



REPUBLIC OF KENYA



**Rwigi v Karuthu & another (Environment & Land Case E011 of 2022)  
[2025] KEELC 747 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E011 OF 2022**

**CK YANO, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**ROBERT NYAGA RWIGI ..... PLAINTIFF**

**AND**

**NAOMI KARUTHU SAMSON ALIAS NAOMI KARUTHU  
MWIRIGI ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN KARANI IKIARA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. The Plaintiff commenced the suit against the defendants vide a plaint dated 10<sup>th</sup> June, 2022 seeking the following reliefs:-
  - a. An order for declaration that the plaintiff has an overriding interest in respect of Land parcel No. Nyayo Sirimoni Scheme/1081 and his rights and interests over the said land are indefeasible.
  - b. An order for declaration that the 1<sup>st</sup> Defendant having acknowledged receipt of full purchase price for sale of Land parcel No. Nyayo Sirimoni Scheme/1081 from the plaintiff, puts the plaintiff into actual possession and use of the said land, allowed the plaintiff to extensively develop the said land, the 1<sup>st</sup> defendant's rights and interests over the said land were extinguished and a constructive trust in favour of the plaintiff had arose in respect of the said land and the 1<sup>st</sup> defendant held the said land in trust for the plaintiff and therefore Land parcel No. Nyayo Sirimoni Scheme/1081 belongs to the plaintiff and the 1<sup>st</sup> defendant was barred by the doctrine of proprietary estoppel from causing the said Land parcel No. Nyayo Sirimoni Scheme/1081 to be registered in her name and /or selling the said land to the 2<sup>nd</sup> defendant.



- c. An order for declaration that the said sale of Land parcel No. Nyayo Sirimoni Scheme/1081 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and the subsequent transfer and registration of the said land to the 2<sup>nd</sup> defendant was unlawful, null and void ab initio.
  - d. An order for declaration that the 2<sup>nd</sup> defendant has no good title in respect of Land parcel No. Nyayo Sirimoni Scheme/1081 and therefore, the title deed issued to him be cancelled and the 1<sup>st</sup> defendant's name be reinstated in the register for the said land forthwith.
  - e. An order requiring the 1<sup>st</sup> defendant to sign all the relevant documents to ensure that Land parcel No. Nyayo Sirimoni Scheme/1081 is transferred and registered in the name of the plaintiff and in default, the Court Administrator of this Honourable Court be empowered to sign all the relevant documents on behalf of the 1<sup>st</sup> defendant to facilitate the transfer and subsequent registration of Land parcel No. Nyayo Sirimoni Scheme/ 1081 in the name of the plaintiff.
  - f. An order of permanent injunction restraining the defendants, their servants, agents, employees, assignees and/or anybody else acting on their behalf from trespassing, entering, interfering and/or in whichever manner interrupting the plaintiff's quite (sic) occupation and use of Land parcel No. Nyayo Sirimoni Scheme/1081.
  - g. Costs of the suit.
2. On 1<sup>st</sup> November, 2022 the 2<sup>nd</sup> Defendant filed a Defence and Counterclaim denying the Plaintiff's claim. He instead averred that he was the registered owner of the suit land having bought and transferred it from the 1<sup>st</sup> Defendant. That he was not aware the Plaintiff had bought the land from the 1<sup>st</sup> Defendant or of any agreement between them. He denied the allegation that the Plaintiff was in actual possession and use of the land as alleged. He denied the existence of the trust and the alleged breach of trust as well as the particulars thereof. The 2<sup>nd</sup> Defendant further denied any fraud on the part of the 1<sup>st</sup> Defendant and or that he colluded with her as pleaded in the Plaint. The 2<sup>nd</sup> Defendant averred that the Plaintiff never acquired the suit land and thus has no indefeasible rights over it whatsoever, stating that the 1<sup>st</sup> Defendant sold the land to him after he conducted his due diligence.
3. The 2<sup>nd</sup> Defendant raised a counterclaim against the Plaintiff, reiterating the contents of his Defence, and adding that he bought the land for Kshs. 1,000,000/-. The 2<sup>nd</sup> Defendant added that the Plaintiff had been indolent in fighting for his rights, if any, and his claim is now time barred and his interests were extinguished by the transfer to him. He averred that the Plaintiff was not living on the land and was only cultivating seasonal crops thereon. The 2<sup>nd</sup> Defendant claimed that as a registered owner, he has rights of use and occupation of the land and the Plaintiff must cease cultivation of his land without permission. The 2<sup>nd</sup> Defendant prayed for:-
- i. An order for permanent injunction restraining the plaintiff by himself, employees, agents or any other persons acting under his instructions or his interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as LR No. Nyayo/Sirimoni Scheme/1081.
  - ii. An order for eviction against the plaintiff by himself, employees, agents and any other persons acting under his instructions or his interest being that he is trespassing on his land and delivery of vacant possession thereof of Land Parcel No. Nyayo/Sirimoni Scheme/1081 to the 2<sup>nd</sup> Defendant.



- iii. An order that the plaintiff is only entitled to refund of the purchase price from the 1<sup>st</sup> defendant herein.
  - iv. An order for dismissal of the plaintiff's suit with costs.
4. In response, the Plaintiff on 14<sup>th</sup> November, 2022 filed a Reply to the 2<sup>nd</sup> Defendant's Defence and Defence to Counterclaim. He denied the allegations in the 2<sup>nd</sup> Defendant's Defence and Counterclaim, and reiterated the averments in his Plaint. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were all along aware that he had purchased the land and was in occupation thereof. The Plaintiff averred that the 2<sup>nd</sup> Defendant's allegation that he conducted a search before buying does not defeat his claim, since the 1<sup>st</sup> Defendant was holding the land in trust for the Plaintiff, and it was not available for sale to the 2<sup>nd</sup> Defendant.
  5. The Plaintiff further averred that he had planted eucalyptus and grevillea trees on the boundaries and fenced the land, so the 2<sup>nd</sup> Defendant ought to have known the land was not available for sale, and any claim that he does not possess the land is dishonest. He denied the allegation that he had been indolent or that his claim is time barred, and further denied that his interests had been overtaken by events. The Plaintiff averred that the rights of a registered owner can be defeated where the registration was obtained through fraud. He averred that the 2<sup>nd</sup> Defendant had no registrable interest on the suit land since his interests arose from a fraudulent agreement. The Plaintiff prayed for dismissal of the 2<sup>nd</sup> Defendant's Defence and counterclaim and for judgment in his favour.
  6. The 1<sup>st</sup> Defendant filed her Statement of Defence on 10<sup>th</sup> July, 2023, where she admitted that the Plaintiff was in possession of the land but she did not give him possession. She denied selling the land to the Plaintiff or receiving payment thereon, stating that she had never met him and he was a stranger. She denied any alleged communication with the Plaintiff or exchanging telephone contacts with him. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant legitimately bought the suit land from her for valuable consideration and a title was processed in his favour. The 1<sup>st</sup> Defendant claimed that the Plaintiff must have been defrauded by a third party, and even termed the signature on the Plaintiff's agreement a forgery. The 1<sup>st</sup> Defendant averred that a constructive trust cannot in the circumstances arise and denied that she breached the said trust. She further denied the alleged fraud and collusion, and claimed that any claim of fraud was barred by the Limitation of Actions Act. It is the 1<sup>st</sup> Defendant's claim that the 2<sup>nd</sup> Defendant is a bonafide purchaser for value and his rights are indefeasible. She prayed that the Plaintiff's case be dismissed with costs.
  7. The Plaintiff filed a Reply to Defence on 19<sup>th</sup> July, 2023, where he denied the contents of the 1<sup>st</sup> Defendant's Statement of Defence and reiterated the allegations in his Plaint. The Plaintiff added that the 1<sup>st</sup> Defendant is dishonest in her allegation that he was a stranger to her or that he was defrauded by a third party. He averred that his suit is properly before the court and not time barred as alleged. He added that the 1<sup>st</sup> Defendant's Statement of Defence does not disclose any reasonable defence and prayed that it be dismissed with costs.

### **Plaintiff's Case;**

8. The Plaintiff's case is that by agreement made on 02/04/2008 he purchased from the 1<sup>st</sup> Defendant land parcel no. Nyayo Settlement Scheme/1081 currently known as no. NYAYO SIRIMONI SCHEME/1081 measuring 1.4 acres (the suit property). The Plaintiff avers that he paid the purchase price of Kshs. 250,000/- in full and took possession thereof and has extensively developed the land, particulars of which he gave. According to him, the 1<sup>st</sup> Defendant had applied to the Land Adjudication and Settlement office to transfer the property to the him but that is yet to be done. The Plaintiff alleges



that he reported the matter to the Chief, Antu Ba Mwitw Location who wrote to the Land Registrar, Meru County. He also instructed his advocates to write to the 1<sup>st</sup> Defendant to no avail.

9. The Plaintiff avers that he filed MERU ELC No. 12 of 2020 claiming adverse possession, but later withdrew the suit as the claim had not matured. The Plaintiff further avers that he received a demand letter from the 2<sup>nd</sup> Defendant asking him to vacate the land, to which was attached a title deed indicating he was the registered owner of the suit property. It has now come to light that the 2<sup>nd</sup> Defendant also claims to have purchased land parcel no. Meru/Nyayo Sirimoni Scheme/1081, which is the same land as the suit property herein, from the 1<sup>st</sup> Defendant on 18/05/2018. The Plaintiff claims to have conducted a search and confirmed that the suit land is indeed registered in the 2<sup>nd</sup> Defendant's name.
10. The Plaintiff averred that upon paying the purchase price in full and taking actual possession and use of the suit land, the 1<sup>st</sup> Defendant's rights thereon were extinguished and a constructive trust arose. That the 1<sup>st</sup> Defendant was thus holding the land in trust for the Plaintiff and was estopped by the doctrine of proprietary estoppel from selling or otherwise disposing of the land contrary to the Plaintiff's interests. The Plaintiff accused the 1<sup>st</sup> Defendant of breach of the alleged trust as well as fraud in secretly transferring the suit land to the 2<sup>nd</sup> Defendant. He set out the particulars of the alleged constructive trust alongside the particulars of the breach of trust and particulars of the fraud on the part of the 1<sup>st</sup> Defendant. The Plaintiff accused the 2<sup>nd</sup> Defendant of colluding with the 1<sup>st</sup> Defendant to defraud him of the suit property and set out the particulars of the alleged collusion. The Plaintiff avers that the change in the parcel's name did not affect his interests on the land, thus the 2<sup>nd</sup> Defendant has no good title on the suit land.
11. The hearing of the suit commenced on 21<sup>st</sup> February, 2024 with the Plaintiff taking the stand as PW1. He was sworn and adopted his two witness statements dated 10<sup>th</sup> June, 2022 and 18<sup>th</sup> July, 2023 as his evidence-in-chief. He produced the documents in his list of documents filed on 10<sup>th</sup> June, 2022 as PEXb1-20, and those in the list of documents dated 18<sup>th</sup> July, 2023 as PEXb21 and 22. He went on to testify that he entered into an agreement with the 1<sup>st</sup> Defendant on 2<sup>nd</sup> April, 2008 and he took possession immediately. He stated that the 1<sup>st</sup> Defendant's signature was not forged, and that they both signed before a lawyer. PW1 testified that in the Replying Affidavit filed on 17<sup>th</sup> February, 2022 in the withdrawn O.S suit, the 2<sup>nd</sup> Defendant had confirmed that the Plaintiff was in possession of and cultivating the suit property.
12. PW1 testified that the 2<sup>nd</sup> Defendant had never taken possession of the suit property. PW1 stated that the 2<sup>nd</sup> Defendant knew that he (the Plaintiff) had purchased the land but never asked him about his interest in the land. That the 2<sup>nd</sup> Defendant texted him in 2021 telling him not to till the land since he had bought it and was the owner. PW1 testified that the 2<sup>nd</sup> Defendant is not entitled to the prayers in his counterclaim. He explained that the 1<sup>st</sup> Defendant and one Damaris Mwirigi, who were both the wives of Japheth Mwirigi, owned Plot Nos. 1081 and 1080 respectively. That the two plots were sold to PW1 on the same date and Damaris transferred her plot to PW1. He testified that the 1<sup>st</sup> Defendant had never accused him of fraudulent acquisition of the land as he had notified the area chief before buying, and the chief wrote a letter.
13. PW1 was cross-examined by Mr Ondari learned counsel for the defendants and he testified that before buying the land, the 1<sup>st</sup> Defendant presented to him a letter of allotment/offer dated 30/11/2001 and statutory receipts, but he never confirmed if she accepted it. He testified that the 1<sup>st</sup> Defendant's husband never provided an affidavit that the land was not family land. PW1 was also not aware that he was to obtain Land Control Board Consent. He conceded that although the agreement had a default clause, he had not sued the 1<sup>st</sup> Defendant on the default, as he trusted the 1<sup>st</sup> Defendant to transfer



the land as agreed. He testified that he had deponed in the Originating summons that the land was sold to him by Japheth Mwirigi, but stated that that was a mistake. He could not confirm whether a caution was lodged on the land. PW1 admitted that the 1<sup>st</sup> Defendant's signature on the sale agreement differed from that on the replying affidavit. PW1 testified that the sale agreement was made in the office of M.M. Kioga & Co. Advocates. He concluded that he would not be surprised to learn that the 1<sup>st</sup> Defendant was in Lamu in 2008.

14. PW1 was re-examined by Mr. Nyamu Nyaga and he testified that the 1<sup>st</sup> Defendant was in Meru in 2008 when the agreement was made, as both of Japheth's wives were in Meru then. He testified that Japheth Mwirigi was aware his two wives were selling the land, and he is the one who told him about it. That Japheth was present when they signed the agreement but no one insisted that he sign it as they were family friends. Further, that neither Japheth nor his children have ever complained that the land was bought without consent. He explained that the advocate who signed the agreement is deceased and cannot testify. In addition, he stated that he has never been summoned by the police for forgery. He also clarified that his claim was not based on the agreement, but on a constructive trust. PW1 explained that at the time of the sale, the land had no title, but that they agreed the same was to be issued in his favour, however, it was issued to the 1<sup>st</sup> Defendant before being transferred to the 2<sup>nd</sup> Defendant. He accused the 1<sup>st</sup> Defendant of lying that he had defaulted on the agreement, and pointed out that she had never evicted him from the land.
15. Geoffery Muthomi Muga testified as PW2. He was sworn and adopted his witness statement dated 18<sup>th</sup> July, 2023 as his evidence-in-chief. He testified that he has known the Plaintiff, who is his neighbour, from 2011. He testified that the Plaintiff is the owner of Plot Nos. 1080 and 1081, and that the 1<sup>st</sup> Defendant sold the land to the Plaintiff before she left. On cross-examination, PW2 testified that the 2<sup>nd</sup> Defendant's land is not part of plot no. 1080 or 1081 which were sold to the Plaintiff by the 1<sup>st</sup> Defendant. He admitted that he was not present when the agreement was signed and does not know if the 1<sup>st</sup> Defendant was present. He testified that he came to know the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2005/2006, before the parcels were allocated. PW2 stated that he does not know where the 1<sup>st</sup> Defendant stays. He was re-examined and he testified that parcel nos. 1080 and 1081 were sold to the Plaintiff by Naomi and Damaris. That the plots have no boundaries and are fenced all round. He testified that they heard from the village elder that the 1<sup>st</sup> Defendant sold land to the Plaintiff. He Confirmed that the Plaintiff is the one using the land currently.
16. PW3 was Joshua Mbijiwe, a senior area manager of Nyarigiru village. He was sworn and he adopted his witness statement dated 18<sup>th</sup> July, 2023 as his evidence-in-chief. He testified that the 1<sup>st</sup> Defendant was no. 1081 and he was no. 952 in the list of squatters. He testified that the 2<sup>nd</sup> Defendant bought the land from the original owners, whereas the Plaintiff has been on the land since 2008 to date. He testified that there is no boundary between plot 1080 & 1081, but there is a fence of eucalyptus trees planted around the two plots. When he was cross-examined by Mr. Ondari, he testified that he was not present when the Plaintiff was buying the suit land. He testified that parcel no. 1081 was in the name of the 1<sup>st</sup> Defendant and not her husband. On re-examination, PW3 testified that he signed PEXb 21 and confirmed it as the chairman. That the suit land was not owned by Mr. Mwirigi but belonged to his wife. He testified that he had not brought the document showing he was the area manager, but had neither seen anything stating that he was not.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Case;**

17. The first Defendant testified as DW1, she was sworn and adopted her statement dated 7<sup>th</sup> July, 2023. DW1 testified that she relocated from Meru to Lamu on 4<sup>th</sup> October, 2005 where she lives to date. She



- testified that she does not know the Plaintiff and only came to know him in court. She denied selling the suit land to the Plaintiff or signing any agreement before an advocate. She testified that she sold the suit land to the 2<sup>nd</sup> Defendant on 18<sup>th</sup> May, 2018 and acknowledged the signature on this agreement as her own. She told the court that her husband and the 2<sup>nd</sup> Defendant's wife witnessed the agreement between her and the 2<sup>nd</sup> Defendant.
18. When cross-examined by Mr. Nyamu Nyaga, DW1 testified that she moved to Lamu in October, 2005 and has a letter from the chief stating she lives there, thus could not have signed the agreement in 2008. She denied changing her ID card because of selling the land to the Plaintiff. She stated that she was given the land on 30<sup>th</sup> November, 2001 and paid for it but that she never gave the Plaintiff those documents. That she lived on the land in 2003-2004 and left in 2005. She stated that when she sold to the 2<sup>nd</sup> Defendant, the Plaintiff was on the land and needed to be evicted, but she never wrote a demand letter as she did not know who was on the land. She then went on to testify that she was unaware someone had trespassed on her land, and that she was informed by the 2<sup>nd</sup> Defendant that there was someone on her land.
  19. DW1 testified that she did not know who her co-wife Damaris had sold her land to. DW1 added that PW1 is a friend and they had never differed. DW1 stated that PW3 lied when he said that she took the Plaintiff to his home. She admitted that she had not gone back to the land since 2005 to 2018. She also conceded that she never reported the forgery of her signature to the CID. When shown the photographs, she testified that she had planted blue gum trees while the Plaintiff planted the rest of the trees. She admitted that the Plaintiff is the one cultivating the land. DW1 concluded by saying that she had never changed her signature. On re-examination, DW1 reiterated her testimony and was adamant that she had never sold land to the Plaintiff or signed an agreement with him and accused the Plaintiff of lying.
  20. The 2<sup>nd</sup> Defendant testified as DW2 and he was sworn and adopted his witness statement filed on 1<sup>st</sup> November, 2022. He produced the documents in the 1<sup>st</sup> Defendant's List of Documents dated 7<sup>th</sup> July, 2023 as DEXb1-5 respectively, and also produced the documents in his List of Documents dated 17<sup>th</sup> October, 2022 as his DEXb6-9 respectively. DW2 testified that he bought the suit property on 18<sup>th</sup> May, 2018. That he did due diligence by conducting a search and involved the seller's family. That he also visited the land and did not find any sign that the land was not for sale, neither was there a caution on the suit land. Further that he had no notice that anyone else had interest thereon, and only found out about the Plaintiff's claim when he filed this case, and that had he known, he would not have bought it. DW2 testified that the suit land did not have the trees shown on the photographs produced as PEXb 20, stating that those trees are on plot no. 1080. He testified that the Plaintiff is currently in possession of the suit land pursuant to court orders. DW2 testified that in his counterclaim he wants the Plaintiff to be evicted and also wants an injunction and costs.
  21. He was cross-examined by Mr. Nyamu Nyaga and admitted that the Plaintiff was on the land before the court ruling. He testified that he had known the suit land very well and had never seen the Plaintiff cultivating. That he inquired from the neighbours and confirmed that there was no one on the suit land. DW2 was referred to his statement and confirmed that he had stated that he was informed by the seller that the Plaintiff was tilling the land. He testified that he did not know the Plaintiff and only met him in court. He also conceded that his sale agreement required the seller to give written notice to the lessee to vacate, but he did not know the lessee being referred to or whether the notice was given. He told the court that he had no evidence to show that the trees on the photographs are not on the land.
  22. DW2 explained that the fence on the land is barbed wire and cedar posts. He confirmed his averment that the Plaintiff is cultivating seasonal crops on the land. The witness testified that per the Plaintiff's



- agreement which he was shown, the seller was to give vacant possession on execution, and she had also applied to the Land Adjudication and Settlement Officer for transfer to the purchaser. He conceded that in his Replying Affidavit filed in ELC 12 of 2020, he had admitted that he was aware the Plaintiff was tilling the land without his consent or permission. He denied any collusion with the 1<sup>st</sup> Defendant to take away the land from the Plaintiff. On re-examination, DW2 testified that he never saw the Plaintiff physically tilling the land but was informed by the 1<sup>st</sup> Defendant. He was aware that the Plaintiff was a lessee and not a purchaser.
23. Pauline Ninga Ndungu, the 2<sup>nd</sup> Defendant's wife testified under oath as DW3. She testified that she was the one making payments on behalf of her husband, who bought the land from the 1<sup>st</sup> Defendant and they signed an agreement which she witnessed. DW3 adopted her witness statement dated 4<sup>th</sup> August, 2023 as her evidence-in-chief.
24. DW3 was cross-examined and testified that when they bought the land, they used to see PW2 cultivating it, and later learnt that he was doing so on behalf of the Plaintiff. She testified that the 1<sup>st</sup> Defendant told them that once they paid, the person cultivating will vacate the land. It was her testimony that they never asked the 1<sup>st</sup> Defendant if she had sold the land previously. She confirmed that they have never taken possession of the land since they bought. She testified that she did not inquire who the Lessee was or whether the notice to vacate was given. She is aware that there is no boundary between plot no. 1081 and 1080. She added that after they got the title, they requested the 1<sup>st</sup> Defendant to ask the person tilling the land to vacate. She clarified that they do not live on the land as they stay in Nairobi.
25. Charles Mureithi Kirigia testified on oath as DW4 and adopted his witness statement dated 4<sup>th</sup> August, 2023 as his evidence-in-chief. He testified that the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant are his neighbours. He testified that he is the one who told the 2<sup>nd</sup> Defendant that the 1<sup>st</sup> Defendant was selling land and an agreement was then made and he was a witness.
26. When he was cross-examined, DW4 testified that he did not know the Plaintiff and only met him in court. He stated that he read the agreement before signing as a witness, but he did not know there was a clause that the lessee was to vacate. He testified that parcel nos. 1080 and 1081 belonged to Japheth Mwirigi but were in his wives names. That there is no boundary between the two plots and they are cultivated as one, although he did not know who was cultivating. He testified that the 1<sup>st</sup> defendant left the land in 2005 and went to Lamu. He was not aware that she sold the land in 2008 to the Plaintiff. He was re-examined and he testified that he was not aware that the 1<sup>st</sup> Defendant had sold the land to someone else before they signed the agreement.

### **Submissions;**

27. The Defence case was closed on 4<sup>th</sup> December, 2024 and the court directed the parties to file their written submissions. They complied, with the Plaintiff filing his submissions dated 10<sup>th</sup> December, 2024 while the Defendant's submissions are dated 14<sup>th</sup> December, 2024

### **The Plaintiff's Submissions;**

28. Counsel for the Plaintiff explained that the claim is based on the doctrine of constructive trust which arose from the agreement between the Plaintiff and the 1<sup>st</sup> Defendant. Counsel recounted the facts and testimonies of the witnesses. He relied on the case of *Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others* (Petition 18 (E020) of 2022) (2023) KESC 106 (KLR), and argued that a constructive trust will automatically arise where a person who is already a trustee takes advantage of



his position for his own benefit. He asked the court to find that the Plaintiff had proved his case to the degree required.

29. Counsel argued that the 1<sup>st</sup> Defendant has no good and/or reasonable defence against the Plaintiff's claim and prayed that the Court dismiss the same. Counsel submitted that the 2<sup>nd</sup> Defendant failed to prove to court that he conducted due diligence before buying the land. On the level of due diligence that should be undertaken to support the claim that one is a bonafide purchaser of land, Counsel cited the Supreme Court Case of Dina Management Limited vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) (2023) KESC 30 (KLR). Counsel argued that the 2<sup>nd</sup> Defendant was at all times aware that the Plaintiff was tilling the land but made no efforts to contact him and inquire the circumstances under which he was doing so. Further, that it is clear the Plaintiff was in possession of the suit property prior to the 2<sup>nd</sup> Defendant buying. That the Defendants did not produce any lease agreement between the seller and the alleged lessee of the land or that a demand letter was served on the purported lessee.
30. Counsel for the Plaintiff asserted that in the circumstances, the 2<sup>nd</sup> Defendant cannot claim to have conducted due diligence. Counsel for the Plaintiff relied on Independent Electoral and Boundaries Commission & Another vs Mule & 3 Others (Civil Appeal 219 of 2013) (2014) KECA 890 (KLR). It was also submitted that it is clear from the case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered the agreement with the sole intention to defraud the Plaintiff of the suit land, believing that once he obtained the title, the Plaintiff's rights would be defeated. Counsel argued that the said title is however subject to overriding interests of the constructive trust bestowed on the 1<sup>st</sup> Defendant on behalf of the Plaintiff. Therefore, the transfer did not defeat the Plaintiff's rights and interests. Counsel opined that as a consequence, the 2<sup>nd</sup> Defendant also had no good and/or reasonable defence and had failed to prove his counter-claim. Counsel prayed that the Defendants' Defences alongside the 2<sup>nd</sup> Defendant's Counterclaim be dismissed and that the Plaintiff's suit be allowed as prayed.

### **The Defendants' Submissions;**

31. On the part of the Defendants, Counsel submitted that the genesis of the dispute is the agreement dated 2<sup>nd</sup> April, 2008 which at clause 8 thereof, provided for remedies in case of default. He submitted that it is not available for the Plaintiff to impute a trust relationship where there was none. Counsel argued that since the 1<sup>st</sup> Defendant denied signing the Agreement, the onus of proof shifted to the Plaintiff to prove that the signature indeed belonged to her and cited Section 107 of the *Evidence Act*. Counsel pointed out that in the Plaintiff's Affidavit filed in ELC No. 12 of 2022 (O.S), he expressly admitted on oath that he bought the land from Japheth Mwirigi. Counsel argued that the Plaintiff was estopped by the provision of clause 8 of his agreement or the contents of his aforementioned Affidavit. It was also submitted that the agreement of 2<sup>nd</sup> April, 2008 was null and void for failure to obtain spousal consent.
32. Counsel for the Defendants submitted that the claim on fraud is time barred under Section 26 of the *Limitation of Actions Act*. In addition to this, Counsel submitted that the standard of proof in fraud cases is higher than in ordinary civil cases. Counsel relied on RG Patel vs Lalji Mukanji (1957) E.A 314 and Kisumu civil Appeal No. E016 of 2023, Meshack Orieny & Another vs National Bank of Kenya. Counsel further submitted that no caveats, restrictions, inhibitions or cautions were registered on the suit property which would have served as notice. That the 2<sup>nd</sup> Defendant carried out his due diligence and it is on the Plaintiff to prove otherwise. Counsel relied on Katende vs Haridar & Company Limited (2008)2 E.A 173 and Malindi Civil Appeal No. 83/2019, Khadija Mohammed vs Amina Badi Duba & Mohamed Abdul Rahman.



33. Counsel also submitted that the 1<sup>st</sup> Defendant had no title deed to the suit property as at 2<sup>nd</sup> April, 2008 when the Plaintiff bought the land, and he only relied on a letter of offer and receipts. That on the other hand, the 2<sup>nd</sup> Defendant relied on the title deed to the suit land to purchase the land and obtain a transfer. Counsel cited Section 26(1) of the Land Registration Act, arguing that the 1<sup>st</sup> Defendant obtained her title legally and without fraud after the process of adjudication. Further that the Plaintiff's possession of the land is contrary to Sections 24 and 25 of the Land Registration Act. Counsel argued that trust or constructive trust is not one of the reasons listed in the proviso to Section 26 of the Land Registration Act. Counsel submitted that the Plaintiff had failed to prove his claim and urged that his case be dismissed and judgment entered in terms of the counterclaim.

#### **Analysis and Determination;**

34. This Court has perused and considered the pleadings, the witness statements and the evidence adduced in Court, the exhibits produced, the written submissions and the authorities cited therein and finds the issues of determination arising therefrom are;
- i. Whether a constructive trust arose between the Plaintiff and the 1<sup>st</sup> defendant in favour of the Plaintiff;
  - ii. Whether the Plaintiff has an overriding interest in respect of the suit property;
  - iii. Whether the 2<sup>nd</sup> Defendant was a bona fide purchaser for value who acquired good and clean title to the suit property.
  - iv. What orders should issue from this court

#### **a. Whether a constructive trust arose between the Plaintiff and the 1<sup>st</sup> Defendant in favour of the Plaintiff;**

35. The Plaintiff filed this suit claiming that he purchased the suit property from the 1<sup>st</sup> Defendant on 2<sup>nd</sup> April, 2008. That he had been following up with the 1<sup>st</sup> Defendant to ensure that the land was registered in his name, but in the process realised that the land had in fact been sold and transferred to the 2<sup>nd</sup> Defendant. The Plaintiff claims that the 1<sup>st</sup> Defendant was not allowed to sell or transfer the land to the 2<sup>nd</sup> Defendant since the same had already been sold to him. He claimed a constructive trust arising out of the fact that he purchased the suit property from the 1<sup>st</sup> Defendant, paid the purchase price in full and was put into possession of the land.
36. The concept of trust is not new, and it is well known that Court's may, where absolutely necessary presume a trust. However, such a presumption is not made easily. The courts have also held that they will not imply a trust except to give effect to the intention of the parties, which intention must be clearly determined before a trust is implied. See Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR.
37. The Black's Law Dictionary, 11<sup>th</sup> Edition at page 1819 defines a constructive trust as:
- “An equitable remedy by which a court recognises that a claimant has a better right to certain property than the person who has legal title to it.”



38. The term constructive trust was properly explained by the Court of Appeal in *Twalib Hatayan & another vs Said Saggah Ahmed Al-Heidy & 5 others* (2015) eKLR, where it was held that:-

“Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.”

39. The Supreme Court of Kenya in the case of *Shah & 7 others vs Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) (2023) KESC 106 (KLR) held that constructive trusts can be imputed into land sale agreements. The Supreme Court explained the purpose and intention of constructive trusts by stating that:-

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.’



70. Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows:

As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”; and, again, at p. 3413, quoting Judge Cardozo “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”

71. The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) stated thus:

Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favour of the one who is truly and equitably entitled to the same...’”

40. In this instant suit, the Plaintiff has produced PEXb1 which is an agreement dated 2<sup>nd</sup> April, 2008 between the Plaintiff and the 2<sup>nd</sup> Defendant for sale of a parcel of land known as Plot No. 1081-Nyayo Settlement Scheme. The 1<sup>st</sup> Defendant is described as the allottee of the land vide Letter of Offer No. DS/EST/Nyayo Squatter/1088. The purchase price was Kshs. 250,000/- which was paid in full on the same date and the Vendor acknowledged receipt thereof, and she was to give vacant possession immediately upon execution. Under the said agreement, the 1<sup>st</sup> Defendant had already applied to the Land Adjudication and Settlement to transfer the land to the Plaintiff.
41. The agreement for sale is accompanied by an acknowledgment note of the same date for payment of the purchase price. The Plaintiff also produced a copy of the aforementioned letter of Offer dated 30<sup>th</sup> November, 2001 accompanied by receipt no. 087703 of 25<sup>th</sup> February, 2002 for payment of Kshs. 4,643/= to the Settlement Fund Trustee. He also produced receipt no. 790894 for Kshs. 5,500/= being survey fees. Notably, the Defendants have also mentioned that the 1<sup>st</sup> Defendant was allotted the suit land vide a letter of offer dated 30<sup>th</sup> November, 2001. They have produced receipt nos. 087703 and 790894 as the basis on which the title was issued to the 1<sup>st</sup> Defendant. Since the 1<sup>st</sup> Defendant has not indicated that the documents were lost or that she misplaced them, and neither has she lodged a complaint in that regard, the only logical explanation is that the Plaintiff obtained the said personal land documents from the 1<sup>st</sup> Defendant.
42. I have also seen a letter dated 25<sup>th</sup> February, 2019 from the Chief of Antu Ba Mwituu Location addressed to the Land Registrar informing him of the dispute herein and stating that the Plaintiff bought the land and is well known to have developed it for 10 years. From the Sale Agreement (PEXb1), the intention of the parties was that the 1<sup>st</sup> Defendant was to transfer the property purchased to the Plaintiff. The witnesses who testified in this case all agree that the Plaintiff has been using the land and he planted the trees that surround the suit property. Through the years, the first Defendant made no effort to evict



the Plaintiff from the land despite knowing that he was occupying it. She has not been honest with regards to how the Plaintiff gained entry into the land, and in fact never told this court how that came to be. I am convinced that the 1<sup>st</sup> Defendant put the Plaintiff into possession of the suit property after selling the land vide the sale agreement dated 2<sup>nd</sup> April, 2008 and after receiving the full purchase price.

43. In their defence, the Defendants were adamant that the 1<sup>st</sup> Defendant did not sell the land to the Plaintiff and that she did not sign his Agreement. She also disowned the signature appearing on the Plaintiff's agreement dated 2<sup>nd</sup> April, 2008 and said that it was forged. The Defendants submitted that the Plaintiff failed to prove the signature on the Agreement was the 1<sup>st</sup> Defendant's. I disagree with this contention. Section 107 of the Evidence Act provides that:-

107. Burden of proof.

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

44. In addition, Section 109 of the same Act provides that:-

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

45. The Plaintiff alleged that he purchased the land vide an agreement dated 2<sup>nd</sup> April, 2008 from the 1<sup>st</sup> Defendant. He produced a copy of the said agreement as proof, as well as an acknowledgment note for receipt of the money. Both bear the 1<sup>st</sup> Defendant's signature, which the Plaintiff testified was appended in the presence of an advocate. Indeed, both documents bear the signature and stamp of M.M. Kioga advocate. Having discharged his burden with relation to that particular fact, the burden of proof now shifted to the 1<sup>st</sup> Defendant who claimed that she did not sign the agreement to prove that her signature was indeed forged. However, apart from making the allegations of forgery, the 1<sup>st</sup> Defendant failed to present any evidence to prove this allegation. She could have called a document examiner to ascertain this fact, but she did not. There is also no complaint made to the police or the DCI of the alleged forgery, even though the 1<sup>st</sup> Defendant has known possibly from 2020 when Meru ELC No. 12 of 2020 was filed that the Plaintiff was in possession of an agreement for sale that was possibly forged.

46. I come to the conclusion that in the circumstances of this case the equitable doctrine of constructive trust is applicable herein. As explained in the authorities above, a trust will automatically arise in favour of the person who advances the purchase money. The Plaintiff's allegation that he paid the purchase price under the agreement in full has not been controverted. In *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* (2014) eKLR, the Court of Appeal held that:-

- “ 19. Pending the sale of all 240 plots by the Respondent, the question that comes to mind is what was to be the legal status and relationship between the Respondent and the Appellants as purchasers who had paid the purchase price for individual plots” It is our considered view that the Respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In *Mwangi & another v Mwangi* (1986) KLR 328, it was held that the rights of a person in possession



or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under section 126(1) of the Registered *Land Act* is merely permissive and not mandatory. In *Mutsonga v Nyati* (1984) KLR 425 and *Kanyi v Muthiora* (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of section 163 of the Registered *Land Act* which provides for the Application of the common law of England as modified by equity.

20. ... In the instant case, it was the Respondent who put the Appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them.”

47. Applying the principles to the case before me, all indications are that a constructive trust arose as between the Plaintiff and the 1<sup>st</sup> Defendant and was already in place when the land was sold and transferred to the 2<sup>nd</sup> Defendant. It follows therefore that the 1<sup>st</sup> Defendant, as trustee, did not have capacity to sell or transfer the land to the 2<sup>nd</sup> Defendant.

**b. Whether the Plaintiff has an overriding interest in respect of the suit property;**

48. Pursuant to Section 25 of the *Land Registration Act*, all registered land is subject to overriding interests, and it provides that:-

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

49. Section 28(b) of *Land Registration Act* provides as follows;

“28. Overriding interests

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

- a. ...
- b. trusts including customary trusts;”



50. Section 28 of the *Land Registration Act* thus recognizes trusts as overriding interests, which interests need not be registered on the title as they subsist and/or are binding on the land. In *Shah & 7 others v Mombasa Bricks & Tiles Limited (Supra)*, the Supreme Court explained that:-

84. Section 28 provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may for the time being subsist and affect the same, without being noted in the register. These overriding interests include, trusts.

85. While sections 25, 26 and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of article 24 of *the Constitution* therefore, the limitation of the right to property is provided under law, and includes a constructive trust.”

51. The transfer and registration of land that is subject of a trust into the name of a different proprietor under the *Land Registration Act*, does not therefore extinguish the rights of the beneficiary of the trust. Such a transfer would also not relieve the new registered proprietor of the duties or obligations as trustee over the land.

52. The court has declared a constructive trust in favour of the Plaintiff over the suit property herein. It is not in doubt that under the *Land Registration Act* 2012, the said trust is an overriding interest over the land that need not be noted on the register. Consequently, the registration of the 2<sup>nd</sup> Defendant as proprietor of the suit property did not extinguish the existence of the Plaintiff’s interest over the land.

**c. Whether the 2<sup>nd</sup> Defendant was a bona fide purchaser for value who acquired good and clean title to the suit property;**

53. On his part, the 2<sup>nd</sup> Defendant based his defence and counterclaim on the claim that he is a bona fide purchaser for value, without notice of the Plaintiff’s alleged interest. His claim arises out of the agreement dated 18<sup>th</sup> May, 2018 pursuant to which he bought the suit land from the 1<sup>st</sup> Defendant. So the question here is whether the 2<sup>nd</sup> Defendant was indeed a bonafide purchaser and whether he acquired good title from the 1<sup>st</sup> Defendant.

54. The Black’s law Dictionary 11<sup>th</sup> Edition at page 1491 defines a ‘bona fide purchaser’ as:

“Someone who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for the property without notice of prior claims..”

55. As to the elements that need to be established before a party can rely on the defence that they are a bona fide purchaser, in the Ugandan case of *Katende vs Haridar & Company Limited (2008) 2 E.A.173* it was held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:



- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

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

56. The 2<sup>nd</sup> Defendant does answer to most of the above-listed elements, except for good faith and the element of notice. While good faith is abstract and would require the court to delve into the presumed intent of the purchaser, notice is a matter of fact and can be proved through evidence. Going by the above definition, the term notice in this instance requires that the purchaser had no prior knowledge of any existing claims or equities to the property or defects in the title.
57. The 2<sup>nd</sup> Defendant’s case was that he purchased the suit property from the 1<sup>st</sup> Defendant who was the registered owner at the time. If his testimony is to be believed, he was shown the original title to the suit land and conducted a search which confirmed that the land was owned by the 1<sup>st</sup> Defendant. However, that appears to be all the due diligence that the 2<sup>nd</sup> Defendant undertook, and even that is not substantiated because this court has not seen any copy of the search allegedly conducted.
58. Moreover, all the witnesses have testified to the fact that the Plaintiff is the one residing on the suit property. DW2 and DW3 both admit that in the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant dated 18<sup>th</sup> May, 2018 the Vendor (1<sup>st</sup> Defendant) was to give written notice to the lessee to vacate and serve a copy of the said notice on the office, which I presume refers to the Advocates who drew the agreement. There is no evidence that the said notice was issued and/or notice that the 2<sup>nd</sup> Defendant followed up to ensure it was issued. Notably however, the 2<sup>nd</sup> Defendant never asked the 1<sup>st</sup> Defendant about the identity of the alleged lessee. The 2<sup>nd</sup> Defendant also did not ask to be shown any lease agreement under which the unknown third party and/or lessee, as referred to in the agreement, was tilling the land before purchasing. He made no effort to inquire into the situation of the Plaintiff with regards to the suit property or attempt to ascertain how the Plaintiff came to be cultivating and/or tilling the land.
59. Looking at the Replying Affidavit sworn by the 2<sup>nd</sup> Defendant on 15<sup>th</sup> February, 2022 in Meru ELC Case 12 of 2020, I am further convinced that the 2<sup>nd</sup> Defendant had or ought to have had sufficient notice of the Plaintiff’s claim on the land. He deponed therein that he was aware that the Plaintiff was tilling the land, but that he would at some point surrender the land to him. He also deponed that the Plaintiff was not living on the land but was cultivating seasonal crops. This is reiterated in the 2<sup>nd</sup> Defendant’s Replying Affidavit filed in this instant suit dated 3<sup>rd</sup> October, 2022 and in his statement filed in court on 1<sup>st</sup> November, 2022. There can be no doubt that even cultivation of seasonal crops amounts to possession and use of land, and should have put the 2<sup>nd</sup> Defendant on notice as to the situation of the land.



60. The element of lack of notice is necessary for one to be able to rely on the defence that he is a bona fide purchaser. This position has recently been reaffirmed by the Supreme Court of Uganda in *Lwanga vs Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7, where the court held:

The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.

The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”.

Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9<sup>th</sup> Edn Page 199) A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9<sup>th</sup> Edn.

It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of *Jones v. Smith* [1841] 1 Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her” See *Yakobo M. N Senkungu & Others v. Cresencio Mukasa* Civil Appeal No 17 of 2014.

28. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that, “...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.” And as in the Supreme Court decision in *Dina Management Limited vs County Government of Mombasa* (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.”

61. As to the allegation that the Plaintiff failed to prove the 2<sup>nd</sup> Defendant did not conduct due diligence, once more, going by Section 107 and 109 of the *Evidence Act*, it is not on the plaintiff to prove that the 2<sup>nd</sup> Defendant did not conduct due diligence. The onus is on the party alleging to have conducted the due diligence by providing proof thereof. Once this is proved, then the onus would shift to the Plaintiff to prove otherwise.
62. As to whether he was a bona fide purchaser for value without notice, I am of the belief that had the 2<sup>nd</sup> Defendant made inquiries into the Plaintiff’s possession and use of the land, he would have discovered the Plaintiff’s interest on the suit property. At the very least, he ought to have enquired into the circumstances through which the Plaintiff came to be on the land. The 2<sup>nd</sup> Defendant failed to do so, and by failing to undertake sufficient due diligence into the suit property, he recklessly turned a blind eye to the blatant fact of the Plaintiff’s occupation of the suit property. Consequently, the 2<sup>nd</sup> Defendant was not by any standard a bona fide purchaser for value of the suit property without notice.



#### d. What orders should issue from this court

63. The 2<sup>nd</sup> Defendant has failed to prove his defence and the allegations in his counterclaim that he is a bona fide purchaser for value and without notice to the required standard. For that reason, he is not entitled to the prayers sought in his Counterclaim. The Plaintiff on the other hand has succeeded in proving that he has an overriding interest over the suit property, being a constructive trust. The Plaintiff is therefore entitled to prayers (a), (b) and (c) of the Plaint.
64. The Plaintiff also sought for an order directing the cancellation of the 2<sup>nd</sup> Defendant's title, as well as a permanent injunction. The court in the case of *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* (2018) eKLR, properly defined a permanent injunction when it held as follows:-
- “...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected...”
65. The principles on injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. The Plaintiff has been in occupation of the suit property since 2008 when he purchased from the 1<sup>st</sup> Defendant to date. He has lived on the suit land peacefully and openly during that time, and even the Defendants admit that he has been utilising the land by cultivating seasonal crops. The Plaintiff has proved that a constructive trust was created in his favour over the suit property, with the 1<sup>st</sup> Defendant as a trustee. The 1<sup>st</sup> Defendant as trustee had no authority to sell or transfer the land to the 2<sup>nd</sup> Defendant, who for the record has failed to prove that he was a bona fide purchaser without notice. Both Defendants have no right or authority to enter into or use the suit property herein. Although the Plaintiff is yet to be duly registered as owner thereof, he is the beneficiary of the constructive trust declared over the land. He is therefore the beneficial owner of the land and is thus entitled to the order of permanent injunction.
66. This court has also been asked to issue a declaration that the 2<sup>nd</sup> defendant has no good title in respect of the suit property, and therefore, that the said title ought to be cancelled, and the 1<sup>st</sup> Defendant's name be reinstated in the register for the suit land. This Court is empowered to rectify the register of any parcel of land pursuant to Section 80 of the *Land Registration Act*, which provides:-
- “80. Rectification by order of Court
- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
  - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”



67. Rectification by Court involves either cancellation or amendment of title in the circumstances outlined above. By the time the 1<sup>st</sup> Defendant transferred the suit property to the 2<sup>nd</sup> Defendant, she was already a constructive trustee for the Plaintiff. Going by the circumstances of this case, it would be unjust and inequitable to allow the 2<sup>nd</sup> Defendant to retain the suit property when it had already been sold to the Plaintiff and a trust had arisen in his favour. Moreover, the 2<sup>nd</sup> Defendant knew or ought to have known of the Plaintiff's interest in the suit land, yet he ignored it and purported to buy it. In the circumstances, and having considered the available evidence, this Court is satisfied that the Certificate of title held by the 2<sup>nd</sup> Defendant is impeachable and ought to be cancelled and the 1<sup>st</sup> Defendant's name be reinstated in the register for the suit property. It also follows that the Plaintiff is entitled to an order directing the 1<sup>st</sup> Defendant to transfer the land into the Plaintiff's favour.

68. Lastly, the Plaintiff also prayed for costs of this suit. The issue of costs is guided by Section 27(1) of the Civil Procedure Act which provides:

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

69. Ordinarily therefore, costs follow the event and Section 27 gives the Court the discretion to award costs. This means that the successful party is entitled to the Costs of the suit. Under the Proviso to Section 27(1), a judge may for good reason depart from this general rule. The Plaintiff has emerged victorious in this instant suit. No justifiable reason exists as to why the Plaintiff should be denied costs, and therefore the Court finds and holds that the Plaintiff is entitled to the costs of the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

70. Consequently, the Defendant's Counterclaim is hereby dismissed and judgement is entered for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in the following terms:-

- a. A declaration be and is hereby issued that that the plaintiff has an overriding interest in respect of Land parcel No. Nyayo Sirimoni Scheme/1081 and his rights and interests over the said land are indefeasible.
- b. A declaration be and is hereby issued that the 1<sup>st</sup> Defendant having acknowledged receipt of full purchase price for sale of Land parcel No. Nyayo Sirimoni Scheme/1081 from the Plaintiff and put the plaintiff into actual possession and use of the said land, allowed the Plaintiff to extensively develop the said land, the 1<sup>st</sup> Defendant's rights and interests over the said land were extinguished and a constructive trust in favour of the Plaintiff arose in respect of the said land and the 1<sup>st</sup> Defendant held the said land in trust for the plaintiff and therefore Land parcel No. Nyayo Sirimoni Scheme/1081 belongs to the plaintiff and the 1<sup>st</sup> Defendant was barred



by the doctrine of proprietary estoppel from causing the said Land parcel No. Nyayo Sirimoni Scheme/1081 to be registered in her name and /or selling the said land to the 2<sup>nd</sup> defendant.

- c. A declaration be and hereby issued that the sale of Land parcel No. Nyayo Sirimoni Scheme/1081 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and the subsequent transfer and registration of the said land to the 2<sup>nd</sup> defendant was unlawful, null and void ab initio.
- d. A declaration be and is hereby issued that the 2<sup>nd</sup> Defendant has no good title in respect of Land parcel No. Nyayo Sirimoni Scheme/1081.
- e. An order be and is hereby issued that the title deed issued to the 2<sup>nd</sup> Defendant be cancelled and the 1<sup>st</sup> Defendant's name be reinstated in the register for the said land forthwith.
- f. An order be and is hereby issued requiring the 1<sup>st</sup> Defendant to sign all the relevant documents to ensure that Land parcel No. Nyayo Sirimoni Scheme/1081 is transferred and registered in the name of the plaintiff AND IN DEFAULT, the Deputy Registrar of this Honourable Court do sign all the relevant documents on behalf of the 1<sup>st</sup> Defendant to facilitate the transfer and subsequent registration of Land parcel No. Nyayo Sirimoni Scheme/ 1081 in the name of the Plaintiff.
- g. An order of permanent injunction be and is hereby restraining the Defendants, their servants, agents, employees, assignees and/or anybody else acting on their behalf from trespassing, entering, interfering and/or in whichever manner interrupting the Plaintiff's quiet occupation and use of Land parcel No. Nyayo Sirimoni Scheme/1081.
- h. The Plaintiff shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. YANO**

**ELC, JUDGE**

In the presence of;

No appearance for the plaintiff.

No appearance for the Defendants.

Court Assistant – Laban.

