



Kiarie & 2 others v Kiarie & 3 others (Environment and Land Appeal E016 & E018 of 2023 (Consolidated)) [2024] KEELC 7081 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E016 & E018 OF 2023 (CONSOLIDATED)**

JG KEMEI, J

OCTOBER 22, 2024

BETWEEN

JAMES KARANJA KIARIE 1ST APPELLANT

HANNAH WANJA KIARIE 2ND APPELLANT

ANTONY JOSEPH MUIRURI NJAU 3RD APPELLANT

AND

WILLIAM NJIU KIARIE 1ST RESPONDENT

PAUL KIHUMBA KIARIE 2ND RESPONDENT

PETER NJOROGE 3RD RESPONDENT

WANJIKU KIARIE 4TH RESPONDENT

(Being an appeal against the entire Judgement of Hon P. Muboli Principal Magistrate delivered on the 13/7/2023 in MCEL&C No 33 of 2021 in Githunguri Law Courts))

JUDGMENT

1. The 1st and 2nd Appellants and the Respondents are children of the Julia Wambui Kiarie (Julia), deceased. Currently the Githunguri/githiga/5757 (suit land) is registered in the name of the 3rd Appellant.
2. In the trial Court the Respondents filed suit against their mother and siblings, the 1st and 2nd Appellants seeking orders inter alia declaration that the suit land was held by Julia under customary trust in their favour and that the title in the name of the 3rd Appellant ought to be cancelled and the land reverted to the name of Julia. In addition, they sought an order of permanent injunction restraining the Appellants from interfering with the quiet enjoyment of the suit land.



3. It is noted that Julia who was the 1st Defendant did not file any defence and it is commonly acknowledged that she died during the pendency of the suit but after filing some replying affidavits which I shall revert to later in this Judgement.
4. In their defence dated the 14/6/22, the 1st and 2nd Appellants denied that Julia held the land in trust for the Respondents and that the suit land devolved to her absolutely devoid of customary trust. They however concede that the mother title being Githunguri/githiga/893 was registered in the name of their uncle namely John Njoroge and upon his demise the land was subdivided into three portions, yielding among others the suit land. The Julia received the land as her share from her father in law's estate one Nene Njiu which land upon transmission morphed into an absolute and indefeasible holding in her favour. Inter alia that Julia, being the absolute owner of the suit land was within her right to transfer the land to the 1st and 2nd Appellants without having to seek the consent and the concurrence of the Respondents. Equally on receipt of the land they pleaded that they sold the land to the 3rd Appellant lawfully as there was nothing to bar them from conveying the interest therein. They urged the Court to dismiss the suit
5. The 3rd Appellant on the other hand filed his statement of defence on the 25/5/22 and denied any customary trust on the suit land. He pleaded that he is a bonafide purchaser for value without notice having purchased the land free of all encumbrances vide an agreement of sale between the 1st and 2nd Appellants on 26/11/21. He urged the Court to dismiss the suit.
6. The Learned Hon Principal Magistrate heard the dispute in which the Respondent's case was led by four witnesses while that of the 1st and 2nd Appellants and 3rd Appellant were led by one witness each.
7. In the Judgement the Learned Magistrate held as follows;
 - a. An order that Githunguri/Githiga/5757 is a customary trust which devolved from the 1st Defendants father in law
 - b. An order issued to the Registrar of Lands for rectification of the register and cancelling all the titles in respect of Githunguri/Githiga/5757 reverting it to the 1st Defendant is hereby issued.
 - c. A permanent injunction against the Defendants , Interested party by himself his agents representatives, employees , servants and or any other persons claiming through him from interfering with the quiet enjoyment of the suit land by the Plaintiffs
 - d. Costs to the Plaintiffs.
8. It is the above decision that has triggered the instant appeal. The 1st and 2nd Appellants filed their appeal in ELCA 16 of 2023 vide the Memo dated the 11/8/2023 raising 11 grounds.
9. The 3rd Appellants appeal is contained in ELCA 18 of 2023 vide the Memo dated the 7/8/2023 premised on 17 grounds.

Consolidation of appeals

10. On the 18/6/23 the parties elected to consolidate the two appeals and the Court duly issued the consolidation orders on even date. The lead file is ELCA 16 of 2023 with the Appellants being the 1st - 3rd Appellants while the Respondents are the 1st - 4th Respondents.



The written submissions of the parties

11. Although the Appellants tabulated a total of 28 grounds , the 1st and 2nd Appellants reduced their grounds to 5 as thus;
 - a. Whether the Respondents proved customary trust
 - b. Whether the late Julia and the 1st and 2nd Appellants held an indefeasible title
 - c. Whether the order for costs was necessary
 - d. Whether the 3rd Appellant is a bonafide purchaser for value without notice of any defect
 - e. Whether the appeal is meritorious
12. Similarly, the 3rd Appellant reduced the grounds to 3 as follows;
 - a. Whether a customary trust was proven
 - b. Whether the 1st and 2nd Appellant held a proper title to the suit land
 - c. Whether the 3rd Appellant was a bonafide purchaser for value without notice of any defect
13. On the 1st ground the 1st and 2nd Appellants submitted that the Respondents failed to proof customary trust on grounds that there is no evidence the suit was a resulted subdivision of the mother title being parcel 893; according to the green card Julia was the first registered owner of the land; Julia was not the administrator of the estate of Kiarie her deceased husband; The confirmation of grant did not provide for holding the land in trust for the Respondents or any such other persons; no evidence that the land belonged to Nene Njiu, their grandfather; Julia gave land to the Respondents and was within her right to gift the suit land to the Appellants; even if Julia inherited the land there was no automatic trust in favour of the Respondents.
14. On the 2nd issue, the 1st and 2nd Appellants relied on the provisions of Section 24 of the [Land Registration Act](#) and submitted that Julia held the land absolutely and gifted to them lawfully. On their part they transferred an absolute title to the 3rd Appellant devoid of customary trust.
15. The 1st and 2nd Appellants submitted that the parties to this suit being related the Court erred in awarding costs to the Appellants and opined that to assist families to resolve their disputes without imposing the burden of costs and also to foster harmony in the family unit, each ought to have met their costs as is the practice by Courts in similar disputes.
16. On to the 4th issue the 1st and 2nd Appellants were firm that the 3rd Appellant was a bonafide purchaser for value without notice on the basis of due diligence of the title which showed that the 1st and 2nd Appellants were registered as absolute owners; no evidence of fraud misrepresentation as proved.
17. Finally, they submitted that the appeal is meritorious and urged the Court to allow it with costs in their favour.
18. The 3rd Appellant filed written submissions and on the question of customary trust reiterated the position of the 1st and 2nd Appellants that there was no proof of a customary trust at all and urged the Court to allow the appeal on this ground.
19. In the absence of proof of a customary trust the 3rd Appellant concluded that Julia and the 1st and 2nd Appellants held the land absolutely and had every right to transact with it the way they did including selling it to him.



20. On the 3rd issue the 3rd Appellant answered this in the affirmative and faulted the learned trial Court for reaching a contrary conclusion for several reasons; he carried out due diligence on the title which showed the 1st and 2nd Appellants were the registered owners; the title was free of any encumbrances; confirmed from neighbours that the land belonged to his co- Appellants and was being cultivated by the Appellants (vendors); paid for the land in full; had no knowledge of the caution lodged on the title; not aware of the suit until after Julia passed away when he sought orders to stop her internment on the suit land by the Respondents;
21. It was also his further submissions that the Respondents failed to prove fraud or misrepresentation on his part or his co-Appellants and therefore no evidence has been adduced to impugn his title.
22. By the time of preparing the Judgment no submissions had been filed by the Respondents despite directions with respect to timelines having been given for not later than 18/9/24.

Analysis and determination

23. Having carefully considered the record of appeal, the Judgment of the trial Court, the grounds of appeal, the rival submissions and the authorities relied on, the issues that commend themselves for determination are;
 - a. Whether the suit land was held under customary trust
 - b. Whether Julia and the 1st and 2nd Appellants held the land absolutely.
 - c. Whether the 3rd Appellant was a bonafide purchaser for value without notice of any defect.
 - d. Who meets the costs
24. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: ‘... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’
25. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
26. On the 1st issue, customary trust is one of the ways of acquisition of land in Kenya. It is a concept that fosters intergenerational trust. In the case of *Mbui vs Mukangu Vs. Gerald Mutwiri Mbui* C.A No. 281 of 2000 the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. If land was passed down from the family member to another, the presumption of trust subject to evidence is high.



27. Its constitutional underpinning is found in Article 60 of *the Constitution* of Kenya which provides as follows;

“Principles of land policy.

1. Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
 - a. equitable access to land;
 - b. security of land rights;
 - c. sustainable and productive management of land resources;
 - d. transparent and cost effective administration of land;
 - e. sound conservation and protection of ecologically sensitive areas;
 - f. elimination of gender discrimination in law, customs and practices related to land and property in land; and [Rev. 2022] Constitution of Kenya 35.
 - g. encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.
 2. These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.”
28. Customary trust is a concept that is now settled by the apex Court in the land in the case of *Isack Kieba M’inanga Vs. Isaaya Theuri M’Lintari & Another* [2018] eKLR where the Court stated as follows:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie Vs. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
 2. The claimant belongs to such family, clan, or group. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
29. The first ground is whether the Learned trial Court erred in holding that the suit land is encumbered with customary trust. The Court stated as follows;

“In the present case it is important to examine the root of the suit land. The parties share an ancestor Njiu Nene who was the father of the 3 sons, one of whom is the Plaintiffs father



and 1st Defendants husband. Evidence was led that the suit land was inherited by the 1st Defendant from his father-in-law who in turn got it from the family Patriarch. There is evidence which is admitted by the Defendants that they did not buy the property. It was family land by virtue of ancestry.

The Defendants on the other hand have told Court that they have never been in possession of the land, in fact in their testimony they confirmed that it is the 1st Plaintiff who has been in occupation and use all through. It therefore lends credence to the argument that this was family land. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust subsists on the suit land in favour of the Plaintiffs.”

30. Under Section 28 of the [Land Registration Act](#) trusts and particular customary trust are provided for
- a. 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—
 - b. ...
 - c. trusts including customary trusts;
31. How can one prove customary trust? In the case of *Njenga Chogera Vs. Maria Wanjira Kimani & 2 Others* [2005] eKLR which quoted with approval the holding in the case of *Muthuita Vs. Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to.
32. Similarly in the case of [Peter Gitonga Vs. Francis Maingi M'ikiara Meru HC,CC NO. 146 OF 2000](#) - it was stated that:-
- “A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).
33. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of *Issack Kieba M’Inanga Vs. Isaaya Theuri M’Linturi & Anor* SCOCK No 10 of 2015.
34. In the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR 9(supra) the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:
- “The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”



35. In its classic pronouncement on the subject of customary trust, the apex Court stated that it is not every claim of a right to land that will qualify as a customary trust as each case has to be determined on its own merits and quality of evidence. With this in mind I shall now evaluate the evidence that was presented before the Court in order to arrive at my own conclusions.
36. As alluded in the opening remarks of the Judgment, with the exception of the 3rd Appellant the parties are related being siblings.
37. Evidence was led that Nene Njiu, the family patriarch had three sons namely Kiarie Njiu, John Njoroge Njiu and Ngethe Njiu. Kiarie Njiu was the husband of Julia.
38. Was the title encumbered by a customary trust in favour of the Plaintiffs? The answer to this question is found in the evidence led by PW1-4 during the trial where they commonly stated that the land belonged to their family patriarch and registered in the name of John Njoroge to hold in trust for himself and the family. That upon the death of their uncle Njoroge the land devolved to each of the households of the three brothers in equal shares. The suit land therefore being for the house of Kiarie devolved to Julia.
39. It is commonly agreed that Julia died while the case was pending in Court. However, in her evidence under oath contained in the Replying Affidavit sworn on 17/1/22 she stated as follows;
5. That I am the biological mother of the Applicants and the 1st and 2nd Respondents herein and the wife of the late Kiarie Njiu the son of the late Njiu Nene.
 6. That land parcel number Githunguri/githiga/893 initially belonged to the late Njiu Kene my late husband's father.
 7. That our late father apportioned the said parcel to my late husband Kiarie Njiu and his brother John Njoroge Njiu.
 8. That land parcel number Githunguri/githiga/893 was thereafter registered in the name of John Njoroge Njiu to hold in trust for himself and his brother Kiarie Njiu. Annexed hereto and marked JWK-1 is a copy of the search to that effect.
 9. That after John Njoroge Njiu's demise and vide Kiambu Succession Cause 87 of 2019 land parcel Githunguri/Githiga/893 was subdivided giving rise to land parcel number Githunguri/Githiga/5757 being my late husbands share of inheritance that was apportioned to me vide the said cause as his surviving wife."
40. It is clear that even Julia admitted that the root of the suit land is traceable to Nene Njiu the family patriarch and that her brother in law one Njoroge Njiu held the land in trust for himself Julia and Ngethe Njiu. It is also admitted by Julia that the share of her husband devolved to her.
41. The evidence of the Plaintiff's when read together with that of Julia leads this Court to one conclusion which is that Julia held the land in trust for the house of Kiarie Njiu, her deceased husband and not in her name absolutely. The interest that devolved and was transmitted to Julia was encumbered with a customary trust and there was no evidence that the said trust has been determined.
42. Consequently, the transfer of the land by Julia to the 1st and 2nd Appellants was encumbered by a customary trust and I therefore find that the learned trial Court did not err in so holding.
43. With respect to the 2nd issue it is trite that the rights of a registered owner are recognized under section 24 and 25 of the *Land Registration Act* which interalia include absolute ownership of the land together with all the rights and privileges belonging to and appurtenant thereto and the law decrees that such



rights cannot be defeated or limited except as provided for in law and shall be held by the proprietor but only subject to such encumbrances permissible in law which includes liabilities rights interests declared under section 28 of the Act unless the contrary is expressed in the register. The act provides that nothing shall be taken to relieve a proprietor of land from any duty or obligation to which the person is subject as a trustee.

44. Customary interests are defined as overriding interests which bind the land without having to be sighted on the title/register. In the case of *Kanyi Vs Muthiora* 1984 KLR 712 CA, the Court held that the registration of land in the name of a proprietor under the *Land Registration Act* did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land.
45. I find that Julia received land that was encumbered with customary trust and given the overriding nature of this interest it need not be noted on the register. The Appellants are therefore right that the same was not present in the title. That said nothing relieved Julia from the overriding interest on the title that devolved to her through transmission on behalf of the estate of her husband.
46. Is the 3rd Appellant a bonafide purchaser for value without notice? The 9th Edition of the Blacks Law dictionary defines a bonafide Purchaser as ‘one 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 property without notice of prior adverse claims.
47. A bona fide purchaser for value without notice is a good-faith buyer who has paid a stated price for a property without knowledge of existing prior claims or equitable interests. For simplicity, the term can be broken down as follows: the party purchased in good faith (no ill/deceptive intention); the party must have bought the property, not been a beneficiary of a gift; the price paid must be a full and fair amount which reflects the value of the property; the party had no actual, constructive, or imputed knowledge of existing adverse claims to the property.
48. A bonafide purchaser was defined by the Court of Appeal of Uganda in *Katende v Haridar & Company Ltd* (2008) 2 EA 173, where 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 as was held in the case of *Hannington Njuki Vs. William Nyanzi* High Court Civil Suit No. 434 of 1996, he must prove that: 1.he holds a certificate of title; 2.he purchased the property in good faith; 3.he had no knowledge of the fraud; 4.he purchased for valuable consideration; 5.the vendors had apparent valid title; 6.he purchased without notice of any fraud; and 7. he was not party to the fraud. A bonafide purchaser for value of a legal estate without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up.”
49. The 3rd Appellant informed the Court that he carried out due diligence on the title by carrying out a search whose results showed him that the land was registered in the name of the 1st and 2nd Respondents. Due diligence when purchasing land does not start and end with conducting a search at the land registry. In *Ngere Tea Factory Company Ltd Vs. Alice Wambui Ndome* (2018) eKLR the Court held that;

“Since the Plaintiff was the one buying the land, the clear duty on their part as the purchaser in the contract of sale of land, was to conduct due diligence and inform itself on all the



relevant aspects concerning the property that he was seeking to purchase. The rule of caveat emptor applies to contracts for the sale of land, and this responsibility on the part of the Plaintiff is clearly explained in Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 51 "Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase."

50. A keen perusal of the green card shows that the suit land was the resultant subdivision of parcel 893. The relevant entry is number 4 dated the 16/9/21 when the 1st and the 2nd Appellants became registered as owners of the suit land. The next entry is a restriction restricting dealings on the land. If the 3rd Appellant carried out due diligence he would have realized that the title was restricted. The agreement of sale between the 3rd Appellant and the 1st and 2nd Appellants was part of the acts that were restricted by the encumbrance. Further unchallenged evidence was led that the land was under the cultivation of the Respondents and their tenants. Secondly, the 3rd Appellant led evidence that he visited the land and found people cultivating but it did not concern him. Inter alia he stated that those cultivating were the vendors. The question is if indeed they were the vendors why did he issue notices of eviction to the cultivators who happen to be the Respondents and their tenants.
51. Thirdly he led evidence that he had another piece of land in the neighborhood and therefore must have known that the family of Julia whom he said was known to him were fighting over the land in Court. Fourthly the 1st and 2nd Appellants who were parties to the suit in Court cunningly caused the removal of the restriction by a Court in Misc Application No 20 of 2022 in Kiambu Court. One wonders why the 1st and 2nd Appellants had to move a different Court and yet the subject matter was already under litigation in Githunguri. The only reason was to mislead the Court to remove the restriction to aid in their fraudulent transfer of the suit to the 3rd Appellant. Had they moved the Githunguri Court the application would have been brought to the attention of the Respondents who were parties in the suit. This was a material fact that if the Court in Kiambu had been made aware of, I am persuaded that the Court would not have granted the orders. The aim was to conceal the removal of the restriction from the Respondents as well as the Court. See the orders of the Court issued on the 24/1/22. When the Respondents got wind of the removal they moved the Court in Kiambu Misc. Application No 20 of 2022 and successfully got the said orders set aside on the 30/6/22 which came too late in the day as by then the schemes of the 1st and 2nd Appellant to transfer the land to the 3rd Appellant had been concluded. Entry No 7 attests to the registration of the land in the name of the 3rd Appellant.
52. There is a fifth reason that militates against the defence of the 3rd Appellant. The reason is found in the common law doctrine of lis pendens.
53. Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a Court over property while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by Section 52 Indian Transfer of Property Act (ITPA)-now repealed.
54. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

"It is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before



the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

55. In the case of *Mawji Vs. US International University & Another* [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of *lis pendens* under Section 52 of Transfer of Property Act is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides, Section 23 of the Registration of Titles Act and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

56. In the same case the Court observed inter alia that:-

“Every man is presumed to be attentive to what passes in the Courts of justice of the State or sovereignty where he resides.

57. It is trite that the doctrine of *Lis pendens* is still applicable to our legal system through the application of Section 3 of the *Judicature Act* read together with Section 107 (1) of the *Land Registration Act* which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

58. It is a principle of law that a disposition made of a property actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the Judgment or Decree in the suit.

59. Given that the 1st and 2nd Appellants sold the land during the pendency of the suit, the Court is not persuaded that the 3rd Appellant was innocent. Far from it. The 3rd Appellant was in cohorts with the 1st and 2nd Appellant to keep the suit land away from the Respondents to defeat their claim of customary trust. In any event any sale or disposition of land in litigation affects the purchaser in the same manner as if he had notice of the suit. Knowledge of the presence of litigation is presumed more so when the 3rd Appellant was quite proximate to the transaction. He cannot be allowed to feign ignorance of the active litigation.

60. Sixthly, the 3rd Appellant for reasons only known to him has not shown any duly executed transfer, payment of the consideration, stamp duty on the transfer nor the land control board consent with respect to the transaction. Absent these documents the Court will never know if any consideration exchanged hands and whether the due process of the law was followed. Whatever it was, it suffices that the interest that was acquired by the 3rd Appellant was encumbered with a customary trust in favour of the house of Julia and Kiarie Njju.

61. In the end I find that the defence of a bonafide purchaser for value without notice cannot be availed to the 3rd Appellant



62. Costs shall follow the event. In this case I find that parties being related each to bear their own costs on appeal and in the trial Court.
63. The appeal is unmerited. It is dismissed.
64. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Olaka for 1st and 2nd Appellants/Applicants

Ms. Kariuki for 3rd Appellant/Applicant

1st, 2nd, 3rd and 4th Respondents – Absent but served – See Affidavit of Service dated 12/10/2024

Court Assistants – Phyllis

