Kiragu & another v Njoka (Being Sued as the Administrator of the Estate of the Late Njoka Wakioriah) (Environment & Land Case 17 of 2024) [2024] KEELC 7348 (KLR) (Environment and Land) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE 17 OF 2024

MC OUNDO, J

NOVEMBER 7, 2024

BETWEEN

TITUS KIRAGU .... 1ST PLAINTIFF

SUSAN W KIRAGU .... 2ND PLAINTIFF

AND

KIORIAH NJOKA .... DEFENDANT

BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE NJOKA WAKIORIAH

JUDGMENT

1. The original Plaint in this matter is dated the 23rd October 2013. The same was amended on 16th May, 2019, wherein the Plaintiffs sought for the following orders:

   i. That the Honourable court be pleased to declare that the 1st and 2nd Plaintiffs made a purchase of 55.6 acres of land on sub-plots number F and C on L.R No. 10317/14 for the value of Kshs. 1,112,264.55.

   ii. That the Honourable Court be pleased to declare that the 1st and 2nd Plaintiffs are the rightful owners of 55.6 acres of land on sub-plots number F and C on L.R No. 10317/14.

   iii. That the Defendant be directed to hive off and transfer 55.6 acres of land on sub plots number F and C on L.R No. 10317/14 to the Plaintiffs.

   iv. An order of permanent injunction restraining the Defendant by himself, his servants, employees, and/or agents from occupying, entering, taking and/or being in possession,

ploughing, grazing, and erecting any structure and/or in any other manner dealing with sub plots F and C out of Land Reference Number 10317/14 situated North East of Naivasha Municipality.

v. General damages.

vi. An eviction order do issue against the Defendant and/or anyone living within the 55.6 acres to be hived off from sub-plots number F and C On L.R No. 10317/14.

vii. Any further orders that the Honourable court may be pleased to issue.

viii. Costs of the suit.

2. The Defendant herein, having been sued as the administrator of the estate of the late Njoka Wakioriah filed his Statement of Defence dated 21st November, 2013 and amended on 4th May 2013 (sic) wherein he denied there ever being any subdivision of L.R 10317/14 in January and February 2002 stating that the same had been carried out between 27th and 30th November, 2001. He refuted the allegations that the Plaintiffs agreement with the deceased was for plots numbers F and C and stated that the said agreement had only related to plot C. That subsequently, the Plaintiffs claim of 100 acres parcel of land from the Deceased's estate was a fraud on the said estate as the same had manifestly been pointed out to the 1st Plaintiff by the deceased during his lifetime. That the letter of Consent of the Land Control Board (LCB) was not valid as the same had been obtained over six months after the subdivision of the land and over two years from the date of the sale agreement. That further, the said LCB consent had been procured at a time when the deceased had been critically sick to have known or voluntarily participated in its obtaining. That accordingly, the Plaintiffs were not entitled to the prayers sought in their Plaint.

3. The matter started afresh pursuant to the setting aside of an ex-parte Judgement of 15th July, 2021 wherein Titus Kiragu, the 1st Plaintiff herein testified as PW1 and confirmed that the 2nd Plaintiff was his wife. He adopted his witness statement as his evidence in chief and proceeded to testify that the late Njoka Wa Kioria was his friend from whom he had purchased a portion of land measuring 100 acres wherein he had paid for the same by cash instalments and in accordance to the demands by the said Njoka.

4. He produced a Grant of Letters of Administration as Pf exh1 and marked a copy of an agreement with the deceased dated 3rd October, 1989 for the purchase of 50 acres of land for Kshs. 1,000,000/= as PMFI-2.

5. He testified that the deceased Njoka had then asked him for additional payments wherein he had agreed on condition that the deceased gave him extra land in proportion to the said additional payments and that parties enter into an agreement to the effect. He explained that the said additional payments had been towards the education of Njoka's children as well as for the deceased's personal expenses. That he had paid the additional monies to Njoka in instalments and according to his demands. That the monies had been collected from his house by the said Njoka. That subsequently, he, the deceased Njoka and the 2nd Plaintiff had signed the agreement dated 8th May, 2000 for the purchase of another 50 acre portion of land for a consideration of Kshs.1,000,000/= . That at the time of signing this agreement, the purchase price had already been paid in cash. He marked the Agreement dated 8th May, 2000 as PMFI-3

6. That after execution of the said agreement, he had continued paying to the deceased wherein he had receipts to the payments where Mr. Kioria was a signatory. He testified that from the batch of receipts, receipt No. 35 had been signed by Njoka Kioria's son because at that time Mr. Njoka had been ill.

7. He admitted that some receipts had a signature that was different from the deceased's signature because while the deceased had been admitted in the hospital, he had asked him to assist his family and he had complied. He sought to produce the following receipts as his evidence; -

   i. Receipt dated 6th June, 2000 for Kshs. 15,000/= signed by Njoka.

   ii. Receipt dated 27th June, 2000 for Kshs. 30,000/= signed by Njoka.

   iii. Receipt dated 3rd August, 2000 for Kshs.20,000/= signed by Njoka.

   iv. Receipt dated 15th September, 2000 for 10,000/= signed by Njoka.

   v. Receipt dated 23rd November, 2002 for Kshs. 600/= signed by Njoka's son (Kioria) (the Defendant herein)

   vi. Receipt dated 19th October, 2002 for Kshs.10,000/= (paid to Njoka's wife)

   vii. Receipt dated 15th November, 2002 for Ksh.10,000/= paid to Anne Wangari. That the same was indicated as a loan and had never been refunded thus he was counting it among the payments for the land. That however, all other receipts gave an indication of purchase save for this one.

   viii. Receipt dated 12th September, 2002 for Kshs.8,500/= signed by Kioria the son of the deceased.

   ix. Receipt dated 16th October, 2002 for 20,000/= signed by Anne, the deceased daughter.

   x. Receipt dated 24th September, 2002 for Ksh.10,000 signed by the son Mr. Kioria. He explained that the said receipt bears the name Anne's and that Esther was the late Njoka's wife while Kioria was his son and that they used to go to the 1st Plaintiff the three of them.

   xi. Receipt dated 16th October, 2002 for Ksh.20,000/= signed by Anne, the deceased daughter.

   xii. Receipt dated 26th October, 2002 for Kshs. 5,000/= signed by Esther, the deceased wife. That the receipts had identified who he was paying and that he was continuing to honour the agreement which they had with the deceased Mr. Njoka.

   xiii. Receipt dated 18th May, 2002 for Kshs.45,000/= signed by Njoka

   xiv. Receipt dated 7th August, 2002 for Ksh.50,000/= signed by Njoka.

   xv. Receipt dated 1st July, 2002 for Kshs.55,000/= signed by Njoka

   xvi. Receipt dated 20th August, 2002 for Kshs.30,000/= signed by Njoka.

   xvii. Receipt dated 27th March, 2002 for Kshs.40,000/= signed by Njoka.

   xviii. Receipt dated 25th February 2002 for Kshs.20,000/= signed by Njoka.

   xix. Receipt dated 27th November, 2001 for Kshs.40,000/= signed by Njoka.

   xx. Receipt dated January 2002 for Kshs.20,000/= signed by Njoka.

   xxi. Receipt dated 18th February, 2001 for Kshs.20,000/= signed by Njoka.

   xxii. Receipt dated 29th January, 2002 for Ksh.50,000/= signed by Njoka. That the said receipt had indicated the amount for survey as Kshs.30,000/= while that one of land was Kshs.20,000/=. He explained that he was also making some payments for survey.

xxiii. Receipt dated 1st October, 2001 for Kshs.40,000/= signed by Njoka

xxiv. Receipt dated 21st November, 2001 for Kshs.40,000/= signed by Njoka. That the said amount had been paid to Surveyor Duncan Kimani at the request of Mr. Njoka.

xxv. Receipt dated 6th November, 2001 for Kshs.50,000/= signed by Njoka.

xxvi. Receipt dated 20th January, 2001 for Kshs.10,500/= signed by Njoka.

xxvii. Receipt dated 8th June, 2001 for Kshs.50,000/= signed by Njoka. that he had a fixed account with HFCK and had thus asked the manager to transfer the money from the said account to Njoka's account since Mr. Njoka who was an auctioneer wanted a sum of Kshs. 100,000/= to get a licence.

xxviii. Receipt dated 21st August, 2001 for Kshs.50,000/= signed by Njoka.

xxix. Receipt dated 23rd June, 2001 for Kshs.15,000/= signed by Njoka.

xxx. Receipt dated 17th September, 2001 for Kshs.10,000/= signed by Njoka.

xxxi. Receipt dated 21st February, 2001 for Kshs.25,000/= signed by Njoka.

xxxii. Receipt dated 19th April, 2001 for Kshs.20,000/= signed by Njoka.

xxxiii. Receipt dated 26th March, 2001 for Kshs.26,000/= signed by Njoka.

xxxiv. Receipt dated 4th May, 2001 for Kshs.28,000/= signed by Njoka.

xxxv. Receipt dated 16th November, 2000 for Kshs.37,000/= signed by Njoka.

xxxvi. Receipt dated 4th January, 2001 for Kshs.7,000/= signed by Njoka

xxxvii. Receipt dated 30th November, 2000 for Kshs.10,500/= signed by Njoka

xxxviii. Receipt dated 1st February, 2001 for Kshs.10,000/= signed by Njoka

8. He testified that whereas his filing system had not been professional and some original receipts were not in the bundles of documents that he had filed, nevertheless he had been able to find the said original receipts in his house which he wished to produce in evidence. The hearing was adjourned to enable the Plaintiff serve the Defendant with the copies of the said receipts for their interrogation wherein on 16th January, 2023 the hearing proceeded.

9. PW1 confirmed that a receipt dated 4th October, 2000 for Kshs.10,000/= and another dated 12th October, 2000 for Kshs.15,000/= for the purchase of suit land had been signed by Njoka WaKioria the seller. That he had a fixed deposit account No. 1030015281-0002 with the HFCK which was to mature sometime on 7th May, 2001, where he was to receive a sum of Ksh.143,564.55. That he had given instructions to the bank that upon maturity, the said sum be transferred to Njoka WaKioria who was an auctioneer had needed a sum of Kshs.100,000/= to pay to the Auctioneers Board for renewal of his licence. That the same monies had been transferred to Njoka as a partial payment for the land that he was purchasing.

10. That subsequently the monies had been transferred to his account at Rehani House HFCK Branch wherein the same had been transferred from his account to account No. 1010-0-1153-15-1 which had belonged to Njoka Wa Kioria on the said Njoka's request. He produced the receipts as listed herein above as Pf exh 4(1) – (38)

11. He clarified that the plots he was buying had been identified to him by the owner Mr. Njoka and his son who was now the administrator of Mr. Njoka's estate.

12. He confirmed that the sketch map at page 29 of his bundle of documents showed the two plots on the eastern part of the land being plot No. F at the top of the land and Plot No. C bordering Karate River both totalling to 100 acres. That the said sketch had been done by Mr. Njoka Kioria and that it had been when he had found out that Mr. Njoka's son was building on plot No. F that he had protested.

13. His evidence was that after Mr. Njoka's demise, he had instructed some tractors to go and plough the said portion of land wherein the drivers had been chased away. That indeed via an agreement in Kikuyu language at page 30 of his bundle, which was translated in English at page 31 and a certificate of the translation issued (at page 32) the same had been executed by Njoka's wife one Muthoni, Njoka's son, he and a witness known as David Ndegwa had been to the effect that Njoka's son had built on his (Plaintiff's) land contrary to the agreement between the Plaintiff and Mr. Njoka. He thus produced the sketch, the Kikuyu version of the agreement, and the Certificate of Translation as Pf exh 5, 6, 7 and 8 respectively.

14. His evidence was that the issue on his first 50 acres had been concluded in the Nairobi Succession Cause No. 3270/2003 in a ruling of 28th February 2019 (page 33) which had not been appealed against. He produced the Ruling as Pf exh 9.

15. That whereas he could not remember the date, he got possession of sub-plot F where the house had been built upon, whilst he had tried to make some survey, the Defendant herein had objected to the demolition of the house that he had built on the said sub-plot F. That he had even tried to discuss with him an option of compensation in vain. His evidence was that bub plot F was not the entire of the parcel of land that Njoka had sold to him.

16. He also confirmed that there had been an application for consent form to the Land Control Board presented by the late Njoka WaKioria which consent had sought for the subdivision of the suit land measuring 168 Ha or 416 acres being the parcel of land from which he was purchasing his portion of land. That the late Njoka had signed the form on 20th August 2002, wherein there had been a copy of a letter of consent addressed to Njoka Kioriah for the sought subdivision. That he did not have the originals because the same had been addressed to the late Njoka WaKioria. He produced a copy of the Application for LCB Consent for sub-division form and the LCB Letter of Consent as Pf exh10 (a) and (b). (page 46 -48)

17. He also confirmed that there had been Land Control Board application for consent for the purchase of 100 acres by him from Njoka Wa Kioriah to be excised from the suit land situated in Karate area. (page 49-50) That he and the 2nd Plaintiff had signed the Sale Agreement as buyers while Njoka Kioria had signed the same as the seller on 20th August 2002. That there had been issued the Land Control Board Letter of Consent for sale of part of LR 10317/14 from Njoka to him and the 2nd Plaintiff for consideration Kshs.2,000,000/=. (page 51) That reference had been made to Land Control Board application of 20th May, 2002 where a meeting had been held on 25th May, 2002. e produced the said Land Control Board Application for Consent and the LCB Letter of Consent Pf exh11(a) and (b) respectively.

18. He testified that on 20th May, 2002, Mr. Njoka had gone to his house wherein he had given him a sum of Kshs.20,000/=. That further, they had been present when Mr. Njoka was signing the Land Control Board application forms showing that he had been willing to continue with the sale. That subsequently Mr. Njoka could not sign the transfer as he had fallen sick for which his family had visited his (Plaintiffs') house about 7 times and had obtained money for his medication. He named the said

family members as Mr. Njoka's son Kioria Njoka, his sister Anne Wangari, his widow Esther Wagikondi and proceeded to testify that these members knew that the said monies he had advanced them had been instalments towards the purchase of another portion of suit land.

19. That after the 1st Defendant had objected to his ploughing of the land, he had filed a citation (page 52) wherein in a Petition (page 55) there had been indicated a sum of Kshs.100,000/= against his name since he had agreed with Mr. Njoka that he would pay for the subdivision of the land wherein the said sum of money would be deemed as a partial payment towards the purchase of a portion of the suit land. That at paragraph 6 of the Petition under liabilities, 50 acres of the suit property had been captured in his favour. Upon being referred to a receipt dated 15th November, 2002 he contended that had the said receipt been for part payment, the purpose would have been indicated therein. That the said receipt had been addressed to Anne Wangari Njoka who had requested him for a friendly loan. His testimony was that a period of 40 years having passed, there ought to be damages paid. He thus prayed that the court grants all the prayers as sought.

20. On cross-examination he confirmed that at the time of the agreement, he had been working at the Lands and Settlement Department at Jogoo House wherein he had subsequently retired at the rank of Deputy Director of Settlement. That he had been introduced to Njoka Kioria by his friend Kingori Mbogo who hailed from Naivasha known as

21. When he was referred to PMFI-2, confirmed that the same was an agreement dated 3rd October, 1989 for the purchase of a 50 acres portion of the suit land and which agreement they had entered into with Nkoka Wa Kioria as the first agreement. On being referred to Paragraph 5 of the said Agreement, he testified that whereas the same had stated that the completion date was 28th February, 1990, he had not completed paying the consideration by then for which they had not drawn another agreement extending the time. That he had however paid the last balance of the purchase price for the agreement on 8th May, 2000.

22. He was referred to paragraph 2 of the said agreement wherein he confirmed that the balance of the purchase price was to be paid within 90 days of issuance of consent but stated that they did not file the Land Control Board consent application form immediately after making the agreement and therefore there had been only one consent. That whereas they did not write down everything that they had discussed, he had paid the sum in clause No. 3 of the agreement in batches as per the receipts that he had produced in evidence.

23. That as per the agreement of 8th May, 2000- PMFI 3, the same had indicated that he had paid in full for the first portion of the suit land that he had bought. he explained that he had entered into the said agreement because the late Njoka had wanted more money. That they had met so that the said Njoka could acknowledge receipt of the said Kshs.1,000,000/=. That subsequently, it was on the basis of the said Agreement that he was claiming the additional 55 acres since the term used therein had been pro-rata. That other than explaining everything in regard to the first agreement, the Agreement of 8th May, 2000 had indicated that the money in excess could be used to buy additional land or be refunded.

24. That there had not been a third agreement with regards to the extra money that had been paid. That whereas the total figure had not been agreed on, they had used the word "proportionally" and not the phrase "pro-rata". The while the price to be applied had not been indicated in that agreement, the same was supposed to be a continuous agreement. He thus maintained that he had bought 105 acres.

25. He testified that the price applied per acre in the year 1989 was the one to be applied in the second agreement. He confirmed that they had drawn the first agreement in the year 1989 while the second Agreement had been drawn on 8th May, 2000 and that it had taken him 11 years to pay for the first

portion of the suit land. He insisted that the price per acre never changed and admitted that they never made a subdivision sketch for the second agreement.

26. When he was referred to Pf exh 5, the sketch map, he confirmed that the same had been their agreement with the late Njoka. That whereas he had prepared the said sketch, they had brought Duncan Kimani, a Surveyor, to do the subdivision. That whilst he had wanted the parcels that he bought to be one whole parcel as shown in the said sketch, Njoka's position had been that the subdivision be in portions of 50 acres each. He however confirmed that there was a sketch for plot No. "F". He maintained that he had paid a sum equivalent to the price of 105 acres portion of the suit land. That he had paid a sum of Kshs.42,000/= in excess at the time of Mr. Njoka's illness, and after he became sick, he had paid a sum of Kshs. 69,000/= more.

27. That whereas the agreement of 8th May, 2000 had indicated that the excess money be refunded in 4 equal instalments in one year, he never wrote to Njoka demanding for the refund of the excess money. Further that whereas Njoka who died in October 2002 never told him whom he should deal with before he became seriously ill, Njoka's family had visited him requesting for a place to host their guests at the funeral wherein he had given them some money. That he continued paying the family money even after Mr. Njoka's death which amount he had included in the amount paid for the purchase of the portion of the suit land.

28. That whilst the amount that he had paid before Mr. Njoka's death had been in the records as they had reconciled the said sums with the Advocate in Mr. Njoka's office, they did not draw any agreement but the receipts were available. He admitted that there had not been Land Control Board consent application for the first 50 acres. That however, there had been an Application for subdivision wherein they had an agreement for the two portions. That Mr. Njoka had informed the Surveyor that he had wanted 8 portions of 50 acres each. That whereas the Application for LCB consent to subdivide was dated 20th August 2002, Mr. Njoka had received the Land Control Board approval to subdivide the suit land into 8 plots measuring 50 acres each.

29. That the application for consent to sell had a similar date as the application for subdivision wherein the said consent and the two transfers had been for a portion of land totalling to 100 acres. That whereas there wasn't an agreement between Njoka, he and the 2nd Plaintiff for the purchase of 100 acres of the suit land, he had intended that the 2nd Plaintiff also be registered as the proprietor of the said portion of land. He however admitted that 2nd Plaintiff was not a party to the 1989 agreement. Further, that whereas the consent had not stated the acreage for which the late Njoka had made the application for consent for sale, they never attended the Board meeting.

30. Upon being referred to Pf exh 9, the ruling in Nairobi Succession Cause No. 3270/2003, he confirmed that whereas the Defendant had admitted that the estate of Njoka owed them (Plaintiffs) 50 acres portion of the suit property, but there was no mention of the Plot number. That although he did not know if the second plot had been beaconed, he had wanted the Defendant herein to vacate plot No. "F". That although he was claiming 105 acres yet he had already received 50 acres and admitted that he did not have a consent of the Land Control Board for 55 acres portion of the suit property.

31. In re-examination he reiterated that whereas he had not fully paid the purchase price of the first agreement within the 90 days, yet by the time of the execution of the second agreement, he had paid a sum of Kshs.1,000,000/= for the first 50 acres. That further payments had been made after the second agreement of 8th May, 2000 which payments had been evidenced by the receipts herein produced. He confirmed that the agreement had indicated that any extra amounts would be used to pay for land proportionally and that the price of the land per acre would not change.

32. That whereas there was no agreement involving the 2nd Plaintiff with regard to the purchase of 100 acres portion of the suit land, the agreement of the year 1989 had allowed for a nominee and the two agreements had referred to the same property. That there never arose the need to ask for a refund since Mr. Njoka had been very co-operative and had even proceeded to apply for a LCB consent to transfer which had indicated a portion of the suit land measuring 100 acres. That the Land Control Board Letter of consent had indicated a sum of Ksh.2,000,000/= and since Kshs.1,000,000/= was for a portion of land measuring 50 acres, it followed that a sum of Kshs. 2,000,000/= was for a portion of land measuring 100 acres. That by 8th May, 2000 he had paid sum of more than Kshs.2,000, 000/=.

33. That the family members of Njoka Kioria had signed receipts evidencing that they had received more money. When he was referred to page 51 of the Defendant's Bundle being a sketch, he objected to the same and stated that he had the subdivision sketch by Mr. Njoka for the plots that they had agreed on being plot No. "F" and "C" and that he could not control how the said Mr. Njoka wanted to subdivide his property. He confirmed that he and the 2nd Plaintiff had executed the application for consent for the sale of 100 acres portion of the suit land. That the High Court had allowed him to receive the first 50 acres which had been identified as Plot "F" hence he was now following up on Plot. "C".

34. Julian Adhiambo Okoth testified as PW2 to the effect that she was a cashier at HFC and was handling documents for HFC in day to day transactions at the customer service regarding all records for the customer. When she was referred to page 3 of the Plaintiff's supplementary bundle, she confirmed that the same was a maturity advice from HFCK for Titus Kiragu of a/c number 10300015281. That it showed that he had a fixed deposit account that had been fixed on 7th May, 1998 and the date of the maturity was 7th May, 2001 while the date of the advice was 7th April, 2001. She confirmed that the document had come from HFCK.

35. Her response when she was referred to page 4 of the bundle was that the same was a statement referring to the same account of Titus Kiragu and that it had the account number at the top. She explained that when an account matured the same would be transferred to the holder's main account. That in the instant case the sum that had matured was Kshs. 143,564.00/=. Upon being referred to page 5 of the bundle, she confirmed that the same was a statement from HFCK showing the transfer of the maturity amount to the main account. That the statement had been stamped and signed thus authenticating that the document had come from the bank.

36. She confirmed that page 6 of the bundle was a statement showing a transfer from the fixed account to the main account and also to another account. That the third line showed transfer to another account while the first row of the sixth column showed the interest percentage. That the second row of sixth column on the other hand had indicated the tax charged while the third row of the sixth column had indicated that the interest had been charged at 15%. That further, the fourth row of the sixth column was the withholding tax on the account sum while the fifth row of the sixth column was the maturity posting of Kshs.143,564.60/=. That the sixth row of the sixth column showed the transfer to the main account No. 1030015281 while the seventh row of the sixth Column showed the internal transfer from account No. 015281 to account No.10100115315.

37. Her further evidence was that the eighth row of the sixth Column was the income charged after the bank got the transfer. That she was the one who had stamped and signed the document for HFCK for the transfer from account No. 015281 to account No.10100115315. When she was referred to page 55 of the Plaintiff's bundle, specifically document No.6 (a) with regard HF Account 1016-0115-315, she confirmed that the same was the account to which a transfer had been made from Mr. Titus Kiragu's account.

38. On cross-examination, she testified that she started working with HF in the year 2018 and that she had held the position of Acting Customer Service Officer. That whereas she had a work place identify card, the same did not indicate the position she held. Further that whilst she had never dealt with Titus Kiragu's account, and although she had brought the files and document to the court, she did not carry the 1st Plaintiff's file or have the original or certified copy of the maturity advice since the hard copies of customer's file had been sent to headquarters. That she neither knew who had authored the letter nor inserted the words written at the bottom. That whereas she had an original of the statement at page 4 of the supplementary bundle, the same had not been certified. That she had generated the copy at the document at page 5 of the bundle from the computer thus it showed the date of generation as 7th December, 2022 which was the status then. She explained that whilst they usually issued a statement for and to the customer, they did not keep a printed copy. She admitted that the said document did not have her name.

39. She also admitted that the document at page 6 of the bundle was not on a HFCK letterhead and neither was there an authentication date. That she could only see the account numbers from where the money was withdrawn and the one to which it was sent. She also confirmed that the same did not show the name of the client owing the transferee account nor the purpose of the transfer. However, she testified that the document could be verified by the stamp.

40. In re-examination, she testified that she needed not to have handled the account for her to produce the documents since by virtue of the position she held, she had the authority to produce the documents. When she was referred to page 5 of the Plaintiffs' bundle she confirmed that the same was the 1st Plaintiff's account with the bank. That the stamp was from HFCK and the signature was hers since her office had granted her the authority to authenticate the same on behalf of the bank.

41. The Plaintiff having closed their case, the same had been re-opened after a successful application dated 9th May, 2023 or purpose of producing the sale agreement of 8th May, 2000 wherein on 9th April, 2023, PW1 was recalled and after being reminded that he had been recalled to produce PMF1-3 as his exhibit, he was referred to page 18 of the Plaintiff's bundles of document wherein he confirmed that the same was the agreement dated 8th May 2000 and that he had made a copy of the said agreement in Mr. Kayai Advocate office in Nakuru town being the Aadvocate who had drawn the agreement. That he, the 2nd Plaintiff, Mr. Njoka Wakioria and Mr. Ben Kayai Advocate had been present in the office at the time of execution of the Agreement. That he could neither trace the original agreement nor Advocate Ben Kayai who had drafted the Agreement. He thus produced a copy of the sale agreement dated 8th May 2000 as Pf exh3

42. On Cross-Examination, and in reference to the said Pf exh3, he denied the allegation that no one had seen the agreement because it was Mr. Kayai Advocate who had drawn the same. That whereas he did not report to the police about the loss of the agreement, the Agreement that he was holding was the one that they had made. That the said Agreement had been drawn between the seller of the land and themselves because the said seller had wanted more money hence they had to have an agreement to that effect. He explained that the sum of Kshs. 1,000,000/= had been for the first phase of the purchase of a portion of the suit land measuring 50 acres through the Sale Agreement of the year 1989.

43. That whereas second Agreement had not indicated the size of the land that he was purchasing, the same had been open since it was dependent on how much money the seller had wanted although they had agreed on the purchase price of Kshs. 20,000/= per acre.

44. When he was referred to the second paragraph of the Agreement on the mode of payment specifically with regards to the excess amount, he read the same and confirmed that they did not have another

agreement on the amount that had been paid. That whereas there had been two options, either to purchase land or be refunded the excess money paid, there was no agreement on the option that he had chosen.

45. That he was demanding for a total of 105 acres which was based on correspondences and not on another agreement. He reiterated that by the time Wakioria died, he had collected from him a sum of Kshs. 42,000/= over and above the initial purchase price of Kshs. 1,000,000/=. That further, while the said Wakioriah was sick, he asked his family to collect money from him.

46. In re-examination he testified that none of the persons with the original document were able to come and produce it. When he was referred to the "mode of payment", he confirmed that he was not refunded any excess money that he had paid.

The Plaintiffs thus closed their Case.

47. The Defence case opened with the testimony of Kioriah Njoka who testified as DW 1 to the effect that he lived in Karati Naivasha and was a farmer. That the Plaintiffs herein had filed the instant suit against he and his mother Esther Wagikondu Njoka who was now deceased, having passed away in the year 2004. That they had been sued in their capacity as the Administrators of the Estate of Njoka Wakioria. He confirmed to having been issue with letters of Administration in a Nairobi High Court Succession Cause, he could not remember its number. That he came to know the Plaintiffs after they had sued them.

48. He adopted his witness statement dated 21st November, 2013 as his evidence in chief and then proceeded to testify that the suit land belonged to his father. That the first time he met the Plaintiffs was when they had claimed in a suit iled in Nairobi that they had bought land from his father. That his father who died on 10th October, 2002 had never told them anything about the sale. He remembered that the first case had been filed on 4th July, 2003 in Nakuru High Court in Succession Case No. 262/2003 which had been a citation to accept or refuse Letters of Administration.

49. He produced the Citation Notice and the Agreement dated 8th May, 2000 as Df exh1 (a) and (b) and then proceeded to testify that after they had been served with the said Notice, they had sought legal advice from their Advocate wherein they had subsequently filed a response to the Notice by way of an objection to the taking out of a Grant. He produced the objection dated 30th July, 2003 as Df exh2 stating that as a family they had wanted the 1st Plaintiff to prove to them as to how he had bought the land.

50. That they had not seen the 1st Plaintiff during his father's lifetime since he just appeared after his father had died. That they had looked at all his father's document and did not find any documents in relation to the 1st Plaintiff. That whereas the 1st Plaintiff had given them two agreements, they did not find a copy of the same agreements in their father's documents.

51. When he was referred to Pf exh 2, the Agreement dated 3rd October, 1989, he confirmed that the same was an agreement for purchase 50 acres of land by the 1st Plaintiff. That this issue had been handled in the Nairobi Succession Cause No. 3270/2003 wherein the court had held that the 1st Plaintiff be given the 50 acres of land which holding had compromised the said sale agreement. That the 1st Plaintiff had however failed to comply with the conditions as had been issued by the court wherein he failed to take possession of the portion of land but instead decided to claim another portion.

52. That whereas the court had asked them to jointly do a sub-division on the 50 acres portion of land, it was not done but instead the 1st Plaintiff had got into another portion of land wherein he had attempted to sub-divide the same. When he was referred to Pf exh3, the agreement dated 8th May, 2000,

he confirmed that the same involved the land in the instant case wherein the 1st Plaintiff was claiming an additional 50 acres from the portion of the suit land. That they did not approve of the said agreement since in the year 2000, his father had been in and out of hospital wherein he had always been with their father during his sickness, hence he was not aware when the said agreement had been executed.

53. That despite the said agreement being for the sale of land measuring 50 acres at a consideration of Kshs. 1,000,000/= wherein the purchase price had been paid in cash and any excess amount was to be used to buy extra acreage, there had been no indication of the stipulated amount paid, the mode of payment, or the portion that was being purchased. That it had only stipulated that after the sub-division, the purchaser would take possession of the land. He reiterated that at the time of his father's death, he knew nothing about the sell and purchase of the land.

54. That whereas they had seen the receipts produced as Plaintiff 4 (1-38), the same had shocked them because they were made by the purchaser and the signatures therein were different from his father's signatures. That the only receipt that had his father's handwriting and signature was Receipt No. 69 dated 27th June, 2000 for a sum of 30,000/= but the rest of the receipts were fake.

55. He admitted that he, his mother and sister had received some money from the 1st Plaintiff totaling to Ksh. 43,500/= according to the four receipts, and a further "Condolence money" of Kshs. 10,000/ =. That the 1st Plaintiff had also given his sister a friendly loan of Kshs. 10,000/=which he had later claimed to have been part payment of the purchase price. He explained that the condolence money that the 1st Plaintiff had given them, for which they had used to transport the deceased body from Nairobi, had been because the 1st Plaintiff was his father's friend. That however, when they totaled the money in the receipts, the same did not add up to Kshs. 1,000,000/= in relation to the Agreement dated 8th May, 2000.

56. His evidence was that he had never heard of a consent that had been entered into between his father and the 1st Plaintiff. He denied having seen Pf exh 10(a), the Applications for consent, prior save for when the same was produced by the 1st Plaintiff in court. That in any case, the said Application for consent was dated 20th August, 2002 during which time his father had been very sick. He also denied seeing or the knowledge of his father going to the Land Control Board. He confirmed that his father had died on 10th October, 2002 after having been in the ICU for 42 days then in the ward for 10 days, thus he could not have gone to the Land Control Board.

57. That whilst they had agreed on the Sub-division of the land bought pursuant to the agreement of the year 1989, in the instant matter, his father had refused the Sub-division by the Plaintiff as seen in the sub-division sketch proposed by the 1st Plaintiff at page 51 of the Defendant's document wherein his father had stated that the document had been taken to him by the 1st Plaintiff and that he did not know from where he had got it from.

58. That from his father's documents, he had retrieved an agreement between his father and the 1st Plaintiff was for the sale/purchase of a portion 50 of acres of land from the suit property. He produced the said undated Sub-division Sketch Map as Df exh 3 and reiterated that his father did not give out 100 acres. He also confirmed that they had not sat down to add the money that 1st Plaintiff had paid and neither had they executed any agreement.

59. That he was not agreeable to the 1st Plaintiff receiving an extra 50 acres in addition to what the court had given him because the said 50 acres of the suit land which the 1st Plaintiff lay claim to an additional portion of land was land which his father had given him and which land he was in occupation having established his home therein. He thus sought that the Plaintiffs' case be dismissed with costs.

60. On cross-Examination, he confirmed that he had a right to represent this father's estate on the two agreements produced by the 1st Plaintiff. When he was referred to paragraph 3 of his statement, he read the same and admitted that after his father's death, they had found the duplicate of the agreement dated 3rd October, 1989 in his (father's) documents and this was after the 1st Plaintiff had sued them. He also confirmed that they had no issue with the said agreement.

61. When he was referred to paragraph 3 of the said agreement, he responded the purchase price had been Kshs.1,000,000/= wherein only Kshs. 124,000/= had been paid as at the time of the agreement. That whereas they had agreed that the 1st Plaintiff gets a portion of 50 acres of the suit land that the court had awarded him, he had neither taken possession and/ or occupation of the same.

62. He denied having used either violence or having used machetes to chase the 1st Plaintiff away so as to dissuade him from taking the awarded 50 acres of the suit land. He contended that the subsequent receipts had not been in relation to the first agreement since the purchase price had already been paid.

63. He reiterated that in the second agreement, the property had been described as 50 acres North East of Naivasha Municipality at a purchase price of Kshs. 1,000,000/=. His response when he was referred to paragraph 5 of the Agreement on the mode of payment was that he would not know what money was being referred to therein as he was not present. That however, he would have known were a sub-division to take place because he was in occupation of the land.

64. That he was opposed to the second agreement because the purchase of a portion of land measuring 100 acres had not been in any agreement. That both the Agreement of the year 1989 and the one for the year 2000 had been with regards to the purchase of 50 acres portion of the suit land. Upon being referred to paragraphs 3 and 4 of his Statement, he admitted that there had been a temporal sub-division done but the same had not been submitted to the Survey of Kenya. That a permanent survey and Sub-division having not been done, the provisions of second agreement had not been complied with.

65. That in any event the second agreement could not have been true because the Application to the Land Control Board was done after 6 months had lapsed. That whereas he had not been there when the agreements and application to the Land Control Board were done, there had been no consent from the Land Control Board.

66. That he had sought evidence of the payment of the second agreement and out of the numerous receipts given to him by the 1st Plaintiff, he had only appended his signature to two receipts of 29th September, 2002 for Ksh. 10,000/= being part payment for the purchase of LR 10317/14 which they had signed with his sister Ann Njoka, and the one dated 12th September 2002 for Ksh 8,500/= being part payment for the purchase of LR 10317/14. He confirmed that the 1st Plaintiff was the one who wrote the receipts and gave them the money. He reiterated that after their father's death, they had only received four receipts dated 16th October, 2002 signed by his sister, a receipt dated 26th October, 2002 for Kshs. 5,000/= signed by his mother and a receipt dated 23rd November, 2002, for Kshs. 6,000/= signed by himself all being part payment for the purchase of LR 10317/14. That further there was a receipt dated 15th November, 2002 for Ksh. 10,000/= which had been a friendly loan.

67. That he had limited trust on the receipt because they had been written by the 1st Plaintiff. He however admitted that the receipts had depicted the purpose for which they had been issued. That although he did not know the total amount issued as part payment for the purchase of LR 10317/14 yet he was not agreeable that the 1st Plaintiff had paid a total of Kshs.1,156,700/= as part payment for the purchase of LR 10317/14. That it baffled him why the 1st Plaintiff had continued giving them additional monies

whereas it had been indicated in the second agreement that he had already paid the full purchase price. That whereas he had received the payments even as late as November, he did not understand why.

68. That the first time he had seen Df exh3 was when the 1st Plaintiff had filed the second agreement. That he had brought the sketch plan which he had retrieved from his father's documents wherein the survey had been done on 2nd November, 2001. He reiterated that he did not approve of the second agreement because it had been executed at a time when his father had been very sick.

69. That as stated in his statement, in the year 2001, his father's mental state was not stable. He further confirmed that he had not been present when the agreement was drawn. That he knew his father's handwriting although sometimes he required guidance. He confirmed that the writing on the sketch plan was his father's handwriting. That the original document of the sketch plan was in Advocates Aswani's office in Nairobi. That he did not know when the LCB consent to sub-divide had been issued.

70. When he was referred to Pf exh10 (a) he confirmed that the signature therein was his father's and that the sub-division had been for two portions of land. That the description had been LR 10317/14 measuring 416 acres. Upon being referred to Pf exh10 (b), he confirmed that the Consent on sub-division had been issued on 20th August, 2002. When he was referred to Pf exh11, he confirmed that the same was an Application for sale dated 20th August 2002 and that his father's signature was on the document.

71. That paragraph 5 of the Agreement gave a description of L.R 10317/14 for the purchase of 100 acres. That his father could not have signed the documents because he had been sick and hospitalized. He however admitted to not having produced any documents as evidence of his father's illness.

72. In re-examination, he maintained that he did not know how the Land Control Board Consents had been procured. That the monies shown on the receipts had not been paid in relation to any agreement between he and 1st Plaintiff. That further, the said receipts had not specified whether they had been in relation to the first or second Agreement. That what he had meant by temporal survey was that whereas the beacons had been placed, the same had not been filed at the Kenya Surveys. That he did not see any mutation forms neither had there been a subsequent agreement on the total amount that had been paid.

The Defence thus closed his case.

73. Upon closure of the Defence case, parties filed their respective written submissions wherein the Plaintiffs framed their issues for determination as follows; -

i. Whether there is a valid agreement for sale.

ii. Whether a copy of the agreement for sale dated 8th May, 2000 should be admitted as secondary evidence in place of the original document.

iii. Whether the sale is void on account of Land Control Board Consent not being obtained within the prescribed time.

iv. Whether the Plaintiffs are entitled to the 55.6 acres of land on sub-plots ''F'' and ''C''.

v. Who should bear the costs of the suit?

74. On the first issue for determination as to whether there was a valid sale agreement between the parties herein, the Plaintiffs contended that they had submitted before the court a copy of a duly executed agreement for sale dated 8th May, 2000 signed by the late Mr. Njoka and the Plaintiffs herein which agreement the Defendant had acknowledged in his witness statement of 21st November, 2013. That

the said agreement had confirmed that the purchase price for the first 50 acres portion of the suit land had been paid in full thus any additional amounts that were to be paid by the 1st Plaintiff would be used to buy extra acreage proportionate to the amount so paid and/or in the alternative such extra amount paid would be refunded. That the Plaintiffs had paid a total amount of Kshs. 2,112,264.55/ = which translated to an extra amount of Kshs 1,112,264.55 over and above the initial purchase price of Kshs. 1,000,000/= hence they were entitled to an extra portion of the suit land LR. No. 10317/14 measuring 55.6 acres.

75. Reliance was placed on the provisions of Section 3(3) of the *Law of Contract Act* and Section 38(1) of the *Land Act* to submit that they had entered into an agreement with the late Mr. Njoka for the purchase of a portion of the suit land vide an agreement dated 8th August, 2000(sic) That a perusal of the said agreement revealed that the same had been in writing and signed by the parties being the vendor one Mr. Njoka and the Plaintiffs herein as the purchasers and witnessed by one Mer. Ben Njau Kayai, an Advocate of the High Court of Kenya. That further, the said agreement for sale had contained the names of the parties, the description of the property, the purchase price and the conditions thereto thus meeting the requirements of Section 3(3) of the Law Contract Act. Further reliance hinged on a combination of decisions in the case of Nelson Kivuvi v Yuda Komora & Another, Nairobi HCCC No. 956 of 1991 and Civil Appeal No. E168 of 2021, Lamba v National Social Security Fund & Another.

76. It was thus their submission that the sale agreement of 8th May, 2000 had satisfied the elements of a valid contract hence the same was valid and enforceable. That subsequently, the Plaintiffs having honored the terms of the agreement by paying the consideration in full as evidenced by the receipts in the Plaintiffs List of documents, they ought to be allowed to enjoy what was rightfully theirs.

77. On the second issue for determination as to whether a copy of the sale agreement dated 8th May, 2000 should be admitted as secondary evidence, it was their submission that at the time the 1st Plaintiff testified about the said sale agreement, he only had a copy as he had mistakenly believed that he had already tendered the original agreement for sale to the court during the first ex-parte hearing thus the same had been marked as PMF-3 in the present case. That however, upon perusing the court's file, it had become apparent that the original agreement had not been submitted in evidence and was not on the court's file.

78. It was the Plaintiffs submission that their effort to trace/search for the original copy of the sale agreement dated 8th May, 2000 had proved futile, their attempt to obtain the counterpart original agreement from the Advocate who had drawn the same, one Mr. Benson Njau Kayai had also been unsuccessful as his whereabouts was unknown since he had gone missing since the year 2021 as could be seen from the newspaper cutting of the National Assembly Hansard dated 4th April, 2023 attached in the Plaintiffs' Supporting Affidavit dated 4th March, 2021 confirming his disappearance. That it had been after such failed efforts that the court had on 8th June, 2023 ordered that the Plaintiff's case re-opened to enable them produce in evidence a copy of the agreement for sale dated 8th May, 2000.

79. That further, all the parties herein had acknowledged the existence of the said agreement dated 8th May, 2000 and made comments on the various aspects of the same in their witness statements. That subsequently, the same was not a strange or a new document for either of the parties hence the Defendant's act of belatedly trying to deny the existence of the said agreement in his Pleadings should not be entertained.

80. The Plaintiffs placed reliance in a combination of decision in the decided case of Paul Nduati Mwangi v Stephen Ngotho Mwangi and 9 Others, Muranga ELC 382 of 2017 and Lee vs Tambang to assert that:

i. The 1st Plaintiff had confirmed on oath that he, the 2nd Plaintiff and the deceased Mr. Njoka wa Kioriah had been present when the Agreement of Sale had been signed on 8th May, 2000. That the said agreement had been prepared by an Advocate wherein both he and the deceased had been given an original of the same and that the third original counterpart had been in the custody of the said Advocate. That he had made a photocopy of the original agreement through the mechanical process of photocopying thus the content of the Agreement of Sale dated 8th May, 2000 was the exact content that had been on the original, was accurate and complete. That further, the court had in its ruling dated 8th June 2023 at page 13 paragraph *27* in Nakuru HCCC 156 of 2003 Titus Kiragu 7 Another v Kioriah Njoka & Another, observed that the suit was based on an agreement made on 8th May, 2000.

ii. That it had been over 24 years since the said agreement was signed but unfortunately the 1st Plaintiff had misplaced the original agreement and his effort to trace the same or the original counterpart had proved futile. That whereas the Defendant has faulted the Plaintiffs for not having a police Abstract to prove the loss of the original Sale Agreement, by the date that the Plaintiff was testifying on the Agreement in court, he had been of the mistaken view that he had already tendered the original Agreement in Court during the exparte hearing of the instant case thus he could not have reported the loss. That however, after discovering that the original agreement had not been in the court file, the Plaintiffs has attempted to trace the same as had been demonstrated herein to no avail hence they had proved the loss of the original Agreement.

iii. That there was no bad faith on the Plaintiffs' part for failing to produce the original agreement and that it was just unfortunate that the same could not be traced. That Nonetheless, the Plaintiffs had made efforts to provide all the original receipts that had acknowledged that money had been paid after the signing of the Agreement of 8th May, 2000, in a bid to prove the existence and implementation of the Agreement. That the law allowed for admission of secondary evidence in circumstances such as in the instant case. That whereas the Plaintiffs would be gravely prejudiced were the copy of the Agreement of 8th May, 2000 not admitted as secondary evidence, the said admission would not occasion miscarriage of justice and or prejudice to the Defendant in any way since the contents of the said agreement were well known to both parties.

81. That whereas the best evidence was primary evidence, the law envisaged situations where the original documents may not be available and allowed for admission of secondary evidence. That accordingly, the 1st Plaintiff having confirmed that he had made copies from the original Agreement for Sale, by the mechanical process of photocopying, the contents of the said copy were in the exact form as the one in the original. That it was in the best interest of justice that the court admits as secondary evidence, the copy of the agreement for sale dated 8th May, 2000. Reliance was placed on the provisions of Sections 66 and 68 of the *Evidence Act* as well as a combination of decisions in the case of Jemima Moraa Sobu v Trans-National Bank Ltd [2016] eKLR Civil Case No. 378 of 1997, Kenya Anti-Corruption Commission v Job Keittany & Another [2017] eKLR and Evangeline Nyegera (Suing as the Legal Representative of Felix M'Ikiugu alias M'IKIUGU Jeremiah M'Raibuni (Deceased) v Godwin Gachagua Githui [2017] eKLR.

82. That they had met the threshold for admission of a copy of the agreement as secondary evidence, the court, in the interest of justice, to so admit the said copy of the agreement dated 8th May, 2000 as good secondary evidence in lieu of the original, which had been lost/misplaced and thereafter to find that there existed a contractual relationship between the parties herein by virtue of the said agreement.

83. On the third issue for determination as to whether the sale was void on account of lack of consent of the Land Control Board within the prescribed time, the Plaintiffs submitted that the terms of the agreement has stipulated that the late Mr. Njoka be responsible for obtaining the consents. That subsequently, he had applied for consents to subdivide the mother parcel LR. No. 10317/14 into two portions and for a further consent to transfer 100 acres portion of the same to the Plaintiffs on 20th August, 2002 wherein the said consent had been obtained on the said date which proved the willingness of the deceased to transfer to the Plaintiffs more than the initially agreed portion of 50 acres.

84. That the Defendant's claim that the Land Control Board Consent had come at a time when the deceased was too ill to have known or voluntarily participated in obtaining it was untrue as the 1st Plaintiff had personally met the deceased who had signed the Application for consent to transfer an acreage of 40.7 hectares (100 acres) to the Plaintiff. That contrary to the provisions of Section 107 of the *Evidence Act*, that no evidence had been tabled by the Defendant to prove that the deceased had lacked the capacity to sign or comprehend that which he was signing.

85. Reliance was also placed on the decisions in the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR and Willy Kimutai Kitilit v Michael Kibet [2018] eKLR as well as on the provisions of Article 10 (2) (b) of *the Constitution* to submit that the equitable doctrines of constructive trust and proprietary estoppel were applicable to and superseded the *Land Control Act* where a transaction relating to an interest in land was void and enforceable for lack of the Land Control Board Consent. That whereas the deceased had failed to obtain the Land Control Board Consent within the stipulated time, he had eventually obtained the same in the year 2002 thus it would not be equitable to deem the sale agreements between the deceased and the Plaintiffs as invalid wherein the deceased had received the full purchase price. They thus urged the court to find that there existed a binding contractual relationship between the parties herein.

86. As to whether the Plaintiffs were entitled to the 55.6 acres of land on sub-plots F and C, their response was affirmative wherein they reiterated how they had advanced a friendly loan to the deceased Mr. Njoka to tune of Kshs. 1,112,264.55/= over and above the agreed purchase price of Kshs. 1,000,000/= for the first 50 acres portion of the suit land. That the Application for consent of the Land Control Board, which was signed by the deceased and the Plaintiffs on 20th August, 2002 was instructive since the description of the land to be sold had been indicated as 100 acres. That further, the nature of the transaction between the Plaintiffs and the deceased had been indicated in the letter of consent, as a sale and the consideration for the said sale for Kshs. 2,000,000/=. That at the very least, the Plaintiffs had paid a sum of Kshs. 1,000,000/= over and above the first Kshs. 1,000,000/= thus they were deserving of extra acreage proportionate to the said extra amount paid.

87. Lastly they submitted that the Defendant bears the costs of the suit and urged the court to grant them the prayers as sought in their Amended Plaint.

88. The Defendant also framed his issues for determination as follows; -

    i. Whether there is any valid sale agreement for the purchase of 55.6 acres and can the court rewrite a contract.

    ii. Whether the Plaintiffs are entitled to an order of specific performance for the alleged 55.6 acres.

    iii. Whether the sums paid after the execution of the sale agreement dated 8th, May, 2000 can be refunded.

    iv. Whether orders of eviction and general damages are viable.

v. Whether an order of injunction can issue.

vi. Who should bear the costs of this suit?

89. On the first issue for determination as to whether there was any valid sale agreement for purchase of 55.6 acres and whether the court could rewrite a contract, his submission was in the negative. That in their opening remarks the Plaintiffs' Counsel had conceded that the Plaintiff had bought land from their friend by receipting and that no agreement for the same had been executed.

90. That the two sale agreements presented before court by the Plaintiffs herein had described the property to be sold as 50 acres wherein this particular plot also described as 50 acres being Plot F had since been declared as rightfully owned by the Plaintiffs, in the Ruling dated 28th February, 2019 in Nairobi Succession Cause No. 3270 of 2003, In the Estate of Njoka Wa Kioriah.

91. That it was trite law that it was not the business of courts to rewrite contracts thus the court ought to decline the invitation by the Plaintiff to rewrite the sale Agreement that they had entered into with the late Njoka Wa Kioriah. Reliance was hinged in a combination of decisions in the case of South Sugar Company Ltd v Leonard O. Arera [2020] eKLR, Five Forty Aviation Limited v Erwan Lenoe [2019] eKLR and Albert Cheboi & Another v Insurance Regulatory Authority [2020] eKLR to submit that the Plaintiffs were desperately attempting to mislead the court into rewriting the contract to change the description of the property in the two Sale Agreements which agreements had expressly stated that the property sold was 50 acres but the Plaintiffs were now seeking that a new clause be inserted describing the property as 105.6 acres of land. That with regard to the 55.6 acres claimed herein by the Plaintiffs, not even equity could come to their aid since there was neither an agreement, whether written or oral in that regard nor did the Plaintiffs ever occupy the alleged 55.6 acres portion of the suit property.

92. That in any event, the two Agreements for Sale presented to court by the Plaintiffs were void on the grounds that; -

i. The Land Control Board consent was not obtained within 6 months from the date of the execution of the sale agreement as required by the law.

ii. With respect of the Sale Agreement dated 3rd October, 1989, the balance of the purchase price was not paid within 90 days as had been agreed.

iii. That it was over 12 years since the Sale Agreements were executed thus they were statute barred and unenforceable.

93. Reliance was also placed on the provisions of Sections 6, 7, 8 and 22 of the *Land Control Act* to submit that since the Land Control Board Consent had not been obtained within the requisite 6 months the transaction and the Sale Agreements herein were void and unenforceable. That the only available remedy to the Plaintiffs was for recovery of any money paid. That whereas in special and peculiar instances the courts may apply the doctrine of constructive trust, the said doctrine was only applicable where the purchaser was and had been in possession of the property for a very long period and would be greatly prejudiced if the transaction was to be rendered void. That however, in the instant case, the Plaintiffs herein were not in possession of the 55.6 acres they were claiming thus the doctrine of constructive trust could not apply and that the only remedy available to them was to seek for a refund of the money loaned to the deceased Njoka Wa Kioriah as the suit property was now in the hands of the beneficiaries of the estate of the said Njoka Wa Kioriah(Deceased).

94. He further placed reliance in a combination of decisions in the decided case of Koyumkei Multipurpose Co-operative Society Limited and 17 Others v Rael Chepn'getich Koech [2019] eKLR,

Isaac Ngatia Kihagi v Paul Kaiga Githui [2017] eKLR, David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR and Willy Kimutai Kitilit v Michael Kibet [2018] eKLR to reiterate that the two Sale Agreements herein were void and unenforceable especially with regards to the claim of 55.6 acres which had not even been stated in the said Agreements. That the Plaintiffs' submission that the 55.6 acres portion of the suit land had been bought by way of receipting was unknown in law and could not be entertained by the court. That the Plaintiffs could not assume to have bought the land yet there had been no meeting of the minds as a requirement for existence of a contract thus their instant claim was hopeless and should be dismissed.

95. On the second issue for determination as to whether the Plaintiffs were entitled to an order of specific performance for the alleged 55.6 acres, he submitted that it was trite law that order of specific performance was only granted in clearest of cases and where refund of the purchase price and/or award of general damages was inadequate. That the order of specific performance being an equitable remedy was discretionary in nature thus the court ought to consider the circumstances of the case in the interest of justice to or not to exercise such discretion. That in any case, where damages could compensate the aggrieved party, then an order of specific performance should not issue. He thus submitted that an order of specific performance was not appropriate in the instance case since the sale agreements in question were highly contested. That further, the said order would be harsh and unfair on the part of the Defendant who was a representative of the Estate of Njoka wa Kioriah.

96. That in any case, the Plaintiffs were not in possession of the claimed portion of the suit land measuring 55.6 acres as the same was currently in possession of the beneficiaries of the Late Njoka Wakioriah. That subsequently, if any order of specific performance were to be granted then some of the beneficiaries of the late Njoka Wakioriah would be disinherited thus creating hostility and animosity and prejudicing the said estate that was yet to be distributed as per the law.

97. He insisted that a refund of the extra monies loaned to the deceased was the most efficacious remedy which had even been stated as the alternative in the clause that the Plaintiffs were seeking to rely on. He placed reliance in a combination of decisions in the case of Thrift Homes Limited v Kays Investment Limited [2015] eKLR, Purple Rose Trading Company Limited v Bhanoo Shashikant Jal [2014] eKLR, and George Njenga Kagai v Samuel Kabi Njoroge & another [2019] eKLR.

98. As to whether the sums paid after the execution of the sale agreement dated 8th May, 2000 should refunded, he submitted that special damages should not only be pleaded but also strictly proved. That accordingly, the Plaintiffs having not pleaded special damages the same should be declined. That further, some of the money being claimed herein had been given out way after the demise of the late Njoka Wakoriah and received by 3rd parties who were not parties in the instant case thus the same should not be considered by the court. He however submitted that the money that had been received from the Plaintiffs by the late Njoka Wakoirah should be refunded to the Plaintiffs to end the instant litigation and enable the estate of Njoka Wakiorah to be distributed to his beneficiaries.

99. On the fifth issue for determination as to whether orders of eviction and general damages were viable, he submitted in the negative to the effect that the Plaintiffs herein had no legal right whatsoever to the 55.6 acres forming part of the estate of Njoka Wakoriah since they had already been granted 50 acres portion of the suit land in ''Plot F''. That subsequently, no general damages could issue since there had been no claim of breach of agreement being that the claim of a portion of the suit land measuring 55.6 acres by the Plaintiff had not been pegged on any sale agreement.

100. As to whether an order of injunction could issue, he placed reliance in a combination of decisions in the case of WKM v JWM [2019] eKLR, and Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR to submit that the Plaintiffs had failed to demonstrate the existence of the triplicate

conditions for an injunction order to be issued in the instant matter. That in any case, the balance of convenience titled in favour of the Defendant hence it was only convenient that the Plaintiffs who were not in possession of the suit property get the alternative remedy of refund of the money advanced to the late Njoka Wakioriah since the legal interest if any, and which had been demonstrated by the Plaintiffs were only with respect to the refund of the said money advanced and nothing more.

101. He relied on the provisions of Section 27 of the Civil Procedure Acts to the submit the costs follow the event to which he was entitled having demonstrated and proved on a balance of probability that the Plaintiffs' suit had no merit and same ought to be dismissed.

Determination.

102. I have considered the parties case as pleaded and the evidence as adduced in proof thereof, the able submissions by Counsel for the parties, the law and the authorities cited.

103. Briefly, the Plaintiffs' case is that vide an original Plaint filed herein dated the 23rd October 2013 and amended on 16th May 2019, the Plaintiffs sought for declaratory orders to the effect that they had vide an agreement of 8th May 2000, purchased from Njoka Wakioriah (Deceased) an additional 55.6 acres of land on sub-plots number F and C for the value of Kshs. 1,112,264.55/= to be excised from L.R No. 10317/14. That the said portion of land be hived from the deceased's estate and they be declared it's proprietors wherein after, the Defendant herein representing the deceased's estate be issued with an order of injunction barring them from interfering with the said hived off portion of land.

104. In support of its case the 1st Plaintiff adduced evidence that he had initially entered into a sale agreement of 3rd October 1989 with the deceased Njoka Wakioriah for the purchase of 50 acres of land at a consideration of Ksh, 1,000,000/=, land which was to be excised from the deceased's land L.R No. 10317/14. That this transaction had been concluded in the Nairobi Succession Cause No. 3270/2003 in a ruling of 28th February 2019 herein produced as Pf exh 9.

105. His evidence had been that payments had been made in instalments wherein as the deceased continued borrowing money from the 1st Plaintiff, it had been agreed that should there be any extra monies, then the deceased was to give the 1st Plaintiff extra land proportionate to the said extra payments. That by the time the purchase price for the first 50 acres had been paid in full, the 1st Plaintiff had paid the deceased a total sum of Ksh. 2,112,264.55/=. That with this in mind, the parties had subsequently entered into the impugned sale agreement of 8th May 2000 with the deceased Njoka Wakioriah for an additional 55.6 acres of land on sub-plots number F and C for the value of Kshs. 1,112,264.55/= which land was to be excised again from L.R No. 10317/14. He produced the said agreement of 8th May 2000 as Pf exh 3 contending that payments had been made in instalments thorough issuance of various receipts which he produced as Pf exh4((i-xxxviii). That it had been upon execution of this second agreement that the estate of the deceased had denied him access, possession and occupation of the additional 55.6 acres of land wherein he had filed the instant suit.

106. The Defendant, who was the deceased's legal representative by virtue of the Letters of Administration herein produced as Pf exh 1 in his defence and evidence refuted the allegations put forward by the 1st Plaintiff to the effect that he was entitled to an additional 55.6 acres of land by virtue of the 2nd agreement of the 8th May 2000. His contention was that no such agreement ever existed, and if it did, that the same had not been executed by his father who at the time was critically ill. That his father had died on 10th October, 2002 without telling his family anything regarding the second sale.

107. That notwithstanding, the alleged agreement of 8th May 2000 despite being for the sale of land measuring 50 acres at a consideration of Kshs. 1,000,000/= wherein the purchase price had been paid

in cash and any excess amount was to be used to buy extra acreage, there had been no indication of the stipulated amount paid, the mode of payment, or the portion that was being purchased. That him, his mother and sister had received some money from the 1st Plaintiff totaling to Ksh. 43,500/= according to the four of the receipts he had produced. That there had also been "Condolence money" of Kshs. 10,000/= and a friendly loan to his sister of Kshs. 10,000/=which the 1st Plaintiff later claimed to have been part payment of the purchase price. That totaled money in the receipts, did not add up to Kshs. 1,000,000/= in relation to the Agreement dated 8th May, 2000.

108. He denied having seen Pf exh 10(a), the Applications for consent, prior save for when the same were produced by the 1st Plaintiff in court. That in any case, the said Application for consent was dated 20th August, 2002 during which time his father had been very sick. He also denied seeing or having knowledge that his father had gone to the Land Control Board because his father had died on 10th October, 2002 after having been in the intensive care unit (ICU) for 42 days then in the ward for 10 days, thus he could not have gone to the Land Control Board. That his father had also refuted the sub-division sketch plan, Df exh 3 proposed to him by the 1st Plaintiff stating that the document had been taken to him by the 1st Plaintiff and that he did not know from where he had got it from. That he was not agreeable to the 1st Plaintiff receiving an extra 50 acres in addition to what the court had given him because the said 50 acres of the suit land which the 1st Plaintiff lay claim to was land which his father had given him and which land he was in occupation having established his home therein.

109. Having given a brief history of the matter herein, I find the issues arising therein for determination as follows:

i. Whether the sale agreement dated 8th May 2008 for an additional 55.6 acres of is valid.

ii. Whether the Plaintiff's claim is statute barred.

110. On the first issue for determination, the 1st Plaintiffs case is anchored on a sale agreement dated the 8th May 2000 herein produced as Pf exh 3 between him and the late Njoka WaKioria to the effect that he had bought an additional 55.6 acres of land on sub-plots number F and C for the value of Kshs. 1,112,264.55/= which land was to be excised again from L.R No. 10317/14. That the said additional land had been purchased by instalments thorough issuance of various receipts which he produced as Pf exh 4(i-xxxviii)

111. The Defendant herein who is being sued as the administratix of the Estate of the deceased Njoka WaKioria on the other hand has refuted the 1st Plaintiff's allegation sating that his late father never entered into such an agreement with the 1st Plaintiff for additional land and that the family was only aware of the initial agreement wherein their father had sold to the 1st Plaintiff 50 acres of land and which agreement had been sealed with a Ruling of 28th February 2019 by the High Court in Nairobi Succession Cause No. 3270/2003. That the subsequent agreement of 8th May 2000 wherein the 1st Plaintiff sought or an additional 55.6 acres of land was a sham.

112. I have considered the fact that the alleged sale Agreement was made in the year 2000 before Section 3(3) of the *Law of Contract Act* which came into effect on 1st June, 2003, I think it is best that I lay out the agreement as was drawn for ease of reference.

Agrefment For Sale

Vendor

Njoka Wa Kioriah P.O BOX 221

ID NO. 346xxxx

Naivasha

Purchaser

Titus Kiragu & Susan W. Ktragu A

PO BOX 263°

ID NO. 187xxxx ID NO. 362xxx

Nakuru

Property

Parcel No. LR 10317/14(Part) Approximately 50 acres.

Location - North East of Naivasha Municipality.

Consideration

Kenya shillings one million (Ksh.1,000,000.00)only.

The Mode Of Payment

The whole purchase price has been paid in cash and execution hereof is acknowledgement of safe receipt.

Any excess amount paid by the purchasers to the vendor will be used to buy extra acreage proportionally or refund the excess amount in 4 equal instalments in one year.

Possession

The Purchasers are at liberty to take possession of the said parcel of land immediately upon sub-division of the whole parcel of land.

Title Deed & Transfer

The parcel of land is sold subject to a sub-division of the whole parcel of land and the title deed will be issued in the purchaser's names respectively.

Transfer Fee And Stamp Duty

The transfer fees and stamp duty if any shall be paid by the purchasers.

Legal Fees

The purchasers and the vendor shall be responsible for Advocates fees for drawing and executing this agreement.

In witness whereof the parties hereunto set their respective hands on this 8th day of May 2000.

Signed by the vendor

Njoka wa Koorah

In the presence of

Titus Kiragu and Susan W Kiragu

113. It was the Plaintiffs contention that this latter agreement of the year 2000 was pursuant to the former agreement of 1989 for an additional 55.6 acres thereby. However, there is nothing in the latter agreement which makes reference to the former one. There would have been nothing easier than for

the parties to insert a clause in the latter agreement, if at all the terms of the former agreement, were to be a part and parcel of this latter agreement stating that now the 1st Plaintiff was entitled to 100 plus acres of land. I am therefore unable to import the terms of the former agreement into the latter one in the absence of clear reference in the latter agreement. I also find that oral evidence cannot be imported to vary or contradict what was clearly put down in writing as it would be contrary to the provisions of Sections 97, of the *Evidence Act*, which provide as follows.

Section 97 of the *Evidence Act*

> (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

114. Secondly the assertion by the 1st Plaintiff that the agreement between him and the late Njoka WaKioria to the effect that he had bought an additional 55.6 acres of land on sub-plots number F and C for the value of Kshs. 1,112,264.55/= which land was to be excised again from L.R No. 10317/14 does not reflect on the mode of payment clause. From what I understand in that clause, the "whole purchase price has been paid in cash and execution hereof is acknowledgement of safe receipt"

115. Now taking into consideration that this Agreement had been executed on the 8th May 2000 acknowledging payment of the whole purchase price herein and also taking into consideration that the receipts herein produced as Pf exh 4(i-xxxviii) had been for payments made post 2000 that is between June 2000 and October 2002, can it strictly speaking be said that those payments were in relation to the additional 55.6 acres of land. I guess not. I say so not only because of the post payments done, but because some of the payments were made to the deceased's children and wife wherein the reason had not been in lieu of the sale agreement, further just for the sake of argument, the total sum of the receipts herein produced was less that the amount therein stipulated in the agreement.

116. I have further considered that the parties had agreed that the 1st Plaintiff herein takes possession of his portion of the suit land immediately after sub-division, and that he meets the cost of the Stamp duty. The court received no evidence in this regard instead the court had been informed that when the 1st Plaintiff submitted his sketch plan Df exh 3 to the deceased, on the subdivision of 100 acres, the same was rejected by the deceased wherein he had noted that the document had been taken to him by the 1st Plaintiff and that he did not know from where he had got it from, at the back of the document, the deceased had noted that the agreement had been for 50 acres.

117. In the case of Shah -vs- Guilders International Bank Ltd [2003]KLR the Court in considering the terms of the parties contract stated that;-

> " The parties executed the same willingly and they are therefore bound by it."

118. I therefore find that the 1st Plaintiffs allegation that the subsequent agreement gave him entitlement to an additional 55.6 acres of land to be excised from LR 10317/14 for a consideration of Kshs. 1,112,264.55 does not hold water.

119. If I am wrong then I could consider the second issue for determination, on whether the Plaintiffs' suit herein is statute barred by the statute of limitation. The Plaintiffs have hinged their suit on a cause of action arising from the sale agreement of 8th May 2000 entered between the Plaintiffs and the deceased

Njoka Wa Kioriah and therefore pursuant to the said agreement they have sought from the court that they be declared the rightful owners of 55.6 acres of land on sub-plots number F and C on L.R No. 10317/14 for which the Defendant be directed to hive off the said portion of land and transfer it to them.

120. Under the provisions of Section 4(1) (e) of the *Limitation of Actions Act*, the limitation period for an action to enforce a land sale contract is six years. Under Section 7 of the *Limitation of Actions Act*, the limitation period for an action to recover land is twelve years.

121. Section 4(1) (e) of the *Limitation of Actions Act* provides as follows;

ctions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

122. The terms of the contract herein lapsed 6 years after the case of action wherein the Plaintiffs neither sought leave nor made an Application for extension of Limitation periods and therefore the claim is incompetent. Secondly Section 7 of the *Limitation of Actions Act* provides:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person
>
> 123. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued.
>
> 124. Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Waki JA. held that,
>
> "A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."
>
> 125. That definition was given by Pearson J. in the case of Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:
>
> "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court."

126. It is clear that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiffs used to justify their rights to sue/cause of action. Their justification is based on a contract for sale of land of the 8th May 2000 to which the limitation period lapsed on 8th

May 2012. Essentially therefore, the Plaintiffs' suit having been filed on 23rd October 2013, was filed out of time. They could sue to recover the land from the Defendant, but only if they did so within twelve years after the execution of the agreement. Quite clearly the Plaintiffs' claim is for the recovery of land from the estate of the deceased after a period of about thirteen (13) years having lapsed since the year 2000 when the impugned contract was executed.

127. The Court of Appeal in Mukuru Munge vs. Florence Shingi Mwawana & 2 others [2016] eKLR held that:

> ''The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.''

128. The Plaintiffs needed to commence their claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time they filed this suit, the claim was already statute barred.

129. In the case of Bosire Ongero vs Royal Media Services [2015] eKLR the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

130. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows;

> 'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

131. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. Plaintiff's suit herein is dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 7TH DAY OF NOVEMEBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE