



Muthaura v Sumbeiywo (As Legal Administrator of the Estate of the Late Elijah Kipkoskei Sumbeiywo) & 3 others (Environment & Land Case 68 of 2017) [2023] KEELC 17851 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 68 OF 2017**

JA MOGENI, J

MAY 11, 2023

BETWEEN

JANE WANJA MUTHAURA PLAINTIFF

AND

SALINA JEPKOSGEI SUMBEIYWO (AS LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE ELIJAH KIPKOSKEI SUMBEIYWO) 1ST DEFENDANT

WILSON KITHINJI MUNYI 2ND DEFENDANT

LAZARO KIPKUMI SUMBEIYWO (AS LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE ELIJAH KIPKOSKEI SUMBEIYWO) ... 3RD DEFENDANT

NAIROBI CITY COUNTY 4TH DEFENDANT

JUDGMENT

1. The Plaintiff has *vide* her Complaint dated 1/02/2017 sued the Defendants seeking the following orders:
 - a. A declaration that all that Plot Number CS27 Umoja belongs to the Plaintiff and an Order of Rectification of Records at the 4th defendant's offices to reflect the Plaintiff as the sole owner of all that Plot Number CS27-Umoja.
 - b. An Order of Rectification directed at the 4th Defendant to rectify its records to reflect the Plaintiff as the sole owner of Plot Number CS27-Umoja.
 - c. A permanent injunction restraining the 1st, 2nd and 3rd defendants by themselves, their agents, employees and/or any other person whomsoever for trespassing, encroaching into, remaining on and/or in any other way whatsoever interfering with all that Plot Number CS27-Umoja.
 - d. Costs of this suit.



- e. Any other relief that this Honourable Court may deem just and fit to grant.
2. The suit is opposed. The 1st and 2nd defendant filed a notice of appointment of advocates dated 13/02/2017 and a statement of defence on 5/05/2017. The 3rd Defendant did not enter appearance or file a defence despite being served as indicated on the Affidavit of service dated 14/02/2017. The 4th Defendant entered appearance on 9/02/2017 and filed a statement of defence dated 7/02/2017 on 9/02/2017.
3. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiff called one witness but the 1st, 2nd and 4th Defendants did not call any witnesses. The Plaintiff testified on 24/11/2022.

Plaintiff's Case: -

4. In her plaint, the plaintiff pleads that at all material times relevant to this suit, the late Elijah Kipkoskei Sumbeiywo (Deceased) was the lawful allottee and owner of all that Plot Number Corner Shop 27 situated at Umoja Inner core, Nairobi.
5. She averred that on or about the 24/11/2008, the late Elijah Kipkoskei Sumbeiywo entered into a Sale Agreement with the Plaintiff herein and sold and transferred his legal and beneficial interest in the said Plot Number CS27 situated at Umoja for adequate and sufficient consideration upon attendant terms and conditions thereto which Sale Agreement expressly included the 1st and 2nd Defendants herein.
6. Pursuant to the Sale Agreement, it is the Plaintiff's case that it was a fundamental term of the Sale Agreement that the 1st and 2nd Defendants were to undertake all necessary steps and procedures to ensure the transfer is effected in the 4th Defendant's records.
7. That in breach of the fundamental terms of the Sale Agreement, the 1st and 2nd Defendants have refused and/or neglected to execute, categorically perform the pertinent obligation requiring them to effect transfer of the subject property with the 4th Defendant herein.
8. As part of the performance of the Sale Agreement, the late Elijah Kipkoskei Sumbeiywo authored a letter dated 20/11/2008 directing the 4th Defendant to transfer Plot Number CS27-Umoja to the Plaintiff herein.
9. In breach of the categorical instructions given to them and in breach of the fiducially duty owed to the Plaintiff, the 4th Defendant has refused and/or neglected to transfer the said Plot Number CS27 Umoja to the Plaintiff despite being furnished with all the pertinent documents thereto.
10. Despite the glaring fact that the Plaintiff is the legal and *bona fide* owner of all that Plot Number CS27-Umoja, the 3rd Defendant has without any colour of right encroached upon the said property and is in the process of erecting temporary structures therein in utter disrespect of the Plaintiff's proprietary rights.
11. The Plaintiff has made several applications for the formal transfer of the Plot Number CS27-Umoja to her name and the same is yet to be effected to date despite the Plaintiff furnishing the 4th Defendant with all the pertinent documents.
12. The actions of the Defendants are in breach of contract, illegal, fraudulent, irregular, unlawful and void ab initio and are instigated by malice, greed, bad faith and is wrongful.
13. The plaintiff listed the particulars of breach of contract, illegality and misrepresentation on the part of the 1st and 2nd defendants as follows: Failing and/or neglecting to undertake registration of Plot



Number CS27- Umoja in the name of the Plaintiff, permitting and/or conspiring to fraudulently divest off the Plaintiff of her proprietary rights over the subject property and negligently refusing to take any action despite the fact that they are aware of the Plaintiffs frustration over the Transfer of the subject property into her name.

14. The plaintiff further listed the particulars of fraud, illegality and misrepresentation on the part of the 3rd defendant as follows: Conspiring to fraudulent divest off the Plaintiff her proprietary rights over the suit property, fraudulently purporting to undermine the Plaintiff's proprietary rights over the suit property and trespassing onto the subject property without any iota and/or scintilla of justification both in law or fact.
15. Lastly, the plaintiff listed the particulars of illegality, irregularity, misrepresentation and fraud on the part of the 4th defendant as follows: Permitting and/or conspiring to fraudulent divest off the Plaintiff's proprietary rights over the suit property, fraudulently purporting to entertain unfounded claims by strangers and/or 3rd parties without the knowledge of the Plaintiff, negligently holding the Plaintiff's registration documents so as to perpetuate, perpetrate and/or expose the Plaintiff to fraud and fraudsters, refusing and/or neglecting to effect a lawful transfer of the subject property to the Plaintiff herein, recklessly misleading the public regarding the true and bona fide owner of the suit property, failing to adhere to the original and proper records at its disposal to effect registration of the suit property in the Plaintiff's name, purporting to entertain register and transfer ownership over the suit property to 3rd parties with the full knowledge that they do not hold any proprietary rights or good title at all capable of being transferred or registered as the subject land has already been sold and transferred to the Plaintiff herein so as to render any transaction to that effect null, void and of no consequence thereof.
16. It is her case that the 1st, 2nd and 4th Defendants have refused, failed and/or neglected to take proper action and/or take necessary precautions to safeguard the interest of the Plaintiff herein despite request to do so from the Plaintiff.
17. The Plaintiff reiterated that she is the legal and beneficial owner of all that plot number C527-Umoja to the exclusion of all and sundry, the 3rd Defendant herein inclusive. The Plaintiff has suffered loss and damages courtesy of the Defendants activities and/or omissions which had interrupted the quite possession and enjoyment of the suit property.
18. The Plaintiff stated that she is now apprehensive that the 3rd Defendant will continue to erect illegal structures on the suit premises and commit wasteful acts therein unless is compelled otherwise by the orders of this Honourable Court.

Defendant's Case: -

1st and 2nd Defendants

19. They deny each and every allegation made in the Plaint against the estate of Elijah Kipkoskei Sumbweiyu.
20. In the alternative, and without prejudice to the foregoing, the 1st and 2nd Defendants aver and shall demonstrate at the hearing hereof that Elijah Kipkoskei Sumbweiyu (Deceased) had prior to his death, fully performed his part of the Agreement for Sale dated 24/11/2008, including executing and delivering to the Plaintiff all the documents necessary for the 4th Defendant to register the Plaintiff as the lawful owner of Plot Number Corner Shop 27 situate at Umoja Inner Core, Nairobi.



21. The 1st and 2nd Defendants deny the Plaintiff's allegations of breach of contract, and particulars thereof as set out in paragraph 13 of the Plaintiff.
22. The 1st and 2nd Defendants admit that the Plaintiff is the legal and/or beneficial owner of the suit Plot as stated in paragraph 15 of the Plaintiff, but aver that they are strangers to the rest of the Plaintiff's averments therein.
23. The 1st and 2nd Defendants support the Plaintiff's Claim as set out in paragraph 16(a), (b) and (c), but deny any liability whatsoever in the Plaintiff's Claim.
24. The 1st and 2nd Defendants pray that the Plaintiff's suit against them be dismissed costs.

4th Defendant

25. The 4th defendant denies each and every Allegation made in the Plaintiff.
26. The 4th Defendant avers that there has never been any letter of Allotment issued to the late Elijah Kipkoskei Sumbeiywo for Plot Number Corner Shop 27 situated at Umoja Innercore, Nairobi.
27. The 4th Defendant states that they do not owe the late Elijah Kipkoskei Sumbeiywo or his estate any duties or obligations.
28. The 4th Defendant states that it could not allow the Transfer until it settled who between the Plaintiff and another who contested ownership was the bona fide transferee.
29. The 4th Defendant states that the allegations of fraud are untrue, baseless and slanderous and that the Plaintiff has not produced any evidence to prove the said allegations.
30. The 4th Defendant states that it does not owe any duties or obligations to the Plaintiff.
31. The 4th Defendant states that there is another individual contesting the same.
32. The 4th Defendant states that the inclusion of the 4th Defendant as a party to the current Suit is vexatious as the pleadings reveal that the Plaintiff's contention lays predominantly with the 1st to 3rd Defendants and the 4th defendant prays to be removed as a party to the Suit.
33. The 4th Defendant states that the Plaintiff is not deserving of the injunction orders sought as the Plaintiff has neither established a prima facie case against the 4th Defendant nor has she shown that the balance of probabilities tilts in her favour as the Plaintiff has not proven that she is the bona fide owner of Plot Number Corner Shop 27 situated at Umoja Inner core, Nairobi.
34. The 4th Defendant denies the authenticity of the documents of ownership produced by the Plaintiff.
35. The 4th Defendant denies that the Plaintiff is entitled to any of the reliefs sought.
36. Lastly, the 4th defendant prays that the Plaintiff be dismissed and struck out with costs.

Plaintiff's Evidence: -

37. PW1 – Jane Wanja Muthaura adopted her witness statement dated 1/02/2017 together with the list of documents dated 1/02/2017 and produced them as her evidence in chief and exhibits, marked as PW1-Exh. She testified that her prayer is that the court adopts her prayers as per the Plaintiff.
38. In cross – examination the witness testified that she indicated that the late Elijah Sumbeiywo has not transferred the property but she agrees that he signed all documents but from the record at Nairobi City Council the transfer was not done eventually. She added that once the seller has given her all the



documents, it is the responsibility of the city council of Nairobi to effect the transfer. She confirmed that they are listed as the 4th Defendant and that she has no claim against the 1st and 2nd Defendants. That only the name on record at the Nairobi city council is that of the late Elijah Sumbeiywo and not her name.

39. It was her testimony that she request the 1st and 2nd defendants to support her case in this matter. That the 1st and 2nd defendants have not opposed her case at all. Her case to a large extent should be against the 3rd and 4th defendants. She is not awaiting to receive any documents from the 1st and 2nd defendants with regard to the transfer.
40. She added that she came to purchase the suit property by entering into a sale agreement dated 24/11/2008. The sale was between herself and the late Sumbeiywo and not Nairobi City County. She confirmed that they did a search and it confirmed that the late Sumbeiywo and not Nairobi City County. From her statement at paragraph 4, the property was allocated to the late Sumbeiywo in 1978. According to the search attached on page 25, it shows that he was allocated the suit property on 25/04/2001 which is in the minutes of H.D.C. They noted this discretionary but they noted it as a minute. She agreed that she was not issued an allotment letter but there is a police abstract as seen at page 19. It shows that the allotment letter got lost in 2007. The affidavit of the late Sumbeiywo was sworn in April 2006. Mr. Sumbeiywo had made effort to report and that is why he swore an affidavit in 2006 and in 2007 he got an abstract and in 2008, he followed up with city council. The document at page 18 does not have folios but it is issued by Nairobi City Council. To her knowledge, she is not clear whether a letter confers ownership. The letter at page 40 is addressed to the director of housing development department of Nairobi City Council. The letter does not contain a stamp from Nairobi City Council to show receipt. The letter on page 51 is from herself. It does not have a stamp of the county as proof of receipt. The letter on page 52 shows that the property was sold to two parties and she picked up the matter with the family and that is why they are represented. There is no record that it is the council that had sold the property to the 2nd party.
41. PW1 testified that she also reported to the police but she has no OB Number in Court. She never got an allotment letter. At the point of purchase there was no dispute. The issue of ownership came much later in 2012. From the search of 2008 and 2009, there was no problem until 2012.
42. In re-examination, PW1 testified that from the city council records, the ownership was by the late Sumbeiywo. At page 63 is a clearance certificate. It is under account of Elijah dated 22/01/2013. The letter of double ownership is dated 2012. The city council has never defended the suit by producing another owner.
43. After hearing the testimony of the one witness, the Plaintiff's case was closed.

Defendant's Evidence: -

1st and 2nd Defendants

44. The 1st and 2nd Defendant did not call any witness to testify in Court when the matter came up for hearing. Counsel for the 1st and 2nd Defendants informed the Court that they will rely on their pleadings.

4th Defendant

45. The 4th Defendant did not call any witness to testify when the matter came up for *viva voce* hearing but they will rely on their statement of defence dated 7/02/2017.



46. After hearing of the Plaintiff's witness, parties closed their respective cases, and were directed to file their written submissions.

Submissions:-

47. The Court gave directions on filing of written submissions on 24/11/2022, which they did, and I have considered them. The Plaintiff's submissions are dated 12/01/2023 and filed on the even date. The 1st and 2nd Defendant's submissions are dated 8/03/2023 and filed on 9/03/2023 and the 4th Defendant's submissions are dated 6/12/2022 and filed on 7/12/2022.

Issues For Determination: -

48. The Court has now carefully read and considered the pleadings, the submissions and the evidence adduced by the Plaintiff and the 1st and 2nd Defendants and I find the issues for determination are as follows.
- i. Who is the lawful owner of the suit property?
 - ii. Whether the Plaintiff proved its case to be entitled to the orders sought.
 - iii. Who should bear the costs of this suit?

Analysis And Determination

Who is the lawful owner of the suit property?

49. The main issue between the antagonists herein is the sort that consistently emerges in cases involving unregistered land. It concerns proof of ownership. Unlike in the case of registered land where the register easily and on a prima facie basis reveals the owner, the burden and task is always heavier for the court to carry when the court has to trace the true owner of the unregistered parcel of land. The parties are never co-proprietors and neither do they so will. The court has to perform the rather delicate task of sorting out a muddle which has potentially long-term serious consequences as only one party is to be determined as having the better title. It was the burden of the plaintiff to prove on a balance of probabilities that he owned the suit property.
50. In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.
51. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically 'the essential indicia of title to unregistered land': per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.
52. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include,



at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.

53. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiff on the one hand and the 3rd Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.
54. To reiterate that statement stated herein, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. Although, the 4th defendant denies that any letter of Allotment was issued to the late Elijah Kipkoskei Sumbeiywo for Plot Number Corner Shop 27, I opine that it is not in dispute that the suit property was allocated to the late Elijah Sumbeiywo. The records before this court demonstrate this. This has been demonstrated by the letter ref no. HDD/310/SM/P dated 9/09/2008 from the Nairobi City Council at page 18 of the Plaintiff's bundle which indicates that Plot No. Corner Shop 27 belongs to Elijah Sumbeiywo and that the plot was allocated to him in 1978. Further, a letter ref no. HDD/315/SM/P dated 10/09/2008 from the Nairobi City Council indicates that the rates against the suit property had been paid in full as at 1/09/2008.
55. In practice, letters of allotment are issued subject to meeting conditions set out therein and among the conditions to be met is payment of rates and rents subject to the property being allocated. To me, this letter by the Nairobi City Council dated 10/09/2008 confirming that the rates outstanding against Plot No. Corner Shop 27 had been paid in full and also informing Elijah Sumbeiywo (now deceased) that he will be required to be paying Kes 2,800.00 annually for the rates and ground rent confirms that he was indeed allocated Plot No. Corner shop 27-Umoja. There is also a Clearance Certificate payments of rates and other charges ref no. HDD/4/11/016 dated 22/01/2013 for an account under the name of Elijah Sumbeiywo which supports Elijah Sumbeiywo's allotment.
56. The long and short of this is that the dispute herein therefore is the issue of ownership between the Plaintiff and the 3rd Defendant/3rd party. This stems from the letter ref: HDD/4/052 dated 26/08/2012 from the City Council of Nairobi at page 52 of the Plaintiff's bundle which indicated that from a search of their record, they found that the plot has been sold to two parties.
57. The Plaintiff went to great lengths to convince this Court that she is the lawful owner of the suit property. Her claim begins from a letter of allotment which was allegedly issued in 1978 to the late Elijah Sumbeiywo. This allegation has been disputed by the 4th Defendant but not evidence was adduced to support the same. It was her case that the original owner had lost/misplaced the letter of allotment but there were several documents and letters that convinced her that he was indeed an owner of the suit property. That the suit property was later sold to the Plaintiff vide sale agreement dated 24/11/2008. Payment of the purchase price was acknowledged in the said sale agreement as well. The Plaintiff further alleged to have taken possession soon after as she followed up on the transfer by the 4th Defendant.
58. The documents relied on by the Plaintiff include a police abstract dated 28/08/2008 which is seen at page 19 of the Plaintiff's bundle together with an affidavit by Elijah Sumbeiywo (deceased) sworn on 27/04/2006 indicating that he had misplaced his letter of allotment, letter from the city council ref no. HDD/310/SM/P dated 9/09/2008 confirming that Elijah Sumbeiywo is the owner of plot no. CS27, Umoja which is seen on page 18, a sale agreement dated 24/11/2008 together with subsequent receipts for payments made towards purchase of Plot No. CS27 and payment of rates and rent among other documents.



59. According to the evidence before this Court, the land is presently in the possession of the 3rd Defendant as alleged by the Plaintiff. The letter ref: HDD/4/052 dated 26/08/2012 from the City Council of Nairobi at page 52 of the Plaintiff's bundle indicates that from a search of their record, they found that the plot has been sold to two parties. The 3rd Defendant is the alleged other party that was sold to the plot from the records of the City Council of Nairobi. The 3rd Defendant was served with the pleadings herein severally but he declined to sign and receive the documents severally. This has been demonstrated in the Affidavits of Service dated 14/02/2017, 27/02/2017 and 8/03/2017. The 3rd Defendant did not enter appearance nor file a defence and failed appear in court to defend the suit.
60. The gist of the matter before me is that the Plaintiff claims ownership of the suit property and alleges that the same was sold to the 3rd Defendant who has taken possession and constructed on the suit property. At the moment, a temporary injunction was issued against the 3rd defendant vide order given on 28/02/2017 restraining him from erecting structures upon plot no. CS27- Umoja pending the determination of this suit. This indicates that the 3rd Defendant is the one who is presently on the suit property. The 3rd defendant did not enter appearance or file a defence to defend his claim on the suit property. The 1st and 2nd Defendants submitted that they are in full agreement with the Plaintiff's submissions and they support the Plaintiff's claim of ownership. It is only the 4th Defendant who is vehemently disputing the Plaintiff's claim of the suit property and yet they did not adduce any evidence to support their allegations as per their statement of defence.
61. In the case of *Stephen Mburu & 4 others v Comat Merchants Ltd & anor* [2012] eKLR, Kimondo J held that: "... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property".
62. I have evidence of a certificate of search dated 12/11/2008 registered in favor of Elijah Sumbeiywo (deceased), a sale agreement dated 24/11/2008, an acknowledgement that the Plaintiff did pay the full purchase price, various receipt dated 14/07/2006, 10/09/2008, 2/09/2008 and 1/09/2008 for payment of rates issued by the Council of Nairobi have been adduced by the Plaintiff, subsequent letter dated 20/11/2008 from Elijah Sumbeiywo to the Nairobi City County (at page 40) authorizing the transfer of the plot to the Plaintiff and a follow up letter by the Plaintiff dated 11/09/2012 requesting the city council of Nairobi to transfer the plot to herself and amend their records accordingly.
63. The Plaintiff has laid claim to the suit property and averred that she is the lawful proprietor of the suit property herein but has not been issued with the certificate of title or rather the transfer of ownership has not been done by the 4th Defendant even after they have applied for the same severally.
64. From what I have on record, I am convinced that Elijah Sumbeiywo was allocated the suit property and that he subsequently sold the suit property to the Plaintiff. That the Plaintiff did her due diligence before purchasing the suit property and that the delay in completion of the sale agreement dated 24/11/2008 is solely because of the 4th Defendant.
65. In the case of *Republic v City Council of Nairobi & 3 others* (2014) eKLR, Odunga, J. had this to say about land that has already been allotted:

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal, or it was against



public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

66. The 4th Defendant did inform the Plaintiff that the property was sold to two parties. There is no evidence that the allocation to Elijah Sumbeiywo was ever cancelled. The 3rd Defendant failed to appear in Court to defend his suit. He declined service. The 3rd Defendant did not therefore establish how he bought the subject property from Elijah Sumbeiywo (deceased) as the original owner. On the other hand, the Plaintiff has indeed established an unbroken chain of events that led to her claim of ownership of the suit property. The 1st and 2nd Defendants also support her claim of ownership. The 4th Defendant denies the authenticity of the documents of ownership produced by the Plaintiff but they did not give evidence to support this allegation. The 4th Defendant only stated that it could not allow the Transfer until it settled who between the Plaintiff and another who contested ownership was the bona fide transferee.
67. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. I find and hold that the Plaintiff stands in better stead. She has provided sufficient evidence to prove ownership. I am inclined to find that the Plaintiff has discharged the burden of proving her case on a balance of probabilities as required in law. My final word in this regard is that the legal and bona fide owner of Plot No. Corner Shop 27 - Umoja, Nairobi is the Plaintiff, for the reasons I have attempted to articulate above.

Whether the Plaintiff proved its case to be entitled to the orders sought.

68. With the above finding that the Plaintiff is the rightful owner of the suit property, it follows that the Plaintiff has the rights over the suit property as set out in section 24(a) of the *Land Registration Act*.
69. Prayer (a) relate to a declaration that all that Plot No. CS27- Umoja belongs to the Plaintiff. I have already effectively granted this prayer and I see no reason to return to it.
70. Prayer (b) relates to an order of rectification directed at the 4th Defendant to rectify its records to reflect the Plaintiff as the sole owner of Plot No. CS27-Umoja.
71. I note that the Plaintiff particularized illegality, irregularity, misrepresentation and fraud on the part of the 4th Defendant. The Plaintiff alleges that the 4th Defendant permitted and/or conspired to fraudulently divest off the Plaintiff's proprietary rights over the suit property, fraudulently purported to entertain unfounded claims by strangers and/or 3rd parties without the knowledge of the Plaintiff, negligently holding the Plaintiff's registration documents so as to perpetuate, perpetrate and/or expose the Plaintiff to fraud and fraudsters, refused and/or neglect to effect a lawful transfer of the subject property to the Plaintiff herein, recklessly misleading the public regarding the true and bona fide owner of the suit property, failing to adhere to the original and proper records at its disposal to effect registration of the suit property in the Plaintiff's name, purported to entertain register and transfer ownership over the suit property to 3rd parties with the full knowledge that they do not hold any proprietary rights or good title at all capable of being transferred or registered as the subject land has already been sold and transferred to the Plaintiff herein so as to render any transaction to that effect null, void and of no consequence thereof.



72. 'Fraud' has been defined in *Black's Law Dictionary* as;

"Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury." Further Black's Law Dictionary 9th Edition at Page 731 also defines 'fraud' as:-

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

73. As regards standard of proof of fraud, the law is quite clear. In *R.G. Patel v. Lalji Makanji* (1957) EA314 the former Court of Appeal for Eastern Africa stated thus:

"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. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi, JA. (as he then was) 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." [Emphasis mine]

75. Regarding particulars of fraud on the part of the 4th Defendant enumerated above, it is 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. The Plaintiff has failed to prove any existence of fraud. No evidence has been proffered to establish the said particulars and I therefore find that the Plaintiff has failed to prove any existence of fraud to this end. However, I opine that the 4th Defendant did in deed refuse and/or neglect to effect a lawful transfer of the subject property to the Plaintiff herein. I have earlier stated that the delay in completion of the sale of the suit property was occasioned by the 4th Defendant and so this warrants the grant of prayer (b) and I shall proceed to grant the same.

76. Prayer (c) relates to a permanent injunction to be issued against the 1st, 2nd and 3rd Defendants. I have already held that the Plaintiff is the legal owner of the suit property and is therefore entitled to possession of the suit property, it follows that no party save for the Plaintiff should have any right to enter therein. The 3rd Defendant has no legal mandate to use the suit property in any manner. As such, this prayer is meritorious. I therefore grant prayer (c) and issue an order of permanent injunction restraining the Defendants by themselves, their agents, employees and/or other person whomsoever from trespassing, encroaching into, remaining on and/or in any other way whatsoever interfering with all that Plot Number CS27 - Umoja, Nairobi.

77. With regard to particulars of breach of contract, illegality and misrepresentation on the part of the 1st and 2nd Defendants, the Plaintiff alleges that the 1st and 2nd Defendants have failed and/or neglected to undertake registration of Plot Number CS27- Umoja in the name of the Plaintiff, have permitted and/or conspired to fraudulently divest off the Plaintiff of her proprietary rights over the subject property and negligently refusing to take any action despite the fact that they are aware of the Plaintiff's frustration over the Transfer of the subject property into her name.



78. Regarding particulars of breach of contract, a Court of law does not re-write a contract between the parties. Its duty is just to enforce it. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2002) E.A 503. From the record, the Plaintiff stated that pursuant to the Sale Agreement, it was a fundamental term of the Sale Agreement that the 1st and 2nd Defendants were to undertake all necessary steps and procedures to ensure the transfer is effected in the 4th Defendant's records. I reiterate that the delay in competition of the sale of the suit property lies with the 4th Defendant. It is the 1st Defendant's evidence that her late husband had executed all the necessary documents, and handed over all the documents relating to the said Plot to the Plaintiff, and therefore leaving no role to be played by the Administrators of his estate, her Co-Administrator and herself are available and willing to execute such documents as shall be necessary, to confer title of the said Plot to the Plaintiff, subject to the Plaintiff paying all costs thereof. I am not convinced that the 1st and 2nd Defendants are at fault and this Court finds that there is no breach of contract in this matter.
79. Regarding particulars of fraud on the part of the 1st and 2nd Defendants enumerated above, the Plaintiff has failed to prove any existence of fraud/fraudulent activity on the part of the 1st and 2nd Defendant in divesting off the Plaintiff of her proprietary rights. I also find that no cogent evidence has been proffered to prove any illegality and misrepresentation on the part of the 1st and 2nd Defendants.
80. Lastly, with regard to particulars of fraud, illegality and misrepresentation on the part of the 3rd Defendant, the Plaintiff alleges that the 3rd Defendant conspired to fraudulently divest off the Plaintiff her proprietary rights over the suit property, fraudulently purporting to undermine the Plaintiff's proprietary rights over the suit property and trespassing onto the subject property without any iota and/or scintilla of justification both in law or fact. Allegations of fraud must be strictly proved. See R.G. Patel (Supra). No evidence has been proffered to establish the said particulars and I therefore find that the Plaintiff has failed to prove any existence of fraud to this end.

Who should bear the Costs of this Suit?

81. It is trite law that Costs follow the event. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff being the successful litigant is entitled to the costs of the suit.

Disposal orders

82. Accordingly, judgment is entered for the Plaintiff in the following terms:-
- a. I declare that all that Plot Number CS27 Umoja belongs to the Plaintiff.
 - b. I direct the 4th Defendant to rectify its records to reflect the Plaintiff as the sole owner of Plot Number CS27-Umoja.
 - c. A permanent injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants by themselves, their agents, employees and/or any other person whomsoever for trespassing, encroaching into, remaining on and/or in any other way whatsoever interfering with all that Plot Number CS27-Umoja.
 - d. I award the costs of this suit to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 11TH DAY OF MAY 2023.



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MOGENI J

JUDGE

In the Virtual Presence of:

Mr Kimathi for the Plaintiff

Ms Nyakundi holding brief for Mr Koceyo for the 4th Defendant

No appearance for the 1st – 3rd Defendant

Ms. Caroline Sagina: Court Assistant.

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MOGENI J

JUDGE

