



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OUKO (P), ASIKE-MAKHANDIA, & MUSINGA, J.J.A.)**

**CIVIL APPEAL NO. 117 OF 2019**

**BETWEEN**

**KAZUNGU FONDO SHUTU.....1<sup>ST</sup> APPELLANT**

**HABEL KAHINDI.....2<sup>ND</sup> APPELLANT**

**AND**

**JAPHET NOTI CHARO.....1<sup>ST</sup> RESPONDENT**

**AFRI-SINE LIMITED.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Judgment and Decree of the Environment and Land Court

at Malindi (J.O. Olola, J.) delivered on 28th March 2019

*in*

***E.L.C. Case No. 172 of 2013 Consolidated with E.L.C Case No. 65 of 2015.)***

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**JUDGMENT OF THE COURT**

1. The appellants are both residents of Mbuzi Wengi area within Malindi Town. The appellants claim title and ownership of **1½ acres** of land on all that property known as **Plot No. C Malindi 10840** (the suit property).
2. The appellants allege that the suit property was registered in the name of the 1st respondent whom they claim is their half- brother to hold it in trust for the family, who include the appellants herein. However, the 1st respondent in breach of the trust bestowed upon him subdivided the suit property and begun selling the subdivisions to third parties.
3. The genesis of the court battle between the parties herein was a suit that was filed in Malindi, viz, **Malindi ELC No. 172 of 2013** as amended on 17th September 2017 by **Kazungu Fondo Shutu** and **Habel Kahindi** Charo (*the appellants*) against their ‘half-brother’ **Japhet Noti Charo** (*the 1st respondent*) claiming ownership of the suit property. In that suit, the appellants filed a Notice of Motion seeking an injunction to restrain the defendant from further trespassing, encroaching into, dealing with or interfering with the appellants’ quiet possession and enjoyment of their share of the suit property. The appellants also sought a declaration that they are the rightful, legal, beneficial and bonafide owners of the said parcel of land.
4. In support of their claim, the appellants argued that they had acquired ownership of their portion of the land from the original parcel which comprised **2.237 Ha** through deliberations both within the family and with the Provincial Administration, which culminated in an agreement with the 1st respondent dated 7th December 2005. It was the appellants’ case that after the said agreement they had been in possession and occupation of the said portion of land until sometime in September 2013 when the 1st respondent started interfering with their quiet possession and challenging their ownership thereof.
5. The 1st respondent denied these claims in his statement of defence and counterclaim. He averred that he was the sole registered proprietor of the suit property. He further stated that the agreement dated 7th December 2005 and which the appellants had placed reliance on in their suit was entered into under duress after the appellants in the company of other unidentified persons threatened to kill him if he refused to sign

it together with a transfer in respect of the suit property. He added that he was advised by the area Assistant Chief to sign the agreement and the transfer to save his life.

6. On 28th April 2015, while the first suit was pending hearing, **Afri-Sine Limited** (the 2nd respondent/Cross appellant herein) filed the second suit, **Malindi ELC No. 65 of 2015**, against the appellants and another person known as **Kirimo Fondo Shutu**.

7. The 2nd respondent claimed to have bought from different persons 13 parcels of land, all being subdivisions of the Original Plot No. C. 10840 sometime between 2014 and 2015. The 2nd respondent sought an injunction to restrain the appellants from trespassing, gaining ingress, erecting any structures and/or in any manner interfering with its quiet and peaceful enjoyment of the 13 plots.

8. The second suit was opposed by the appellants. They stated that they were not aware that Plot No. C. 10840 had been subdivided; that if at all Plot No. C 10840 had been subdivided and subsequently sold and registered in the name of the 2nd respondent as alleged in the Complaint, then the same was done *pendente lite* ELC No. 172 of 2013 and in contempt of injunction orders issued therein on 5th September 2014; and that such actions had no legal force, and for that reason was null and void *ab initio*.

9. On 6th March 2017, the two suits were consolidated, with the consequence that the Plaintiff in the second suit (the 2nd respondent) became the 2nd defendant in the consolidated suit.

10. During hearing before the trial court, Kazungu Fondo Shutu (the 1st appellant herein) testified as PW1. He told the court that he and the 1st respondent are cousins; that the suit property first belonged to their grandfather known as Shutu Masha; and that upon his grandfather's demise the suit property was registered in the name of **Mzee Charo Shutu** whom he claimed to have been his father.

11. PW1 further told the trial court that in 1966 the Municipal Council of Malindi acquired much of the family land and allocated the same to strangers; that in 1992 the Municipal Council began the process of acquiring another parcel of land that was to be given to the Shutu family in compensation; that the Municipal Council held various meetings and discussions with the Shutu family, which meetings and discussions were attended by the 1st respondent, having been appointed by the family to spearhead the discussions on their behalf; that the Municipal Council eventually gave alternative land to the Shutu family being Plot No. C. 10840 but the 1st respondent in breach of the trust bestowed upon him by the family registered the same in his sole name and begun alienating the suit property by way of subdivision and sale, thus rendering the other family members squatters.

12. On his part, **Samuel Kariuki Mwangi**, who was the Land Registrar, Mombasa, testified as **PW2**. He told the court that records on Plot No. C 10840 had been closed on 21st April 2009 after subdivisions starting from 12241 to 12283 were registered and that some of the subdivided portions had subsequently changed hands, with only 11 parcels still remaining in the name of the 1st respondent.

13. The defence on the other hand presented three witnesses. The first witness, (DW1), was the Assistant Chief, Shella Sub-location, known as **Nichodemus Mayele Ndundi**. It is important to point out that on 9th May 2018, parties consented to having the witness statement of DW1 produced without having to call the maker.

14. DW1 stated that together with four elders they went to Shutu's home to solve a family dispute; that he was led to a bar belonging to the 1st respondent and when he got there, he found the 1st respondent surrounded by the appellants and a mob of about twenty people, threatening to kill him if he failed to sign an agreement to transfer the suit property and a transfer form in favour of the appellants; that he advised the 1st respondent to sign the documents to save his life and thereafter report the matter to the police, which he did.

15. The 1st respondent testified as DW2. He told the court that he was the son of the late Charo Wa Shutu who was the beneficial owner of a parcel of land known as Plot M5 Malindi; that some twenty years ago, he commenced the process of getting a title document for the suit property but upon realizing the difficulties involved in processing title for the whole parcel of land he decided to subdivide the suit property and acquire titles for the subdivisions.

16. When DW2 was issued with the title for the parcel No. 10840, the 1st appellant started claiming that he was entitled to a portion thereof. One day, the appellants in a group of other men approached him and demanded that he signs an agreement and transfers to them a portion of the suit property. They threatened to kill him unless he complied. The crowd locked him up in his office when he refused to sign the documents and set the office on fire. He managed to escape but with severe burns on his body. Subsequently, the same group proceeded to his office with an already prepared sale agreement and compelled him to sign it or face death. The area Assistant Chief who was called to the scene advised him to sign the agreement and transfer form. The Assistant Chief also advised him to report the matter to the Police. He did as advised, and some of those involved were arrested and charged in court. DW2 further told the court that later on the sub-divided the suit property and sold it out and he was not therefore the registered owner as at the time the suit was filed.

17. DW3 was a Director of the 2nd respondent herein. He narrated to the court how the 2nd respondent acquired title to 13 parcels of the suit property in the year 2014; that in early 2015 the appellants began encroaching on the said parcels of the suit property belonging to the 2nd respondent and started constructing semi-permanent structures thereon.

18. Vide its judgment delivered on 28th March 2019, the trial court dismissed the appellants' suit in its entirety. The suit by the 2nd respondent was also dismissed in its entirety. However, the court allowed the counterclaim by the 1st respondent.

19. Aggrieved by that determination, the appellants lodged this appeal, citing nine grounds, among them being that the learned judge failed in law and in fact by: holding that the appellants' claim was for a portion measuring 1½ acres of land comprised in portion no. 10840 held in trust by the 1st respondent but failed to address himself to the legal principles of trust; by treating their claim as one based on the agreement dated 7th December 2005 and not on the constructive and resultant trust; making a finding that the agreement dated 7th December 2005 was signed under duress; failing to appreciate that there were two separate agreements, the first one dated 5th November and the second one dated 7th December 2005; by faulting the 1st appellant's evidence that Charo Shutu was the father to the appellants; and by making a finding

that the 2nd respondent did not acquire any rights and interests in the titles transferred *pendente lite* in application of the doctrine of *lis pendens* but failed to make a declaration that the titles so acquired were null and void.

20. In their submissions, the appellants urged us to find that there existed a constructive trust and the 1st respondent as a trustee breached the duty to act loyally and in good faith with regards to the trust property. The appellants urged us to look at the four elements of a constructive trust namely, promise, transfer of property, confidential relationship and unjust enrichment. The appellants placed reliance on the cases of *Charles K. Kandie v Mary Kimoi Sang [2017] eKLR* and *Twalib Hatayan Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & Others [2015] eKLR* to buttress their submission on constructive trust. With regards to breach of fiduciary duty, the appellants relied on the case of *CFC Financial Servoceds v Juja Road Fancy Store [2017] eKLR*.

21. The 1st respondent on its part submitted that the suit property being Plot No. C10840 did not exist at the time of filing of the first suit before the trial court; that the suit property was not in any way ancestral land as claimed by the appellant; and that the agreement cited by the appellants had been entered into under duress.

22. On its part, the 2nd respondent/cross appellant argued that the claim by the appellants was on 1½ acres of Plot No. C 10840; that the suit property measured about five acres and the order of the court in Malindi ELC 172 of 2013 was in respect of the 1½ acres claimed by the appellants; that the share claimed by the appellants was neither identifiable nor ascertainable and therefore the order of the court issued in Malindi ELC 172 of 2013 vide a ruling dated 5th September 2014 was incapable of enforcement; that the order issued by the trial court in ELC 172 of 2013 was only in respect of the 1½ share claimed by the appellants; and that there was no order stopping the 1st respondent from alienating the remaining portion of the land and transferring it. The 2nd respondent cited, *inter alia*, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR* and *Maithene Malindi Enterprises Ltd v Kaniki Karisa Kaniki & 2 others [2018] eKLR* to buttress its arguments.

23. On the basis of the memorandum of appeal and the submissions filed by the parties, we identify the main issues for determination as follows:

- a) Whether the 1<sup>st</sup> respondent held the suit property in trust for the appellants;
- b) Whether the 1<sup>st</sup> respondent was bound by the agreement between the appellants and himself to transfer 1½ acres of Plot C.10840 to the appellants; and
- c) Whether the 2<sup>nd</sup> respondent had acquired good and clean title to the suit property.

24. The mandate of this Court on a first appeal as set out in *rule 29(1)* of the *Court of Appeal Rules* requires the Court to re-appraise the evidence and draw its own conclusion. In *Peters v Sunday Post Limited [1958], EA 424*, the Court of Appeal for Eastern Africa stated that:

*“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or approved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”*

#### **Whether the 1<sup>st</sup> respondent held the suit property in trust for the appellants**

25. It is not disputed that the family of Mzee Charo Shutu suffered land injustices when the Municipal Council of Malindi erroneously allocated a huge portion of the family’s land to strangers. The family was able to reclaim their land from the Municipal Council through a process that involved serious negotiations and discussions with the Municipal Council of Malindi and the Provincial Administration. The appellants argue that the reclaimed land was ancestral, which the 1st respondent registered in his sole name and which he had alienated in breach of the trust bestowed upon him. The 1st respondent argues on his part that the suit property was not ancestral land and that he inherited the same from his late father and obtained title to it.

26. It is not in dispute that the 1st respondent was issued with a title for portion No. 10840 which he claims to be a small portion of the parcel of land known as Plot M5 Malindi which belonged to his late father. Mzee Charo Shutu had acquired this land from his father, Shutu Masha, by way of inheritance. The rights of a registered owner of property are clearly set out under *sections 24, 25 and 26* of the *Land Registration Act, 2012*. *Section 24(a)* provides:

*“24. Subject to this Act*

*(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

27. *Section 25(1)* provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by *section 28* of the *Land Registration Act* as not requiring noting in the register.

*Section 28* of the *Land Registration Act* provides that:

**“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—**

**(a) .....**

**(b) trusts including customary trusts;”**

28. The concept of trust must however be proved. This Court in the case of Mumo v Makau [2002] 1EA.170, held that **“trust is a question of fact to be proved by evidence.....”** See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982.

29. In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to Twalib Hatayan Twalib Hatayan & Anor v Said Saggah Ahmed Al-Heidy & Others [2015] eKLR and re-stated the law on trusts as follows: -

**“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as**

**“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”**

**Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”**

**In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...**

**A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...**

**This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell’s Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor’s intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell’s Equity at p.177) (supra).”**

30. The argument by the appellants was that there was a constructive trust which was breached by the 1st respondent. The 1st respondent on the other hand argued that he inherited the suit property from his late father, and that the suit property was just a small portion of Plot M5 which belonged to his late father.

31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

**“The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”**

32. The onus to prove existence of a trust lay squarely on the appellants. **Section 107** of the **Evidence Act** further provides that:

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

33. **Section 108** of the **Evidence Act** provides as follows:

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

34. **Section 109** of the aforementioned Act again provides that:

**“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.”*

35. In this appeal, the appellants alleged that the 1st respondent was their half-brother. During cross-examination before the trial court, the 1st appellant conceded that Mzee Charo Wa Shutu was the 1st respondent's father and elder brother to his (1st appellant's) father known as Fondo Shutu Masha. We agree with the trial court's finding that more evidence needed be adduced as why Mzee Charo Wa Shutu would inherit all the land from the appellant's grandfather, Shutu Masha, when the appellant's own father was alive and had his own children. We agree with the trial court's finding that there was nothing placed before it to demonstrate that the family had agreed that the 1st respondent's father would hold the land for the benefit of the wider family members.

36. Further, the Court cannot imply a constructive trust since there was no evidence placed before the trial court that the 1st respondent acquired the property by way of any wrongdoing and therefore unjust enrichment cannot be inferred.

37. The circumstances of this appeal are distinguishable from the circumstances in *Charles Kandie* (supra) which was cited by the appellants in their submissions. In that matter, the court noted that there was no constructive trust but went on to find that there was a resulting trust.

38. Accordingly, we find that there was no evidence adduced by the appellants before the trial court to show that there existed any form of trust. The 1st respondent cannot be regarded as a trustee and therefore cannot be said to have acted in breach of trust by alienating a portion of Plot C.10840. This ground of appeal is therefore without merit and must fail.

**Whether the 1st respondent was bound by any agreement between the appellants and himself to transfer 1½ acres of Plot C. 10840 to the appellants.**

39. The appellants argued that the learned judge erred when he made a finding that the agreement entered into between the parties where the 1st respondent was to transfer 1½ acres of Plot No. C 10840 to the appellants was entered into under duress.

40. In his evidence before the trial court, the 1st appellant told the court that by an agreement dated 7th December 2005, the 1st respondent voluntarily donated 1½ acres of the land to the two appellants and another person; that when the appellants moved to the land and began fencing it, the 1st respondent moved to court and obtained orders of injunction against the 1st appellant. On his part, the 1st respondent noted that the agreement had been entered into under duress; and that he only signed the agreement on the advice of the area Assistant-Chief (DW1) in order to save his life.

41. The 1st respondent told the court that the appellants in the company of a group of other men accosted him on an unidentified date and demanded that he signs an agreement and transfers of a portion of the suit property; that they threatened to kill him unless he complied; that when the 1st respondent refused to sign, the crowd locked him up in his office and set it on fire. The 1st respondents stated that he escaped with burns and that some of the culprits had been charged before court. It is important to point out that the particulars of the charge or copies of the charge sheets were not produced before the trial court. That notwithstanding, the trial court noted at paragraph 47 of its impugned judgment that during cross-examination, PW1 (the 1st appellant) admitted that he was aware that one of his brothers had been charged for the offence of “burning” the 1st respondent.

42. Regarding the agreement dated 7th December 2005 and the transfer form, the 1st respondent told the court that he was coerced into signing the agreement after the area Assistant Chief (DW 1), who had been called to the scene advised him to do so to save his life. That evidence was corroborated by the Assistant Chief. Although DW1 did not testify, his statement was produced and admitted by consent.

43. **Section 20A** of the **Evidence Act Cap 80** deals with statements admitted into evidence by consent. The relevant sub-sections are **(2)** and **(4)** which state as follows:

**“20A. Proof of written statement by consent**

**(2) A copy of the statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.**

**(4) If a party does not object under subsection (2) or if the parties agree before or during the proceedings in question that the statement may be so tendered in evidence, the statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.”**

44. The evidence of DW1 corroborated the evidence of the 1st respondent that he signed the agreement and the transfer forms to avoid being attacked and/or killed by the appellants and a mob that accompanied them. In the circumstances, the trial court was right in its finding that the agreement dated 7th December 2005 did not afford the 1st respondent opportunity to negotiate, seek legal advice and/or exercise his free will in appending his signature on the agreement and the transfer form.

45. The trial court, in addressing the meaning of the term duress made reference to the case of *Jayantilala Lalji Gandhi & another v Mavji Ruda [1986] eKLR*, where the court quoted *Cheshire & Fifoot's Law of Contract, 8th Edition at page 281* thus: -

**“Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e., threats calculated to produce fear of loss of life or bodily harm. It is a part of the law which nowadays seldom raises an issue.**

***That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort...***

46. The Court in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR*, held:

***“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”***

47. The existence of duress is sufficient to vitiate a contract. Accordingly, we are satisfied that the circumstances under which the 1st respondent executed the agreement and the transfer form were tainted with threats and coercion, rendering the agreement so executed unenforceable. In any case there was no consideration for the transfer.

**Whether the 2<sup>nd</sup> respondent acquired good and clean title to the suit property**

48. The 2nd respondent has argued that it bought 13 parcels of land, all being subdivisions of the original title Plot C. 10840 from various persons in the year 2014 and was thereafter issued with Certificates of Title for each of them. It is important to note that the 2nd respondent did not present before the trial court any sale agreement between the alleged vendors and itself.

49. The argument by the 2nd respondent on the one hand was that it was a bonafide purchaser for value without notice and that it was unaware of the fact that a portion of the land which it had bought was subject of litigation. On the other hand, the 2nd respondent appears to be saying that even though there was an order in place relating to the parcel of land which they bought, the order only related to the 1½ acres of land which the appellants were claiming, and that since the suit property measured about 5 acres, there was nothing to stop it from purchasing, as it did, the portion of land which the appellants were not claiming.

50. Vide a Notice of Motion dated 30th September 2013, the appellants had sought from the trial court orders, *inter alia*:

***“b) That pending the hearing and determination of this application inter parties, the defendant through himself, his servants, agents, employees, nominees, assigns or any other person or authority connected therewith be restrained by an Order of prohibitive injunction from continuing to trespass, to enter into, to deal with or in any way, interfering with the plaintiff’s/applicant’s quite possession of their share of land comprised in Plot C. 10840 situated within Malindi.”***

51. The appellants did not exhibit by way of annexures to their affidavit in support of their application any map or sketch drawing to show the location of their alleged 1½ acres on the Plot C. 10840.

52. The trial court vide its ruling dated 5th September 2014, issued an order restraining the defendant, his servants, agents, employees, nominees or any other person or authority from alienating, transferring or charging the suit property pending the hearing and determination of the said application.

53. We agree with the 2nd respondent that the suit property as pleaded by the appellants before the trial court was the 1½ acres which the appellants were claiming from the 1st respondent. The order of the court needed to be more specific as to whether it was in respect of the 1½ acres or the entire parcel of land. In our view, the suit property did not extend to the remainder of the land belonging to the 1st respondent.

54. We are persuaded by the 2nd respondent’s submission that the appellants did not establish any nexus between the claimed 1½ acres and the 13 plots it purchased from the 1st respondent. The orders granted by the trial court were in respect of the suit property (1½ acres) and this would mean that the 1st respondent was at liberty to deal with the rest of the larger property being the remainder of Plot C. 10840. It follows, therefore, that the sale of the 13 plots did not violate the interim orders issued by the trial court on 5th September 2014.

55. The last issue is whether the 2nd respondent was a bona fide purchaser for value without notice. The registration of the 13 parcels of land took place between 25th September 2014 and 20th January 2015. The first suit, ELC 172 OF 2013, was between the appellants and the 1st respondent. The 2nd respondent was not a party to that suit and therefore the 2nd respondent could not have known of any order that may have been issued by the trial court in respect of the suit property.

56. The 2nd respondent stated that no inhibition or caution had been registered against the property at the relevant land registry.

57. In *Katende v Haridar & Company Limited [2008]2 EA 173*, the Court of Appeal in Uganda held as follows:

***“... a bona fide purchase 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 purchase 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 had 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 purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”*

58. From the foregoing, we find and hold that the 2nd respondent was a bona fide purchaser for value without notice.

59. In conclusion, we find the appellants’ appeal lacking in merit and dismiss it with costs to the respondents. We allow the 2nd respondent’s cross appeal with costs to be paid by the appellants.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**