

**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELC CAUSE NO. 463 OF 2017**

**BERNADETTE MWELU MUSAU.....**

**PLAINTIFF**

**=VERSUS=**

**BERNADETTE MUTONO.....1<sup>ST</sup>**

**DEFENDANT**

**BERNARD KITUNDU.....2<sup>ND</sup>**

**DEFENDANT**

**TITUS MASEKI.....3<sup>RD</sup>**

**DEFENDANT**

**RHODA NYARUAI.....4<sup>TH</sup>**

**DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup>**

**DEFENDANT**

**JOHNSON MWANZIA MUSYOKA.....6<sup>TH</sup>**

**DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE.....7<sup>TH</sup>**

**DEFENDANT**

**JUDGMENT**

1. Vide an amended plaint dated 9<sup>th</sup> November 2017, the Plaintiff sought for the following reliefs:-

- (i) A declaration that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein did not have and could not pass a valid title in the suit properties to the 4<sup>th</sup> and 6<sup>th</sup> Defendants.**
- (ii) A declaration that the title held by the 4<sup>th</sup> and 6<sup>th</sup> Defendants were acquired *malafides* and are therefore null and void.**
- (iii) A declaration that the two suit properties lawfully belong to the Plaintiff.**
- (iv) An order cancelling/revoking the titles held by the 4<sup>th</sup> and 6<sup>th</sup> Defendants and directing the Chief Registrar of Lands, Nairobi to register the two suit properties in the name of the Plaintiff herein.**
- (v) Orders of prohibitory injunction stopping the Defendants and/or their servants, agents, employees and any other persons acting in**

**their stead or behalf from selling, transferring, alienating, leasing, renting, licensing, subdividing, developing, intermeddling and/or in any other way dealing with the suit property in a manner prejudicial to the Plaintiff.**

**(vi) An order of mandatory injunction compelling the 4<sup>th</sup> and 6<sup>th</sup> Defendants to vacate the suit properties and hand over possession thereof to the Plaintiff or to the Plaintiff's nominee.**

**(vii) Compensation against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants for the value of the items at paragraph 19 hereof, particulars of which shall be provided before trial.**

**(viii) Punitive damages against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants for demolishing and/or abetting illegal demolition of the buildings on the suit property despite the court order and further for selling and transferring the suit property to the 4<sup>th</sup> Defendant despite a court order.**

**(ix) Costs.**

2. The suit was contested by the Defendants and this necessitated the same to proceed for trial.

**The Plaintiff's case**

3. It was the Plaintiff's case that at all material times relevant to these proceedings, she was the lawful owner of two parcels of land situate in Kamulu area and more particularly known as Nairobi Block/118/603 and Nairobi Block/118/604 (hereinafter, "the suit properties") having bought the same from Joseph Kaloki Maseki who was the father of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants and who is now deceased.

4. It was averred that on 12<sup>th</sup> March, 1992, she signed an agreement with the said Joseph Kaloki Maseki, her brother in law for the purchase of the above suit properties at a total cost of Kshs. 260,000.

5. The Plaintiff also averred that after signing the agreement, she lost her job and was not able to keep pace with the payment plan. However, she discussed this situation with the deceased, who was her brother in law and who allowed her a more relaxed payment plan. The deceased allowed her to pay the purchase price by installments whenever she got money; which she did.

6. It was also avered that she continued payment of the purchase price by installments as agreed by the seller. However, the late Joseph Kaloki Maseki passed on before the Plaintiff had completed paying the purchase price.
7. It is the Plaintiff's contention that having paid the initial installment on the purchase price, the late Joseph Kaloki gave her possession of the suit properties and that she proceeded to construct permanent and temporary structures for classrooms, offices and residential houses on the property on which she ran a Girls' Secondary School known as Kamulu Girls' Centre.
8. It was further averred that she ran the school for about three years before she relocated to the United States of America.
9. When she moved to America, the Plaintiff avers that she had to close down the school as it was difficult to manage the same while out of the country.
10. It was stated that upon the demise of the vendor, she executed another agreement on 29<sup>th</sup> January 2013 with the deceased representatives including the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein, aimed at facilitating completion of the agreement. Vide the said agreement, the Plaintiff agreed

to pay to the deceased family the balance of the purchase price together with a penalty of Kshs. 145,000 in compensation for delay in completing the transaction.

11. It is the Plaintiff's contention that indeed she prepared banker's cheques as agreed and through her lawyer, asked the deceased family to collect the same in fulfillment of the agreement.
12. The Plaintiff avers that when she called the 1<sup>st</sup> - 3<sup>rd</sup> Defendants to collect the cheques as agreed; they declined and thereafter sued her in Milimani CMCC No. 996 of 2014.
13. Further, the Plaintiff avers that in the said suit, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein obtained injunctive orders stopping her from dealing with the suit properties pending the hearing and determination of the said suit.
14. The Plaintiff also avers that in blatant abuse of the said order, which was merely prohibitory, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein proceeded and unlawfully demolished all the structures that were erected on the suit properties and carted away all the material, movable property, equipment, tools and items that were recovered from the

demolition as well as other movable property that were kept in the houses that were demolished.

### **PARTICULARS OF DEMOLISHED STRUCTURES**

- (i) Caretaker's standard size three room house;
- (ii) Seven door pit latrine.
- (iii) Three classrooms.
- (iv) Two offices.
- (v) One dormitory.
- (vi) One borehole.

### **PARTICULARS OF MATERIAL AND MOVEABLE PROPERTY CARTED AWAY BY THE 1<sup>ST</sup> - 3<sup>RD</sup>**

#### **DEFENDANTS**

- (i) 100 pieces of 3\*6 high density mattresses.
- (ii) 50 metal double deck beds.
- (iii) Metal podium/pulpit.
- (iv) 6 tricycle padlocks.
- (v) 1 wooden 4\*6 bed.
- (vi) 1 high density 4\*6 mattress.
- (vii) 150 pieces of 3m iron sheets.
- (viii) 142 pieces of metal bars/rods.
- (ix) 4 rolls of binding wire.
- (x) 15 pieces of R8 metal rods.

- (xi) 20 pieces of R6 metal rods.
- (xii) 24 pieces of 6ft (90 degree angular) metal bar.
- (xiii) 24 pieces of metal tubes.
- (xiv) 17 standard size wooden doors.
- (xv) 100 pieces of metallic frame student chairs.
- (xvi) 2 wooden benches.
- (xvii) 5 pieces teacher's tables/desks.
- (xviii) 10 metal frames staff chairs.
- (xix) 100 metallic student boxes.
- (xx) 10 pressure lamps.
- (xxi) Diesel generator.
- (xxii) Immersion water pump.

15. It was stated that the illegal demolition of her property was done by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants under the protection of police officers from Ruai Police Station who kept guard at gun point until the structures were completely down.

16. Further, the Plaintiff's workers who tried to intervene to stop this unlawful destruction of property were repulsed by the said police officers.

17. The Plaintiff avered that the police officers therefore aided and abetted unlawful act by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and are therefore jointly liable with them.
18. Following the illegal demolition of the buildings and other structures on the suit property contrary to the court order, She lost her many years of investment on the suit properties and filed a counter-claim seeking compensation for illegal destruction of property resulting in such loss.
19. Further, Learned Magistrate issued a further order barring any party from interfering with the suit properties pending the hearing and determination of the said suit. The said suit is part-heard and that the 2<sup>nd</sup> Defendant herein has testified as PW1 and that the same was however stayed following the petition filed by the Malindi Chapter of the Law Society of Kenya seeking judicial determination as to whether lower courts have jurisdiction in land matters.
20. It was pleaded that she has now learnt that pending the determination of the said suit filed by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein and despite the conservatory orders issued to preserve the status quo by the trial court, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein have now purported to sell and to transfer Nairobi Block/118/603 to the 6<sup>th</sup> Defendant and

Nairobi Block/118/604 to the Defendant. The 4<sup>th</sup> Defendant has now fenced the said Nairobi Block/118/604 aforesaid and has commenced construction thereon to the detriment of the Plaintiff herein who is the lawful beneficial owner.

21. It was averred that the sale and transfer of the suit properties without her consent and despite a conservatory order issued pending determination of the dispute in the lower court is malafides and the Defendants herein who are parties to the lower court suit cannot give good title.

22. She held the 1<sup>st</sup> - 3<sup>rd</sup> Defendants herein liable to her for the following:-

**(i) Recovery of the suit properties or their market value.**

**(ii) The value of the housing and other structures demolished on the suit properties by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants.**

**(iii) Value of the materials, equipment, moveable property, building materials unlawfully carted away from the suit properties.**

23. During trial, five witnesses testified on behalf of the Plaintiff. **Redempta Mumo testified as PW1.** She

adopted and relied on her witness statement dated 18<sup>th</sup> May 2022 in her evidence in chief.

24. It was her testimony that she is a niece to the Plaintiff. On 21<sup>st</sup> March 2014 she was notified of the demolition of the structures that were happening at the Plaintiff's property and upon rushing to the site she found police and young men. She saw the Plaintiff's items being carried away using the lorry that was at the site. She took some photos of what had happened.

25. It was also her testimony that there was a school at the site which was demolished. She also stated that she was able to identify the 1<sup>st</sup> and 2<sup>nd</sup> Defendant at the scene. She did not know where those items were taken to.

26. When cross-examined by Learned Counsel Mr. Ondieki, she stated that she did not witness the preparation of the agreement signed in 1992. She did not know how much money the 1<sup>st</sup> Defendant was to pay. She had been given a cheque of the balance to take to the lawyers but the same was declined.

27. She also stated that there were no students at the school when the incident happened. She was notified of the incident by the caretaker before rushing to the site. The

same was reported at Kamulu Police Station and she was issued with an O.B number.

28. On cross-examination by Learned Counsel Mr. Gatumuta, she stated that she did not know the 4<sup>th</sup> Defendant. She does not know who currently owns the land. The transaction started in 1990s. The Plaintiff brought the balance before the demolition even though she could not remember exactly when it was. She also stated that she never saw any certificate of ownership.

29. When re-examined, she stated that the cheques were never accepted and she returned them back to the bank. The police were notified of the incident. There was no case before the said incident.

30. **Benson Kyalo Musau testified as PW2.** He adopted and relied on his witness statement dated 18<sup>th</sup> may 2022. It was his testimony that on 21<sup>st</sup> March 2014, he was equally informed by a neighbour of what was happening on the Plaintiff's property. Upon rushing there he found an ongoing demolition exercise. The property had a school and other household items which were also demolished.

31. Upon cross-examination by Learned Counsel Mr. Ondieki, he stated that he did not know how the Plaintiff acquired the property. He could not remember how many students were in the school. The caretaker was chased away from the site. He also stated that he did not see any permanent house being constructed.
32. When cross-examined by Learned Counsel Mr. Gatumuta, he stated that he did not know how her sister, the Plaintiff acquired the property. He did not know who was the current owner of the same.
33. When re-examined, he stated that, he did not see any permanent structure save for only the wooden structures that were on the property.
34. **Catherine Mwatunga testified as PW3.** She stated that she is a daughter to the Plaintiff and a cousin to the 1<sup>st</sup> Defendant. She adopted and relied on her witness statement dated 18<sup>th</sup> May 2022.
35. It was her testimony that her mum acquired the said property through purchase and was paying for it by instalments. She also stated that the school was set up and started running in early 2000. The Plaintiff relocated to the USA in 2001 but the school continued with its

operation being managed by her father before he later relocated to the USA.

36. It was also her testimony that when he went to the site on 21<sup>st</sup> May 2014, she found the structures had been demolished and he saw the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the site. The incident was reported to the police. She was not shown any court order for the demolition.

37. When cross-examined by Learned Counsel Mr. Ondieki, she stated that the sale agreement was done in 1992. Her mother had not finalized payment of the purchase price at the time of Mr. Kaloki's death. She was not aware that Mr. Kaloki rescinded the agreement and that the same had been terminated. There were no students in school at the time of the incident.

38. On cross-examination by Learned Counsel Mr. Gatumuta she stated that the transaction started sometimes in 1992 when they were young. Payment of the purchase price had not been completed when Mr. Kaloki passed away in 1998. There was no title deed given to the Plaintiff. The 4<sup>th</sup> Defendant is not known to her and neither did she see her during the demolition. The school had stopped operating sometimes between 2011 to 2012.

39. When re-examined, she stated that she did not take any photos at the site. The agreement was dated 12<sup>th</sup> March 1992. Some payments made in April 1994.

40. **Alex Magombe a Surveyor testified as PW4.** He produced his report dated 24<sup>th</sup> September 2021 which was the basis of his examination in chief. It was his testimony that the total value of the demolished structures and items was Kshs. 13,800,000/= He did not physically see the items.

41. When cross-examined by Learned Counsel Mr. Ondieki he stated that he did not see the items. He did not see any mattresses. He never saw any beddings. He never visited the suit property. The structures had already been demolished when he was doing the report.

42. Upon cross-examination by Learned Counsel Mr. Gatumuta he stated that he did his report in 2012, he did not know when the demolition took place. He later learnt that the demolition took place in 2014. He could not remember seeing any copy of the title.

43. In re-examination, he stated that he is able to estimate the cost of building materials based on the current market value.

44. The Plaintiff **Bernadette Mwelu Musau testified as PW5**. She relied on her witness statement in her evidence in chief. She stated that some of the Defendants were the children of her cousin.
45. It was her testimony that her brother-in-law Joseph Kaloki requested her to buy the property because he needed school fees for his children. The agreement was done on 12<sup>th</sup> March 1992 and by May 1992 she had already made payment in excess of Kshs. 30,000/= and she took possession of the property immediately thereafter. She built a school which was registered on 15<sup>th</sup> June 1998. She had ownership documents which were used to register the school.
46. It was also her testimony that she had paid a total sum of Kshs. 105,000/= as at the time of the death of Mr. Kaloki. She was never informed that the transaction had been rescinded. She had a balance of Kshs. 155,000/= of which his children wanted him to pay interest of about Kshs. 145,000/= making a total of Kshs. 300,000/= She also stated that the children never turned up to collect the cheque for the balance. After the demolition, she instructed the Quantity Surveyor to value the items that

had been demolished. She is in court seeking to have her property returned to her and compensation for the damages and loss.

47. On cross-examination by Learned Counsel Mr. Ondieki, she stated that she signed the agreement on 12<sup>th</sup> March 1992. The completion date was to be end of May 1992. She paid a sum of Kshs. 3,000/= at the execution of the agreement and Kshs. 23,000/= at the end of May. She also stated that another agreement was done in 1998 and she paid Kshs. 105,000/= Mr. Kaloki's children declined to pick the cheques for the balance. There were about 40 students as at the time she was leaving to the USA. Her property was destroyed under the instructions of the police. She had not finished paying the balance.

48. Upon cross-examination by learned Counsel Mr. Gatumuta, she stated that the 4<sup>th</sup> Defendant was not known to her. She did a search before purchase. She never doubted her brother in law when she bought the property from him. The Ministry of Education had registered the school after confirming that she was the owner of the property. The property had not been sold to another party at the time of Kaloki's death.

49. When re-examined, she stated that the title had not yet been processed as at the time of the death of Mr. Kaloki. There was a court order restraining any demolition as at the time the incident happened.

**The 1<sup>st</sup> to 3<sup>rd</sup> Defendant's case**

50. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants filed an amended Statement of Defence and Counterclaim dated 26<sup>th</sup> July 2018. They sought the following reliefs in their Counterclaim:-

**(a) The plaint be dismissed with costs and Counterclaim be allowed.**

**(b) The Defendants had the good title which was passed to the 4<sup>th</sup> Defendant.**

**(c) A declaration that the 4<sup>th</sup> Defendant is the lawful owner.**

**(d) An order that the Plaintiff is only entitled to damages.**

51. It was their case that the sale agreement dated 12<sup>th</sup> March 1992 was vitiated in 1994 and the Plaintiff failed to pay the consideration by May 1992. They denied ever receiving Kshs. 260,000/= from the Plaintiff and never signed any agreement with him.

52. It was pleaded that the Plaintiff had trespassed onto the property and was requested to remove all the temporary structures. They denied demolishing the structures as the same was done by the caretaker.
53. It was also pleaded that the 4<sup>th</sup> Defendant acquired good title of the property since the Plaintiff had not acquired the same. They had never surrendered the same to the Plaintiff.
54. It was also pleaded that the suit is time barred as it offends the provisions of Section 27 and 29 of the Limitation of Actions Act.
55. It was averred that the sale agreement entered into between the Plaintiff and the late Joseph Kaloki Maseki in respect to Nairobi/Block/118/604 was void because the same was being sold without the consent of Mueni Kaloki. It was also averred that the same agreement was also to purchase plot Nairobi/118/603 for a sum of Kshs. 260,000/= but only Kshs. 105,000/= had been paid for the two years.
56. It was also averred that the late Mueni Kaloki had stopped the Plaintiff from accessing the said property.

57. During trial, 4 witnesses testified on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. **Jonah Mutuku Munguti testified as DW1.** He stated that he works with Drumvale. He adopted and relied on his witness statement during his evidence in chief. It was his testimony that Block 118/604 belonged to Mueni Kaloki who passed away in 2010. Her children did undertake the succession and sold the same to Rhoda Nyaruai the 4<sup>th</sup> Defendant herein who is now the current owner of the same.
58. On cross-examination, he stated that they never received any letter from the Plaintiff asking them not to undertake any transfer of the same and that in this case they issued a letter approving the transfer from Kaloki to the 4<sup>th</sup> Defendant.
59. On cross-examination by Learned Counsel Mr. Juma, he stated that the company has been under liquidation from 2009. He joined as a member in 1999. He did not have a receipt for Mueni.
60. When re-examined, he stated that Mueni Kaloki was member No. 647 and she had a membership certificate.
61. **Daniel Munyaka, the Chairman of Drumvale Farmers Society Limited testified as DW2.** He adopted and

relied on his statement dated 21<sup>st</sup> January 2022. He testified that the late Mueni Kaloki was a member and she was allocated Plot 118/604 which was later sold and transferred to Rhoda Nyaruai. The transfer was done in their offices and proper procedure was followed.

62. Upon cross-examination by Gatumuta Advocate, he stated that Plot 118/604 belonged to Kaloki Mueni who was a member of their company since inception. There was no transfer made to the Plaintiff. Rhoda Nyamai is the owner of the land as per their records.

63. On cross-examination by Learned Counsel Mr. Juma, he stated that they were not involved with any developments on the property. He did not know the owner of the school.

64. When re-examined, he stated that the school had about 10 students. It did not operate for quite some time. There was a wooden and mabati structure on the property. Rhoda Nyamai is the current owner. They have never been informed of any dispute in respect to the property. No other transfer was done in respect to the property save for the one done to the 4<sup>th</sup> Defendant.

65. **Titus Maseki testified as DW3.** He adopted and relied on his statement dated 31<sup>st</sup> January 2022 in his evidence

in chief. He stated that he was the last born son to Joseph Kaloki and Veronica Mueni. His father's membership number was 112 and mother was 647. The Plaintiff had opted to purchase 2 plots but she did not clear the down payment and 2 years later the same was cancelled. The property was then sold to the 4<sup>th</sup> Defendant.

66. Upon cross-examination by Learned Counsel Mr. Gatumuta, he stated that they did not have any agreement to sale the property to the Plaintiff. Due process was followed.

67. When cross-examined by Learned Counsel Mr. Juma, he stated that he was 8 years old when the land was initially sold to the Plaintiff. His father had agreed to sale the 2 parcels to the Plaintiff. His mother Mueni consented to the sale. His mother passed away in 2010 and his father passed away in 1998. As at April 2013, all his 7 siblings were alive. There were several letters showing that his mother objected to the sale. He could not remember how much the property was sold to the 4<sup>th</sup> Defendant.

68. When re-examined, he stated that the Plaintiff never came to seek for her refund. His father was ready to refund her. His mother had directed the Plaintiff to remove the

structures. The Plaintiff never paid the agreed balance. His parents passed away before the balance could be cleared.

69. **Bernadette Mutemi testified as DW4.** She stated that she was the second born to Veronica Mueni. She relied on her witness statement and bundle of documents dated 31<sup>st</sup> January 2022 in her evidence in chief and her further statement which was on record. She stated that his late father wanted to dispose of the property so that she could get money for her school fees. The Plaintiff expressed interest. She bought and cleared the balance for the first property but did not clear the balance for the second property. This led to the cancellation of the transaction. Later the property was sold to the 4<sup>th</sup> Defendant.

70. When cross-examined by Learned Counsel Mr. Gatumuta, she stated that there was no existing agreement with the Plaintiff at the time the suit was sold to the 4<sup>th</sup> Defendant. There were no existing structures in the property. They visited Drumvale offices with the 4<sup>th</sup> Defendant to effect the transfer.

71. Upon cross-examination by Learned Counsel Mr. Juma, he stated that her mother was informed of the construction

by the Plaintiff on the land in 2000 and the Plaintiff was requested to vacate upon which she agreed to do so.

72. The school was closed in December 2010. The Plaintiff paid only Kshs. 105,000/= out of Kshs. 260,000/= that was required. There was a court order preserving the property.

73. She also stated on cross-examination that she saw the caretaker demolishing the property together with 5 other persons. She paid Kshs. 5,000/= to the caretaker so that he could seek alternative accommodation. She also stated that she was not sure of the amount paid by the 4<sup>th</sup> Defendant towards the purchase of the property.

74. On being shown the agreement she stated that the property was sold to the 4<sup>th</sup> Defendant on 21<sup>st</sup> May 2014 for a sum of Kshs. 5,000,000/=.

75. When re-examined by Learned Counsel Mr. Ondieki she stated that she had nothing to do with the demolition. The caretaker initiated the demolitions. The Plaintiff was a trespasser to the property. The Plaintiff never came for the refund. They never collected any bankers cheque from the Plaintiff. The Plaintiff's agreement with their late father was rescinded in 1994.

### **The 4<sup>th</sup> Defendant's case**

76. She filed a Statement of Defence dated 10<sup>th</sup> July 2018. It was her case that she is the lawful owner of the suit parcel. She carried out due diligence at the offices of Drumvale Farmers Cooperative Society Ltd and the Ministry of Lands before purchase and she confirmed that there was no caution on any inhibition on any other order stopping any dealings on the property. She also denied having any knowledge of any injunctive orders or being aware of Milimani CMCC No. 966 of 2014.
77. It was also averred that she purchased the property from Joseph Kaloki and Veronica Mueni as an innocent purchaser for value.
78. During trial, she testified as DW5. She adopted and relied on her witness statement dated 9<sup>th</sup> April 2019 in her evidence in chief together with her bundle documents of even date.
79. When cross-examined by Learned Counsel Mr. Ondieki, she stated that she did not see any restrictions when she bought the land. The land was vacant at the time of purchase and she never saw any structures.

80. When cross-examined by Learned Counsel Mr. Juma, she stated that she would not have bought the land if it had a pending case before court. She bought the land around 2013 to 2014. She also stated that she took possession and fenced the property upon purchase.

81. When re-examined, she stated that she was not aware of any pending case when she was purchasing the property. She was never joined as a party to the initial case.

### **The Plaintiff's submissions**

82. The Plaintiff submitted on the following issues;-

- (i) Whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were entitled to evict the Plaintiff from the suit land.**
- (ii) Whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had locus standi to rescind the agreement and re-sell the property to the 4<sup>th</sup> and 6<sup>th</sup> Defendants.**
- (iii) Whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants demolished the buildings on the suit property.**
- (iv) Whether the 4<sup>th</sup> Defendant is an innocent purchaser.**
- (v) Whether the Plaintiff is entitled to the prayers sought.**

83. It was contended that Joseph Kaloki Maseki being the initial owner of the property sold the same to the Plaintiff who was her sister in law. Drumvale had written to the Ministry of Education to confirm ownership of the suit property to the Plaintiff and thus the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had no right to evict her.

84. It was also submitted that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had not provided any evidence that the agreement was rescinded by their late father. Reliance was placed on the case of **Ann Mumbi Higna =Versus= William Mwangi Gathuma & Another (2017) eKLR** and **Njamunyu =Versus= Nyaga (1983) KLR.**

85. The court was urged to find that the purported rescission of the contract by the 1<sup>st</sup> to 3<sup>rd</sup> Defendant's through forceful eviction of the Plaintiff from the suit property was not founded in law and amounted to an illegal enterprises.

86. On whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had locus standi to evict the Plaintiff, it was submitted that no letters of administration had been produced in court and as such the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had no locus standi. Reliance was placed on the case of **Benson Mutuma Muriungi**

**=Versus= Kenya Police Sacco & Another [2016]**

**eKLR.**

87. In respect to the demolition of the property, it was submitted that there was a prevailing status quo order on record. The same was not adhered to and as such the 1<sup>st</sup> to 3<sup>rd</sup> Defendants are liable for the demolition.

88. As to whether the 4<sup>th</sup> Defendant is an innocent purchaser for value, it was argued that she is not an innocent purchaser because when they visited the site she saw structures and hence did not do due diligence.

89. On the remedies sought, it was stated that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants did not and could not have passed good title. The 4<sup>th</sup> Defendant was not an innocent purchaser and as such the reliefs sought ought to be granted.

**The submissions of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants**

90. It was submitted that the Plaintiff has no claim whatever against the Defendants because she failed to complete the agreement of the purchase price within the agreement. Her attempt to bring a claim for destruction of property must fail because it is premised on lies and falsehoods. As early as April 2000, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's late mother had cautioned her not to put any

illegal structures on the property but she went ahead to put temporary structures comprising of iron sheet rooms which she named as a school. She has exaggerated that one iron sheet costed her 1500/= but from a market survey the prevailing market prices at that times was about 400/500 or even the best quality did not cost 600 at a piece at that time but she has exaggerated the prices three times which shows bad faith to exploit the Defendants who are her relatives and are orphans.

91. The agreement having been vitiated by the Plaintiff's conduct and failure to pay the purchase price and so she cannot divert that to the Defendants. The Plaintiff is the architect of her own misfortunes as she never completed payment.

92. It was also submitted that the Plaintiff took advantage of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's late mother's sickness and absence to put structures on her plot. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants late mother had written several notices to the Plaintiff to vacate the premises. The introduction of the further list of documents in November 2021 alleging that her property was destroyed was an afterthought because she never included those items in her plaint filed in 2017

yet she alleged the property was destroyed in 2014. There was a case 996 of 2014 where she was sued by the beneficiaries of the Estate of Mueni Kaloki to desist and stop trespassing the property.

93. The court was urged to dismiss the suit with costs.

### **The 4<sup>th</sup> Defendant's submissions**

94. The 4<sup>th</sup> Defendant submitted on whether she was an innocent purchaser of the suit property and whether the title was obtained procedurally.

95. It was submitted that the 4<sup>th</sup> Defendant was an innocent purchaser for value having met all the conditions. There was no evidence adduced indicating that the 4<sup>th</sup> Defendant was aware of any court proceedings. Reliance was placed in the case of **Lawrence P. Mukiri Mungai & Another =Versus= A.G & Others [2017] eKLR** where the court cited the case of **Katende =Versus= Harinder & Company Ltd (2008) 2 E.A 173.**

96. The court was urged to dismiss the Plaintiff's case against the 4<sup>th</sup> Defendant with costs.

### **Analysis and Determination**

97. Having considered the parties respective cases and written submissions filed, this court is of the view that the following issues arise for determination:-

- (i) Whether the Plaintiff is the lawful owner of the suit property.**
- (ii) Whether the 4<sup>th</sup> Defendant is a bonafide purchase for value.**
- (iii) Whether the Plaintiff is entitled to the reliefs sought in her plaint.**
- (iv) Whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants counterclaim is merited and they are entitled to the reliefs sought in the counterclaim.**

**Issue No. (i)**

**Whether the Plaintiff is the lawful owner of the suit property**

98. During trial, it emerged that the Plaintiff was evicted from the suit property and the same had been sold to the 4<sup>th</sup> Defendant. The Plaintiff did not have any title to the property. The property was initially allocated to Joseph Kaloki and Veronica Mueni and while the same was initially sold to the Plaintiff by Joseph Kaloki, it was evident that

the Plaintiff did not complete the payment of the purchase price within the stipulated period.

99. Parties should always be aware of the consequences and repercussions before entering into any agreement. Parties should not merely enter into agreements with the sole purpose of not honouring them. In reference to above issue, I place reliance on the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit & another (2001)**

**KLR 112** the court stated that:

***“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.***

100. In view of the foregoing, there is no way that the Plaintiff can claim any interest to the property when she failed to complete the payment of the purchase price within the stipulated period and as such even without the rescinding of the said agreement, it is evident that the same was breached by the Plaintiff and as such, it is the finding of this court that the Plaintiff is not the legitimate owner of the suit parcel.

**Issue No. (ii)**

**Whether the 4<sup>th</sup> Defendant is an innocent purchaser for value**

101. It was the case of the 4<sup>th</sup> Defendant that she was an innocent purchaser for value without notice.

102. In Kenya, the question of whether a party can become a bona fide purchaser for value of land with a riddled title is complex and highly dependent on the specific circumstances of the case and the interpretation of the law by the courts.

103. The Supreme Court's position in the case of **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** adopted the Black's Law Dictionary 9th Edition's definition of a bona fide purchaser as;

***'one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'***

104. The definition of a *bona fide* purchaser is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A *bona fide* purchaser may successfully rely on the *bona fide* doctrine if he proves that:

- i) He holds a certificate of Title.**
- ii) He purchased the Property in good faith;**
- iii) He had no knowledge of the fraud;**
- iv) The vendors had apparent valid title;**
- v) He purchased without notice of any fraud;**
- vi) He was not party to any fraud.**

105. The Court of Appeal in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:

***“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title***

***and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register”***

106. For a party to successfully plead and claim to have been an innocent purchaser for value, he or she must demonstrate the aforementioned factors.
107. During trial, it emerged that the Plaintiff having entered into an agreement with Joseph Kaloki in 1992 for the purchase of the land was unable to complete the payment of the purchase price within the stipulated time.
108. At the time the 4<sup>th</sup> Defendant came on board to purchase the same, there was no evidence that the property was still owned or had been transferred to the Plaintiff. Evidence was also tendered confirming that the 4<sup>th</sup> Defendant did due diligence before purchase and even visited Drumvale Farmers Cooperative offices to confirm the status of the property. The Defendant's witnesses indeed confirmed that the same had not transferred to the Plaintiff and they effected a transfer in favour of the 4<sup>th</sup> Defendant.

109. In view of the foregoing, it is the finding of this court that the 4<sup>th</sup> Defendant is indeed an innocent purchaser for value of the said property.

**Issue No. (iii)**

**Whether the Plaintiff is entitled to the reliefs sought**

110. The Plaintiff sought for various reliefs as enumerated in the plaint. The Plaintiff also sought compensation for the demolished structures together with punitive damages against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> and 7<sup>th</sup> Defendants for demolishing of the structures.

111. In respect to the compensation for the demolished structures, the Plaintiff called a quality surveyor who provided an assessment for value. The nature of this relief is akin to special damages and in a claim for special damages.

112. In respect to special damages it is trite law that special damages must be pleaded and strictly proved. In **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR**, the Court of Appeal reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly

proved with as much particularity as circumstances permit. In **Jogoo Kimakia Bus Services Limited v Electrocom International Limited [1992] eKLR**, the Court of Appeal stated: -

***“The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”***

113. Equally the Court of Appeal in the case of **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR** stated as follows: -

***“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree***

***of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.***

***In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:***

***“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest***

**case, Cockar JA who dealt with the issue of special damages said in his judgment:**

**“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.**

**“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by**

***which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”***

114. During trial, the Quantity Surveyor admitted that he never visited the site to assess the items nor verifying the actual loss as he merely relied on the information provided to her by the Plaintiff and as such the court is unable to grant an order for compensation of the said items as prayed for by the Plaintiff. However, the Plaintiff may only be entitled to damages. As regards to general damages, general damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it.

**Issue No. (iv)**

**Whether the 1<sup>st</sup> to 3<sup>rd</sup> Defendants Counter claim is merited and they are entitled to the reliefs sought**

115. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants filed a Counter Claim dated 26<sup>th</sup> July 2018 in which they sought the following orders:

**(i) The plaint be dismissed with costs and counterclaim be allowed.**

**(ii) The Defendants had the good title and passed good title to the 4<sup>th</sup> Defendants.**

**(iii) A declaration that the 4<sup>th</sup> Defendant is the lawful owner.**

**(iv) An order that the Plaintiff/Defendant is only entitled to damages.**

116.A Counterclaim just like a suit ought to be proved to the required standard.

117.It is trite law that It is trite law that whoever alleges must proof. **Section 107 (1) of the Evidence Act**, Cap 80 Laws of Kenya provides that:

***'Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.'***

On evidentiary burden of proof, **Sections 109 and 112 of the Evidence Act** provide as follows:

***"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by***

***any law that the proof of the fact shall lie on any particular person.”***

***112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”***

118. From the evidence that was tendered It was evident that the sale agreement dated 12<sup>th</sup> March 1992 was vitiated in 1994 and the Plaintiff failed to pay the consideration by May 1992. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants never received Kshs. 260,000/= from the Plaintiff and never signed any agreement with her. The 4<sup>th</sup> Defendant therefore acquired good title of the property since the Plaintiff had not acquired the same and the 1<sup>st</sup> to 3<sup>rd</sup> defendants had never surrendered the same to the Plaintiff.

119. The sale agreement entered into between the Plaintiff and the late Joseph Kaloki Maseki in respect to Nairobi/Block/118/604 was void because the same was being sold without the consent of Mueni Kaloki who was its initial owner and further the late Mueni Kaloki had stopped the Plaintiff from accessing the said property.

120. In view of the foregoing, this court finds that the 1<sup>st</sup> to 3<sup>rd</sup> Defendant's Counterclaim is merited and the same has been proved to the required standard and the reliefs sought are for granting.
121. It is worth noting that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants had pleaded that the Plaintiff may only be entitled to compensation for damages, the Plaintiff had equally prayed for punitive damages.
122. The eviction of the Plaintiff from the suit property was carried out in a manner that led to destruction and demolition of her property. While the court did not agree with the Plaintiff in the manner in which the assessment of the destroyed structures was undertaken the court is of the view that she is entitled to damages. On the quantum payable for damages, none of the parties provided any quantum to the court. The court would have expected the parties to do so in their submissions but none was provided. That notwithstanding this court is still obligated to consider the same. In the case of **Nakuru Industries Limited v S. S. Mehta & Sons [2016] eKLR** where the court faced such a similar situation awarded a sum of Ksh 500,000/- as general damages. Having that in mind and

doing the best I can, will award a similar sum of Ksh 500,000/ to the Plaintiff as general damages payable by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.

123. On the issue of costs, the dispute was largely between family members save for the 4<sup>th</sup> to 8<sup>th</sup> Defendants and in the circumstances this court directs each party to bear own costs of the suit and Counterclaim.

### **Final Orders**

124. In conclusion, this court proceeds to grant the following final orders in respect to the Plaintiff's suit and the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Counterclaim. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Counterclaim is hereby allowed in the following terms: -

**(a) The Plaintiff's suit be and is hereby dismissed.**

**(b) A declaration be and is hereby issued that the 4<sup>th</sup> Defendant is the lawful owner of suit parcel Nairobi Block 118/604.**

**(c) General damages of Kshs. 500,000/= are hereby awarded to the Plaintiff payable by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.**

**(d) Each party to bear own costs of the suit and Counterclaim.**

**Dated, Signed and Delivered Virtually at Voi this 8<sup>th</sup> day  
of October 2025.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:-**

**N/A for Plaintiff.**

**Mr. Oyaro h/b for Mr. Ondieki for the 1<sup>st</sup> to 3<sup>rd</sup>  
Defendants.**

**Ms. Sharon Njoki h/b for Mr. Gatumuta for the 4<sup>th</sup>  
Defendant.**

**No appearance for other parties.**

**Court Assistant: Mary Ngoira.**