

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. 24 OF 2020

PROTUS **MASIBO**
WATIBINI-----1ST PLAINTIFF
VERONICA NANGAMI WATIBINI-----
2ND PLAINTIFF
CONCEPTA NANJALA WATIBINI-----
3RD PLAINTIFF

VERSUS

THE BOARD OF MANAGEMENT
ST. BRIGID'S GIRLS HIGH SCHOOL KIMININI-----1ST
DEFENDANT

THE CATHOLIC DIOCESE OF KITALE-----2ND
DEFENDANT

AND

GETRUDE NAFULA TSUMA-----3RD
DEFENDANT

JUDGMENT

1. The plaintiffs approached the court with an amended plaint dated **13/5/2024**. They described themselves as the executors of the estate of Wenslau Watibini, deceased, who passed on, on **6/9/2010**, following a grant issued on **23/6/2011** and confirmed on **11/6/2019**.

2. The plaintiffs averred that the deceased was the beneficial owner and was entitled to **L.R. No. 6670** measuring **2 acres** in Kiminini Township, sharing a boundary with the 1st defendant, a school sponsored by the 2nd defendant. It was averred that the subject land, during the survey process and issuance of title, was inadvertently registered in the name of the interested party, a beneficiary and occupier of **L.R. No. 6671**, that abuts the suit land. The parties averred that they had sought the correction or rectification of the anomaly with the defunct Commissioner of Lands.
3. It was averred that in the administration of the estate, the plaintiffs discovered that in unknown date after the death of the deceased, the 1st defendant illegally and wrongfully trespassed onto **L.R. No. 6670**, put up buildings, and had embarked on constructing a perimeter fence to hive off a portion of the suit land to the side of the school, allegedly claiming that it had purchased it from the deceased.
4. The plaintiffs termed the sale agreement a forgery, undated, conflicting, based on no consideration, lacking any survey works, and undertaken unprocedurally. Further, the plaintiffs averred that

the 1st defendant was wrongfully occupying, developing, and claiming the portion.

5. The plaintiffs sought:
 - (a) **Declaration that the deceased was the beneficial owner of Parcel No. 6670 and is entitled to be the land transferred by the interested party.**
 - (b) **Declaration that the 2nd defendant did not lawfully purchase any part of L.R. No. 6670 from the deceased.**
 - (c) **Declaration that the 1st defendant is a trespasser to L.R. No. 6670.**
 - (c) **An order of eviction of the 1st defendant from L.R. No. 6670.**
 - (e) **Damages for trespass.**
6. By an amended defence and counterclaim dated **19/6/2024**, the 1st and 2nd defendants denied the plaintiffs' claim. It was averred that the 2nd defendant was a lawful and *bona fide* purchaser of **0.75 acres** out of the suit property in **2002** from the deceased for value. Who handed over the 1st and 2nd defendants vacant possession, occupation, and use of the purchased portion in **May 2008** to date?
7. The 2nd defendant, being the sponsor of the 1st defendant school, averred that it bought the suit property for the benefit and use of the 1st defendant educational institution, being a public national high

school, situated in Trans Nzoia County. The defendants averred that since **2008**, when they took possession, use, and occupation of the school, they have substantially made developments therein.

- 8.** The developments as pleaded included storey buildings, classrooms for the students, and a fence, which were undertaken in full view or knowledge of the plaintiffs, without any objection or interference from anyone, until the perimeter fence was completed before the filing of this suit. The defendants denied that they were trespassers onto the land as alleged or at all, more so given that the sale agreement dated **19/5/2008** between the 2nd defendant and the deceased was prepared before an advocate.
- 9.** The defendants averred that the deceased was paid all the purchase price by way of a bankers' cheque on the strength of which he handed over vacant possession, use and occupation of the suit land since **2008**, thus creating a constructive trust in favour of the defendants.
- 10.** By way of a counterclaim, the 2nd defendant averred that as a diocese, which was split from the larger Catholic Diocese of Eldoret, is to lawfully and bona fide purchaser for value of **0.75 acres** of **L.R. No.**

6671 from the deceased, whose estate the plaintiffs represent, and being the official sponsor of the 1st defendant, bought the land for use and benefit of the 1st defendant which is a public national high school whose land where it stands is in the name of the 2nd defendants - the sponsor.

11. It was averred that the deceased father passed on before the completion of the transaction in its favour. Therefore, the defendants counterclaimed for:

(a) Declaration that the 2nd defendant is the lawful and *bona fide* purchaser for value of 0.75 acres out of L.R. No. 6671 from the deceased.

(b) An order that the plaintiffs' administrator sign all the necessary legal documents to subdivide, transfer, and register the bought suit land in favour of the 2nd defendant, in default, the Deputy Registrar of the court to execute the same.

12. In reply to the defence and a defence to the counterclaim dated **3/7/2020**, the plaintiffs denied the alleged purchase, terming the sale agreement as undated, unsigned, and based on a parcel of land belonging to the interested party. Further, it was averred that the deceased at the time knew that his land on the ground was **L.R. No. 6670** and therefore

would not have purported to sell **L.R. No. 6681**, which he knew beneficially belonged to the interested party.

- 13.** The plaintiffs averred that the alleged sale is doubtful because there was no survey whatsoever which was carried out in **2008** or thereafter, during the lifetime of the deceased, except the one carried out by Baintos Ombudi Hussein in **2019** over **6670**, whose report was submitted to the 1st plaintiff after the suit had been filed.
- 14.** Equally, the plaintiffs averred that the deceased could not have given the defendants' vacant possession of an unsurveyed land, which required curving out of the sold portion and the marking of clear boundaries, which was never done. The plaintiffs admitted that though the defendants had undertaken substantial developments on part of the suit land, which borders their land, the same was carried out without any colour of right or consent, of which the plaintiffs had raised issues with the defendants, after which they produced the belatedly doubtful sale agreement of the land.
- 15.** The plaintiffs averred that if any developments occurred earlier without the knowledge of the deceased because the deceased did not live on the

suit land or use it. The plaintiffs averred that the failure by the alleged maker of the sale agreement to witness renders it curious and fatal. The plaintiffs averred that it is not clear what the bankers' cheques referred to in the defence were for and who paid them to the deceased; otherwise, they could have been for different transactions that the deceased carried out in the law firm of Kidiavai & Co. Advocates, the copies of which have been falsely presented in this case.

- 16.** Similarly, the plaintiffs averred that if the two bankers' cheques bearing the name of the deceased, one of which was misspelt, and if at all it had originated from the 2nd defendant, nothing could have been easier than to supply evidence of the source of funds, the requisition of the cheques from the banks, and the bank account from which the cheques were drawn.
- 17.** The plaintiffs averred that the 2nd defendant has not produced minutes or resolutions to purchase land from the deceased and or produced such vouchers or bank slips to prove that the deceased had prior to making the undated sale agreement, received **Kshs. 750,000/=**, from the 2nd defendant or any other party for the sale of the alleged plot; otherwise, it

was not possible for the 2nd defendant to possibly pay **Kshs. 750,000/=** to the deceased without an initial agreement and or acknowledgement of payment signed by the deceased.

- 18.** Further, the plaintiffs averred that the date that the 2nd defendant alleges that the deceased received a down payment of **Kshs. 750,000/=**, has not been disclosed in the purported sale agreement. The plaintiffs averred that the 1st time they came to know about a surveyor ever visiting the land was when a report was filed before this court; otherwise, if a survey pursuant to the sale was ever done, then the same would not have resulted in the preparation of a report, but mutation drawings for purposes of subdivision and transfer to the purchaser.
- 19.** The plaintiffs averred that the purported undated sale, if it ever arose, related to the sale of **6** plots and a portion measuring **0.3** of a plot, which is a strange way of selling part of the suit land whose size is **2 acres**.
- 20.** The plaintiffs while admitting that the 2nd defendant is a sponsor of the 1st defendant, denied the alleged purchase or sale, otherwise, the 2nd defendant is cleverly attempting to save the 1st defendant from the careless, costly trespass on the suit land which

abuts the 1st defendant's land, otherwise there was no plan or arrangement whatsoever by the deceased to grant the 2nd defendant title to any part of **L.R. No. 6670**.

- 21.** The plaintiffs averred that if there had been any alleged sale or valid sale by the deceased, the defendants would have applied to join **Kitale High Court Succession Cause No. 82 of 2011** as creditors to the estate. The plaintiffs averred that the reliefs sought by the 2nd defendant are untenable since the land is agricultural, subject to the Land Control Act, hence, the sale became null and void pursuant to **Section 6** thereof.
- 22.** Further, the plaintiffs averred that the reliefs sought by the 2nd defendant are *ex turpi causa*, as the sale agreement is in breach of the law, hence, unenforceable in law. The plaintiffs termed the suit as disclosing no cause against them, as administrators of the estate whose deceased will and resulting grant bind them.
- 23.** In reply of defence to counterclaim dated **14/7/2020**, the defendants averred that the conduct of the deceased giving actual possession, use and ownership of the land in **2008** to them to date, caused them to acquire equitable rights thereon,

hence created a constructive trust, that is enforceable in law, hence it would be unjust and inequitable to allow the plaintiffs to retain the portion of land sold by their late father, as would defeat or violate the principles of equity in **Article 10(2)(b)** of the Constitution.

- 24.** The defendants averred that the equitable doctrine of constructive trust and proprietary estoppel supersede the Land Control Act and the Law of Contract Act as modified by **Section 38(2)** of the Land Act, which doctrines the court under **Article 159 (2) (e)** of the Constitution has to apply and is bound by in interpreting any law vide **Article 10(1) (b)** of the Constitution.
- 25.** The defendants averred that the plaintiffs were aware and have admitted their occupation and developments on part of **L.R. No. 6670** on the ground, though title deed at the time was held by the deceased, and the Ministry of Lands was aware of the mix up, hence had undertaken to correct the anomalies, to ensure that the title was in tandem with the actual land possession and occupation. The defendants averred that the suit property was not part of the **Kitale HC Succession Proceedings Cause No. 82 of 2011.**

- 26.** When this matter came up for hearing on **24/2/2025**, in the presence of the parties and their advocates on record, the parties by consent sought another date to attempt a possible out-of-court settlement. The court adjourned the matter to **2/7/2025** for hearing. On **2/7/2025**, the plaintiffs and their advocates on record failed to attend court. Efforts to reach out via Mr. Kraido, advocate, by the defendants' counsel, bore no fruit. In their absence, the defendants sought the dismissal of the suit for non-attendance with costs and for the amended counterclaim to be prosecuted.
- 27.** The court, after having listed the matter during the call over earlier and waiting for the plaintiffs till **10:55 a.m.**, proceeded to dismiss the plaintiffs' suit for non-attendance and non-prosecution. It was ordered for the prosecution of the counterclaim dated **19/6/2024**.
- 28.** **Francis Murikwa** testified as **PW1** in the counterclaim. He relied on a witness statement dated **18/6/2020** as his evidence in chief. He told the court that he was one of the trustees of the Catholic Diocese of Kitale, the 2nd defendant, which was initially part of the larger Catholic Diocese of Eldoret, then referred to as the Prefecture Apostolic of Eldoret

Trustees Registered. PW1 told the court that the 1st defendant school is sponsored by the Diocese, and that the land on which it is built is held in the name of the larger Catholic Diocese of Eldoret.

- 29.** PW1 told the court that the suit land was bought from the late Wenslaus Watibini, for the benefit and use of the 1st defendant, a national public school drawing students from all over Kenya. PW1 told the court that the land was bought for **Kshs. 1,550,000/=**, a deposit as per the sale agreement dated **19/5/2008**, was paid for **Kshs. 750,000/=** to the deceased and a balance of **Kshs. 800,000/=** made up of two bankers' cheques, duly paid. He said that the agreement had been signed by both Bishop Crowley and the deceased.
- 30.** PW1 said that upon full payment in **2008**, the deceased gave the defendants vacant possession, use, and occupation of the land. He produced the letter showing he is a trustee dated **18/1/2020**, the sale agreement, copies of the cheque, letter dated **24/4/2008**, surveyor's report dated **18/4/2020**, letter dated **1/4/2001**, bundle of photos and record of creation of the Diocese as **P. Exhibits. No. 1, 2, 3(a) and (b), 4(a) and (b), 5, 6, 7, 8 and 9**, respectively.

- 31.** According to PW1, Tabitha, a sister in law of the deceased, was a partner in the suit land, hence the reason that she was paid part of the purchase price as per **P. Exhibits. No. 6 and 7**. PW1 told the court that the school has made substantial developments on the suit land as per **P. Exhibit No. 8(a), (b), (c), (d) and (e)**, between **2012 - 2018** with no attempt to stop the same.
- 32.** PW1 said that the school has been on the land for over **12** years uninterruptedly by the plaintiffs, especially the 1st plaintiff, who was not only a parent of the school but also used to teach there immediately after graduating from college.
- 33. Edward Baraza** testified as **PW2**. He relied on a witness statement dated **24/9/2020** as his evidence-in-chief. As the chairman of St. Brigid's Primary School and BOM in **2008**, PW2 told the court that the 2nd defendant bought the land for school expansion through an agreement between the late Wenslaus Watibini. He said that he was the one who negotiated the same, and minutes dated **12/4/2008**, show the same, which he produced as **P. Exhibit. No. 10**.
- 34.** PW2 said that the plot that they bought was exchanged with and surrendered to the 1st defendant, after clearing all the purchase price as

per the bankers' cheques before the court. PW1 confirmed that Tabitha was a sister in law of the seller, possessing three plots out of the suit land, hence the reason that she was paid **Kshs. 750,000/=**, as per **P. Exhibit No. 5**, an acknowledgement of the receipt by the BOM.

- 35.** PW2 said that the balance of **Kshs. 800,000/=** was paid in cash, which she acknowledged receipt of. PW2 confirmed that vacant possession took place in **2008**, and later on, developments on the land were undertaken, including a perimeter fence as per **P. Exhibit No. 8(a) - (e)**.
- 36.** The defendants to the counterclaim did not attend the court to ventilate their reply to the defence and defence to the counterclaim, hence the court marked the same as closed. Parties were directed to put in written submissions by **30/7/2025**.
- 37.** The defendants rely on written submissions dated **19/7/2025**. It is submitted that under **Order 12 Rule 3(1)** of the Civil Procedure Rules, the court was justified in dismissing the plaintiffs' suit for non-attendance and ordering the counterclaim to proceed as per **Order 12 Rule 3(3)** of the Civil Procedure Rules.

- 38.** The defendants submit that the exhibits produced as **P. Exhibits. No. 1, 2, 3(a) and (b), 4(a) and (b), 5, 6, 8(a)-(c)** confirm that there was a sale of the suit land, payment of consideration, taking up of the possession and developments of the suit land namely **Plot No. 6671** from the seller which land he jointly owned with his brother.
- 39.** The defendants submit that having performed part of the sale agreement by giving vacant possession in **2008**, a constructive trust arose, there was a common intention and therefore, nothing in law prevents the defendants from relying on the doctrine. The defendants submit that it could be unjust and inequitable to allow the plaintiffs to retain both the portion and the money, based on the case law of **Willy Kimutai Kitilit -vs- Michael Kibet [2018] eKLR.**
- 40.** The defendants submit that since the defendants to the counterclaim did not testify or call any witness to support their reply to the defence and defence to the counterclaim, their testimony in support of the counterclaim remained uncontroverted. The defendants submitted that no evidence was tendered to controvert that the deceased signed the sale agreement, handed over vacant possession and

hence, a constructive trust was created in the circumstances. The defendants submitted that the plaintiffs did not tender any evidence of fraud, forgery, or to sustain their defence that the deceased did not sign the sale agreement.

41. The court has carefully looked at the pleadings, evidence tendered and the written submissions. The issues calling for my determination are:

- (1) If the plaintiffs have the capacity to advance the suit on behalf of the late Wenslaus Watibini regarding the suit land.**
- (2) If the deceased was the beneficial owner and occupier of L.R. No. 6671.**
- (3) If the plaintiffs have proved that the defendants have trespassed onto L.R. No. 6671 and caused permanent developments thereon.**
- (4) If the plaintiffs have proved that there was illegality in the alleged sale, occupation, use and development of the suit land by the defendants.**
- (5) If the plaintiffs have proved entitlement to a transfer of the suit land from the interested party.**
- (6) If the plaintiffs are entitled to reliefs (b), (c), (d), (e) and (f) of the amended plaint dated 13/5/2024.**
- (7) If the defendants have proved justification by way of the purchase of 0.75 acres out of L.R. No. 6671 from the deceased.**

(8) If the defendants are entitled to the reliefs sought.

- 42.** It is a trite law that parties are bound by their pleadings, and issues for determination flow from the pleadings. See **Raila Odinga -vs- IEBC & Others [2017] eKLR**. It is also a trite law that the person who made an averment must lead evidence to prove that fact. See **Gatirau Peter Munya -vs- Dicskon Mwenda Kithinji & Others [2014] eKLR**.
- 43.** The plaintiffs' case as legal representatives of the deceased is contained in the amended plaint dated **13/5/2024**. It was alleged that the trespass, encroachment, occupation, use and development on the suit land are unjustified, based on an alleged illegal and unlawful sale agreement. Illegality, irregularity, and or fraud must be specifically pleaded and proved on a balance higher than in an ordinary suit. See **Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR**.
- 44.** Despite taking a hearing date by consent, none of the plaintiffs or their witnesses appeared before the court to tender both oral and documentary evidence to sustain the contents of the amended plaint.
- 45.** In **Ken Nyaga Mwige -vs- Austin Kiguta & Others [2015] KECA 334 [KLR]**, the court held

that the filing of documents does not make it become part of the court record. The court said that to constitute evidence, a document has to be produced, as an exhibit, proved under the law, after which the court has to apply its judicial mind to determine the authenticity, relevance and veracity of its content. The plaintiffs' claim revolves around trespass to land by the defendants.

- 46.** In **Emfil Ltd -vs- Safaricom Ltd Civil Appeal E100 of 2022 [2023] KECA 133 1 [KLR] (18th July 2023) (Judgment)**, the court cited *Black Laws Dictionary 10th Edition and Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428*, that trespass to land or interference with possession and that mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. The court also cited **M'Ikiara M'Mukanya & Another vs. Gilbert Kabere M'Mbijiwe (1983) KECA 121 (KLR)**, that trespass is a violation of the right to possession and a plaintiff must prove that he has a right to immediate and exclusive possession of land, which is different from ownership.
- 47.** Further, the court cited **Godfrey Julius Ndumba Mbogori & Another -vs- Nairobi City Court**

[2018] KECA 702 [KLR], that as soon as a person is entitled to possession, and enters in to the possession of the possessor, or gets in with the command of the lawful owner, the law immediately vests the actual possession in the person who has so entered.

- 48.** The court said that to recover anything against an alleged trespasser or to succeed in a claim for trespass, a claimant must prove title to land and, secondly, in the absence of such title, be in actual or constructive possession of the land upon which trespass is alleged to have been committed.
- 49.** In this suit, the plaintiffs failed to attend court to ventilate the contents of the amended plaint. Failure to do so meant that the contents therein remain mere statements. That notwithstanding, the defendants had to prove justification for the alleged trespass by showing that they lawfully and procedurally acquired possession of the land from the rightful owner for value.
- 50.** Evidence to show that the sale agreement was a forgery, illegal, and was not signed by the deceased during his lifetime has not been provided by the plaintiffs. Evidence that the bankers' cheques for the purchase price drawn in the name of the deceased

and his partner, one Tabitha, for the suit land were forged, the forgery was undertaken by the defendants, and that the alleged cheques did not exist, and further that the lawyer alleged to have handled the sale agreement has denied preparing or execution of by the parties to it including the deceased, has not been availed.

51. Equally, there is no evidence that the deceased had no capacity to dispose of the suit property and to hand over vacant possession to the defendants. The interested party was not called to testify that his portion of land was illegally sold to the 1st and 2nd defendant by his neighbour, the deceased. Evidence that the deceased protested to the possession, developments, and use of the land by the defendants during his lifetime is missing.

52. P. Exhibit. No. 2, 3(a), 5, 6, 7, and 10 were not subjected to any forensic document examination to prove that they were forgeries, fraudulently obtained, or were a misrepresentation of facts. The plaintiffs, as of **19/5/2008**, had no capacity to deal with the properties of the deceased, going by the grant of letters of probate of **2011**. The will prepared by the deceased was allegedly made on **11/6/2008**. The deceased passed on **6/6/2010**, long after he had

sold the land and handed over vacant possession. The deceased had also obtained the banker's cheque in his name as valuable consideration.

- 53.** The banker's cheque from the bank statement went through on **19/5/2008**. The rectified grant dated **5/2/2021** is the one that includes the suit land as forming part of the estate of the deceased; otherwise, the alleged lease had already expired. This came up following the renewal of the lease, and issuance of a certificate of title **I.R. No. 265796**, and the lease was registered on **2/11/2022**.
- 54.** Upon renewal of the lease and the issuance of a rectified grant, the plaintiffs appeared to be asking the court to use the rectified grant based on the will to invalidate acts done by the deceased during his lifetime or undertaken by the defendants on the land which did not bear the name of the deceased upon expiry of the lease, or after he had passed on. Acts committed by the deceased willingly, consciously, and lawfully require credible and reliable evidence to invalidate them. In the absence of such evidence, the court finds the ingredients of trespass as to the immediate right to exclusive possession as of the date of entry to the land, coupled with a fraudulent

transaction to acquire possession, use, and occupation by the defendants unproven.

- 55.** Further trespass relates to the violation of the right to own, use, and occupy. The plaintiffs failed to produce any evidence that it was not the deceased who authorised the entry into, use, and occupation of the suit land by the defendants on account of a lawful transaction. Similarly, evidence of any attempt by the deceased during his lifetime to disown, refute, complain and or demand a refund of the alleged funds which found their way to his account is lacking.
- 56.** Coming to the defendants' defence and counterclaim, the defendants rely on the concept of constructive trust and proprietary estoppel as a basis for being on the land.
- 57.** In **Willy Kimutai Kilitil -vs- Michael Kibet [2018] KECA 573 [KLR]**, the court cited **Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kanyiri [2014] eKLR**, where the court held that the appellant's action of receiving full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, hence showing a common intention.
- 58.** In **Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others Petition 19 (EO20) of 2022**

[2023] KESC 106 KRL (28th December 2023 (Judgment), the court said that a constructive trust was an equitable instrument serving the purpose of preventing unjust enrichment, and was a right traceable from the doctrine of equity, when a party conducted himself to deny the other party beneficial interest in the property acquired. The court said that the doctrines of equity were applicable in Kenya vide **Section 3(1)** of the Judicature Act and that it was one of the overriding interests or encumbrances, envisaged under **Sections 25, 26 and 28** of the Land Registration Act. The court said that a constructive trust could be imported into a land sale agreement to defeat a registered title.

- 59.** The court said that it is an intervention against unconscionable conduct, where the circumstances of the case were that the legal owner is a trustee, or where the law requires it to be imposed for the ends of justice and good conscience to be met.
- 60.** In this suit, there is no dispute that the defendants issued bankers' cheques in favour of the deceased and his sister in law, on account of land which they had been offered for sale, were handed over vacant possession and later on embarked on its use, possession and development with the full knowledge

and view of not only the deceased, but also the plaintiffs as of the entry date. Evidence that attempts were made to eject, evict, stop, and or reclaim the land by the deceased or the plaintiffs between **2008** and up to the filing of the suit is lacking. Assertion of superior right is key.

- 61.** The defendants have pleaded in the amended defence and counterclaim dated **19/6/2024**, that they were lawful and bona fide purchasers for value of part of **L.R. No. 6671** measuring **0.75 acres**, which they lawfully took possession of, extensively developed and have been using since **2008** and is under the utilisation by a national public school, servicing students from all over the country.
- 62.** By way of a counterclaim, defendants reiterate the contents of the amended defence. It is averred that the deceased passed on before the process of titling was completed in favour of them. The defendants, based on the tendered oral and documentary evidence, urge the court to declare them bona fide purchasers for value.
- 63.** A *bona fide* purchaser for value was defined as one who has, in good faith, paid valuable consideration for property without notice of any prior adverse claim. See **Dina Management Ltd -vs- County**

Government of Mombasa & Others [2013] eKLR. In **Torino Enterprises Ltd -vs- Attorney General, Petition No 5(E006) of 2022,** the court emphasized the need to undertake due diligence before one can claim to be an innocent purchaser for value. In **Sehmi & Another -vs- Tarabana & Co. Ltd & Others [2025] KESE 21 [KLR] (11th April 2025) (Judgment),** the court observed that the doctrine of bona fide purchaser entails three elements, namely, innocence, purchase for value and a legal estate. The court said that the element of innocence means that the purchaser acted in good faith, that the purchase for value means that consideration in money or money's worth was paid in return for the land, and the purchaser must be in reference to a legal estate vis-a-vis an equitable interest in the suit land.

- 64.** The evidence tendered by the defendants is that there was no contest as to the ownership of the land by the deceased on the operative date when the offer was made and accepted, consideration discussed and paid and vacant possession handed over. The testimony of PW1, **2** and **3** and the exhibits relied upon have not been challenged. The alleged interested party has not disputed the pleadings and

evidence by the defendants on the factual details on the ground that the land belonged to the deceased and his sister-in-law, the taking over of vacant possession in **2008**, courtesy of the deceased, and the subsequent developments on the suit land. All these developments on the land occurred without objection from either the deceased or the interested party, or the plaintiffs herein.

- 65.** Evidence that the interested party and the plaintiffs objected to or attempted to stop the occupation and the developments therein is lacking. Evidence to assert that the defendants were not innocent purchasers for value has not been tendered in support of the reply to the defence and the defence to the counterclaim.
- 66.** **Section 12** of the Land Act **2012** relates to renewal of leases. The subject lease herein expired on **1/6/2012**. The deceased knew it had erroneously been issued in the name of the interested party. It is not disputed that plots **No. 6671** and **No. 6670** abut each other. The occupation on the ground was not disputed between the interested party and the deceased at the time he sold the portion of **0.75 acres** to the defendants. The issuance of the rectified certificate of lease, lease, and a deed plan

No. 466 322 on **12/5/2023** was therefore subject to the overriding interests or rights of possession, use, and occupation that had accrued in favour of the defendants herein since 2008.

67. Consequently, I find the defendants entitled to **prayers (a) and (b)** of the amended defence and counterclaim dated **19/6/2024**. Costs of the plaint and the counterclaim to the defendants.

68. Orders accordingly.

Judgment dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **1st** day of **October 2025**.

In the presence of:

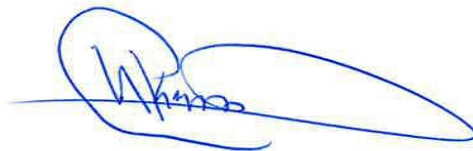
Court Assistant - Dennis

Miss Munialo for the plaintiffs present

1st plaintiff present

Songole for Onyancha for 2nd defendant present

Miss Chilaka for the 1st defendant absent



HON. C.K. NZILI
JUDGE, ELC KITALE.