



**Meria & another v Kiambu County Government; Land Registrar, Kiambu (Interested Party)  
(Environment & Land Case 118 of 2020) [2023] KEELC 17595 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17595 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 118 OF 2020**

**JG KEMEI, J**

**MAY 25, 2023**

**BETWEEN**

**FRANCIS NJUGUNA MERIA ..... 1<sup>ST</sup> PLAINTIFF**

**HELLEN NYAWIRA NJUGUNA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KIAMBU COUNTY GOVERNMENT ..... DEFENDANT**

**AND**

**LAND REGISTRAR, KIAMBU ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide an amended Plaint dated 3/8/2021 the Plaintiffs filed suit against the Defendants seeking the following Orders:-
  - a. A permanent order of injunction restraining the Defendant, his servants, agents or anyone claiming through or under them from extending borders within, trespassing, claiming title, selling, assigning, transferring, alienating or otherwise dealing, interfering with proprietorship rights with the property known as L.R No. 13537/41 Juja Sub-County.
  - b. A declaration that suit property LR No. 13537/41 Juja Sub-County is legally owned by the Plaintiffs herein.
  - c. Any other orders that the Court may deem fit.
  - d. Damages, for want of business waste of time, travelling fees, accommodation.
  - e. Costs of the suit.



2. It is the Plaintiffs' case that L.R. No. 13537/41 (the suit land) belonged to their father Joseph Meria Wamai, deceased. That upon the succession of his estate the land was held in trust by Peter Wakaba Meria, Peter Kariuki Meria, Francis Njuguna Meria and Margaret Wangui Ngatia, then administrators of the deceased's estate.
3. That the suit land was transferred to the Plaintiffs vide minutes dated 30/4/2015. A title was issued on 25/6/2015.
4. That in 2019 when in the process of selling the suit land, to a 3<sup>rd</sup> party, the Defendant claimed to be the owner of the land. Further that the Defendant has refused to issue the Plaintiffs- with the Clearance Certificate despite evidence of payment of rates to the Defendant.
5. The Defendant has denied the claim of the Plaintiffs and sought to put the Plaintiffs to strict proof vide an amended defence and counterclaim dated 19/1/2022, the Defendant averred that it purchased the suit property from the estate of the Plaintiff's father.
6. In its counterclaim, the Defendant averred that the Plaintiffs sold the suit land to the Defendant following successful succession from previous registered owner and was paid fully. That the Plaintiffs together with other administrators of the previous registered owner gave the Defendant possession of the land.
7. That the Plaintiffs' claim is based on irregular, illegal and fraudulent documents and procedures. Particulars were enumerated at paragraph 13 thereof.
8. Consequently the Defendant sought the following reliefs:-
  - a. That the Plaintiff's suit be dismissed with costs and counterclaim be allowed.
  - b. That a declaration that the suit property LR No. 13571/41 situated in Juja Sub-County is legally owned by the Defendant.
  - c. That the Provisional Certificate of Lease issued on 20<sup>th</sup> March 2015 in the Plaintiffs possession be cancelled.
  - d. That the Chief Land Registrar, be ordered to issue a Lease Certificate in favour of the Defendant.
  - e. That a permanent injunction be issued restraining the Plaintiffs, his servants or agents or anyone claiming through or under them from trespassing, claiming title, selling, assigning, transferring, alienating or otherwise dealing or interfering with proprietorship rights on LR No. 13571/41 situated in Juja Sub-County.
  - f. In the alternative, compensation to the Defendant for the price of the suit parcel L.R. No. 13571/41 at the existing current market value.
  - g. Costs of the suit.
  - h. Any other relief the Court deems fit to grant.



## The Evidence

### The Evidence

9. PW1 – Francis Njuguna Meria relied on his witness statement on page 9 – 11 of the trial bundle as his evidence in chief. The witness also produced documents marked as PEX No. 1 – 15 in his List of Documents dated 10/11/2021.
10. That upon succession of their father’s estate the suit land was held in trust by the administrators of the estate.
11. That a duplicate title was issued to them on 20/3/2015 following the loss of the original title.
12. Vide family minutes dated 30/4/2015 the administrators agreed to transfer the land to the Plaintiffs; and a title issued to them on 25/6/2015 whereupon they registered a caution on 21/12/2016.
13. That they proceeded to enter into a sale transaction with a 3<sup>rd</sup> party in 2019 where they received a deposit but was found that the suit land had a dispute / claim by the Defendant. That the Defendant claims to have purchased the land in 2006.
14. In cross the witness stated that he was not aware that the suit land had been sold to the Defendant, neither was he told that the Clearance Certificate was denied because the suit land had been sold to the Defendant.
15. PW1 stated that there was a caveat on the title. That the suit land was sold to the Plaintiffs by his siblings in 2015 vide agreement dated 30/4/2015.
16. PW2 – Richard Njongiro Meria relied on his witness statement dated 24/3/2022 as his evidence in chief.
17. That the Plaintiffs are his brother and sister in law respectively.
18. He informed Court that he is not aware that this family sold suit land to the Defendant. That he was not aware that his brothers were paid by the Defendant for the sale of the suit land. That he neither reported any fraud to the Police nor the revocation of Grant issued to the administrators.
19. That he did not sell the suit land to the Defendant and that the Grant issued on 24/10/2005 was in the name of his brothers. That the grant was revoked on 17/3/2006. That after the revocation the land was sold to the Plaintiffs.
20. On the other hand DW1 – Celina Gathure Muriithi stated that she is a Civil Servant working as a Sub-County Administrator with authority of the Defendant to so testify on its behalf. She relied on her witness statement dated 14/3/2022 as her evidence in chief. She produced the documents in support of the Defendant’s case marked as DEX No. 1- 72.
21. She stated that from the records the suit land was purchased by the Defendant, for the construction of the market and the full purchase price paid to the beneficiaries of the estate of Joseph Meria Wamae upon which the Defendant took over possession of the suit land pending formal transfer.
22. That there was a letter dated 8/3/2006 informing the Defendant of revocation of Grant in the estate. She did not know if completion documents were supplied to the Defendant.
23. That the suit property has not been transferred to the Defendant.



24. That acceptance of rates payment is not conclusive evidence of ownership. She clarified that Clearance Certificates are not issued on disputed land. That the Defendant claimed ownership of the land. That the Defendant has not taken possession of the land. The Plaintiffs are in possession of the land.

### **Written submissions**

25. The Plaintiffs filed written submissions dated 13/10/2022 through the law firm Gregory Ndege Associates.
26. Ms. Keziah Mbugua County Attorney filed the written submissions dated 21/10/2022 on behalf of the Defendant.
27. The Plaintiffs framed 6 issues for determination as follows:-
- a. Whether the suit property belongs to the Estate of JOSEPH MERIA WAMAE.
  - b. Whether the sale of the suit property to the Defendant on or before 17<sup>th</sup> March 2009 was fraudulent and illegal.
  - c. Whether the Defendant was a bona fide purchaser.
  - d. Whether the entire family was aware of the sale and gave their consent to sale to Plaintiffs or to sale to Defendant.
  - e. Whether the Plaintiffs were bona fide purchaser.
  - f. Whether the suit property belongs to the estate of Joseph Meria Wamae.
28. The first issue was answered in the affirmative that the suit land belonged to the father of the 1<sup>st</sup> Plaintiff.
29. That the purported sale to the Defendant was illegal and irregular for the following reasons; purported vendors had no capacity to sell the suit land; no specific contract in support of the transaction; no evidence of payment of purchase price.
30. It was further submitted that the agreement was contrary to Section 3(3) of the *Law of Contract Act*.
31. It was submitted that the vendors Peter Wakaba Meria and Peter Kariuki lacked the capacity to sell the land. That there was no consent of the family to dispose off the suit land and that PW1 and PW2 were categorical that they were not aware of any sale to the Defendant.
32. Furthermore that the Defendant was not party to the transactions and even the documents she relied on were vague and incomplete. That the sale was illegal, fraudulent and contrary to the law.
33. On the question of bonafide purchasers, the Plaintiffs submitted that they are bonafide purchasers for value and deserve the protection of the law. The Plaintiffs relied on the case of Katende Haridar & Co. Ltd [2008]2 EA 173 and Mwangi James Njehia v Jannetta Wanjiku Mwangi & Another [2021]eKLR.
34. The Plaintiffs argue that by 17/3/2009 the alleged vendors held no title in the suit land thus passed no interest to the Defendant. They rely on the principle of “Nemo Dat quod Non Habet” in support of this preposition. Finally that the Defendant was not a bonafide purchaser for value seeing that it proceeded with the transaction in clear want of capacity to transact.



35. Relying on the decision of the Court in *David Kamunya Kingori & Anor v Wambui Nderitu & 4 Others* [2020]eKLR held that:-

“... From the provisions of Section 24 it is clear that the rights of the deceased’s estate were protected by law even after his and the Defendants had no standing to interfere with the suit land unless they obtained letters of administration to the deceased’s estate which they never did.”

36. That the Plaintiffs through sale agreement dated 30/4/2015 purchased the land after obtaining valid grants in the estate of the original proprietor of the land.

37. That the Grant dated 24/10/2005 issued to Peter Kariuki Meria and Peter Wakaba Meria were never confirmed to allow distribution of sale and transfer of the estate. They relied on the case of *Hezron Kimeli Cheruiyot v Rusi Chepkemoi Chebochok & 3 Others* [2021] eKLR.

38. Relying on 24, 25 & 26 of *Land Registration Act* it was submitted that having made full payment in terms of consideration for the suit land ownership now vests in the Plaintiffs prompting them to place a caution on the suit property. Lastly on the issue of costs, Plaintiffs submitted that they had a reasonable expectation to obtain a Clearance Certificate and sell the suit land but was hampered by actions and or inactions of the Defendants. To that end they prayed for damages for loss or want of business.

39. Conversely the Defendant drew 3 issues for determination;

- a. Whether or not the 1<sup>st</sup> Defendant is an innocent purchaser for value without notice;
- b. Who is the bona fide owner of the suit land; and
- c. Whether or not the Plaintiffs are entitled to the reliefs sought.

40. On the first issue the Defendant submitted that it acted in good faith and in public interest in the purchase of the suit land from the administrators of the estate of Joseph Meria Wamae. That the full purchase price was received by the family thus the agreement accorded to Section 3(6) of the *Law of Contract Act*; that the said vendors failed to transfer the land to the Defendant.

41. Relying on the case of *Vijay Morjaria v Narsingh Modhusingh Darbar & Anor* [2000] eKLR the Defendant contended that the Plaintiffs failed to plead and prove fraud.

42. Equally it was submitted that collusion between the Defendant and the administrators of the estate of the suit land was not proven. See ELC No. 930 of 2013 – *Lucy Nchebeere Vs Rose Musee & Anor*.

43. Who is the bonafide owner of the suit land? The Defendant submitted that the then Thika Municipality Council various meetings held approved the purchase and acquisition of the 16144 & 13537/41 located in South West Thika Municipality for construction of a modern market and bus park. That a sale agreement was entered into between Peter Wakaba Meria and Peter Kariuki Meria, the administrators of the suit property. That despite paying up the full purchase price to the administrators of the said estate the title deed was never transferred in their favour.

44. On the last issue, the Defendant reiterated that he who comes to equity must come with clean hands. That the Plaintiffs knew or ought to have known the sale between members of their family and the Defendant. Reliance was placed on the case of *Francis Munyoki Kilonzo & Anor v Vincent Mutua Mutiso* [2013]eKLR where the Court held as follows:-

“The maxim of equity on the principle of equity is expressed as follows;



‘No one is entitled to the aid of a Court of equity when that deed has become necessary through his or her own fault ... a Court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created ...’”

45. Equally in the case of *Sattrya Investments Ltd v J. K. Mbugua* CA 1964 of 2004; the Court stated as follows:-

“It is common knowledge that land and plot grabbers and/or speculators have stopped at nothing to acquire and sell plots; even Government houses, which are occupied purporting that they are either vacant or condemned. Sugut is one such person because in the face of correspondence between the Commissioner of Lands, the City Council and the Defendant over the suit plot dating as far back as 1979 it cannot be true to say that in 1993 this plot was vacant. It is high time land grabbers and/or speculators are told that they have enriched themselves enough through such loot and caused innocent people a lot of suffering and Courts cannot continue to condone such practices when evidence emerges that the acts, as in our present case, were all wrongful and unlawful.”

46. In the end the Defendant maintained that it had proven its case on a balance of probabilities against the Plaintiffs and urged the Court to dismiss the Plaintiffs’ suit and allow its counter claim with costs.

47. The Interested Party did not participate in the proceedings.

#### **Analysis & Determination.**

48. The issues for determination in my view are as follows;

- a. Whether the Defendant has proven its claim in the counter claim.
- b. Whether the Plaintiffs have proven their claim.
- c. What orders should the Court grant.
- d. Costs of the suit.

49. Before delving into the issues for determination, I find it appropriate to discuss the issues that are not in dispute. The suit land measuring 0.43537 ha was registered in the name of Joseph Meria Wamai on the 23/10/91. According to the grant of administration on record the said Joseph Meria Wamai died on the 30/8/1998 leaving behind two wives and 19 children (18 at the time of petitioning for succession, one having passed on in the 1998 bomb blast in Nairobi). From the account given on record, the deceased was a successful family man given that some of his children worked and resided overseas and the size of his estate, all testament of a hardworking and prosperous man.

50. Upon his demise his estate remained unsucceeded until the year 2005 when the grant of letters of administration were issued to Peter Wakaba Meria and Peter Kariuki Meria on the 24/10/2005.

51. Shortly thereafter the beneficiaries of the estate moved the Court for the revocation of the said grant on the grounds that the same was obtained through fraud, misrepresentation and concealment of material facts as to the beneficiaries of the estate. In particular the non-inclusion of six children of the deceased who resided and worked overseas with the risk of disinheriting them. See the Application for revocation dated the 7/12/2005.

52. On the 7/3/2006 the parties entered into a consent whereupon the grant issued on the 24/10/2005 was amended and in its place a new one issued on the 7/3/2006 was issued to Peter Wakaba Meria,



- Peter Kariuki Meria, Francis Njuguna Meria and Margaret Wangui Meria as joint administrators of the estate. The Grant was registered against the suit land on the 17/7/2014.
53. The Confirmation of Grant was issued on the 24/2/2009 wherein the suit land was given to Peter Wakaba Meria, Peter Kariuki Meria, Francis Njuguna Meria and Margaret Wangui Meria to hold in trust for all the other dependants.
  54. Evidence was led by PW1 and PW2 that the family transferred the suit land by way of assent to the Plaintiffs in a family meeting held on the 30/4/2015. See the deed of family arrangement dated the 30/4/2015.
  55. The said assent in the name of the Plaintiffs was registered on the title on the 25/6/2015 and a title issued to the Plaintiffs on even date.
  56. It is the Plaintiffs case they are the registered proprietors of the suit land having acquired the same legally from the dependants of the estate of their late father in 2015.
  57. That in 2019 as they were in the process of selling the suit land to a prospective purchaser, the Defendant refused to issue the Clearance certificate for the suit land on grounds that it had acquired the interest in the land from the estate of Joseph Meria Wamai.
  58. The Defendant's case on the other hand is that it is the owner of the suit land having purchased the same from the estate of Joseph Meria Wamai. That the purchase was approved in a series of meetings by the then Thika Municipal Council for the construction of a modern market and bus park – public use. That they instructed the law firm of Muu & Associates to act on their behalf and a sale agreement was entered into by the initial two administrators of the estate of Wamai in 2005. According to the agreement of sale on page 56 of the Defendants bundle the purchase price was Kshs 1.9 Million. The property was to be sold on vacant possession upon completion.
  59. It is pleaded that despite payment of the full purchase price to the administrators of the said estate, the title was never transferred in its favour.
  60. That the Defendant has attempted to take possession of the suit land to no avail until 2020 when they received a letter from Equity Bank requesting for the clearance certificate of the suit land on behalf of a prospective purchaser.
  61. The starting point is the counterclaim of the Defendant. The Court has been called upon to impeach the title of the Plaintiffs on grounds of illegality, fraud and irregularity.
  62. I find it necessary to repeat the particulars of the said illegality, irregularity and fraud set out in the Defence and counterclaim at para 13 thereof;
    - a. Unlawfully, irregularly and fraudulently obtaining a Certificate of Lease on the property LR No. 13537/41.
    - b. Providing false information and claiming the original lease title was lost, hence causing the issuance of a provisional certificate of lease by the Lands Registry.
    - c. Fraudulently obtaining a title to a suit property that they had received full and final payment of the purchase price and the said property is for public utility.
    - d. Being in possession of documents claiming possession of a parcel of land that is for public utility purpose.
    - e. Illegally and fraudulently converting public land to private land.



63. Article 60 of *the Constitution* of Kenya provides that land in Kenya shall be held used and managed in a manner that is equitable efficient productive and sustainable and in accordance with the following principles;
- “ 1. Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles;
    - a. Equitable access to land;
    - b. Security of land rights;
    - c. Sustainable and productive management of land resources;
    - d. Transparent and cost effective administration of land.
    - e. Sound conservation and protection of ecologically sensitive areas;
    - f. Elimination of gender discrimination in law, customs and practices related to land and property in land; and
    - g. Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.
  - (2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.”
64. It is trite that title in Kenya is protected in law as set out under Article 40 of *the Constitution* of Kenya. Protection of the right to property is one of the civil liberties that Kenyans bequeath unto themselves. Land being a factor of production occupies a central place both in the hearts of Kenyans and the fundamental rights and freedoms that may not be limited except by law provided.
65. This point is further amplified in Article 40 (6) Constitution of Kenya where it states as follows;
- “The rights under this Article (Article 40) do not extend to any property that has been found to have been unlawfully acquired.”
67. Under Statute Law (The *Land Registration Act*) once a person is registered as a proprietor of land the certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or a transmission by the proprietor shall be taken as prima facie evidence by Courts that the person named as proprietor of the land is the absolute and indefeasible owner subject to permitted limitations and conditions in law.
68. Section 26 of the *Land Registration Act* further provides ways in which a title may be impeached as follows:-
- “(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



69. Otherwise under Section 24 and 25 of the Act, the registration of a person as a land owner vests in that person the absolute ownership of the land together with all rights and privileges appurtenant thereto and the title is not liable to be defeated except as provided by the Act.
70. From the above it is clear that title may be impeached on grounds of fraud or misrepresentation to which the person is proved to be a party, illegality unprocedurality and or acquisition through a corrupt scheme.
71. It is the case of the Defendant that the Plaintiffs acquired the land by way of fraud, illegality and irregularity.
72. The Black's Law Dictionary defines fraud as follows;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
73. It is trite that fraud must be pleaded and proved in evidence and the same cannot be left to the Court to infer from the facts led in evidence. The former Court of Appeal for Eastern Africa in *R.G. Patel v Lalji Makanji* [1957] EA 314 stated as follows:
- “Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
74. The dicta was the same in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where the Court stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
75. In the case of *Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others* [2015] eKLR it was settled that a person who holds a bad title cannot pass a good title to a purchaser.
76. In this case evidence was led by DW1 that she has been working at the County of Kiambu as a county sub county administrator since 2016 and therefore was not present when the transaction was done. She however relied on the records found in the county as produced in the trial bundle pages 1-160.
77. Evidence was led by DW1 that the suit land was purchased by the county in 2005 through a sale agreement that was executed by Peter Wakaba Meria and Peter Kariuki Meria, the administrators of the estate of the late Wamai.



78. The witness led evidence and produced minutes of the County Council of Thika – Ordinary Works Town planning and Markets committee meeting held on the 17/5/2006, 24/5/2007 9/8/2007 28/8/2008 where the issue of the pending acquisition was discussed and updates given to the committee.
79. The witness informed the Court that the Defendant was informed about the revocation of grant in 2006. Evidence was led that despite paying the full purchase price the estate failed to transfer the land to it and hence the counterclaim.
80. The crux of the matter is whether the administrators of the estate of Wamai either in 2005 or 2007 had the legal capacity to dispose of the suit land to the Defendant. I have already found that the agreement was signed in 2005 by the two administrators whose grant was revoked / amended in 2006. Therefore, they had locus to dispose of the land in 2005. The revocation of the grant was by consent of the previous and new administrators. The grant was amended to allow enlargement of the number of administrators where Peter Wakaba Meria and Peter Kariuki Meria, the administrators of the estate of the late Wamai continued in their capacities as such. The 1<sup>st</sup> Plaintiff and Margaret Wanjiku Meria were the two additions in 2006.
81. On the 4/6/2007 the aforementioned 4 administrators entered into another agreement with the Defendant in which the 1<sup>st</sup> Plaintiff was represented by J W Wanjohi who held his power of Attorney. In this agreement the parties agreed as follows;
- a. The sellers have on the date hereinabove written agreed to unconditionally allow the buyer to immediately move onto and to take possession of the said land and to immediately commence developing the same howsoever it wishes and without any restriction whatsoever, upon payment of the purchase price in full.
  - b. In consideration thereof, the buyer has and hereby authorises the firm of Muu & Associates Advocates to release the entire outstanding amount of Kenya Shillings Four Hundred and Eighty Two Thousand, Three Hundred and Ten only (Kshs. 482,310.00) due to the sellers upon execution of this agreement.
  - c. The sellers warrant that they have the Authority of the entire Meria family, who constitute the beneficiaries of the Estate of the late JOSEPH MERIA WAMAI to get into this agreement.
82. From the above it is clear that possession was handed over to the 1<sup>st</sup> Defendant who had the liberty to develop it as it wished and in return the administrators were paid the balance of the purchase price in the sum of Kshs 482,310/- due to the sellers. This evidence has not been rebutted by the Plaintiffs.
83. The administrators, the 1<sup>st</sup> Plaintiff included warranted to the Defendant that they collectively had the authority of the entire Meria Family to dispose of the land. This evidence is in tandem with the contents of the letter dated the 21/4/2005 addressed to their lawyer Messrs Muu & Co Advocates signed by 14 members /dependants of the estate as follows;

“ 21<sup>st</sup> April, 2005

John Muu Ndungo Advocate,  
Box 9394-00300,  
Nairobi

Dear Sir,

Re: Authority For Plot Sale Part Payment



We the undersigned beneficiaries of the late Joseph Meria Wamae hereby give you authority to process plot sale part payment of Kshs. 183,000/- and administrative legal charges of Kshs. 17,000/- totalling to Kshs. 200,000/- to Estate Administrators' or directly to the beneficiaries who are to appear before you. Incase of further guidance on whom to pay feel free to contact the undersigned on Mobile No. 0723756324.

Yours Faithfully,

Peter Wakaba Meria For Meria's Family

1. Irene Wambui - Deceased Wife .....
  2. Raphael Wamai - Son .....
  3. Peter Wakaba - Son .....
  4. Michael Kariuki - Son .....
  5. Mary Wanjiru - Son .....
  6. Margaret Wangui - Daughter .....
  7. Paul Kimani - Son .....
  8. Evans Njuguna - Son .....
  9. Jane Wangari - Daughter .....
  10. Peter Kariuki - Son .....
  11. Anne Wanjiru - Daughter-in-law .....
  12. Jackson Ngugi - Daughter .....
  13. Richard Njong'orio - Son .....
  14. Lucy Muthoni - Daughter ....."
84. The import of the above is that the original administrators, Margaret Wangui (added in 2006), and PW1 had the authority of the family, including that of PW2 to dispose of the land to the Defendant. The evidence of PW1 and PW2 that they were not aware of the sale of the land to the Defendant is not only untruthful but also misleading. I say so because PW2 signed the authority contained in the letter in para 88 of the Defendant's bundle and the 1<sup>st</sup> Plaintiff ratified the same on the 7/3/2006 upon being appointed as an administrator of the estate. No evidence was led to show that the said letter was forged or obtained without the consent of PW2. The Court finds that he signed the authority letter and the issue of forgery/feigning ignorance is but an afterthought.
85. Furthermore, some of the monies received from the Defendant went into paying for the succession and other outgoings of the estate. See page letter on page 44 N of the Plaintiffs' trial bundle where the administrators authorised their advocate to make payments for the rates and land rent clearance so as to facilitate the Clearance certificate for the transfer of the land to the Defendant. Other payments made to the administrators appear on page 44O of the trial bundle produced by PW1. Vide a letter dated the 14/6/2006 the original administrators instructed their Lawyer Messrs Muu & Co Advocates how the proceeds of the sale from the Defendant was to be shared among the beneficiaries. The Plaintiffs have not led any evidence to show that they did not receive the monies or that the monies received was refunded to the Defendant.



86. It must be noted that that the reason for the amendment of the Grant was in order to include the children of the deceased who lived abroad but the issue of the disposal of the suit land was not challenged by any of the beneficiaries and or dependants even after they were included as dependants. None of them objected to the sale.
87. Evidence was led that on the 24/2/2009 the certificate of Confirmation of Grant was issued. The suit land was awarded to the 4 administrators to hold in trust for the other dependants. The Confirmation of Grant was lodged against the title on the 17/7/2011.
88. From the evidence on record between 2006-2008 the matter of the purchase of the suit land by the Defendant remained an active agenda in the Town Planning Committee of the Defendant. This property was purchased alongside another namely L R No 16114 for purposes of expanding the market. In this one the transaction was completed and a title obtained in the name of the Defendant in 2005.
89. There is evidence led that in 2009 the Defendant received the sum of Kshs 770,000/- being compensation for the acquisition of 0.0891 ha of the land. Vide a letter dated the 8/8/2008 the administrators were notified about the compulsory acquisition and were called upon to sign an affidavit that they no longer held any interest in the land. This explains why the Defendant was paid compensation monies instead of the administrators of the estate of the deceased. The Court finds that the Defendant was compensated because it had purchased the land.
90. The delay in completing the transaction led to the notice to complete dated the 19/3/2008 by the Advocate of the Defendant. The 1<sup>st</sup> Plaintiff was already an administrator by this time. He did not protest the notice to complete.
91. The title of the suit land as per the letter dated the 13/4/2005 was in the custody of Messrs Muu & Co Advocates. The administrators have not rebutted this evidence and the actions of the administrators in obtaining a provisional certificate in 2015 was not only fraudulent irregular but illegal. The Court finds that the title of the suit land was handed over to the Defendant pursuant to the sale agreement and in open contemplation of transfer of the suit land to the Defendant and there could not be any other explanation why the title deed is in the hands of the Defendant and its lawyer.
92. I will now examine whether or not the administrators had power to dispose the suit land. It is not disputed that the Defendant was aware that the owner of the suit land was deceased. Para 2 of the agreement describes the vendors as the administrators of the estate of the late Wamai. The opening statement of para A states that the estate of the late Joseph Meria Wamai is the registered owner of the suit land. It is not in dispute that both parties were represented by the law firm of Muu & Associates who acted for both parties. Parties therefore had legal advice available to them.
93. Section 45 of the *Law of Succession Act* prohibits the intermeddling of a deceased asset

“No intermeddling with property of deceased person

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
2. Any person who contravenes the provisions of this Section shall-



- a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
  - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
94. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.
95. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. In *re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:
- “ .... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”
96. The Confirmation of Grant was made in 2009 and the matter of the sale to the Defendant went quiet completely until 2015 when the land was transferred to the Plaintiffs vide an assent by the rest of the administrators and beneficiaries.
97. Having set out the facts above, I find the Plaintiffs had full knowledge of the sale of the land to the Defendant including the receipt of the consideration and they cannot seek to hide behind the principle of intermeddling. There is no evidence that the sale was challenged even after the administrators acquiesced into locus in 2009 after the confirmation of the grant. I rely on the case of the *Francis Munyoki Kilonzo & Anor Vs. Vincent Mutua Mutiso* (2013)eKLR that a man cannot be allowed to benefit from his own wrong doing. The 1<sup>st</sup> Plaintiff was an administrator and were they to be found guilty of intermeddling, he cannot turn around and use the wrong doing as a shield to defeat the equitable rights of the Defendant.
98. Having held that the sale of the suit land was concluded with fulfilment of all the conditions in the agreement including the payment of the purchase price and the handing over of vacant possession and what remained was the formal transfer of the land to the Defendant, a constructive trust therefore



ensued from the year 2009 – 2015 when the Plaintiffs purported to acquire the suit land. The suit land was already encumbered with a constructive trust in favour of the Defendant.

99. A constructive trust can either be express or implied. A constructive trust is a doctrine of equity imposed by Courts to benefit a person who has been wrongfully deprived and requires a person who would be unjustly enriched to transfer the property to the intended party. The concept of remedial constructive trust grants the Courts the discretion to grant justice tailored on the facts of the case where the rules are strict. He who comes to equity must come with clean hands. From the foregoing the Plaintiffs hands are tainted they approached the Court with unclean hands.
100. Specific performance on the other hand is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done. It is decreed at the discretion of the Court and the basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position he would have been but for the breach. The jurisdiction for the grant of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. Specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the opposite party.
101. In the Willy Kimutai Kililit v Michael Kibet [2018] eKLR case above the Appellate Court stated that *the Constitution* under Article 10 (2) (b) has elevated equity as a principle of justice to a constitutional principle. Under Article 10(2) equity is now a national value enshrined in *the Constitution*.
102. Courts of equity protect agreements to purchase land or interests in land with orders of specific enforcement when the common law remedy of damages are inadequate. Hence equity treats the agreement for all purposes as if it was done. This is embodied in the equitable maxim that equity regards as done what should have been done", this maxim means that when individuals are required, by their agreements or by law, to perform some act of legal significance, equity will regard that act as having been done as it ought to have been done, even before it has actually happened. This makes possible the legal phenomenon of equitable conversion and paves way for the equitable remedy of specific performance.
103. It has been argued that equity imposes a constructive trust on the intention of the seller to fulfil his original intent in other words against the contrary intent not to perform or an unconscionable denial to perform on the part of the seller. The intention of the administrators PW1 included was clear – to sell the land to the Defendant. No evidence was tendered before me that this intention was disposed at any time.
104. Having said that I find that this is a case where the principles of constructive trust and estoppel apply. I rely on the decision of the Court in the Willy Kitilit case where the Court stated;  

“However, whether the Court will apply the doctrines of constructive trust and proprietary estoppel to a contract rendered void by lack of consent of the land control board will largely depend on the circumstances of each particular case.”



## What orders should the Court grant?

105. Having held that the land was transferred to the Plaintiff irregularly, fraudulently and unprocedurally, the title of the Plaintiffs is therefore capable of being impugned under Section 26 of the [Land Registration Act](#) which states as follows;

“(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

106. Consequently, this Court is permitted in law to order for the cancellation of the title held by the Plaintiff under Section 80 of the [Land Registration Act](#) which states as follows;

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.

- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

107. The Court finds that the Plaintiffs notwithstanding the approval of the sale to the 1<sup>st</sup> Defendant purported to knowingly assent and receive land that was encumbered with the interest in favour of the Defendant.

108. The Court finds that there was no bonafides on the part of the Plaintiffs. They sold the land to the Defendant, approved the sale as beneficiaries and administrators, received purchase monies in full, distributed the proceeds among the beneficiaries, handed over possession of the land to the Defendants, handed over the title deed to the joint advocate on behalf of the Defendant in contemplation of the transfer and entirely participated in the forbearance of the compensation monies from the Government in the knowledge that the land no longer belonged to the estate of Mberia on account of sale to the Defendant.

109. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Court has determined that the 1<sup>st</sup> Defendant has succeeded in its counterclaim.

110. Final orders for disposal.



- a. That the Plaintiffs' suit is unmerited. It is dismissed.
- b. The 1<sup>st</sup> Defendant's counterclaim is allowed.
- c. That a declaration be and is hereby made that the suit property LR No. 13571/41 situated in Juja Sub-County belongs to the Defendant.
- d. That the Provisional Certificate of Lease issued on 20<sup>th</sup> March 2015 in the Plaintiffs possession hereby stands cancelled.
- e. That the Chief Land Registrar, be ordered to issue a Lease Certificate in favour of the Defendant.
- f. That a permanent injunction be issued restraining the Plaintiffs, his servants or agents or anyone claiming through or under them from trespassing, claiming title, selling, assigning, transferring, alienating or otherwise dealing or interfering with proprietorship rights on LR No. 13571/41 situated in Juja Sub-County.
- g. The alternative prayer for compensation to the Defendant for the price of the suit parcel L.R. No. 13571/41 at the existing current market value is declined.
- h. Costs of the suit and the counterclaim shall be in favour of the Defendant.

111. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF MAY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of**

**1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs – Absent**

**Ms. Keziah Mbugua for Defendant**

**Interested Party - Absent**

**Court Assistants – Kevin & Lilian**

