



**Selim (Legal Representative of the Estate of Kimutai A. Selim) v Cheboi & 10 others  
(Environment & Land Case 613 of 2013) [2023] KEELC 18411 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18411 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 613 OF 2013**

**FM NJOROGE, J  
JUNE 29, 2023**

**BETWEEN**

**SELINA CHEPKOECH SELIM (LEGAL REPRESENTATIVE OF THE ESTATE OF  
KIMUTAI A. SELIM) ..... PLAINTIFF**

**AND**

**EZEKIEL CHEBOI ..... 1<sup>ST</sup> DEFENDANT  
ROBERT ..... 2<sup>ND</sup> DEFENDANT  
ZEPHANIAH KURGAT ..... 3<sup>RD</sup> DEFENDANT  
ALLAN OGUTA ..... 4<sup>TH</sup> DEFENDANT  
PIUS OKELO ODERO ..... 5<sup>TH</sup> DEFENDANT  
SARAH MASOLO ..... 6<sup>TH</sup> DEFENDANT  
ANDREW ..... 7<sup>TH</sup> DEFENDANT  
HEZRON MAGAK OBUYA ..... 8<sup>TH</sup> DEFENDANT  
SAMUEL OSEE ..... 9<sup>TH</sup> DEFENDANT  
RICHARD KOSKEY ..... 10<sup>TH</sup> DEFENDANT  
KINARO NDUBI T/A EKEGORO STATIONERIES SUPPLIES .... 11<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced these proceedings through a plaint dated 3/12/2013 filed on the same date. The plaintiff's claim is that at all material times the deceased Kimutai Arap Selim was the sole proprietor of all that land known as Njoro/Ngata Block 2/2733 and now forms a part of his estate; that the 11<sup>th</sup>



defendant illegally and without justification encroached on the suit land and wrongfully and illegally leased or sold for financial gain portions of that land and caused those defendants and 3 other unknown persons to trespass and encroach on the deceased's land and erect structures thereon. It is alleged that by reason of the illegal and wrongful acts of the defendants the plaintiff has suffered loss and damage; The plaintiff seeks the following orders:

- a. A declaration that the defendants are trespassing and are not entitled to enter, cross, trespass or in any way gain access into the deceased's land being Njoro/Ngata/2733 and that the plaintiff is entitled to quiet unfettered enjoyment of the same.
- b. An order of eviction and ejection of the defendants, members of their families, their proxies, servants, employees or agents from the suit land and removal of any structures put up by them.
- c. A temporary injunction pending the hearing of this suit, and a permanent injunction restraining the defendants and or agents, families, proxies, servants and employees from entering, remaining on, cultivating, erecting structures in any other manner interfering with the suit land being Njoro/Ngata/2/2733.
- d. General and exemplary damages for trespass against the defendants.

#### **6th and 10th Defendants' Statement of Defence**

2. The 6<sup>th</sup> and 10<sup>th</sup> defendants' statement of defence was filed on 15/1/2014 through the firm of Maritim Omondi & Co. Advocates, denying the plaintiff's claim. In that defence it was stated that: the defendants deny that they have encroached, trespassed or erected structures on the deceased's land or that they did not have authority to deal with the suit land; that no material particulars have been raised against them; that they purchased a land parcel measuring a quarter of an acre to be exercised from Njoro/Ngata Block 2/2246 from one Justine Oyagi Omoge and Edna Kwamboka Riechi for the consideration of Kshs.600,000/= and Kshs.550,000/= respectively; that they did not purchase their land from Njoro/Ngata Block 2/2733 as claimed by the plaintiff; that they have not denied the plaintiff use or enjoyment, utilization or occupation of any parcel of land or occasioned her any loss or damage as alleged in the plaint. The defendants denied that the plaintiff is entitled to the prayers sought in the plaint. They also denied that she is the legal beneficiary of the suit land and averred that the suit does not disclose any cause of action against them.

#### **The 11th Defendant's Defence**

3. The 11<sup>th</sup> defendant filed a defence on 22/1/2014 through the firm of Sheth & Wathigo Advocates. In that statement of defence, he admits that Kimutai Arap Selim was the proprietor of Njoro/Ngata Block 2/2733 but denied that the same forms part of his estate for the reason that it was the subject matter of an agreement that he and the said Kimutai entered into prior to his death. The defendant denied encroaching on Njoro/Ngata Block 2/2733 or erecting structures thereon. The 11<sup>th</sup> defendant averred that if at all the other defendants entered the suit land it was by virtue of the sale agreement dated 15/3/2010 by virtue of which the 11<sup>th</sup> defendant had been empowered to subdivide the land and dispose it to the third parties. Loss and damage are denied.

#### **Reply to the 1st 5th,7th,8th, 9th and 11th defendants' defence**

4. The plaintiff replied to the 1<sup>st</sup> – 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants' defence. In that pleading the plaintiff reiterated the contents of the plaint and averred that the sale agreement cited by the defendants if any was void in law for the reason that it was undated and improperly attested to; that the agreement was inconclusive as the 11<sup>th</sup> defendant had breached its terms by failing to pay the balance of the



purchase price which default disentitled him from vacant possession; that without vacant possession, the 11<sup>th</sup> defendant could not have had the legal capacity to transfer the property to third parties through subdivision and sale. In the same pleading it is alleged that the 11<sup>th</sup> defendant never paid a single cent for the land.

5. The 6<sup>th</sup> and 10<sup>th</sup> defendants successfully applied to have Justine Oyage Omoge and Edna Kwamboka Riechi joined as the 1<sup>st</sup> and 2<sup>nd</sup> third party respectively vide an application dated 3/4/2014 and third party notice dated 10/11/2014 issued.

### **1st and 2nd Third Parties' Statement of Defence**

6. The Third Parties filed their statement of defence on 9/2/2015 and stated as follows: that the plaintiff lacks capacity to bring the suit; that the plaintiff is not the sole legal representative of the estate of the late Kimutai Arap Selim; that they admit that Kimutai Arap Selim is the proprietor of Njoro/Ngata Block 2/2733 but denied that the same forms part of the deceased's estate. This court noted that the rest of the contents of their defence rhymes with the defence of the 11<sup>th</sup> defendant save the addition that they also deny the contents of the Third Party notice and further deny that the 6<sup>th</sup> and 10<sup>th</sup> defendants innocently purchased parcels of land from the Third Parties vide an agreement dated 4/8/2012 and paid the full price.

### **Plaintiff's Evidence.**

7. PW1, Daniel Kiplangat Mutai testified on 24/5/2021 and adopted his witness statement dated 18<sup>th</sup> September 2020 as his evidence-in-chief. He evidence is as follows: Kimutai Selim his father who owned Njoro Ngata Block 2/2733 passed away in 2011 and Selina Chepkoech Selim, the Plaintiff is his mother; Kimutai never allowed the 11<sup>th</sup> Defendant to sell Njoro Ngata Block 2/2733, but as at the date Kimutai passed away, there was another plot which the 11<sup>th</sup> Defendant had purchased from him and in respect of which he still owed some money. PW1 and others asked the 11<sup>th</sup> defendant to pay that amount and the amount they received from him after that was not consideration in respect of the suit property herein.
8. Under cross-examination by Mr. Kisilah he stated that his father never sold the suit property which measures 10 acres; currently, some people have built houses and homes on it; he did not know how many people have moved into it or when the first person moved in or the identities of the persons on the plot but he knows that Kimutai sold many other plots before he passed away; that there are sale agreements; he was not present when the agreements were signed; some of the parcels sold were 20 acres in size; he was not a co-proprietor of the plots and was not involved in the sales and Kimutai did not seek his permission in the sales; he saw the agreements before his father passed away but Kimutai never filed any case claiming unpaid purchase price in respect of any of the agreements; he never saw any demand letter from Kimutai demanding any unpaid purchase price for any of the plots; he believes that Njoro/Ngata Block 2/2733 exists though he has not personally conducted any search for the plot; he has not seen the plaintiff's signature on any of the sale agreements; they did not obtain any handwriting examiners' report showing that Kimutai did not sign any of the agreements; he knows the 11<sup>th</sup> Defendant as he came to their home many times to meet Kimutai; most of the sale agreements were signed with the 11<sup>th</sup> Defendant; they have filed this case because they did not have any sale agreement in respect of the suit property in their file; that the 10 acres were subdivided and sold by the 11<sup>th</sup> Defendant; some of the original buyers have sold to other buyers; the plaintiff obtained a grant of letters of administration from Kericho Law court prior to filing this case which were revoked and a fresh one issued to the plaintiff jointly with Samuel Kibii Mutai, who is PW1's step brother; that the plaintiff informed the whole family that she was filing this case; that the 11<sup>th</sup> Defendant paid about



Kshs.4,800,000/= to the plaintiff on several occasions after Kimutai passed away; they went through all the payments in all the 5 agreements and they came to the conclusion that the 11<sup>th</sup> defendant had not fully paid purchase price in some agreements; Kimutai passed away in November 2011; Sammy Kiplagat Ruto is PW1's relative, a member of his clan; Cherotich Viona is PW1's blood sister and she was paid some money; Joel Kiptonui is PW1's brother; the 11<sup>th</sup> Defendant was to make all payments to the plaintiff. According to PW1, all payments which are not in their records were not made.

9. Upon cross-examination by Ms. Waititu he stated that Kimutai owned a parcel of about 100 acres before he passed away; he was not present when he acquired the land but he is aware that Kimutai sold some of the land to the 11<sup>th</sup> Defendant and that some of the parcels were later subdivided and sold.
10. Under re-examination by Mr. Kipkoech he reiterated that the suit property is 10 acres and is in the name of Kimutai his late father.
11. PW2, Selina Selim testified on 24/5/2021 and on 7/12/2021 and adopted her witness statement dated 3/12/2013 as her evidence-in-chief. Her evidence is as follows: she seeks an injunction against the defendants; she produced the Grant to Kimutai's estate dated 15/7/2013, the copy of title deed; the various sale/agreements dated 22/2/2006, 30/5/2008 and 29/8/2007, 10/10/2007 and 4/8/2012; an undated agreement (PEXh.4); the demand letters to the defendants and the certificate of official search. She averred that she had been defrauded of her land.
12. Upon cross-examination by Mr. Kisilah PW2 stated that she did not know the 11<sup>th</sup> defendant Mr. Kinaro; that they met in the farms; that since he took the suit land of 10 acres he has never visited her home. Her husband had sold Mr Kinaro some other land which she can identify; she does not know how many times Kinaro was sold land; she does not know how many acres Kimutai had; Kinaro is the one who subdivided the land; Kimutai told them he had sold land to Mr. Kinaro; the plots are named in the agreements. She was not called to witness any of them. Kimutai had a large parcel which was subdivided and he said he had sold land to Kinano; Kinaro gave the family members money for their expenses, just to help them but he never gave them any money for any land; Kinaro is not her relative though; she does not know Johana Kipkurui. Kinaro gave her Kshs. 1,000,000/= on 30/4/12 and gave her no other money. Samuel Mutai is her son; she did not know of any threat of disposal of the Kericho property belonging to Kimutai; her children wanted to subdivide the land; she had informed all her children of the succession cause; she still confers with Samuel Kibii, her son, but when she calls him he does not come to her. There are houses on the suit land but she does not know when they were built though construction was after Kimutai died; she filed suit after the houses were built.
13. Upon cross-examination by Ms. Waititu PW2 stated that she does not know know the size of the land but Kimutai had sold some parts. Her husband sold land and came to tell them of the remaining parcel but she does not know the number of that plot. Upon Re-examination by Kipkoech PW2 stated that she is in court over 10 acres only and she has no issue with the other portions sold by Kimutai; that Sammy Ruto is not her child; that Samuel Kibii Mutai is son to an elder wife to Kimutai. Upon cross-examination by court PW2 stated that Kimutai had 2 wives but the elder wife is no deceased. With the evidence of PW2 the plaintiffs' case was marked as closed.
14. DW1, Kinaro Kimaiga Ndubi testified on 24/11/2022 and adopted his witness statement dated 18/11/2020 as his evidence-in-chief. His evidence is as follows: his name is Kinaro Kimaiga Ndubi, t/a as Ekegoro Stationers/Supplies, the 11<sup>th</sup> defendant. He had filed the his list and bundle of 80 documents and he produced copies of those documents attached to that list as DEXh.1 – 80 and the copies of documents attached to the list dated 14/12/2020 as DEXh.81 – DEXh.92 which were admitted by the consent of the parties; DW1 knows all the other defendants in this suit and he sold to them portions of the suit land Njoro/Ngata/Block 2/2733, they being among 50 other persons;



he knows the plaintiff; she is the person whose husband sold him the suit land and is also the seller's legal representative; his initial desire was to purchase 2 acres for Kshs. 700,000/= per acre and Kimutai wanted to sell the whole 83 acres; he paid for the 2 acres then Kimutai gave him 10 acres to subdivide and obtain buyers. He then offered 10 acres. DW1 subdivided the 10-acre portion into quarter acre plots including his 2 acres and sold the subdivisions to buyers and he transferred the quarter acre plots to all of them and it instantly became an attractive business. The first 2 acres had been intended to be for his own use; DW1 began a business, Ekegoro properties. For the initial 10 acres there was an agreement; then they made another agreement for 10 more acres at Kshs. 750,000/= per acre which sold quickly after subdivision into quarters; before subdivision of the second lot of 10 acres the seller added DW1 another 10 acres to make it 20 acres and DW1 subdivided them as 20 acres and sold them.

15. Kimutai then sold a Mr. Kwegu some 5 acres but Mr. Kwegu then disappeared. By then Kwegu had subdivided and sold eighth and quarter acre plots and when the seller could not trace Mr. Kwegu he directed the persons who bought Kwegu's land to DW1 and he subdivided them under the docket of the 20 acres and sold; the Kwegu group paid DW1 Kshs. 600,000/= to raise Kshs. 3,000,000/= for the 5-acre portion; there was a separate agreement with the seller for the Kwegu 5 acres.
16. In addition to the 10 acres plus 5 acres, DW1 got three more parcels. 10 acres plus 10 acres in one agreement of 20 acres' aggregate which he paid fully for. Then Kimutai did a transfer of these 10 acres plus the Kwegu land to DW1 directly; this was already subdivided and sold to third parties and it had no dispute; on 15/3/2010 the deceased sold DW1 the last 10 acres. As DW1 continued paying Kimutai gave him possession of those 10 acres; the whole block had not been subdivided including the 25 acres; when it was done, and title issued it was in May 2010. The 10 acres were part of that main block. DW1 had paid Kshs. 1,000,000/= before the agreement; he later paid Kshs. 2,000,000/=, then another Kshs 1,000,000/= to the seller before he died. He pointed to an RTGS form from Co-operative Bank for Kshs. 1,000,000/= dated 20/2/2010; the second payment was on 26/3/2010 for Kshs. 1,000,000/= to the seller. The next payment was Kshs. 2,000,000/= million made on 29/10/2011 made to the sellers' account; the seller was sick at this time; later, he passed on. Thereafter the seller's children, and they were nearly all of them together, came to DW1's office in Nakuru; Selina the plaintiff was not among them. They had a talk. DW1 had already known them. They asked if DW1 had money to help them settle a pressing debt. On 30/4/2012 he remitted Kshs. 1,000,000/= to the plaintiff for purchase and transfer of the property in dispute; he transferred Kshs. 70,000/= to Viona Cherotich, a daughter of the plaintiff; on 23/3/2020 he paid Kshs. 200,000/= by way of deposit to the account of Sammy Ruto whom he knew as the deceased's son while the deceased was sick; On the same day, he also deposited a further Kshs. 500,000/= to Sammy Ruto's account; the money was to be given to Kimutai. DW1 made the last payment of Kshs. 130,000/= through Sammy Ruto on 18/3/2010 by way of a deposit to his account; the other payments were made through Samwel Kibii Mutai the elder son of Kimutai. Samuel came with some elders who had allegedly sold Kimutai a Kericho plot to and who stated that Kimutai had not completed payment; DW1 paid Kshs. 1,000,000/= to those Kericho plot sellers who had reported that the balance outstanding for the Kericho plot amounted to Kshs. 2,000,000/=. He paid the balance of Kshs. 1000,000/= on other diverse dates through Samuel Kibii; he showed the court mobile money (Mpesa) payments to Samuel: Kshs. 5000/= on 25/12/2013, Kshs. 9,100/=. on 15/7/2014; DW1 also paid through a deposit to KCB bank account some Kshs. 15,000/= to the credit of Diana Chepkirui. He also transferred Kshs. 12,000/= to Kiptonui Joel, son to Kimutai. According to him those were payments for the agreement over the suit land. His understanding arising from visiting the deceased's home repeatedly was that he was taken as a son in the family as the plaintiff used to welcome him very well. They had a good relationship and he did not foresee that there would be a problem later. He did everything he did out of trust.



17. Kimutai called DW1 to his home and summoned all his family members around October 2011 and he attended and gave an explanation like the one he has given in court in this case; the children, the mother and some elders – an uncle to the children attended the gathering. Kimutai told them that DW1 had bought the land and they should not deprive him of the land; DW1 stated that while making the payments to the family after Kimutai died there was no balance in respect of previous transactions; by the time Kimutai died DW1 had sold  $\frac{3}{4}$  of the said land plot No 2246 which DW1 subdivided into many parcels of quarter-acre plots and eighth acre plots; DW1 had not been in land selling business previously but when he bought his two acres, Kimutai said DW1 had bought him money and gave him 10 acres to sell. As at the time Kimutai died DW1 had subdivided plot no 2733 and some persons had settled on the subdivisions. Some permanent houses have been built on plot No 2733; there are many people, more than the 11 defendants, settled on the land; DW1 admitted that he owes the deceased some balance but he has not calculated it. DW1 denied that he had trespassed onto the land; there was no court order prohibiting DW1 or other buyers from erecting permanent structures on the land. The plaintiff has 3 other co-administrators – Samwel Kibii, one Daniel and Rachael Chepkorir. Before that, there were only two administrators, Selina Chepkoech and Samuel Kibii; a consent cancelling the earlier grant to Selina alone was cancelled. DW1 objected to the Succession at Kericho when it failed to reflect that the property was sold to him. However, Selina never brought the four administrators on board in the suit. She has progressed with it alone.
18. Upon cross-examination by Mr. Kipkoech, DW1 stated that the agreement dated 15/3/2010 is for plot No. Njoro/Ngata/Block 2/2246 and he does not have any agreement for plot No. 2273. He did not pay Kshs.10 million by 30/6/2010. He however denied breaching the agreement; that under Clause 4, surrender of land not paid for was provided for; he admitted that he does not have another agreement to vary the one dated 15/3/2010 yet there was a title in existence as at 31/5/2010, 3 months after making the agreement of 15/3/2010. On 21/11/2011 the deceased died. That was around 18 months after the date of the purported agreement. During that time there was no agreement made between the deceased and DW1 over LR No. Njoro Ngata Block 2/2733. DW1 does not know whether consent of the Land Control Board for transfer to him of LR No. Njoro/Ngata Block 2/2733 was ever issued. The application for funds transfer dated 20/2/2010 is in respect of the agreement made on 15/3/2010. He admitted that that payment was done earlier than the date of the agreement; that though Mr. Kisilah's signature is appearing on it, DW1 did not appear before Mr. Kisilah but his brother did so and signed the agreement on DW1's behalf. He admitted that paragraph 3 of the agreement dated 15/3/2010 does not make any reference to the payment made on 20/2/2010. On 30/4/2012 he paid Kshs. 1,000,000/= to Selina the plaintiff though he had no agreement with her in respect of the land or any court order directing payment of the money to her. He also made payment to Viona, Samuel Kibii, John Kipkurui and Sammy Ruto with whom he had no agreement and Sammy is his witness in the present case. He admitted that he did not have any authority to subdivide plot No. 2733 which was Kimutai's land; that there was no LCB consent to subdivide that parcel. Samuel Kibii from the deceased's first house who had been receiving money after the demise of Kimutai, had signed a statement in DW1's favour and is his witness in this case. DW1 has no full details of the total sum he paid to Samuel. He paid some money directly to some persons who were said to be owed money by the late Kimutai. He also paid Samuel Kibii several times. Selina is an administrator, amongst others, of Kimutai's estate; DW1 does not have any minutes of the family meeting that he speaks of in this case. He insisted that there is no dispute in respect of the 20 acres and the 5 acres first sold. DW1 denied that he took advantage of Kimutai's old age and the conflict between the first family and the second family.
19. Upon re-examination by Mr. Kisilah DW1 stated that title to Njoro/Ngata/Block 2/2733 was issued on 31/5/2010 after the agreement regarding the original land parcel No. 2246, the mother title but the agreement speaks of 10 acres to be excised from LR No. Njoro/Ngata Block 10/2246. Plot No. 2733



- is 10 acres. DW1 did not purchase any other 10 acres from plot No. 2246. Clause 8 of the agreement dated 15/3/2010 states that vacant possession was to be immediate. He maintained that there was a basis for subdivision and sale. Clause 5 allowed subdivision. DW1 did not know there would be a suit by Selina. He paid Sammy Ruto while Kimutai was still alive.
20. DW2, David Kipyegon Letich testified on 24/11/2022 and adopted his witness statement dated 15/12/2020. His evidence is that Selina Selim the plaintiff is his cousin and widow of Kimutai Selim; he also knew Kimutai Selim who was his half-brother; he knows the 11<sup>th</sup> defendant; Kimutai is his half-brother. He had land in Nakuru. There was a meeting at Kimutai's home in October 2011. DW2 and his brother Samuel Letich came from Ainamoi to Kimutai's place at Chepsir. Samuel Kibii and the other children of Kimutai were present at the home. Kimutai was resting in the house. The 11<sup>th</sup> defendant was also present and he narrated the issue of the land. The deceased said from an inner room that the 11<sup>th</sup> defendant should not be deprived of the land and he should pay the balance outstanding.
  21. Upon cross-examination by Kipkoech, DW2 stated that he was born in 1963; he could not recall the exact date but the meeting was held sometime in October 2011; there was no record made of the meeting; he had just visited Kimutai Selim as he was a sick person; he never witnessed any execution of any sale agreement between the Kimutai and the 11<sup>th</sup> defendant. Upon re-examination by Kisilah DW2 maintained that he was present and he heard the deceased give instructions
  22. DW3, Samuel Kibii Mutai testified on 24/1/2022 and adopted his witness statement as his evidence-in-chief in this case. His evidence is as follows: Selina Selim is his step-mother and Kimutai Selim his father; he is the eldest son and an administrator of Kimutai's Estate among 4 administrators one other of whom is the plaintiff; before, there were only 2 administrators, Selina and himself. Selina had applied for a grant without informing him. There are people settled on the suit land already. Kimutai called Kinaro, and Samuel Ruto. DW3 also came from Ainamoi together with David Letich, DW2. There were introductions. Kinaro then stated there was a land parcel of 10 acres which he had been paying for before his wife fell sick and when he informed Kimutai, he told him to first cater for his wife. Kinaro had to do a fundraiser. Kimutai sent Kinaro Kshs. 10,000/=; Later, his wife died. Later Kimutai also became sick. After DW1's wife's burial, Kimutai called him. He came and explained his agreement with Kimutai. That was in 2011. DW3's sisters, uncle and cousins were present. Kimutai went to an inner room to rest. DW3's kin began to question Kinaro over the transaction. Kimutai then called Ruto then he said aloud that Kinaro should not be deprived of the land and he should pay the balance. He does not agree that the 11<sup>th</sup> defendant and other buyers should be evicted from the land. Selina did not consult DW3 and so secretly obtained a grant of letters of administration. He does not support this case. It is not just to evict Kinaro. Kinaro paid some debts for Kimutai. DW3 was paid by Kinaro and with those proceeds he paid for Kimutai's plot; Johanna Kipkurui Bor had sold Kimutai father a plot. The payments were made in the presence of an advocate and DW3 was a witness. DW3 has the title in respect of the Kericho plot. Only the transfer remains to be done. It is true Kinaro bought 10 acres. The family was to receive the balance of purchase price and give him title.
  23. Upon cross-examination by Mr. Kipkoech DW3 stated as follows: he does not recall the date of the meeting; he never witnessed the making of the agreement dated 15/3/2010 as he was not present at its execution; Selina is not disputing the sale of the first 25 acres in this case; he never went with Kimutai to the Land Control Board to obtain a Land Control Board Consent to subdivide the land parcel No. Block 2/2733; he has never seen any such consent; he does not have any minutes of the meeting held at Selim's home in October 2011; on 21/8/2012 Kinaro paid DW3 Kshs.40,000/- after demise of Kimutai; DW3 also received Kshs.1,000,000/= in cash from Kinaro before an advocate in respect of plot No. Block 2/2246 on 6/5/2023 and acknowledged it through a written document of the same date; that the payment was in respect of an agreement (the document stated that the agreement was



- dated 29/9/2011) that the acknowledgment does not state that it is in respect of Block 2/2733 but is in respect of plot no 2246. (By that date however title had already issued in respect of plot 2733) and it states that balance is Kshs. 1,000,000/= to be paid once succession proceedings are cleared. Kinaro also paid DW3 Kshs. 100,000/= on 23/11/2013, Kshs. 250,000/= on 7/12/2013, Kshs. 50,000/= on 11/12/2019, Kshs. 50,000/= on 11/1/2014, Kshs. 200,000/= on 11/2/2014, Kshs. 250,000/= on 12/5/2014, Kshs. 55,000/= on 17/5/2014, Kshs. 50,000/= on 19/9/2014, Kshs. 100,000/= on 6/11/2014, Kshs. 100,000/= on 13/12/2014, Kshs. 250,000/= on 25/2/2015 and Kshs. 5,000/= by mobile money on 25/12/2013. DW3 also received Kshs. 20,000/= on 5/5/2014 from Bosire Ndubi after Kimutai had died. DW3 admitted that though he has received much money from Bosire and Kinaro, he has not gotten any order in Succession Cause in Kericho to enable him to receive any money or to pay Mr. Bor, the alleged Kericho plot seller. He admitted to not seeing any statements evidencing any payments to Selina the plaintiff. Upon re-examination by Mr. Kisilah DW3 insisted that he paid the monies received from Kinaro and paid it to Mr Bor.
24. DW4, Sammy Kiplangat Ruto resident of Chepseon in Kericho County testified on 6/3/2023 and adopted his witness statement dated 6/11/2019 and filed on 20/12/2022. His evidence was that he knows the plaintiff whom he described as being “like my mother”. DW4’s father and the plaintiff are brother and sister. He knows that the deceased sold Kinaro land at Ngata. DW4 was present on 15/3/2010 when an agreement was made between the deceased and Kinaro and which was executed before an Advocate; however, he never executed the agreement but he understood their engagement; that was the last parcel Kimutai was selling; there was only one Surveyor used in respect of all the sales to Kinaro and on that day he excised the 10 last acres.
25. Upon cross-examination by Mr. Kipkoech DW4 insisted that his father and Kimutai are brothers; regarding his Affidavit of 14/7/2014 which he swore in the present matter, which is attached to the Affidavit of Kinaro Ndubi filed on 10/9/2014) which states under oath that he was Kimutai’s nephew. DW4 rejected the contents thereof and preferred to go by his witness statement and insisted that he was a stepchild and not a nephew to the deceased; that on 22/3/2010 Kshs. 200,000/= was deposited into his account by Bosire Ndubi; on 29/3/2011 he received Kshs. 500,000/= from Mr. Kinaro; on 18/3/2010 he received Kshs. 130,000/= from Mr. Kinaro though he never sold Mr. Kinaro any land; that he received the Kshs. 200,000/= after Kimutai’s demise; the money was in respect of Kimutai’s land at Ngata. He witnessed the execution of the agreement of 15/3/2010 but is not named a witness in it. He was related to Kimutai because the two used to be friends.
26. Upon re-examination by Mr. Kisilah with respect to the deposit slips mentioned in cross-examination DW4 admitted to having received money on Kimutai’s behalf and stated that those were not the only instances he had received money on behalf of Kimutai since he was his nephew. In an about turn, he owned up to having sworn the affidavit he was cross-examined on by Mr Kipkoech and stated that all the contents of the affidavit are correct. After DW4 completed giving evidence, the case of the 1<sup>st</sup> – 6<sup>th</sup>, 7<sup>th</sup> – 9<sup>th</sup> and 11<sup>th</sup> defendants was marked as closed.
27. DW5, Sarah Masolo resident of Kiamunyi, a teacher testified on 6/3/2023 and adopted her witness statement dated 27/12/2019 as her evidence-in-chief in the present case. She does not know the plaintiff. She knows the 3<sup>rd</sup> parties who sold her a piece of land she bought on 4/8/2012. She paid the entire purchase price. DW5 did not conduct a search. The vendor was a beneficiary owner. DW5 has also not constructed anything on the plot. She does not know how many people live near the plot but they are many and they have built permanent houses. She produced the sale agreement dated 4/8/2012 as evidence and prayed that the court to accord her right to the plot as per the agreement. Upon cross-examination by Mr. Kisilah she stated that she has not fenced her plot. Upon cross-examination by Mr. Kipkoech DW5 stated that she did not do a search on the title before purchasing the property and



reiterated that she has not developed the plot. Upon re-examination by Ms. Waititu DW 5 stated that she did not conduct a search since the case was in court and the agreement had been done through an advocate's firm, Sheth & Wathigo Advocates. She refrained from developing the plot in obedience to a court order.

28. DW6, Richard Koskey resident at Ngata, a manager with a local insurance company testified on 6/3/2023 and adopted his witness statement dated 27/12/2018. He does not know the plaintiff. He knows the 3<sup>rd</sup> parties who sold him a portion of land baptised "No. 34". They entered into a sale agreement at a law firm, Sheth & Wathigo Advocates, and he was shown the mother title and said the mother parcel was still in the process of being subdivided. DW6 completed payments for his parcel. He has not built on the property but he has fenced it. There are around 40 people living within the vicinity. He produced his sale agreement dated 4/8/2012 as well as copies of receipts as evidence and maintained that he purchased the land legally. Upon cross-examination by Mr. Kisilah DW6 stated that he took possession and fenced his plot around December 2012 and reiterated that there are people who live on their respective plots.
29. Upon cross-examination by Mr. Kipkoech DW6 confirmed that he only fenced the land; that he never conducted a search on Njoro Ngata Block 12/2246; that he appeared before the Law firm of Sheth & Wathigo but he does not know which advocate's signature is on the agreement in attestation. He was aware the plot cost Kshs. 550,000/=; that it is not true that the agreements were done by Mr. Kinaro who submitted them to the advocates for attestation; that he has not yet conducted any search for plot No. Njoro Ngata Block 2/2246; that he went to the Lands office and they told him it was not possible to have a search for the entire block as it was still under subdivision process.
30. Upon re-examination by Ms. Waititu, DW6 stated that he had worked with an insurance firm and he knew that Sheth & Wathigo was the best Law firm; that he believed plot No. 34 belonged to the 3<sup>rd</sup> parties.
31. At the conclusion of DW6's evidence, the case of the 6<sup>th</sup> and 10 defendants was marked closed. Mr. Kisilah also closed the case of the third parties who opted not to call any evidence.

### **Submissions**

32. The Court ordered the parties to file and serve submissions within a given time frame. The plaintiff filed her submissions on 16/3/2023 while the 6<sup>th</sup> and 10<sup>th</sup> defendants filed theirs on 28/3/2023 and the 1<sup>st</sup> – 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants filed submissions on 19/4/2023.

### **Plaintiff's Submissions**

33. Submitted for the plaintiff: the following issues arise for determination: whether there was a sale agreement in respect of Njoro/Ngata Block 2/2733 and whether the plaintiff is entitled to reliefs sought. On issue (1) that the agreement dated 15/3/2010 relied on by the defendants stipulated that the property sold was Njoro/Ngata Block 2/2246; that the 11<sup>th</sup> defendant has not produced a duly executed sale agreement in respect of Njoro/Ngata Block 2/2733 to prove that he was purchasing the property before the demise of Kimutai Selim who died on 21/11/2011 by which time the title deed had been in existence for long – in fact 18 months before Kimutai's demise; that PW2's evidence was that she was aware of the deceased's transactions with the 11<sup>th</sup> defendant and she is aware that the 11<sup>th</sup> defendant subdivided the property; that her evidence was that there was no written document in the nature of the transaction in relation to the suit property; that from previous transactions the deceased never gave the 11<sup>th</sup> defendant land freely in the absence of any written agreement clearly demonstrates that the deceased never intended to sell the suit property; that the plaintiff acknowledges



the previous sale transactions save for some little unpaid balance consideration to be expected from the 11<sup>th</sup> defendant. It is stated that failure to produce the sale agreement for Njoro/Ngata Block 2/2733 offends the mandatory provisions of Section 3(3) of the Law of Contract Act and is therefore null and void. The case of Daudi Ledama Morintat Vs- Mary Christine Karie & 2 others [2017] eKLR was cited. Further, the 11<sup>th</sup> defendant confirmed the lack of consent from the Land Control Board to transfer the same property which also renders the purposed sale to be void. Section 6 and Section 8 of the Land Control Act as well as Margaret Muthoni Wanyee Vs. Mukenia Cooperative Society Ltd [2018] eKLR, Onyango & another Vs. Luwayi [1986] KLR 513 were cited by the plaintiff for the proposition.

34. On issue no. (2): that the defendants had no colour of right to encroach on the land and develop it purporting that they had bought it from the deceased; that the plaintiff considered to having received some monies from the 11<sup>th</sup> defendant thinking that it was part of the payment for the initial transaction and during that payment the 11<sup>th</sup> defendant did not expressly state that the money was for the purchase of Njoro/Ngata Block 2/2733; that as at Kimutai's death he had not sold parcel No. Njoro/Ngata Block 2/2733; that she as an administrator of the deceased's estate has the authority to protect the estate's assets; See: the case of Beatrice Kanzayile and another Vs. Adam Gasongo [2014] eKLR for the proposition; that the 11<sup>th</sup> defendant intermeddled with the estate of the deceased with the help of Samuel Kibii Mutai and others who received monies in pretense that there was a sale transaction; that DW2 and DW3 did not have authority to receive money on the estate's behalf; that under the law of Succession Act immovable property of a deceased person cannot be sold before confirmation of the grant hence the sale to the defendants was null and void. See the case of Gulam Mohammed Noor Vs. Bahadur Noor Mohammed Gulam and another [2017] eKLR where the 1<sup>st</sup> respondent, a joint administrator had caused the estate property to registered in his name and the court held that it was his duty to bring in protect and preserve and secure the estate property and that he ought to have renewed the lease in favour of the administrators of the estate thus he had breached statutory as well as fiduciary obligations by obtaining title in his name as it deprived other beneficiaries entitlement in the estate property, and the estate of its property in a fraudulent manner and the only remedy was for him to restore the property to the estate for distribution in accordance with the law; the acts of the 1<sup>st</sup> and 11<sup>th</sup> defendants are labelled as illegalities but also as criminal activities; that even if the defendants have developed the suit property, they are trespassers for lack sale agreement and consent and the persons who received monies from the 11<sup>th</sup> defendant are intermeddlers.

#### **6th and 10th Defendants' Submissions**

35. Submitted for these defendants: that two issues arise to wit, whether they are purchasers of plot Number 34 excised from Njoro/Ngata Block 2/2246 and whether the plaintiffs have established a claim against them on a balance of probabilities. Regarding the first issue, they cite Section 3 of the law of Contract Act and rely on a sale agreement dated 4/8/2012 between them and the Third Parties as giving them rights to the land. They also cite Broadspect Investment Ltd Vs. F. N. Mwangi [2017] eKLR. They submit that they bought the land through the firm of Sheth & Wathigo Advocates and were assured by the vendors that they had bought the land from the 11<sup>th</sup> defendants which Sheth & Wathigo Advocates confirmed; that the plot was a subdivision of Njoro/Ngata Block 2/2246; that they paid for the land and took possession based on the boundaries shown to them by the Third Parties and the agreement was valid; that the agreement dated 4/8/2012 was executed by all parties present and witnessed by the advocate as required by Section 3(3) of the Law of Contract Act. Relying on Section 107 and 108 of the Evidence Act and the case of Muringi Kanoru Jeremiah Vs. Stephen M'mwarabua [2015] eKLR and aver that they are strangers to the plaintiff's claim in respect of Njoro/Ngata Block 2/2733.



### Submissions of the 1st 5th, 7th, 8th 9th and 11th defendants'

36. Submitted for these defendants: that the issues arising for determination are: (1) whether the plaintiff has locus standi to prosecute the suit as the legal representative of the deceased, (2) whether the 11<sup>th</sup> defendant purchased Njoro/Ngata Block 2/2733 from the deceased, (3) whether the land parcel Njoro/Ngata Block 2/2733 forms part of the estate of the deceased and (4) whether the plaintiff is entitled to the reliefs sought in her plaint. The defendants averred that the grant for letters of administration relied upon by the plaintiff was cancelled vide a consent dated 24/3/2014; that PW1 confirmed this in his evidence; that though the plaintiff allegedly withdrew the case and filed a fresh one, the record does not support that claim as the plaint on record is the one dated 3/12/2013; that the said plaint was never withdrawn and the new letters of administration alluded to were never filed as the plaintiffs' list of documents and the letters of administration were amended to include Samuel Kibii, Daniel Kiplangat Mutai and Rachael Kipkorir Mutai in addition to the plaintiff (Page 181 of the 11<sup>th</sup> defendant's bundle) but no final grant was ever made or applied for as is evident from the certificate of the Principal Registrar dated 12/4/2013 that no grant has been made or applied for (page 184); that one can only enforce a suit on behalf of the estate of a deceased upon appointment as a personal representative by way of a full grant; see the case of Joseph Muriuki Githinji Vs. Peterson Ileri Mwaniki & 3 others, Embu ELC Case No. 23/2019 and case of Beatrice Mbeere Njiru Vs. Alexander Nyaga Njiru. It is averred that the grant relied on by the plaintiff was temporary and subject to confirmation and so the plaintiff lacked locus. Regarding the 2<sup>nd</sup> issue on whether the defendant purchased the Njoro/Ngata Block 2/2733, from the deceased: that title to the disputed suit land is a subdivision of the original land parcel Njoro/Ngata Block 2/2246 which was initially subdivided to yield the following subdivisions: Block 2/2733 – 67 acres, Block 2/2733, Block 2/2736 and 50 other portions; that the 11<sup>th</sup> defendant had a sale agreement with the deceased dated 15/3/2010 for sale of the 10 acres to be excised from 2246 and consideration was Kshs.10,000,000/= which was paid; that parcel of 10 acres was subdivided and sold to his co-defendants who moved into them and occupied their respective portions with the knowledge of the deceased which according to the defendants is why the deceased never raised any complaint to their occupation. The defendants drew the court's attention to a mutation (page 59) and aver that there is no doubt the deceased sold the land parcel; that lack of a sale agreement with respect to the suit land, if that were the case, would not invalidate the sale thereof to the 11<sup>th</sup> defendant; that the sale agreement of 15/3/2010 provided for the 11<sup>th</sup> defendant to subdivide and sell the portion to third parties at Clause 5, at Clause (e); see the case of Lawrence Muchiri Kwenja Vs. Mary Waithera Gathecha & another and Macharia Mwangi Maina & 87 others Vs. Davidson Mwangi Gakiri Civil Appeal No. 6 of 2011, Nyeri as consolidated with Civil Appeal 26 and 27 of 2011, Nyeri. On the issue of the Land Control Board consent, it was urged that nowhere in the plaintiff's pleading was the issue pleaded and that parties are bound by their pleadings. The issue is therefore not available for determination by this court; see the cases of Republic Vs Chairperson Public Procurement Administrative Review Board & 2 others Ex-parte Rhombus Construction Company Ltd [2022] KEHC 1 KLR. As to whether the parcel of land forms part of the deceased, Kimutai's estate, the defendants pointed to DW2's evidence that he was with Kimutai on 15/3/2010 when he signed an agreement with the 11<sup>th</sup> defendant for the sale of the land, subject matter herein. The evidence of DW3 of the family meeting at which Kimutai was alleged to have given instructions that the sale be concluded was also relied on. As a result of those instructions, DW3, the plaintiff and others within the family had received substantial payment from the 11<sup>th</sup> defendant as part of the purchase price. The evidence of DW4 was also relied on. With those submissions the defendants urged the court to dismiss the plaintiff's case with costs.



## Determination.

37. In the present case it is generally admitted by all parties as follows:
- a. The suit land Njoro/Ngata/ Block 2/2733 measuring 4.0560 ha. is registered in the name of the deceased Kimutai Selim who died on 21/11/2011;
  - b. The Green card for Njoro/Ngata/ Block 2/2733 was opened on 18/5/2010 and the title was issued on 31/5/2010;
  - c. No title has issued in any of the defendants' names;
  - d. The suit land is a subdivision of a larger parcel known as Njoro/Ngata/Block 2/2246 which was also registered in the deceased's name before subdivision;
  - e. After Kimutai Selim's demise colossal amounts of money were paid by the 11<sup>th</sup> defendant to individual members of his family and doubtful third parties who were not administrators to his estate and before any grant was taken out;
  - f. The initial grant of letters of representation to Kimutai's estate were originally issued on 15/7/2013 to the plaintiff; another grant was issued on 25/8/2014 in the names of the plaintiff and Samuel Kibii Mutai, DW3;
  - g. The plaintiff and 3 other persons are now administrators to the estate of the deceased; however only the plaintiff has sued; the additional administrators are the plaintiff's children;
  - h. All the other defendants joined to this suit claim under the 11<sup>th</sup> defendant who sold them land alleging that he had purchased the same from the deceased;
    - i. During his lifetime, Kimutai Selim indeed engaged with the 11<sup>th</sup> defendant and sold some land to him but there is no agreement bearing the LR No Njoro/Ngata block 2/2733;
  - j. The only agreement that the 11<sup>th</sup> defendant depends on for all the claims that the deceased sold him the suit land is dated 15/3/2010.
  - k. Demands for the defendants to vacate the suit land on the ground that it had not been sold to the 11<sup>th</sup> defendant began in 2013, a month after the plaintiff obtained a grant of letters to the estate;
38. The issues that arise for determination in this matter are as follows:
- a. Whether the defendant illegally encroached on LR No Njoro/Ngata Block 2/2733 and by illegally disposing of portions thereof to third parties for financial gain and so caused the third parties to also trespass onto the said land and if so whether the defendants, their families and/or agents ought to be evicted from the suit land;
  - b. Who ought to meet the costs of the present litigation?
39. In addressing the first issue, it is the case that Kimutai Arap Selim owned LR No. Njoro Ngata Block 2/131 which he subdivided into a number of portions, among them Plot No 2246 which was registered in his name. That plot was further subdivided into numerous plots ranging from 0.0858 to 10.60 ha in size. From documentary evidence of copies of agreements provided in the case by the plaintiff, it can be tentatively stated that there were land sale agreements as follows:



- a. To Ekegoro on 22/2/2006- 10 acres from LR no 131
  - b. To Ekegoro on 10/10/2007- 5 acres from LR No 131;
  - c. To Ekegoro on 29/8/2007- 10 acres from LR No 131
  - d. To Ekegoro on 30/5/2008- 20 acres from LR No 2246;
  - e. To Sumat coop on 1/9/2009- 12 acres from LR No 2246;
  - f. To Sumat coop society on 23/11/2009 – 5 acres from LR No 2246;
  - g. To Elijah Langat on 17/3/2010 -6 acres from LR No. 2246;
  - h. To Ekegoro (undated) (maybe in 2010); 10 acres from LR No 2246 (unsigned)
  - i. To Nakuru Equipment on 7/6/2011 – whole of LR No 2735;
40. From the evidence before court Kimutai arap Selim appears to have sold various parcels of land to different people between the years 2006 and 2010 and received money for the sales, including from the sales to the 11<sup>th</sup> defendant. It is however denied by the plaintiff that he ever sold LR NO Njoro/Ngata Block 2/2733 and indeed none of the agreements bear that LR Number. The application for Molo LCB consent to subdivide showed that LR NO 2246 was to be subdivided into 52 portions ranging from 0.0858 ha to 10.60 ha. A copy of the LCB consent in those terms was produced by the 11<sup>th</sup> defendant. It is dated 16/12/2009 and cites an application dated 11/3/2010. The mutation produced by the plaintiff reflects that subdivision. According to the copy of title produced and the mutation dated 29/3/2010 and registered on 18/5/2010, LR NO Njoro/Ngata Block 2/2733 is a subdivision of LR NO Njoro/Ngata Block 2/2246 and measures about 10 acres.
41. LR NO Njoro/Ngata Block 2/2733 is a sister to LR NO Njoro/Ngata Block 2/2736, they having emanated from the same subdivision scheme. However, the approach the 11<sup>th</sup> defendant took with regard to the alleged transactions over the two properties differ. The 11<sup>th</sup> defendant produced an undated application for consent to transfer LR NO Njoro/Ngata Block 2/2736 to the 11<sup>th</sup> defendant but none for LR NO Njoro/Ngata Block 2/2733 and an LCB consent dated 12/7/2012 citing an application by the deceased allegedly dated 10/7/2012. Notably by these dates Kimutai who was supposed to be the applicant was already deceased, having died on 21/11/2011 and it is a mystery as to how he could have made the LCB applications while deceased. By then the grant to representation to his estate had not been raised by any person in his family and nobody had capacity to execute those applications. It would appear that the stamp duty for LR No LR NO Njoro/Ngata Block 2/2736 was paid on 15/7/2013 to facilitate the transfer and title to that parcel was issued in the name of the 11<sup>th</sup> defendant on 25/7/2013. Soon thereafter on 8/5/2014 the 11<sup>th</sup> defendant obtained an LCB consent to subdivide that parcel into 109 portions.
42. The copy of agreement dated 15/3/2010 that the 11<sup>th</sup> defendant exhibited as evidence resembles the unsigned and undated produced as P. Exh 4 by the plaintiff. However, the 11<sup>th</sup> defendant's copy is apparently signed and dated. The 11<sup>th</sup> defendant also produced 3 funds transfer forms dated 20/2/2010, 26/3/2010 and 29/10/2011 from a Cooperative Bank held by Ekegoro Property to an account in the name of Kimutai for the sums of Kshs 1,000,000/=, 1,000,000/= and 2,000,000/= respectively. On 22/3/2010 he paid Kshs. 200,000/= to Sammy Ruto whom he knew as the deceased's son; those payments were made while the deceased was sick; he showed a cash deposit slips into Sammy Ruto's account as proof of payment. On the same day, he also deposited Kshs. 500,000/= to Sammy



- Ruto's account; the money was to be given to Kimutai. DW1 made the last payment of Kshs. 130,000/= through Sammy Ruto on 18/3/2010 by way of a deposit to his account.
43. A month after the last payment, Kimutai died on 21/11/2011. Thereafter, the 11<sup>th</sup> defendant made a raft of payments to various persons as admitted. On 30/4/2012, the 11<sup>th</sup> defendant paid the plaintiff herein Kshs 1,000,000/= by electronic transfer to her account at Standard Bank. allegedly for purchase and transfer of the property in dispute which allegation she disputes; he transferred Kshs. 70,000/= to Viona Cherotich, a daughter of the plaintiff on 28/11/2011; the other payments were made through Samwel Kibii Mutai the elder son of Kimutai. Samuel allegedly came with some elders who had sold the Kericho property to Kimutai and Kimutai had not completed payment. and so on 6/6/2013, DW1 paid Kshs. 1,000,000/= directly to Johana Kipkurui Bor, the alleged Kericho plot seller who had reported that the balance outstanding for the Kericho plot amounted to Kshs. 2,000,000/=. DW1 allegedly paid the balance of Kshs. 1000,000/= on other diverse dates through Samuel Kibii. (Kshs 40,000/= on 21/8/2012, Kshs 245,000 on 16/5/2014, Kshs 5000/= on 25/12/2013, Kshs 9100/= on 15/7/2014; he showed the court mobile money (Mpesa) records to Samuel for the said electronic transactions of Kshs. 5000/= on 25/12/2013, Kshs. 9,100/=. On 31/1/2014 DW1 paid through a deposit to KCB bank account some Kshs. 15,000/= to the credit of Diana Chepkirui. On 7/3/2012, he also transferred Kshs. 12,000/= to Kiptonui Joel, son to Kimutai. According to the 11<sup>th</sup> defendant, those were payments for the agreement dated 15/3/2010 over the suit land.
44. Samuel Kibii applied to have the plaintiff's grant to the deceased's estate revoked vide an application dated 20/12/2013 on the grounds that the plaintiff had allegedly in bad faith omitted to state some assets of the deceased or all the survivors of the deceased. It was alleged that she only named members of her own house (the 2<sup>nd</sup> house) and she had also not faithfully administered the estate but acted in bad faith. A consent was entered into on 24/3/2014 by which the plaintiff's grant was cancelled and replaced by one that included Samuel Kibii and such a jointly held grant was issued on 25/8/2014. Vide an application dated 28/11/2019, two more administrators, Daniel Mutai and Viola Cherutich were added in the grant and on 26/10/2020 a grant was issued bearing names of four administrators. It is noteworthy that the suit land was listed in the petition for a grant dated 22/1/2013 as part of the deceased's estate's assets and the certificate of official search dated 4/1/2013 showed that the title thereto was unencumbered.
45. I have traversed the pleadings and the evidence in this case and I have found no evidence that the deceased ever entered into any agreement with the 11<sup>th</sup> defendant over the sale of LR NO Njoro/Ngata Block 2/2733 and that if there was ever an oral agreement, the omission to reduce it into writing is in breach of the provisions of section 3(3)(i) of the Law of Contract Act which requires all agreements for the sale of land to be in writing.
46. Further, the signatures on the agreement dated 15/3/2010 are not attested to by a witness as required by Section 3(3)(b) of the Law of Contract Act. Besides, the 11<sup>th</sup> defendant never executed the agreement but it is stated that it was executed by one Bosire Ndubi on his behalf yet that person was not called to testify in this case. This state of affairs contrasts sharply with that regarding the agreement dated 22/2/2006 between the 11<sup>th</sup> defendant and the deceased; the latter agreement is fully attested to and stamped with the stamp of one Kisilah G. Advocate of Nakuru. The 11<sup>th</sup> defendant has thus not given any good ground as to why the execution of his agreement on which he relies so much in this suit, and which was made long after his other agreements had been attested to.
47. Perchance this court were to deem that the said agreement was properly executed which is not and can not be the case, the same never received the consent of the Land Control Board, it being agricultural land. I have already earlier in this judgment examined and expressed great doubt as to the propriety



of the application made for consent to subdivide and to transfer LR No Njoro/ Ngata Block 2/2736; those applications were purportedly made by the deceased yet the deceased was already dead by the dates of the application and of the consents. If the 11<sup>th</sup> defendant obtained those consents for that parcel, there is no reason why he should approach this court with a meek admission that consents for LR No. Njoro/Ngata Block 2/2733 were not and hope for this court's mercy. I must however state that had he presented posthumous applications and consents as in the case of LR NO Njoro/Ngata Block 2/2736, this court would still have required of him an explanation as to how they were obtained and by whom they were who executed. However, the principal point I am making here is that there is no reason why the 11<sup>th</sup> defendant could not have been having the LCB consents to show the court to prove his alleged transaction with the deceased over the suit land was valid, just as he has done in respect of LR NO Njoro/Ngata Block 2/2736. There is also no reason why, this suit having been commenced on 3/12/2013, the 11<sup>th</sup> defendant had not commenced or even completed any LCB consents application and subdivision processes in respect of the suit land herein if he had genuinely acquired it from the deceased whereas by 12/7/2012 he had already undertaken those actions in respect of LR NO Njoro/ Ngata Block 2/2736 which emanated from the same mother title. Consequently, I find that even if that agreement dated 15/3/2010 had been deemed properly executed, the same is void by virtue of the provisions of Section 6 (a) of the Land Control Act in that it lacked LCB consents.

48. Thirdly, this court notes that no expert evidence was adduced on the subject but even to the naked eye, the signature attributed to Kimutai on the 11<sup>th</sup> defendant's purported agreement dated 15/3/2010 is markedly different from the deceased's signatures on the other agreements that have not been challenged by the plaintiff and it is very possible especially in the absence of attestation by an independent witness who can testify to the fact, that the signature was not affixed by the deceased. It is a most curious thing that DW4 testimony is that he was present on 15/3/2010 when the agreement was made between the deceased and the 11<sup>th</sup> defendant, that the agreement was executed before an Advocate but that he himself for some reason never executed the agreement. His evidence is proved false by the 11<sup>th</sup> defendant's production of an agreement bearing no attestation by any advocate or other witness and in which the signature attributed to the deceased is quite doubtful. Besides, to crown it all, he is not an independent witness, having conceded to having received colossal sums of money from the 11<sup>th</sup> defendant purportedly for the suit land both before and after the deceased died. His evidence is not for those reasons reliable and I hereby dismiss it all as mere fabrications.
49. I have also noted that another purported beneficiary of the subdivision of LR NO Njoro/Ngata Block 2/2246 is one Elijah Cheruiyot Langat who purportedly purchased 6 acres of land from the deceased vide an agreement dated 17/3/2010, only 2 days after the date of the 11<sup>th</sup> defendant's purported agreement subject matter of this case. When I examined the record I found that very little has been said about him in this case. One vital bit of information DW4 gave the court is that there was only one surveyor who was used in the land sales to the 11<sup>th</sup> defendant. My conclusion is that Elijah Cheruiyot Langat must be the same person as E.C. Langat, the surveyor who by the handwritten agreement dated 22/2/2007 which the 11<sup>th</sup> defendant produced as an exhibit at the hearing was contracted to subdivide the mother parcel known as LR NO Njoro/Ngata Block 2/131 and it is quite curious that he also obtained land from the deceased long after the first subdivision for which he was hired. However, his land is not the focus of this suit.
50. Does it not matter then that the 11<sup>th</sup> defendant has evidence of payments? In this case it does not and for several reasons. First, the plaintiff has clearly stated that she believed the amount of Kshs 1,000,000/= paid to her to belong to a valid past transaction between the deceased and the 11<sup>th</sup> defendant. Secondly, the 11<sup>th</sup> defendant's evidence was so jumbled up, and I believe this was with some calculation at deception and befogging of the court's perception, that it was impossible to assign any of the payments



he effected, even those made to the deceased, to any particular parcel of land and in my view that is not how an honest litigant who believes in the justice his case ought to proceed. It is also noteworthy that he dumped so much material before the court without any pagination and indexing and submitted some partially legible documents which made the preparation of this judgment unnecessarily difficult and which this court takes great exception at in view of the very clear stipulation as to indexing and pagination. Thirdly most of the payments he made were to third parties who despite being kin were strangers to the very agreement that he claimed to have made with the deceased, and who are likely to be declared as intermeddlers. The most noteworthy of documents that DW1 produced was the acknowledgment dated 6/5/2013 which he would like this court to believe belonged to the alleged sale transaction over plot no 2733. However, that document on its face expressly declared that it was in respect of an agreement dated 29/9/2011. It is quite a source of great concern and mystery as to whom the parties to that agreement were. The very fact that DW1 opted to omit production of the said agreement despite his willingness to provide numerous copies of other documents may be construed as evidence of a desire to conceal something detrimental to his case. It is also quite curious that the agreement dated 15/3/2010 says nothing, not even an acknowledgment of receipt of Kshs 1,000,000/= allegedly paid to Kimutai before it was executed.

51. The only proper and valid transaction that could have furthered any sale of the deceased's land, if the administrators so wished, would have been a transaction made directly with the administrators themselves. Section 45 of the *Law of Succession Act* forbids any dealings with the property of a deceased person except those by a person duly authorized by the court through issuance of a grant. I do not for a moment think that the 11<sup>th</sup> defendant was so naïve as to make the payments that he effected to third parties for colossal amounts of money even when he was clearly aware that they lacked the authority of the court through a grant of letters of administration to the deceased's estate. Rather, this court is persuaded that he was likely, if there arose nobody to object, to proceed in the same manner of obtaining the LCB consents and transfer forms posthumously as he did in respect of LR NO Njoro/Ngata Block 2/2736 and conclude his business and disappear and only the grant issued timely in favour of the plaintiff disrupted his plans. This court can also see the concealed hand of the 11<sup>th</sup> defendant in the DW3's application for the revocation of the plaintiff's grant as it was a threat to DW3 who had received colossal amounts of money from the 11<sup>th</sup> defendant in respect of a land he had no authority to sell. This state of affairs he tried to regularize by successfully fighting to be made an administrator to Kimutai's estate, but this court hardly thinks that that inclusion among the administrators will help him escape penance for any past mischief. None of that money was demonstrated to have served any interests of the estate of Kimutai and DW3 must in the future be held fully to account in another forum. I would not say the same of the plaintiff who upon perceiving deception by the 11<sup>th</sup> defendant, quickly obtained a grant and came to this court to halt any further illegalities.
52. It is therefore clear that there was no sale agreement between the deceased and the 11<sup>th</sup> defendant and that the latter rode on a wave of previous agreements to purport and hoodwink everyone that he had purchased the suit land from the deceased while he had not. He therefore lacks any interest in the land and this court is in agreement with the plaintiff that the 11<sup>th</sup> defendant not only trespassed upon the suit land but also caused other third parties to follow suit. A curious thing here is that none of the other defendants established that they purchased their plots out of LR Number Njoro/Ngata Block 2/2733. This court notes that the LCB approved subdivision LR NO Njoro/Ngata Block 2/2246 into numerous (52) portions of sizes ranging from portions ranging from 0.0858 ha to 10.60 ha. If they were settled by the 11<sup>th</sup> defendant on any defined and demarcated portions those portions must have been among the small ones arising out of that subdivision and not the ones of 10.60 ha. This view is reinforced by the observation that for example, DW6 stated in evidence that he was sold plot



no 34. Plot no 34 is in the area list at page 61 of the bundle of the 11<sup>th</sup> defendant and is said to measure 0.089 Ha and has been assigned LR NO 2718. Plot no 34 is so distant from Plot no 50 on the mutation sketch at page 60 (which is stated in the area list to be LR NO Njoro/Ngata block 12/2733) that there can be no case of mistaken identity of the two plots. Further to this argument, some of the defendants and the third parties flatly rejected the claim that they bought plots from LR NO 2733 and insisted that they bought them from plot no 2246. There being no proof that subdivision of LR Number Njoro/Ngata Block 2/2733 was ever applied for or approved or even conducted on the ground, there was no good reason why the 11<sup>th</sup> defendant would have wanted to settle them on the suit land measuring 10 acres except the desire to deceive both the buyers and the deceased and/or his estate. If they were indeed settled on the suit land rather than on their small parcels, it is not without much sympathy for the rest of the defendants that this court informs them that they were deceived by the 11<sup>th</sup> defendant who had nothing to sell to them out of LR Number Njoro/Ngata Block 2/2733 and that they ought to therefore seek an appropriate remedy against him and his collaborators in the mischief as the plaintiff is faultless in the matter. Consequently, I find that all the defendants should be evicted from the suit land being LR Number Njoro/Ngata Block 2/2733. The same position applies to the third parties.

53. Regarding general damages and exemplary damages for trespass no evidence was adduced. However, this court having found that the defendants were in trespass, it has inherent power to grant a nominal amount of damages for trespass. In this endeavour, I would prefer to exclude all the defendants who obtained land through the 11<sup>th</sup> defendant and focus only on him as he was the sole cause of their misfortunes and he ought to be held vicariously liable for their trespass. I would find general damages of Kshs 1,000,000/= and exemplary damages of Kshs 1,000,000/= to be sufficient in this case.
54. As regards costs though the 11<sup>th</sup> defendant was deceptive and the rest of the defendants were negligent for not conducting due diligence in order to escape the mess, all defendants shall jointly and severally bear the costs of the present suit.
55. The upshot of the foregoing is that the plaintiff has established her claim on a balance of probabilities. Therefore, I enter judgment in her favour against all the defendants and the third parties in respect of her claim in the plaint dated 3/3/2013 and I issue the following final orders:
  - a. A declaration is hereby issued declaring that the defendants are trespassers and are not entitled to enter, cross or in any way gain access into the deceased's land being LR No Njoro/Ngata Block 12/2733 and that the plaintiff is entitled to quiet unfettered enjoyment of the same.
  - b. All the defendants, members of their families, their proxies, servants, employees or agents shall remove themselves and any structures put up by them from the suit land being LR No Njoro/Ngata Block 12/2733 within 90 days from the date of this order and give the plaintiff vacant possession thereof in default of which they shall be forcibly evicted therefrom.
  - c. A permanent injunction is hereby issued, restraining the defendants and or their agents, families, proxies, servants and employees from entering, remaining on, cultivating, erecting structures in any other manner interfering with the suit land being Njoro/Ngata Block 12/2733.
  - d. The 11th defendant shall pay Kshs 1,000,000/= being general damages for trespass to the plaintiff;
  - e. The 11th defendant shall pay Kshs 1,000,000/= being exemplary damages to the plaintiff.
  - f. The costs of the present litigation shall be borne by all the defendants jointly and severally.

It is so ordered.

**Dated, signed and delivered at Nakuru via electronic mail on this 29th day of June 2023.**

**MWANGI NJOROGE**



JUDGE, ELC, NAKURU

