



REPUBLIC OF KENYA



**Karinge & 2 others v Muchai (Environment & Land Case  
592 of 2016) [2023] KEELC 18038 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18038 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 592 OF 2016  
LA OMOLLO, J  
JUNE 15, 2023**

**BETWEEN**

**PETER KARIUKI KARINGE ..... 1<sup>ST</sup> PLAINTIFF**

**PETER GITHUTHIA KARINGE ..... 2<sup>ND</sup> PLAINTIFF**

**SIMON MWANGI KARINGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KARIUKI MUCHAI ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiffs commenced this suit *vide* a plaint dated December 21, 2015.
2. They aver that they are the registered owners of land parcel No Mau Summit/Molo Block 2/158 (Mona).
3. They further aver that their parcel of land borders the land belonging to the step-mother of the defendant, that the defendant has invaded their parcel of land and has been living on it since the year 2012.
4. The plaintiffs also aver that the defendant's step mother Wangari Muchai died on December 17, 2016 and the defendant intended to bury her on the suit property on December 23, 2016.
5. The plaintiffs aver that they are prejudiced by the purported burial since they stand to suffer loss and damage.



6. The plaintiffs pray for judgement against the defendant for;
  - a. A declaration that the plaintiffs are the owners of all that parcel of land known as Mau Summit/Molo Block 2/158 (Mona).
  - b. A permanent injunction restraining the defendant his servant and/or agent from burying Wangari Muchai (deceased) on the subject land namely Mau Summit/Molo Block 2/158(Mona).
  - c. An eviction order against the defendant from the parcel of land known as Mau Summit/Molo Block 2/158 (Mona)
  - d. Costs of this suit.
  - e. Interest.
  - f. Any other relief that this honorable court deems fit to grant.
7. The defendant filed his statement of defence and counterclaim dated June 21, 2017 on June 27, 2017. He denies the averments in the plaint.
8. In the counterclaim, he denies being served with a court order on December 22, 2016 restraining him from burying the remains of Wangari Muchai (deceased) on land parcel No Mau Summit/Molo Block 2/158(Mona).
9. The Defendant states that his deceased mother Wangari Muchai obtained the title to land parcel No Mau Summit/Molo Block 2/157(Mona) on August 1, 1990 which title was reissued on June 5, 2009.
10. The defendant further states that his claim against the plaintiffs is for a declaration that the late Wangari Muchai is the lawful and beneficial owner of land parcel No Mau Summit/Molo Block 2/158 (Mona).
11. The defendant also states that his other claim against the plaintiffs is for a permanent injunction to issue restraining them from entering, trespassing, transferring, selling, alienating or interfering with his occupation and possession of land parcel No Mau Summit/Molo Block 2/158 (Mona).
12. The defendant seeks the following orders against the plaintiffs;
  - a. A declaration that the late Wangari Muchai is the lawful and beneficial owner of parcel Mau Summit/Molo Block 2/158 (Mona).
  - b. An order of permanent injunction restraining the plaintiffs now defendants from entering, trespassing, transferring, selling, alienating or interfering with the defendant now plaintiff's occupation and possession of parcel title Mau Summit/Molo Block 2/158 (Mona).
  - c. An order of permanent injunction restraining the plaintiffs now defendants, their servants and/or agents from exhuming the remains of the late Wangari Muchai on parcel title Mau Summit/ Molo Block 2/158 (Mona).
  - d. Costs of suit and interests at court rates.

### **Factual Background.**

13. This suit first came up for hearing on March 7, 2022 but the hearing was adjourned to April 27, 2022.



14. On April 27, 2022, counsel for the plaintiffs informed the court that he had an amended plaint filed on March 14, 2017 which had not been placed in the court file. He sought time to file further documents in support of the amended plaint.
15. Counsel for the defendant opposed the said application and informed the court that they have never been served with the said amended plaint. Nevertheless, this court granted the adjournment and directed counsel for the plaintiffs to ensure that the amended plaint was in the court file by close of business that day and to further ensure that it was served upon the defendant.
16. Parties were also granted leave to file any further documents if they wished to do so. The hearing was adjourned to July 5, 2022 and witness summons were issued to the Land Registrar to produce the entire file and green card in respect of Mau Summit/Molo Block 2/158(Mona).
17. When the suit came up for hearing on July 5, 2022, the court noted that the alleged amended plaint was still not in the court file and the copy of the amended plaint served on the defendant did not bear the court stamp. This was brought to the attention of the counsel for the plaintiff and he elected to proceed with the hearing on the basis of the original plaint.

### **Plaintiffs Evidence.**

18. During the hearing of the plaintiffs case, one Peter Kariuki Karinge testified as PW1. He stated that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are his brothers.
19. It was his evidence that land parcel No Mau Summit/Molo Block 2/158 (Mona) measures two and a half acres and is co-owned by all the three plaintiffs.
20. He also testified that on December 17, 2016, their immediate neighbour who is the defendant buried his step mother Wangare Muchai on the suit property. It was his further testimony that prior to the burial, they obtained a court order barring the said burial but the burial proceeded.
21. He reiterated that the suit property belongs to them and they were issued with a title deed on January 20, 2011.
22. PW1 further stated that the title deed that he has in court is for land parcel No Mau Summit/Molo Block 2/158(Mona) and the owners are Peter Kariuki Karinge of ID No 7xxxx8, Peter Githutha Karinge of ID No 0xxx2 and Simon Mwangi Karinge of ID No 8xxx2 of P. O Box 257 Molo.
23. He went on to state that they had conducted several searches including one dated January 21, 2014 and all the searches confirm that the suit land belongs to them.
24. PW1 sought that the prayers in his plaint be granted except for prayer (b) which has been overtaken by events.
25. He produced a copy of the title deed as exhibit P1 and a copy of the search dated January 21, 2014 as exhibit P2.
26. On cross examination by counsel for the defendant, PW1 confirmed that the late Wangari sold the suit property to him between the years 2009 and 2010.
27. He also confirmed that he did not have the said agreement in court and also confirmed that the agreement was not drawn by an advocate.
28. PW1 admitted that the suit property is agricultural land and further admitted that they never attended the Land Control Board to obtain consent to transfer.



29. He stated that Wangari Muchai was living in Molo and that when she was evicted from Molo, she went to live with her brother in Bahati adding that the sale agreement was entered into in Bahati.
30. He admitted that he did not know that the suit land belonged to Wangari's husband and that he had shares at Mona Farm but confirmed that the defendant is the step son of Wangari Muchai.
31. He stated that as at the time of sale the defendant was living in Molo and also confirmed that Wangari Muchai did not have any children. He admitted that the defendant was not involved in the sale.
32. PW1 further stated that he was not involved in the burial plans of Wangari Muchai but confirmed that he attended the burial. He stated that he could not remember who presided over it.
33. He confirmed that during the burial ceremony, he saw the defendant but did not see his brothers and sisters because he did not know them.
34. PW1 was referred to an official search done on January 20, 2014 and he confirmed that it shows that Wangari Muchai is the owner and that she was issued with the title deed on August 1, 1990. He also confirms that the next entry is re-issue on June 5, 2009.
35. PW1 confirmed that he obtained a court order and gave it to a process server who, in turn, took it to Molo adding that he gave his copy to the police. He stated that he could not remember the process server's name.
36. When referred to an affidavit of service filed on February 6, 2017, PW1 confirms that the process server indicates that he served the order on 22<sup>nd</sup> January adding that it is not true that the defendant was not served.
37. He admitted that he was not present during the service of the order and does not know if the process server was chased away. PW1 confirmed that he did not report to the Officer Commanding Station.
38. PW1 denied allegations that he obtained the title fraudulently but confirmed that he did not have consent of the Land Control Board and added that his lawyer kept the agreement for sale.
39. On re-examination, PW1 denied that the title was obtained fraudulently.
40. He also stated that he had never been charged in any court with the offence of fraud and that he had not heard of any report being made against him to the police.
41. Simon Mwangi Karinge testified as PW2. He testifies that he is the 3<sup>rd</sup> plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are his brothers.
42. He stated that land parcel No Mau Summit/Molo Block 2/158(Mona) is more than two acres but less than three acres in size.
43. He reiterated that the land is registered in his name together with Peter Gathutha Karinge and Peter Kariuki Karinge of ID No 7xxxx8. His ID No is 8xxxx2.
44. It is his testimony that the title to the suit property was issued on January 20, 2011 by the Registrar of Lands after they had bought it from the late Wangari Muchai between the year 2009 and 2010.
45. In response to clarification sought by the court, PW2 stated that he is not related to the defendant.
46. He further testified that he was not present during the negotiations for the sale but subsequently signed certain documents that required him to append his signature and photograph. He also testified that the person who was present at the negotiations was PW1.



47. It was his testimony that at some point him and the other plaintiffs went to the Assistant Chief to confirm whether the deceased had voluntarily sold the land to them and the village elders and the chief were present at the meeting.
48. In answer to clarification sought by the court, PW2 stated that he bought the suit parcel for Kshs 270,000/= but he did not know who received the money as he only gave the money to his brother.
49. On cross examination, he confirmed that he was not present during the negotiations and stated that they paid Kshs 270,000/= as the purchase price.
50. He also stated that he does not know how much was paid for the transaction and that it was his brother (PW1) who picked up the title deed from the Lands Office.
51. He confirmed that he did not have any receipts from the Lands Office or from Kenya Revenue Authority and that he has never seen any of the said receipts.
52. He admitted that he has never attended the Land Control Board as his brother was acting on their behalf. He also admitted that they have never attended any meeting between them and the seller in which she consented to selling the land to them.
53. PW2 further confirmed that his brother never informed him of attending the Land Control Board. He, however, denied that the purchase was illegal adding that they followed the necessary procedure.
54. He stated that they shared the cost of transfer and obtaining title.
55. The plaintiffs' closed their case.

#### **Defendant's Evidence.**

56. Benson Kariuki Muchai testified as DW1. His witness statement dated June 21, 2017 was adopted as part of his evidence.
57. In his evidence in chief, he stated that the suit against him is by the three plaintiffs. He testified that Wangari Muchai is his mother who died on December 17, 2016 and a death certificate No 4xxx3 was issued on April 28, 2017. He further stated that she passed away at St Mary's Hospital in Gilgil. The death certificate was marked and produced as Exhibit D1.
58. DW1 stated that the plaintiffs are claiming ownership of land parcel No Mau Summit/Molo Block 2/158 (Mona) which is in his late mother's name.
59. He also stated that the title deed to the suit parcel was misplaced and that he reported the matter to Molo Police Station. The police abstract was marked and produced as exhibit D2.
60. He produced land rates payment receipts as exhibit D3 (a) – (c). His testimony is that the receipts are for the years 2014, 2015 and 2017 and that the last payment was made on May 2, 2017. The receipts are evidence of payments made to the County Government of Nakuru.
61. He further testified that he conducted a search on April 23, 2013 which confirmed that the suit land is owned by Wangari Muchai. The certificate of search was produced as exhibit D4. He also testifies that he conducted another search in 2014 which revealed that the land belonged to his mother.
62. He testified that he disputes the plaintiffs claim that the suit property belongs to them.
63. It is his evidence that the plaintiffs presented a title deed issued in 2011 adding and that his mother had not told him that she had sold the land to anyone.



64. It is his testimony that he took his mother to hospital where she died and was buried on the suit property. He also testifies that he was never served with orders to stop the funeral.
65. DW1 stated that the plaintiffs' title was fraudulently acquired as he never saw any land sale agreement signed by his late mother.
66. DW1 further stated that he and the plaintiffs went to the police station on January 23, 2014. He narrated that the plaintiffs were asked to produce the green card for the suit parcel but they never brought any. He explained further that the area chief called him and he produced searches for the years 2013 and 2014.
67. When referred to exhibit P2, he stated that the title was issued on January 20, 2011 when his mother was alive and that his mother never told him that the plaintiffs were claiming her land.
68. DW1 further explained that he had commenced succession proceedings which were yet to be concluded. He ended his testimony by praying that he be granted orders in the counterclaim and that the plaintiff's suit be dismissed with costs.
69. On cross examination, he confirmed that his mother passed away on December 17, 2016. He also confirmed that he had delayed in commencing succession proceeding to the estate of his deceased mother because he had not obtained a death certificate.
70. He admitted that he reported the loss of title and has the OB dated June 15, 2017 and explained that he had not replaced the lost title because he is not the owner.
71. He also admitted that he has not commenced succession proceedings because of this suit adding that he is a beneficiary of the estate of Wangari Muchai. He further confirmed that he has copies of certificate of searches and knows that the land belongs to them.
72. The defendant also confirmed that the search that has been produced by the plaintiffs shows that the land belongs to them which is at variance with their position because he too had produced searches obtained in the years 2013 and 2014 showing that the land belongs to Wangari Muchai.
73. On re-examination he stated that there is a contradiction between the searches and the title. He also stated that the plaintiffs title was issued in 2011 while a search conducted in 2013 shows that the suit land belongs to his mother.
74. He further states that the plaintiffs dragged him to court without asking whether he had instituted succession proceedings to the estate of the late Wangari Muchai.
75. Liyai Collins testified as DW2. He introduced himself as a Land Registrar based at the Nakuru Land Registry.
76. He stated that he received summons in respect of land parcel No Mau Summit/Molo Block 2/158 (Mona) to produce the contents of the parcel file and a copy of the green card.
77. He stated that he had a certified copy of the land register for land parcel No Mau Summit/Molo Block 2/158 (Mona) adding that it was opened on July 25, 1990.
78. He further testifies that the approximate measurement of the suit parcel is 1.063 Ha and that it appears on the Registry Index Map No 118/3/5/9/10.
79. It is his evidence that on Part B of the register which is the proprietorship section, entry No 1 dated July 25, 1990 indicates that the land was registered to the Government of Kenya, entry No. 2 dated



- August 1, 1990 indicates that the land was registered to Wangari Muchai of ID No 0xxxx9/63 of P. O Box 140 Molo.
80. He further testified that entry No. 3 is dated August 2, 1990 and indicates that a title deed was issued. He stated that entry No 4 is dated June 5, 2009 and shows that a title deed is re-issued *vide* gazette notice No 3956 of June 2, 2006.
  81. He went on to state that entry No 5 is dated January 20, 2011 and it indicates that the land is registered to Peter Githutha Karinge of ID No 0xxx2, Peter Kariuki Karinge ID No 7xxx8 and Mwangi Karinge of ID No 8xxx2 of P.O Box 257 Molo and that entry No 6 is dated January 20, 2011 and shows that a title deed was issued to them.
  82. DW2 further stated that part C is the encumbrance section and it is blank adding that the excerpt of the register was certified on November 15, 2022. He produced it as exhibit D5.
  83. It was DW1's testimony that a parcel file ordinarily contains all applications in relation to the parcel of land.
  84. It is his evidence that in case of a transfer of agricultural land, the consent of the Land Control Board should also be in the file.
  85. It was also his evidence that he could not find the parcel file of the suit property.
  86. He testified that in case of a sale or gift, the following documents would be in possession of the Land's registry and the parties;
    - a. Duly signed and executed transfer forms between the parties.
    - b. Copy of Land Control Board application and consent.
    - c. Copies of Identification document, Identity Cards and KRA pins.
    - d. Registrar's copy of consent for transfer.
    - e. Payment receipts for registration.
    - f. Payment receipts for stamp duty.
    - g. The original title deed being surrendered.
  87. He also testified that all the documents are issued in triplicate, the Registrar keeps a copy and the other copy is issued to the transferee.
  88. He went on to testify that for the consents, a copy can be obtained from the Land Control Board. It is his evidence that going by the record, the plaintiffs should have a transfer from Wangari Muchai which copy of the transfer, he has not seen.
  89. On cross examination, DW2 confirmed that the 5<sup>th</sup> entry shows that there was a transfer to the plaintiffs and the documents support the ownership of the plaintiffs.
  90. He admitted that he was seeing the records relating to the suit property for the first time and added that he had not had any previous interactions with the said records. He stated that according the said records there is no anomaly.
  91. On re-examination, DW2 stated that there is no anomaly and that for the court to know the truth, entries on the register need to be supported with other documents.



92. He further states that the documents should be in the parcel filed or in possession of the person holding title especially in contentious matters such as the present one.
93. The defence case was then closed.

### **Issues for Determination**

94. The plaintiffs did not file any submissions while the defendant filed his submissions on December 23, 2022.
95. The defendant relies on section 26 of the *land Registration Act*, the case of *Samuel Kamere v Land Registrar Kajiado* [2015] eKLR and submits that the plaintiffs herein have not produced any sale agreement to show that they bought the suit property from the deceased Lucy Wangari Muchai.
96. The defendant further submits that the plaintiffs have not produced any receipts to demonstrate that they paid for the alleged sale agreement or stamp duty for the transfer of the title from the deceased Wangari Muchai to the plaintiffs.
97. The defendant also relies on the case of *Zacharia Wambugu Gathimu & another v John Ndung'u Maina* [2019] and submits that the provisions of section 26 of the *Land Registration Act* are meant to protect the genuine proprietor of land from being deprived of his rights by third parties and adds that in the absence of any supporting documents including transfer documents signed by the deceased, then one must conclude that the issuance of a title deed to the plaintiffs was un procedural.
98. The defendant concludes his submissions by seeking that the plaintiffs case be dismissed with costs.

### **Analysis and Determination.**

99. After considering the pleadings, testimonies of the plaintiffs, defendant and their witnesses and submission of the defendant, the following issues arise for determination;
  - a. Who is the registered owner of land parcel No Mau Summit/Molo Block 2/158 (Mona)?
  - b. Whether an eviction order should issue against the defendant over land parcel No Mau Summit/Molo Block 2/158 (Mona).
  - c. Whether the defendant is entitled to the orders sought in the counterclaim.
  - d. Whether this court should issue orders for cancellation of title and rectification of register.
  - e. Who should bear costs of this suit.

#### **A. Who is the Registered owner of land parcel No Mau Summit/Molo Block 2/158 (Mona)**

100. It is the plaintiffs' case that they bought land parcel No Mau Summit/Molo Block 2/158 (Mona) from Wangari Muchai, the defendant's stepmother between the years 2009 and 2010 for a consideration of Kshs 270,000.
101. It is also the plaintiffs' case that they were issued with a title deed on January 20, 2011 which was produced as exhibit P1. The plaintiffs also produced a certificate of official search dated January 21, 2014 that shows that the suit property is registered in their name.
102. The plaintiffs admit that apart from the certificate of search and copy of title, they did not have any other documents to support their ownership of the suit property.



103. They also admit that they did not go to the Land Control Board and neither do they have a copy of the sale agreement that they allegedly entered into with the late Wangari Muchai. In the plaint, the plaintiffs seek, among other orders, a declaration that the suit property belongs to them.
104. On the other hand, the defendant's case is that the suit property belongs to his late mother Wangari Muchai who died on December 17, 2016. He produced a certificate of death issued on April 28, 2017.
105. It is also his case that his mother did not sell the suit land to the plaintiffs and that the acquisition of the title by the plaintiffs was unprocedural.
106. In support of his case, the defendant produced as exhibit D1 a copy of the death certificate of Lucy Wangari Muchai, copies of receipts of payment of land rates dated February 5, 2014, September 23, 2015 and May 2, 2017 as exhibit D3 (a) to (c). He also produced an abstract from the police which indicates loss of title deed for LR No Mau Summit/Molo Block 2/158 as exhibit D2. The abstract is dated June 15, 2017. I note that this was obtained after the suit was filed. The defendant also produced a search certificate issued on April 23, 2013 as exhibit D4. The proprietorship section of the search certificate had two entries and they are as follows;
- 2.1.8.90 – Wangari Muchai
4. 5.6.09- title deed issued
107. The Land Registrar testified and produced a certified copy of the land register as exhibit D5. He took the court through its entries and on a scrutiny of the said exhibit it only tallies with the exhibit D4 to the extent of entries at No 2 and No 4. Entry 5 and 6 are missing exhibit D4.
108. Entry No 5 dated January 20, 2011 indicates that the plaintiffs were registered as the owners of the suit property and the title deed issued on the same day.
109. In his testimony, the Land Registrar (DW2) confirms that exhibit D4 and D5 are at variance and goes on to state that in the absence of the parcel file relating to the suit property, the plaintiffs would have to produce other documents that explain how the parcel was acquired and registered in their names. He listed these documents as: transfer forms, land control board consents, copies of identification documents among others adding that these documents are usually in triplicate and a transferee (s) should have his/her/ their copies.
110. The plaintiffs allege that they are the owners of the suit property and had it registered in their name in the year 2011. The defendant has produced a search certificate that points to the fact that his step mother was the owner of the suit property as at the year 2013.
111. The burden of proof normally lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. Bearing the defendant's evidence in mind, the plaintiff ought to have gone a step further to explain the root of his title.
112. In *Wainaina v Kiguru & another* (Environment & Land Case E023 of 2021) [2022], the learned judge cited with approval the decision in *Hebert L Martin & 2 others v Margaret J Kamar & 5 others* [2016] wherein it was held that

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that



brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.” (emphasis is mine)

113. Further, in the case of *Munyu Maina v Hiram Gathiba Maina*, civil appeal No 239 of 2009, the Court of Appeal held as follows

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

114. Section 24(a) of the *Land Registration Act* provides as follows;

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

115. Section 26 of the *Land Registration Act* provides as follows;

“26.

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

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

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.”

116. During the hearing of the present case, the question whether the plaintiffs had acquired the suit property unprocedurally arose. On cross examination PW1 confirmed that he did not have the land sale agreement to show how he purchased the suit property. He admitted that the suit property is



agricultural land and that he did not go to the Land Control Board to get the consent as they were purchasing the property.

117. The defendant alleges that the late Wangari lived on the suit parcel until her demise adding that her remains were interred on the suit parcel. The plaintiffs allege that the late Wangari Muchai moved to Bahati after she was evicted from Molo during land clashes and that the sale agreement was entered into with her while she was living in Bahati with her brother. They also allege that the interment on Wangari Muchai's remains on the suit parcel were in contempt of orders of injunction issued by this court. The defendant states that they were never served with such an order. I note that one of the prayers sought by the plaintiffs is an order of eviction against the defendant. The plaintiffs do not explain how the defendant came to be in possession of the suit land.
118. All these questions called for answers from the plaintiffs but they failed to offer any. I find that the plaintiffs have failed to discharge their burden of proof. In particular they have been unable to explain how land parcel No Mau Summit/Molo Block 2/158 (Mona) came to be registered in their names.

**B. Whether an eviction order should be issued against the Defendant over land parcel No. Mau Summit/Molo Block 2/158 (Mona)**

119. Bearing in mind my finding on issue (a) above, I decline to issue orders of eviction against the defendant over land parcel No Mau Summit/Molo Block 2/158 (Mona).

**C. Whether the defendant is entitled to the orders sought in his statement of defence and counterclaim.**

120. The defendant is seeking that the court gives a declaration that the late Wangari Muchai as the owner of the suit property.
121. It is not disputed that the suit property was initially registered in the name of Wangari Muchai. It is also not disputed that the said Wangari Muchai is deceased and the defendant produced her certificate of death as exhibit D1.
122. The court in the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR held as follows:

“...Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

29. In this matter therefore the respondent lacked the requisite *locus standi* to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.”
123. The defendant admitted that he has commenced succession proceedings which are yet to be concluded and he therefore has no *locus standi* to seek the orders in respect of the estate of the late Wangari Muchai as set out in his counterclaim.



124. This notwithstanding, my view is that the plaintiffs dragged the defendant to court and he had to offer a defence and/or explanation on the question of his occupation of the suit parcel. I am convinced that the defendant's prayers in the counterclaim are essential for purposes of preservation of the suit property for the benefit of the estate of the deceased. I am also well aware that this court has inherent powers under section 3A of the *Civil Procedure Act* and section 13 (7) of the *Environment and Land Court Act* to make any order or grant any relief as this court deems its just in order to meet the ends of justice.

#### **D. Whether this court should issue orders for cancellation of title and rectification of register**

125. Section 80(1) of the *Land Registration Act* provides as follows;

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

126. I have found that the title deed held by the plaintiffs was acquired unprocedurally and ought to be cancelled. Therefore, it is in the interest of justice that a declaration be issued that the late Wangari Muchai is the lawful and beneficial owner of land parcel No Mau Summit/Molo Block 2/158(Mona) and the register rectified in favour of the estate of the late Wangari Muchai.

#### **E. Who should bear costs of this suit.**

127. The general rule is that costs shall follow the event. This is in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

128. In the result, I find that the plaintiffs have failed to prove their case on a balance of probabilities and hereby dismiss this suit with costs to the defendant.

129. The counter claim succeeds and I enter judgment for the defendant in the following terms:

- a. A declaration is hereby issued that the late Wangari Muchai is the lawful and beneficial owner of land parcel No Mau Summit/Molo Block 2/158 (Mona).
- b. An order of permanent injunction is hereby issued restraining the plaintiffs from entering, trespassing, transferring, selling, alienating or interfering with the defendant's occupation and possession of parcel No Mau Summit/Molo Block 2/158 (Mona).
- c. An order of permanent injunction is hereby issued restraining the plaintiffs, their servants and/or agents from exhuming the remains of the late Wangari Muchai on parcel No Mau Summit/ Molo Block 2/158 (Mona).
- d. A declaration is hereby issued that the registration and issuance of title deed in respect of parcel No Mau Summit/ Molo Block 2/158 (Mona) to the plaintiffs was unprocedural, is null and void and the same is hereby cancelled.
- e. An order is hereby issued that the register of land parcel No Mau Summit/ Molo Block 2/158 (Mona) shall be rectified by deleting the names of the plaintiffs and registering the name of Wangari Muchai.



- f. The defendant shall have costs of this suit and interests thereon from date of judgment until payment in full.

130. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF JUNE, 2023.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**No appearance for the Plaintiffs**

**Miss Nancy Njoroge for the Defendant**

**Court Assistant; Ms. Monica Wanjohi.**

