



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 73 OF 2017

(Formerly Machakos ELC No. 240 of 2010)

RACHEL MWIKALI KANYOLO (Suing on behalf of

the Estate of HERMAN SYANDA KANYOLO).....PLAINTIFF

VERSUS

MARY NDUTA WAKABA (Sued on behalf

of the Estate of NAOMI NYAMBURA WAKABA).....1ST DEFENDANT

DAVID SAMOINE SHANKA.....2ND DEFENDANT

MIAMIS PROPERTIES LIMITED.....3RD DEFENDANT

HENRY SIMARU KISIA.....4TH DEFENDANT

SIGMA SUPPLIES LIMITED.....5TH DEFENDANT

DIPAK SHAH.....6TH DEFENDANT

NATIONAL LAND COMMISSION.....7TH DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO.....8TH DEFENDANT

INSPECTOR GENERAL OF POLICE.....9TH DEFENDANT

ATTORNEY GENERAL.....10TH DEFENDANT

JUDGEMENT

By an Amended Complaint filed on 31st October, 2014, the Plaintiff prays for judgement against the Defendants in the following terms:

- a) A permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants by themselves, their agents, servants or otherwise howsoever from trespassing, encroaching, alienating, transferring, selling, leasing and charging or in any other way dealing in L.R. Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743;
- b) For a declaration that at all material times to this suit, the late HERMAN SYANDA KANYOLO was and still is the bona fide owner and proprietor of titles Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743;
- c) A declaration that the 3rd Defendant's title issued on the 27th June, 2001 as well as those subsequently issued to the 1st, 2nd, 4th and 5th Defendants in respect to KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743 were obtained fraudulently;
- d) A declaration that the processing and issuance by the Commission of Lands and the Registrar of Titles of the Title Deed in respect of Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743 was unlawful and hence a nullity;

e) In view of prayer (d) above, the court do order rectification of the register by the Commissioner of Lands and the Registrar of Titles;

f) Such further relief or remedy as this Honourable Court may deem just and expedient;

g) An order for costs of this suit.

The 1st Defendant though duly served via substituted service in the Daily Nation Newspaper failed to enter appearance nor file a Defence.

The 2nd and 3rd Defendants filed their Defence where they denied each and every allegation in the Plaint except for the descriptive and the jurisdiction of the Court. They denied the pleadings of fraud and illegality attributed to them including alleged particulars of fraud, mistake or error and negligence. The 2nd Defendant confirmed being a shareholder and Director to the 3rd Defendant. They contended that they purchased their respective properties upon representations from the 1st and 4th Defendants, which representations they believed to be true. Further, the parties in the sale transaction were properly represented by Counsel and therefore had reasonable ground to believe and they did believe upto the time the said contracts were made that the representations by the 1st and 4th Defendants were true. They claimed they sold the properties for value, where a Counsel represented them and their actions were not induced by fraud as alleged. They stated that the 5th Defendant took immediate possession of the said parcels of land upon purchase and has since remained in possession. They reiterated that the cause of action against them is barred by dint of section 4(2) and Section 7 of the Limitation of Actions Act. Further, that since there was no leave granted to extend time to bring this action, the suit is statute barred, incompetent and an abuse of the court process. They denied being served with a notice of intention to sue.

The 4th Defendant filed a Defence where he admitted the descriptive as well as the jurisdiction of the court. He averred that he is a stranger to the criminal case but if the same be proved to be true, then he was not aware of its existence at the time he purchased the suit property. He denied that the restriction was removed unlawfully and neither was he involved in its' removal He further denied that the issuance of the title deed was fraudulent and insisted he did not participate in the alleged fraud. He contended that he purchased land parcel number Kajiado/ Kapatiei North/ 6742 for value and the whole transaction was carried out by a competent Advocate. Further, at the time he purchased the said parcel of land, he honestly believed the same belonged to the 2nd Defendant as he held a title to the land in question. Further, he did not purchase the suit property when it had a restriction.

The 5th and 6th Defendants filed their Defence and contended that it is hearsay to allege that the Herman Syanda Kanyolo discovered fraudulent transfer of the suit properties to Naomi Nyambura Wakaba and insisted the claim is a nullity as it offends the Limitation of Actions Act. They stated that the allegations of fraud, error and mistake pleaded in the Amended Plaint cannot attach to them. They denied that a notice was issued to Miamis Properties Ltd on 13th August, 2010. The 6th Defendant averred that no title was issued to him nor does he have any proprietary interests/rights over the suit properties as alleged. Further, that he is wrongly sued and no cause of action is disclosed in the Amended Plaint against him. They denied unlawfully fencing the suit properties as alleged. The 5th Defendant claims it is a bona fide purchaser for valuable consideration and adhered to all the legal procedures in acquiring the suit properties. Further, that upon the said purchase, the 5th Defendant took possession and developed the suit properties by erecting thereon permanent buildings but the Plaintiff did not raise any objection. They further contend that David Shanka (2nd Defendant) had a genuine title bestowing upon him all proprietary rights of a registered owner hence a valid and legal interest/ right to pass over the suit properties to the 5th Defendant. They denied that they unlawfully, fraudulently, recklessly and/carelessly dealt with the suit properties and the same had never belonged to the Plaintiff as alleged. They pleaded innocence to the particulars of fraud, error, mistake and negligence averred by the Plaintiff.

The 8th, 9th and 10th Defendants filed their Defence where they admitted the descriptive as well as jurisdiction of the Court but denied all the remaining averments in the Plaint. They contended that the restriction, which was removed, was done in accordance with the laid down legal procedures and the 8th Defendant acted within the law. They averred that if at all the suit properties were transferred and registered in the name of the 1st Defendant and subsequently to the 2nd – 5th Defendants, then it was based on the documents presented before the 8th Defendant's office, who exercised due diligence and the said documents being believed to be genuine were registered.

The matter proceeded for full hearing.

Evidence of the Plaintiff

The Plaintiff called two witnesses. The Plaintiff confirmed that the deceased Herman Syanda Kanyolo was owner of land parcels number Kajiado/ Kapatiei North/ 6742 and Kajiado/ Kapatiei North/ 6743 respectively. The Plaintiff averred that the suit lands were irregularly transferred from the deceased to the late Naomi Nyambura Wakaba by forging Herman Syanda Kanyolo's signature. Further, that Naomi was charged in a criminal case for forgery of title but died before the conclusion of the matter. The Plaintiff contended that through fraud, illegality, error, mistake and negligence, the Defendants colluded and caused the suit lands to be transferred from the deceased through to the 5th Defendants. She sought for the Court's intervention for rectification so that the titles to the suit lands could revert to the estate of the late Herman Syanda Kanyolo.

Evidence of the Defendants

The 1st Defendant did not enter appearance nor file a defence despite being duly served.

The 2nd and 3rd Defendants called one witness who was the 2nd Defendant where he confirmed having purchased the suit lands from the 1st Defendant and subsequently selling them to the 4th and 5th Defendants respectively. He explained that the 4th Defendant resold back the land to the 3rd Defendant, after which he sold the land to the 5th Defendant. He contended that an advocate PC Onduso oversaw the transactions

and he denied any allegations of fraud. The 2nd and 3rd Defendants however failed to summon PC Onduso Advocate to attend court and give evidence on the two transactions.

The 4th Defendant called one witness. He confirmed purchasing land parcel number Kajiado/ Kaputiei North/ 6742 from the 2nd Defendant for purposes of setting up an orphanage. He averred that PC Onduso Advocate oversaw the transaction. It was the witness' testimony that the 2nd Defendant promised to sell him five (5) more acres of land but the same was not forthcoming for over 4 years. He contended that the 2nd Defendant requested him to return the land to him as he had Police issues to deal with over it which he did not want him to get embroiled in. He further confirmed that the 2nd Defendant paid him back for the land at the market price and he surrendered the title back to him. He denied having any dealings with land parcel number Kajiado/ Kaputiei North/ 6743.

The 5th and 6th Defendant called one witness who was the 6th Defendant where he testified on behalf of the 5th Defendant and himself. The 6th Defendant confirmed that the 5th Defendant purchased the suit lands from the 2nd Defendant and took possession. It was the witness' testimony that the 6th Defendant has been wrongfully sued and the amended Plaintiff did not disclose a reasonable cause of action against him. The 6th Defendant confirmed being a director to the 5th Defendant. The witness contended that the 5th Defendant purchased the suit lands after undergoing due diligence and confirming the said lands belonged to the 3rd Defendant. Further, that the purchase of the land was genuine as there was no encumbrance registered against it, at the time of purchase.

The 8th Defendant called one witness who was the Principal Land Registrar, Kajiado who confirmed that the transfer in favour of the 5th Defendant was legally done upon verification and confirmation that all documents/ requirements were adhered to. Further, that it is the 3rd Defendant who transferred the land to the 5th Defendant.

The Plaintiff, 2nd, 3rd, 4th, 5th, 6th and 8th Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the pleadings including materials presented in respect of the suit herein and considering testimonies of the witnesses, the following are the issues for determination:

- Whether the suit is statute barred.
- Whether the 1st Defendant had the legal capacity to transfer suit lands to the 2nd Defendant.
- Whether the 4th Defendant owed a duty of care to the Plaintiff in dealing with land parcel number KJD/ KAPUTIEI NORTH/ 6742.
- Whether the 5th Defendant is a purchaser for value without notice.
- Whether the 5th, 6th, 7th, 8th, 9th and 10th Defendant owed a duty of care to the Plaintiff while dealing with the suit lands.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Who should bear the costs of the suit.
- As to whether the suit is statute barred.

The Defendants contended that the Plaintiff's claim is statute barred by virtue of sections 4 and 7 of the Limitation of Actions Act. The Plaintiff pleaded that the Defendants' fraudulently transferred the suit lands through to the 5th Defendant to their detriment as beneficiaries of the late proprietor Herman Syanda Kanyolo. It was the Defendants' argument that the Plaintiff were aware of the fraud from 2001 and the claim herein was hence statute barred. I note the substratum of the suit herein which was filed in 2010 revolves around recovery of land. In the Plaintiff, the Plaintiff has made allegations of negligence and fraud on the part of the Defendants. It emerged that in 2010, the 2nd and 3rd Defendants had sold the suit lands to the 5th Defendant. It was the 4th Defendant's testimony that he bought land from the 2nd Defendant in 2004 but returned it in 2010 after which he received a refund of Kshs. 3.6 million from the 2nd Defendant. Section 7 of the Limitation of Actions Act provides that: *'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 first accrued to some person through whom he claims, to that person.'*

While section 26 gives an extension of time and states as follows: **'Where, in the case of an action for which a period of limitation is prescribed, either—**

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake

was made, by a person who did not know or have reason to believe that the mistake had been made.'

In the current scenario, I note that the Plaintiff alleges fraud against the 1st, 2nd, 3rd, 5th and 6th Defendants. Insofar as the Plaintiff knew about the transaction in 2001, there were fresh transactions in 2004 as well as 2010 and I opine that the Limitation period begun to run when the Plaintiff learned of the fresh transactions over the suit lands. In relying on the legal provisions cited above, I find that the suit herein is hence not statute barred.

As to whether the 1st Defendant had the legal capacity to transfer suit lands to the 2nd Defendant.

The 1st Defendant entered into a Sale Agreement dated the 19th April, 2004 with the 2nd Defendant to sell the suit lands to him. At that time, the suit lands were registered in the name Naomi Nyambura Wakaba who was already deceased. The 2nd Defendant DAVID SHANKA confirmed in court that he purchased the suit lands from the 1st Defendant and they entered into an Agreement dated the 19th April, 2004. I note from the Court Records that the 1st Defendant applied for Letters of Administration Intestate in respect of the said estate and the same was gazetted on 8th October, 2004 vide Succession Cause No. 2687 of 2004. Section 45 (1) of the Law of Succession Act provides that: **'Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.'**

Section 55 of the Law of Succession Act provides that: **'(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.'**

The 1st Defendant failed to controvert the evidence of the Plaintiff that she was not the administrator of NAOMI NYAMBURA WAKABA's estate. The 2nd and 3rd Defendant submitted that the Plaintiff failed to prove that NAOMI NYAMBURA WAKABA was deceased since no Death Certificate was produced. The 2nd and 3rd Defendants have disputed the said gazette notice and insist there has to be evidence that Naomi Nyambura had died. The 2nd Defendant however did not offer any explanation as to why he entered into a Sale Agreement dated the 19th April 2004 with the 1st Defendant over parcels of land which were registered in the name of NAOMI NYAMBURA WAKABA. The Provincial State Counsel vide his letter dated the 29th January, 2003 addressed to the Provincial CID Rift Valley which letter was produced as an exhibit, stated clearly that the charge against Naomi Nyambura Wakaba had aborted since she had died. I note the 2nd and 3rd Defendants did not submit evidence to the contrary that she was still alive. The 2nd Defendant in his testimony confirmed that NAOMI NYAMBURA WAKABA was deceased. Further, in the gazette notice which I have cited above, it also confirmed NAOMI NYAMBURA WAKABA was indeed deceased. In the case of **Winnie Kinyua Kaburu V Ali Juma Abdirahman & Another (2018) eKLR**, the Court of Appeal held that an agreement which was entered into in respect of a deceased person's estate without letters of representation was void.

From the evidence I have analyzed above and based on the legal provisions cited above as well as the Court of Appeal decision, I find that the said legal provisions are couched in mandatory terms and there is no short cut around it. In the circumstances, I find that the purported Sale Agreement between the 1st and 2nd Defendants was void as the 1st Defendant lacked the legal capacity to deal with the deceased estate without Letters of Administration Intestate.

As to whether the 4th Defendant owed a duty of care to the Plaintiff in dealing with land parcel number KJD/ KAPUTIEI NORTH/ 6742 .

The 4th Defendant testified in Court as DW1 and confirmed that he had initially purchased land parcel number KJD/ KAPUTIEI NORTH/ 6742 measuring 8 acres from the 2nd Defendant but denied involvement with land parcel number KJD/ KAPUTIEI NORTH/6743. It was his testimony that PC Onduso Advocate had overseen the transaction. They entered into an agreement dated the 11th June, 2004, where he paid Kshs. 1.8 million and the Advocate obtained for him a title deed on 3rd August, 2004. He contended in 2010, after Easter holidays, it was the 2nd Defendant who requested him to return the said land to him as he had Police issues to deal with over it. He confirmed that, after the 2nd Defendant paid him back Kshs. 3.6 million for the land at the market price, he surrendered the title back to him and signed a document dated 19th May, 2010 to that extent. He however was categorical that he was not interested in the suit land. He insisted that the 2nd Defendant never informed him of any encumbrance at the time he purchased the suit land. In court, he pointed out that his name was entered in the Green Card on 3rd August, 2004. Further there was a restriction registered on 13th April, 2004 but by the time he purchased the land, the said restriction had been removed. The 2nd Defendant pleaded that he bought land from the 4th Defendant and in his testimony, he insisted it is the 4th Defendant who returned the land to him but did not explain why he executed a document for refund of purchase price. The Plaintiff claimed the 4th Defendant owed her a duty of care and was negligent in purchasing the suit lands. PW1 insisted he could pinpoint fraud on the part of the 4th Defendant since his name had once appeared on the Green Card as owner of KJD/ KAPUTIEI NORTH/ 6742. He however confirmed during cross examination that the 4th Defendant was not a party to the Kibera Criminal Case No. 4312 of 2001 and was not involved in the transaction in 2001. PW2 confirmed illegality of the transaction was undertaken by a third party to the 4th Defendant. She confirmed that 4th Defendant did not participate in the fraud. It was her testimony that after the 4th Defendant discovered the fraud, he stopped buying the parcel of land. Further, that he did not make developments on the suit land. She reiterated that the 4th Defendant was still a party to the suit because he failed to undertake due diligence before he embarked on purchasing the suit land. From these facts, I find that the 4th Defendant was indeed not a party to any form of fraud as alleged by the Plaintiff. I further find that since the 4th Defendant rescinded the Sale and got a refund of his purchase price from the 2nd Defendant, he did not owe a duty of care to the Plaintiff after that. I will hence proceed to exonerate the 4th Defendant from the proceedings herein.

As to whether the 5th Defendant is a bona fide purchaser for value without notice. The 6th Defendant gave evidence on behalf of the 5th and 6th Defendants. It was the 5th Defendant's contention that it was a bona fide purchaser for value without notice. The Plaintiff contended that the suit lands were fraudulently transferred to the 5th Defendant and hence they did not hold a valid title. In order to establish whether the 5th Defendant is a bona fide purchaser for value without notice, I opine that since transaction to land is a process, I will first analyze the

testimonies of the witnesses as well as the documents presented in respect of the transaction that culminated in the 5th Defendant's acquisition of title to the suit lands.

As for the transaction between Naomi Nyambura Wakaba and Herman Syanda Kanyolo, it is unfortunate the two parties are deceased. I note Naomi Nyambura Wakaba was charged with forgery vide Kibera Cr. Case No. 4312 of 2001 but died before the determination of the criminal case. However, from a report by Antipas Nyangina who was a Forensic Document Examiner dated the 11th August, 2001, which was produced as an exhibit, he confirmed that the signature on the transfer document purportedly signed by the late Herman Syanda Kanyolo to transfer the suit lands to Naomi Nyambura Wakaba could not have been his. I suppose this is what led to Naomi Nyambura Wakaba being charged with forgery. From the transfer documents, there was no Consent from the Land Control Board to confirm transfer of land from Naomi Nyambura Wakaba to Herman Syanda Kanyolo and from Naomi Nyambura Wakaba to Henry Simaru. There were further no documents to confirm transfer from 3rd Defendant to 5th Defendant. The DCIO letter dated the 13th April, 2004 referred to in the Green Card instructing for the removal of the restriction was not produced in court. In the Land Registrar's testimony as DW2, he was emphatic that no transfers could be effected without the physical presence of the documents. He contended that the transaction to the 5th Defendant was authentic and above board. DW3 who is the witness for the 5th and 6th Defendants denied acquiring the suit lands through fraud and insisted there was no error or mistake when he acquired the said lands. He explained that the 2nd Defendant is the owner of the 3rd Defendant and the 5th Defendant acquired the suit lands from them. He denied knowledge of how the 1st, 2nd and 3rd Defendants acquired the suit lands. DW3 insisted that when the 3rd Defendant sold the suit lands to them, there was no restriction and this is reflected in the Green Card. He insisted the 5th Defendant paid for the acquisition of the suit lands including adhering to all the legal processes and the transfer was properly recorded. Further, that the 5th Defendant took possession and developed the suit lands, as evidenced by the photographs which he produced as exhibits. He averred that even though the Plaintiff stopped them from developing the suit lands, the court allowed them to proceed. I however note that they proceeded to develop the suit lands after the court had dismissed the Plaintiff's application for injunction. It was his contention that the 6th Defendant had no proprietary interest over the suit lands even though together with his co-director to the 5th Defendant, they jointly executed the Sale Agreement. Further that the 6th Defendant should not have been sued.

In cross-examination he insisted they undertook due diligence before purchasing the suit lands. When he was taken through the various entries in the Green Card for land parcel number Kajiado/ Kaputiei North/ and 6742 and 6743 respectively, he confirmed the contradictions relating to dates in the Green Card and the two title documents. He noted that as for Kajiado/ Kaputiei North/ 6743 the 3rd Defendant was issued with title on 22nd February, 2010 but in the Green Card it indicates title deed was issued on 12th August, 2010. As for Kajiado/ Kaputiei North/ 6742, he was issued with a title on 13th August, 2010 as per the Green Card. Further, the Sale Agreement between the 3rd Defendant and 5th Defendant is dated 13th April, 2010. He explained that by the time they executed the Sale Agreement in respect of Kajiado/ Kaputiei North/ 6743, the owner of the land was indicated as Naomi Nyambura Wakaba while Kajiado/ Kaputiei North/ 6742 was owned by the 4th Defendant. Further, at the time of signing the Sale Agreements the 3rd Defendant did not own the suit lands as evident in the Green Card. He stated that the Consent of Land Control Board was dated 14th April, 2010 and in the said Consent Form the 3rd Defendant is the Applicant, yet it was not an owner of the suit land at that time. Further, that the said Consent refers to parcel number Kajiado/ Kaputiei North/ 6743 only and not Kajiado/ Kaputiei North/ 6742. He further averred that transfer document for Kajiado/ Kaputiei North/ 6742 is dated 21st April, 2010 but by that time the 3rd Defendant was not the owner of the suit land. At the transferor section, it is signed by David Shanka who was DW3. He did not produce the transfer form for Kajiado/ Kaputiei North/ 6743 in court. The Transfer was not sealed by the 5th Defendant but only signed by one director. Further, the 6th Defendant did not produce any searches he conducted before purchasing the suit lands. He confirmed title for Kajiado/ Kaputiei North/ 6743 was in the name of 3rd Defendant but he did not have title for Kajiado/ Kaputiei North/ 6742. However in re-examination he retracted and said Naomi Nyambura Wakaba and Henry Simaru were not shown as owners of the land. He reiterated that 3rd Defendant showed them title deeds that they were the owners of the suit lands but when transfer was being done, he got the original documents. He denied being responsible for any error on the Green Card as the lands office kept the said records. Further, that even if transfer was signed by one person, the lands office accepted it and issued them with title deeds. He reiterated that he obtained consent of the land control board at the time of transfer but only availed a copy for one of the parcels in court.

DW4 who is the 2nd Defendant confirmed that he is a director to the 3rd Defendant and he purchased the suit lands from Mary Nyambura Wakaba who is deceased, through PC Onduso Advocate. He however did not produce any documentary proof to confirm that 1st Defendant is deceased. The purchase price for both parcels of land amounted to Kshs. 975,000. He confirmed selling land to the 4th Defendant but bought back the same from him and sold it to the 5th Defendant. He however did not rebut the 4th Defendant's averments that he bought the said land back from him as the subject matter was part of a police case. He confirmed being vendor for Kajiado/ Kaputiei North/ 6742 while 3rd Defendant was vendor for Kajiado/ Kaputiei North/ 6743. The total purchase price paid to them by the 5th Defendant was Kshs. 10, 400,000/= which they received in full purchase price after which the 5th Defendant acquired a good title. He said PC Onduso Advocate claimed he had lost the file and did not respond to his lawyer whether he could be a witness in the instant case. He explained that in 2004 he had an issue over the suit land and went to Kajiado Court. He insisted the 4th Defendant sold the land back to them but could only produce evidence of photocopy of a cheque for Kshs. 400,000 which he paid him. It is evident in the Green Card for Kajiado/ Kaputiei North/ 6743 that title deed was issued to 3rd Defendant on 13th August, 2010 but on the title deed it indicates the same was issued on 22nd February, 2010. As for Green Card for Kajiado/ Kaputiei North/ 6742 it indicates at entry no. 5 dated the 27th June, 2001, that Naomi Nyambura Wakaba was proprietor but title deed was issued to Mary Nduta Wakaba on 2nd August 2004. The 2nd Defendant failed to furnish in court copies of Land Control Board Consent; Transfer Documents and Title Deeds and claimed he left them at his lawyers' offices. He insisted that as a director of the 3rd Defendant together with his wife and son, they do not keep records. I note the Sale Agreement between 3rd and 5th Defendant is dated 13th April, 2010 and the 3rd Defendant got title to Kajiado/ Kaputiei North / 6743 on 12th August, 2010. As for Kajiado/ Kaputiei North/ 6742, the 3rd Defendant got title on 13th August, 2010, while the Sale Agreement is dated 13th April, 2010 and Transfer documents dated 21st April 2010. He explained that his wife had also signed Transfer forms for the 3rd Defendant but her photo and ID is not in the transfer documents. He contended that for the transfer between 3rd and 5th Defendants, the agreement was prepared by the 5th Defendant and he only signed it. Further that transfers were witnessed by an advocate and Agreements dated the 19th April 2004 and 11th June 2004 respectively were all prepared PC Onduso Advocate. He said he had only seen entries in the Green Card in court but the person who facilitated the registration and transfer was PC Onduso Advocate. He disputed the fact that he paid Kshs. 3.6 million to the 4th Defendant and contended that there was no evidence to prove this.

Upon reviewing the evidence placed before the Court which I have analyzed above, I can indeed decipher that it is the 2nd and 3rd

Defendants who were the mastermind of the alleged transfers of the suit lands to the respective parties. This has emerged when he requested the 4th Defendant to transfer Kajiado/ Kaputiei North/ 6472 back to him as there was a court case. The 2nd Defendant failed to produce any documents in court to prove the transactions. Further, there are so many contradictions, which I have highlighted above in respect of the transfer of the suit lands from the 2nd and 3rd Defendants through to the 5th Defendant. It clearly emerges that the 2nd Defendant was busy transferring land which he did not even own as evidenced by the entries in the Green Card and the Sale Agreements between him and the 5th Defendant. It is trite law that the Green Card is the Register that contains all entries in respect of transactions to a parcel of land and a title deed extracted therefrom should not contain contrary information to it. This brings me to the issue as to whether the 2nd and 3rd Defendants had a good title to pass to the 5th Defendant.

In the case of **Case of Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR** the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of **Katende V Haridar & Company Ltd** cited with approval in the Kenya High Court the case of **Lawrence Mukiri V Attorney General & 4 others ELC 169 of 2008**, on what amounts to bona fide purchaser for value thus: '...a bonafide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'

I wish to make reference to the repealed Registered Land Act which was the existing regime when all transactions to the suit land took place. I note section 39 of the Registered Land Act gives a purchaser for value reprieve in terms of land he purchases while section 85 of the said Act requires a party to file an instrument of transfer. Further section 109 makes provisions in respect as to how a company was supposed to seal its documents. Some of these provisions are similar to section 25 and 26 of the Land Registration Act which gives proprietors rights over land but have exceptions depending on how a title was acquired. In the case of **Alice Chemutai Too Vs Nickson K. Korir & 2 others (2015) eKLR** the learned Judge critically dealt with the position of a title acquired fraudulently and held that the same could not stand.

Insofar as the Land Registrar stated that the transaction between the 2nd, 3rd and 5th Defendants was authentic, he did not explain the contradictions in dates within the Green Card and the Title Deeds and neither did he produce the missing documents. I am of the view that his testimony was more to protect the office of the Land Registrar from any repercussions than to aid the court to determine the dispute at hand. From the Green Card for the two parcels of land, there was a flurry of transactions recorded therein between 12th August, 2010 upto 13th August, 2010. On 12th August, 2010, a restriction that had been subsisting for a while on land parcel No. Kajiado/Kaputiei- North/6743 and 6742 were quickly removed and the suit lands registered in the name of the 3rd Defendant on 13th August, 2010 after which the land was transferred to the 5th Defendants on the same day. Inasmuch the Land Registrar stated in court that transfer could be done in one day, this to me is a red flag. Further, the Sale Agreement and Purported Consent had been obtained in April, 2010 and it took almost five months before the said registration could be perfected to the 5th Defendant. What is interesting is the speed of the transactions in August, 2010 and the way the restrictions were removed twice without any reference to the Plaintiff as required by the law.

In relying on the two Judicial decisions as well as the evidence as presented above I find that due to the contradictions in the dates of the transactions between the 2nd, 3rd and 5th Defendants in respect of the suit lands as well as my finding that the 2nd and 3rd Defendants were not owners of the suit lands at the time of transfer and hence did not have a proper title to pass to the 5th Defendant; I hold that the Plaintiff has indeed proved fraud on the part of the 1st, 2nd, 3rd, 5th and 6th Defendants. I further hold that due to the glaring inconsistencies, the 5th Defendant cannot be termed as a bonafide purchaser for value without notice as he purchased lands, which the vendor did not even hold titles to at the time of executing the Sale Agreement. The evidence in the Green Card is too overwhelming which a court of law cannot ignore. The 6th Defendant claimed the Plaintiff did not have any reasonable cause of action against him but based on his averments in court, and as a Director to the 5th Defendant who confirmed participating in the transaction in respect of the suit lands herein, I disagree with him. Since it is the 2nd and 3rd Defendants that had hoodwinked the 5th Defendant to purchase the suits land that did not legally belong to them and will rely on the case of **Dennis Mukhulo Ochwada & another Vs Elizabeth Mungai Njoroge & Another (2018) eKLR** where the court of appeal dealt with the issue of indemnifying a purchaser for value and hold that the 5th Defendant is entitled to be compensated by the 2nd and 3rd Defendants for the suit lands as well as developments thereon.

As to whether the 7th, 8th, 9th and 10th Defendant owed a duty of care to the Plaintiff while dealing with the suit land.

The Plaintiff through PW2 contended that the removal of the restrictions culminating in the registration of the suit lands to the 5th Defendant is the reason she insists they owed her a duty of care. The Land Registrar confirmed in Court that they had removed the restrictions dated

13th April 2004 and 12th August 2010 on the suit lands twice as instructed by the DCIO. I however disagree with the Land Registrar, since he was well aware there had been a dispute in respect of the suit lands, it was just and equitable for him to refer to the person who had lodged a complaint before the restriction could be removed.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff.

Since I have already held that the 1st, 2nd and 3rd Defendants did not have a good title to pass to the 5th Defendant. Further, that the 5th Defendant is not a bonafide purchaser for value without notice. I note the only issue to be dealt with is whether the suit lands belonged to Herman Syanda Kanyolo. I note from the record that Naomi Nyambura Wakaba had been charged with forging titles but died before the suit was concluded. Further, from the evidence of the Fingerprint Expert which was produced as part of the Plaintiff's documents, he indicated that the signature of Herman Syanda Kanyolo in the transfer documents was forged. From the evidence of the 2nd, 3rd, 5th and 6th Defendants and their submissions, they dispute Herman Syanda Kanyolo's title and contend that since there was no consent to transfer land from Betty Wambui Radovan to Herman Syanda Kanyolo, then his title was not authentic. I however note that the Land Registrar actually produced the said documents to confirm there was indeed authentic transfer from Betty Wambui Radovan to Herman Syanda Kanyolo. Further, Betty Wambui Radovan who is deemed to have sold the land to Herman Syanda Kanyolo never came to court to claim any fraud against Herman Syanda Kanyolo's title. I note section **136, 137 and 138 of the Registered Land Act** (repealed) which was the law in place at the time of the transactions herein mandated the Land Registrar to register a restriction and not to remove the same unless the proprietor was informed, and given an opportunity to be heard, which was not the position in this instance. In relying on the case **KINYANJUI KAMAU Vs GEORGE KAMAU NJOROGE, CIVIL APPEAL NO. 132 OF 2005**, I find that due to the inconsistencies in the documents presented and failure by the 2nd, 3rd, 5th and 6th Defendants to explain the contradictions in the dates contained in the title deeds and Green Card and considering the fact that the 2nd and 3rd were well aware of the dispute on the suit lands before the same was registered in the 5th Defendant's name; I hold that the suit lands indeed belong to the estate of Herman Syanda Kanyolo. In relying on the provisions of section 143 of the repealed Registered Land Act, which is similar to section 80 of the Land Registration Act, I will direct that there be a rectification of the two titles in respect of the suit lands and order that the same be reverted back to the said estate of Herman Syanda Kanyolo.

On the issue of costs, I find that since the Plaintiff had been inconvenienced, she is entitled to the costs of the suits.

In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and will proceed to make the following orders:

- i. A permanent injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants by themselves, their agents, servants or otherwise howsoever from trespassing, encroaching, alienating, transferring, selling, leasing and charging or in any other way dealing in L.R. Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743; A declaration be and is hereby made that at all material times to this suit, the late
- ii. HERMAN SYANDA KANYOLO (deceased) be and is hereby declared to be the bona fide owner and proprietor of titles Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743;
- iii. A declaration be and is hereby issued that the 3rd Defendant's title issued on the 27th June, 2001 as well as those subsequently issued to the 1st, 2nd, 4th and 5th Defendants in respect to KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743 were obtained fraudulently;
- iv. A declaration be and is hereby issued that the processing and issuance by the Land Registrar, Kajiado of the Title Deeds in respect of Nos. KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743 was unlawful and hence a nullity;
- v. An order be and is hereby made that the Chief Land Registrar and Registrar of Lands, Kajiado do rectify the Land Register to reflect that KJD/ KAPUTIEI NORTH/ 6742 and KJD/ KAPUTIEI NORTH/ 6743 respectively belong to the estate of the late HERMAN SYANDA KANYOLO
- vi. Costs of the suit is awarded to the Plaintiff to be borne by the 1st, 2nd and 3rd Defendants equally.

Date signed and delivered in open court at Kajiado this 20th May, 2019.

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CHRISTINE OCHIENG

JUDGE