



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L NO. 561 OF 2012**

**JOSEPH MUGO GATHI.....PLAINTIFF**

**VERSUS**

**HEZEKIAH MUGO WAITHANJI.....1<sup>ST</sup> DEFENDANT**

**JACKSON KIPRONO.....2<sup>ND</sup> DEFENDANT**

**DORIS ANYANGO OSWAGO.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR,**

**UASIN GISHU COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

By an amended plaint dated 12<sup>th</sup> May 2017 and filed in court on 15<sup>th</sup> May 2017 pursuant to leave granted by the court on 23<sup>rd</sup> March 2017, the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

(a) A declaration that the plaintiff is rightful, bona fide and legitimate owner of that parcel of land known as BLOCK 12 NEIGHBOURHOODE UNS, RES. PLOT NO. 29 ELDORET MUNICIPALITY (now known as ELDORET MUNICIPALITY BLOCK 12/234) and accordingly an order be issued for the cancellation of the Certificate of Lease dated 18<sup>th</sup> March 2009 issued to 2<sup>nd</sup> 3<sup>rd</sup> defendant and for the rectification of the land register by deleting the name of the 2<sup>nd</sup> 3<sup>rd</sup> Defendant and inserting the plaintiff as the owner thereof.

(b) An order that the issuance of Certificate of Lease to the 1<sup>st</sup> Defendant and the subsequent transfer and issuance of the Certificate of Lease to the 3<sup>rd</sup> Defendant by the 4<sup>th</sup> Defendant is void ab initio.

(c) A temporary and permanent injunction be issued to restrain the Defendants either jointly or severally, either by themselves or through their agents or servants from trespassing, alienating, wasting, selling, developing, constructing, cultivating or in other manner interfering with that parcel of land known as ELDORET MUNICIPALITY/ OLOCK 12/234 and further the Defendants are restrained from committing a breach of the sale agreement dated 14<sup>th</sup> March May 1988.

(d) In the alternative the Defendants be ordered to pay the Plaintiff compensation equivalent to current market value of the plot together with the value of the damaged fence.

(e) Costs and interest.

(f) Any other relieve this honourable court may deem fit to grant in the circumstances.

The defendants filed their defenses and denied the plaintiff's claim.

**Plaintiff's Case**

It was the plaintiff's evidence that he entered into a sale agreement dated 14<sup>th</sup> March 1988 with the 1<sup>st</sup> defendant whereby he purchased parcel of land number Block 12 Neighbourhood UNS. Res Plot No. 29 Eldoret Municipality as per plan 31710/XV from the Commissioner of Lands at a consideration of Ksh. 35,000/ which amount was paid in full,

It was further the plaintiff's evidence that the 1<sup>st</sup> defendant acknowledged the same by signing and therefore took possession on 5<sup>th</sup> June 1988 upon full payment of the consideration and fenced the same using posts and barbed wire. The plaintiff also stated that the 1<sup>st</sup> defendant gave him the letter of allotment and that it was a term of the agreement that he would obtain the consent of all authorities to effect transfer to him.

The plaintiff stated that the 1<sup>st</sup> defendant was issued with a certificate of lease with a new number as Eldoret Municipality/Block 12/234, but he kept promising he would effect transfer meanwhile he relocated to Nairobi. It was the plaintiff's further evidence that in the month of September 2009 the 3<sup>rd</sup> defendant trespassed onto the plaintiff's plot and erected a new fence. He later learnt through the Area chief, Pioneer that the 1<sup>st</sup> defendant had sold the plot to the 2<sup>nd</sup> defendant who had sold it to the 3<sup>rd</sup> defendant and had been issued with a certificate of lease on 18<sup>th</sup> March 2009.

The plaintiff testified that the transaction between the defendants were fraudulent, illegal, null and *void ab initio* citing that the 1<sup>st</sup> defendant misrepresented himself and obtained title over the suit property by breaching a valid binding contract. The plaintiff further particularized fraud and illegalities against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claiming that they had colluded with the 1<sup>st</sup> defendant with the intent to defraud and deprive the plaintiff of his property.

It was the plaintiff's evidence that he had sued the 4<sup>th</sup> and 5<sup>th</sup> defendants for refusing to register a caution lodged by the plaintiff despite making the requisite payments, colluding with the 1<sup>st</sup> defendant with the intent to defraud the government by transferring and issuing title to the 3<sup>rd</sup> defendant and by-passing the 2<sup>nd</sup> defendant who had purportedly purchased the suit land from the 1<sup>st</sup> defendant. The plaintiff produced a sale agreement dated 14<sup>th</sup> March 1988,

The plaintiff therefore urged the court to grant the orders as prayed and in the alternative that the 1<sup>st</sup> defendant refunds him the amount equivalent to the current market value of the plot in addition to the value of the fence, which was damaged by the 3<sup>rd</sup> defendant.

On cross-examination, the plaintiff reiterated his evidence and stated that he was given the allotment letter by the 1<sup>st</sup> defendant and that a fence was in existence for 20 years without destruction. He also confirmed that the 1<sup>st</sup> defendant did not have a certificate of lease when he sold to him the parcel of land. He further stated that the allotment letter did not have the special conditions attached and that he was aware the 2<sup>nd</sup> defendant sold the suit land to the 3<sup>rd</sup> defendant who continued to build while the case was in court. It was his evidence that there was no injunction stopping the 3<sup>rd</sup> defendant from construction.

When cross examined by Mr. Aseso Counsel for the 3<sup>rd</sup> defendant, the plaintiff confirmed that the last paragraph of the sale agreement stated that if the vendor did not get consent then he would refund the purchase price. It was further the plaintiff's evidence that the 1<sup>st</sup> defendant got a title to the land in 1991 but only came to learn of this in 2009.

On cross-examination by Mr. Odongo for the 4<sup>th</sup> and 5<sup>th</sup> defendants, the plaintiff stated that he completed payment on 5<sup>th</sup> June 1988 and he filed the case on 26<sup>th</sup> October 2009 basing his claim on the sale agreement dated 14<sup>th</sup> March 1988. The plaintiff also confirmed that he neither carried out a search nor sought information from the 1<sup>st</sup> defendant on whether he got consent from the Commissioner of Lands.

On reexamination, the plaintiff testified that the right procedure was not followed in registering the land in the name of the 3<sup>rd</sup> defendant.

PW2 Phillip Kiplagat Chemwok testified and stated that he was the Area chief, Pioneer Location and had dealt with the matter when he was an Assistant Chief in 2009. The plaintiff had reported to him that someone had uprooted his fence and he advised that he reports the matter to the police station. He stated that he had visited the site and found that the fence had been removed. He then wrote a letter to the Eldoret DCIO on 23<sup>rd</sup> September 2009 and 4<sup>th</sup> January 2010 summoning the parties. On cross-examination by Counsel he stated that the 1<sup>st</sup> defendant never appeared when he was summoned to appear before the chief and that the Land Registrar never responded to the letter.

PW3 Samwel Kiptalei Chemeli a Land Valuer based in Eldoret town testified that as at the time he prepared the report, the land had not been developed and he valued the same at Ksh 850,000/=. On cross-examination he testified that the plot was vacant and there was no encumbrance on it, and the same was a leasehold. He carried out a search and the property was registered in the name of Doris Anyango Oswago the 3<sup>rd</sup> defendant. It was his evidence that there was only a fence on the property. The plaintiff therefore closed his case and urged the court to grant the orders as prayed in the amended plaint.

### **Defence Case**

DW1 Hezekiah Mugo testified that he had been allotted the suit plot by the government on 1<sup>st</sup> July 1986 and that he gave the original allotment letter to a purchaser. He received a demand letter informing him of rates arrears for Ksh 844,177/=. Upon receipt of the demand notice he sold the land to Jackson Kiprono, the 2<sup>nd</sup> defendant vide a sale agreement dated 5<sup>th</sup> March 2009 at a consideration of Ksh 750,000/= whereby he paid Ksh 400,000/= and the rest was used to pay for land rates. He further testified that he had never sold land to the plaintiff, and denied knowing the lawyer who drafted the purported agreement between himself and the plaintiff. He denied making any payment to M.B Patel advocate. He denied colluding with others to defraud the plaintiff.

On cross-examination he testified that the 1<sup>st</sup> entry in the register was made on 2<sup>nd</sup> January 1991 and that he had been allotted the land by the Commissioner of lands who issued him with an allotment letter for plot number was Block 12 Neighbourhood. UNS.Res.Plot no. 29 Eldoret, which was later renamed as Block 12/234 in the lease certificate. When shown the agreement, he disowned the same and denied any involvement in the sale agreement with the plaintiff. He denied telling the plaintiff he would give him the title after clearing a loan with the bank.

It was DW1's evidence that plaintiff's agreement was fake and that the plaintiff fenced the plot after he had sold the same to the 2<sup>nd</sup> defendant. On re-examination he stated that the writing on the back page was for a loan that he had lent the plaintiff. DW1 produced a copy of the lease certificate, demand notice for payment of rates and a sale agreement between him and Jackson Kiprono. He denied to ever have sold any land to the plaintiff and therefore closed his case at this juncture.

DW2 Mark Muigai the Land Registrar Uasin Gishu County testified that he had an extract of the white card, which indicated that the lessor was the government and the lessee was Hezekiah Mugo Waithanje for a term of 99 years from 1<sup>st</sup> July 1996. That the plaintiff was issued with a certificate of lease on 2<sup>nd</sup> January 1991 which was produced as (dex no. 5). The third entry was made on 18<sup>th</sup> March 2009 when there was a transfer to the 3<sup>rd</sup> defendant.

DW2 produced a white card, transfer and a consent to transfer as exhibits before the court and stated that he does not have any evidence to show that Hezekiah Mugo Waithanje transferred land to Joseph Hinga Gathii the plaintiff herein.

On cross-examination he testified that there was a charge of Ksh 4.55 Million to K.C.B, made on 16<sup>th</sup> June 2010 and that there was no discharge of charge. It was further DW2's testimony that the search tallied with the white card and that the plaintiff's name did not appear in his records.

On cross-examination by the plaintiff's Counsel, DW2 stated that he did not have the original file with him, though he had certified copies. Further that one had to be issued with an allotment letter, a lease by government and that he had come with some documents but did not have a transfer application from Hezekiah Mugo to the 2<sup>nd</sup> defendant.

DW3 Jackson Kiprono testified that he bought land parcel No. Eldoret Municipality Block 12/234 from the plaintiff vide an agreement dated 5<sup>th</sup> March 2005 which he later sold to Doris Oswago vide an agreement dated 10<sup>th</sup> March 2009 at a consideration of Ksh 900,000/=. It was his evidence that the land was vacant and not fenced.

DW3 stated that he was paid Kshs. 535,000/ and a balance of Kshs. 350,000/ was used to offset the outstanding rates at Eldoret Municipal Council. He also stated that he was aware that the property was charged to AFC and therefore urged the court to dismiss the plaintiff's suit

with costs.

On cross –examination he testified that the land was vacant when he sold it to the 3<sup>rd</sup> defendant and that he was not a party to the transfer of lease agreement.

DW4 Doris Anyango Aswago testified that she carried out a search dated 17<sup>th</sup> August 2008 and entered into an agreement with Jackson Kiprono. That she was shown an agreement between Hezekiah Mugo and Jackson Kiprono. It was her evidence that she executed a transfer with Hezekiah Mugo, which was registered on 18<sup>th</sup> March 2009 and was issued with a certificate of lease on the same day.

DW4 stated that the original certificate of lease was with K.C.B having taken a loan with them. She further stated that there was a charge in favor AFC of Ksh 80,000/= which was cleared by Hezekiah Mugo and she got a discharge of charge.

On cross-examination she testified that she never saw any document which indicated that the plaintiff was the owner of the suit land. On further cross-examination by Mr. Njuguna Counsel for the plaintiff she stated that the agreement, dated 5<sup>th</sup> March 2009 was between Hezekiah Mugo and Jackson Kiprono and by then she had not bought the land. She had signed for the transfer documents on 9<sup>th</sup> February 2009 before the sale agreement. Upon signing the sale agreement she went to inspect the land and found that there was no fence and she started construction on it in 2010.

On re-examination, when referred to the transfer of lease, she stated that the same was signed on 9<sup>th</sup> February 2009 and was presented on 18<sup>th</sup> March 2009 further confirmed that a transfer takes effect on the day it is presented which, in this case was after her agreement with Jackson Kiprono.

### **Plaintiff's submission**

Counsel for the plaintiff filed submissions and listed the following issues for determination by the court.

- a) Whether there was a valid Agreement between the 1<sup>st</sup> Defendant and the Plaintiff.
- b) Whether the Plaintiff is entitled to the prayer of specific performance or an alternative of a refund of the purchase price.
- c) Whether the suit is statute barred.
- d) Whether fraud was proved on the part of the 1<sup>st</sup> Defendant
- e) Whether the subsequent purchasers got a good title and whether they exercised due diligence

On the first issue as to whether there was a valid agreement between the plaintiff and the 1<sup>st</sup> defendant Counsel submitted that the Plaintiff produced a written sale agreement dated 14<sup>th</sup> March, 1988 drawn and attested by M. P. Patel Advocates whereby the 1<sup>st</sup> defendant acknowledged receipt of full payment of the purchase price that is Kshs. by signing on the agreement.

Counsel cited the provisions of Section 38 of the Land Act as amended by Section 55 of the Land Laws (Amendment) Act No. 28 of 2016 which deals with the validity of a Contract for sale of land.

Section 38 (1) provides, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.

The Law of Contract Act, Chapter 23 of the Laws of Kenya provides in Section 3 that;

"No suit shall be brought upon a contract for the disposition of an interest in land unless;

(a) The Contract on which the suit is founded

(i) is in writing

(ii) is signed by all parties thereto; and

(b) The signature of each party signing has been attested by a witness who is Present when the contract was signed by such party".

Counsel therefore submitted that the sale agreement produced by the Plaintiff meets the requirements of Section 3 of the Law of Contract Act and therefore there was a valid sale agreement between the plaintiff and the 1<sup>st</sup> defendant.

On the second issue as to whether the Plaintiff is entitled to the prayer of specific performance or an alternative of a refund of the purchase price, Counsel submitted that the court should uphold the principles enshrined in Articles 2, 4 and 10 of the Constitution in respect of social justice and equity and find that the 1<sup>st</sup> Defendant received the purchase price in full from the plaintiff.

Counsel cited the provisions of Section 7 of the Land Control Act Cap 302 Laws of Kenya which provides as follows

"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this act, that money or consideration shall be recoverable as a debt by a person who paid it from the person to whom it was paid".

Mr.Njuguna relied on the case of **Koyumkei Multipurpose Co-operative Society Limited and 17 Others —vs- Rael Chepng'etich Koech (2019)eKLR** — where the court ordered that the defendant do refund to the plaintiffs the purchase price owing to breach of the sale agreement contract.

Counsel further cited the case of **Halling Manzoor —vs- Serwan Singh Baram (Supreme Court Civil Appeal No. 9 of 2001) (2002)UGHCCO 10** where the Supreme Court of Uganda granted the orders of specific performance of a contract for the sale of 2 plots and stated as follows:

*"The contract was partly performed. The appellant as purchaser performed his principal obligation of paying the purchase price. In addition, he performed the supplementary obligation of processing the repossession of the suit property successfully, and thereby acquired the equitable interest therein.*

*What remained for the contract of sale to be completed was for the respondent, as vendor to perform the principal obligation he undertook to do, which I reiterate is to convey the legal estate, so that the appellant acquires ownership of the suit property. Specific performance is an equitable remedy grounded in the equitable maxim that "Equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have for long considered damages inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent/ who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance".*

Counsel also cited the case of **Ignatius Okemer Iteba —vs- Golfrida Ikabuku Etyang & Another (2019) eKLR**, where the court granted orders of refund of the land purchase price to the plaintiff after the same was sold to someone else, the court held in paragraph 22,

*"the best option is the plaintiff to get a refund..... and further in paragraph 23 that "the Plaintiff is better of getting a refund rather than imposing himself on unwilling parties who have already transacted with someone else",*

Further that in the case of **Thrift Homes Limited —vs- Kays Limited (2015)eKLR**, the High Court held that the plaintiff was entitled to a refund of Kshs.1,200,000/= being the purchase price of the suit property. The High Court held thus;

*"The Defendant also breached the laws of the agreement by rescinding the agreement without issuing notice and not availing the title document to the plaintiff to enable it transfer document"*

Counsel stated that on specific performance the court state that;

*"Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an alternative remedy. The court then posed the question as to whether the plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction*

Mr. Njuguna therefore urged the court find that the Plaintiff is entitled to an order of specific performance or refund of purchase price at

current market value.

On the third issue as to whether the suit is statute barred, Counsel submitted that from plaintiff's pleadings and testimony it is evident that he discovered about the fraud on the part of the defendants on or about September, 2009. That the plaintiff's cause of action hinges on the sale agreement dated 14<sup>th</sup> March, 1988 entered between the Plaintiff and the 1<sup>st</sup> defendant and therefore the suit is therefore founded on a mixture of breach of the said agreement as well as breach of trust. At the core of the said agreement is ownership of the suit property which is a claim over land which claims becomes time barred after 12 years as per section 7 of the Limitations of Actions Act.

Counsel cited the provisions of Section 26 of the Limitation of Actions Act which provides as follows;

"Where, in the case of an action for which a period of limitation is prescribed, either;

- a) The action is based upon the fraud of the defendant or his agent, or for any person through whom he claims or his agent; or
- b) The right of action is concealed by the fraud of any such person as aforesaid, or
- c) The action is for relief from the consequences of a mistake".

Mr. Njuguna submitted that the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

See the case of Justus **Lureti Obara —vs- Peter Koipeitai (2014)eKLR** wherein Okong'o J. held that;

*"I am in agreement with the Plaintiff's claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the Limitation of Actions Act Cap 22 Law of Kenya. I would wish to point out further that the plaintiff's case although for recovery of land is based on fraud. The provision of Section 26(a) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial".*

Counsel also relied on the case of **Jane Mbiku Muchira —vs- Kenya African National Traders and Farmers Union & 2 other (2018)eKLR** to buttress the issue of ascertaining when a cause of action accrues.

Counsel submitted that in ascertaining when the cause of action accrues the court stated that, the right of action accrued when the Plaintiff discovered about the transfer of the suit land to the 2<sup>nd</sup> defendant, as that is the date on which the right of action accrued That this case had been filed in court in 2009 whereas the plaintiff had purchased the suit property from the 1<sup>st</sup> Defendant in 1988 but had discovered of the irregular transfer of land in September, 2009.

Further in the case of **Philip Kimutai Langat —vs- John Kibet Maina, Kericho High Court Civil Case NO. 100 of 2010 cited in Ebby Musimbi —vs- Said Egunza Bunyali & 2 others (2018)eKLR**, the court held that;

*"The issue for determination by this court is whether the Plaintiff's suit is time barred. The plaintiff pleaded that the defendant fraudulently transferred the suit land to himself in 1976. He further averred that the defendant fraudulently subdivided the suit land in 2001 without following the requisite procedure. The plaintiff's suit is based on fraud. Whereas I agree with the defendant that any suit for the recovery of land ought to be filed within 12 years as provided by Section 7 of the Limitation of Actions Act Section 26 of the said Act provides that where fraud, mistake or ignorance of material facts in pleaded time will run from the moment such a litigant discovered the fraud or mistake"*

Counsel therefore submitted that this suit is not statute barred as the period of limitation began to run in the year 2009 when the Plaintiff discovered the fraud and the court should find so.

On the fourth issue as to whether fraud was proved on the part of the 1<sup>st</sup> defendant, Counsel submitted that Section 26 (1) of the Land Registration Act provides for instances where a title can be challenged;

- i. Where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party
- ii. Where a certificate of title has been acquired through a corrupt scheme

Counsel submitted that the evidence on record shows that the 1<sup>st</sup> defendant fraudulently deprived the plaintiff of his **property by colluding with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Counsel relied on the case of Munyaka Kuna Company Limited —vs- Bernado Vicezo De Masi**, where the court held that the plaintiff who had been in possession of the suit land after completion of a sale agreement had acquired a constructive trust as they held the title as constructive trustees of the purchaser.

Counsel urged the court to find that the plaintiff has acquired the title to the suit property vide the doctrine of constructive trust having proved in evidence. Further that in the case of **Macharia Mwangi Maina & 87 others —vs- Davidson Mwangi Kagiri (2014)eKLR**, the issue of constructive trust was exhaustively discussed as follows;

" (a) In upholding the decision in *Lloyds Bank p/c —vs- Rosset (1991) 1 AC 107, 132*

"A constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant the respondent all along acted on the basis and represented that the Appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention"

(b) The court further upheld the decision in *Steadman —vs- Steadman (1976) AC*

536, 546;

"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".

(c) In *Hussey —vs- Plamer (1972)(All ER)*, the court held that a constructive trust is a trust imposed by law whenever justice and good conscience require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

(d) In the *Macharia Mwangi Maina (Supra)*, the court held that;

"It was the Respondent who put the appellants in possession of the suit property"

(e) It was further held in this *Macharia Mwangi* case that the honourable judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created constructive trust in favour of the individuals in the respective plot.

(f) We do not find that the possession and occupation by the appellants of the suit property is an overriding interest attached to the said property as per Section 30 (g) of the Registered Land Act, Chapter 300/ Laws of Kenya (repealed).

The plaintiff has proved that he was the bona fide purchaser and occupant of the suit land. That the contract of sale of land which was never rescinded bestows on him the absolute right of ownership of the suit land".

Counsel submitted that the 1<sup>st</sup> Defendant abused the trust held by the plaintiff by falsely misrepresenting himself that he had capacity to sell the suit property to him and that 1<sup>st</sup> Defendant's right to sell the land was relinquished the moment he entered into a legally binding agreement for sale with the plaintiff and received full purchase price.

On the fifth issue as to whether the subsequent purchasers got a good title and whether they exercised due diligence, Counsel submitted that the 3<sup>rd</sup> defendant failed to prove that she exercised due diligence by physically visiting the suit parcel to confirm the status of possession. Counsel therefore urged the court to grant the orders as prayed in the amended plaint and that the current market value of the suit parcel is Kshs. 6,000,000/

### **1<sup>st</sup> Defendant's Submission**

Counsel for the 1<sup>st</sup> defendant submitted that based on the evidence the plaintiff had failed to prove his case on a balance of probabilities as he pleaded fraudulent conduct and illegalities against the 1<sup>st</sup> defendant but no efforts were made to prove the fraud and illegalities.

Counsel cited the case of **R. co. PATEL v LELJI MAKANGI, (1957) B.A. 314** in which it was held that

"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

Counsel further submitted that at the time the plaintiff filed this suit in 2009 based on an agreement dated 1988 21 years had lapsed. That the plaintiff was seeking to enforce a contract. Section 4 (1) (e) of the Limitation of Actions Act, Cap. 22 which bars the enforcement or the bringing of an action 6 years after a cause of action based on a contract has accrued.

Counsel relied on the case of **Gathoni v Kenya Co-operative Creameries Limited, (1982) KLR 194 in which Potter; J.A** as he then was held that :

"The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own

interests"

Counsel therefore urged the court to dismiss the plaintiff's suit with costs to the defendants.

### **2<sup>nd</sup> Defendant's Submissions**

Counsel for the 2<sup>nd</sup> defendant filed submissions and listed the following issues for determination by the court.

- a) Whether or not the 2<sup>nd</sup> defendant herein legally bought Title No. ELDORET MUNICIPALITY/BLOCKI 2/234 from the 1<sup>st</sup> defendant.
- b) Whether or not the 2<sup>nd</sup> defendant diligently determined ownership of the suit land before purchasing the same.
- c) Whether or not the 2<sup>nd</sup> defendant was privy to any transaction alleged to have taken place between the plaintiff and the 1<sup>st</sup> defendant.
- d) Whether or not the 2<sup>nd</sup> defendant could pass a legally recognized interest over the suit land to the 3<sup>rd</sup> defendant.
- e) Whether or not the plaintiff has any legal claim or cause of action as against the 2<sup>nd</sup> defendant .

Counsel submitted that the plaintiff failed to prove the illegality or fraud on the part of the 2<sup>nd</sup> defendant. Counsel also submitted that if the plaintiff had an interest in the suit land he should have registered a caution to protect his interest which he never did.

It was Counsel's further submission that the 2<sup>nd</sup> defendant was a diligent *bonafide* purchaser for value without notice. The transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was valid and legal thus binding as both parties performed their obligations. That the 2<sup>nd</sup> defendant was not aware that the land had been sold and the 1<sup>st</sup> defendant had entered into another agreement with the plaintiff.

Counsel also submitted that it is not enough to simply infer fraud but the facts had to be distinctly proved as was held in *Vijay Morjaria v. Nansingh Madhusingh Darbar & Anor*(2000) eKLR, Tunoi, JA held that

*"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts are done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the pleadings.(Emphasis ours.)"*

Counsel also relied on the case of *Central Bank of Kenya Ltd v. Trust Bank Ltd & 4 Ors* (1996) eKLR where the Court of Appeal held as follows:

*"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case"*

Mr. Wafula therefore submitted that the plaintiff has failed to prove his case to the required standard and the 2<sup>nd</sup> defendant has demonstrated that he was a diligent bonafide purchaser who entered into a valid agreement with the 1<sup>st</sup> defendant which was binding on them. That he was not privy to any earlier transaction as alleged. That he has proved that he procedurally purchased the property and was not a party to and or had any notice of any fraud and or illegality. Counsel urged the court to dismiss the plaintiff's case with costs to the defendants.

### **3<sup>rd</sup> Defendant's submission**

Counsel for the 3<sup>rd</sup> defendant filed submissions and stated that parties are bound by **Sections 107 and 108 of the Evidence Act** that place the burden of proof on the person alleging. Counsel submitted that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts as was held in the case of **Kinyanjui Kamau –vs– George Kamau [2015]eLKR** as well as in **Vijay Marjata –vs– Narsingh Madhusingh Darhar & Another [2000]eKLR**.

Mr. Aseo submitted that fraud allegations made in the Plaintiff and the evidence tendered by the Plaintiff fell below the threshold set out. That an allegation, which was not pleaded but came out in evidence, that the date of the sale agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 10<sup>th</sup> March 2009 was before title had been transferred to the 2<sup>nd</sup> Defendant was debunked as the date of the registration of the transfer of lease was 18<sup>th</sup> March 2009 though parties had appeared before the Advocate (W.K. Kalya) on 9<sup>th</sup> February, 2009.

Counsel cited the case of **Kuria Kiarie & 2 Others –vs – Sammy Magera [2008]eKLR**, whereby it was held that consent to transfer and sale agreement cannot be obtained on the same day. The Court of Appeal then held that the allegation fell below the standard of proof in fraud cases.

Counsel further submitted that the Plaintiff is attempting to re-write or redefine the common law doctrine of privity of contract which provides, inter alia that: no one except a party to a contract can acquire rights under it; and no one except a party can be subjected to liabilities under it. As a general rule, a person should not have contractual obligations imposed on him without his consent. This definition is from **Treitel on the Law of Contract, Sweet & Maxwell 11<sup>th</sup> Edition.**

On the issue of limitation of time Counsel relied on the provisions **Sections 4 and 7 of the Limitation of Actions Act** which bar the enforcement of claims of a contractual nature after six (6) years and reliefs over claims over land for 12 years. A tabulation of the claim shows that the agreement being impugned is over twenty one (21) years from date of execution while the 1<sup>st</sup> title held by the 1<sup>st</sup> Defendant was registered on 2<sup>nd</sup> January, 1991, which is eighteen (18) years prior to filing of this suit.

Counsel submitted that the 3<sup>rd</sup> Defendant has ably demonstrated that she was a bonafide purchaser for value without notice to default of title as was defined in the case of **Lawrence Mukiri –vs – Attorney General & 4 Others [2013]eLKR**, the Court reiterated that:-

***“A bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”***

Further that the Plaintiff has failed to establish the link between the parcel of land known as BLOCK 12 NEIGHBOURHOOD UNS, RES. PLOT NO.29 ELDORET MUNICIPALITY, which was the subject to the alleged agreement himself and the 1<sup>st</sup> Defendant, and the parcel of land owned by the 3<sup>rd</sup> Defendant – being ELDORET MUNICIPALITY BLOCK 12/234 hence cannot lay claim over the latter whether in terms of title or monetary claim of compensation as sought in prayer (d).

Mr. Aseo also stated that the plaintiff has not demonstrated that any complaint was lodged at the Police and therefore urged the court to dismiss the plaintiff's suit with costs to the defendant.

#### **4<sup>th</sup> and 5<sup>th</sup> Defendants submission**

Counsel submitted that the plaintiff's claim was statutory barred as provided by section 4 and 7 of the Limitation of Actions Act. Counsel cited the case of **Abraham Gina Adams (Suing as the Administrator of the Estate of the late Geoffrey Adams Ogwa v James Ouma Natolio [2015] eKLR** where Justice S. M. Kibunja held that:

*There is no doubt that the period of about twenty two years had lapsed from the date of the sale agreement to the date this suit was filed. No leave for extension of time to file the suit outside the six year period has been exhibited before this court. The late Geoffrey or anybody else claiming under him or for his estate on the agreement dated 10th March, 1991 needed to commence such a claim within the time prescribed under Section 4 (1) of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.*

Further in the case of **Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR** Justice M. C. Oundo held that:

*42. If we decide to tabulate the limitation time from the period when the 1st Defendant was put into possession of the suit land, to when the suit was filed, the time sums up to nineteen years. On the other hand if we tabulate the limitation from the time the suit land changed title, we would be looking at 14 years, either way the Plaintiff's case would be statutorily time barred.*

*43. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute time-barred.*

Counsel therefore submitted that 21 years had lapsed from the time the plaintiff purportedly entered into an agreement and there was no

proof of having applied for extension of time.

On the issue as to whether the plaintiff acquired any registrable interest over the suit land Counsel submitted that the plaintiff failed to prove this pertinent issue. That the testimony of the County Land Registrar, Mr. Muigai (DW 2) confirmed that per their record the suit land was allocated to the 1<sup>st</sup> defendant who later transferred it to 3<sup>rd</sup> defendant herein and that the plaintiff's name did not appear in the proprietary section of the register of the suit land.

Counsel therefore urged the court to dismiss the plaintiff's claims as he failed to prove on a balance of probabilities.

### **Analysis and determination**

I have considered the pleadings and the evidence on record and I am of the view that the issues for determination in this case are as follows:

- a) Whether there was an agreement between the plaintiff and the 1<sup>st</sup> defendant.
- b) Whether the plaintiff's claim is time barred.
- c) Whether the plaintiff ever acquired any registrable interest over the suit parcel of land.
- d) Whether the 3<sup>rd</sup> defendant holds a valid title.
- e) Whether the plaintiff has proved fraud.

From the onset it is important to note that this is a very old case which should have been finalized but it suffered many setbacks due to one reason or another. This is a 2009 case which has been in the court corridors for a long time.

On the first issue as to whether there was an agreement between the plaintiff and the 1<sup>st</sup> defendant, the plaintiff gave evidence and produced an agreement dated 14<sup>th</sup> March 1988 for a consideration of Kshs. 35, 000/ of which the plaintiff paid Kshs. 16200/ on execution leaving a balance of Kshs. 18800/. At the back of the agreement indicates acknowledgements of receipt of Kshs, 10,000/, 2000/ 1800/ and lastly 5000/ which brings a total of Kshs 18,800/ What was the payment for and why was it acknowledged at the back of the agreement. This shows that there was an agreement for sale between the plaintiff and the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant confirmed that the signatures were his but the money was for a debt that the plaintiff was repaying. I did not believe that the money was for a debt being repaid as the 1<sup>st</sup> defendant did not lay a basis for the debt.

The plaintiff also had the original allotment letter belonging to the 1<sup>st</sup> defendant. What business did the plaintiff have with the original allotment letter if it was not given to him by the 1<sup>st</sup> defendant? It seems the 1<sup>st</sup> defendant got desperate when he received a demand notice for payment of the rates and sold the suit land to the 2<sup>nd</sup> defendant without informing him that the land had earlier been sold to the plaintiff who went to sleep after buying the land. It is therefore my finding that there was an agreement between the plaintiff and the 1<sup>st</sup> defendant.

On the issue as to whether the plaintiff acquired a registrable interest in the suit land, from the evidence on record it is evident that the plaintiff entered into a sale agreement with the 1<sup>st</sup> defendant but did not take possession of the suit land. He went away and resurfaced in 2009 after 21 years to come and claim the suit land. The plaintiff went into deep slumber which cost him the interest on the suit land. He had not secured his interest either by following up the sale with a transfer or a caution on the suit land. The land had legally been transferred to third parties and a charge registered on the suit land. I find that he was overtaken by the subsequent transactions which had legal validity as bona fide purchasers without notice.

On the issue as to whether the claim was time barred, I have alluded to the issue above. The plaintiff entered into a sale agreement on 14<sup>th</sup> March 1988 and came to court after 21 years in 2009. The plaintiff claimed that the defendants fraudulently transacted and colluded to defraud him of the parcel of land but fell short of proving the fraud. The law is clear that where there is fraud then the limitation period starts running when the fraud is detected. Section 26 of the Limitation of Actios Act provides the :

**[26] Where, in the case of an action for which a period of limitation is prescribed, either:**

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**

**(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:”**

Courts are courts of justice and equity and if a party proves that there was fraud and that such fraud or mistake was discovered after the limitation of Actions period, then the court would not shy away from granting such orders. But mere allegation without proof would be tantamount to awakening the dead from their peaceful slumber.

Section 4 and 7 of the Limitations of Actions Act provides as follows:

*4(1) the following actions may not be brought after the end period of six years from the date on which the cause of action arose-*

*a. Actions founded on contract*

*7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, it is first accrued to some person through whom he claims to that person.*

Limitation of Actions Act is intended to protect defendants against unreasonable delay in bringing suits as was held in the case of *Gathoni v. Kenya Co-operative Creameries* (1982)eKLR. There has to be a timeframe within which suits must be filed and litigation must also come to an end at some point. If such provisions were not in place then parties would sleep on their rights only to resurface with a claim after 50 or so years when either witnesses have since passed on or the subject matter has changed hands severally. This is capable of causing injustice. I therefore find that this suit is time barred.

On the issue as to whether the 3<sup>rd</sup> defendant holds a valid title, from the evidence on record supported by the evidence of DW3 the Land Registrar, it is clear that the 3<sup>rd</sup> defendant was a bona fide purchaser without notice. The evidence also shows no irregularity in the acquisition and transfer of the title in the 3<sup>rd</sup> defendant's name.

The sale agreement dated 5<sup>th</sup> March 2009 indicates that the said plot was sold to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant, and transferred to the 3<sup>rd</sup> defendant who is the current registered owner as per the certificate of lease produced. The sale agreement dated 10<sup>th</sup> March 2009 is between the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant. There was no proof that there was any fraud or illegality on the part of the 3<sup>rd</sup> defendant. The court therefore finds that the 3<sup>rd</sup> defendant holds a valid title deed and is an absolute proprietor. The entries in the white card as produced by the Land Registrar confirmed this position. The plaintiff had not lodged any caution to protect his interest in the suit land even after filing this suit in 2009. There was no injunction stopping the 3<sup>rd</sup> defendant from carrying out any developments on the suit land.

In the case of **Lawrence Mukiri v. A.G & 4 Ors [2013]eKLR** it was held that

*“A bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner”*

Further it is trite law under Section 22, 24, 25 and 26 of the Land Registration Act, that a party has to demonstrate that he or she is the absolute and indefeasible owner of the suit property. The said section provides as follows:

*“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 thereof”*

Furthermore, section 24 of the Land Registration Act No 3 of 2012 provides as follows:

*“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

Section 26 of the same Act 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 indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26 has brought a sigh of relief to persons who would previously lose their land due to the indefeasibility of title whether acquired procedurally or fraudulently. I find that the 3<sup>rd</sup> defendant is protected by the principle of indefeasibility of title as no fraud was proven.

When a matter is affected by the statute of Limitation of Actions, the courts hands are tied. Even if the court would wish to apply equity and social justice in favour of a party, in a case of where a suit is time barred the court would only empathize and nothing more. The matter was time barred for refund which the statute limits at 6 years and recovery of land at 12 years. Having found that there was no fraud proved the only conclusion is to dismiss the case. Looking at the circumstances of the case, I will use my discretion and order that each party to bear their own costs.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF JANUARY, 2020**

***M. A. ODENY***

***JUDGE***

***JUDGMENT*** read in open court in the presence of Mr.Kipkurui for Plaintiff, Mr.Mogambi for 1<sup>st</sup> Defendant and holding brief for Miss.Tirop for 3<sup>rd</sup> Defendant and in the absence of Mr.R.M. Wafula for 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Mr. Yator – Court Assistant