



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC SUIT NO. 86 OF 2018**

**ANGELINA MUKII MWAU.....PLAINTIFF**

**VERSUS**

**1. THOMAS MUTHIANI MASILIA**

**2. JACINTA MUTIO**

**3. PETRONILLA WANZA**

**4. SIMON KYALO.....DEFENDANTS**

**JUDGEMENT**

1. By her plaint dated 30<sup>th</sup> of August, 2018 and filed in court on 31<sup>st</sup> August, 2018, the Plaintiff prays for judgement against the four Defendants jointly and severally for: -

**(a) An order for specific performance by transfer of the parcels of land known as LR Numbers Makueni/Unoa/2635, Makueni/Unoa/2636, Makueni/Unoa/2648 and Makueni/Unoa/2649 to the Plaintiff.**

**(b) An order for extension of the time within which to obtain consent of the Land Control Board beyond the statutory 6 months, for a further 6 months from the date of judgment.**

**(c) Costs of the suit and interest thereon.**

**(d) Any such other or further relief as this honourable court may deem fit and just to grant.**

2. She has averred in paragraphs 3, 4 and 5 of her plaint that the 1<sup>st</sup> Defendant is sued in his own capacity, as well as jointly with the other Defendants as the administrators of the estate of the late Masilia Mwavu and/or registered as current proprietors of the property the subject of this suit, that vide an agreement for sale dated 10<sup>th</sup> December, 2011, she purchased from the 1<sup>st</sup> Defendant four plots measuring 50x100 feet each to be excised from LR number Makueni/Unoa/471 situate within Wote Township in Makueni County, and which was at the time registered in the name of the 1<sup>st</sup> Defendant and that at the time of purchase, the four plots were clearly identifiable on the site map as plot numbers D1, D2, D4 and D5 and were correspondingly numbered as LR numbers Makueni/Unoa/2635, 2636, 2648 and 2649. Upon payment of the first installment as per the terms of the sale agreement, the Plaintiff took possession of the plots and fenced them off, and they remain in her possession to date.

3. The Plaintiff's claim is denied by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants vide their joint statement of defence dated 22<sup>nd</sup> November, 2018 and filed in court on even date.

4. In paragraphs 3, 4 and 6 of their defence, the Defendants contend that the suit is bad in law and is incompetent and it should be struck out and or dismissed with costs in so far as it discloses no cause of action known against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, that save that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are jointly registered together with the 1<sup>st</sup> Defendant as the lawful proprietors of the subject of this suit, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny that they are currently the administrators of the estate of the late Masilia Mwavu by virtue of confirmed grant making them such administrators having been revoked and that without prejudice whatsoever to the foregoing, and in further answer to paragraph 5 of the plaint, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny that the Plaintiffs have ever taken possession and or is in possession or at all, of the suit properties known as Makueni/Unoa/2635, 2636, 2648 and 2649 and puts the Plaintiff to strict proof thereof.

5. In his defence dated 25<sup>th</sup> February, 2019 and filed in court on 26<sup>th</sup> February, 2019 the 1<sup>st</sup> Defendant admits that he sold four plots to the Plaintiff and states that he has always been willing to transfer the same but that he could not do so due to family dispute that arose after the sale and that he is now ready and willing to transfer the plots to the Plaintiff if the other Defendants cease their objection.

6. In her reply to defence by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant dated 14<sup>th</sup> December, 2018 and filed in court on even date, the Plaintiff has averred in paragraphs 3 and 4 that the Defendants are properly sued as the registered proprietors of the suit property. She further avers that she is aware that the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants have in any event appealed against the decision that nullified the grant making them administrators and that she has erected a fence around the plots and has actual possession of the said plots and puts the Defendants to strict proof of any allegation to the contrary.

7. The Plaintiff in her evidence in chief adopted her statement dated 30<sup>th</sup> August, 2018. She went on to produce 8 documents filed simultaneously with her plaint as P.Exhibit Nos.1 to 8. These documents were certificates of search for the year 2011 (P.Exhibit No.1), a land sale agreement dated 10<sup>th</sup> December, 2011 (P.Exhibit No.2), payment cheques and corresponding acknowledgement (P.Exhibit No.3), title deeds (P.Exhibit No.4), signed application for Land Control Board consent forms (P.Exhibit No.5), certificate of confirmation of grant dated 16<sup>th</sup> September, 2016 (P.Exhibit No.6), Ruling in Machakos High Court Succession cause No.78 of 1992 (P.Exhibit No.7) and certificates of official search in respect of land parcels numbers Makueni/Unoa/2636, 2649, 2648 and 2635 (P.Exhibit No.8).

8. The Plaintiff went on to say that in the year 2011, she bought four plots each measuring 50x100 feet from the 1<sup>st</sup> Defendant herein. She said that the purchase price for each plot was Kshs. 760,000/=. She added that a sale agreement was prepared by lawyer Jacob Ngwele and that prior to the purchase, she carried out search which revealed that the plots were registered in the name of the 1<sup>st</sup> Defendant. She pointed out that she paid the 1<sup>st</sup> Defendant Kshs. 1,000,000/= on 10<sup>th</sup> December, 2011 when she and him executed the sale agreement. The second and the third instalments of Kshs. 1, 000,000/= and 1,040,000/= were paid on 28<sup>th</sup> October, 2011 and 01<sup>st</sup> October, 2012 respectively.

9. The Plaintiff went on to say that upon payment of the first installment, she took possession of the four (4) plots and fenced them off with a chainlink. That when she and the 1<sup>st</sup> Defendant filled the necessary forms for consent to transfer the four plots to her, she learnt that the 1<sup>st</sup> Defendant's siblings had filed an application for revocation of grant issued to him and which grant had enabled him to inherit land parcel number Makueni/Unoa/471 from his late father, Masilia Mwavu. That the search that she later conducted for the suitland shows that it is registered in the names of four people.

10. The Plaintiff's evidence in cross-examination by Mr. Kioko for the 1<sup>st</sup> Defendant was that the 1<sup>st</sup> Defendant has not refused to transfer the plots to her. And on being cross-examined by Mr. Njagi for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants, the Plaintiff told the court that the sale agreement (P.Exhibit No.1) was executed. She however admitted that the agreement is not stamped by lawyer Jacob Ngwele whom she appeared before for execution of the same. She said that she does not know if the agreement is of no consequence as it is unexecuted. She revealed that she only came to know the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants when the grant issued to the 1<sup>st</sup> Defendant was revoked. Regarding the completion date of the sale agreement, the Plaintiff told the court that it was 30<sup>th</sup> April, 2012. She reiterated that she applied for a consent from the Land Control Board in October, 2012 immediately after the completion of sale. She said that the application form (P.Exhibit No.5) for consent is not dated and denied having prepared it conveniently for purposes of this case. She went on to say that she did not submit the document (P.Exhibit No.5) to the Land Control Board. It was also her evidence in cross-examination that she sued the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants after the grant that the 1<sup>st</sup> Defendant had was revoked and also due to the fact that the search that she carried out revealed that the title deeds were in their four names. She admitted that she tried to enjoin herself in succession cause No.78 of 1992 but her application was not successful. She said that even though she had taken possession of the plots, she never settled on them. She agreed that she had not annexed a photo to show that she had fenced off the plots. She said that she has the original title deeds which are in the name of the 1<sup>st</sup> Defendant but admitted the title deeds in question were cancelled. According to her, the 1<sup>st</sup> Defendant had the capacity to sell the land.

11. Her evidence in re-examination by her advocate, Mr. Wairegi, was that the sale agreement between herself and the 1<sup>st</sup> Defendant was executed.

12. The Plaintiff thereafter closed her case.

13. The 1<sup>st</sup> Defendant in his evidence in chief adopted his recorded statement dated 25<sup>th</sup> February, 2019. He went on to say that he was prepared to transfer ownership of the parcels of land to the Plaintiff but the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants lodged a caveat. That his co-Defendants went to court and had the grant issued to him revoked. He went on to say that the succession cause is still ongoing and that he had a grant at the time of sale of the four (4) plots.

14. The 1<sup>st</sup> Defendant produced four (4) documents in his list of documents dated 25<sup>th</sup> February, 2019 as D.Exhibit Nos.1 to 4 respectively. Those documents were a family letter dated 30<sup>th</sup> May, 1992 (D.Exhibit No.1), a consent dated 16<sup>th</sup> June, 1992 (D.Exhibit No.2), an interim grant dated 05<sup>th</sup> January, 1993 (D.Exhibit No.3) and certificate of confirmation of grant dated 30<sup>th</sup> September, 1994 (D.Exhibit No.4).

15. On being cross-examined by Mrs. Kalinga for the Plaintiff, the 1<sup>st</sup> Defendant told the court that the 4<sup>th</sup> Defendant was one of the people who gave consent in 1992 while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not involved even though they are his sisters. He said that their none involvement was due to his father's decision to follow Kamba customary law which required that each wife and her sons to be included. The 1<sup>st</sup> Defendant pointed out that the 4<sup>th</sup> Defendant's parcel of land is about 6 kilometres from Wote in an area known as Kamunyii. He said that he was aware that the Plaintiff had applied in the succession cause to be allocated her land. He added that one Joseph has his land in Wote and was not included in the succession cause because the latter acquired his title deed after his father allocated him the land.

16. On being cross-examined by Mr. Njagi for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants, the 1<sup>st</sup> Defendant told the court that the sale agreement (P.Exhibit No.2) between himself and the Plaintiff was prepared by Jacob Ngwele Advocate. He said that the agreement is not attested by an

advocate. He admitted that he was the one who received the money and that he had not shared it with his co-Defendants. He pointed out that the plots that he sold were four and their numbers were Makueni/Unoa/2635, 2636, 2648 and 2649. He however said that he was not sure if those were the plots that he sold to the Plaintiff. He went on to say that paragraph 5 of the plaint shows that the plots were identifiable as D1 to D4 and were marked as Makueni/Unoa/2635, 2636, 2648 and 2649 and added that what is in the plaint is what he sold. He later clarified his position and stated that the parcels in the sale agreement are what he sold. He admitted that by 30<sup>th</sup> April, 2012 which was the completion date of the sale, the transaction was not complete. He said that he acquired his title deeds through succession cause number 78 of 1992. He also said that there are no title deeds in the name of the Plaintiff nor did he have consent from Makueni Land Control Board. He said that he was aware that the grant issued to him was revoked and that he had used it (the grant) to sell the four properties. He also said that he was aware that the properties revert back to the estate of the deceased once the grant is revoked. He added that he sold the properties as an individual and that the family gave him permission (D.Exhibit No.1) to sell the same.

17. His evidence in re-examination by his advocate, Mr. Kioko, was that the suit properties were in his name at the time of sale. He thereafter rested his case.

18. The 2<sup>nd</sup> Defendant, Jacinta Mutio Masilia, testified on her own behalf and on behalf of the 2<sup>nd</sup> and the 4<sup>th</sup> Defendants. She produced three (3) documents in her list of documents dated 22<sup>nd</sup> November, 2018 and filed in court on even date as D.Exhibit Nos.5, 6 and 7. These were the ruling in Machakos High Court Succession cause No.78 of 1992 dated 23<sup>rd</sup> November, 2015 (D.Exhibit No.5), another ruling in the same cause delivered on the 31<sup>st</sup> July, 2018 (D.Exhibit No.6) and an order dated 31<sup>st</sup> July, 2018 and issued on 04<sup>th</sup> September, 2018 (D.Exhibit No.7).

19. The 2<sup>nd</sup> Defendant proceeded to adopt her statement dated 22<sup>nd</sup> November, 2018 as her evidence. She said that she has been sued as an administrator of the estate of the late Masilia Mwavu. She went on to say that the ruling delivered by Justice P. Nyamweya on 31<sup>st</sup> July, 2018 (D.Exhibit No.6) revoked the grant that had been issued to her and her co-Defendants by the same court. That as at 30<sup>th</sup> July, 2018 she and her co-Defendants were not administrators of the estate of their late father. She pointed out that she came to know of the sale agreement (P.Exhibit No.2) when this case was filed. She added that the agreement (P.Exhibit No.2) which is dated 10<sup>th</sup> November, 2011 is not attested by an advocate. It was also her evidence that the agreement was in respect of property title numbers Makueni/Unoa/2636, 2637, 2638 and 2639 while at paragraph 5 of her plaint, the Plaintiff claims for parcel title numbers Makueni/Unoa/2635, 2636, 2648 and 2649 thus there is a discrepancy between the sale agreement and the plaint.

20. It was also the 2<sup>nd</sup> Defendant's evidence that under paragraph 7 of the agreement (P.Exhibit No.2), completion date was 30<sup>th</sup> April, 2012 and that time was of essence. She added that she was not aware of any consent from the Land Control Board and that the application for consent forms (P.Exhibit No.5) are not dated. Further that the forms are in respect of land parcel numbers Makueni/Unoa/2635, 2636, 2648 and 2649. She pointed out that there was no official stamp of the lands office on the forms. As a result of the discrepancy in the description of the plots, the 2<sup>nd</sup> Defendant stated that she was not aware of the parcels that the Plaintiff was claiming. It was also her evidence that in view of the revocation of grant, the plots belong to the estate of her father and that the 1<sup>st</sup> Defendant had no capacity to sell them. That the only recourse open to the Plaintiff was to claim for compensation from the 1<sup>st</sup> Defendant. Lastly, the 2<sup>nd</sup> Defendant stated that she was not aware of any fencing of the plots as claimed by the Plaintiff.

21. On being cross-examined by Mrs. Kalinga for the Plaintiff, the 2<sup>nd</sup> Defendant reiterated that because of the discrepancy in their description, she does not know the plots that the Plaintiff claims. She said that the Plaintiff is not in occupation of the property of the late Masilia and that his estate will suffer prejudice because the four (4) plots were sold by one beneficiary who benefited alone. She also said that she did not know what the law provides in case of a sale based on a revoked grant. She agreed that the succession cause of the estate of the late Masilia was awaiting judgement. And on being cross-examined by Mr. Kioko for the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant admitted that the 1<sup>st</sup> Defendant had a valid grant before it was revoked.

22. The 2<sup>nd</sup> Defendant thereafter rested her case.

23. In her written submissions, the Counsel for the Plaintiff stated that the Plaintiff's claim is for specific performance, and for extension of time within which to obtain consent from the Land Control Board. The Counsel went on to submit that the Plaintiff is entitled to the prayer for the following reasons: -

***1) That her interests are protected by the provisions of Section 93(1) of the Law of Succession Act, which specifies that 'a transfer of interests of immovable or immovable property made to a purchaser ..... shall be valid notwithstanding any subsequent revocation or variation of the grant.' That provision clearly applies to the Plaintiff's case herein.***

***2) The Plaintiff is a bonafide purchaser for value without notice. She undertook a search and confirmed that the plots were registered in the name of the 1<sup>st</sup> Defendant, and only then did she enter into a sale agreement with him. He even gave her the title deeds and they remain in her custody todate.***

In support of her submissions the Counsel cited the case of **Bob Njoroge Ngarama vs. Mary Wanjiru Ngarama & Another [2014] eKLR** where the Court quoted in some length W. Musyoka's (Judge) casebook on the law of succession as follows: -

***"However there is now the existence of a third party – the purchaser. W. Musyoka in his casebook on the Law of Succession at page 581 states that:***

***Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property."***

However, the author goes on to cite **RE DIPLOCK –VS- WINTLE [1984] ch 485** which makes an exception to this general rule in a case where the holder of such property is a bona fide purchaser for value.”

24. The Counsel submitted that the Plaintiff’s case meets the standard for the award of the order of specific performance. The Counsel cited the case of **Fred I. M. Imbalu vs. Rashid K. Too [2018] eKLR**. The Counsel was of the view that arising from the above, it is judicious that the orders sought be granted as failure to do so would cause undue hardship to the Defendants and especially the 1<sup>st</sup> Defendant who would be compelled to compensate the Plaintiff even though he is not guilty of any wrong doing.

25. The Counsel went on to submit that the Defendants will not suffer any loss if the prayers sought are granted. The Counsel was of the view that the beneficiaries should simply consider what the 1<sup>st</sup> Defendant received as purchase price for the plots as part of the estate of the deceased and either recover it from him, or make it part of his share of his estate. In support of her submissions, the Counsel cited the case of in Re-estate of **Josiah Mantu [2017] eKLR**.

26. As for extension of time within which to seek consent from the Land Control Board, the Counsel cited the proviso to **Section 8(1) of the Land Control Board Act chapter 302 of the Laws of Kenya** which states as follows: -

**“provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”**

27. The Counsel urged the court to extend the period within which the consent of the Board may be obtained in order to facilitate the transfer of the parcels of land to the Plaintiff.

28. As for the challenge by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants regarding the sale agreement having not been witnessed by an advocate, the Counsel for the Plaintiff submitted that this does not arise when the agreement has been admitted and confirmed by both parties who signed it. The Counsel went on to submit that it is trite law that it is the court’s duty to give effect to the intention of the parties to a contract which intention in this case is clearly expressed in the sale agreement.

29. The Counsel concluded by urging the court to do substantial justice taking into consideration the totality of the circumstances of the suit (*emphasis are mine*). The Counsel was of the view that justice will only be served if the court facilitates the transfer of the four plots to the Plaintiff.

30. The submissions by the Counsel for the 1<sup>st</sup> Defendant were that the latter confirms that he sold land parcels Makueni/Unoa/2636, 2637, 2638 and 2639 to the Plaintiff and that he has always been willing to transfer the said plots to her. Like the Plaintiff’s Counsel, the 1<sup>st</sup> Defendants Counsel urged the court to extend the period within which the consent of the Board may be obtained in order to facilitate the transfer of the parcels to the Plaintiff once the succession cause is completed. The Counsel agreed with the Plaintiff’s Counsel’s submissions that even though the 2<sup>nd</sup> to 4<sup>th</sup> Defendants have challenged the sale agreement on the ground that it is not witnessed by an advocate, the issue does not arise where the agreement is admitted and confirmed by both parties who signed it.

31. On the other hand, the Counsel for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants submitted that there was and there is no valid contract for sale of the alleged plots between the Plaintiff and the 1<sup>st</sup> Defendant. The Counsel pointed out that there is simply no agreement for sale which can be enforceable in a court of law. The Counsel cited **Section 3(3) of the Law of Contract Act chapter 23 of the Laws of Kenya** which provides that: -

**“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”** (*emphasis are the advocate’s*)

32. Arising from the above, the Counsel was of the view that, on this point alone, the Plaintiff’s suit should collapse.

33. It was also submitted on behalf of the 2<sup>nd</sup> to the 4<sup>th</sup> Defendant’s that the Plaintiff confirmed that she has not obtained consent to transfer from the Land Control Board and that the application forms (P.Exhibit No.5) were undated and lacked any receiving stamp as proof of presentation to the Land Control Board offices. The Counsel added that the transaction between the Plaintiff and the 1<sup>st</sup> Defendant, which the 2<sup>nd</sup> to 4<sup>th</sup> Defendants deny, became void for all purposes under the provisions of the Land Control Act. In support of his submissions, the Counsel relied on the case of **Kariuki vs. Kariuki [1983] KLR 225** where C.B Maden, (as he then was) held as follows: -

**“With respect, I do not agree. No general or special damages are recoverable in respect of a transaction which has become void for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act.”**

34. The Counsel went on to submit that the above legal position notwithstanding, the Plaintiff in her evidence in cross-examination was categorical that her claim is not for refund of purchase price she allegedly paid to the 1<sup>st</sup> Defendant, but rather strictly on specific performance of getting the plots. The Counsel pointed out that in her pleadings, the Plaintiff has not sought for the refund of the purchase price but rather the order of specific performance of parcels of land known as LR numbers Makueni/Unoa/2635, 2636, 2648 and 2649.

35. It was also submitted that on cross-examination, the Plaintiff confirmed that save for the allegations of having fenced off the said plots, and which the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants deny, she has not carried out any development nor taken possession. The Counsel pointed out that in any case, the Plaintiff did not prove her allegation of fencing off the said plots.

36. Regarding the plots that were the subject of sale, the Counsel for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants submitted that in paragraph 5 of her plaint dated 30<sup>th</sup> August, 2018 as well as in the prayers sought, the Plaintiff has laid her claim to parcels of land known as Makueni/Unoa/2635, 2636, 2648 and 2649. The Counsel added that in the purported sale agreement (P.Exhibit No.5), it is stated at paragraph 1 as follows:-

***“The properties sold are all four (4) town plots located in Wote town, Makueni County adjacent to the Kusoombunguo Guest House, measuring 50x100 feet each, identifiable on the site map by the block numbers D1, D2, D4 and D5 and comprised in Title Numbers; Makueni/Unoa/2636, Makueni/Unoa/2637, Makueni/Unoa/2638 and Makueni/Unoa/2639.”***

37. Arising from the above, the Counsel pointed out that only one plot title number Makueni/Unoa/2636 appears in both the plaint and agreement and that when the Plaintiff was cross-examined, she was categorical that her claim is as per what is reflected in the sale agreement and not the plaint. It was also submitted that since the Plaintiff had not amended her pleadings, her claim must therefore fail for disclosing no cause of action against the Defendants. In support of his submission, the Counsel cited the case of **Stephen Ndolo Wambua vs. Beatrice Mbula Mutilu & 2 others [2016] eKLR** where D. K. Kimei, J had this to say while citing the case of **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** which had in turn cited the decision of **Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3** in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled; **“The present importance of pleadings”** which was published in **[1960] current legal problems, at page 174** where the author stated: -

***“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.*** (emphasis are advocates)

38. Regarding the payment of the purchase price, the Counsel submitted that the Plaintiff had in her evidence in chief said that she paid the money to the 1<sup>st</sup> Defendant and not to the estate of the late Masilia Mwavu (deceased) and thus she has no claim known in law against the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants and/or the estate of Masilia Mwavu. The Counsel pointed out that it is unfortunate that the Plaintiff did not pursue the 1<sup>st</sup> Defendant for the refund of the purchase price and that her efforts to be enjoined in Machakos succession cause No.78 of 1992 as a beneficiary of the estate of Masilia Mwavu was dismissed by the court.

39. The Counsel for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants further submitted that at the time of instituting this suit on 31<sup>st</sup> August, 2018, the grant issued to the four (4) Defendants herein as administrators of the estate of Masilia Mwavu had long been revoked on 17<sup>th</sup> July, 2018 thus the Plaintiff sued the wrong persons. The Counsel was of the view that there is no cause of action against the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants and hence the suit against them must fail.

40. The Counsel went on to submit that it is worth noting that there was no transfer of title to the Plaintiff to justify her submissions at page 3 where she alleges that her interests are protected by the provisions of section 93(1) of the Law of Succession Act. The Counsel added that the aforementioned provisions do not apply to the Plaintiff.

41. Regarding the Plaintiff's assertion that she is a bona fide purchaser for value without notice, the Counsel was of the view that to say the least that was a fallacy since no title of the suit property ever passed to her. In support of his submissions, the Counsel cited the case of **Elijah Makeri Nyagwra vs. Stephen Mungai Njuguna & Another** where Sila Munyao, J had this to say: -

***“Is the title impeachable by virtue of Section 26(1) (b) ” First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.***

***The evidence in this case puts no one in doubt that the title to the 1<sup>st</sup> defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1<sup>st</sup> defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1<sup>st</sup> defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1<sup>st</sup> defendant was snared by the scheme perpetuated by the 2<sup>nd</sup> defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.*** (emphasis are advocates)

42. Arising from the above, the Counsel submitted that even though the Plaintiff's case is that she was an innocent purchaser for value and that she carried out due diligence by carrying out an official search, she did not produce certificates of official search in her evidence.

43. Lastly, it was submitted that the 2<sup>nd</sup> Defendant stated that she and her other co-Defendants were strangers to the purported sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant.

44. I have evaluated the evidence on record and considered the rival submissions by the parties herein and I am of the view that the only issue for determination is whether or not the Plaintiff is entitled to the prayers sought in her plaint.

45. Whereas the Plaintiff has stated that she is entitled to the prayer of specific performance by virtue of the provisions of section 93(1) of the Law of Succession Act chapter 160 of the Laws of Kenya and whereas she has further stated that she is a bona fide purchaser for value without notice, it is not in dispute that the 1<sup>st</sup> Defendant was yet to transfer to her the four plots that she bought from him by the time when the grant issued to him was revoked. It is also not in dispute that she and the 1<sup>st</sup> Defendant were yet to obtain the consent to transfer the four plots from the relevant Land Control Board from the 1<sup>st</sup> Defendant to her. Even though the Plaintiff in her evidence stated that she took possession of the four plots and fenced off the plots in question, her evidence is disputed by the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants. The Plaintiff did not adduce any documentary evidence e.g. photos to show that she had indeed taken possession and had fenced them off. In any case, her evidence of possession and fencing off the four plots remains tenuous considering that the 1<sup>st</sup> Defendant is silent on the issue even though the latter has maintained his willingness to transfer that which he sold to her. In any case, the grant dated 06<sup>th</sup> November, 2012 which the 1<sup>st</sup> Defendant used to transfer ownership of land parcel number Makueni/Unoa/471 to himself and also sell four (4) plots from the said parcel of land to the Plaintiff was revoked on 23<sup>rd</sup> November, 2015 vide Machakos succession cause No.78 of 1992 thus the suit property reverted to the estate of the late Masilia Mwavu. There was therefore no interest in the suit property that the 1<sup>st</sup> Defendant could transfer to the Plaintiff. In addition to the above, the grant issued to the four Defendants on 08<sup>th</sup> March, 2016 and confirmed on 21<sup>st</sup> September, 2016 in the same succession cause was similarly revoked on the 31<sup>st</sup> July, 2018. This would therefore explain the inability of the 1<sup>st</sup> Defendant to transfer the four plots to the Plaintiff. As at 31<sup>st</sup> August, 2018 when the Plaintiff filed this suit, the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants were no longer administrators of the estate of the late Masilia Mwavu. I would therefore agree with the Counsel for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants that the Plaintiff therefore had no basis to sue the said Defendants. There is a discrepancy in the description of the plots that were the subject of sale. Whereas paragraph 5 talks of Makueni/Unoa/2635, 2636, 2649 and 2649, the sale agreement shows the plots that were the subject of sale as Makueni/Unoa/2636, 2637, 2638 and 2639.

46. I would also agree with the Counsel for the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants that it is not possible to tell which plots were the subject of sale and hence despite the sale agreement having been admitted by both the Plaintiff and the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants were justified in challenging the said sale.

47. Having found that the Plaintiff's evidence of possession of the four plots that she bought from the 1<sup>st</sup> Defendant is tenuous, section 93(1) of the Law of Succession Act does not come to her aid and in any case, it would have come in handy in prosecuting her case in Machakos High Court succession cause No. 78 of 1992 had she been allowed to be enjoined in those proceedings. As earlier on stated in my judgement, it is not in dispute that both the Plaintiff and the 1<sup>st</sup> Defendant had not obtained the necessary consent from the relevant Land Control Board to transfer the suit properties and neither was there evidence that the application forms for consent to transfer the four plots (P.Exhibit No.5) were submitted to the Land Control Board.

48. It seems to me, therefore, that the only remedy available to the Plaintiff is to pursue the 1<sup>st</sup> Defendant for the refund of the purchase price or to compensate her by providing alternative plots from what the 1<sup>st</sup> Defendant will get as his share after the distribution of the estate of the deceased father of the Defendants herein. I however add that it is not lost on me that refund of the purchase price is not one of the prayers sought for in the plaint filed by the Plaintiff.

49. From the foregoing, it is clear that issuing of an order of extension of time within which to obtain consent from the Land Control Board beyond the statutory 6 months will be an exercise in futility.

50. The upshot of the foregoing is that I am not satisfied that the Plaintiff has a cause of action against the Defendants. Her claim must therefore fail. In the circumstances, I hereby proceed to dismiss the Plaintiff's suit against the Defendants with costs to the 2<sup>nd</sup> to 4<sup>th</sup> Defendants. As for the 1<sup>st</sup> Defendant, I have noted that he has expressed his willingness to transfer the suit property to the Plaintiff but for the revocation of the grant issued to him. Under such circumstances, justice demands that between him and the Plaintiff, each one of them should bear their own costs and it is so ordered.

**Signed, dated and delivered at Makueni via email this 14<sup>th</sup> day of July, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Mr. Kwemboi**