



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC APPEAL NO.122 OF 2017

(FORMERLY CIVIL APPEAL NO.223 OF 2015 AT NAIROBI)

NJERI NJOROGE.....APPELLANT

-VERSUS-

JOSEPH MAINA GICHUHI.....1ST RESPONDENT

RUKUNGU MAINA.....2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. J. W. Onchuru, Principal Magistrate delivered at the Chief Magistrate's Court at Thika in Civil Suit No.991 of 2008 on 1st April 2015)

JUDGEMENT

The Appellant herein *Njeri Njoroge* had filed *Civil Suit No.991 of 2008* at the *Chief Magistrate's Court* at *Thika* on *30th December 2008*. The claim was against *Joseph Maina Gichuhi*, the 1st Respondent and she has sought for the following orders:-

- a) The Defendant be ordered to vacate from the parcel of land No.Chania/Ngorongo/633, and in default he be forcefully evicted therefrom.***
- b) Costs of the suit.***
- c) Any other and further relief that the court may deem fair and just to grant.***

The Defendant was allegedly served with Summons to Enter Appearance and copy of the *Plaint*. He failed to enter appearance and interlocutory Judgement was entered against him and the matter proceeded for formal proof whereafter ***Judgement was entered in favour of the Plaintiff (Appellant)*** herein and a *Decree* to that effect was issued on *27th July 2009*. However, the said *ex parte* proceedings were later set aside and the Defendant (1st Respondent herein) was allowed to file a *Defence*.

Further, the Appellant (Plaintiff then) applied to amend her *Plaint* and join the 2nd Defendant herein. The said application was allowed and Plaintiff (Appellant) filed her ***Amended Plaintiff*** on *22nd February 2011* and enjoined the 2nd Respondent (2nd Defendant then) to the suit. In the ***Amended Plaintiff***, the Appellant sought for the earlier orders sought in the initial ***Plaint***.

In her ***Amended Plaintiff***, the Appellant (Plaintiff then) had alleged that at all material times to the suit, she was and still was the owner of land parcel *No.Chania/Ngorongo/633*. She further averred that on or about the *year 1999*, the 2nd Defendant purported to sell a portion from land parcel *No.Chania/Ngorongo/633*, to the 1st Defendant and the 1st Defendant without any colour of right or authority took over the said portion of land and asserted ownership right, making use thereof, squatting thereon and generally conducting himself as the owner of the said portion of land from *LR.No.Chania/Ngorongo/633*. She had particularized the said ***fraud*** and ***wrongful possession*** of the Defendants in ***paragraph 4*** of the ***Amended Plaintiff***. Therefore the Appellant's claim against the Defendants was an order to vacate from the said portion of land of the suit property and in default, he be forcibly evicted from thereon.

Though the Defendants were served with copies of the ***Amended Plaintiff***, they did not enter appearance and again interlocutory Judgement was entered against them. An attempt to have the said interlocutory Judgement set aside and for ***Leave*** to file *Defence* out of time vide an application dated *29th September 2011*, was rejected by the court on *23rd January 2012*, when the said application was dismissed with costs.

The matter was heard before **Hon. J. W, Onchuru, Ag. Principal Magistrate**, on various dates. The Appellant **Njeri Njoroge** gave evidence for herself and called no witnesses and produced the title deed for the suit land which is in her name. She further alleged that she did not know the 1st Respondent who purchased a portion of suit land from the 2nd Respondent.

The 1st and 2nd Respondents also gave evidence for themselves and called no witnesses. After the close of viva voce evidence, parties filed their written submissions. Thereafter, the trial Magistrate delivered his determination on **1st April 2015**, and dismissed the Appellant's claim (Plaintiff) with costs to the Respondents. In particular, the trial Magistrate held that:-

"I do find that the 1st Defendant is entitled to ¼ acre from land parcel No.Chania/Ngorongo/633. The Plaintiff should thus facilitate the survey process so that the 1st Defendant gets his ¼ acre share".

The Appellant herein was aggrieved by the above determination and dismissal of her suit by the trial Magistrate's Court. She has sought to challenge the said determination through the **Memorandum of Appeal** filed in court on **15th May 2015**, wherein she has sought for the setting aside of the said Judgement and Decree in favour of the Respondents and that the consequential orders made by the Subordinate Court as to interest and costs be set aside and the Appellant be awarded costs of the Appeal and Subordinate Court.

The grounds upon which the Appellant has sought for the Appeal to be allowed are as follows:-

- 1) That the Learned Magistrate erred in law and in fact by finding the Appellant's case unmeritorious and dismissing the same with costs.***
- 2) The Learned Magistrate erred in finding that the suit property had been transferred to the 1st Respondent whereas no Land Control Board Consent had been obtained in order to effect the same.***
- 3) That the Learned Magistrate erred in law and in fact in awarding the 1st Respondent, a ¼ an acre from the Appellant's land parcel No.Chania/Ngorongo/633, which the 1st Respondent had not made any claim to in his pleadings.***
- 4) That the Learned Magistrate erred in law by finding the transfer of land by the 2nd Respondent to the 1st Respondent legitimate whereas the 2nd Respondent has no title to the property.***
- 5) That the Learned Magistrate erred in law by failing to have due regard and to take into account the various issues raised in the affidavits and evidence produced by the Appellant.***
- 6) That the Learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.***
- 7) That the Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding in favour of the 1st Respondent herein.***
- 8) That the Learned Magistrate erred in law and in fact by finding a sale to be legitimate when it lacks the consent of the Land Control Board.***
- 9) That the Learned Magistrate erred in law and in fact by finding for the Respondent when there was no authority by any court and o no valid Grant of Letters of Administration by any court to allow dealing with the land of a deceased person.***
- 10) That in all the circumstances of the case, the Learned Judge failed to do justice before him and the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.***

The Appeal is opposed by the Respondents who filed the **Grounds of Opposition** on **11th January 2017** and urged the Court to dismiss the said Appeal. These Grounds of Opposition are:-

- 1) That the Appeal; is incompetent as it was filed without leave of court.***
- 2) That the sale of a ¼ acre of the suit property to the 1st Respondent was a family decision and the Appellant participated in the discussions thereof and also gave her approval for the sale.***
- 3) That the Appellant was aware of the requirement of obtaining of Land Control Board Consent but she failed obtain the same.***
- 4) That the 1st Respondent was able to prove that he is a bona fide purchaser for value and therefore entitled to ¼ an acre of the suit property.***
- 5) That the Appellant failed to disclose material facts at the time of filing Succession Cause Number 31 of 2007 that the 1st Respondent was one of the beneficiaries by virtue of being a purchaser of ¼ acre portion of the suit property.***

6) *That the Appellant herein created an implied and or constructive trust in favour of the 1st Respondent and the Appellant cannot renege the same.*

7) *That the Judgement of the learned trial Magistrate in CMCC No.991 of 2008 was well informed and correct in law and fact.*

8) *That the Appeal has no chances of succeeding and is only meant to delay and keep the Respondents from enjoying fruits of the judgement and therefore it should be dismissed with costs.*

This Appeal was first filed at the **Civil Division (Civil Appeal No.223 of 2015) at Milimani Law Court**. The Court gave directions under Section 79(C) of the Civil Procedure Act on **19th August 2016** and certified the Appeal ready for hearing and directed the same to be heard at Nairobi by a single Judge. When the parties appeared in court on **1st April 2017**, for hearing of the Appeal, the matter was transferred to this court by a consent order. It was thus ordered:-

“By consent, the file shall be transferred to Thika, Environment and Land Court for hearing and determination”.

When the parties appeared before this Court through their respective advocates, they consented to canvass the Appeal by way of written submissions. The Court directed the parties to file their written submissions respectively.

In compliance to the above direction, the **Law Firm of Kiarie Joshua & Co. Advocates** filed their written submissions and submitted that the issues for determination were:-

i. Legitimacy of Transfer of land parcel No.Chania/ Ngorongo/633.

- **Capacity to Sale and Transfer.**
- **Land Control Board Consent**

ii. Are parties bound by their pleadings?

On capacity to sale and transfer, the Appellant submitted that by the time the Respondents executed the Sale Agreement, the Appellant's husband who was the registered owner of the suit property was deceased at that particular time and there were no letters of administration taken out. Further that the Appellant by virtue of being the deceased widow was a legal beneficiary ranking in priority by dint of **Section 29 of the Law of Succession Act**. Then automatically the suit property devolved into her possession upon filing of the Succession Cause. However, the trial

Magistrate had observed that the transmission of the suit property to the Appellant was fraudulent. If at all the Respondent had a genuine case against the transfer to the Appellant, then they were indolent and the trial court erred in law in aiding their indolence. It was further submitted that though the Appellant was the beneficiary of the suit property, there was no transaction between the Appellant and the 1st Respondent. Further the said sale was for a deceased's property which fact was well known to the 1st Respondent. It was therefore her submission that neither of the parties herein had contractual capacity over the suit property at the time of the alleged sale.

On the issue of the **Land Control Board Consent**, the Appellant relied on Section 6(1) of the Land Control Act and stated that the suit land being an agricultural land, then Land Control Board Consent was a requirement and failure to have such Consent meant the said sale was **null** and **void**. However the trial Magistrate erred in law in failing to appreciate the evidence given by the parties to the fact that no such Consent was obtained. The Appellant relied on the case of **Hirani Ngaithe Githire...**

Vs...Wanjiku Munge(1979) KLR 50, where the Court held that:-

“Under Section 6 of the Land Control Act, failure to obtain Land Control Board Consent makes the Sale Agreement void for all intents and purposes and no principle of equity can soften or change the mandatory statutory provision”.

Regarding development on the suit property and occupation by the 1st Respondent, it was submitted that no evidence of such occupation and development was adduced in support of the same. Therefore the trial Magistrate erred in clothing with legality, the 1st Respondent's action, which was more of a Criminal Offence than legal.

On whether the parties are bound by their pleadings, the Appellant submitted that the trial Magistrate awarded the 1st Respondent a ¼ an acre of land out of the suit property though the said 1st Respondent had not pleaded to the same. It was further submitted that the trial court issued orders that were not pleaded and prayed for by the parties. In conclusion, the Appellant submitted that the trial Magistrate wrongly arrived at the said determination and the Court was urged to allow the Appeal. For this the Appellant relied on the case of **Mbogo...Vs...Shah & Another (1968) EA 93**, where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion”.

Therefore the Appellant submitted that the Judgement and subsequent orders issued by the trial Magistrate **Hon. J. W. Onchuru, PM**, should not be allowed to remain standing as it represents grave injustice to the Appellant as it is totally against the weight of evidence and it failed to uphold the principles of law. The Appellant urged the Court to set aside the said Judgement and allow the Appeal as prayed.

The Respondents filed their submissions dated 5th October 2017 through the **Law Firm of Njoroge Kugwa & Co. Advocates** and stated that the issues for determination are as follows:-

- i. Does the Appellant have automatic right to appeal?*
- ii. Did the 2nd Respondent have capacity to sell the subject land?*
- iii. Did the 1st Respondent prove that he is a bona fide purchaser for value and therefore entitled to ¼ acre of the suit property?*
- iv. Did the Appellant create an implied and or constructive trust in favour of the 1st Respondent?*
- v. Were the orders granted by the trial court pleaded by the 1st Respondent?*

On the first issue, that the Respondents did not have automatic right of Appeal as the Order issued by the court did not fall under Section 75 of the Civil Procedure Act and Order 43 Rule 1(i) of the Civil Procedure Rules, the Respondents relied on **Section 75(1)** of the **Civil Procedure Act** which provides:-

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;*
- (b) an order on an award stated in the form of a special case;*
- (c) an order modifying or correcting an award;*
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;*
- (f) an order under section 64;*
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*
- (h) any order made under rules from which an appeal is expressly allowed by rules.*

The Respondents submitted that the Appellant should have sought for **Leave** to Appeal as provided by Order 43 Rule 3 of the Civil Procedure Rules. Further the Respondents submitted that the trial court gave an Order directing the Appellant to facilitate the survey process for purpose of transferring the ¼ acre out of the larger portion of **LR.No.Chania/ Ngorongo/633**, to the 1st Respondent. To the Respondents, the said orders did not fall under the provisions of Section 75(1) of the Civil Procedure Act and the Appellant ought to have sought for leave to file the Appeal. For this the Appellant relied on the case of **Peter Nyaga Murake...Vs...Joseph Mutunga CA No.86 of 2015 at Nairobi quoted in the case of Josephat Muchiri Muiruri & Another....Vs...Abdi Adan (2015) eKLR**, where the Court held that:-

“without leave of the High Court, the Applicant was not entitled to give Notice of Appeal whereas in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal and without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked....”.

The Respondents submitted that the above requirements applied to the Appellant who failed to seek leave prior to filing the Memorandum of Appeal and therefore the Appellant has no right of Appeal and therefore the Appeal should be dismissed with costs.

On capacity to sale and transfer, the Respondents submitted that the 2nd Respondent was a dependant of the deceased estate and by dint of Section 29 of the Law of Succession Act, he had a beneficial interest over the subject property. Further that the 2nd Respondent transacted the sale of the suit properties as a beneficiary of the deceased estate and with approval of the Appellant. It was further submitted that the Appellant filed **Succession Cause No.31 of 2007**, but deliberately failed to include the 1st Respondent as one of the beneficiaries though the Sale Agreement had stipulated so. Therefore the Appellant obtained the grant **fraudulently** and through **concealment of material facts** and therefore the Court should find that 2nd Respondent had capacity to transact the sale of the subject suit property by virtue of being a beneficiary of the estate of his father **Mwangi Kirae**.

On Land Control Board Consent, it was submitted that at the time of transacting the sale, the suit land was registered in the name of the

deceased **Mwangi Kirae** and as such the Land Control Board Consent could only be obtained by the Appellant after the Grant to the estate of **Mwangi Kirae** (deceased) had been confirmed. It was submitted that at that time, requirement of Consent from Land Control Board had not accrued. The Respondents submitted that the Grant was obtained in exclusion of the 1st Respondent, despite the fact that he was one of the beneficiaries to the estate of the deceased and therefore the Grant was obtained **fraudulently**, through **concealment of material facts** by the Appellant. It was further submitted that pending the filing of the Succession Cause, the Appellant created an implied or constructive trust in favour of the 1st Respondent who paid a consideration of **Kshs.50,000/=** as purchase price, pending acquisition of the subject suit by way of transmission. The Respondents relied on the case of **Macharia Mwangi Maina & 87 Others...Vs...Davidson Mwangi Kagiri (2014) eKLR**, where the Court held that:-

“the Respondent created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that the Consent of the Land Control Board was not required where a trust was created over agricultural land”.

The Respondents further submitted that this being a court of equity, it should uphold the equity principles such as **‘Equity detests unjust enrichment and No man shall benefit from his own wrongdoing’**.

It was further submitted that the 1st Respondent is not a trespasser to the suit property as alleged by the Appellant as he is a *bona fide* purchaser for value and failure to obtain the Land Control Board Consent can only be vested upon the Appellant and not 1st Respondent.

On whether the Orders granted by the trial court were pleaded by the 1st Respondent, it was submitted that the trial court relied on the documentary and oral evidence adduced to arrive at its decision. Further that the 1st Defendant had stated in his witness statement that the Appellant should be directed to transfer a $\frac{1}{4}$ **an acre** out of the large portion of **LR.No.Chania/Ngorongo/633**. The Court was also at liberty to issue such orders as it deemed fit and just to the circumstances to issue and should not be faulted. The Respondents therefore urged the Court to dismiss the instant Appeal and uphold the lower court’s decision that the 1st Respondent is entitled to a $\frac{1}{4}$ **an acre** out of the larger portion of **LR.No.Chania/Ngorongo/633** and that the Appellant should facilitate for the survey of the process. It was further submitted that the Appellant’s Appeal has no merit and should be dismissed entirely with costs to the Respondents.

The above were therefore the pleadings, evidence and submissions before the trial court. The Court is called upon to make a determination of the Appeal filed by the Appellant but as provided by Section 78 of the Civil Procedure Act, this Court is called upon to analyse the whole evidence, evaluate, assess, weigh, interrogate and scrutinize it and arrive at its own independent conclusion. The Court will also caution itself that it neither saw nor heard the witnesses and must therefore give allowance for that. However, the findings of the trial court must be given due deference, unless they fall foul of proper evaluation of the evidence on record or that the trial Magistrate acted on wrong principles in arriving at his/her findings. See the case of **Selle...Vs...Associated Mobi Boat Co.(1968) EA 123**, where the Court held that:-

“An Appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”. (See **Abdul Hameed Saif...Vs...Ali Mohamed Sholah [1955] 22 EACA 270**).

As the Court determines this Appeal, it will also take into account that the Court only interferes with the discretion of the trial court where it is shown that the discretion was exercised contrary to the law or that the trial court (Magistrate herein) misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant fact or that on the facts and law as are known the decision is plainly wrong. (See the case of **Ocean Freight Shipping Company Ltd...Vs...Oakdale Commodities Ltd, Civil App.No.198 of 1995**).

This Court has now carefully considered the Grounds of Appeal and the Grounds of Opposition thereto, the written submissions by the respective Counsels, the proceedings and Judgement of the trial court as well as the applicable law and the Court finds that the issues for determination are as framed by both the Appellant and the Respondents’ Counsels.

There is no doubt that the Appellant herein had filed **Civil Suit No.991 of 2008**, against the Respondent herein at the **Chief Magistrate’s Court Thika**. She had sought for vacant possession of **LR.No.Chania/ Ngorongo/633**, and in default forcible eviction of the 1st Respondent from the suit land. The Appellant had alleged that the 2nd Respondent had fraudulently sold the suit property to the 1st Respondent and the 1st Respondent had wrongfully taken possession of the said suit property. The Respondent had alleged that the transaction between the two Respondents was above board and the Appellant was aware of it. Since the Appellant had alleged fraud, the burden of proving such allegation was upon her since allegations of fraud are serious allegations. See the case of **Urmilla W/o Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76**, where the Court held that:-

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

The Court has considered the particulars of fraud as alleged by the Appellant and the Court finds that the Appellant had a duty to prove the said allegations on the required standard since she is the one who had alleged.

The trial Magistrate arrived at a finding that the 1st Respondent was entitled to a $\frac{1}{4}$ **acre** from the suit property since he had purchased the same from the 2nd Respondent’s share of his entitlement of the suit property as a beneficiary of the estate of **Mwangi Kirae(deceased)**. The Appellant alleged that the 2nd Respondent had knowledge that he lacked title and authority to the suit property but he illegally and

fraudulently sold the same to the 1st Respondent. However from the exhibits produced in court, it is evident that the sale agreement was entered in **1999**. The 1st Respondent alleged that he took possession of the suit property after payment of the initial deposit of the purchase price. The Respondents alleged that the said sale was agreed in a family meeting wherein the Appellant was present and gave a go-ahead for the said transaction. She later changed her mind and filed a Succession Cause No.31 of 2007, without involving the Respondents.

If the 1st Respondent entered into the suit property in **1999/2000**, why did the Appellant not complain about his occupation then? Why did she wait until when the Grant was confirmed in **2008** to file this suit? This Court after evaluating the available evidence finds that it is indeed the Appellant herein who concealed material facts while applying for the Letters of Administration and Confirmation of Grant to the Estate of **Mwangi Kirae (deceased)** who was her husband and the initial registered owner of the suit property.

The Appellant had further alleged that the 2nd Respondent knew that the 1st Respondent had no colour of right over title to the suit property but allowed him to take possession. However, from the available evidence, it is evident that the 2nd Respondent was selling his entitlement as a beneficiary of the estate of **Mwangi Kirae(Deceased)** and this Court finds that the said believe is what caused the 2nd Respondent to allow the 1st Respondent to take possession of the $\frac{1}{4}$ acre, a portion from the suit property. The Appellant further alleged that the 1st Respondent has continued to illegally and fraudulently to remain in possession of the alleged portion from the suit property. However, the Court finds that the 1st Respondent is in possession of the said portion from the suit property because he bought the same from 2nd Respondent who is a beneficiary of the estate of **Mwangi Kirae (deceased)**.

The trial Magistrate dismissed the Appellant's suit and the Appellant was dissatisfied with that finding. The Court will now consider the set out issues for determination;

i) Does the Appellant have automatic right to Appeal?

The Respondents have averred and submitted that the orders given by the court did not fall under Section 75 of the Civil Procedure Act and Order 43 Rule 1(i) of the Civil Procedure Rules and therefore the Appellant had no automatic right of Appeal. That she needed Leave of the Court to Appeal such Order as provided by Order 43 rule 3. However, Section 75 and Order 43 deals with orders which are issued after determination of applications. The order issued by the trial court was an order issued after full hearing of the case and final determination and therefore the extracted order was a **decree**. Therefore the Appeal herein is as provided by Section 65(1)(b) of the Civil Procedure Act and that is an automatic right and the Appellant herein did not require the Leave of Court to file the instant Appeal.

ii) Did the 2nd Respondent have capacity to sell the subject land?

The Appellant had alleged that by the time the Respondents entered into the sale agreement for sale and purchase of $\frac{1}{4}$ acre from the suit property, the said suit property was till registered in the name of **Mwangi Kirae** (deceased) and the 2nd Respondent had no capacity to sell the same to the 1st Respondent. However the Respondents submitted that the 2nd

Respondent was a beneficiary of the estate of the deceased and he sold his share of inheritance with the blessings of his mother the Appellant. That the said transaction was done after the family consulted and agreed to the said transaction. That the Appellant later changed her mind and filed the Succession Cause without involving both Respondents herein. The Court has indeed seen the sale agreement which was entered in **1999** and was witnessed by a number of witnesses. If indeed the Appellant was not part of the said transaction, she should have called **Geoffrey Githio Mwangi**, who was a witness and the administrator of the estate of the deceased to confirm that indeed the said transaction was not done with the knowledge of the Appellant. Further the Appellant should have called **Lazarus Kimani Karanja** the other witness who was an area elder to confirm if indeed the Appellant had allowed the said transaction. The area Chief also witnessed the said agreement and he would have been a very crucial witness who was not called. The presumption then would be that his evidence would have been adverse to the Appellant. See the case of **Bukenya...Vs...Republic (1972) EA 549**, where the East African Court of Appeal held that:-

“.....the general law of evidence is to draw an inference that the evidence of those witnesses if called would have been or would have tended to be adverse to the prosecution case”.

Since the Appellant did not call the said crucial witnesses, this Court finds and holds that indeed the family of **Mwangi Kirae** (deceased) including the Appellant had discussed and agreed that the 2nd Respondent could sell a share of his inheritance from the estate of his father which was a $\frac{1}{4}$ acre from the suit property. The Appellant was to consider the said sale during the Confirmation of Grant which she failed to do so. The Respondents alleged that the Appellant filed **Succession Cause No.31 of 2007** without involving the Respondents and after Confirmation of Grant, she filed this suit whereas she knew very well that the 1st Respondent was in occupation of the $\frac{1}{4}$ acre of the suit property since **1999** as a *bona fide* purchaser.

Having now considered the available evidence, the Court finds that indeed with the blessings of the family of **Mwangi Kirae** (deceased), the 2nd Respondent had capacity to sell his expected share from the suit property as he was a dependant and beneficiary of the estate of **Mwangi Kirae**.

iii) Did the 1st Respondent prove that he was a bona fide purchaser for value and therefore entitled to $\frac{1}{4}$ acre of the suit property?

The Court has found and held that indeed there exist a sale agreement that was witnessed by a number of witnesses who were not called to dispute and/or confirm their presence. The Court has also found that the 2nd Respondent had capacity to sell the said $\frac{1}{4}$ acre to the 1st Respondent. The 2nd Respondent did testify in court and confirmed that he indeed sold his intended share of $\frac{1}{4}$ acre from the suit property to the 1st Respondent as he was in dire financial need and that was in the year **1999**. That his mother, the Appellant did not object to the said

sale and even to the taking of possession of the said $\frac{1}{4}$ acre by the 1st Respondent.

That she only filed the suit after obtaining Confirmation of Grant to a Succession Cause which she filed without involving the Respondents herein and she knew about the transaction all along. The Court believe that the 1st Respondent genuinely bought the $\frac{1}{4}$ acre from the 2nd Respondent and he is indeed a *bona fide* purchaser for value and is entitled to the said parcel of land.

iv) Did the Appellant create an implied and/or constructive trust in favour of the 1st Respondent?

Black Law Dictionary, 9th Edition defines '**constructive trust**' as

“an equitable remedy that a court imposes against one who has obtained property by wrongdoing. A construct trust is imposed to prevent unjust enrichment, creates no fiduciary relationship. Further it defines Resulting trust as a remedy imposed by equity when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have beneficial interest in the property”.

From the available evidence, it is evident that the 1st Respondent was a *bona fide* purchaser for value and was entitled to $\frac{1}{4}$ acre from the suit property. It is also evident that the Appellant knew of his purchase and occupation of the said $\frac{1}{4}$ acre way back from 1999. However, she filed a ***Succession Cause No.31 of 2007***, over the Estate of ***Mwangi Kirae*** (deceased) and failed to involve the Respondents. When the Grant was confirmed, she became the sole beneficiary of the whole suit property without taking into account the beneficial interest of the 1st Respondent. The Court therefore finds that she created a constructive trust in favour of the 1st Respondent and the same is to prevent the Appellant from unjust enrichment.

v) Was the Land Control Board Consent a requirement herein?

The Appellant had submitted that the transaction was null and void and thus unenforceable for lack of Land Control Board Consent. However, the Respondents submitted that such Consent was not required as at the time of transaction, the suit land was still registered in the name of the deceased ***Mwangi Kirae***. Indeed this

Court has found and held that the Appellant created a constructive trust in favour of the 1st Respondent and therefore the Land Control Board Consent was not required. See the case of ***Macharia Mwangi Maina & 7 Others...Vs...Davidson Mwangi Kagiri (supra)***, where the Court held that since the Respondent had created a constructive trust in favour of all individuals who had paid the purchase price for the respective plots, then the Land Control Board Consent was not required.

vi) Are parties bound by their pleadings?

The Appellant alleged that the trial Magistrate awarded a $\frac{1}{4}$ an acre, out of the suit property to the 1st Respondent despite not having pleaded for the same. Indeed parties are bound by their pleadings. Though the 1st Respondent had not pleaded for an award of $\frac{1}{4}$ acre, the Appellant pleaded in her Amended Complaint prayer no.(c) any other and/or further relief that the Honourable Court may deem fair and just.

The Court finds that by awarding the $\frac{1}{4}$ acre to the 1st Respondent, then the trial Magistrate was answering to prayer no.(c) of the Appellant as pleaded in her Complaint and the said award was not unlawful.

vii) Were the orders granted by the trial court pleaded by the 1st Respondent?

The Court found and noted that the Subordinate Court did not allow the Respondents to file their Defence out of time. However the Respondents were allowed to participate in the proceedings and they gave

their Defence. Further exhibits were produced by the Plaintiffs to show that there was a sale agreement between the Respondents herein. After the evaluation of the evidence, the Court came to a conclusion that the 1st Respondent was entitled to $\frac{1}{4}$ acre from the suit property. As submitted by the Respondents, the Court concurs that the trial court was at liberty to issue orders as it deemed just and fair in the circumstances as provided by Section 3A of the Civil Procedure Act. The Appellant had even urged the trial court to make any order and/or relief it deemed fit to issue. The Court issued the said order and this Court finds that the order issued by the trial court was a just and necessary order under the available circumstances.

Having now carefully considered the available evidence, evaluated it and having come to its own independent decision, the Court finds and holds that the trial Magistrate did not err and misdirect himself as alleged by the Appellant herein. Consequently this Court upholds the decision of the trial court to the effect that the 1st Respondent is entitled to a $\frac{1}{4}$ an acre out of the larger portion of ***LR.No.Chania/Ngorongo/633***, and the Appellant should facilitate for the survey process.

The upshot of the foregoing is that this Court finds the Appellant's Appeal is not merited and the same is dismissed entirely with costs to the Respondents both at the lower court and for this Appeal.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of March 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Muhia holding brief for Kiarie for Appellant

M/S Murigi holding brief for Mr. Kugwa for Respondents

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/3/2018