



**Lutilo (Suing on Her Own Behalf and on Behalf of the Estate of the Late Edward Lutilo Deceased Suing Through the Guardian ad Litem and Next Friend David Lutilo and Kevin Kiveu Lutilo) & 2 others v Simiyu (Environment & Land Case 9 of 2019) [2024] KEELC 4916 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 9 OF 2019**

**FO NYAGAKA, J  
JUNE 12, 2024**

**BETWEEN**

**ROBAI SYALO LUTILO (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE EDWARD LUTILO DECEASED SUING THROUGH THE GUARDIAN AD LITEM AND NEXT FRIEND DAVID LUTILO AND KEVIN KIVEU LUTILO) ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPHINE LUTILO (SUING IN HER CAPACITY AS ADMINISTRATORS OF THE ESTATE OF THE LATE EDWARD LUTILO SUING THROUGH THE GUARDIAN AD LITEM AND NEXT FRIEND DAVID LUTILO AND KEVIN KIVEU LUTILO) ..... 2<sup>ND</sup> PLAINTIFF**

**PHYLIS KHALAI LUTILO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**WYCLIFFE WAKOLI SIMIYU ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a further amended plaint dated 20/12/2021, the Plaintiffs sued the Defendant and prayed for the following reliefs:
  - a. A declaration that the plaintiffs and the estate of the deceased are the *bona fide* purchasers and have acquired ownership of title number Kitale Municipality Block 7/194 (formerly plot not surveyed ‘C’) and the defendant be directed to surrender the relevant documents to facilitate processing of title to the beneficiaries of the estate and in default the Deputy Registrar be mandated to sign all documents of transfer for defendant in favor of the plaintiffs.



- b. A permanent order of injunction do issue restraining the defendant by himself, his servants, agents or any person acting on his behalf from trespassing thereon, selling, transferring, transacting or in any other manner or otherwise dealing with title number Kitale Municipality Block 7/194.
  - c. Costs.
  - d. Interest.
  - e. Any other relief the court shall deem fit to grant.
2. The defendant filed his Statement of Defence and Counterclaim dated 17/05/2019. He denied the averments set out in the plaint. He prayed that the plaintiffs' claim be dismissed and the counterclaim allowed in the following terms:
- i. That the plaintiff are (sic) in breach of sale agreements dated 04/02/2002, 11/12/2012, 12/03/2015 and the same are declared void, hence the plaintiffs are entitled to a refund of only the amount advanced to the defendant.
  - ii. That the plaintiffs be evicted from the suit land.
  - iii. Costs of the suit.

### **The Plaintiffs' Case**

3. The Plaintiffs called PW1, one Kevin Kivei Lutilo, to the witness stand. He testified that he had authority to testify on behalf of Robai Syalo Lutilo and Josephine Lutilo, in pursuance of a court order dated 20/12/2021 issued in Eldoret High Court Misc. App. No 11 of 2021 as manager of Robai Syalo Lutilo. He produced the order and ruling and marked them P.Exhibit 1(a) and P.Exhibit 1(b) respectively.
4. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiff were his mother and step mother respectively, and the administrators of the estate of his father the late Edward Syalo Lutilo. He produced as P.Exhibit 2 the Grant of Letters of Administration. He stated further that since the two Plaintiffs' health had deteriorated, they were unable to testify hence his (PW1's) evidence in that behalf.
5. PW1 adopted the written witness statement of his mother, the 1<sup>st</sup> plaintiff. It was dated 23/01/2019. He also adopted his witness statement dated 01/02/2019. According to the Plaintiff, vide a Letter of Allotment dated 08/11/1994, produced as P.Exhibit 3, the defendant was allotted the parcel of land referenced as KTL/10/94/58. Upon fulfillment of the conditions set out therein, the plot was registered as Kitale Municipality Block 7/194. It would finally form the basis of a number of agreements entered into between the deceased and the defendant, wherein the defendant disposed of portions of the large parcel of land. PW1 was neither a party nor witness to any of the agreements.
6. PW1 testified further that on 26/09/1997, the Commissioner of Lands wrote to the Director of Survey who, in his letter dated 25/03/1999, indicated that a survey was to be conducted on the defendant's parcel of land in accordance with the Part Development Plan (PDP) annexed to the letter of allotment.
7. According to the plaintiffs, on 04/02/2002, the deceased entered into a Sale Agreement, produced as P.Exhibit5(a), with the defendant for the sale of a portion of plot No 20089/XXXVIII within Kitale Municipality measuring 100ft × 150ft for a sum of Kshs 270,000.00. PW1 testified that the deceased settled the said sums in installments of Kshs 35,000.00 on 04/02/2002, Kshs 5,500.00 on 10/02/2002, Kshs 50,000.00 on 10/03/2002 and Kshs 75,000.00 on 10/04/2002.



8. In respect to P.Exhibit 5(a), PW1 testified that the payment was Kshs 224,800.00; the last payment being made in the sum of Kshs 55,000.00. while the balance of Kshs 45,200.00 was paid by his mother on the death of his father.
9. Further, that Kshs 5,000.00 was received by the Defendant on 05/03/2002 and Kshs 55,000.00 on 15/03/2002. Those acknowledgements, handwritten by the defendant, were produced and marked P.Exhibit 5(b) and P.Exhibit 5(c) respectively. It was the plaintiffs' evidence that on completion the defendant gave vacant possession to the deceased.
10. Subsequently, on 11/12/2012, the 1<sup>st</sup> plaintiff purchased from the defendant another portion measuring 50ft × 100ft for a sum of Kshs 600,000.00. In this instance, the 1<sup>st</sup> plaintiff paid by way of 22 bags of maize valued at Kshs 69,000.00. She thereafter paid Kshs 159,000.00 and Kshs 15,000.00. The Agreement was produced and marked P.Exhibit 6.
11. Thereafter, further sums of money were paid to the defendant as follows: Kshs 174,000.00 on 18/12/2012, Kshs 80,000.00 on 31/12/2012, Kshs 46,000.00 on 17/01/2013, Kshs 60,000.00 on 26/02/2013, Kshs 40,000.00 on 27/05/2013, Kshs 20,000.00 on 15/08/2013, Kshs 50,000.00 on 28/10/2013, Kshs 130,000.00 on 16/11/2013 all totaling Kshs 600,000.00. The Petty Cash Vouchers of payment of these sums were produced and marked P.Exhibit 6(a) - (h).
12. The 1<sup>st</sup> plaintiff also purchased another portion of equal size for the same price on 12/03/2015. This Agreement was marked P.Exhibit 7. It was a term of the agreement of the parties that the payment would be done through the delivery of a milling machine from Muharata Food Company Limited valued at Kshs 145,000.00. The machine was delivered at the defendant's business premises.
13. The same was receipted as follows: Kshs 20,000.00 on 17/03/2014, Kshs 20,500.00 on 11/04/2014, Kshs 30,000.00 on 07/01/2013 and Kshs 75,000.00 on 30/11/2013. The parties drafted an Agreement to this effect together with a guarantee dated 30/11/2013 and a letter dated 18/04/2014 from the company. PW1 produced and marked the document as P.Exhibit 7(b) and that the balance of the purchase price was paid in cash.
14. The plaintiffs also produced a bundle of Petty Cash Vouchers marked P.Exhibit 8(b) of sums as follows: Kshs 50,000.00 on 05/01/2014, Kshs 100,000.00 on 10/05/2014, Kshs 80,000.00 on 20/07/2014, Kshs 100,000.00 on 25/05/2014, Kshs 60,000.00 on 15/04/2014 and Kshs 65,000.00 on 20/10/2014 totaling Kshs 455,000.00. Following this Sale Agreement, the defendant wrote to the Town Clerk informing him that he had sold a portion of land to the deceased. He produced the letter dated 25/11/2013 and marked it as P.Exhibit 9.
15. Similarly, the 3<sup>rd</sup> plaintiff, who is PW1's sister, bought a portion measuring 50ft × 100ft from the defendant for a sum of Kshs 600,000.00 on 12/03/2015. The witness produced the Agreement and marked it as P.Exhibit 8(a). According to the plaintiffs, as a result of the purchases, they constructed permanent residential structures which earn them an income of Kshs 30,000.00 monthly.
16. It was a term of agreement that upon settling the full purchase price, the defendant would deliver vacant possession of the property and handover all documents to process the title deeds. The plaintiffs further contended that it was agreed that the defendant would indemnify the plaintiffs on any shortcomings and interferences from whoever. They stated that in spite of the agreements, the defendant has to date, failed to furnish them with the necessary documentation to enable them obtain title deeds; yet the purchase prices were all settled in full. They in fact demanded for transfer documents through their Advocate's Letter dated 02/11/2015 which was produced and marked as P.Exhibit 4.



17. The deceased paid Kshs 13,600.00 on 07/09/2012, Kshs 1,000.00 on 04/04/2006 and Kshs 5,000.00 on 21/08/2006 for a site visit. The parties were issued with a PDP. That there was a demand notice to the 3<sup>rd</sup> plaintiff for a sum of Kshs 31,950.00 dated 02/01/2019 for land rates in respect to the suit land. These documents and photographs, together with the letters dated 26/09/1997 and 25/03/1999 were by the Plaintiffs as a bundle and marked as P.Exhibit 10.
18. In 2015, PW1's mother put up permanent structures on the plot. She is currently drawing rent from the structures. Sometime later, the Plaintiffs learned that the defendant clandestinely surveyed the parcel and processed a Certificate of Lease registered as Kitale Municipality Block 7/194 with an ulterior motive of disposing of the title to a third party in breach of the agreement between the plaintiffs and the defendant.
19. As a result of the defendant's actions, the plaintiffs lamented that they shall be exposed to untold loss and suffering that cannot be adequately compensated by an award of damages. They were further apprehensive that they would not be in a position to acquire a similar portion taking into account the location of the property and changes in value of the currency since purchase.
20. The 3<sup>rd</sup> plaintiff testified as PW2. She adopted her witness statement dated 01/02/2019 as well as that of PW1. Her evidence was that she purchased unsurveyed plot 'C' measuring 50ft x 110ft for Kshs 600,000.00 from the defendant situated behind the defunct Nakumatt (later Tusksys) supermarket as per the pre-agreement dated 04/12/2014 marked P.Exhibit 8(a). It was PW2's evidence that before executing the Sale Agreement, she was able to view the property and ascertain its locality. The plot is adjacent to the plot belonging to her parents'. She thereafter took possession and constructed a rental structure that extends to her mother's plot.
21. She added that she finished paying for the said plot sometime in April, 2015. According to PW2 she paid the purchase price in installments of Kshs 200,000.00 on execution of the agreement, Kshs 100,000.00 on 13/12/2014, Kshs 85,000.00 on 03/01/2015, Kshs 12,000.00 on 10/01/2015, Kshs 8,000.00 on 03/02/2015 and Kshs 80,000.00 on 02/05/2015. The balance of Kshs 133,000.00 was paid via an MPESA transaction.
22. Then the parties entered into a Sale Agreement dated 12/03/2015. It was produced and marked as P.Exhibit 8(a). At Clause 1 of the agreement, "... in consideration of the sum of Kshs 600,000.00 receipt whereof is admitted...".
23. According to PW2, the defendant undertook to transfer the suit property in her name but has failed to do so to date. She has now discovered that the defendant is intent on disposing of the title to a third party and would cause irreparable harm to PW2. Her evidence was that by virtue of the plot, they are collecting Kshs 30,000.00 monthly together with her mother. The matter had previously been reported to other offices but the same bore no fruit. She thus urged this court to grant the reliefs as sought.
24. Regarding the rates from the Town Clerk, PW2 testified that the Town Clerk demanded Kshs 1,600,000.00 vide a letter addressed to the defendant. The plaintiffs forwarded the letter to him and accompanied him to the County Council. A waiver was granted adjusting the sum sought to Kshs 375,000.00 which was paid by the plaintiffs as demonstrated in P.Exhibit 11(a) and P.Exhibit 11(b) addressed to PW2.

### **The Defendant's Case**

25. The defendant, DW1 adopted as his evidence in-chief his replying affidavit sworn on 29/02/2019. He testified that he was allotted the suit land on 22/11/1994. He relied on a copy of the letter marked DMFI-1(a). He produced the receipt in payment of the allocation sum of Kshs 20,000.00 marked



- D.Exhibit 1(b) and a checking fee of Kshs 13,600.00 paid on 07/09/2012 marked D.Exhibit 1(c). He is the registered proprietor of the suit land namely Kitale Municipality Block 7/194, measuring 0.3 Ha, having been issued with a title deed on 12/05/2016. He produced the Title Deed and marked it as D.Exhibit 2. He also produced a Certificate of Lease issued in his name on 23/03/2016 and marked it as D.Exhibit 3.
26. The defendant's case is that he met the deceased Edward Lutilo and wished that he assists him in developing the plot. It turns out that the two also agreed that the deceased would purchase the property from the defendant. According to DW1, they entered into a sale agreement but the deceased breached the it and only paid Kshs 149,800.00 for his plot measuring 150ft × 100ft. That a balance of Kshs 120,200.00 remains outstanding to date. DW1 testified that upon the death of Mr. Lutilo, his family approached him to renegotiate the terms and buy other plots.
  27. Resultantly, on 11/12/2012, the defendant sold a plot measuring 50 ft × 100ft at a consideration sum of Kshs 600,000.00 to the 1<sup>st</sup> plaintiff pursuant to the agreement marked P.Exhibit 6. However, DW1 maintained that she only paid a sum of Kshs 466,000.00 leaving a balance of Kshs 134,000.00. Further, on 12/03/2015, the 3<sup>rd</sup> plaintiff purchased a parcel of land measuring 50ft × 100ft and paid the full agreed sum of Kshs 600,000.00.
  28. The defendant lamented that the plaintiffs, in spite of breaching the contractual agreements, went ahead and occupied his entire parcel of land consisting of six (6) plots each measuring 50ft × 100ft and even went ahead to demolish the defendant's house. Further, they started farming on the land. According to the defendant, the plaintiffs had settled on the wrong plots. That they proceeded to construct permanent structures on the pieces of land earning rent since 2015 at Kshs 30,000.00 monthly. He stated that he was willing to refund the said sums of money advanced to secure his property.
  29. DW1 denied authoring or executing the Petty Cash Vouchers marked P.Exhibit 6(a)-(h); in addition he denied being in receipt of the sums therein; that plot 192 did not belong to him; that the documents were a forgery; he denied the contents of P.Exhibit 7(a) stating that the said document was not executed before an advocate; he denied receiving machinery; that the 1<sup>st</sup> plaintiff deposited the purchase sum in the bank and could not thus ascertain whether P.Exhibit 8(a) was an accurate representation of the facts on the ground. Finally, DW1 testified that the surveyor visited the suit property and surveyed the land on 25/09/2023. DW1 urged this court to dismiss the plaintiff's suit and allow his counterclaim as prayed.
  30. When questioned on the survey report, DW1 observed that according to the surveyor, the plaintiff (owner) was not available. He maintained that he was present when the survey was conducted. He complained that the plaintiffs were in occupation of plots 192, 193 and 194. That while his agreement with the deceased had not been revoked, it was frustrated on account of the fact that the payment of the consideration sum was not settled in full but could not ascertain how much he had received. He added that P.Exhibit 7(a) correctly had his name and address. He stated that although there was a demanded to transfer the suit land in his name, he could not do so as the dispute was litigious. Lastly, he admitted that he was once paid 10 bags of maize. But he could not state where and how he acknowledged receipt of it and what it was for, if not for the purchase of the plots in question.
  31. Confused during re-examination, DW1 testified that he had only sold 1 plot and not 3 plots as earlier testified. For those reasons, the witness was stood down to another date for further re-examination and consideration of whether he would state the truth or insist on a lie. His demeanor was noted as greatly wanting. On the subsequent date, he did confirm that he sold 3 plots. However, only 1 was fully paid.



He maintained that the rest were never fully paid for. In closing his evidence on the dock, the defendant produced the survey report that was marked D.Exhibit 4.

### Written Submissions

32. At the close of hearing, parties were directed to file and serve respective written submissions. The plaintiffs filed their written submissions dated 10/01/2024 on 15/01/2024. They submitted that by dint of the various sale agreements entered with the defendant, they were entitled to the reliefs sought. This is because they had fully paid the purchase price all the while the defendant was in breach of his obligations. That in fact, pursuant to the letter from the Town Clerk, the defendant had relinquished his interest to the plaintiffs. Urging the Court to find that the defendant was dishonest, they urged this court to dismiss his Counterclaim and allow the further amended plaint as prayed.
33. The defendant on his part relied on his written submissions dated 22/01/2024 and filed on 23/01/2024 to argue that the contract with the deceased was abandoned the moment the deceased's kin entered into other sale agreements with him. In any event, the full purchase prices have to date, not been settled in full. He denied all the allegations in toto and stated that since they had benefitted from the rental income, they ought not to recover any sums of money. He urged this court to agree with his testimony to dismiss the plaintiff's suit and allow the counterclaim.

### Analysis And Disposition

34. I have considered the pleadings, examined the evidence and analyzed the law. I have also considered the rival submissions filed by the parties. It is not disputed that the defendant is the legal proprietor of the suit parcel of land namely Kitale Municipality Block 7/194, measuring 0.3 Ha. In support thereof, the defendant produced a title deed marked D.Exhibit 2 and a Certificate of Lease marked D.Exhibit 3. Thus, ownership and capacity of the defendant to enter onto the agreements at the time of sale of the plots is not subject to challenge.
35. It is also not denied that the deceased person, entered into a sale agreement with the defendant to dispose of a portion of the suit land to him. Thereafter the deceased person's kin, namely Robai Syalo Lutilo and Phylis Khalai Lutilo his wife and daughter respectively, entered into subsequent sale agreements with the defendant. They are the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs respectively. What is in dispute however is the payment of the full purchase price for the plots and or whether there was breach of the agreements entered into. The defendant admitted that the 3<sup>rd</sup> plaintiff did settle the purchase price in full. As such, it can be concluded that since the contract was agreed as completed, then it ought to be upheld with both parties bound by their terms accordingly.
36. The point of departure is the agreements the deceased and the 1<sup>st</sup> plaintiff entered with the defendant to which the defendant categorically stated that they never fulfilled their contractual obligations and as such, those contracts were frustrated. This brings this court to the first issue for determination: whether the contracts between the deceased and 1<sup>st</sup> plaintiff and the defendant respectively were revoked?
37. The evidence before this court reveals that the deceased entered into a sale agreement with the defendant on 04/02/2002 vide the agreement produced before this court and marked P.Exhibit 5(a) for the sale of a portion of the suit land measuring 100ft×150ft. The consideration price was agreed at Kshs 270,000.00. The evidence reveals further that the defendant received a total sum of Kshs 224,800.00 as revealed by P.Exhibit 5(a). According to the plaintiffs, the balance of Kshs 45,200.00 was paid by the deceased's wife, the 1<sup>st</sup> plaintiff herein upon his death.
38. Come the 11/12/2012, the 1<sup>st</sup> plaintiff purchased a portion measuring 50ft × 100ft from the defendant for a sum of Kshs 600,000.00. The 1<sup>st</sup> plaintiff paid by way of 22 bags of maize valued at Kshs 69,000.00.



- Although the Defendant feebly admitted in cross-examination that he received 10 bags he did not have evidence to show that it was not the 22 bags that he received. What is clear to the Court is that maize was exchanged between the parties towards the purchase. He who was placed in the position of trust had the burden of proof that the amount or number stated was not the one exchanged, and that was the Defendant. He had an upper hand in the instant transaction. Since he deceived not to keep the record and actually issue the document to evidence the receipt of the bags of maize he cannot be heard to deny they were 22 in number.
39. Further, the Defendant was paid Kshs 159,000.00 and Kshs 15,000.00. The Agreement to that effect was produced and marked P.Exhibit 6. It was also demonstrated that the purchase price was received by the defendant in the form of Petty Cash Vouchers which sums totaled Kshs 600,000.00 as revealed in P.Exhibit 6(a)-(h). Although at first the Plaintiff denied that the signatures on the Petty Cash vouchers were his, he faltered in cross-examination by admitting that some were his yet they all appeared the similar. Thus, on this issue, this Court holds that the signatures were appended by the same person.
  40. Upon settling the full purchase price, the 1<sup>st</sup> plaintiff entered into a second agreement with the defendant on 12/03/2015 marked P.Exhibit 7. Looking at its contents, it appears that it was a firm up of the agreement dated 11/12/2012. It essentially buttressed the earlier agreement. It disclosed that payments would be done through the delivery of a milling machine from Muharata Food Company Limited valued at Kshs 145,000.00. The machine was delivered at the defendant's business premises. In support of this contention was a guarantee dated 30/11/2013 and a letter dated 18/04/2014 from the company produced and marked P.Exhibit 7(b). Further, although the Defendant purported to deny delivery of the machine, the cumulative conduct of his evidence which was inconsistent and full of lies leaves this Court with only one inescapable conclusion: the machine was delivered to him in furtherance of the agreement of sale.
  41. According to the Agreement dated 12/03/2015, Clause 1 read in part as follows: "... in consideration of the sum of Kshs 600,000.00 receipt whereof is admitted...". Furthermore, the defendant's letter dated 25/11/2013 and marked P.Exhibit 9 informed the Town Clerk that he had sold a portion of his land to Robai Lutilo, the 1<sup>st</sup> plaintiff herein, measuring 50ft x 100ft.
  42. This court finds that insofar as the agreement between the 1<sup>st</sup> plaintiff Robai Syalo Lutilo and the defendant is concerned, the defendant was paid the full purchase price. This can be discerned from the Agreement dated 12/03/2015 informing that the defendant was in receipt of the full purchase price and the defendant's letter to the Town Clerk dated 25/11/2013.
  43. Further, the defendant attempted to explain away the documents produced by the plaintiffs stating that his signature and handwritings were forged. Not only did he not plead and specify the allegations of fraud but also failed to prove the allegations to the required standard. In fact, this court forms the opinion that those allegations were merely thrown in the dock during his testimony as a red herring and could only be dismissed as an afterthought.
  44. The plaintiffs also produced a bundle of Petty Cash Vouchers marked P.Exhibit 8(b) of sums as follows: Kshs 50,000.00 on 05/01/2014, Kshs 100,000.00 on 10/05/2014, Kshs 80,000.00 on 20/07/2014, Kshs 100,000.00 on 25/05/2014, Kshs 60,000.00 on 15/04/2014 and Kshs 65,000.00 on 20/10/2014 totaling Kshs 455,000.00. They also produced handwritten Acknowledgements by the defendant marked P.Exhibit 5(b) and P.Exhibit 5(c) respectively in the sum of Kshs 5,000.00 received on 05/03/2002 and Kshs 55,000.00 received on 15/03/2002.
  45. The totality of the other payments than those between the parties that that Defendant acknowledged were for the plots fully paid for, alluded to the deceased's contractual agreement. The evidence does reveal that indeed the plaintiffs settled several sums of money paid to the defendant. In my view, on a



balance of probabilities which is the required standard in civil cases, it is more probable than not that a portion of the sums went into settling the balance that the deceased person had not settled in full, and it was done when the survivors or the family of the deceased approached the Defendant to further the deceased father's agreement to purchase the portions he had began to. Having discharged the legal burden of proof that the family made the payments for the portions, the defendant did not discharge the evidentiary burden that now lay on him. All he stated was that he was never paid the full sum. He did not show the exact sums that he received, including the exact bags of maize and their equivalent in money. In fact, he failed to disclose how much he had been paid by the plaintiffs: he was intent on withholding important truth about the transactions that he himself "fathered". How then could he justify his allegations if he could not rudimentarily quantify how much he had received so far?

46. In my view, the defendant was not candid. He attempted to use all means to defeat the plaintiffs' legitimate claim because he wanted to benefit from his own wrongdoing. This court abhors illegitimate conduct. I find that the defendant could not be heard to state that the agreements were revoked or frustrated because the plaintiffs did not abide by their contractual agreements without cogent evidence.
47. The defendant in my view, obtained title in trust for the plaintiffs collectively based on the relevant portions that had been purchased and fully paid by the plaintiffs. He was unwilling to even surrender that which he acknowledged as having been fully paid for. The Supreme Court of Kenya in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* [2023] KESC 106 (KLR) (28) held that a constructive trust serves the purpose of preventing unjust enrichment. The court continued:

"It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired... A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit."

48. Based on the foregoing, I find that the plaintiffs' case against the defendant is successful. I am satisfied that the plaintiffs purchased the entire suit parcel of land namely Kitale Municipality Block 7/194. The next issue for determination is whether the defendant's counterclaim is merited.
49. According to the defendant, he entered into a Sale Agreement with the deceased purely because the deceased was assisting him with the development of his plot. The parties subsequently entered into a Sale Agreement to purchase a portion of the defendant's plot measuring 150ft x 100ft. That sale agreement was produced and marked P.Exhibit 5(a). His evidence was that a balance of Kshs 120,200.00 was unpaid. However, I have already established that the defendant failed to prove the allegations and they must thus be dismissed.
50. The defendant claims that the contractual agreement was renegotiated thereby revoking the first agreement. Nothing would have been easier than for the defendant to expressly state so in the subsequent sale agreements entered between the parties. The parole evidence rule provides that a party cannot rely on futuristic oral or written evidence to defeat the intention of parties evinced documentary evidence. In *Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited* [2017] eKLR, the Court of Appeal stated as follows:

"So that where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the



principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.”

51. Based on this principle, I also find that the defendant could not renege on the fact that the 1<sup>st</sup> plaintiff had fully paid the purchase price as per the agreement they had entered into. This could be demonstrated from his letter dated 25/11/2013 and the agreement dated 12/03/2015 marked P.Exhibit 9 and P.Exhibit 8(a) into evidence as respectively. The findings of the survey report dated 25/09/2023 marked D.Exhibit 4 did not also assist the defendant's case. The findings merely revealed what was on the ground but did not ascertain ownership.
52. In light of the foregoing, I find that the plaintiffs' suit succeeds as against the defendant while that of the defendant or her Counterclaim against the plaintiffs must consequently fail. Thus, this court makes the following orders:
  - a. A declaration be and is hereby made that the plaintiffs are the bona fide purchasers severally and lawful owners but severally of all that parcel of land namely Kitale Municipality Block 7/194.
  - b. The defendant is hereby directed and ordered to surrender the relevant documents to facilitate processing of title to the plaintiffs within 30 days from the date of this order and in default, the Deputy Registrar shall execute all the relevant documents of transfer instead of the defendant in favor of the plaintiffs.
  - c. A permanent order of injunction be and is hereby issued restraining the defendant by himself, his servants, agents or any person acting on his behalf from trespassing thereon, selling, transferring, transacting or in any other manner or otherwise dealing with all that parcel of land namely Kitale Municipality Block 7/194.
  - d. The plaintiffs are awarded costs of the suit together with interest thereon at court rates.
  - e. The defendant's counterclaim is dismissed with costs to the plaintiffs.
53. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY ON THE 12<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

In the Presence of:

Karani for the Plaintiffs

Wanyonyi for the Defendant

