

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO. E059 OF
2024

MARGARET APIYO ARODI
(Suing as the Administrator
of the Estate of JOSEPH ARODI
NDIEGE (Deceased).....
APPELLANT

VERSUS

CHARLES OWITI

OWINO.....RESPONDENT

(Being an appeal against the judgment of Hon. Jacinta A. Orwa delivered on 15th November 2024 at Homabay in MCELC/068/2021)

JUDGEMENT

- 1.** By way of a Further Amended Plaintiff dated 1st February 2024, the Appellant sought the following orders in the trial court;
 - 1) General Damages for Trespass**
 - 2) Vacant Possession to be granted to the Plaintiff over the suit Property.**
 - 3) A permanent injunction restraining the 1st Defendant whether by himself or his servants or agents or otherwise howsoever from entering or using the said parcel of land in any way whatsoever.**
 - 4) A Declaration that the Parcel of Land Title No. Kanyada/Kanyango/Kalanya/5128 was acquired**

and/or procured illegally and/or against the law thus null and void ab initio.

5) Cancellation of the Parcel of Land Title No. Kanyada/Kanyango/Kalanya/5128 issued in the 1st Defendants' name.

6) An order of mandamus directing the 2nd Defendant to rectify the registration of Parcels Kanyada/Kanyango/Kalanya 5060 and Kanyada/Kanyango/Kalanya 5061 in accordance with the Land Control Board consent dated 2nd May 2006.

7) Costs of the suit against all the Defendants and interest at Court rates.

8) Any other relief the Honourable Court may deem just to grant.

2. The appellant pleaded that the deceased Joseph Arodi Ndiege was the registered proprietor and lawful owner of Kanyada/Kanyango/Kalanya/857 measuring about 0.71 Ha. That on 4th September 1999, the deceased entered into a written agreement with the 1st Defendant regarding the sale of a portion of land located on LR No. Kanyada/Kanyango/Kalanya/857 at a consideration of Kenya Shillings 72,000/=. The Purchase price for the sale of land was to be made in three instalments in order to complete the sale transaction as follows: First Instalment of Kenya Shillings 37,000/=; Second Instalment of Kenya Shillings 20,000/= and the Third instalment of Kenya Shillings 15,000 was to be

paid in kind being iron sheets worth the same value in November 1999. Total: 72,000/=.

- 3.** The plaintiff pleaded that the 1st Defendant duly paid the 1st Instalment of the Purchase price being Kenya Shillings 37,000/= during the signing of the Agreement. Further, that the 1st Defendant failed to pay the second instalment and the third instalment contrary to the Sale Agreement thereby rendering it incapable of being finalized and transferring any interest thereof to the 1st Defendant.
- 4.** The plaintiff pleaded that the sale agreement stood rescinded and the deceased did not at any material time transfer any interest in Kanyada/Kanyango/Kalanya/857 to the 1st Defendant capable of being registered and issued with a title document.
- 5.** The appellant pleaded that on or about the year 2005, the deceased entered into a Sale Agreement for the sale of land measuring about 0.05 Ha that was to be hived off from LR. Number Kanyada/Kanyango/Kalanya/857 at a consideration of Kenya Shillings 120,000/=. The Purchaser was Vincent Morara Nyangena Ogoro. Further, that in order to actualize the Land Transaction, the deceased applied for the Consent of the Land Control Board at Homabay vide L.C.R NO. 070/5/06 seeking consent to subdivide Kanyada/Kanyango/Kalanya/857 into two parcels of land measuring 0.66 Ha and 0.05 Ha Respectively. The Land Control Board acceded to the request by the deceased and granted its consent vide a letter of Consent dated 2nd May 2006 allowing Kanyada/Kanyango/Kalanya/857

measuring 0.71 Ha to be sub-divided into two portions measuring 0.66 Ha, to be retained by the deceased and his family and the second portion measuring 0.05 Ha, to be allocated to Vincent Morara Nyangena Ogoro, the Purchaser.

- 6.** She stated that on 15th May 2006, the 1st Defendant illegally and fraudulently colluded with Surveyors from J.R.R AGANYO & ASSOCIATES in surveying the Property and illegally subdividing the property into three portions namely: 5060 measuring 0.62 Ha, 5061 measuring 0.04 Ha and 5128 measuring 0.05 Ha contrary to the two portions approved by the Land Control Board. Based on the illegal sub-division that was not approved by the Land Control Board, the Surveyors presented the Mutation Form to the 2nd Defendant who proceeded to register the same without verifying the authenticity and correctness of the documents presented to him thereby being in complicity in the fraudulent scheme orchestrated by the 1st Defendant to defraud the Plaintiff and her family off their lawful property.
- 7.** She pleaded that she resides together with her family at Parcel Number 5060, Vincent Morara Nyangena Ogoro who lawfully purchased his piece of land from the deceased occupies Parcel Number 5061 whereas the 1st Defendant illegally occupies Parcel Number 5128. That LR No. Kanyada/Kanyango/Kalanya/857 being the Mother title, it was closed down following the sub-division.
- 8.** She pleaded that she became aware of the title deed that was acquired illegally regarding Parcel Number 5128 by the 1st Defendant in the year 2020 when she filed for succession

proceedings to enable her administer the estate of the deceased. That on 4/9/1998 the 1st Defendant entered an agreement with Joseph Arodi Ndiege (Deceased) for the sale of land parcel measuring 25x100 square feet for a consideration of Kenya Shillings Seventy-Two Thousand (Kshs. 72,000/=) The 1st Defendant made a payment of Kenya shillings Thirty-Five Thousand (Kshs. 35,000) contrary to the agreement dated 4/9/1998. Sometime in 2020 when the Plaintiff filed succession proceedings on 9th April 2008 the 1st Defendant fraudulently caused his name to be registered against the suit property.

- 9.** She pleaded that the 1st Defendant has without the consent of the Plaintiff, entered upon the said property and taken possession of it by among other things erecting a permanent residential house thereon. She laid down the particulars of fraud and prayed that the suit be allowed.
- 10.** The defendant filed a statement of defence dated 20th December 2021. He averred that the defendant by a written Sale of Land Agreement form dated the 28th day of September 1997 first purchased a portion of Land Parcel No. Kanyada/ Kanyango-Kalanya/857 measuring 25 feet by 100 feet for the sum of Kshs. 35, 000/= which the defendant paid in full. Further, that by hand-written agreements dated 4th September 1999 and 6th November 1999 the deceased further sold to him the remaining half plot measuring 25 feet by 100 feet thus making a plot measuring 50 feet by 100 feet or 0.03 of a hectare at a total price of Kshs. 72, 000/= which the defendant paid in full and having applied for and

obtained the consent of the Land Control Board the same was transferred to him as Land Parcel No. Kanyada/Kanyango-Kalanya/5128 and a title deed was duly issued on 9th April 2008.

11. The defendant denied the allegations of fraud and stated that in the year 1999 the deceased put the defendant in actual occupation of the premises and the defendant erected a plot thereon and has been in actual and peaceful, open, notorious, continuous and uninterrupted occupation and possession of the same as a registered proprietor since 9th April 2008 and has been in occupation of the same as a registered parcel of land since 15th December 2003 in all 18 years. He averred that he had acquired title to the same by adverse possession and the fact that he is the registered proprietor thereof his title and interest is an overriding interest in accordance with Section 28(h) of The Land Registration Act

12. He urged that the deceased obtained Land Control Board Consent to subdivide Land Parcel No. Kanyada/Kanyango-Kalanya/857 into 3 parts measuring 0.71 of a hectare. 0.66 of a hectare and 0.05 of a hectare known as Land Parcel No Kanyada/Kanyango-Kalanya/5126, 5127 and 5128 and he duly transferred Land Parcel No. Kanyada/Kanyango-Kalanya/5128 to the defendant after obtaining a Land Control Board Consent.

13. The matter then proceeded for hearing.

14. PW1 was Margaret Apiyo Arodi, the wife to the deceased. She stated that in 2006, her late husband caused subdivision

of the land to Vincent Morara. Application for subdivision was approved by land control Board and the land was to be subdivided into two portions. During succession, she came to learn that Charles Awino acquired a 3rd portion of the land belonging to her husband. She stated that the lands office made a mistake. The parent land was No. 857 and upon distribution, it was No. 5060 & 5061. That 5060 was for her late husband and 5061 belonged to Morara. That 5128 was subdivided in favour of Charles Awino illegally. She stated that she reported the matter to the police station. She prayed that parcel no.5128 be cancelled and the house be removed from the land.

- 15.** During cross examination, she stated that she was married to the deceased in 1984. That they established their house on parcel No. 857 in 1996. In 1997, she was on parcel no.857. Further, that her husband never sold land to the defendant. That she never signed the sale agreement dated 4/9/1999 and that Kshs.57, 000/- was not paid on 4/9/1999. That On 6/11/1999 she never signed acknowledgment of receipt of kshs.74,000/-. She denied writing a letter to the Land Control Board on 13th December, 1999. She stated that it was true that the defendant was registered as the owner of portion of land No.857 and on 2/5/2006 her husband applied for subdivision of land in favour of Morara. That her husband applied for a subdivision of land No.857 into two portions and the land was later on subdivided into 3 portions.
- 16.** When shown a copy of an application for consent shown to PW1 and stated that it was a lie that the deceased applied

for transfer of land No.5128 to Charles Owiti Awino. She denied that her husband was given a consent form and that he transferred to Charles Owiti Awino.

17. She stated that her husband sold Vincent Morara Nyangena a portion of land No.857. She confirmed the sale agreement and stated that her husband caused subdivision of land parcel No.857 into 5061. That it was into two portions.

18. PW2 was Dr. Odhiambo Arodi. He stated that he was supposed to put up a structure on the land/place where Charles put up a mabati structure. He wrote a letter to him that he intended to put up a structure on the land and that he reported the matter to the land Registrar complaining about encroachment on his father's land by the 1st defendant. That during succession, he noted that the land occupied by Charles was erroneously obtained. That they reported to the DCI office but never found any solution. That his father applied for subdivision of his land into two portions but at the time of mutation three portions were created out of the land.

19. He stated that he has never received any communication from land Registrar. That the 1st defendant never showed up when summoned by the land Registrar.

20. During cross examination, he stated that he was a minor as at 2005. That in 1997, they were residing on parcel No.857. That there was no sale of land by his father to Mr. Charles Awino. That in 2005 the land was to be sub-divided into 2 portions of 0.05 Ha, Vincent Morara was sold land in

2006/2005 by his father. Further, that Vincent paid money to his father but not Charles. That parcel No. 857 was subdivided into 3 portions as per the Green Card. That 5060, 5061 and 5128 were resultant divisions of parcel No.857 and that it is his father who caused subdivision of land No.857 in two portions. That the first registered owner of land No.5128 was not known to them. He stated that it was fraudulently acquired by Charles.

21. He urged that on 7/2/2005, Charles did not appear before the land registrar when summoned. On 14/2/2005, another letter was written to the 1st defendant but he did not appear. That the structure was demolished around 2016/2017, they did not have a photograph of structures constructed on the land NO.5128. He constructed a structure on the land in 2016 after demise of his father.

22. DW1 was Charles Owiti Owino he adopted his witness statement as evidence in chief. He stated that he was summoned and appeared before the District Land Registrar. Bernard Otieno Ndiege, Joseph Otieno Ndiege and Margaret Arodi Ndiege were present. That it was resolved that he go back and continue working on land parcel No. 857 KANYADA/KANYANGO/KALANYA. That the surveyor was to be sent to survey the plot sold to him by the late Arodi. He produced his list of documents in court as a bundle of Exhibits (DE 1-13). That he filed a further list of supplementary lists of documents dated 7/10/2022 which he produced as exhibits (DE-14).

23. During cross examination, he stated that, when shown the sale agreement, that Silas Oyugi Owuor was the Assistant chief and a witness as well as Bernard Otieno Ndiege. Further, that the purchase price was kshs.35,000/- and he made a down payment of Kshs. 11,000/- in cash. That he did not pay the balance at that time but later paid it. That it was indicated in the agreement that was executed later. He paid kshs.11,000/- and 9,000/- in the 2nd agreement. That the 2nd agreement was on 4/9/1999 and he paid in form of 11,000/- and 9,000/-. That Kshs. 11,000/- was part of the agreement initially executed and kshs.9,000/- was a fresh payment. That in the agreement dated 4/9/1999, it was not indicated as a part payment of 24,000/-, that when the agreement dated 1997 was shown to DW1 he stated that Joseph A. Ndiege, Charles O. Owino, Bernard Otieno and Silas Owuor Oyugi were witnesses and are also witnesses to this case.

24. He stated that he signed an agreement with seller, dated 28/9/1997 with a full purchase price is kshs.35, 000/-. That the transfer was to take place upon payment of last instalment. He paid last instalment to Joseph Arodi on 6/11/1999. He produced the Agreement dated 6/11/1999 and stated that 24,000/- was paid as it is included in Kshs. 59,000/- but it was not specifically indicated. That the purchase price was kshs.72, 000/- for a full plot. That it was a settlement of the 1st and 2nd agreement at Kshs. 35,000/- and 37,000/- respectively. An agreement for kshs.35, 000/- was not contained in the agreement dated 6/11/1999.

- 25.** When shown DE-4 he stated that he bought the property once but at different time schedules. That his signature is not on the agreement dated 6/11/1999. That his name was on the agreement but he did not sign it. He stated that he appeared before the DO Joseph Arodi Ndiege lodged the complaint. That Margaret lodged the complaint and it was about purchase of parcel no. 857. That nobody stopped him from working on the land. When referred to the application for consent shown to DW1, he stated that it was for subdivision of land into two portions. 0.66 and 0.05.
- 26.** That the numbers are 5126, 5127 and 5128. That there was no document provided by him for approval to subdivide the land in 3 portions. He stated that he was not aware of how parcel No.5127, 5126 and 5128 were registered. That he did not know Nyagera Ogoro and Vincent Morara. When the consent of spouse was shown to DW1 he stated that it was the refusal to sell the land by Margaret Apiyo.
- 27.** DW2 was Bernard Ochieng. He adopted his witness statement as evidence in chief.
- 28.** During cross examination, he stated that he witnessed the sale of land to Charles. That he was a witness of Charles and witnessed money being given to Joseph Arodi. That the chief did documentation of the agreement in his absence and he could not recall when he met Charles' advocate. That on 28/9/2022 he was at the venue where the agreement was executed at the chiefs' place where the agreement was executed. He stated that he could not read but he signed the documents the chief was writing.

29. DW3 was George Ouma Nyambok who adopted his witness statement as evidence in chief.

30. During cross examination, he stated that on 4/9/1999, he witnessed the sale agreement between Joseph Arodi and Charles Awino. When the Agreement was shown to DW3 he stated that he signed the agreement. That the agreement was signed at the office of Charles Owiti Awino in Homabay in the presence of Joseph Owiti Ndiege, himself, Charles Awino and Margaret Arodi. There was no signature of the buyer on the agreement.

31. The defence closed his case and the parties filed submissions. Upon considering the pleadings, testimonies and submissions, the trial court dismissed the appellants' suit.

32. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a Memorandum of Appeal dated 13th December 2024 premised on the following grounds;

1)The Learned Honourable Magistrate erred in law and fact by finding that there existed valid sale of land agreements between the Defendant and the deceased person despite the 4th September 1999 and 6th November 1999 agreements having not been signed by the Purchaser contrary to the provisions of the Law of Contract Act which was applicable at the time regarding land transactions.

2)The Learned Honourable Magistrate erred in law and fact by holding that the Plaintiff was under an

obligation to call the Chairman of the Asego Land Control Board as a witness or provide minutes of the meeting of 15/12/2006 whereas the authenticity of the document was not in question as it was adduced by both parties.

3) The Learned Honourable Magistrate erred in law and fact by failing to analyse the Land Control Board Consent that was adduced by the Defendant which was for sub-division of the suit property, Kanyada/Kanyango/Kalanya/857, into TWO portions whereas the property was sub-divided into Three portions contrary to the consent adduced by the Defendant himself.

4) The Learned Honourable Magistrate erred in law and fact by failing to address the issue as to whether the Sub-division, if at all, was proper and procedural was obtained within the statutory timeframe of six (6) months as provided under section 8(1) of the Land Control Act as the last purported Sale Agreement was in 1999 and the Consent was sought 7 years without prior extension of time from the High Court.

5) The Learned Honourable Magistrate erred in law and fact by holding that parties kept on changing the terms of agreement from 28.9.1997 and 4.9.1999 and hence bound by the subsequent terms without satisfying herself that both parties had indeed consented to the subsequent terms

particularly the agreement of 4.9.199 which was not signed by the Purchaser.

- 6) The learned magistrate erred in law and fact by erroneously finding that there's no evidence on record to prove that the deceased never signed the application for consent to transfer the land in favour of the 1st Defendant in 2006 in the Application and Consent which was also adduced by the Defendant did not indicate to whom the land was being subdivided into but simply indicated the number of portions which the sub-division was sought is TWO portions into 0.66Ha and 0.05Ha whereas the land was sub-divided into three portions without any Consent thereof.
- 7) The Learned Magistrate erred in Law and Fact by failing to appreciate and apply the provisions of Section 26(1) (b) of the Land Registration Act 2012 which was relied upon by the Appellant in her written submissions that provides a basis for challenging the validity of a title on grounds acquired illegally, unprocedurally or through corrupt scheme.
- 8) The Learned Magistrate erred in law and in fact by arriving at an erroneous conclusion that the Appellant was not entitled to the reliefs sought despite the overwhelming evidence adduced by the Appellant and the documents in support of her case.

9)The Learned Honourable Magistrate erred in principle by misinterpreting both facts and the law and thus failing to determine the real issues in controversy as pleaded by the Appellant.

33. The parties prosecuted the appeal vide written submissions.

Appellants' submissions

34. On whether there existed a valid Contract for sale of land capable of enforcement between the deceased and the 1st Respondent, counsel submitted that its common ground between all parties that at one time when the deceased was alive, there was an attempted sale of a portion of his land to the 1st Respondent. What is at issue and divergence between the parties is how, when and if the attempted sale materialized into a full transaction capable of lawfully conferring interest in land to the 1st Respondent.

35. He referred to the testimony of PW1 and urged that the trial Court failed to appreciate the effect of a party failing to fulfil their obligations under a Contract and at the same time seek to benefit from it. He urged that the 1st Respondent failed to pay the entire purchase price for the suit property therefore rendering the 4th September 1999 Sale Agreement incapable of enforcement. Further, that it is instructive to note that the said agreement was categorical that the last instalment was to be paid in kind with iron sheets worth Kshs. 15,000/= by November 1999. There was no variation of these terms and the 1st Respondent did not aver or give

evidence at any point during trial that indeed he paid the last instalment.

36. Counsel urged that legally, the 4th September 1999 Sale Agreement stood rescinded when the 1st Respondent failed to pay the entire purchase price as contractually agreed upon. This explains why no transfer or any action was ever taken by the deceased in transferring the suit property to the 1st Respondent during his lifetime. As such, the 1st Respondent could not have derived a valid title document in absence of the authority of the deceased. He cited the decision of the Court of Appeal case of Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR) and urged that a party cannot obtain a valid title to a property where he is yet to fulfil his obligations under a Sale of Land Agreement

37. On how the 1st Respondent acquired the disputed title over the suit property, he urged that the deceased entered into a different Sale Agreement with one Vincent Morara Nyangena over a different portion of land within the mother parcel of land Kanyada/Kanyango/Kalanya/857. It should be noted that this was six (6) years after the 4th September 1999 Sale Agreement had been abandoned. It was in favour of this subsequent purchaser that the deceased had intention of transferring a portion of his property to. This intention was manifested in the deceased's application for sub-division to the Land Control Board (LCB). He stated that the LCB Consent for the sub-division into two portions and questioned how it could be possible that the intention of the deceased was to sub-divide

Kanyada/Kanyango/Kalanya/857 into 2 portions, get the LCB approval for 2 and the same translated into 3 sub-divisions being registered. This was the illegality that the Appellant pleaded and sought to enjoin the 2nd Respondent herein at the trial proceedings.

38. He urged that during cross-examination, the 1st Respondent conceded that his statement was inconsistent with what is included in the Land Board Consent. The 1st Respondent further confirmed that there was no document availed that the deceased had consented to Kanyada/Kanyango/Kalanya/857 being sub-divided into three portions. He stated that the learned trial magistrate fell into grave error by considering extraneous matters such as that the Appellant was under duty to call upon the Chairman of the Land Control Board to testify in support of his case.

39. He pointed out that during cross examination the 1st Respondent maintained that the Application was for two and not three portions as he had pleaded. Additionally, that on the 6th November 1999 agreement titled "SALE OF LAND AGREEMENT P/NO 857" the 1st Respondent confirmed unequivocally that agreement was neither witnessed by any other party nor did he sign the agreement himself despite producing the agreement in Court. He urged that the provisions of the Law of Contract Act which were in force in 1999 regarding unsigned agreements, memorandums or notes thereof that were in relation to disposition of an interest in land. He cited Section 3(3) of the Law of Contract act and conceded that it was true that prior to the

Amendment of the Law of Contract Act by the Statute Law (Miscellaneous Amendments) Act, 2002 (Act No. 2 of 2002), that one could not defeat a suit on the mere basis that a Contract for sale of land had to be in writing. However, the Law of Contract Act was categorical that whenever an agreement, memorandum or note thereof, was reduced into writing then the same ought to be signed by the party to be charged or by some person authorized by him to sign it.

40. Counsel urged that the trial learned magistrate fell into grave err by holding the same to be an acknowledgment despite the document speaking to itself even if the same was to be construed to be correct. The alleged 6th November 1999 Sale of Land Agreement that purports to confer an interest in land was untenable in law for failure to comply with the mandatory requirements of the Law of Contract Act as it was applicable in 1999. He cited the case of *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* [2023] KESC 105 (KLR) in this regard.

41. He urged that the failure of the agreement dated 6th November 1999 was hinged on its non-compliance with the signature of the person to be conferred an interest in land, in this case being the 1st Respondent and not on the element of requiring the same to be in writing. Secondly, during cross examination no explanation was given for this grave omission or was the same remedied during re-exam. He reiterated that there was no valid sale agreement capable of enforcement and subsequent grant of title to the 1st Respondent herein. The 9th April 2008 title document was

procured illegally as the deceased only had the intention of sub-dividing Kanyada/Kanyango/Kalanya/857 into two portions only and not in favour of the 1st Respondent. The impugned title document was registered through connivance and failure by the 2nd Respondent to properly ascertain as to whether the third sub-division was sanctioned

42. On whether the Certificate of Title in relation to Kanyada/Kanyango/Kalanya/5128 was legally and validly acquired by the 1st Respondent, counsel urged that the trial Court failed to address the same and it's propriety on the impugned sale transaction. This being the first appellate Court, he invited the Court to interrogate the issue and make an independent determination thereof. He urged that the law governing the sale of Agricultural land, such as the suit property is governed by the Land Control Act CAP 302 which became operational in 1967 thus applicable to any transactions carried out within 1997-1999.

43. He cited Section 6 of the Land Control Act and submitted that the suit property was subject to the approval of the Land Control Board. Therefore, the only issue for determination was whether proper approval was granted. He pointed out the testimony of the 1st defendant and urged that the 1st Respondent having confirmed that the subdivision that was approved was for two, it follows that any sub-division beyond two portions was illegal, unprocedural, unsanctioned thus null and void for all intent and purposes.

44. Counsel cited the mandatory provisions of Section 8(1) of the Land Control Act and urged that as per the 1st

Respondent's testimony that the last sale agreement was made on 6th November 1999, then the LCB Consent should have been obtained within six (6) months of that date. The 1st Defendant has not explained why the Sale Agreement was finalized in 1999 with the consent being obtained in 2006; seven years later. This is a fundamental omission which renders the entire sub-division resulting into the claimed parcel of land, if it was ever obtained, null and void.

45. He submitted that Section 8(1) of the Land Control Act provides only one exemption where the time for obtaining the LCB Consent can be enlarged, that is, by making an application for extension to the High Court. The 1st Respondent did not adduce such evidence. Therefore, the Sale Agreement of 1999 could not have been submitted to the LCB Board in 2006 for approval without approval of the High Court. He cited the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR). He urged that the inescapable conclusion is that the subdivision of Kanyada/Kanyango/Kalanya/857 into 3 parcels of land was irregular, unprocedural therefore null and void for two reasons: the consent that was granted by LCB Asego was for two and not three portions, and secondly, that the said approval was not obtained within six months contrary to the Land Control Act mandatory requirements.

46. Counsel submitted that the failure to obtain the LCB Consent within 6 months could not be salvaged by equity as having failed to pay the full purchase price the 1st Respondent has effectively driven himself away from the

dictates of equity. He cited the findings of the Court in *Kioko v Musembi* (Environment & Land Case E076 of 2022) [2024] KEMC 31 (KLR) in this regard. He invited the court to be guided by the finding of the Court of Appeal in *David Sironga Ole Tukai v Francis Arap Muge SUPRA* that “Lastly, we do not share the view that the express provisions of the Land Control Act cannot be equated to procedural technicalities that can be overlooked by virtue of Article 159 (2) (d) of the Constitution and the overriding objective under the Appellate Jurisdiction Act.”

47. On whether the Certificate of Title in relation to Kanyada/Kanyango/Kalanya/5128 was legally and validly acquired by the 1st Respondent, counsel cited the decision of the Court of Appeal case of *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal No.239 of 2009 and reiterated that as at 2006, there was no valid contract for sale of land that was capable of enforcement between the deceased and the 1st Respondent. He urged that as at 2006, the 1st Respondent had not paid the entire purchase price and that the deceased did not at any point in time seek to sub-divide the suit property in favour of the 1st Respondent. As such Kanyada/Kanyango/Kalanya/5128 was procured illegally and therefore liable for cancellation as the acquisition was tainted with illegalities.

48. Counsel cited the case of *Wainaina v Kiguru & another* (Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR) and submitted that there being no enforceable contract for sale of land between the deceased and the 1st

Respondent in 2006 and no sub-division sought for three portions, the title document held by the 1st Respondent can therefore not pass the test of legality. That the third subdivision and issuance of Kanyada/Kanyango/Kalanya/5128 title deed to the 1st Respondent was therefore neither approved, proper nor consented by the deceased. The same must suffer the fate of cancellation for failing to muster the legal threshold under the Land Control Act and the Land Registration Act 2012.

49. On whether the Appellant proved her case on a balance of probabilities, counsel urged that it is trite law that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That the question of what amounts to proof on a balance of probabilities was succinctly summarized by Kimaru, J in *William Kabogo Gitau V George Thuo & 2 Others* [2010] KEHC 4124 (KLR). He urged that the Appellant discharged her legal obligation and also proved her case on a balance of probabilities and prayed that the appeal be allowed with costs.

Respondents' submissions

50. Counsel urged that on ground 1 and 5 of the appeal, the 1st respondent produced a copy of the sale of land agreement dated 28th September 1997 in which the deceased was selling a portion measuring 25ft by 100ft of Land Parcel No. KANYADA/KANYANGO/KALANYA/857 at a consideration of Kshs. 35,000/= whereby the 1st respondent paid a sum of Kshs. 11,000/= leaving a balance of Kshs.

24,000/=. After about two years the 1st respondent and the appellant entered into a further sale agreement in which the plaintiff was given additional 25ft by 100ft at a consideration of Kshs. 37,000/= which amount he paid in full and also added the appellant a sum of Kshs. 9000/= being balance of the original sale of land agreement made on 28th September 1997 which was now treated as a second instalment in the subsequent agreement made on 4th September 1999 hence the sum of (original 11,000/= plus subsequent 9000/= paid on 4th September, 1999)= Kshs. 20,000/=.

51. The 1st respondent also produced a copy of sale of land agreement dated 6th September 1999 detailing the total payment for a full plot (50 feet by 100 feet) at consideration of Kshs. 72000/= The sale of land agreement (acknowledgement note) for 6th November 1999 was not signed by the 1st defendant and the plaintiffs' counsel cross examined the 1st respondent on the same. It is noteworthy that the plaintiff, Joseph Arodi Ndiege now deceased and his wife, Margaret Apiyo Arodi signed the contested agreement dated 6th November, 1999.

52. Counsel cited Section 3 (3) of The Law of Contract Act and that Section 3(7) of the Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3 (3) of the Law of Contract Act, came into force on 1st June, 2003. He produced the provisions prior to the amendment of Section 3(3) of the Law of Contract Act in 2003 and submitted that in the instant case, the respondent took possession sometimes

in the year 2000 after he had completed payment of a full plot which is equivalent to 0.05 of a hectare. The respondent thus purchased a portion of land parcel No. KANYADA/KANYANGO/KALANYA/857 measuring 0.05 of a hectare.

- 53.** On grounds 2, 3 and 6, he urged that the 1st respondent produced a copy of application for consent to subdivide Land Parcel No. KANYADA/KANYANGO/KALANYA/857 into two portions measuring 0.66 of a hectare and 0.05 of a hectare which application was approved vide a letter of consent dated 2nd May 2006 also produced by both parties. What is outstanding is that the application was done by Joseph Arodi Ndiege now deceased and not the 1st respondent. Although the appellant did not produce a copy of green card for Land Parcel No. KANYADA/KANYANGO/KALANYA/857, both parties were agreeable that that the said land was subdivided into three portions but the 1st respondent was only conversant with Land Parcel No. KANYADA/KANYANGO/KALANYA/5128 registered in his name. That in cross examination, PW2 testified that Land Parcel No. KANYADA/KANYANGO/KALANYA/ 5128 was registered in his name. In cross examination, PW2 testified that Land Parcel No. KANYADA/KANYANGO/ KALANYA/ 857 was subdivided into Land Parcel No. KANYADA/KANYANGO/KALANYA/5060, 5061 and 5128 and that all the parcels were registered in the name of his father, Joseph Arodi Ndiege now deceased.
- 54.** Counsel urged that the appellant alleged that the deceased never signed and or consented to transfer the land

to the 1st respondent whilst the consent forms filed indicated otherwise. It was upon the appellant to call upon the Chairman of Asego Land Control Board or the person designated to the office to produce documentation pertaining to the meeting held on 15.12.2006 and issuance of consent by deceased in favour of the 1st respondent as approved on 15.12.2006. In absence of minutes dated 15.12.2006 from Asego Land Control Board to corroborate the evidence of the appellant that the 1st respondent illegally and fraudulently obtained registration of land in his name without consent of the deceased his words remain mere averments with no iota of proof.

55. On ground 4, counsel urged that parties are bound by pleadings and at no point did the appellant's plead the averments now raised in ground 4 of the memorandum of appeal. That the appellant cannot present and or raise a case that contradicts or goes beyond the facts and arguments raised in their formal pleadings, and any such evidence must be disregarded. The court is only confined to the specific issues framed by the parties. He cited the case of Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others (2014)

56. On ground 7, counsel urged that the 1st respondent produced copies of undated application to transfer Land Parcel No. KANYADA/KANYANGO/KALANYA/5128, Letter of consent to transfer dated 15th December 2006 and transfer of land form dated 10th December 2007 which was well executed by the plaintiff, Joseph Arodi Ndiege now deceased.

The plaintiff produced a copy of title deed and official search certificate showing that he was the second registered proprietor of Land Parcel No. KANYADA/KANYANGO/KALANYA/5128. The appellant produced a copy of title deed for Land Parcel No. KANYADA/KANYAN GO/KALANYA/5128 which is registered in his name.

57. Counsel cited section 26 (1) of The Land Registration Act 2012 and urged that in this particular case the appellant pleaded fraud but did not prove the same as discussed. He cited the case of Vijay Morjaria Vs Nansigh Madhusing Darhar & Another (2001) eKLR. He stated that the 1st respondent is the sole registered proprietor of Land Parcel No. KANYADA/KANYANGO/KALANYA/5128 hence eviction orders cannot issue against him.

58. On grounds 8 and 9, counsel urged that the question of what amounts to proof on a balance of probabilities was discussed by Kimaru J in William Kabogo Gitau vs George Thuo & 2 Others (2010) eKLR. He urged that the appellant failed to satisfactorily discharge his legal burden and prayed that the appeal be dismissed with costs.

Analysis and Determination

59. This being an appeal, I must state the duty of the appellate court. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept

the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

60. Further, in **PIL Kenya Limited v Oppong [2009] KLR 442**, it was held that:

“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

61. The issue that arises for determination is; **Whether the trial court erred in dismissing the Appellants’ suit**

62. The Appellants’ claim was premised on the allegation that the respondents fraudulently transferred the suit land from her deceased husband despite him not consenting to the same. It is trite law that he who alleges must prove.

63. This position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

“ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

64. Sections 109 and 112 of the same Act states 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 that 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 that fact is upon him.”

65. Given that the claim was one of fraud, a fundamental principle is that the same must be specifically pleaded and proved. This was aptly expressed in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently”

66. Indeed, fraud cannot be inferred from facts. In **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR**, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud....”

67. I have considered the proceedings in the trial court and the evidence that was tendered therein. I find that the appellant did not lead any evidence to prove that the transfer of the suit land was fraudulent. Instead she acknowledged the sale agreements which she also signed and the receipt of consideration for the purchase of the land actually existed. Copies of the Land Control Board Consents were produced. There was no evidence to prove that the same were obtained fraudulently. From the sequence of events, it is clear that the deceased sold his land in three separate sub divisions and consented to the same. I am in agreement with the findings of the trial court on the failure of the appellant to prove her case to the required standard.

68. I also note that there was an allegation of collusion to transfer the suit land from her husband and create the sub division that is the suit land in the year 2006. he also pleaded that she became aware that the suit land had been sub divided and acquired illegally on the year 2020 when filing succession proceedings.

69. Section 7 of the Limitation of Actions Act provides inter alia:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or,

if it is first accrued to some person through whom he claims, to that person”.

70. Section 13 is in these terms:

A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.”

71. Section 17 of the act provides;

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

72. In the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996** the court held:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

73. The upshot of the foregoing is that even if the fraudulent transfer had been proven, the appellants’ could not claim any rights over the land as the title would have been extinguished by the time the claim was made.

74. The appeal is therefore dismissed for lack of merit with costs to the respondent.

Judgment dated, signed and delivered virtually via the Teams Platform this 16th day of December 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence,

Ms. Odhiambo holding brief for Orina for the Appellants

Ms. Oyala for G.S. Okoth for the 1st Respondent

Attorney General for the 2nd Respondent, absent.