



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 81 OF 2011

BETWEEN

DISMAS WAFULA.....1ST APPELLANT
JACK SOITA WAMBUA2ND APPELLANT
ZAKAYO KAKAI3RD APPELLANT
DAVID JANDI4TH APPELLANT
CHRISTOPHER WABWIRE5TH APPELLANT
ISAACK MWAKWE6TH APPELLANT
FESTUS KHASIANI7TH APPELLANT
JOHN KADI8TH APPELLANT
GEORGE COSMA KAGHALI9TH APPELLANT
NORAH SAMMY L. OGANA10TH APPELLANT
KEPHA IMBUSI11TH APPELLANT
HESBORNE NGANYI12TH APPELLANT
CHARLES SUDI13TH APPELLANT
HELLEN JAHENDA LIVAI14TH APPELLANT

AND

DISHON MUDEMBEI.....1ST RESPONDENT
REUBEN S. MUDEMBEI2ND RESPONDENT

JOHN ASAMBU SABATIA3RD RESPONDENT

LEAH USIDE SABATIA4TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega Lenaola, J) dated 22nd
February, 2011

in

H.C.C.C. NO. 245 OF 1990)

JUDGMENT OF THE COURT

This appeal involves a dispute over a parcel of land known as *Land reference No. Kakamega/Soy 113 (the suit property)* in Soy Settlement Scheme which the respondents claim at all material times belonged to their father, *Sabatia Musiyani Asambwa, (Sabatia)* the 1st defendant, while the appellants claim that at all times it belonged to the respondents' grandfather, *Musiani Asambwa (Musiani)*. The reasons for this will become apparent later.

By an Amended Complaint dated 28th May 200, *Dishon Mudembei Sabatia*, the 1st respondent, *Reuben S. Mudembei*, the 2nd respondent *John Asamba*, the 3rd respondent and *Leah Sabatia*, the 4th respondent in the present Appeal, filed a suit in the High Court at Kakamega (HCCC No. 245 of 1990) against Sabatia and 17 Others, seeking, among other orders;

1. *Cancellation of the defendants' various title deeds resulting from subdivision of the suit property known as Plot number 113, Soy Settlement Scheme.*
2. *An Injunction restraining the defendants from dealing in any manner with the suit property.*
3. *An order compelling the 1st defendant to transfer a portion of the suit property to the plaintiffs.*
4. *An order for eviction of the 2nd to 18th defendants from the suit property.*

The 1st, 2nd and 3rd respondents were Sabatia's sons, while the 4th respondent was his wife. The respondents stated that sometime in 1966, the Settlement Fund Trustee (*SFT*) allocated the suit property, measuring approximately 46 acres, to Sabatia as the sole allottee to hold in trust for the family. They said that they had lived on the land since its allocation and thereby acquired their own rights independent of their relationship with their father. When Sabatia was unable to repay the loan owing to the SFT, it was agreed that his sons would pay the outstanding balance, and in return he (Sabatia) would transfer the suit property to them. The respondents claimed that in breach of the aforesaid agreement, their father declined to transfer the land to them as agreed, and instead, secretly entered into agreements for sale of the land, with other persons. It was their complaint that they had since been prohibited from using the suit property, and were apprehensive that the appellants would encroach onto the land and subdivide it into smaller portions.

In a defence, through which he contended that he was the sole allottee of the suit property, Sabatia denied that he held the land in trust for the respondents. He denied entering into an agreement with them to settle the SFT loan, and was unaware of the sale of the suit property to other third parties, but in any event, he stated he was under no obligation to consult them on the transactions concerning the suit property. He subsequently filed an amended defence, this time, admitting that he held the land in trust for the respondents, which he confirmed he was willing to transfer to them. He agreed that his sons had repaid the loan owing to SFT, and claimed that the 2nd, 3rd, 5th, and 6th, appellants took advantage of his illness

and old age, and transferred the suit property to a third party, before transferring it to themselves. He stated that the respondents had rights in the suit property and were entitled to a share as their inheritance.

The 2nd to 6th respondents generally denied all averments as contained in the Complaint, while the 6th, 7th, 8th and 10th to 18th appellants denied that Sabatia was allocated the suit property by the SFT. They further denied that the respondents occupied and acquired rights to the suit property since allocation. They denied wrongfully trespassing onto the said land and chasing away the 1st respondent and his workers as alleged.

Conversely, the 6th to 18th appellants asserted that the original owner of the suit property was Musiani, the father to the Sabatia, Andrew Kesenwa, the 9th defendant and Peter Vwamu, the 10th defendant. He was the grandfather to the 1st, 2nd and 3rd respondents, and the 4th respondent's father in law. They stated that Musiani subdivided the suit property to create 5 plots namely, Kakamega/Soy/337; 338; 339; 340; and 341. Three of which he transferred to his sons, with the result that Sabatia was allocated Plot number Kakamega/Soy/340, on which he resided together with his family, including the respondents. That Musiani again subdivided Plot number 337 to create additional plots, and the 10th appellant also subdivided plot number 338, and the new portions were sold to some of the appellants and other third parties not included in the proceedings.

They further denied having any dealings with Sabatia, but insisted that the possession of the various portions of land was pursuant to lawful contracts of sale between themselves and Musiani. The appellants sought to have the Complaint struck out for failure to disclose any reasonable cause of action.

The High Court found for the respondents holding that the suit property belonged to Sabatia since he had expressly admitted the claim as set out in the Complaint, and as a consequence, there was no defence. The trial court also found that the 6th to 18th appellants had dealt with the suit property after 1990, when the said land was the subject of a suit pending in court, and that in so doing they acted in bad faith.

The appellants being aggrieved by the finding of the trial court, lodged the present appeal, claiming that the trial judge erred in law and fact in failing to hold that the appellants were purchasers for value without notice, among other grounds as raised in their memorandum of appeal.

During his submissions, learned counsel for the appellants, **Mr. David Otieno**, informed us that he proposed to consolidate the grounds of appeal into one ground, namely that the learned judge failed to properly evaluate the evidence before him, and reached the wrong conclusion that the suit property, originally belonged to the Sabatia. It was his submission that, the dispute revolved around the identity of the original allottee of the suit property, that is, whether it belonged to Musiani or to Sabatia. Counsel submitted that, Sabatia and Musiani were two different people and that the suit property belonged to Musiani; that the High Court was wrong to have overlooked witness evidence that clearly showed that Sabatia and Musiani were two different persons. It was counsel's further submission that, the High Court wrongly relied on a letter of 26th February 1991 addressed to the Registrar, High Court stating that the original allottee was Sabatia, to determine that the original owner of the suit property was indeed Sabatia without due regard of evidence to the contrary from David Oloo and James Sifuna Omari, the Land's officers, which evidence remained unchallenged.

It was counsel's further complaint that, the learned judge erred when he relied on the amended defence to find that, the suit property belonged to Sabatia, yet at no time was the suit property registered in Sabatia's name, and further he did not testify to this or at all. Counsel relied on ***Kenya Cold Storage (1964) Ltd vs Overseas Foods Services (Africa) Ltd (1982) KLR 453*** for the contention that an amendment cannot retract an admission.

As further support for the contention that the learned judge failed to evaluate the evidence, it was counsel's submission that the record did not show that any persons had been convicted as by the time the injunction was granted on 18th October 1991, the 6th to 14th appellants were not parties to the suit. They became parties on 21st May 2001, nearly 10 years after the temporary injunction was ordered. In addition,

it was submitted that the court made orders against parties who were already deceased, and persons who were not parties to the suit. Consequently, a decree against a deceased person is a nullity, and where there is no legal representative substituted, it cannot be executed. In conclusion counsel submitted that the entire suit should have been dismissed for lack of evidence.

On his part the 1st respondent, **Dishon Mudembei** who appeared in person submitted that, by way of a letter dated 11th October 1988, their father had sought a correction of his name from Musiani Asamba, to Sabatia Musiani Asambwa, which was made official through the letter. He further stated that the names specified in the Green Card from the Land Registry was that of their grandfather Daudi Musiani Jandi of ID Card No. 6498485/69.

Mr. Mudembei maintained that their father Sabatia was allocated the suit property by the SFT in 1966, which land was irregularly and unlawfully transferred to Musiani on 17th November 1993, to subvert the respondents' claim to the land. It was following the proceedings of 27th November 1990 that High Court ordered the parties to confirm the name of the allottee of the suit property, and in response to this order, the Land's Registrar notified the High Court on 26th February 1991 that the original allottee was Sabatia. It was his contention that, Zakayo had taken the suit property from Sabatia, transferred it to their grandfather, Musiani, after which he subdivided it, and sold portions to other third parties. The transfers were all presented for registration on the same date, 3rd August 1994. In his view this was unlawful as, by this time, Musiani was deceased. He died on 30th April 1994.

It was his contention that the judgment upheld the respondents' case as Sabatia admitted being the original allottee of the suit property, which he held on trust for his family. He concluded by stating that the suit property did not undergo a proper process of transfer and subdivision, and that the claim by the appellants that the land belonged to Musiani, was false.

Mr. Kahi learned counsel for the 2nd, 3rd, and 4th appellants contended that the land was allocated to Mushiangi Asambwa, meaning Sabatia, and that this was consistent with the notification of correction of name in the letter dated 11th October 1988 which indicated that Mushiangi Asambwa and Sabatia Musyani Asambwa ID No. 1932042/64 referred to the same person. Counsel further submitted that a constructive trust existed between Sabatia and the respondents who had repaid the SFT loan for the suit property. At first Sabatia denied holding the suit property on trust for the respondents, but later changed his position in an amended defence to confirm that they were entitled to have the suit property transferred to them.

Counsel asserted that the original allottee was never in dispute, as Sabatia was at all times the first allottee, having admitted that he owned the land. Musiani, was never at any time the original allottee, and only appeared on the Land Control Board consent when the suit property was transferred to him on 3rd August 1994. Counsel concurred with Mr. Mudembei that this transfer was irregular as the SFT had not consented to such transfer, and that since Musiani died on 30th April 1994, while registration of the transfer took place on 3rd August 1994, title was incapable of passing to the appellants. It was counsel's further contention that the appellants ought to have had knowledge of the existence of the respondent's overriding interest and the ensuing trust.

Counsel concluded that the learned judge correctly identified the issue, evaluated the evidence and rightly found that Sabatia was the original allottee of the suit property which he held on trust for the respondents.

In reply, Mr. Otieno, conceded that the letter of 26th February 1991 to the Registrar, High Court to the effect that Sabatia was the original allottee was produced at the instance of the court, but maintained that the contents of the letter were incorrect; that the various acts of fraud contended had been neither pleaded nor proved, and all the land purchases of the subdivided portions were for value. He submitted that, the transfers were valid, as Musiani signed the transfers prior to his demise, and the registration was effected thereafter. The respondents are aggrieved because they allegedly paid off the loan, but that this could not be the basis of a claim to the suit property, whether it belonged to their father or their grandfather.

On the correction of name counsel submitted that, in evaluating the evidence the trial court should have concerned itself with the reason for the change, but that in any event, the document of change of name, the death certificate and the statement from Criminal Investigation Department which formed a part of the respondents' Supplementary record, were not produced as evidence in the High Court. Counsel urged us to ignore the entire contents of the new supplementary record.

On the existence of a trust, counsel argued that since this was not registered against the title, no valid trust could be held to have been created.

In respect of the admissions and the reversal of his denial that the suit property was owned by his father in the amended defence, counsel submitted that the amended defence, was filed without the leave of the court, and that Sabatia had since died and was not substituted. Counsel pointed out that since there was no notice seeking to affirm the decision of the learned judge, the respondents were obliged to support the judgment on the basis of the grounds adopted by the learned judge.

This being a first appeal, we must consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. We are alive to our duty on a first appeal as stated by Sir Clement de Lestang VP in *Selle v. Associated Motor Boat Company* [1968] E.A. 123 at p. 126;

“... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

This was cited with approval by this Court’s in *Jivanji v. Sanyo Electrical Company Ltd* [2003] KLR 425 at p. 431.

The issue identified by the trial court for determination was whether Sabatia acquired the suit property to hold in trust for the respondents, and whether the respondents paid off the monies due to the original owner, the SFT, with the understanding that they would acquire shares in the land upon transfer to the Sabatia.

In its judgment the trial court in arriving at a determination of who was the original title holder, stated thus,

“...I must say that regarding the defences of the 6th – 18th Defendants; they said that they obtained the land from one, Misiani Asambwa (deceased), who was the father of the 1st Defendant. That may be so but I have shown above that the original owner, Sabatia, intended and accepted the fact that the transfer to Msiani was only done to facilitate transfer to the larger Sabatia family and any actions by Msiani should be seen with that fact in mind. There is no evidence in any event, that Sabatia ever transferred any land to any of the Defendants directly, and their claim to the contrary, is neither borne by the evidence of the Land Adjudication Officer nor the Land Registrar. No evidence was tendered by anyone who received the land directly from Sabatia, as alleged, and all the defence witnesses were alleged purchasers from persons whose titles are in question and it is instructive that save for one, none of the defence witnesses have titles to the land titles that they occupy”.

The issue of who between Musiani and Sabatia was the original allottee of the suit property was central to the case, as this would determine who between the appellants and the respondents could legitimately lay claim to the suit property, and the succeeding portions. As such, a re-evaluation of the evidence will be necessary to arrive at a determination of the original allottee.

The respondents' claim that Sabatia was allotted the suit property by the SFT in 1966, and that it was registered in the name of Mushangi Asambwa. It was their case that, Sabatia Musyangi Asambwa and Mushangi Asambwa referred to one and the same person. In support of this, they produced a letter dated 11th October 1988 to the SFT wherein Sabatia had sought the correction of his name to the effect that, Musiani Asambwa and Sabatia Musiyani Asambwa referred to one and the same person, namely Sabatia.

The appellants on the other hand contended that the suit property was originally allocated to Musiani, and further that Musiani Asambwa and Sabatia Musiyani Asambwa referred to two different people. It was their case that, the name Mushangi Asambwa, which appeared on the letter of allotment, referred to Musiani and not to Sabatia.

There is no dispute that the original allottee of the suit property in the SFT records was one Mushangi Asambwa. What is in issue is whether this name was with reference to Musiani, or Sabatia.

To answer to this, what we must first ascertain is whether the names Sabatia Musiyani Asambwa and Musiani Asambwa were with reference to one and the same person or to separate individuals, and further whether the Musiani Asambwa and Mushangi Asambwa was one and the same person.

When the evidence concerning the identities of the Sabatia Musiyani Asambwa and Musiani Asambwa is considered, there can be no doubt that Musiani and Sabatia were two separate individuals. Though their identity cards were not made available to the court, various documents show that Musiani's ID Card Number was 6498485/69, while Sabatia's ID Card No. was 1932042/64.

We have also seen a distribution and sale agreement made between Musiani on the one hand and his sons on the other dated 19th November 1989. We will consider this agreement in detail below, but for now, the agreement provided that the owner of the suit property, Musiani of ID Card Number 6498485/69 had agreed to distribute his land amongst his sons, including Sabatia of ID Card No.1932042/64. The agreement is thumb printed by Musiani, and signed by Sabatia as well as his other 3 sons. Related to this, is an application for Land Control Board consent to subdivide the suit property made a few days later, on 27th November 1989 also showing Musiani's ID card number as 6498485/69. Evidently, if Musiani and Sabatia were one and the same person, then two different persons, bearing two different identity cards could not have signed the same distribution and sale agreement.

Regarding the letter to the District Settlement officer, Ministry of Lands and Settlement dated 11th October 1988 correcting Sabatia's names, there is nothing on the record to show that this was placed before the High Court. It would seem that the respondents included it in the Supplementary record filed for the first time in this Court on 29th November 2013. No leave was sought for the admission of additional evidence as required by **Rule 29** of this Court's Rules. As such this Court did not re-appraised the evidence in order to ascertain its veracity, and as a consequence this evidence is rejected in its entirety.

Having said that, besides the respondents' testimonies, there is nothing else on the record to support the contention that Sabatia Musiyani Asambwa ID Card No. 1932042/64 was also known by the name of Mushangi Asambwa. And even if there was evidence to show that Sabatia had sought to correct his name, we take the view that, there ought to have been other documentation identifying Sabatia as Mushiangi Asambwa, hence the necessity to correct his names. Sabatia's identity card was not produced, and neither was any document produced to show that he was also referred to as Mushiangi Asambwa. It is also instructive that according to the Lands Settlement Officer, the SFT records make no reference to any letter seeking to register a correction of name.

Accordingly, we are satisfied that Sabatia Musiyani Asambwa was not at any time referred to as Mushangi Asambwa, and since Musiani was a separate person, who was the father of Sabatia, by deduction, Musiani was Mushangi Asambwa, save for the difference in the spelling of his name. We would go so far as to question the motive behind the 'convenient' appearance of such a document at this point in time, given that it was not produced or verified during the proceedings in the High Court. We will say no more

on this.

Who was the original allottee between Musiani and Sabatia? In answer to this question, the respondents' produced a letter dated 26th February 1991 which stated that Sabatia Musyani Asambwa was the owner of the suit property. The letter specified that,

"The Registrar High Court

26th February 1991

P.O. Box 22

KAKAMEGA (HCCC. NO. 245/90)

REF: OWNER OF PLOT NO. 113 – SOY SETTLEMENT SCHEME

SABATIA MUSYANI ASAMBWA = ID NO. 1932042/64

I hereby confirm that the abovementioned settler is the legal owner of the plot No. 113 Soy, Documented to it on 24th march, 1966, as per our records stand now.

(J.A.G. MATHENGE)

DISTRICT LAND ADJUDICATION

& SETTLEMENT OFFICER

(KAKAMEGA)

It was this letter, together with the admission of ownership in Sabatia's defence upon which the High Court placed significant premium to arrive at the conclusion that the suit property belonged to Sabatia, despite there being other evidence to the contrary which pointed to Musiani as the original allottee.

To begin with, when ***David Odhiambo Oloo (PW3)***, District Land Adjudication Settlement Officer, Lugari District testified, he compared the letter dated 26th February 1991 with the Lands Register, and concluded that the name on the Lands Register indicated that Musiani Asambwa was the registered owner and not Sabatia.

The SFT records, also produced by David Oloo, and more particularly the charge dated 24th March 1996 made between Mushangi Asambwa as the Chargor, and the SFT as Chargee, specified that the original allottee was Mushangi Asambwa.

Other evidence of significance, within the SFT correspondence produced, showed that a dispute over the suit property existed between Musiani and Sabatia. As early as 25th September 1974, the Chief, Soy Location sought confirmation of the ownership of the suit property from the officer in charge of Turbo Settlement Schemes. In a letter dated 1st October 1974, the reply was as follows;

"The Chief

1st October, 1974

P.O. Box 22

RE: DISPUTE - PLOT NO. 113 SOY SCHEME

“I acknowledged the receipt of your letter dated 25th Sept., ‘1974 and I am in a position of telling you that the records held in this office intimate that Mr. Mushangi Asambwa is the owner of the aforesaid plot.

Yours faithfully

(JACOBS B. OPONDO)

for SETTLEMENT SCHEME OFFICER I KITALE”

The letter is further confirmation that Musiani, and not Sabatia was the original allottee. It is questionable as to how between this letter and the letter of 26th February 1991 to the Registrar, High Court, a change of allottee occurred, as there is nothing on the record to explain how such a change came about. Without any documents to show how Sabatia became the original owner as indicated by the letter of 26th February 1991, the only conclusion that can be reached is that Musiani at all times remained the original allottee.

Finally, **James Siguna Onari**, Land Registration Officer, Kakamega Land Office testified, that the Green Card for the suit property was opened on 19th July 1975 and registered in the name of SFT, and that on 3rd May 1994 SFT transferred the suit property to Musiani Asamba.

In conclusion, besides the impugned letter of 26th February 1991, there is nothing else to support the contention that Sabatia was the original allottee. To the contrary, all the documents point to Musiani as the original allottee. We find that the High Court failed to properly evaluate the evidence, and in so doing, arrived at the wrong conclusion that the respondents had proved their case on a balance of probabilities that the suit property belonged to Sabatia, instead of to Musiani.

Having found that Musiani was the original allottee of the suit property, it now behooves us to consider the effect of this finding on the claims of the disputing parties, which we will address having regard to the facts of the case.

Turning to the respondents’ case, it was their contention that the suit property belonged to them, as on 19th November 1989, they had entered into an agreement with Sabatia to salvage the outstanding SFT loan over the suit property. The agreement provided that, in return for repaying the loan, the suit property would be transferred to them. True to their word, they repaid the entire outstanding loan to the extent that SFT copied a letter to Mushangi Asambwa on 24th May 1989 confirming settlement of the loan and the impending discharge of the charge over the suit property.

Returning to the distribution and sale agreement, on 19th November 1989, Musiani entered into an agreement with his sons Sabatia, Andrea and Peter Vwamu and with a neighbor Zakayo, the 4th appellant for the subdivision, and distribution of portions to his sons, and the sale of a portion to Zakayo. Indeed, in terms of that agreement the land was subdivided into 5 portions where, Sabatia received plot no. 340 comprising 24 acres, Andrew Kesenwa the 9th defendant received, plot No. 339 comprising 8 acres and Peter Vwamu, the 10th defendant received plot no. 338 comprising 8 acres, while plot no. 341 of 2 acres was sold to Zakayo. The agreement was witnessed by 5 persons including one J.K. Arap Too, the assistant Chief, Soy, Sergoit, none of whom testified.

Having liquidated the loan, the respondents, were of the belief that the land belonged to them, and were incensed by the turn of events. In protest, they sought to file an injunction to stop the impending transfer

of portions of the suit property by Musiani. Being cognisant of the legal limitations of bringing a suit directly against their grandfather as the registered proprietor, there being no privity of contract of the loan repayment agreement with him, they filed a suit against their father, Sabatia, uncles, and Zakayo with the intention of halting any further dealings in the land, until their grievances were addressed, and the suit heard and determined. An injunction was subsequently issued by the High Court on 18th October 1991.

At this point, the question that arises is whether by repaying the SFT loan the respondents acquired any rights or interests in the suit property. It was their argument, that they derived rights in the suit property through Sabatia who owned the land, which he held in trust for them.

It is not disputed that the respondents were instrumental in repaying the loan, as evidenced by receipts and acknowledgments of payment installments. But having done so, the effect was to free the suit property from the SFT charge, and pave way for Musiani, (who we earlier found was the registered proprietor), to deal with it in whatever manner he deemed fit. Since there was no agreement between Musiani and the respondents, and no encumbrance registered against the title to secure their interest following the loan repayments, such claim against the suit property would have no basis.

On the existence of a trust through Sabatia, we find that this claim must fail. This is for reasons that firstly, this was not a first registration, as defined by **section 28** of **the Registered Land Act** (now repealed), given that the SFT and not Sabatia was the first registered owner. We might add that in order for a trust to be found to exist, the particulars of the trust must be pleaded and proved.

In citing with approval the case of ***Captain Harvey Gandy vs Casper Air Charters Ltd (EACA) 1956 Vol 23***, this Court in ***Wilson Kenyenga vs Joel Ombwori Civil Appeal No 96 of 1998*** stated,

“We are satisfied that the trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with O 6 rule (8) of the Civil Procedure Rules.... In the absence a pleading of trust, this claim cannot be permitted to be raised on decree. As a rule, relief not founded on pleading will not be given and cases must be decided on the issues on record.”

Secondly, and of singular importance, since Sabatia did not hold any proprietary interest in the suit property, there was no interest upon which a trust in favour of the respondents could be anchored through him, so as to create a trust.

Accordingly, we find and hold that the respondents held no claim to ownership or otherwise over the suit property on account of having paid the SFT loan, and that no trust existed, either between Musiani and the respondents or between Sabatia and the respondents.

Turning to the appellants’ case, it was their contention that their ownership of portions of the suit property stemmed from the distribution and sale agreement with Musiani. Indeed, the evidence showed that Musiani subdivided and distributed portions of the suit property to his sons. Subsequently, Land Control Board consent to subdivide in the agreed portions was obtained, and in the case of Zakayo, it was agreed that Plot No 341 would be sold to him. A transfer was executed in his favour and Land Control Board Consent was obtained to transfer that portion.

The only witness who testified on the agreement, was Zakayo. It was his testimony, that the land belonged to Musiani, and the agreement provided for the subdivision and distribution thereof the suit property amongst his sons, and the sale of a portion to him. He confirmed that at all times, he derived possession of his portion of the suit property from Musiani, and did not at any time deal with Sabatia. It was his evidence that Sabatia was opposed to the subdivision and sale by his father.

No evidence was led to rebut or question the existence or validity of this agreement, or the ensuing Land Control Board consent to subdivide the suit property of 14th December 1989, and the consent to transfer to Zakayo of 19th November 1989 referred to earlier. Also on the record is a transfer to Zakayo dated 10th January 1991 executed by Musiani. It is instructive that despite being a party to both the loan settlement

agreement with the respondents, and the subdivision agreement with Musiani, Sabatia did not testify. There is also no evidence to show that he objected to the distribution and sale of portions of the suit property, by Musiani, particularly if indeed he considered himself to be the registered owner. Needless to say, he received the largest share of the suit property perhaps in recognition of the part played by his family in paying off the SFT loan.

In *The Registered Trustees Anglican Church of Kenya Diocese vs The Rev. David Waweru Njoroge Civil Appeal No. 108 of 2002*, this Court whilst citing *Shells Equity 29th Edition* observed,

“... where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Thus in Re-Rose Midland Bank Executor and Trustee Co. Ltd vs Rose (1949) Ch. 78 the donor executed a transfer of shares in a private company and handed it with share certificate to the donee who died before it was registered. Although the donee’s legal title would not be perfected until the company had passed the transfer for registration or at last until the donee had unconditional right to be registered, it was held that the gift was good because the donor had done all that was necessary on his part. Likewise a gift of Registered Land becomes effective upon execution and delivery of the transfer and cannot be recalled there after even though the donee had not yet been registered as proprietor.”

With this in mind, and there being no evidence to the contrary, we consider that the distribution and sale agreement, and the related Land Control Board consent to subdivide the suit property in terms of the distribution agreement were valid, binding and enforceable in the portions specified as against Musiani’s estate in favour of Sabatia, Andrew Kesenwa, and Peter Vwamu. Likewise, we consider that Zakayo was a bona fide purchaser for value, as Musiani had sold and transferred and also obtained Land Control Board Consent to transfer Plot No. 341. As such, the transfer became effective upon execution and delivery and as such could not be disregarded.

We have found that the High Court misdirected itself and wrongly concluded that Sabatia owned the suit property, and further erred in finding that a trust over the suit property existed in favour of the respondents, despite there being evidence to the contrary.

Accordingly we find it necessary to interfere with that decision. We therefore allow this appeal and set aside the judgment of the High Court dated 22nd February 2011, with costs to the appellants.

We so order.

Dated and delivered at Kisumu this 25TH day of SEPTEMBER, 2015.

D. K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR