Plaintiff by Mr. Chuchu Wataku after it bought the suit land from him vide the sale agreement dated 12th September 1989.

16. He stated that the purchase price was kshs.1,260,000/= and it took possession immediately after signing the agreement before Mr. F.M Gatonye Advocate. He further stated that their chairman, and Secretary, and Chuchu Wataku signed the agreement at his own free will and

they paid a deposit of kshs.50,000/= and the balance as per receipts produced.

17. He stated that after it finished paying, it instructed a surveyor who subdivided the land into plots with authority of Mr. Chuchu who told the Plaintiff that when title shall be issued, he would take the Plaintiff to the Land Control Board.

18. He stated that Mr. Chuchu was a shareholder of Githunguri Njiru Farm [1966] Limited and that is how he was issued with title and when he got it, he gave it to the plaintiff. He referred to exhibit No. P4 which is a letter by Githunguri Njiru Farm to Chuchu Wataku which forwarded the suit title to him and he in turn released it to the Plaintiff.

19. He stated that the late Mr. Chuchu also signed an application for land control board consent so that the land would be transferred to the Plaintiff's name by Mavoko Land Control Board . He added that the Plaintiff took the form to the D.O Mavoko and were told to attend the board at an appointed date.

20. He further stated that the late Chuchu did not go to the board as his properties had been stolen and he was required to attend to court thus he told the Plaintiff to wait but he subsequently fell ill, got bedridden and died in March 2006.

21. He stated that while they were awaiting the late Chuchu's administrators to transfer the land, when he learnt that someone was removing beacons from the land. He went to the suit land, he found a new surveyor with two other people who told him that they had been instructed by one Memo Mercy who had bought the land.

22. He stated that when the Plaintiff's original lawyer Mr.Gatuguta died, the Plaintiff transferred its file to Mr.Kamonde Advocate who became their Advocate but it later turned out that Mr. Kamonde was also the late Mr. Chuchu's lawyer and that administrators of the late Mr. Chuchu were trying to sell the land therefore he told them to get another lawyer and sue the administrators which it did and got orders stopping further transactions over the suit land.

23. He also stated that the suit land has not been transferred to them up to date. He referred to exhibit No. P5 which is an application for land control board consent form signed on 22nd October 1999. He also referred to certificates of shares of its members, ballot Numbers and photographs and testified that the Plaintiff's shareholders are occupying the land but the administrators of the late Chuchu are hostile to them. He denied stealing the title to the suit land and stated that he has never been taken to the police on allegation of theft from 1989.

24. When cross-examined; he told the court that vide the sale agreement dated 12th September 1989, the Plaintiff was buying Mr. Chuchu's shares representing his land thus it bought the shares and the land came later. He stated that the company was left with Mr. Chuchu's share certificate but it returned it to Githunguri Njiru Farm (1966) limited and it was given a title. He further stated that it was Mr. Chuchu's responsibility to inform Githunguri Njiru Farm (1966) Limited that the Plaintiff was the new shareholder. It was his testimony that that Mr. Chuchu did return his share certificate and got the title from Githunguri farm and gave it to the Plaintiff on 4th October 2000.

25. He testified that the Plaintiff did not know the number of shares Mr. Chuchu had but it bought 1 share and agreed to pay kshs.1,260,000/= for the land. He added that the Company paid a deposit of kshs.50, 000/= on 12th September 1989. Put to task on why receipts for payment towards the agreement are dated 1st August 1989, he stated that he was not the chairman then. He was also cross-examined over paragraph 6 of the sale agreement which states that the balance of the purchase price after paying the deposit was Kshs.1,110,000/= and paragraph 5 of his replying affidavit which states that the deposit was kshs.1,110,000/= he stated that he may be mistaken as to the deposit because he was not the chairman then. He also stated that the Plaintiff paid the last installment on 14th September 1990 and it filed the instant originating summons on 18th April 2007 while Mr. Chuchu died in March 2006.

26. When cross examined on the Advocates who witnessed the sale agreement, he stated that it was signed before Mr.Gatuguta and not Mr.Gitanga. He further stated that after paying the deposit, Mr.Chuchu told the Plaintiff to enter the suit land and authorized a surveyor to subdivide it. He added that subdivisions were done immediately and members of the Plaintiff entered the land in 1991.He added that Exhibit P9 and P10 are letters dated 14th March 1990 and 30th march 1990 addressing application for subdivision from Ministry of lands.

27. He stated that Mr. Chuchu signed the application for Land Control Board consent form and they went to the land board in 1999 and that he gave them title to the land in 2000 and not 1996.On Plaintiff Exhibit 3 9b) which is a copy of a banker's cheque sent to KCB Githunguri, he stated that he could not explain why it was not the Plaintiff's and stated that some documents and receipts were stolen from their offices.

28. When re-examined, he stated that the purchase price was kshs.1, 260,000/= and that the Plaintiff paid the balance in instalments as it received money from members. He also stated that it took them time to go to the land control board after getting the title because they were sent by Mr. Chuchu to get the application in Machakos and they were told to return the next month but Mr. Chuchu could not make it because his premises were robbed and he had to attend a court case in relation to the same.

29. He added that they sued the woman who occupied the land and got orders from Ang'awa j which is exhibit P5. He stated that the Plaintiff's members entered the land and some are there to date while others had their properties demolished. He also stated that receipts of payment are not forgeries and that they used to pay Mr. Chuchu by way of banker's cheque.

30. PW2 Johnson Alard Macharia, a surveyor testified on 16th November 2011.He was cross-examined on 5th May 2014.He stated that he worked with Nairobi City Council as a surveyor from 1979-2002.He told the court that he has done several jobs as the Plaintiff's surveyor and that he has planned several properties bought by the Plaintiff. He produced the plan he drew of the suit land and stated that he was authorized to plan the subdivision by the late Mr. Chuchu.

31. It was his testimony that he presented the plan to the land control board for approval of subdivision and to clerk, county council, land

officer Machakos and director of survey. He added that exhibit P10 is the letter dated 30th March 1990 from District Physical Planner who approved the subdivision and approval from Mavoko.

32. He further stated that after getting the approvals, he went to the ground to do a survey and he surveyed the suit land into 309 plots measuring 27 meters by 10 meters which are residential properties and placed a beacon. He added that a scheme plan is the one that circulated for approval and it is kept by the director of survey. When the survey work is on the field, he will be issued with a deed plan. He produced the scheme plan as exhibit P12. He further stated that there is provision for a business center with 6 plots of 6 meters by 13 meters and a community area of 3 plots and roads that measure 15 meters while others are 9 meters. He stated that all the scheme plans are with central authority; the commissioner of lands. He added that the process did not get to its logical conclusion and he told the directors of the Plaintiff to allocate the plots to the members as they await title processing.

33. When cross-examined, he stated that the Plaintiff engaged him in November 1989 as a surveyor with regard to the suit property and that he entered the land in 1990 with the approval of Mr. Chuchu who authorized him to subdivide the suit land pending completion of the sale transaction. He further stated that he submitted the plan to the lands ministry in February 1990 for approval.

34. On re-examination, he stated that the subdivision of the suit land was meant for the Plaintiff to give its member's subtitles. He added that after sub division, the original title is required to have the approved plan and sub titles.

35. PW3, Peter Mwangi Githinji a member of the Plaintiff told the court that he was approached by the Plaintiff to go to the suit land and investigate whether the court order issued against interference with the suit land was being violated. He testified that in February 2009, he paid kshs.21,000 to a company called Uturagwo Mwiruti Women group which was selling plots on the suit land at kshs.160,000/= and they took him to the plot which is on the suit land. He produced the receipt dated 18th December 2008.

36. He stated that there is interference with the suit property but he is not sure if they knew of the court case and they even sent him a message to complete the purchase price.

The Defendants' evidence

37. DW1, James Wataku Chuchu, the Late Chuchu Wataku's son testified on 15th June 2021. He adopted his witness statement dated 4th December 2020. He told the court that the 1st Defendant; now deceased was his late Mother while the 2nd and 3rd Defendants are his step mothers. He stated that the 2nd Defendant also died and the 3rd Defendant suffers from memory loss.

38. He stated that that he knew about the suit land and that his father did not sell it He stated that it is questionable for the Plaintiff's director to claim at paragraph 5 of his affidavit that it bought 26 shares for Kshs.1,260,000/=, paid a deposit of kshs.50,000/= and remained with a balance of Kshs.1,110,000 yet the sale agreement refers to a deposit of Kshs.250,000 and a balance of kshs.1,110,00/=. He stated that his father got the title in 1999 yet the suit was filed in 2007 after 18 years since the date of the sale agreement, thus the Plaintiff is lying and the suit should be dismissed.

39. When cross-examined, he stated that his father got the title in 1999. He did not have a copy of the title but his father had it but it was stolen from the safe. When Referred to P-Exhibit 1 which is the title, he stated that it was issued on 5th September 1996. He stated that they have been paying rates over the suit property and the receipts are in the name of Chuchu Wataku.

40. He stated that he does not agree with the assertion that Chuchu Wataku (deceased) signed the sale agreement as vendor as the signature does not belong to his father. He also stated that they did not report the forgery to the police because they did not know that the suit land had been sold and since they were in possession. He stated that the Plaintiff got the title fraudulently. He also stated that Anne Wambui Ndung'u bought the land from them and they sold it after conducting a search since they did not have title.

41. When he was re-examined, he stated that they sold the suit land to Anne Wambui Ndung'u who sold to other people through Urutagwo Mwiruti Women Group whose members have been on the suit land since 2006 and they have been enjoying quiet possession of the suit property.

The Interested Parties' evidence

42. IPW1; Jackson Osewe Agwet a representative of the Interested Parties told the Court that Interested Parties got to know about the case in 2015 and then they sought to be enjoined in these proceedings. He stated that the suit land is subdivided into 1/8th plots measuring 40 x 60 feet and that he entered the suit land in 2006 and his plots are No.36 and 37.

43. He stated that 80% of the land is occupied and well developed with houses, churches, a supermarket, boreholes and other amenities. He prayed that the Interested parties be issued with titles.

44. When cross-examined, he stated that the Interested Parties bought the land from Urutagwo Mwiruti women group who issued them with share certificates in respect of the suit land. The said vendor bought from the Defendants. He added that he saw a search certificate in the name of Chuchu Watuku (deceased).

45. At the close of the oral testimonies the parties tendered written submissions.

The Plaintiff's submissions

46. The Plaintiff raised the following issues for determination:-

- a) Whether there is a valid agreement of sale dated 12th September 1989 between the deceased and the Plaintiff and if so was there a breach of the terms of the agreement by the deceased?*
- b) Whether the Plaintiff should be registered as the proprietor of the piece of land known as LR No.7340/91 in place of the deceased and /or his administratrixes?*
- c) In the alternative, has the Plaintiff become entitled to the title and ownership of the suit property by virtue of adverse possession and occupation of the suit premises?*
- d) Who should bear the costs of the suit?*

47. The Plaintiff submitted that as early as the year 1989, the deceased and the Plaintiff agreed to the terms of the contract for sale of the suit land and to signify this, they signed an agreement for sale which meets the essential components of a contract as observed in **Garvey v Richards [2011] JMCA 16**.

48. It further submitted that there was offer and acceptance to sell and there was purchase with an agreed consideration of kshs.1,260,000/= .It added that to the Plaintiff, the offer and acceptance was signaled when the Defendant signed the agreement and even received kshs.50,000/= as part payment. It urged the court to enforce the contract since in **National Bank of Kenya Limited v. Pipe Plastic Samkolit (k) ltd & Another [2001] KLR**, the court stated that a court of law cannot rewrite a contract between the parties. It also cited **Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] e KLR** where the court noted that offer and acceptance supported with consideration equate a contract.

49. It submitted that fraud, misrepresentation, illegality and duress are factors which vitiate a contract .It added that since the Defendants deponed that the sale agreement is forged and fraudulent, and that the deceased collected the title to the suit property but it was missing from his safe, they had the duty to prove the particulars of fraud alleged. It relied on the cases of **Koinange & Others v Koinange[1986] KLR 23**,and **Okerer v Kiiyukia& others[2007]1 EA 30**.

50. It submitted that the Plaintiff and the Defendant are in concurrence that the suit property was subdivided before the deceased's demise but the Defendants did not produce any evidence in court while the Plaintiff called the surveyor who subdivided the suit land and he produced evidence to the effect that the suit land was subdivided by the Plaintiff.

51. It also submitted that its rights as a purchaser to the estate of the deceased are recognized under Section 2 of the law of succession Act and the court found so in **Johnson Muinde Ngunza & Another v Michael Gitau Kiarie & 12 Others [2017]e KLR**.It added that the sale transactions was in the advanced stages of completion and would have been successfully completed were it not for the death of the deceased thus its interest should be legitimately taken into account in distributing the estate of the deceased.

52. It submitted that in the alternative, it is entitled to the suit property by way of adverse possession since it has been in occupation of the suit property since the year 1989 which is a period of over 12 years .It added that it has also been in occupation and possession of the suit property openly and continuously and without interruption for all that period and the Defendants have not availed any material evidence to contradict the Plaintiff's averments and it is a fact that the suit land is still registered in the name of the deceased and that its photographic evidence showing extensive developments including permanent buildings and crops shoe. There is no doubt that such developments have been undertaken over time and openly. It cited the court of Appeal's decision in **Mtana Lewa v Kahindi Ngala Mwangandi [2005] e KLR** and in **Wambugu v. Njugua [1983] KLR, 173**.

The Defendants' submissions

53. They are dated 29th September 2021.The Defendants raised the following issues for determination:-

- a) Whether the Plaintiff purchased the suit land from the deceased (Solomon Wachu Wataku) as alleged.*
- b) Whether the Plaintiff has been in continuous and quiet possession and use of the suit land since 1989.*
- c) Whether the Plaintiff can simultaneously sustain a claim of purchase and adverse possession at the same time.*
- d) Whether the Plaintiff has proved its case on a balance of probabilities.*
- e) Who should pay costs.*

54. They submitted that there were glaring inconsistencies in the alleged agreement of sale and the testimonies of the witnesses. They pointed out that PW1'S testimony that they were purchasing the entire suit land is inconsistent with the sale agreement at clause 2 which indicates that the Plaintiff was purchasing 31½ acres comprising a portion of L.R No.7340/91, the whole acreage of the suit land is 31½ acres.

55. They also submitted that the alleged sale agreement indicates that the Plaintiff was purchasing 26 shares yet the PW1 claimed that the Plaintiff purchased 1 share and that it was buying shares then land came later.

56. On whether the Plaintiff has been in continuous and quiet possession of the suit land since 1989, they submitted that they did not have

evidence to prove it and it is obvious that the land is occupied by the interested parties. They relied on the case of **William Gitahi Murathe v Gakuru Gathimbi-Civil Appeal No. 49 of 1996**.

57. On whether the Plaintiff can simultaneously sustain a claim for a purchaser's interest and that of adverse possession, he submitted that those 2 claims cannot co-exist. They relied on the case of **Kweyu v Omutut (1990) KLR 709**.

The Interested Parties submissions

58. They are dated 8th September 2009. The Interested parties raised the following issues arose for determination:-

- a) Whether a doctrine of trust may arise out of the agreement*
- b) Whether a doctrine of advance possession may arise out of the sale agreement.*
- c) Whether the Plaintiffs/Applicants are entitled to the order sought in prayer (3) & (4) of the application.*
- d) Who shall bear the costs of the application?*

59. They submitted that the deceased was the registered owner of the suit land on 10th June 1996 vide a grant, thus the Plaintiff's claim to have been in actual possession since 1989 is not supported by any title. They further submitted that the Plaintiff's claim could only start running after the plaintiff was issued with the grant in 1996 and as such the plaintiff's claim was brought prematurely only after 8 years.

60. They also submitted that the Plaintiff's claim fails as it does not meet all the elements of adverse possession provided in the case of **Gabriel Mbui Mukundia Maranya [1993] e KLR**. They added that the Plaintiff's members are not in actual occupation and possession of the land and no evidence was tendered to show that they have been in uninterrupted continuous actual possession of the land and there is no single development by the Plaintiff company or its members.

61. They submitted that the sale agreement dated 12th September 2009 falls way below the legal threshold because it is not admissible in evidence as it is unstamped as per Section 19 of the Stamp duty Act. They added that is time barred as per section 4(1) of the Limitation of Actions Act which provides that no action may be brought after the end of 6 years from the date which the cause of action accrued and it is also void for lack of land control board consent.

62. I have considered the pleadings and the evidence on record. I have also considered the submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

- (i) Whether there is a valid agreement of sale dated 12th September 1989 between the deceased and the Plaintiff.*
- (ii) If so was there a breach of the terms by either party?*
- (iii) Whether the Plaintiff should be registered as the proprietor of the parcel of land known as LR NO 7340/91 in place of the deceased and/or his administratrixes.*
- (iv) Whether the Plaintiff can sustain a claim for adverse possession.*
- (v) Is the Plaintiff entitled to the reliefs sought?*
- (vi) Who should bear costs of this suit?*

63. I have gone through the sale agreement dated 12th September 1989 between the plaintiff and Chuchu Wataku. The subject property is 31 ½ acres out of LR NO 7340/91 and the purchase price is Kshs.1,260,000/-.

Clause 1: provides that:-

“The purchaser shall pay Kshs.50,000/- on or before the execution of this agreement as part payment of the purchase price. The receipt thereof is hereby acknowledged”

Clause 2: provides that:

“The property being sold 31 ½ acres is a portion of LR NO 73401/91 owned by Githunguri Njiru Farm (1966) Ltd and is represented by share certificate No 034 comprising of 26 shares registered in the name of the vendor “

Clause 5 provides that;

“The vendor shall transfer the said certificate No 034 comprising of 26 shares to the purchaser after the whole of the purchase price is paid in full and final settlement by the purchaser”

Clause 6 provides that;

“It is hereby mutually agreed between the parties that the balance of purchase price which is Kshs.1,110,000/- shall be paid by instalments in such away that the entire balance of the purchase price shall have been paid in full and final settlement to the vendor within a period of 1 year from the date of signing agreement after which the vendor shall transfer the property being sold together with share certificate No 034 to the purchaser”.

Clause 7 provides that;

It is further mutually agreed between the parties that the purchaser shall take possession of the property being sold immediately after signing agreement hereof and may cultivate the parcel of land being sold but should not put up any permanent developments on the said parcel of land”.

Clause 8 provides that;

“The vendor hereby undertakes to take all necessary steps to transfer the said share certificate No 034 and the portion of land being sold to the purchaser immediately the purchaser has paid the whole of the purchase price”.

64. The said agreement is duly signed by the chairman and secretary of the Plaintiff and the vendor Chuchu Wataku in the presence of J. K. Gatuguta Advocate.

65. The Plaintiff has produced an application for consent of Land Control Board. The same is signed by the vendor Chuchu Wataka ID NO 3096648/66 on the 25th October 1999. The Plaintiff representatives signed on 22nd October 1999. In the said form it is stated that the purchaser was in possession. The Plaintiff has also produced share certificates showing that it allocated the land to its shareholders in various dates in the year 1990.

66. It also produced approvals for subdivision of the suit property from the Ministry of Lands and Mavoko Town Council. All these processes commenced after the deceased was issued with a title for the suit property. The title issued to the Deceased and which is held by the Plaintiff shows that it was issued on 10th June 1996 but as per the letter from Githunguri Njiru Farm 1966 Limited it was collected in 1999.

67. I agree with the Plaintiff's submissions that the basis of sale of land is an agreement for sale entered by parties with intention of creating a legal relationship. In the case of **Garvey vs Richards [2011] JMCA 16** Harris JA observed thus:-

“It is well settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation born out of an oral or written agreement is in existence”.

68. Similarly in **National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another [2001] eKLR** the court expressed itself thus:-

“A court of law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”

69. The parties entered into a sale agreement in 1989. Kshs.50,000/- being part payment was paid on the 12th September 1989 and the balance was to be paid by instalments within one (1) year. The plaintiff produced receipts of payments in respect of the suit property totaling to Kshs.1,000,000/-.

70. It is not in dispute that the suit property has been subdivided. It is the Plaintiff's case that it subdivided the same and allocated to its shareholders. PW2 Johnson Alard Macharia told the court that he was instructed by the Plaintiff to subdivide the suit property. He submitted the subdivision plans to Central Board Authority. He produced a subdivision plan as exhibit P8, a letter dated 14th March 1990 as exhibit P9, a letter from the District Physical Planner stating he had no objection as exhibit P10, a letter from Mavoko Town Council as exhibit P11 and a scheme plan as exhibit P12. He told the court he subdivided the suit property into 309 plots measuring 27 X 10 metres each for residential plots.

71. It is the Defendant's case that the deceased signature was a forgery. They contend that the deceased never sold the suit property to the Plaintiff. Whoever alleges must prove. I find that the Defendants were under an obligation to prove fraud. They did not tender any evidence on this allegation. Fraud must be specifically pleaded and proved. In the case of **Derry vs Peek [1990] 14 A C 337, 334** the court noted;

“Fraud, I must state, is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless, whether it be true or false. It is an act of dishonesty which is set or intended to mislead and which a party acts upon. All these have not been demonstrated by the Defendants.”

72. The Defendants claim that the title for the suit property is missing from the deceased's safe and they reported matter to the police. That they were in the process of acquiring another title. They however did not produce any occurrence book extract before this court to confirm.

It is the Plaintiff's case that the deceased surrendered the title after he got it from Githunguri Njiru Farm (1966) Limited and that is why it is in their possession. This was not challenged by the Defendants.

73. I find that the deceased, Chuchu Watuka sold the suit property to the Plaintiff. He intended to transfer the same vide the application for consent to Land Control Board form he duly executed unfortunately he passed on before he could transfer the suit property. There is nothing to suggest that the deceased had rescinded the agreement.

74. I find that there is a valid sale agreement dated 12th September 1989 between the Plaintiff and the Deceased. As to whether there was any breach of the terms by either party the answer is no.

75. It is the Plaintiff's case that the date to appear before the Land Control Board had been set except that on that date the deceased had been robbed in his premises and he had to attend court in respect of the said incident.

76. I find that the Plaintiff has proved that it paid the full purchase price to the Deceased who handed the original title to the suit property. He also signed the application for consent from Land Control Board though they never appeared due to his sudden passing. In the case of **Willy Kimutai Kitilit vs Michael Kibet [2008] eKLR** The Court of Appeal stated thus:-

“The Land Control Act does not unlike Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act save the operation of the doctrine of constructive trust and proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purposes of the two statutes are apparently different, they both limit the freedom of contract by making the contract valid and enforceable since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view and by analogy they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Board Act, have unreasonably delayed in performing the contract. However, whether the court will apply the doctrine of constructive trust and proprietary estoppel to a contract rendered void by lack of consent of Land Control Board will largely depend on the circumstances of each particular case”.

I find that the sale agreement dated 12th September 1989 is enforceable contrary to the Defendants' claim that it is void for want of consent from the Land Control Board.

77. It is the Interested Parties' case that they bought the suit plots they are occupying from Urutagwo Mwiruti Women Group. That they are in occupation of the suit property. A study of the plot ownership certificates held by the Interested Parties show that they were issued between September 2008 and the year 2014. This suit was already pending in court.

78. Furthermore, on the 22nd July 2008 the following consent was recorded:-

“By consent of the parties the application dated 15th July 2008 be and is hereby allowed on the following terms:-

1. That the parties be restrained from disposing off or alienating the suit premises namely LR NO 7340/91 until the determination of the suit.

2. There be no orders as to costs.

M. A. ANG'AWA

JUDGE

22/7/2008”

79. Had the Interested Parties done due diligence they would have discovered that there was a dispute pending determination in respect of the suit property.

80. DW1 James Wataku Chuchu told the court that they sold the suit property to Ann Ndung'u who subdivided it into plots. He does not state when the sale was. It is clear that the Defendants acted contrary to the orders dated 22nd July 2008 not to dispose off and to alienate the suit property pending determination of the suit. I find that the Interested Parties claim is against the Defendants and by extension Urutagwo Mwiruti Women Group. PW2 Peter Joseph M. Githinji confirmed that “Urutagwo Mwiruti Women Group” was selling the plots in 2013.

81. I find that the Plaintiff should be registered as the proprietor of this suit property being LR NO 7340/91 in place of the deceased and/or his administratrixes. In the case of **Johnson Muinde Ngunza & Another vs Michael Gitau Kiarie & 12 Others [2017] eKLR** the court stated that:-

“The law of Succession Act recognizes the purchaser's right...”

Makhandia J (as he then was) in **Titus Muraguri Warothe & 2 Others vs Naomi Wanjiru Wachira Njeri HCSC No. 122 of 2002** the court held that:-

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises...Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

I agree with the Plaintiff’s submissions that the transaction was at the stage of completion were it not for the deceased’s demise. The Plaintiff’s interest should be taken into account in the distribution of the estate of the deceased. In the case of **Twalib Hatayan & Another vs Said Saggat Ahmed Al Heidy & Others [2015] eKLR** the Court of Appeal examined and stated the Law on Trusts as follows:-

“.....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 This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edition, Sweet & Maxwell p.175). 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 (see. Snell’s Equity at p.177) (supra).”

82. I find that the deceased as at 5th March 2006 held the suit property in trust of the Plaintiff.

83. The ingredients of adverse possession were discussed by the Court of Appeal in **Mtana Lewa vs Kahindi Ngala Mwangandi eKLR** where it was held that:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in asserting of his title for a certain period, in Kenya 12 years”.

The Plaintiff has sought as an alternative that it can be found to be entitled as the owner of the suit property through adverse possession.

84. The title to the suit property was issued to the deceased on 10th June 1996. Time for purpose of limitation period must be computed from when the suit property was registered in the name of the proprietor. The Plaintiff has therefore been in possession for a period of eleven (11) years which is less than 12 years. Its claim for adverse possession may not succeed.

85. Section 27 (1) of the Civil Procedure Act provides:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

86. In **Republic vs Rosemary Wairumu Munene; Ex parte applicant vs Ihururu Dairy Farms Cooperative Society**, the Court held thus:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken on prosecuting or defending the case.”

The Plaintiff is entitled to costs.

87. Accordingly, judgment is entered for the Plaintiff as against the Defendants as follows:-

a) That a declaration is hereby issued that as at the time of the death of late Solomon Chuchu Wataka a.k.a Chuchu Wataku Githiba alias Cucu Wataku (Deceased) on 5th March 2006 he held the land parcel number 7340/91 in trust for the Plaintiff Kenya Ihenya Company Limited.

b) That the Defendants are hereby permanently restrained from distributing the said parcel namely Land Reference No. 7340/91 otherwise than to the Plaintiff, the said Kenya Ihenya Limited.

c) That in default of (b) above the Deputy Registrar of this court is authorized to sign and execute the necessary transfer forms in favour of the Plaintiff.

d) That the Plaintiff shall have costs of the suit to be borne by the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kipkirui for Mr. Wanyoike for the Plaintiff

Mr. Nyatika for Mr. Nduati for the Defendants

Mr. Mugo for the Interested parties

Steve – Court Clerk