



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MURGOR, JJA)

CIVIL APPEAL NO. 255 OF 2011

BETWEEN

JOEL MBATARU KANYOKO.....APPELLANT

AND

LUCY WAMBUI MBATARU.....1<sup>ST</sup> RESPONDENT

LARRY GREGORY KISWILI NGUTTER.....2<sup>ND</sup> RESPONDENT

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (D. K. S. Aganyanya, J) dated 11<sup>th</sup> February, 2011*

*in*

*Civil Suit No. 511 of 2005)*

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JUDGMENT OF THE COURT

The appellant herein, **Joel Mbataru Kanyoko (Joel)** has been pursuing the ownership of LR No. 209/7383/205 situate in Kimathi estate, Nairobi (**kimathi plot**) for the last 28 years. Much of that time was spent before the High Court which, for reasons that are said to have been 'beyond the court's control', did not conclude the matter until 11<sup>th</sup> February, 2011 when the Judgment now under challenge was delivered by **Aganyanya, J.**

At the time of filing the suit on 20<sup>th</sup> February, 1990, the kimathi plot was registered in the name of the 1<sup>st</sup> respondent, **Lucy Wambui Mbataru (Lucy)**, who was at the time his wife. How she became so registered is for later. Joel filed the suit because he had fallen out with Lucy and she was about to dispose of the plot which she had advertised for sale in October 1989. He proceeded to register a caveat on 9<sup>th</sup> November, 1989 to protect his interest and then filed the suit seeking a declaration that Lucy held it in trust for both of them. He also applied for an injunction for preservation of the property pending the hearing of the suit, and to prevent the Registrar of Titles from rectifying the register without his involvement. **Mbito, J.** granted the injunction *ex parte* on 18<sup>th</sup> May, 1990.

One member of the public who saw the newspaper advert for sale of the kimathi plot in 1989 was the 2<sup>nd</sup> respondent, **Larry Gregory Ngutter Kiswili (the deceased)**, who died during the pendency of this appeal in 2012. When he saw the advert, he looked for the owner at the address given and found her. He confirmed from the documents presented to him and searches made at the land registry, that it belonged to Lucy and they discussed and agreed on the price. He made a part payment on 6<sup>th</sup> October, 1989 and subsequently proceeded to an advocate's office where a sale agreement was executed on 18<sup>th</sup> January, 1991 and the full deposit was paid. He then applied for a loan from Housing Finance Co. Ltd (**HFCK**) for completion of the purchase price and this was granted. The purchase was completed on 9<sup>th</sup> July, 1991 when the transfer to him and the charge to HFCK were registered. According to the deceased, the transaction was above board and he was not aware of any dispute between Lucy and Joel or any injunctions issued by the court as he was not a party and was never served with any court documents. A caveat earlier registered against the Title had already been removed by the Registrar of Lands.

In view of the sale of the plot, Joel applied in August 1992 and was granted leave to amend the plaint. He enjoined the deceased alleging that he was living with Lucy as husband and wife and they were both aware of the injunction issued by Mbito, J. but nevertheless had the plot transferred in contempt of the order. He pleaded fraud and sought orders for nullification of the transfer to the deceased. The deceased denied ever living with Lucy as alleged or being aware of any dispute on the plot and pleaded his innocence as a buyer.

The marriage between Joel and Lucy came to an end on 9<sup>th</sup> May, 1994 when **Bosire, J.** dissolved it and a decree absolute issued pursuant to a petition filed by Lucy on 26<sup>th</sup> January, 1994. In view of that development, the plaint was further amended in July 1996 seeking further declaratory orders against Lucy and seeking orders directed at the Registrar of Titles to cancel the deceased's name as the owner of the plot and register Joel. The registrar was not enjoined in the suit.

So how did Lucy become the sole proprietor of the plot before selling it to the deceased? Joel says the plot was acquired by him from the Nairobi City Council and he was the registered owner since 1972. He owned other properties including two plots in Ngong, Nos. 8302 and 8303, and plot No. S.273 situate in Riruta. They were all acquired before he met and married Lucy in December 1984, after the death of his first wife in 1979. He had also acquired a loan on the security of the Riruta property.

According to Joel, on 15<sup>th</sup> May, 1986, he transferred the kimathi plot to Lucy in her maiden name in a scheme arranged between them that would not only enable Lucy to get owner/occupier allowance from her employer, but also enable her to obtain a loan to repay the Riruta property loan and leave some money to start a joint venture business with her on the Ngong properties. That is how they got a loan of Sh.200,000 from HFCK after the transfer of the kimathi plot to Lucy. In his words, the purported sale to Lucy was a mere 'pretence' and a lie to HFCK.

But that story was denied by Lucy. Yes, she was married to Joel in 1984 and found him owning those properties. The Riruta property was their matrimonial home, but Joel did not tell her about the kimathi plot. At the time, he was unemployed and was struggling with a loan on the Riruta property which was on the verge of auction in July 1985. That is when he disclosed to her the kimathi plot and said he would sell it to save the Riruta property which was bigger. She agreed to buy it instead of letting a stranger do so and he agreed. She paid him a deposit of Sh.80,000 from her savings and a receipt was issued to her by Joel's advocates. She then applied for and obtained a loan from HFCK for Sh.200,000, the proceeds of which were released to Joel by HFCK lawyers on 25<sup>th</sup> August, 1986. According to her, the transaction was purely commercial and had nothing to do with a family arrangement or the use of her maiden name which she had never changed, or the running of a joint venture in Ngong, which Joel never invested in.

That is the property she sold openly to the deceased after confirming that there was no caveat or other prohibition registered against it. She was not aware of any court order issued against her since her marriage to Joel had all but ended by July 1989 and they had ceased cohabitation. The HFCK loan was accumulating arrears and she started receiving threatening letters from the lender. That is when she decided to dispose of the plot to cut her losses. The deceased knew nothing about their problems and he was therefore an innocent purchaser.

The suit was heard by several judges: **Mbito, J.** who heard the full evidence of Joel between 23<sup>rd</sup> February, 1998 and 25<sup>th</sup> February, 1998; **Aganyanya, J.** who recommenced the hearing afresh on 13<sup>th</sup> March, 2001 and partly reheard Joel before **Ransley, J.** took over on 12<sup>th</sup> July, 2005 and completed the evidence of Joel and partly heard one other witness. He subsequently retired and **Aganyanya, J.** returned on the scene on 29<sup>th</sup> May, 2007. The parties agreed to set aside all the evidence heard before Ransley, J. and urged Aganyanya, J. to proceed from where he had left the matter. He heard the evidence of Joel's three other witnesses, as well as Lucy's and the deceased's evidence up to October 2010, before delivering the judgment on 11<sup>th</sup> February, 2011.

After reviewing the evidence, Aganyanya, J. made findings that Joel voluntarily sold and transferred the kimathi plot to Lucy in a commercial transaction; that there was no 'pretence' of a sale as asserted by Joel; that Lucy advertised the plot for sale and that is how the deceased came to know about it; that the sale of the plot to the deceased was valid and devoid of fraud; that the caveat registered by Joel was lawfully removed before the transfer was registered; that the deceased was an innocent purchaser for value without notice of any defects in the title; that there were no particulars of fraud alleged against the deceased; and that the orders sought against the Registrar of Titles could not be granted since the Registrar was not joined as a party to the suit.

Those are the findings that aggrieved Joel who challenges them on 10 grounds listed in his memorandum of appeal. Essentially, he faults the trial court for failing to hold that **section 52** of the **Transfer of Property Act** applied to stop any sale of the plot; failing to hold that the sale and transfer to the deceased was null and void by virtue of the doctrine of *Lis Pendens*; failing to hold that both Lucy and the deceased were in contempt of a court injunction; failing to hold that there was no sale of the plot between Joel and Lucy but only a family arrangement; failing to hold that Lucy had no valid defence to the suit; disregarding the submissions made by Joel; failing to find that Lucy had no transferable interest in the plot; failing to hold that failure to reply to the amended amended plaint amounted to admission; and finally failing to exercise his discretion judiciously.

At the hearing of the appeal on 1<sup>st</sup> October, 2018, it transpired that Joel had been aware that the deceased had died four years earlier on 19<sup>th</sup> December, 2012, but no application had been made in the appeal to substitute his legal representative. The appeal against the deceased had thus abated and an order was made accordingly. The appeal thus proceeded against the remaining respondent, Lucy, only. Learned counsel for him, **Mr. Ndirangu**, instructed by M/s Kirundi & Company Advocates, then proceeded to withdraw the prayers directed at the Registrar of Titles and restricted the appeal to two issues which he urged orally.

He firstly took up the issue of the sale between Lucy and the deceased and submitted that it was a nullity because it was done during the pendency of a suit. He observed that there was a caveat registered against the title as well as an order for injunction which were ignored, and therefore the doctrine of *Lis pendens* applied to nullify the transaction. No particular authority was cited for those submissions, despite a promise by Mr. Ndirangu to file a list of authorities after the hearing.

Secondly, urged counsel, the trial court did not properly evaluate the evidence on record when it held that the transaction between Joel and Lucy was commercial and not a domestic arrangement. Counsel referred to the deed of assignment which was signed between Joel and Lucy, effectively transferring his interest on 16<sup>th</sup> May, 1986. He also referred to the evidence of Lucy on the transfer which, in his view, corroborated the version of events explained by Joel. He submitted in view of such evidence that the trial court was wrong to find that the sale was a commercial transaction.

In response, learned counsel for Lucy, **Mr. Mwiti**, holding brief for Mr. Okinyi submitted that the appeal turned on whether fraud was

properly pleaded and proved to the required standard. In his view, there was no plea or proof of fraud; the doctrine of *lis pendens* was not applicable; correct findings of fact were made on the basis of the evidence on record; and where discretion was required to be exercised, the trial court did so judiciously. He called on us to dismiss the appeal as it lacked merits.

We have considered the issues raised by the appellant in this appeal by way of a retrial in order to draw our own inferences of fact and arrive at our own conclusions. See **Rule 29 (1) (a)** of the **Court of Appeal Rules**. As stated earlier, two issues or broad grounds of appeal were urged, namely: whether the transaction between Lucy and the deceased was a nullity; and secondly, whether the trial court properly evaluated the evidence on record, especially on the transaction between Joel and Lucy. Before we examine the two issues, we must pronounce ourselves on the position of the deceased, the appeal against whom was marked as abated. 'Abatement', according to **Black's Law Dictionary, Tenth Edition**, is 'the act of eliminating or nullifying'. It is also said to be 'putting an end to a law suit'. In the case of **Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR**, this Court pronounced the effect of abatement as follows:

***"The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."***

The most crucial finding made by the trial court in favour of the deceased in this matter was that he was an innocent purchaser of the kimathi plot for value without notice of any irregularity or dispute. Joel sought to challenge that finding in this appeal. By dint of the order of abatement, it is our view that any challenge to that finding and consequently to the title of the deceased is foreclosed. It follows that Joel may only be compensated in damages, if he succeeds in the appeal against Lucy, the remaining respondent.

And now to the first issue. It is correct, as stated by Joel, that the trial court said nothing about **section 52** of the **Transfer of Property Act** or the doctrine of *lis pendens*. But there was a good reason for this. There was simply no pleading made in the plaint relating to those issues despite the three chances given to Joel to amend the plaint over a period of six years. No issue was framed for determination based on such pleading and no submissions were made on it. In those circumstances, it would be idle to blame the trial court for failure to decide on the issues. It would even be worse for the appellant to raise the issues before us for the first time. As this Court has stated before regarding new issues that are raised before it for the first time:

***"In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau vs Nyakwara [1986] KLR 712)"***

See the case of **George Owen Nandy vs Ruth Watiri Kibe [2016] eKLR**.

And in **North Staffordshire Railway Company vs Edge [1920] A.C. 254, Lord Birkenhead, L.C.** explained the reason why an appellate Court is reluctant to entertain new points on appeal:

***"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."***

Furthermore, it has always been held by courts that parties are bound by their pleadings and that evidence which is at variance with the pleadings is for rejection. For emphasis, we will only cite this Court's decision in **Independent Electoral and Boundaries Commission & Anor. vs Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

***".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

Our own Supreme Court has weighed in on the matter as follows:-

***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."***

See **Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR**.

The express pleading made by the appellant in his amended amended plaint was that Lucy had no transferable interest in the kimathi plot and that she fraudulently transferred it to the deceased. That is the case upon which evidence was directed and the case the trial court evaluated.

For the above reasons, we reject the complaint raised by the appellant in its first ground of appeal.

The 2<sup>nd</sup> and final issue was on evaluation of the evidence, particularly pertaining to acquisition of the plot by Lucy. No fraud was pleaded in respect of the transfer between Joel and Lucy. The particulars of fraud pleaded in the amended amended plaint dated 18<sup>th</sup> June, 1996 were purely directed at the transaction between Lucy and the deceased on the basis that there was a caveat registered against the Title and an injunction, both of which Lucy and the deceased were aware of, but ignored. Allegations of fraud have been held to be of a serious nature and have to be specifically pleaded and proved. See Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (2000) eKLR. In the case of Richard Akwesera Onditi vs Kenya Commercial Finance Company Limited (2010) eKLR, it was stated that fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability. As stated earlier, the trial court examined the evidence on record, and made a finding that the deceased committed no fraud. That finding is not challenged in this appeal and therefore, we are not at liberty to re-examine the transaction between Lucy and the deceased.

But Joel testified strongly on the acquisition of the plot by Lucy, contending that she had no transferable interest. The evidence on this is summarized above and was to the effect that despite his admitted execution of the Deed of Assignment of the plot to Lucy on 16<sup>th</sup> May, 1986 and the subsequent registration at the Land Titles Registry in Nairobi on 23<sup>rd</sup> May, 1986 in favour of Lucy, all that was a ruse, a stratagem, which conferred no interest to Lucy, but was only meant to hoodwink HFCK to advance some business loan to her. It was a 'family arrangement', so he said. We may quote some excerpts of his evidence in that regard:

In examination in chief, he stated in part:-

*"I agreed with my wife - 1<sup>st</sup> defendant that I pretend I was selling my Kimathi House to her. She was still using her maiden name Lucy Wambui Kariuki. This would enable her to claim owner occupier House allowance from her employer in respect to the Kimathi House and we would use the house to get a loan to start a catering school on the Riruta House - 1/4 acre. We would use the Kimathi House after the so called sale and mortgage it for the intended loan after same has been transferred to her name. It was clear between us that there was no money to pass from her to me."*

.....

*"We approached Housing Finance to release Kshs.200,000/= but they insisted the applicant must show she had paid her share of kshs.80,000/=. We had no money so we approached a family friend the late Paul Kamau advocate and persuaded him to issue us with a receipt to show we had paid the money. He did so and the receipt, dated 2.10.85 is on page 19 (exhibit 9). No money had been paid to the late Kamau but he agreed to give us the receipt to present to HFCK. 1st defendant was not going to pay any money. This was an arrangement between me and the late Kamau. Housing Finance Company of Kenya released Kshs.194,530/35 thought the firm of Ransley & Awori in their letter dated 25.8.86 - page 41 (exhibit 10)."*

And in cross examination, he testified in part:

*"Kimathi property was registered in my name. Bought it on tenant*

*- purchase scheme from Nairobi City Council. - 12.3.71 (paid kshs.2,500/=. Paid full balance on 10.12.85 - 24,035/=. I was not given any document of ownership because I had agreed with 1<sup>st</sup> defendant to transfer the plot to the 1st defendant. The document which came out was in 1<sup>st</sup> defendant's name. - (page 27 to 39 of record). I transferred all my interests to the 1<sup>st</sup> defendant. Document was properly made and witnessed and signed. It was registered by Nairobi city council. My intention then was to transfer all my interest to the 1<sup>st</sup> defendant. Nairobi city Council accepted and recognized this transfer. Lease was prepared in respect of this property to the 1<sup>st</sup> defendant. (Page 24) which was registered at the Lands Office. I recorded nothing to show I had entered into a family arrangement over this house with the 1st defendant. Nobody else was involved."* .....

.....

*"I signed an agreement of the Kimathi house in favour of 1st defendant. When I did I was very much of sound mind. I was not illiterate. I understood it was a legal document binding on the parties. I understood I was transferring my interest in that property to my wife for the purpose we had agreed. This was to raise fund to develop the school. It was in her name to enable her to get a loan. The loan was obtained from H.F.C.K. 1<sup>st</sup> defendant applied for a loan of shs.200,000/= she gave as a reason she was buying the house. The application was successful. Money was received shs.194,000/=. It was disbursed to me as she instructed HFCK. I got a cheque from Ransley & Awori Advocates."*

.....

*"I am aware that to get a loan purchaser must show that they have paid part of the purchase price. It did not happen in the case. I pleaded with Paul Kamau he gives us a receipt for Kshs.180,000/=. It was a fiction."*

**Question:** *It is your evidence that Mr. Paul Kamau would put his reputation on the line to state a falsehood and give fictitious receipt.*

**Answer:** *He did.*

*I have seen the receipt.*

See page 19 of exhibits.

It has a name receipt. It says kshs.80,000/= received from Lucy W.

Kariuki. It is signed by Mr. Kamau. Page 42 - receipt from KFC.

What is the difference between this receipt and that at page 19.

The only difference is one is real and other not. If Paul Kamau got the money he did not give it to me."

.....  
"**Question:** I put it to you that the transaction of changing the property to your wife amounted to obtaining money by false pretences.

**Answer:** I think we were pretending we were doing these things with her. We were lying to HFCK in saying we were selling the house."

And so there it was; a 'family arrangement' based on falsehoods which the appellant sought to have the trial court endorse as a perfectly legal manner of transacting business. The trial court made no finding on the legality of the transaction but instead disbelieved Joel on his evidence and rejected it. The court chose to accept the evidence of Lucy on the manner and reason for acquisition of the plot. We may similarly cite a few excerpts of her evidence:-

"Paragraph 7 of plaintiff is talking of property No. L.R 209/7383/2005- which was in Kimathi Estate - House No. E 33 plaintiff transferred this property to me. S273 Dagoretti/Riruta matrimonial home then - by Kenya Finance Corporation which wanted to auction it.

One day I went to this plot our home - and found plaintiff who told me the home was to be auctioned over a loan he had taken from Kenya Finance Corporation. Plaintiff was unable to repay the loan taken before we got married. We continued talking. He said he could not let this property go because it was more spacious, and more constructions could be done there. he said had an alternative property he could sell. This is how he told me about Kimathi property. I had not known anything about it. He said he wanted to sell the Kimathi property to redeem the Riruta property. I got interested. 2 days later I went to TSC to find out what facilities I was entitled to. I found out that TSC could recommend me to buy a house or I could get TSC to recommend, me to HFC to give me money to build or buy a house. With this information I went home and told the plaintiff I was an interested buyer of the Kimathi house. Plaintiff supported the idea. I went back to TSC. And told them I wanted to buy a house. TSC gave me a letter to take to National Bank Kenya. National Bank of Kenya gave me another letter to take to HFCK and was granted permission to buy the house. House at Kimathi was valued at ksh.280,000/ I was required to raise kshs 80,000/= and pay to the seller. Produce proof that I had paid this money to HFCK. The HFCK would grant the balance of kshs.200,000/= I paid Ksh 80,00/= to the plaintiff in house and then we went to Moses Kamau and Co's office, where we obtained a receipt. (See plaintiff exhibit 9 at page 19). This is the receipt ksh.200,000/= was paid to the plaintiff. Process was by the firm of Ransely and Awori advocates.

I see a letter from the firm of advocates dated 25/8/86 addressed to me. (LR 209/7383/205). Letter was accompanied by a charge (1st defendant exhibit 3). I see a charge made on 15/8/1986 between me and HFCK Ltd. This is the charge which accompanied the letter dated 25/8/86 (1st defendant's exhibit No. 4) Plaintiff confirmed having this money. He immediately paid ksh.100,00/= to Kenya Finance for redeeming the Satellite home. I left the matrimonial home in 1987 15<sup>TH</sup> July. The home had not been auctioned. I don't know what the plaintiff did with the balance."

.....  
"Understanding was I was buying this property. Plaintiff did not transfer the property to me as his wife. I was buying the property which was on sale. I see an assignment from Nairobi city council to plaintiff - then to me plaintiff signed the assignment. He did it voluntarily - (plaintiff exhibit 4). After I married the plaintiff I did not change my name I had taken time using my maiden name and it remained that way to the time problem in our marriage started. Kimathi property was not family home during my marriage to the plaintiff. I did not know of its existence until the time, plaintiff suggested I buy it. I don't know if it was a family home when plaintiff had his first wife because when I found him and we courted and married one another he was at Satellite. Plaintiff did not express any sadness in selling the Kimathi house because he had to make the decision otherwise he would have lost the Satellite home."

She was not shaken in cross examination on that aspect of her evidence. In the end the trial court concluded as follows:-

"There is no doubt the plaintiff assigned all his benefits in the suit plot to the 1st defendant which she accepted by a deed of assignment dated 15<sup>th</sup> May 1986 which both parties signed. And following this assignment the city council of Nairobi granted a new lease over the plot to the 1st defendant by a lease agreement dated 16<sup>th</sup> May 1986 for the term of 83 years which was the unexpired term of the lease of 99 years previously granted to the plaintiff by the said Council. With this kind of evidence on record I don't find the plaintiff's evidence serious when he testified that he only pretended to be selling the plot to the 1st defendant, or that it was simply a family arrangement to enable the 1<sup>st</sup> defendant to get owner-occupier house allowance from the Teachers Service Commission."

.....  
*"There was no dispute that the 1st defendant applied for a loan from Housing Finance Company of Kenya. She said it was to assist her buy the suit plot No.209/7383/205. The plaintiff does not say anything about it. However in the 1st defendant's bundle of documents which are part of this court record, by letter dated 25th August 1986, the firm of M/s Ransley & Awori Advocates who then acted for Housing Finance Company of Kenya handed over a cheque for kshs.194,530/35 to the plaintiff being final payment for the suit property. If the plaintiff insists that he never sold the suit plot to the 1st defendant, what was this cheque for Kshs.194,530/35 from M/s Ransley & Awori Advocates to him for? He says nothing about it and does not deny receiving it. I agree with the 1st defendant's evidence that this was the final payment of the purchase price of the suit plot after the initial payment of Kshs.80,000/= the 1st defendant paid to him directly earlier. In the face of the evidence adduced by the plaintiff and the 1st defendant I agree with and accept the latter's evidence that there was no pretence in the sale of L.R. No.209/7383/205 by the plaintiff to the 1st defendant and that the transaction was purely of a commercial nature and the question of simple family arrangement does not come in."*

We have carefully re-examined the evidence on record on this aspect of the matter and we find no reason to depart from the findings made by the trial court. Much of the evidence turned on the credibility of the witnesses and the trial court chose to believe Lucy. As the trial court was in a better position to assess credibility after hearing and seeing the witnesses, we have no reason to doubt the court's assessment. At all events, it would have been extraordinary for the court to endorse the transaction put forth by Joel, clouded as it was by admitted and deliberate falsehoods. The complaint that the trial court did not properly evaluate the evidence is baseless and we reject the second ground of appeal also.

It follows that the appeal against the 1<sup>st</sup> respondent has no merits and we order that it be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of March, 2019.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**