



REPUBLIC OF KENYA



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**Kireru v Kibe & 2 others (Civil Appeal 174 of 2018)
[2024] KECA 1097 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1097 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 174 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
AUGUST 21, 2024**

BETWEEN

PAUL KIRERU APPELLANT

AND

JANE WANJIRU KIBE 1ST RESPONDENT

KIBE KINYANJUI 2ND RESPONDENT

MWANIKI KINYANJUI 3RD RESPONDENT

*(Being an appeal against the Judgment of the Environment and Land
Court at Nyeri (L.N. Waithaka, J.) dated 31st July 2018 in E. L. C. Civil
Suit No. 116 of 2013 Consolidated with E.L.C Civil Suit No. 178 of 2013)*

JUDGMENT

1. By a plaint dated 12th June, 2013 and amended on 4th June 2015, Paul Kinyanjui Mwaniki, the deceased husband to Jane Wanjiru Kibe, the 1st respondent, sued Simon Muthui Kahiga, Paul Kireru Kahiga (the appellant) and the Hon Attorney General seeking orders, inter alia, that: A declaration that the transfer of the parcel of land known as Nyeri Euwaso Nyiro/673 (suit property) by the 1st defendant to the 2nd defendant was illegal and unlawful as that parcel of land had already been sold by the 1st defendant to the plaintiff. Cancellation of 2nd defendant's title over the suit property and the registration of the same in the names of the plaintiff.
2. Following the death of Paul Kinyanjui Mwaniki, the 1st respondent, his wife and legal representative, was substituted in his place. The 1st respondent's case as pleaded was that he was at all material times the beneficial owner of a parcel of land known as Nyeri Euwaso Nyiro/673 (the suit property) which he bought from one Simon Muthui Kahiga (the vendor/ Kahiga). His complaint was that the said Kahiga sold the suit property to him but before he could effect the transfer he entered into another



sale agreement with the appellant and transferred the same to him; Further that the said Kahiga obtained the requisite consent for sub-division and transfer of the suit property to himself from their mother before he obtained consent to transfer the sub-division to the appellant who is his brother. According to the 1st respondent, after he purchased the suit property he took possession and undertook developments thereon.

3. In his amended defence dated 19th April, 2014, Kahiga acknowledged having entered into a sale agreement with the 1st respondent for sale of a portion of the parcel of land known as Nyeri/Euwaso Nyiro/469 which on subdivision became Nyeri/Euwaso Nyiro/673 but denied having received the full purchase price for the portion and having obtained the consent of the Land Control Board to transfer the portion he sold to the 1st respondent. Concerning the developments effected by the 1st respondent on the suit property, Kahiga contends that he only allowed the 1st respondent to build a semi-permanent structure to store his harvest in the suit property. He stated that his attempt to transfer the land to the 1st respondent was frustrated by his wife and mother who filed a caution to restrict dealings with the suit property. He also acknowledged having transferred the suit property to the appellant on intervention of his family members. He maintained that the transfer to the appellant was lawful and he offered to refund the purchase price to the 1st respondent.
4. The appellant in his statement of defence and counter-claim filed on 3rd February, 2014 denied having had any knowledge concerning the sale agreement entered between the 1st respondent and Kahiga over the suit property. He however admitted that the 1st respondent had constructed a structure on the suit property but termed it as a one roomed mabati structure (a store). With regard to the 1st respondent's contention that Simon Muthui Kahiga had obtained consent of the Land Control Board for sub-division and transfer of the portion he had bought, the appellant contends that Simon Muthui Kahiga could not have lawfully done so as the suit property was encumbered by his mother and wife who had filed a caution to restrict dealings with the land. Further, it was the appellant's case that when they got to know that Simon Muthui Kahiga was selling the land, as a family they decided to redeem it by having it sold to him.
5. In his counterclaim, the appellant termed the sale and transfer of the suit property to him as being lawful and accused the 1st respondent of interfering with his rights to the suit property yet he is the registered proprietor. He urged the court to permanently restrain the 1st respondent by herself, her servants, agents and anyone claiming under her from entering, remaining on, cultivating or in any other way interfering with the suit property.
6. The appellant further asked the Court to order the 1st respondent to remove the structure he has built on the suit property and in default the same be demolished and that the 1st respondent be evicted from the suit property.
7. The 1st respondent's case was that her deceased husband, Paul Kinyanjui Mwaniki, purchased the suit property and that after he passed on she obtained grant of letters of administration in respect of his estate. She told the court that the deceased entered into two agreements in respect of the suit property and that the 1st agreement was executed on 12th March, 2009 and was for 1 ½ acres at Kshs 195,000 and thereafter her husband bought a further ¼ acre from Kahiga. She testified that after her husband completed paying for the land they took possession and built a dam, a house and planted trees and that she still utilizes the suit property.
8. She testified that her husband and Kahiga obtained a consent for transfer of the suit property to her husband and that Kahiga signed transfer documents in favor of her husband and paid the requisite transfer fees but when her husband went to register the transfer he found that Kahiga had lodged a



caution to restrict dealings with the suit property. She told the court that the suit property is currently registered in the name of the appellant who is a Kahiga's brother.

9. The 1st respondent further told the court that by the time the appellant applied for consent to transfer the suit property and transferred the same to the appellant, Simon Muthui Kahiga (the vendor) had already completed the transaction with her husband.
10. On the other hand, the appellant's case was that Kahiga was his brother. He testified that he purchased the suit property from him. that the agreement of sale was witnessed by his wife and his mother and that they later attended the Land Control Board and Kahiga signed a transfer in his favour.
11. He testified that he was not aware that his brother was selling the suit property to another person and according to him it was his brother who was in occupation at the time. He testified that at the time he bought the suit property the 1st respondent's husband was tilling part of the land but his brother told him that he had leased the land to him. He further testified that he was ready to refund the purchase price with interest.
12. In her judgement, the learned Judge found that the issues for consideration to be:
 - i. Whether there was a departure from pleadings.
 - ii. Whether the contract entered into between the 1st defendant and the plaintiff's husband was valid?
 - iii. Whether there was fraud in the transfer of the suit property to the 2nd defendant?
 - iv. If the answer to (iii) above is in the affirmative, whether the 2nd defendant obtained a good title to the suit property?
 - v. Whether any of the parties to this suit has made up a case for being granted the orders sought or any of them?
 - vi. What orders should the court make?
13. In her judgment, the learned Judge found, inter alia, that no evidence was led which was capable of showing that the subject matter of the agreements entered into between the plaintiff's husband and the 1st defendant was registered in the name of the 1st plaintiff's mother as opposed to the 1st defendant. On the second issue the learned Judge found that at the material time the law did not require a registered proprietor of land to seek spousal consent before entering into a sale agreement in respect of his/her property.

The learned Judge also found that the failure to obtain the consent within the time stipulated in Section 8 of the [Land Control Act](#) merely rendered the agreement voidable as opposed to void. As regards the issue as to whether there was fraud in the transfer of the suit property to the 2nd defendant, the court found that the transfer of the suit property was not an honest transaction and the same was calculated at defeating the plaintiff's interest in the suit property.
14. The court also found that although the 2nd defendant in his evidence claimed that he was an innocent purchaser for value without notice, at paragraph 8 of his statement of defence and counter-claim as read with the evidence adduced in court to the effect that they sat together as a family and agreed to redeem the suit property negates such a finding. Having sold the suit property to the plaintiff, it was unconscionable and unjust for the 1st defendant with connivance of his family members, the 2nd defendant included, to purport to sell the suit property to the 2nd defendant without first meeting his obligations to the plaintiff under the agreements he had entered into with the plaintiff's husband.



Ultimately, the court found that the transfer of the suit property to the 2nd defendant, in as far as it was calculated at defeating the plaintiff's interest in the suit property, was fraudulent and did not confer on the 2nd defendant "legally protected or protectable interest in the suit property".

15. In the end, the learned Judge issued the following orders;

“on whether any party to this dispute has made up a case for being granted the orders sought, upon considering the totality of the evidence adduced in this case, I find and hold that the plaintiff has made up a case for being granted the orders sought, which I hereby grant her in terms of prayers (a) to (c) of the amended plaint dated 4th June, 2015. With regard to the 2nd defendant's counter-claim and the orders sought in ELC 178 of 2013, I find both the counterclaim and the suit to be lacking in merit and dismiss them with costs to the plaintiff.”

16. Dissatisfied with the said decision, the appellant lodged the instant appeal in which he contended that the learned Judge erred in fact and in law: in holding that the plaintiff had proved fraud against the appellant and holding that the appellant obtained the land fraudulently as he bought land that had been sold to the plaintiffs husband yet the seller who was the 1st defendant had offered to refund the purchase price to the plaintiffs husband; in holding that the 2nd defendant had departed from his pleadings whereas he had denied the plaintiffs averments concerning the consent that was issued by the land control board to the 1st respondent's husband when the land was not in the name of the seller and failing to analyze that point which was brought to the courts attention and which can be clearly seen and proven from the documents produced in evidence and even at the time of submission and she therefore erred in failing to order that the consent obtained by the 1st respondent's husband and the 1st defendant was irregular, null and void as it was issued when the land was in the name of a third party; in holding that the land control board consent which had been obtained between the plaintiffs husband and the 1st defendant was still valid when they had not signed any transfer within 6 months and no extension of time was obtained; in holding that the land control board consent obtained between the plaintiff's husband and the 1st defendant was valid when there was proof that he same was obtained when there was a caution registered over the land; in holding that the consent of the spouse of the 1st defendant was not necessary in the transaction between the plaintiff's husband and the 1st defendant; to find that the plaintiff's husband's conduct was not above board and he had not come to court with clean hands; in failing to address the issue in controversy in the plaintiff's case and relying on extraneous findings and in allowing the plaintiff's claim and dismissing the 2nd defendant's counterclaim.

17. At the virtual plenary hearing of the appeal on 20th March, 2023 learned counsel, Ms. Thungu and Mr. Muhoho appeared for the appellant and the respondent respectively.

18. Ms. Thungu relied on the submissions dated 17th August, 2022 which she briefly highlighted. In those submissions, it was contended in regards to grounds 1,3,4,6,7 and 8 that the appellant did not commit any fraud when he bought his brother's land because the land that the appellant's brother was selling previously had a different number after sub-division and that he got his own parcel which he sold to the appellant.

19. Further, that according to the search it was submitted that Kahiga became the registered owner of Land Parcel No Nyeri/Uasonyiro/673 on 21st July, 2011 and that the 1st respondent's husband bought the suit land way back in 2009 before the same became registered in the names of the seller.

20. It was further contended that the sale agreements show that the respondent's husband was buying 1 ½ acres of Land Parcel No. Nyeri/Uasonyiro/469 and that the other agreement does not specify the parcel of land that was being sold and only states that it was a payment for sale of a quarter acre of land.



21. Further, that the consent of the Land Control Board was issued on 20th July, 2011 a day before the seller became the registered owner of the suit land, hence it was submitted that Simon Muthui Kahiga had entered into a sale agreement over the land that was not in his name and further that the consent obtained from the Land Control Board was for Parcel No Nyeri/Uasonyiro/673 and yet he was selling Parcel No Nyeri/Uasonyiro/469 and it was a different parcel of land from that which he had entered into a sale agreement over.

It was further contended that the Land Control Board gave consent over land that had a caution and was not registered in the name of the seller and as such was null and void since the registered owner of Parcel No Nyeri/Uasonyiro/673 on the date of the issuance of consent was Regina Muthoni and that the consent ought to have been issued in her name.

22. Counsel contended that the particulars of fraud indicate that the appellant signed transfer forms for Land Parcel No Nyeri/Uasonyiro/673 into his name knowing fully well that the same had been sold. It was contended that the land which had been sold was different and not yet sub divided and that the 1st respondent was not able to prove that it was the same land that was transferred to the appellant.
23. It was submitted that there was no misrepresentation by the appellant and that he neither induced the respondent's husband or Kahiga to act to his detriment. It was also submitted that before the appellant bought the land he ensured that Kahiga would refund the purchaser the amount of money he had received which information is contained in a letter dated 30th January, 2013. Further that the 1st respondent admitted in her evidence to have received the letter but refused to receive the purchase price as she wanted the land to belong to her children. It was hence submitted that there was no concealment on the part of the appellant and he bought the land with full knowledge of the respondent.
24. It was also submitted that the sale agreement between Kahiga and the 1st respondent's husband had a default clause and as such the agreements were not capable of specific performance as they related to a land that was not in the seller's name.
25. Finally, it was submitted that the evidence of the 1st respondent was that the suit land was both matrimonial and ancestral having been inherited by Kahiga from his mother and the spousal consent was necessary before the land could be sold. We were urged to allow the appeal and set aside the judgment of the trial court and to allow the appellants counterclaim.
26. The respondent's submissions were dated 18th March, 2023.

Learned counsel Mr. Muhoho adopted the same and made brief oral highlights. According to the respondent, the trial court found, correctly, that the appellant departed from his pleading as provided for under Order 2 rule 6(1) of the Civil Procedure Rules. It was submitted that this Court in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR laid down the principles of non-departure from pleadings and hence that the trial court was aptly guided by the case relied upon and as such that the trial Judge rightfully rejected the contention on ownership that the 2nd respondent introduced during submissions which information was not even led in evidence.

27. On the issue of the alleged failure to obtain consent within 6 months and on the issue of the validity of the agreement between the 1st respondent and Kahiga which has been questioned by the appellant, it was submitted that section 9(2) of the *Land Control Act* is instructive and also that this Honorable Court in *Willy Kimutai Kitilit v Micheal Kibet* [2018] eKLR held:

“A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of



the Land Control Board is made or if made, it is refused and the Appeal from the refusal, if any, has been dismissed (see Section 9 (2)).'That based on the foregoing the Learned Trial Superior Court Judge cannot faulted in her finding in this regard as she did in her Judgment."

28. On the issue of fraud the respondent submitted that the appellant had not pleaded fraud as required and did not particularize the said fraud and that the court correctly found that so long as the transfer was calculated at defeating the 1st respondent's interest there was fraud. That the learned Judge went on in analyzing the pleadings of the appellant and the evidence to show that the transfer was tainted with fraud. We are urged to dismiss the appeal with costs.
29. In a first appeal, such as the one before us, we are enjoined to consider the entire record of the proceedings before the trial court and, in doing so, we are under a legal duty to re-analyse and re-assess the evidence on record and reach our own conclusions. In carrying out our mandate, we must be cognizant of the fact that, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify and, therefore, give allowance for that disadvantage. This position was restated in *Selle v Associated Motor Boat Co.* [1968] EA 123
30. However, the Court, sitting as the first appellate court, must always appreciate that while undertaking its said obligation, as held in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR, it will interfere with the findings of the first trial court:

"only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."
31. In this appeal, certain facts are not in dispute. It is not disputed that Paul Kinyanjui Mwaniki (the deceased/ purchaser) and Simon Muthui Kahiga (vendor) entered into a sale agreement dated 12th March, 2009 in respect of 1 ½ acre of land Parcel No. Nyeri/Euasonyiro/469 at the agreed purchase price of Kshs 195,000; that a sum of Kshs 171,000 was paid upon signing of the agreement leaving Kshs 24,000 which was agreed to be paid at the point of obtaining a Land Control Board consent to transfer. A further agreement was entered into by the parties on 12th August, 2009 for an additional sale of ¼ acre of the same parcel of land at the purchase price of Kshs.10,000. On 3rd March 2010 an acknowledgement note was signed by the parties whereby Kahiga acknowledged receipt of the balance of the purchase price.
32. Upon payment, the deceased took occupation of the suit property which was well known to both the vendor and the appellant; that despite the deceased paying the balance of the purchase price as agreed, Kahiga then entered into an agreement with the appellant to sell the same parcel of land to the appellant who on 12th March 2013 entered into an agreement with the vendor for the sale of the suit property now described as land Parcel No. Nyeri/Euasonyiro/673 measuring 1 ¾ acres for an undisclosed purchase price. Upon this consent the appellant was issued with a title deed to the said property on 3rd April 2013 before the deceased could obtain title of the suit property; that before the deceased could obtain title one Regina Muthoni Kahiga, the vendor's and appellants mother registered a caution on 23rd August 2011 against the title to the suit property; that the fact of registration of the Caution was well known to both the vendor and the appellant.
33. In addition, it is not in dispute that it was after the transfer of the suit parcel in the name of the appellant that the deceased filed suit seeking orders, inter alia, that the transfer of land Parcel No. Nyeri/Euasonyiro/673 by Simon Muthui Kahiga to the appellant was illegal and unlawful the same parcel of



land having already been sold by Simon to the deceased; a cancellation of the appellant's title over land Parcel No. Nyeri/Euasonyiro/673 and for registration of the same into the names of Paul Kinyanjui Mwaniki (the deceased).

34. Having considered the entire record of appeal along with the rival submissions by learned counsel, we discern the issues for our determination as: whether the caution registered against the suit property, Nyeri/Euasonyiro/673, was proper and was lawfully removed prior to the registration of the land into the appellant's name and whether it amounted to fraud; whether the appellant's title was properly obtained; whether the sale agreement between the deceased and Simon Muthui Kahiga was lawfully terminated; and whether the learned Judge was correct in granting the impugned orders.
35. From the record, it would seem that the fulcrum of the 1st respondent's case was that the caution registered against the suit property on 23rd August, 2011 by the vendor's mother was meant to defeat registration of the suit land in her deceased husband's name. There is no doubt as to the fact of registration of that caution. The appellant's case was that, the reason the caution was placed by his mother was because Kahiga was a drunkard and had not obtained his wife's consent to sell the suit property.
36. We appreciate that, under Section 107(1) of the Act, 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. We are also cognisant of the legal maxim "omnia praesumuntur legitime facta donec probetur in contrarium (all things are presumed to have been legitimately done, until the contrary is proved). However, sections 109 and 112 of the *Evidence Act* provide that:
- "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."
37. Since it was the 1st respondent who was making positive averments that the caution was put in place in order to defect her husband's registration of the suit property, it was incumbent upon her to adduce evidence to show that this was actually the position. The 1st respondent proved that fact for the reason that there was indeed a caution registered by the vendor's mother and that caution did not exist by the time of the registration of the suit property in the name of the appellant.
38. All parties have agreed on the proper legal position that no registration of any instrument can be possible where a caution was validly registered. Such registration has to be cancelled for being done before the caution is properly and procedurally removed in accordance with Section 73 (2) of the *Land Registration Act*, and Articles 50 (1) and (2) of *the Constitution* of Kenya which required the cautioner be heard before the caution was removed.
39. Section 73(2) of the *Land Registration Act* is clear that no disposition is to be registered if it is inconsistent with the caution as long as the caution is still registered, unless the consent of the cautioner is obtained, or there is a court order to that effect. In this case, we have not been shown that either a consent was reached or that the registration was carried out pursuant to a court order. Accordingly, we are persuaded that the registration of the suit property in the appellant's name was, in those circumstances, unlawful and was done to defeat the interest of the deceased's registration.



40. Did the appellant obtain proper title to the suit property? Section 26 of the [Land Registration Act](#) provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme”. (Emphasis added)

41. In view of the foregoing, we reach the conclusion that the appellant’s title was not properly obtained. Apart from the foregoing, it was the respondent’s case that there was no evidence of transfer having been executed, clearance certificates having been obtained, and stamp duty and transfer fees having been paid by the appellant. On his part, the appellant contended that Kahiga transferred the suit land to him after the consent was reached with his family for him to purchase the suit land. He exhibited a Stamp Duty Pay-in-Slip as well as a transfer form.

42. The question regarding the indefeasibility of title has now been well settled in this jurisdiction. The myth that hitherto held sway to the effect that, once a person holds a title to land, his proprietorship cannot be successfully challenged, has now been debunked. This Court in *Embakasi Properties Limited & another v Commissioner of Lands & another* [2019] eKLR appreciated section 26 of the [Land Registration Act](#) when it held that although it has been held time without end that the certificate of title is conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party (See section 23 of the repealed Registration of Titles Act). Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is, prima facie, evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.”

43. The Court has explained that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title, and that courts would not hesitate to nullify titles held by those who stare at the court and wave a title of grabbed land by merely pleading loudly, as the appellant did in this case in reliance on the general principle of the indefeasibility of title. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the instrument of title. In this regard, it was held by this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR that:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is under challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”



44. Equally, this Court in *Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR*, held that:

“... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

45. Our view is that, where credible allegations are made and basis laid for believing that acquisition of property may not have been made following proper channels, then the registered proprietor is thereby called upon to adduce evidence showing the process through which that title was acquired.

46. In this case, the parties were aware of the existing relationship between the appellant and the vendor, and the fact that the deceased was in occupation of the land for a long time. Indeed, the appellant’s mother lodged the caution with the full knowledge that the suit land had been sold to the deceased in order to frustrate the transfer to the deceased, and with full knowledge that she wanted the land transferred to the appellant so that the same could be retained in the family. Without casting aspersions, it is clear to us that there was credible evidence in support of the 1st respondent’s case that the process by which the appellant acquired his title to the suit property was fraudulent. The fact that Kahiga had not sought his wife’s consent before selling the suit land is neither here nor there because as found by the learned Judge, at the material time the law did not require a registered proprietor of land to seek spousal consent before entering into a sale agreement in respect of his/her property.

47. That brings us to the issue as to whether the sale agreement between the deceased and Kahiga was lawfully rescinded. To determine this issue, it is important for us to consider whether time was of the essence in the contract between the deceased and the vendor. In the agreements dated 12th March, 2009 and 12th August, 2009 the deceased and the vendor agreed in clause 3 of the agreement dated 12th March 2009 that: The balance of 24,000 (Twenty Four Thousand) shall be paid during LCB consent or upon transfer.

48. In the case of *Sagoo v Dourado [1993] eKLR 365*, it was held that:

“The Modern Law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of essence unless (a) The Parties expressly stipulate that conditions as to time must be strictly complied with. (b) The nature of the subject matter of contract or the surrounding circumstances show that time should be considered to be of the essence or (c) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.”

49. From our reading of the said agreement, it is clear that, whereas the parties agreed on the last payment, the parties did not set any timelines for the completion of the agreement. In those circumstances, we are persuaded as was held by this Court in *Njamunya vs. Nyaga [1983] KLR 282* that: “The principle to be acted upon in such a case is stated in *Halsbury’s Laws (4th edn) p 338, para 482*, that:

“Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties. Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by



the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify.”

50. In our view it is evident in the instant case that no notice of termination of the sale transaction was issued to date and that means, which is trite law, that the original sale agreement over the suit property duly entered between the vendor and the deceased on 12th March, 2009 and 12th August, 2009 remained intact, valid and enforceable.
51. As to whether the learned Judge was correct in granting the orders in issue, we find no reason to fault the learned Judge in the reliefs granted in the impugned judgment. Ultimately, we find this appeal without merit and dismiss it with costs to the respondents.
52. Orders Accordingly.

DELIVERED AND DATED AT NYERI THIS 21ST DAY OF AUGUST, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

