



REPUBLIC OF KENYA



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Karugu (Suing as the personal representative of the Estate of Peter Karugu Guandai - Deceased) v Karanja & 2 others (Environment & Land Case 1374 of 2014) [2023] KEELC 16861 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16861 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1374 OF 2014

AA OMOLLO, J

APRIL 20, 2023

BETWEEN

WINFRED NYAMBURA KARUGU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER KARUGU GUANDAI - DECEASED) PLAINTIFF

AND

LUCY WAIHIRA KARANJA 1ST DEFENDANT

SIMON NJUGUNA KARIUKI 2ND DEFENDANT

MARY NJERI MBURU 3RD DEFENDANT

JUDGMENT

1. The plaintiff Winfred Nyambura Karugu brought this suit as the administrator of the estate of Peter Karugu Guandai – deceased vide a plaint dated 28th October, 2014 against the three defendants. She pleaded that at all material times the late Peter Karugu Guandai (hereinafter referred to as the deceased) was the registered proprietor of Land L.R No. 2327/152 situate in Karen, Nairobi (be referred to as the suit property).
2. The plaintiff stated that the deceased passed away on 26th August, 2009 and at the time of his death he had not parted with the ownership of the suit property. That the 1st Defendant purported to have acquired the suit property vide an indenture of conveyance dated 14/9/2009 for the sum of Kenya Shillings three Million (Kshs.3,000,000) only. The plaintiff averred that the 1st defendant subsequently transferred the suit land to the 2nd defendant.
3. It is her claim that the transfer to the 1st defendant and subsequently to the 2nd defendant was illegal and fraudulent. The plaintiff set out the particulars of fraud as follows:



As against the 1st Defendant

- i. The 1st Defendant purporting to execute and register the Conveyance dated 14th September, 2009 with the deceased whilst the deceased had been dead for eighteen (18) days and could not be in a position to convey the property to her.
- ii. The 1st Defendant purporting to have purchased the suit property from the deceased for sum of Kshs.3,000,000/= yet no such monies were paid to the deceased or his estate.
- iii. The 1st Defendant purporting to have purchased the suit property from the deceased for the paltry sum of Kshs.3,000,000/= yet the property is situate in Karen, a prime residential area whereby an acre cannot go for anything less than Kshs.30,000,000/=.
- iv. The 1st Defendant relying on a forged signature of the deceased on the said Conveyance as the deceased was dead on the said 14th September, 2009 when he is purported to have signed the Conveyance.
- v. The 1st Defendant purporting to transfer the suit property on 20th September, 2011 to the 2nd Defendant knowing that she had no good title to do so.

As against the 2nd defendant

- vi. The 2nd Defendant purporting to enter into a Conveyance with the 1st Defendant did not have any good title to pass to it and despite a Caveat Emptor published in the Daily Nation Newspaper of 21st April, 2011.
 - vii. The 2nd Defendant purporting to have purchased the suit property from the 1st Defendant yet no monies at all were paid by the 2nd Defendant to the 1st defendant but a mere Conveyance meant to distance the property from the estate of the deceased.
 - viii. The 2nd Defendant purporting to enter into a Conveyance with the 1st Defendant for the paltry sum of Kshs.10,000,000/= yet the property is situate in Karen, a prime residential area whereby an acre cannot go for anything less than Kshs.30,000,000/-.
4. The Plaintiff pleaded further that the 3rd defendant was the architect of the fraudulent actions as she engaged the plaintiff in the succession proceedings before the High Court Cause No. 1931 of 2009. The plaintiff pleaded that the fraudulent dealings of the Defendants has caused the estate of the deceased irreparable damages and the Defendants are likely to alienate the suit property unless they are restrained by an order of this court. Despite demand to sue given, the Defendants have refused, failed and or neglected to deliver the original title for cancellation of the fraudulent transfers.
5. The plaintiff prayed for judgment to be entered against the defendants as follows;
- a. A declaration that the estate of the Peter Karugu Gundai (deceased) is the lawful proprietor known as Land Reference No. 2327/152, Nairobi.
 - b. An order that the Chief Land Registrar do forthwith cancel the Conveyance dated 14th September, 2009 in favour of the 1st Defendant and the Conveyance dated 20th September, 2011 in favour of the 2nd Defendant with regard to Land Reference No. 2327/152, Nairobi.
 - c. Pending the hearing and determination of this suit an order of injunction restraining the Defendant whether by themselves, their servants, officers and/or agents from offering for sale, selling, leasing, transferring, charging, occupying, constructing on or in any manner whatsoever alienating or interfering with Land Reference No. 2327/152, Nairobi.



- d. A permanent order of injunction restraining the Defendants whether by themselves, their servants, officers and/or agents from offering for sale, selling, leasing, transferring, charging, occupying, constructing on or in any manner in whatsoever alienating or interfering with Land Reference No. 2327/152, Nairobi.
 - e. A mandatory injunction compelling the Defendants whether by themselves, their servants, officers and/or agents to forthwith vacate the suit property and to remove any materials, structures and/or buildings erected thereon and to deliver up vacant possession of Land Reference No. 2327/152, Nairobi to the Plaintiff.
 - f. General damages.
 - g. Costs of this suit.
 - h. Interest on (e) and (f) above at court rates
6. The 1st Defendant Lucy Waithira Karanja filed her statement of defence on 23rd November, 2015 with admits the claim by the plaintiff. The 1st defendant stated that she has never purchased the suit property L.R No. 2327/152 or any other property at all from the late Peter Karugu Gundai – deceased. She added that if she signed any document relating to the said property, the same was done without her knowledge and or with fraudulent misrepresentation.
 7. The 1st Defendant denied the particulars of fraud pleaded in paragraph 9 of the plaint. In response thereto, she stated that;
 - a. The 1st Defendant has never executed and/or registered the conveyance dated 14/09/2009 or any other document relating to the suit property.
 - b. The 1st Defendant has never purchased the suit property or any other property at all from the late Peter Karugu Guandai and that she has never paid a penny towards the purchase of the said property.
 - c. She has never relied on any forged signature of the late Peter Karugu Gundai or any other conveyance affecting the suit property.
 - d. The first defendant has never had any interest whatsoever in L.R No. 2337/152 and she equally had to purportedly transfer.
 8. The 3rd defendant filed a statement of defence on 4th November, 2015 denying the plaintiff is the administrator of the deceased estate. The 3rd defendant pleaded that the conveyance in question was executed by the deceased and left undated until date of presentation for registration as happens with conveyance transactions and put the plaintiff to strict proof.
 9. The 3rd defendant pleaded that she was not party to the transaction between the 1st defendant and the 2nd defendant as pleaded in paragraph 8 of the plaint. She further denied the particulars of fraud levelled against her. The 3rd defendant admitted being charged with fraud but blamed the plaintiff for instigating the charges and she was acquitted after full trial. The 3rd defendant urged this court to dismiss this case with costs.
 10. The 2nd defendant had filed a separate suit ELC No. 456 of 2012 against the plaintiff and City Council of Nairobi, Lucy Waithira and Tom Odongo – Town clerk. Pursuant to directions given by the court in that file on 19th May, 2020, ELC 456 of 2012 was ordered to be heard together with this case. There were no directions given on the arrangement of parties pursuant to the consolidation. However, this



court inferred that the 2nd defendant's claim as contained in ELC 456 of 2012 formed part of his defence and counter-claim in the current file. I proceed to summarise the 2nd defendant's claim as below.

11. In a further amended plaint in ELC 456 of 2012, the 2nd defendant (Simon Njuguna Kariuki) pleaded that at all material times, he was the registered owner of the suit land L.R No. 2327/152 having purchased the same from the 3rd defendant (Lucy Waithira Karanja). That prior to purchase, the said 3rd defendant had obtained all approvals in respect of the suit property vide development plan No. FA 770 for the proposed domestic building to be erected on the suit property.
12. That he took possession and commenced construction. However, the City Council of Nairobi (sued as the 1st defendant) without any right served him with enforcement notice No. 9876 on 25th July, 2012 which stopped him from going on with construction.
13. The 2nd defendant filed his suit and alongside it sought vide interlocutory application orders of temporary injunction to restrain the Defendants from interfering with or curtailing the on-going development. He impleaded that an order was given on 30th July, 2012 which was duly served on the 1st Defendant's legal director. Subsequently an order was given on 19th September, 2012 was served on his contractor who then suspended the construction forthwith.
14. Mr. Njuguna contended that on 19th October, 2012 at 8:30 a.m., employees of the 1st defendant and on instruction of the 5th defendant descended on the suit property and proceeded to demolish the building purporting to implement enforcement No. 9876 but which action was illegal. The 2nd defendant pleaded that he suffered loss of special damages of Kshs.7,708,726 being the values of the demolished building.
15. The 2nd defendant asked for judgment to be entered in his favour and against the 1st defendant (County government of Nairobi), the 2nd defendant (Winfred Karugu – Plaintiff) and the 5th Defendant (P. Tom Odongo) as follows:
 - a. A permanent Injunction restraining the 1st Defendant by itself, its agents, servants or any other persons acting under it from stopping, curtailing, or in any other way interfering with the plaintiff's development and construction on parcel No. L.R No. 2327/152 along Koitobos Road Hardy Area – Karen.
 - b. A declaration that the 2nd Defendant has no locus standi in the matter as the plaintiff is the duly registered proprietor of L.R No. 2327/152.
 - c. Special damages Kshs.7,708,726/=
 - d. General damages.
 - e. Costs and interest until payment in full.
16. That 1st and 5th Defendants filed a joint statement of amended defence dated 20th January, 2016 and filed in court on 2nd March, 2017. They pleaded that indeed the 3rd defendant applied for and obtained plan No. FA 770 for the proposed domestic building. That the plan was approved subject to compliance with several conditions which included non-existence of any dispute over the land. The 1st and 5th defendants stated that when the dispute over the land was brought to their attention, they took steps to stop the construction by issuing the enforcement notice No. 9876 of 25th July, 2012.
17. The 1st and 2nd Defendants aver that after interpartes hearing of the injunction application, the court vacated the interim orders which had been earlier issued. However, the 2nd defendant continued with construction and to avoid a situation of the development being demolished after completion, they



opted to implement the enforcement No. 9876 adding that the approved plan then in place had been cancelled.

18. They added that the 2nd Defendant (plaintiff) salvaged the building materials once the demolition had been done hence he cannot claim loss of Kshs.7,708,726/= without specifying how the figure was arrived at. The 1st and 5th Defendants assert that the plaint does not disclose any reasonable cause of action, is defective, misconceived and should be dismissed with costs.

Defence by Winfred:

19. The hearing of the case commenced on 7th March, 2019 with the evidence of Winfred Nyamburu Karugu. She adopted her witness statement dated 28th January, 2014 filed alongside the plaint. PW 1 stated that she brought this suit as the legal representative of Peter Karugu Gaundai – deceased who was her husband. She said Karugu Guandai died on 26th August, 2009 at Karen Hospital and produced a death certificate to confirm. The witness explained that the indenture relating to the suit property dated 14th September, 2009 between Lucy Waithira Karanja and the deceased bore the deceased passport photo at page 7 but denied the signature therein belonged to him.
20. PW 1 averred that the indenture was signed after the demise of Guandai. She referred the court to paragraph 5 of the 1st Defendant's statement of defence where she denied purchasing the suit property from the deceased. PW 1 added that the transaction between the 1st defendant and the deceased was not lawful. She also referred the court to the indenture dated 20th September, 2011 between the 1st and 2nd defendant at the execution page and paragraph 10 (iv) of the defence where the 1st defendant denied having any interest in the suit property.
21. The plaintiff continued in her evidence that she had not seen any sale agreement between the 1st defendant and the deceased nor any evidence of payment made to the deceased. She stated that the succession proceedings in respect of the estate of the deceased are still on going and annexed copies of the petition & cross Petition in her bundle which was produced. She averred further that the 3rd defendant and herself are in agreement that the suit property be listed as part of the assets of the deceased. She sought to be granted the reliefs sought in the plaint and produced documents in her bundle filed on 28th October, 2014 as P ex 1.
22. In cross-examination by Ms. Kayoi learned Counsel for 1st Defendant, PW 1 stated that the signature on the indenture between the deceased and the 1st defendant did not belong to the deceased. She said that even the signature of the 1st defendant on that document was suspect. PW 1 asserted that no money was paid to the deceased arising out of this transaction. Further she did not believe that the 2nd defendant paid any money to the 1st Defendant in their subsequent transaction.
23. PW 1 admitted she was the complaint in criminal case No. 360 of 2012 adding that the 1st defendant testified in the criminal case and said she never bought the suit property. PW 1 held the view that it was the 3rd defendant (Njeri Mburu) who was involved in all these transactions. That the 1st Defendant has been sued because of her signature on the impugned document.
24. In further cross-examination by Mr. Njuguna appearing for the 3rd defendant, PW 1 said they started buying the suit property in 1993 from Matere Kariri and completed the transaction in 2007. That the indenture in the deceased name was registered on 1st April, 2008 by which time they were not staying together. That as at 1st April, 2008, she had lived separately with Karugu Gundai for about one year. She admitted that in 2008 they were involved in a divorce case and division of property case.
25. Counsel showed the witness pleadings in HC Originating Summons Cause No. 34 of 2007 relating to the division of properties. She also confirmed that by this time, Guandai deceased was living with the



- 3rd defendant. PW 1 confirmed filing the succession case over the estate of Guandai without consulting the 3rd defendant. She was aware that the 3rd defendant obtained orders staying the limited grant issued to her in her understanding, the orders of status quo granted meant that the Limited grant issued to her remained. She confirmed the evidence of the 1st defendant's husband in the criminal proceedings when he said that the 1st defendant was his nominee for various transactions. PW 1 was shown page 58 of the judgment in the criminal proceedings where the trial court found the 1st defendant had signed the indenture during the lifetime of Karugu Guandai – deceased.
26. In re-examination, PW 1 said the Limited grant issued to her had not been set aside. That as at the time of death of Guandai, the cases PW 1 had brought against him had not been heard and determined and that the deceased had challenged the divorce petition. That the 1st defendant's husband Geoffrey Njoroge Mburu is a brother to the 3rd defendant.
 27. She added that in the criminal trial, the 1st defendant denied entering into any sale agreement with Karugu Guandai – deceased which statement is consistent with her statement of defence filed in this case. This marked the close of the plaintiff's case.
 28. The 1st defendant gave her evidence as DW 1 on 4th December, 2019. She adopted her witness statement filed in court on 30th November, 2015 as part of her evidence in chief. She said that she did not purchase any property from Karugu Guandai. That it was after the death of Karugu that she was brought some document by the 3rd defendant who is her sister in-law who told her that she would hold the suit property temporarily. She averred that when the documents were brought to her to sign, it was only the 3rd defendant and her present.
 29. DW 1 conceded that she gave the 3rd defendant a copy of her Identity Card and her passport photograph. DW 1 averred that she was not paid any money. Shown the indenture dated 20th September, 2011, (P ex 14). She said that she never transferred the suit property to the 2nd defendant and she has never met him. DW 1 insisted that she never signed the document of transfer to the 2nd defendant.
 30. Ms. Lucy Waithera continued in her evidence that she learnt of the transaction was a set up by the 3rd defendant when she received a demand for land rates in March, 2012. She informed the 3rd defendant who told her that it was not a big deal as she would sort it out. She stated that in her testimony in the criminal proceedings, she also said that she did not buy any property from Karugu Guandai – deceased.
 31. During cross-examination by Mr. Koech learned Counsel for the plaintiff, DW 1 admitted meeting Karugu Guandai before his demise but denied discussing the issue of the suit property with him. That she knew the property is in Karen and she has never visited the land. The witness was aware Karugu Guandai died on 26th August, 2009. That the indenture dated 14th September, 2009 was brought to her by the 3rd defendant to sign after the death of Karugu. DW 1 added that she did not sign any other document relating to this transaction.
 32. According to DW 1, she did not know what she was signing as she believed the 3rd defendant that she was doing a temporary transfer to her. It is her evidence that the 3rd defendant informed her that she did not want to lose the properties belonging to the deceased. DW 1 added that she was unaware when the documents were brought to her the 3rd defendant was involved in a succession dispute with the plaintiff. DW 1 was shown the Petition filed on 8th September, 2009 which was before the date of the conveyance dated 14th September, 2009.
 33. DW 1 was referred to the witness statement of her husband Geoffrey Njoroge Mburu at paragraph 9. She denied that she was holding the suit property as trustee for her husband and that they never



- discussed the transaction with him. That they were living together as a couple in 2009 and her husband never mentioned to her the issue of purchasing any property from the deceased neither did the 3rd defendant inform her she was signing the documents as a trustee.
34. DW 1 stated that she separated with Geoffrey in July, 2011. That after their separation, she was never approached by the 3rd defendant or her husband to retransfer the property to them. She was shown the sale agreement between Geoffrey Mburu (DW 3) and the 2nd defendant dated 13th July, 2011 and her answer is that she did not know about this agreement until this suit was filed neither was she aware of the agreement dated 10th March, 2008. DW 1 said she is not opposing the prayers sought by the plaintiff.
 35. In further cross-examination by Mr. Kariuki learned Counsel for the 2nd defendant, DW 1 said she got married to Geoffrey in 1996 and they have 4 children. DW 1 said she met Guandai – deceased once in the 3rd defendant’s house but did not know his relationship with the 3rd defendant. DW 1 asserted that she did not know the deceased had children with 3rd defendant.
 36. DW 1 continued that her marriage was peaceful until July, 2011 and during that period, they were good friends with the 3rd defendant. That her husband would tell her all things he was doing. She did not know that Geoffrey purchased the suit property from the deceased. DW 1 contended that the 3rd defendant convinced her to sign one document but she did not read it. DW 1 admitted giving the 3rd defendant her ID and passport photo willingly. She further admitted that the plaintiff is her friend.
 37. It is her evidence that she met the plaintiff during Karugu’s funeral. She was not sure the plaintiff was the 3rd defendant’s co-wife. That it is not possible for her husband to purchase the land without her knowing as he had included her in the properties he was buying. DW 1 admitted giving evidence against the 3rd defendant in the criminal trial and against her husband in an assault case.
 38. DW 1 denied that her evidence here is meant to hit back at her husband and sister in-law because of their separation. DW 1 denied signing the indenture dated 20th September, 2011 insisting the one she signed was signed in the year 2009. DW 1 averred that someone may have forged her signature in the 2011 document. DW 1 was not aware that her husband had nominated her in the transaction with Guandai since she was not aware of the transaction. DW 1 also denied being used by the plaintiff.
 39. In cross-examination by Mr. Mbigi, learned counsel for the 3rd defendant, DW 1 stated that she met the 3rd defendant in 1995 before she got married to Geoffrey and they were good friends. That she visited the 3rd defendant in hospital when she gave birth to her 2nd born named Anastacia Mumbi. The witness agreed that in the Mburu’s side there is no person called Mumbi. She accepted that Mumbi was the name of the mother to Karugu Guandai – deceased. DW 1 admitted meeting Karugu in the 3rd defendant’s house during a birthday party. She affirmed that Karugu was the father to the 3rd defendant’s son. The witness denied that she had met Karugu on several occasions.
 40. Referred to paragraph 3 of her witness statement, DW 1 said she was not certain on the date when the 3rd defendant brought documents to her to sign but by then the deceased had not been buried. She asserted that the request to sign the documents was informal and it was made in the 3rd defendant’s house. DW 1 admitted she knew what she was doing as she was helping a sister in-law. In the criminal case, she was called by the CID to testify while in this case she was called by a lawyer for the plaintiff to come and testify.
 41. DW 1 stated that she did not know that the 3rd defendant was married to the deceased. When she signed the documents, she was married to Godfrey Mburu and still she is married as they are only estranged. She conceded that her husband used to nominate her in his transactions but in this particular case, she



- did not sign any documents on behalf of her husband. That she is a friend to both the plaintiff and the 3rd defendant.
42. In re-examination, DW 1 insisted that her husband did not appoint her as a nominee in this transaction. That when she went to the 3rd defendant's house, she only signed the transfer with Karugu but did not sign any transfer with Simon Njuguna (2nd defendant). That the photo used in the transfer to Njuguna is what she had given to the 3rd defendant in the earlier transaction. In the criminal case, he was called to give evidence by Mr. Koech who was representing the plaintiff's interest. In examination by the court, DW 1 admitted signing the transfer document between herself and the deceased in the 3rd defendant's house.
43. Simon Kariuki Njuguna who is sued as the 2nd defendant in this suit and is the plaintiff in ELC 456 of 2012 gave his evidence as DW 2. He adopted his further amended plaint as well as the bundle of documents and witness statements filed therein. DW 2 avers that he is the registered owner of L.R No. 2327/152 situated in Hardy Area of Nairobi. That he acquired the suit property in July, 2011 through purchase from Geoffrey Njoroge Mburu. DW 2 stated that he did not produce the sale agreement executed between them because he did not deem it necessary as there is no dispute between him and the vendor – Geoffrey Mburu.
44. DW 2 stated that the vendor had informed him that the registered owner of the suit property at the time of purchase was his wife (1st defendant). That he had known Mr. Mburu since 1992 while Mr. Mburu was working in the banking industry therefore he had no reason to doubt the information given by the Vendor. The 2nd defendant said that he paid the purchase price to Mr. Mburu while the 1st defendant facilitated the registration of the property into his name by providing the requisite documents of transfer.
45. DW 2 continued that the conveyance instrument dated 20th September, 2011 was prepared by Mercy Kanyara advocate and was duly executed which document was produced as D ex 1. DW 2 asserted that he paid for the property with Kshs. 5million was paid through his advocate while the balance of Kshs.5m was paid over a period of 3 months. Thereafter, the suit property was duly registered in his name. The witness said that he took the drawings that had been approved for Mr. Mburu by the City Council of Nairobi. The approved plans FA 770 produced as D ex 2 and receipts made for the approvals dated 14th April, 2011 for Kshs.36,501 all in the name of the 1st defendant now produced as D ex 3.
46. Letters of indemnity and certificate of structural design all produced as D ex 6 – 8. The 2nd defendant averred that he engaged John Mwangi Waweru Trading as Bothex Construction Co. to start the construction works. That the contractor began but did not finish because DW 2 received an enforcement notice No. 9876 dated 25th July, 2012 asking him to stop the ongoing construction. The enforcement notice is produced as D ex 9.
47. DW 2 remarked that he found the Notice absurd because he had all the necessary approvals and certificates. He stated that he received a second enforcement notice dated 3rd August, 2012 addressed to the 1st Defendant requiring that they remove the building which notice alleged that the construction did not have approvals. The 2nd notice now produced as D ex 10. He stated that he instructed his advocates to send a complaint to the City Council and a demand letter was written dated 26th July, 2012 (D ex11) which enclosed copies of the approved plans given the City Council.
48. He continued that when the City Council did not respond to their said letter, they filed ELC Case No. 456 of 2012 and obtained an order of temporary injunction restraining the City Council from interfering with his plot (suit plot). The witness contended that the order (D ex 12) was served on the



Legal Director of the 1st defendant on 30th July, 2012. However, the City Council still proceeded on 19th October, 2012 and demolished the structures as shown in the various photos produced as – D ex 13.

49. DW 2 further stated that he knew the demolition was witnessed by several people including boba boda operators. That the demolition was undertaken by the City Council because the people who carried out the demolitions were in City Council branded vehicle. He engaged a quantity surveyor to assess the damage and loss and Mr. James Mwangi Nyaga who is Quantity Surveyor quantified the loss at Kshs.7,708,726 by using the bill of quantities to arrive at that figure. He asked the court to award him the special and general damages and the cost of his suit and interest.
50. In regard to the plaintiff's claim, DW 2 stated that he had filed a defence and counter-claim. He denied the allegation that the 1st defendant had no good title to pass to him. He was also not aware of any notice prohibiting any dealings with the suit property otherwise he would not have purchased it. DW 2 argued that Kshs.10m was the agreed market value and he did not know how the plaintiff arrived at a value of Kshs.30 million pleaded.
51. Further, DW 2 denied defrauding anybody nor has he been charged with any criminal offence touching on the suit property. DW 2 told the court that he has since sold the suit property (in 2017) to West Light International. That the plaintiff (Winfred Nyambura) had no right to seek restraining orders in regard to the suit property. DW 2 urged the court to dismiss the plaintiff's claim.
52. Under cross-examination, DW 2 corrected the date of purchase as 2011 not 2007 as he earlier stated. DW 2 said that 1st defendant was introduced to him as Mrs. Mburu but he had no dealings with her. He confirmed the sale agreement dated 13th July, 2011 annexed to the statement of DW 3 as the one he executed. He also confirmed that the purchase price was Kshs.15 million which was paid to Mr. Mburu in instalments through her advocates' office.
53. DW 2 said he will not call his advocate Ms. Mercy Kanyara as his witness in this case. He confirmed not seeing the 1st defendant sign the transfer in his favour because according to DW 2, he dealt with 1st defendant (Lucy Waithira's husband). The witness expressed himself that he had not produced any receipt to confirm payment of the purchase price. DW 2 averred that he sold the suit property to West Light International in 2017 because there was no order barring him from selling it.
54. DW 2 was referred to an order issued on 19th September, 2012 in ELC 456 of 2012 which at paragraph 3, the court stopped any constructions. He answered that he was not aware of any order stopping the construction. That he was claiming Kshs.7,708,726 which is monies he had spent on the demolished structures.
55. In re-examination, DW 2 reiterated that he purchased the suit property from Geoffrey Mburu which property was registered in Mburu's wife name. That because of their friendship with Mburu, he had no doubt the deal was valid. That he had been shown the agreement between Geoffrey Mburu and the deceased which had special condition No. (g) for nomination of representation. DW 2 stated he did not make any payment to the 1st defendant and he had no obligation to do so.
56. Geoffrey Njoroge Mburu gave evidence as DW 3. He introduced himself as working current as an auctioneer and previously worked with Co-operative Bank for 25 years. He adopted his witness statement recorded on 17th July, 2017 which statement annexed several documents including; indenture dated 30th July, 2007 between Matere Keriri and the deceased relating to the suit property. The witness also produced a sale agreement dated 10th March, 2008 between himself and the deceased, a receipt issued by the 3rd defendant for the sum of Kshs.5 million as well as a letter dated 10th March,



- 2008 from the said advocate. DW 3 stated that the indenture between the deceased and the 1st defendant was drawn by the 3rd defendant. The documents were produced as a bundle and marked as D ex 14.
57. DW 3 confirmed that he was married to the 1st defendant but they separated in August, 2011. DW 3 further confirmed that the 3rd defendant is his sister and an advocate. He admitted selling the suit property to the 2nd defendant. He stated that the deceased was his brother in-law having married the 3rd defendant in 1997 through a traditional ceremony. He averred that they were good friends with the deceased who died in August 2009.
58. DW 3 continued in evidence that he purchased the suit property from the deceased and they both executed the agreement dated 10th May, 2008 in the 3rd defendant's office. He stated that he bought the property for Kshs.10m and paid a deposit of Kshs.5 million through the 3rd defendant who issued him with a receipt. He admitted that he had no document before the court to support the transfer saying most of his documents were taken away by his wife when they separated.
59. DW 3 added that the agreement between him and the deceased allowed him to nominate a person in whose name the property was to be registered. He added that he paid the balance of the purchase price in instalments but did not have documents of payment stating the same were equally taken by his wife. He asserts that the 3rd defendant's law firm acknowledged the payments. That because he had loans with the bank he could not take further loans to pay for the property. He also asserted that the deceased signed the document before his death as the conveyance was prepared in September, 2008.
60. According to this witness his wife also signed the disputed indenture in September, 2008. DW 3 denied that their transaction was fraudulent maintaining the documents were signed before the demise of the vendor and it is only registration which took place after his death. DW 3 stated that it was him who took the documents to the 1st defendant at their home in Ongata Rongai to sign before returning them to the offices of the 3rd defendant.
61. He went on to state that their relationship with the 1st defendant has since broken down. He was arrested and charged on complaints instigated by his wife but he was acquitted. That he later sold the suit property after he was retrenched and therefore it was not possible for him to develop a home on the suit property.
62. DW 3 further stated that his wife did not have any objection to his selling the suit property to the 2nd defendant. That the 2nd defendant paid him the full purchase price some of which was paid through the law firm of the 3rd defendant. Subsequently, the 1st defendant transferred the property to the 2nd defendant. That the property was sold to the 2nd defendant together with the approval plans. DW 3 admitted that the 1st defendant did not know the plaintiff before the death of Guandai. However, the 1st defendant switched camps and started supporting the plaintiff. DW 3 contends that his wife (1st Defendant) feels aggrieved because of the separation, while the plaintiff feels aggrieved because the 3rd defendant was married to the deceased making the basis of the claims in this suit.
63. In cross-examination by Mr. Koech for the plaintiff, DW 3 said he was not aware of a succession dispute between the plaintiff and the 3rd defendant. He was shown the cross-petition by Njeri Mburu at page 31 which listed the suit property as one of the assets of the deceased. DW 3 admitted the agreement dated 10th March, 2008 is initialised by the 3rd defendant but they did not appear before her with the deceased. That he did not see the deceased sign the document but he signed after him.
64. DW 3 affirmed that as at 10th March, 2008, the 3rd defendant had offices at St. Georges House but she later moved her office to Delamere Flats. In the letter dated 10th March, 2008, the 3rd defendant's office is given as located at Delamere Flats. DW 3 denied that the agreement of 10th March, 2008 was filed a



- year later for the purpose of this case. That he paid Kshs. 5 million in cash directly to the deceased and the balance was paid vide a bankers cheque deposited in the advocates account.
65. Mr. Njoroge Mburu assisted that the deceased had signed the indenture before he died and that the deceased had engaged a Mr. Mungai to registrar the indenture. DW 3 did not know why the 3rd defendant did not take up the registration of the documents. DW 3 said he never met the said Mungai. He also maintained that his wife signed the documents (indenture) in his presence around September, 2008.
 66. In the transaction with the 2nd Defendant, DW 3 stated he was paid Kshs.1.5 million in cash and the balance was paid in instalments through the office of the 3rd defendant. He did not know how M. N. Kanyara advocates transferred monies to Njeri Mburu advocates but he received the rest of the monies from Njeri Mburu Advocates. DW 3 denied that the suit property is still forms part of the deceased estate.
 67. In re-examination, DW 3 conceded not seeing Karuga signing the document and that he was to be Mr. Karugu's witness. That he paid the balance of the purchase price through the law firm of the 3rd defendant. That nothing prevented him from selling the suit property as he did. He stated that the conveyance between the 1st defendant and the deceased was prepared around July, 2008 and not on 14th |September, 2009. DW 3 did not interact with Mr. Mungai who was the deceased agent.
 68. DW 3 stated that he did not know why the conveyance between the 1st defendant and the deceased was dated on September, 2009. That there was nothing wrong with the 3rd defendant representing him. In examination by the court, DW 3 stated that he was retrenched in 2011. That he had bought the suit property in 2008 while still working with Co-operative Bank. That he had some temporary structures in Ongata Rongai and was also doing some farming while the 1st defendant was a teacher. DW 3 stated that he sold some properties and some shares to raise the purchase price.
 69. John Mwangi Waweru testifying as DW 4 gave evidence on behalf of the 2nd defendant. He introduced himself as a building contractor and adopted his witness statement made on 17th July, 2017. DW 4 said that he was orally contracted by the 2nd defendant to build for him a residential house on L.R. 2327/152 – the suit property. DW 4 stated that the construction started in May, 2012 and in July the City Council served them with enforcement notice to stop building.
 70. DW 4 contended that before construction began, they had all the licences and approvals. Subsequently, his client got a court order which allowed them to continue with the constructions. In September, 2012, the City Council came back and stopped them. DW 4 averred that they moved out of the suit premises but left behind security guards. That on 19th October, 2012 the City Council returned and demolished the structures.
 71. It is DW 4's evidence that at the time of demolition, the structure was 50% done. That the total costs of building was Kshs.15,717,212. He produced the Bill of Quantity as D ex 14. He concluded that it was wrong for the City Council to bring down the building.
 72. In cross-examination, DW 4 said the 2nd Defendant had said he was the owner of the suit property. That the approvals were in the name of 1st Defendant. That the City Council served the first enforcement notice on 25th July, 2012. He also confirmed being served with a court order on 19th September, 2012 and he moved out after receipt of the court order. That between 19th September, 2012 – 19th October, 2012, no construction took place. In re-examination, DW 4 said he did not know if there was a court order for demolishing the structure.



73. James Mwangi Nyaga who is a quantity surveyor gave evidence on behalf of the 2nd defendant as DW 5. He stated that he was engaged by the 2nd defendant on 2nd October, 2012 to assess the value of the property destroyed. That on receipt of the instructions, he visited the site and was also shown the Bill of Quantities for the project. Thereafter, he did an assessment and returned a value of Kshs. 7,708,726. He produced his report as D ex 16.
74. On cross-examination by Mr. Koech learned Counsel for the plaintiff, DW 5 said that as a Quantity Surveyor, there was no need for him to look at approvals or licences. This marked the close of the 2nd defendant's case.
75. The 3rd defendant gave her evidence on 23rd November, 2022 and adopted her witness statement dated 26th October, 2015 and filed in court on 4th November, 2015. The 3rd defendant denied that the plaintiff is the administrator of the estate of the deceased Peter Karugu Guandai thus unsuited. She admitted the contents of paragraph 6 of the plaint in so far as relating to the date of death of the deceased. She produced as D ex 1 & 2 copies of the application for revocation of grant.
76. DW 6 stated that during the life time of her husband, she handled all his numerous legal issues including conveyances and that she was also the custodian of his documents. DW 6 avers that the plaintiff's suit is predicated on the assumption that the indenture of transfer was done after the demise of the deceased since the plaintiff had no knowledge of what was happening in the life of the deceased prior to his death.
77. The 3rd defendant stated that the deceased sold the suit plot and the neighbouring one No. 2327/151 during his lifetime and the conveyances drawn and executed without dating and were dated around the time of presentation for registration as happens in many transactions and there is nothing fraudulent about it.
78. It is her contention that the criminal case No. 1360 of 2012 were instigated by the plaintiff to embarrass and harass her prior to determination of the succession cause as part of her evidence. DW 6 produced proceedings and judgment in the criminal case. She concluded her testimony by saying that it was ironical for the plaintiff to say that the deceased could not have sold the suit property for Kshs. 10 million yet put the value at the same amount in the succession pleadings. She urged the court to dismiss the plaintiff's suit with costs.
79. In cross-examination by Mr. Koech learned Counsel for the plaintiff, DW 6 confirmed drawing the indenture dated 14th September, 2009 at page 7 of the plaintiff's documents between the deceased and 1st defendant. That she witnessed the parties signatures in her capacity as an advocate. DW 6 admitted drawing the sale agreement between her husband – deceased and Geoffrey Njoroge Mburu (DW 3) who was the husband to the 1st defendant. She admitted that the 1st defendant made no payment to her late husband as she was not the actual buyer of the suit property.
80. She continued that the purchase price was Kshs.10 million but Kshs.3 million was the value put for purposes of payment of stamp duty. It is her stake that it is the lands office who determine the value for purposes of payment of stamp duty. That Kshs.10 million was paid through her client's account. DW 3 stated that the 1st defendant would not know if money exchanged hands because she was just a nominee.
81. DW 6 declared that she was not involved in the transaction between the 1st and 2nd defendants except for receiving the balance of the purchase price on behalf of Geoffrey Mburu (DW 3). She did not carry any document to prove receipt of monies on behalf of Geoffrey Mburu. DW 6 averred that although



- she listed the suit property as part of the assets of the deceased in her cross petition, she later clarified that it did not form part of the estate.
82. In re-examination DW 6 said the 1st defendant was involved at the initial and she (1st defendant) admitted signing the documents. That on the indenture, there is a valuation returned by W. Kamuyu who accepted the declared value of Kshs.3 million. That the conveyance dated 30th July, 2007 had stamp duty value of Kshs.2.5 million by S. Birundu. That matters of clients account do not get published without a cause and the plaintiff did not serve her with notice to produce the client's account statement. She affirmed that there was never an issue whether the property was sold. This marked the close of the 3rd defendant's case.
 83. The plaintiff filed written submissions dated 14th December, 2022. I did not find on record any submissions by the 1st defendant. The 2nd defendant filed submissions dated 20th February, 2023 and the 3rd defendant's submission are dated 14th February, 2023. I have read all the three sets of submissions and will make appropriate references in the body of my determination.
 84. The 3rd defendant filed a statement of agreed issues dated 26th October, 2015 which I find as summarising the issues in dispute and which I adopt. The statement raised the following;
 - a. Whether the Plaintiff has legal capacity to bring this suit.
 - b. Whether the suit property was sold by the deceased prior to his death.
 - c. Whether the conveyance of the suit property was done through fraud or illegality.
 - d. Whether consideration was paid for the sale transaction
 - e. Whether this matter ought to have been determined in Succession Cause No. 1931 of 2009.
 85. In addition to the above questions, (in ELC 1374 of 2014), this court will proceed to determine the merit or otherwise of the 2nd defendant's claim as prayed in ELC 456 of 2012.
 86. Black's Law Dictionary 10th Edition defines status as "A person's legal condition, whether personal or proprietary, the sum total of a person's legal rights and duties, liabilities and other legal relations..." and status quo is defined as "the situation that currently exists."
 87. Mbugua J. in the case of *Fatuma Abdi Jilo vs Kuro Lengeseu & Another* (2021) eKLR cited several decisions on the purpose of an order of status quo inter alia R Vs NET, exparte Palm Holms Ltd & Another (2013) eKLR where Odunga J. (as he then was) stated thus;

"When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."
 88. The 3rd defendant submitted that the plaintiff lacked capacity to bring this suit because she had obtained an order (D ex 18) on 18th May, 2010 which directed that the status quo on the ground as of 18th May, 2010 is to be maintained. The plaintiff had been issued with Limited Letters of Administration on 29th April, 2010 for purposes of collection, preservation of the estate as well as defending or instituting suits." The question the court is tasked to answer is whether the order of status quo de clothed the plaintiff of capacity to bring the present suit.



89. As defined above, status quo means the situation as currently exists. The situation that was existing when the order was given was the plaintiff having been given letters to defend or institute suit on behalf of the estate of the deceased. This court interprets that the order of status quo did not divert the plaintiff of the letters of grant earlier given. Secondly, the 3rd defendant did not present any order which set aside the limited letters of grant issued on 29th April, 2010. I am therefore convinced that the plaintiff had authority to bring the present suit.
90. The 3rd defendant also submitted that the matters in issue could have been handled in Nairobi HC Succession Cause No. 1931 of 2009. Consequently, the filing of this suit contravened the provisions of Section 6 of the *Civil Procedure Act* Cap 21. This court takes the position that once the property was registered in the name of the 1st defendant and subsequently the 2nd defendant it generated a dispute whether the registration of the suit property was obtained by fraud. The court clothed with jurisdiction to hear and determined dispute regarding ownership of property is the Environment and land court.
91. The 3rd defendant stated that the hearing in the succession dispute had commenced. She however did not produce those proceedings so that this court would ascertain that the High Court in Succession Cause 1931 of 2009 was also hearing the dispute as raised in the current suit. Further, the 1st and 2nd defendants are pleaded to comprise beneficiaries of the deceased estate and or parties to the succession dispute. It is not submitted by the 3rd defendant that the 1st and 2nd defendants could litigate either through her or the plaintiff. It is my finding that this claim and the claim in ELC 456 of 2012 (consolidated) is subjudice Nairobi HC Succession Cause 1931 of 2009.
92. The 2nd question is whether or not the suit property was sold prior to or after the demise of Peter Karugu Guandai – deceased. It is not in dispute that the indenture of the transfer of the suit property conferring interest on the 1st defendant was dated 14th September, 2009. It is also not in dispute that Karugu Guandai – deceased died on 26th August, 2009. Further, it is not contested that there was no transaction as between the deceased and the 1st defendant – Lucy Waithira Karanja as the sale agreement is stated to have been executed between the deceased and Geoffrey Mburu (DW 3).
93. Mr. Geoffrey Mburu told court that he was the one buying the suit property which he later registered in his wife’s name (1st defendant) as his nominee. The plaintiff’s claim and testimony is that no such sale took place and no money was ever paid to the deceased. The court is alive to the provisions of Sections 107 – 109 of the Evidence Act which places the burden of proof on the plaintiff as the party who was alleging that no such sale took place.
94. The plaintiff pleaded the particulars of fraud against the 1st defendant who was the immediate registered owner after the deceased. The 1st defendant did not contest them by the plaintiff both in her testimony and the statement of defence filed. In her testimony to the court, she denied transacting with the deceased regarding the purchase of the suit property. The 1st defendant also stated that the conveyance (indenture) was given to her to sign after the death of Peter Karugu Guandai. With this position taken by the 1st defendant, the burden of proving the fraud in my view shifted to the 2nd and 3rd defendants to now persuade the court that indeed there was no fraud in the transaction that divested the estate of the deceased of the suit property.
95. Further, it is my further considered opinion that on the basis the impugned indenture on the face of it is dated 14th Sept 2009 after the demise of Karugu Guandai, the burden was always upon the Defendants



to prove otherwise. On the question of the date of attestation, section 5 of the [Statutory Declarations Act](#) Cap 15 of the Laws of Kenya provides thus;

“Every commissioner before whom any oath or affidavit is taken or made under this Act, shall state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

96. The 3rd Defendant relied on the judgement delivered in Criminal case number 1360 of 2012 where she was acquitted of the criminal charges of fraud. At page 62 of the said judgement, the trial magistrate Hon T. Muriuki SPM referred to the evidence of Jacob Oduor who was the document examiner and who gave evidence as PW7. The magistrate stated thus,

“It is his evidence that on the 25th July 2012 he examined and compared the questioned signatures and the known signatures of the deceased marked as exhibit 22 A – E. That upon comparison and examination, he noted that the signatures in exhibit 6 and 7 which were both indentures of conveyance were written in different style and formation as those in exhibit 22A-E. That he formed an opinion that the signatures in exhibit 6 and 7 were made by a different author”

97. The honourable trial magistrate went to give reasons on how much weight to attach to the evidence of a handwriting expert based on the case law she cited that the same is a mere opinion which is not binding on the court. That the court has to make its own independent evaluation and finding the opinion of the expert notwithstanding. The honourable trial magistrate did not dismiss the evidence of this witness but said she had to make her own evaluation I presume based on other evidence presented before the court.

98. The reason I have paraphrased the above findings from the criminal case is to show that there was an expert's evidence that made a finding that the deceased signature on the impugned indenture was not similar to his known signature. This is a civil case where the standard of proof is on a balance of probabilities. The plaintiff's case is that the document which transferred interest on the suit land to the 1st Defendant was not signed by the deceased. Having laid a basis why she thought so (date on the face of the document, evidence of DW1 and the statement of the handwriting expert), the burden shifted in my view to the defendants.

99. The 1st defendant's husband, Geoffrey Mburu (DW 3) went into great detail in his testimony to explain that indeed the sale took place before the death of Karugu Guandai – deceased. DW 3 said that he learnt of the intention to sell from his sister (3rd defendant) and they subsequently executed the sale agreement dated 10th March, 2008 with the deceased. In his written statement, DW 3 stated that he paid Kshs.5 million as deposit to the vendor through the 3rd defendant who was the joint lawyer of the parties. The written statement does not however give details on how the balance of the Kshs.5 million was paid.

100. DW 3 attached to his witness statement a receipt issued to him by the 3rd defendant on 10th March, 2008 for the sum of Kshs.5 million. He also included a copy of the sale agreement and the 3rd defendant's letter of 10th March, 2008. Paragraph 3 and 4 of the stated letter read as follows:

“3. The balance shall be paid after the transfers

4. The firm of Njeru Mburu shall give you a professional undertaking to safeguard your position pending the acquisition of the Title and the subsequent transfer in your favour.”



101. The letter was clear that the balance was to be paid after the transfer. The same provision is stated in clause 3 of the sale agreement last sentence thus,
- “.....The balance of the purchase price shall be paid to the vendor after the transfer of the title to the purchaser.”
102. There is evidence that the registration of the conveyance took place after the demise of the Vendor. DW 3 in his evidence said he paid the balance of the purchase price, in instalments through cash and bank transfers to their mutual advocate who was the 3rd defendant and his sister. He did not produce any document to prove that monies were forwarded to the 3rd defendant. I also note on the face of the agreement they executed that it did not provide for payment through the 3rd defendant. If any payment was made post the date of transfer (although no such evidence has been provided) then the burden again shifted on the 3rd defendant to provide evidence of payment received on behalf of the deceased.
103. DW 3 was working in the bank as at the time he made the deposit of Kshs.5 million. He has been put on the spot by his nominee that no such transaction took place. The 3rd defendant is his sister and to remove any doubt, there was nothing difficult in obtaining bank trails for the transfer of the said sum of money. There was no evidence that he wrote to the bank which made the transfer and he received a feedback that those documents could not be retrieved. DW 3 alleged that his wife (1st defendant) took away the documents relating to this transaction but he does not explain why the 1st defendant did not take away the documents he attached to his statement.
104. Although DW3 was not a party to these proceedings, however the 2nd defendant relied on it to support his case that indeed he had a good title to pass on to the 2nd defendant. The 2nd defendant has cited the case of *Katende Vs. Harder & Company Limited* (2008) 2 E.A 173 which sets out the pre-requisites of a bonafide purchaser to include that the purchase was for valuable consideration. Payment of consideration is a key element in contract for sale of land and it is not enough to display a receipt without supporting document and in particular where the receipt has not been issued by the Vendor.
105. In the case of *Esther Kabugi Njuguna V Martha Chebet & 3 Others* (2020) eKLR, where Munyao J. stated as follows in paragraph 25 and 27 thus;
- “ 25. From the provisions of sections 107-109 of the Evidence Act, it is clear that the Defendant had the burden to prove that the Plaintiff was paid the purchase price. It was not enough for the 1st Defendant to say that the money was released to Chesire & Co Advocates. There was no evidence that Chesire & Co advocates was acting on as agents of the plaintiff. The agreement was not express that the Advocates were to represent the Plaintiff in the transaction...
27. There was no evidence that the plaintiff was paid the purchase price and consequently there was lack of consideration for the contract. The lack of consideration vitiated the contract and the same was rendered null and void.”
106. The 3rd defendant cited the case of *R. G Patel vs Lalji Makanji* (1957) EA 314 and *Ulmila Mahindra Shab vs Barclays Bank International* (1979) eKLR for the proposition that, “courts have stated that fraud has everything to do with one’s state of mind and intentions, and not the outcome of actions and the standard of proof for fraud is very high beyond the usual standard balance of probabilities in civil cases approaching but below proof beyond reasonable doubt,”



107. She further submitted on the provisions of section 107 and 109 of the Evidence Act. She argues that the plaintiff did not prove any illegality or fraudulent intention on her part to divest the estate of the suit property. She was categorical that the suit property was sold during the lifetime of the deceased and the conveyance executed without dating as happens in many conveyancing transactions.
108. Did the plaintiff prove fraud or intention to defraud the deceased of the suit property? In the particulars of fraud levelled against the 3rd defendant, the plaintiff blamed her for forging the signature of the deceased on the indenture dated 14th September, 2009. The 3rd defendant cited Section 112 of the Evidence Act which states as follows:-

“In paragraph 6 of the said matrimonial property case the plaintiff had averred that the marriage she had with the deceased had irretrievably broken down and there was a pending divorce case in Resident Magistrate’s Court – Nairobi namely, Nairobi Divorce Case No. 137 of 2007. From all these and the plaintiff’s submissions during cross-examination, she was not in a position to know what the deceased was doing or the transactions the deceased was involved in the person who could know about the affairs of the deceased was the 3rd defendant who was living with the deceased and not the plaintiff.”

She also referred to paragraph 6 of the Originating Summons in Nairobi HC case No. 34 of 2007 where the plaintiff pleaded thus:

“In paragraph 6 of the said matrimonial property case the plaintiff had averred that the marriage she had with the deceased had irretrievably broken down and there was a pending Divorce case in Resident Magistrate’s Court – Nairobi namely, Nairobi Divorce Case No. 137 of 2007. From all these and the plaintiff’s admission during cross examination she was not in a position to know what the deceased was doing or the transactions the deceased was lived in the person who could know about the affairs of the deceased was the 3rd defendant who was living with the deceased and not the plaintiff.”

109. The 3rd defendant also relied on a statement made by the trial magistrate in the judgment in the criminal case where the magistrate state that;

“The prosecution witness namely PW 2 and PW 8, the investigating officer having confirmed the evidence of the accused that registration of document can be done much later after the same have been prepared and based on the fact this charge is premised on the ground that the indentures were registered after the demise of Karugu Guandai I find the charge must fail.”

110. The above paragraphs in my view did not exonerate the 3rd defendant from the burden she had to discharge before this court as required of her under Section 112 of Cap 80. The fact that the plaintiff did not know what the deceased was doing did not imply that the plaintiff could not bring this case on behalf of the estate having been authorised by law to so do. The 3rd defendant missed the step that the suit is brought on behalf of the estate and not in the personal capacity of the plaintiff.
111. Secondly, the statement by the trial magistrate that a document could be registered after death of a deceased refers to evidence made by a prosecution witness referred to as the investigating officer not an advocate or a Land Registrar. The views of the magistrate regarding the registration of the impugned documents had nothing to contribute in proving that the documents were signed earlier than 14th September, 2009.



112. Has the 3rd defendant discharged her mandate as provided for in Section 112 of Cap 80 which she quoted? It is her evidence that the deceased signed the document but it was not dated as is the practice. She did not provide evidence to show that this practice has been upheld as a common practice. DW 3 in his evidence stated that the conveyance was prepared around September, 2008 and signed by the vendor and his wife (DW 1) around the same time. However, DW 1 insists that she signed the document after the demise of the vendor. The evidence of DW 3 that the 1st defendant signed the indenture in their house in his presence contradicts the document which on its face show it was signed in the presence of DW 6. According to DW 3, the delay in registration was occasioned by the illness of the deceased. DW 3 averred that the conveyance was lodged at the lands office by a land broker called Mungai on behalf of the deceased.
113. He added that Mr. Mungai was looking for Mr. Karugu and by which time Mr. Karugu was already dead. DW 3 conceded that the deceased did not sign the document in his presence. The 3rd defendant did not know why the deceased had given the so called land broker the completion documents to lodge at the lands office. The plaintiff is contending that the indenture was signed post the death of the vendor which position is corroborated by the 1st defendant. It is the 3rd defendant who prepared the impugned indenture. She was a joint advocate for both vendor and purchaser. She undertook to give her brother professional undertaking, why would the vendor be in possession of the indenture and subsequently surrender it to a Mungai who was not acting on instructions from the 3rd Defendant? Mungai was also not called as witness whose evidence would have cleared the air when the deceased signed.
114. Further the payment of the balance of the purchase price was pegged on the registration and transfer of the property to the purchaser of indeed the indenture was executed in September, 2008 there is nothing that stopped the 3rd defendant from presenting the indenture for registration despite the illness of the deceased. Under the special conditions B in the agreement dated 10th March, 2008, it was the purchaser to pay the Stamp Duty in respect of the transfer to his name (or nominee). DW 3 instead alleged the delay was because the deceased told him he was looking for money to pay Special Duty.
115. It is my opinion that if the advocate (3rd defendant) was acting professional without any hidden intention, then had the document been executed in September, 2008 as alleged by DW 3 and or prior to the demise of the deceased as pleaded by the 3rd defendant and the purchase price having been fully paid as alleged, then the 3rd defendant owed it to the plaintiff and to this court on which day she witnessed the deceased sign the document since it is only her who saw the deceased execute the document and which she (3rd Defendant) has failed to do.
116. In the case of *Speaker of the County Assembly- Kisii County and 2 others vs James Omariba Nyaoga* (2015) eKLR the Court of Appeal addressed itself on the import of section 97 and 98 of the Evidence Act for the proposition that documents should be taken as they appear and not explain them using extraneous matters. They said thus;

“In the case of *John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda* [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, *Halisbury’s Laws of England* 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragraph, 1478 as follows:-

#39; Extrinsic evidence generally excluded:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions



of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

117. In sum, based on my analysis of the evidence adduced, I find something fishy in the transaction between DW 3 and the deceased. I am persuaded to find that no money or consideration was paid to the deceased for the purchase of the suit property. I also find that the loopholes in the evidence of DW 3 and DW 6 (3rd defendant) is a pointer that the deceased did not execute any transfer in favour of Geoffrey Njoroge Mburu or his nominee Lucy Waithira Karanja.
118. The next question is whether the 2nd defendant acquired a good title which makes him entitled to the suit property. The 2nd defendant submitted that he is a bonafide purchase for value without notice. In his evidence, the plaintiff stated that he purchased the suit property from DW 3. He did not meet the 1st defendant who he was told was only a nominee of DW 3 and having known DW 3 and having known DW 3 for a long time he had no reason to doubt him.
119. DW 3 stated that because he had nominated the 1st defendant, there was no objection to the sale. The property was said to have been sold for Kshs.15 million. The 1st defendant who was the registered owner denied signing any document in favour of the 2nd defendant. The 1st defendant alleged that her Identity Card and PIN used in the transaction trust have been retrieved from those he gave to the 3rd defendant. DW 3 contended that the 1st defendant must have switched loyalty because of their separation.
120. The 2nd defendant had a duty to persuade this court that he is a bonafide purchaser for value without notice of defect on the title. He has admitted not meeting the person in whose name the title was registered. The 2nd defendant was not a client of the 3rd defendant and thereafter cannot enjoy the advocate's client account confidentiality alluded to by the 3rd defendant.
121. He was sued by the plaintiff and one of the particulars of fraud levelled against him is that no monies were paid by him to the 1st defendant. The Plaintiff also stated that she had placed a caveat on the title which was published in the daily nation of 21st April 2011 which was before the 2nd Defendant entered into an agreement of purchase on 13th July 2011. In order to contradict this allegation and to qualify that he had paid consideration of Kshs.15 million for the suit property, he needed to produce supporting documents for the payment. DW 2 did not however consider those documents necessary because he had no dispute with the person who sold to him the land (DW 3).
122. The moneys were paid through DW 3's advocate to the 3rd defendant (on behalf of the vendor). No iota of correspondence document either by M. N. Kanyara advocate or the 3rd defendant confirming monies exchanging hands was produced to this court. The 3rd defendant averred that she was not a party to the transaction between the 1st and 2nd Defendants. Yet DW 3 testified that the balance of the purchase price was paid to him vide the law firm of the 3rd defendant. Isn't receipt of Kshs.8.5 million or more on behalf of a person on involvement?
123. If the 3rd Defendant was not party to the transaction between the 1st and 2nd defendant then who received the balance of the purchase price from the 2nd defendant? In any event, clause 3 of the agreement dated 13th July, 2011 on payment of the purchase price stated that Kshs 1.5 million was to be paid to the Vendor (DW 3) on execution. The balance of Kshs.8.5 million was also to be paid to DW 3. The only evidence the court has of those payments is the word of mouth of DW 3.



124. I am of the considered opinion and I so hold that having found that the 1st defendant did not acquire a good title, the title of the 2nd defendant would survive were the 2nd defendant to demonstrate that he was a bonafide purchaser. He did not deal with the registered owner and he has not produced evidence of paying for valuable consideration. He therefore fails to meet the principles set out in the case of *Katende Vs. Harder Supra*.
125. Is the 2nd defendant entitled to special damages as prayed to ELC 456 of 2012 against the City Council of Nairobi and Winfred Nyambura Karuga (the plaintiff). According to the 2nd Defendant, the plaintiff is the one who instigated the City Council to undertake the demolition of his structures. In his evidence, he did not say how the plaintiff instigated the demolition. The 1st and 5th defendants (in ELC 456 of 2012) pleaded that at paragraph 7A that after inter partes hearing, the court vacated the orders of injunction that were in force and ordered the plaintiff (2nd defendant) to stop any further constructions.
126. During cross-examination, the 2nd defendant admitted that he was aware of the order of 19th September, 2012 but asserted that no construction took place between 19th September, 2012 and 19th October, 2012 when the demolition took place. The 1st and 5th defendants did not deny carrying out the demolitions but stated that the same was carried out because the existing approved plans had been disapproved. The 1st and 5th defendants did not call any witness to support this averment.
127. When the construction works began on the suit property the 2nd defendant had approved plans albeit in the name of the 1st defendant. The City Council of Nairobi have not produced any evidence that there were ongoing constructions post 19th September, 2012 after the order was served. There was no order issued by this court directing the Nairobi City Council to carry out any demolition.
128. As a government institution, even if they received a complaint from whoever, regarding dispute over the ownership of this land, and being aware that the matter was pending in court. It was incumbent upon them to act within the law. This court agrees with the 2nd defendant's averment that the demolition that took place was unlawful.
129. The 2nd defendant called the evidence of DW 4 – the contractor who confirmed the state of the building and the quantity surveyor as DW 5 who assessed the value of the damages occasioned. There was no evidence that gave a contrary value. Consequently, I enter judgment for Kshs.7,708,726 as contained in prayer (c) as against the Nairobi City Council.
130. The prayers for permanent injunction is dismissed on the basis that he has no good title to the suit land. He is awarded costs of the suit (ELC 456 of 2012) payable by the 1st defendant the Nairobi City Council now the County Government of Nairobi.
131. In conclusion, he claims (in 1374 of 2014) is allowed in terms of prayers a, b, d, e and g of the plaint. The claim in ELC 456 of 2012 succeeds partially in terms of the award of special damages granted in the sum of Kshs.7,708,726 and costs payable by the Nairobi City council now the Nairobi County Government. The orders are summarised as follows;
- a. A declaration be and is hereby made that the estate of Peter Karugu Gundai (deceased) is the lawful proprietor of land known as Land Reference No. 2327/152, Nairobi.
 - b. An order is issued directed at the Chief Land Registrar to forthwith cancel the Conveyance dated 14th September, 2009 in favour of the 1st Defendant and the Conveyance dated 20th September, 2011 in favour of the 2nd Defendant with regard to Land Reference No. 2327/152, Nairobi.



- c. A permanent order of injunction is hereby issued restraining the Defendants whether by themselves, their servants, officers and/or agents from offering for sale, selling, leasing, transferring, charging, occupying, constructing on or in any manner in whatsoever alienating or interfering with Land Reference No. 2327/152, Nairobi.
- d. A mandatory injunction compelling the Defendants whether by themselves, their servants, officers and/or agents to forthwith vacate the suit property and to remove any materials, structures and/or buildings erected thereon and to deliver up vacant possession of Land Reference No. 2327/152, Nairobi to the Plaintiff.
- e. Costs of the suit to the Plaintiff as against the Defendants jointly and severally.
- f. Kshs 7,708,726 awarded to Simon Njuguna Kariuki (Plaintiff in ELC 456 of 2012) together with costs payable by the County Government of Nairobi
- g. Interest on (F) above from date of filing of the suit until the money is paid in full

Dated, Signed and Delivered at Nairobi this 20th Day of April 2023

A. OMOLLO

JUDGE

In the Presence of

Mr Koech Adv for Plaintiff

Ms Githinji h/b for Mbigi for 3rd Defendant

Ms Kayoi h/b for Nyakundi for 1st Defendant

Kariuki G.E for 2nd Defendant

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