



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION CAUSE NO. 48 OF 2017**

**IN THE MATTER OF THE ESTATE OF NASOTOKINI OLE**

**SANE ALIAS NASOTOKINI LESANE-DECEASED**

**STEVEN NDUNGI KINYANJUI.....1ST OBJECTOR**

**GEORGE KARORI WAINAINA.....2ST OBJECTOR**

**VERSUS**

**RESIA ENE NASOTIKINI**

**NADUNG'U ENE NASOTIKINI**

**SAKIMBA OLE LESANE.....ADMINISTRATORS**

**JUDGMENT**

1. The Administrators of the Estate of the late **NASOTOKINI OLE SANE ALIAS NASOTOKINI LESANE** filed a summons for confirmation of grant under Section 71(1) of the Law of Succession Act dated 25th of May, 2018 pursuant to the Court order dated 18th April, 2018.

2. It was pursuant to the filing of the summons for confirmation of the aforementioned grant that, **STEVEN NDUNGI KINYANJUI and GEORGE KARORI WAINAINA** filed affidavits of protest dated 13th June 2018 and 11th November 2018 in which they protested the confirmation of the grant pointing out *inter-alia* that the administrators maliciously excluded their names in the list of liabilities in their affidavit in support of the petition for letters of administration, pretending not to be aware of their proprietary claim and rights in regard to six and 10 acres in the suit property respectively.

3. The 1st Objector's case is that he had purchased six acres of land from the deceased herein **NASOTOKINI OLE SANE in Parcel No. LOITOKTOK/NGAMA** in the year 1974. He annexed a copy of the sale agreement signed by both the vendor and purchaser on the 8th day of April 1974. Further that after the death of the vendor, he entered into yet another agreement with the beneficiaries of the estate on the 3<sup>rd</sup> January 1997 namely; **RESIA ENE NASOTOKINI** (widow), **NADUN'GU ENE NASOROKINI** (widow), **SAKIMBA OLE LESANE** (son) and **SILINKAI LESANE** (son) of which he was to finance then to the tune of Kshs. 60,000/- so as to enable them apply for letters of Administration Intestate. In exchange the estate was to add one more acre of land to his subsisting share of 6 acres. (He annexed a copy of the agreement dated 3<sup>rd</sup> January, 1997).

4. The beneficiaries of the said estate therefore petitioned the High Court for letters of admin Intestate vide succession cause number 610 of 1997. He was included in the affidavit in support of petition for letters of Administration Intestate sworn by the beneficiaries which indicates all assets and liabilities of the estate. He was listed therein as a creditor as the purchaser of 6 acres of land. (A copy of the said affidavit dated 3<sup>rd</sup> January, 1997)

5. The Court issued a grant of letters of Administration Intestate to four petitioners which was issued on the 22<sup>nd</sup> day of July 1997.(*he produced a copy of the said grant of Letters of Administration Intestate and the grant letters of Administration Intestate*). Thereafter, the Petitioners abandoned the process by neglecting to apply for the confirmation of the grant. And the same is said to have been the case even after being served upon with notices by the Deputy Registrar of High Court requiring them to apply for a confirmed grant. (Annexure SNK-06 is a copy of the notice addressed to the Petitioners dated 11<sup>th</sup> April 2006).

6. Even after having been served with the said notice, the petitioners neglected or refused to proceed with the process and the same led to the

court ordering them to deposit a surety bond of Kshs. 200,000/-. He then instituted a citation cause citing the Petitioners to either accept or refuse the letters of Administration Intestate. The succession cause was then transferred to High Court at Kajado. The citees entered appearance and opposed the citation and in their affidavit of protest they claimed inter alia that they had never filed any succession cause before.

7. On the 20<sup>th</sup> of April 2018, new petitioners petitioned for letters of Administration Intestate for the deceased's estate and surprisingly the affidavit in support of the petition for letters of Administration Intestate only included the assets of the estate and excluded the 1<sup>st</sup> protestor a bonafide and genuine creditor from the list of liabilities. The said grant of letters of Administration Intestate was issued on the 10<sup>th</sup> of April 2018 (SNK-07 is a copy of the grant of letters of Administration Intestate dated 10<sup>th</sup> April 2018).

8. The new Petitioners subsequently filed summons for the confirmation of grant, affidavit in support of and consent for confirmation of grant and mode of distribution. In the later proceedings pertaining to the distribution of the deceased's estate, the petitioners blatantly excluded the 1<sup>st</sup> Objector, a genuine creditor or purchaser of the estate from the process of obtaining the grant and also in the distribution of the estate property.

9. It was deposed that as per the Law of Succession Act, a bona fide creditor is to be prioritized even before the estate is fully divided to the beneficiaries. The 1<sup>st</sup> Objector holds the view that the Petitioners act of excluding him from the list of liabilities and further in the distribution list is made in bad taste and actuated with malice

10. He further averred that the Petitioners acted with malice by excluding him from the list of liabilities, by pretending not to have known him for the past 40 years of which he has been farming in the land parcel in question and by a disclaimer of not being aware of his proprietary claim and rights in regard to six acres of the suit property.

11. He therefore urged the court not to allow the summons to confirm the grant in question basing on the argument that the same is tainted with serious concealment of material factor on the existing assets and liabilities against the estate which were well outlined and admitted in Succession Cause 610 of 1997.

The 1<sup>st</sup> Objector made oral submissions and he reiterated his purchaser's interest in the suit property.

#### **The 2<sup>nd</sup> Objector's Case.**

12. His case is premised upon a further affidavit dated 11<sup>th</sup> November, 2018. His claim is that he purchased 10 acres of land from the deceased's property which was later to be subdivided. He took possession of the said land and some of his family members live on that land. After the demise of the deceased, he took up the matter with the Administrators who had applied for the Grant of Letters of Administration vide succession cause no. 610 of 1997 in the High Court of Kenya at Nairobi.

13. He has on numerous occasions tried to follow up with the area chief and even the District Officer Loiktoktok through his advocate M.A Khan Advocates to have the Administrators summoned and ordered to obtain the said confirmation of Grant to no avail. He then protested in the cause against the distribution of the estate since he will be highly disadvantaged if the same is undertaken without his involvement. This was after he had learnt that the deceased's property is set to be subdivided or distributed by the Administrators who have abandoned the suit in High Court at Nairobi and filed another matter at High Nairobi Cause No. 610 of 1997.

14. He believes that he ought to have been involved in the decision making process resolving to distribute the said property so that his interest can be well safeguarded. He alleged malice and misrepresentation in the Administrators' act of excluding him from taking part in the distribution process.

15. The 2<sup>nd</sup> Objector filed submissions dated 21<sup>st</sup> December, 2018. He contended therein that he is a bona fide purchaser for value and sought to demonstrate his proprietary interest by offering several exhibits, and that both two Objector's are entitled to their rightful share of the estate of the deceased and that the grant ought not to be confirmed without their involvement.

#### **Administrators Case.**

16. The Administrators filed a replying affidavit through SAKIMBA OLE LESANE (one of the Administrators) in opposition of the protesters' case. He deposed that they were not aware and informed when the grant was filed as they never attended Court in Nairobi. He alleged that they learnt of the fact that grant was applied for by the 1<sup>st</sup> Objector who used his advocate and registered his interest without their knowledge and through trickery and deceit upon their illiterate mothers and children.

17. He stated that the 2<sup>nd</sup> Objector is registered as a surety on their application for grant and he cannot therefore claim proprietary interests of part of the deceased's estate. They denied the 1<sup>st</sup> Objector's claim that he purchased land from their father and had he done so the he would have completed and title processed to him.

18. It was averred that their father died in 1988 while the Objectors claims to have bought the land in 1974 hence there is 14 years period without transfer which only goes to show that they did not buy land as for they bought they should have transferred it in his lifetime. Further that their mothers did not witness any sale or received any money.

19. It was also stated that their mothers never saw any Kenya Gazette as they are illiterate and if the documents had been made before the area Chief, the Chief would have been able to explain to their illiterate mothers the documents and the intentions of Applicants. He begged

for the court's protection since if the land is distributed according to the manner suggested by the Objectors, the same would render them homeless.

20. He responded to para 6 of the Affidavit he was not able to enter into any agreement dated 3<sup>rd</sup> January 1997 as the parties mentioned therein had no authority as they had no grant and moreover the grant dated 22<sup>nd</sup> January 1997 now cancelled was unknown to the current administrators and the alleged agreement dated 3<sup>rd</sup> January 1997 was a nullity.

21. He also stated that the agreement dated 3<sup>rd</sup> January 1997 is unknown to the administrators and that no sum of consideration was paid to their father. He alleged that the document dated 3<sup>rd</sup> January 1997 is a forgery and has no standing in law as in law in any case the sum of KShs. 60,000/= alleged was never paid and the parties were and are not conversant with the English Language or its contents.

22. He contended that if land is to be given to the objector's herein, the estate will suffer loss and the beneficiaries disinherited. He urged the court to strike out the Affidavit of Protest of Summons for the Confirmation of Grant dated 25<sup>th</sup> May 2018 sworn by Stephen Ndugi Kinyanyui and allow then to be issued with full grant to the estate of their late father.

23. The respondents gave oral testimony before court through Resia Ene Nasotokoni. He stated that when his father passed on he left two properties. He stated that he was not aware of the purchaser's interest over one of the said properties as claimed by Stephen Ndungi Kinyanjui. He also stated that neither was he informed of the same by the deceased. He indicated that before the deceased's death he had distributed some parcels of land known as Olkaria – 243 and the three people who purchased that land were all issued with title deeds. He alleged that it was the applicant who made them sign some forms after which he went and informed his eldest sons that he had received the money.

24. He further indicated that there were many other people claiming a share in the deceased's estate. It was his testimony that he was in the company of his wife and sons when they signed the applications. Upon cross examination by the counsel of the applicant Mr. Wachira he contended that when he signed the papers he had no knowledge of their content. That the papers were to obtain the title that was lost at Kajjado. He stated that the applicant (Stephen) was a close friend to his deceased's father and he has known him for 10 years. The applicant came to his deceased's father with an intention to buy some part of his land but the family was not involved in the land buying transactions. Further that the family is not aware whether the applicant bought the land.

25. He averred that the applicant has not developed the land, he has not taken vacant possession of the land in question and that he has only erected a temporary structure. He also gave evidence to the effect that his children also constructed their houses on the other parcels of land because they did not want to interfere with the lady that is occupying the land. He conceded and corroborated the applicant (Stephen's) averment that he has cultivated the land many years. Further that the applicant is the one who knows the whereabouts of the title deed subject to the land in question.

26. The administrators filed submission dated 16<sup>th</sup> January, 2019. In their submissions they argued that the grant should be confirmed as filed as the Protesters have failed to prove their interests as purchasers to the estate during the lifetime of the deceased or thereafter. They denied the claims by the Protesters hold proprietary interest in relation to part of the suit estate. They believe that they are simply intruders and intermeddlers.

### **Law And Analysis**

27. I have considered the pleadings of both Protesters and that of the Administrators. I have also considered both oral and written submission as presented by Learned Counsels Mr. Wachira for the objector and Mr. Kahuthui on behalf of the administrators. The main issue for determination is whether each of the protesters herein holds a valid purchaser's interest in the estate of the deceased.

**Section 93 of the Law of Succession Act** provides as follows:

*“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.*

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”*

28. The above cited provisions of law have been subject to a myriad of judicial interpretation over time. In **Jacinta Wanja Kamau vs Rosemary Wanjiru Wanyoike and Another (2013) e KLR** where the appellant therein unsuccessfully sought protection under **Section 93**, the Court of Appeal sitting in Nyeri stated:-

*“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82(b) (11) of the Act it would have been illegal for Beatrice Njeri Mugundu to sell the land before the confirmation of the grant.”*

29. In **Adrian Nyamu Kiugu vs Elizabeth Karimi Kiugu and Another (2014) e KLR** the High Court at Meru stated:-

*“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid*

***notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.***

30. From the facts of the present case, the deceased entered into sale agreements with the protesters regarding the purchase of the land in question in question. The 1<sup>st</sup> Objector STEPHEN NDUNGI KINYAJUI labored to demonstrate that he entered into two sale agreements with the deceased. The first one is dated 8<sup>th</sup> April 1974 for the purchase of three (3) acres which agreement was drawn by G.B.M. Kariuki Advocates and the 2<sup>nd</sup> one is dated 15<sup>th</sup> July 1974 for the purchase of three more acres which agreement was drawn by the same Advocates. The said Sale Agreements contain the terms and conditions of sale of the said property and their contents were not controverted by any credible evidence by the Administrators.

31. The 2<sup>nd</sup> Objector told the court that after having purchased the 10 acres of land from the deceased, he constructed a house which has been in place till to date. He explained that his failure to transfer the property in question was as a result the nature of his work. He used to work with the Kenya/Uganda Railways Cooperation until he retired. He denied the allegations leveled against him by the administrators that he is seeking to defraud the estate of the deceased. Further that he genuinely bought the said parcel of land from the deceased.

32. The Counsel for the Administrators contends that the grant should be confirmed as filed as the Protesters have failed to prove their interest their interest as purchasers to the estate during the lifetime of the deceased. Further that the sale agreements produced by the protesters in evidence are false documents.

33. Taking into consideration the P & A.5 drawn and filed by the administrators of the estate in Succession Cause No.610 of 1997. It is a mandatory form which contains the list of names of beneficiaries, particulars of assets left by the deceased, the net value of the estate and the particulars of liabilities left by the deceased. In the said P & A.5 form and the supporting affidavit in support of the petition for the letters of Administration Intestate sworn by all the Petitioners clearly indicated and listed all assets and liabilities of the estate.

34. The Petitioners or administrators in Succession Cause Number 610 of 1997 recognized and listed among other persons the 1<sup>st</sup> and the 2<sup>nd</sup> as objectors as the purchasers of 6 and 10 acres of land parcel number LOITOKTOK/NGAMA/63 respectively. They also identified the value of the said properties in question. This Court takes the same as admitted facts and therefore the Administrators cannot omit or abandon that particular fact at this late juncture.

35. The Administrators in Succession Cause Number 48 at Kajiado denied having been involved in the previous and neither were they aware of such proceedings, to wit, Succession Cause 610 of 1997. The administrators pointed that it was the 1<sup>st</sup> Objector who tricked their illiterate mothers into those proceedings and made himself a creditor.

36. I have also considered the Kenya Gazette dated 20<sup>th</sup> June, 1997 for Succession Cause No.610 of 967 which identifies the same administrators in respect of the estate of the deceased. The same tallies with the P & A.5.

37. This is in my view, strong proof on a balance of probability that several purchasers' interests existed in favor of the protesters. And the same cannot only be displaced without satisfactory evidence showing some kind of irregularity or illegality on the part of the respondents and not by just a mere denial.

38. The evidence on record herein shows that the Administrators appeared to have abandoned the process of obtaining the letters of Administration Intestate at some point by neglecting to apply for the Confirmation of the grant. This was the case even after having been served upon with notices by the Deputy Registrar of the High Court requiring them to apply for a confirmed grant.

39. The 1<sup>st</sup> Objector institute a citation cause citing that the administrators in the earlier petition had become reluctant to file for confirmation of the grant. He also cited that he had purchaser's interest in the deceased's estate. This triggered the Administrators of the deceased's estate and made the citees to enter appearance. The citees opposed the citation by way of an affidavit of protest in which they claimed that they had never filed any succession case before. It was through that citation that a new petition for grant of letters of administration intestate was made but however the same was made by new administrators. On 10<sup>th</sup> April 2018, a new grant was issued to new administrators namely: SILINKAI OLE LESANE (son); MENANGÍ OLE LESHAN (son); SAKIMBA OLE LESANE (son) and KAMURITA OLE NASOTOKINI (son).

40. The petitioners subsequently filed summons for the conformation of grant, affidavit in support of the summons and consent to confirmation of grant and mode of distribution. I have noted that in the new petition for grant of letters of Administration, the Protesters were excluded from the list of creditors or liabilities. On the 13<sup>th</sup> June 2018, an affidavit of protest was filed the 1<sup>st</sup> Objector and a further affidavit was subsequently filed by the 2<sup>nd</sup> Objector on the 11<sup>th</sup> of November 2018, against Confirmation of the said grant.

41. In the said affidavits of protest, the Protesters demonstrated a purchaser's interest and attached the sale agreement which were accompanied by the reasons why the suit property was not transferred during the lifetime of the deceased. (I have alluded to the same above).

42. It is noteworthy that the Protesters herein were identified and recognized as each of them having a purchaser's interest in the deceased's estate. In the subsequent application for grant of letters of administration and the confirmation of the same, the new administrators omitted their names. No explanation has been given to the satisfaction of this this court. I therefore hold the view that there was a concealment of material facts at the tail end of the confirmation process of the grant of letters of administration.

43. Further that, the identification and recognition made in the earlier petition for the grant of letters of administration that the Protesters held

a purchaser's interest in the land they are claiming herein was as good as an admission of the existence of certain liabilities in the estate left, behind by the deceased. These include the current protester's claims. I therefore dismiss the Administrators' replying affidavits and arguments that there is no purchaser's interest as well as that the protesters have not acquired any proprietary rights over time.

44. The purchasers in the instant matter had been in occupation of the land in question for over 30 years of vacant possession, they have been tilling and cultivating the land for farming purposes, they have constructed homes and in my view such proprietary rights cannot be taken away by reason that there is no transfer before the death of the deceased. The administrators cannot omit or abandon the particular admitted fact which was made in the process of obtaining the earlier grant.

45. In view the that land in question is agricultural land controlled under section 6 of the Land Control Board Act, do the protesters lose their rights by virtue that there was no transfer of land during survivorship of the deceased?

46. The answer is no. The rights of the protesters have been elevated to an equitable constructive trust. It is noteworthy to consider the fact that the land in issue related to a controlled transaction in agricultural land which transaction is governed under Section 6(1) of the Land Control Act and which stipulates that such a transaction:

***“is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”***

47. **Section 6 (2)** of the Land Control Act provides:

***“For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.***

48. Notwithstanding the above provision of the law, the circumstances of this case are such that deceased entered into several sale agreements with the protesters regarding the sale of land in question. Purchase price was paid to the deceased during his lifetime. The deceased alienated the said parcels of land and allowed the protesters to take possession of the suit land. Thus, the protesters have been in occupation of that land for over 30 years now. They have done farming during all these years, established homes and enjoyed quiet possession on that land.

49. The Protestors herein demonstrated in clear terms that they purchased the parcels of the land in question from deceased, and documentary evidence has been furnished to the court to that effect. ***In Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR*** a decision of the Court of Appeal sitting at Nyeri, held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent. It was stated by Lord Reid in ***Steadman – vs- Steadman (1976) AC 536, 540,***

***“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”.***

50. As Lord Bridge observed in ***Llyods Bank Plc – 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. In the instant case, there was a common intention between the protesters and the deceased in relation to the suit property. The property in question had already set aside for purposes of transferring the same to the protesters.

51. This common intention was also adopted by the administrators who were in the earlier petition for grant of letters of administration who recognized and identified the interests of the two protesters in their petition. Nothing in the ***Land Control Act*** prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The deceased herein acted on the basis and represented that the Protesters were to obtain proprietary interest in the suit property.

52. Under the doctrine of constructive trust the Supreme Court of Canada in the case of ***Soulos v Korkontsilos (1997) 2 SCR 217*** held that the court is entitled to infer existence of a trust where the following threshold conditions are met that;

***(1) The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands.***

***(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of the equitable obligation to the plaintiff.***

***(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy either personal or related to the need to ensure the others like the defendant remain faithful to their duties and there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.***

53. The Principle of constructive in the field of acquisition land is the most recent milestone in our jurisprudence. The trust arises by operation of the Law where the circumstances of the case permits giving rise to its existence. The function of the court is merely to declare that such a constructive trust as a remedy to bar a party from unjustly enriching himself from a land transaction.

54. In the scheme of things as deduced from the pleadings and viva voce evidence from the objectors and the administrators the following features arises. The objectors have demonstrated that a constructive trust as a remedy for their claim is based on the breach of Fiduciary obligation on the part of the vendor. The land was directly purchased from the deceased. Equally significant the objectors have convinced

this Court that the constructive trust over their respective parcel of and is appropriate in the circumstances because of the non-monetary importance element of land to them.

55. The Law regarding a situation of this kind was stated in the case of **Beaty v Guggenhm Exploration Co 1973 CLR17** where the court held;

**“That when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”**

56. The contention by the objectors in their quest for an equitable remedy as stated in court was that the deceased did bequeath the property to them. That at the time they entered into a purchase agreement they communicated orally for purposes of seeking the Land Control Board Consent. The deceased either expressly or by silent acquiescence promised to perform his obligation but time lapsed until his demise. For them the deceased allowed that they take vacant possession even as they await the Land Control Board Consent and transfer of land into their own title.

57. In the matter where the seller was supposed to provide the lead as the original title holder, we the objectors will do was to wait for him to take the necessary steps since the deceased cannot be made to perform the obligation a court of equity will raise a constructive trust in favor of the objectors intended by the deceased.

58. 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. Thus the fact that the registered owner of the suit land died without having transferred the alienated land to the names of the protestors does not mean the two have lost proprietary interest in the property.

59. The scene visit by the Court confirmed the protestors’ position herein that the two are in occupation of the land. Therefore the argument by the administrators that their late father had leased the land to the protestors or that they are temporary lease-holders was not supported by any documentary evidence. In my view the administrators’ argument is an afterthought aimed at defeating the purchaser’s interest of the two protestors. By weighing the evidence of the administrators, particularly one by the name: RENE NASOTOKINI, I consider her a pathological liar in these proceedings who just need to defeat the ends of justice to be met in this case. She gambled on the evidence that the interest of the two protestors held was an annual lease for purposes of farming. However the evidence of the protestors controverted the same and paint the picture that their occupation dates back to the period during which the deceased was alive.

60. The enjoyment of those proprietary rights over land continued to subsist even after the death of the deceased. This is given credence by the administrators in their own affidavit (P and A.5 form) confirming existence of the purchasers’ interest or liabilities. Therefore, there is misrepresentation and concealment of material facts, lack of notice to the protestors when they applied for confirmation of the grant of letters of administration. The administrators intended to seek confirmation of the grant and have the estate left by the deceased to be distributed without their involvement. The position had earlier been taken in the case of **Gatimu Kinguru – vs- Muya Gathangi (1976) KLR, 253** where it was stated:

**“The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for the purpose of Section 6(1) of the Land Control Act and, therefore, does not require the consent of the local Land Control Board.”**

61. It is noteworthy that the above judicial decisions were all rendered before the promulgation of the Constitution of Kenya, 2010 and that was before the Overriding Objective principles were enacted into the *Appellate Jurisdiction Act, Chapter 8, Laws of Kenya*. However the main role of this court is to insure that substantial justice is accorded to both all the parties in any the matter. I find useful guidance in the sentiments of the Honourable Lady Justices (Mwilu; Koome and Otieno-Odek) in the Court of Appeal of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR**, whom while deciding a case with similar circumstances, had the following to say:

**“What is justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases.**

**The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in Hussey – vs- Palmer (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”**

62. In my view, the transaction between the deceased and the protestors created a constructive trust in favour of all the parties who paid the purchase price. I’m inclined to make a similar finding as that of the Honourable Lady Justices **in Macharia Mwangi Maina Case**, that constructive trust relating to land subject to the Land Control Act is enforceable. And this view is guided by the overriding objectives of the Appellate Courts as well as the need to dispose substantial and not technical justice. I’m also in agreement with the Honourable Justices in seeking further guidance in the dicta of Madan, JA (as the he was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others, [1978] KLR 143; [1976-80] 1 KLR 891** to the effect that:

**“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed....”**

63. By virtue of the foregoing, the rights acquired by the protestors cannot be taken away by the fact that they did not effect the requisite transfer as required under section 6 of the Land Control Act. These purchasers’ interests are the kind of interests which can be pursued under the Environment and Land Court but rather under the law of succession by dint of the equitable principle of constructive trust.

64. The administrators in their submission as well as other evidence have not brought any material before this court to challenge these particular rights that those particular rights that the process by the protestors obtained their 6 and 10 acres respectively was tainted with fraud. The evidence by the two protestors was remained unchallenged and they therefore under succession law entitled to the land they are still in occupation and should be alienated so that the same can be transferred by the administrators.

65. In my view, the administrators basically have no land of their own. They are the voice of the dead so their role is to execute and administer the estate of behalf of the deceased person. In law therefore, the administrators cannot take what the deceased had legally bequeathed to the particular protestors. Thus, forty years down the line in 2019, the administrators cannot deny to pass a clean title to the protestors herein.

66. Having made the above findings, I hereby make the following orders:

- a) That the protestors acquired an equitable constructive trust in the six and ten acres respectively by dint of their purchaser's interests under section 93 of cap 160.*
- b) That the Application for confirmation of the grant of letters of administration is hereby set aside.*
- c) That the two protestors be included under the scheme of arrangement to benefit from the distribution of the deceased's estate.*
- d) That the six and ten acres of land belonging to the 1<sup>st</sup> and 2<sup>nd</sup> objector respectively, are not available for distribution to the rest of the other beneficiaries and the same be alienated and be transferred in favor of the protestors.*
- e) That the Administrators do execute and sign the necessary transfer form to pass on title to the protestors for the two parcels of land within 90 days from today's date.*
- f) That in default of compliance the deputy registrar of the high court to execute transfer documents in compliance with this judgement which shall be registered by the land registrar.*
- g) The protestors to lodge the transfer documents with the deputy registrar of the high court for execution or transfer of the parcels of land in question for the benefit of the protestors.*
- h) Cost of this suit be borne by both parties.*

It is so ordered.

Dated, signed and delivered in open court at Kajiado this 7<sup>th</sup> June, 2019.

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

**Mr. Gulenywa h/b for Wachira for the Objector**

**Objector 1 and Objector 2 present**