



**Karugu (Suing as the Personal Representative of Peter Karugu Guandai - Deceased) v Kiburu & 3 others (Environment & Land Case 1375 of 2014) [2023] KEELC 18137 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18137 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1375 OF 2014**

**LN MBUGUA, J  
JUNE 15, 2023**

**BETWEEN**

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

**AND**

**LYDIA WAMBUI KIBURU ..... 1<sup>ST</sup> DEFENDANT**

**RISER ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**SIMON NJUGUNA KARIUKI ..... 3<sup>RD</sup> DEFENDANT**

**MARY NJERI MBURU ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. At the heart of the dispute herein is parcel L.R.2327/151, the suit land which was apparently owned by one Peter Karugu Guandai as at the time of his death on 26.8.2009. The plaintiff identifies herself as a wife and the personal representative of the estate of Karugu, but they were not living together at the time of his death. The 4<sup>th</sup> defendant also identifies herself as a wife of the deceased, (Karugu) and that she was living with him as at the time of his death. She is also an advocate of the High Court of Kenya and was conducting legal transactions on behalf of the deceased.
2. Vide an indenture of Conveyancing dated 14.9.2009 drawn by the 4<sup>th</sup> defendant, the suit property was transferred from Karugu to the 1<sup>st</sup> defendant. On 9.12.2011, the suit property was transferred from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, and on the same date, the land was transferred to the 3<sup>rd</sup> defendant. The plaintiff contends that the transfer of the suit land by Karugu Guandai to 1<sup>st</sup> defendant was unlawful as it was done after his death. The 4<sup>th</sup> defendant on the other hand avers that the deceased



had executed the transfer documents long before his death, and that the date of 14.9.2009 is the one when the documents were lodged at the lands registry.

### **Plaintiff's case**

3. The Plaintiff commenced this suit by a plaint dated 28.10.2014, where she contends that her husband Peter Karugu Guandai (deceased) was the registered proprietor of the property known as Land Reference No. 2327/151 situated in Karen, having purchased it from one Matere Keriri vide a conveyance dated 14.3.2008. She contends that while the deceased passed away on 26.08.2009, the suit property was purportedly transferred to the 1<sup>st</sup> Defendant vide an indenture of conveyance dated 14.9.2009 drawn by the 4<sup>th</sup> Defendant. That the 1<sup>st</sup> Defendant purportedly transferred the suit property to the 2<sup>nd</sup> Defendant who in turn transferred the said land to the 3<sup>rd</sup> Defendant.
4. It is the Plaintiff's case that the purported conveyances of the suit property to the Defendants were done as part of a fraudulent collusion between the Defendants to illegally divest the estate of the deceased of the suit property. She seeks a declaration that the estate of the late Peter Karugu Guandai (deceased) is the lawful proprietor of the suit property, that there be an order cancelling the conveyances to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, an order requiring the defendants to vacate the suit premises, a permanent injunction restraining them (defendants) from dealing with the suit property and general damages as well as costs of the suit.
5. During the trial, the Plaintiff's case was led by 1 witness; PW1 who is the Plaintiff. Her witness statement dated 28.10.2014 was adopted as her evidence and the documents in her list of even date were produced as exhibits.
6. In her witness statement, she states that Karugu Guandai neither sold nor transferred the suit property in his lifetime. He passed away on 26.8.2009, thus he could not have executed the conveyance of the suit property to the 1<sup>st</sup> Defendant on 14.9.2009 as he had been dead for 18 days. She further states that the 4<sup>th</sup> Defendant who purports to have witnessed the signing of the conveyance committed fraud as the deceased's signature appearing on the conveyance could only be forgery for which the 4<sup>th</sup> Defendant was charged in Criminal Case No.1360/2012.
7. She states that in the alleged conveyance dated 14.9.2009, the suit property was sold for 3 million yet it was worth ksh. 30million at the time and deceased's estate never received the purchase price. She also states that the 1st Defendant then purported to transfer the suit property by a conveyance dated 9.12.2011 to the 2<sup>nd</sup> Defendant for ksh.10 million in furtherance of the fraud. She adds that the 2<sup>nd</sup> Defendant was aware that the suit property belonged to the deceased as she had caused a caveat emptor to be published in the daily nation newspaper of 21.4.2011.
8. She also states that even though the suit property was transferred to the 3<sup>rd</sup> Defendant allegedly for ksh.11 million by conveyance dated 9.12.2011, no money was paid to the 3<sup>rd</sup> Defendant as it was just a scheme to further alienate the suit land from the estate of the deceased.
9. On cross-examination, Pw1 stated that she was not living with her late husband at the time of his death as they had separated in April 2007 of which Karugu went to live with the 4<sup>th</sup> defendant in a place called South lands. Pw1 then filed for divorce in July 2007 being CMC Divorce Cause 137 of 2007.
10. Pw1 had then rented accommodation in Kileleshwa and during the separation, she was privy to her late husband's dealings to a limited extent. She also filed a case O.S No. 34 of 2007 relating to matrimonial properties. She gained access to the documents in respect of the suit land after her husband's death and it is the date in the conveyance to the 1<sup>st</sup> Defendant that prompted her to conclude that there was forgery. She also stated that she placed the 1<sup>st</sup> caveat on the suit land when she commenced divorce



proceedings and at the time, the land was in Matere Keriri's name whom they had bought the land from.

11. She states that the 4<sup>th</sup> Defendant is a lawyer, but she was not her husband's lawyer. She further stated that the Indenture of conveyance to the 1<sup>st</sup> Defendant was drawn by Njeri Mburu & Company Advocates and it was witnessed by the 4<sup>th</sup> Defendant though she did not see any sale agreement relating to the conveyance.
12. She stated that they purchased the suit land from Matere Keriri thus it is possible that the title would still be in his name in 2007. They started paying for the land in 1993 and they were given possession though it remained vacant as their matrimonial home was in Loresho. PW1 also stated that she cannot remember when the title to the suit land was issued to her late husband but the signature on the conveyance was forged as a document examiner testified in the criminal case and confirmed that the signature was a forgery.
13. Referred to Criminal Case No.1360/2012 in which the 4<sup>th</sup> Defendant was charged, she stated that the 1<sup>st</sup> Defendant testified therein that no money changed hands in respect of the 1<sup>st</sup> conveyance. She also stated that she is the one who made a complaint to the police about the forgery and she is the one who gave samples of signatures of her late husband to the police.
14. Referred to the succession proceedings in respect of the estate, she stated that the succession cause is No. 1931/2009 and the 4<sup>th</sup> Defendant is an objector in the said cause. She added that she was granted a limited grant in the cause to initiate the present proceedings and she did not consult the 4<sup>th</sup> Defendant when applying for the same.
15. She also stated that she does not have personal evidence that the transaction relating to the transfer to Lydia was not done prior to the demise of her late husband.
16. On re-examination, Pw1 stated that the conveyance from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was executed by the 4<sup>th</sup> Defendant as an Attorney of the 1<sup>st</sup> Defendant, by then Pw1 and the 4<sup>th</sup> Defendant had filed a petition and a cross-petition respectively and listed the suit property as an asset of the deceased.
17. She also stated that the conveyance from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was done on 09.12.2011 and the subsequent transfer from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant was done on the same day. They were both subsequently registered on the same day; 21.12.2011 and stamped on the same day. One bore day Book No.2014 of 21.12.2011 and the subsequent conveyance bore day book No.2015 of 21.12.2011. The value assessed for the purpose of stamp duty was ksh.10 million and 11million respectively on the same day.

#### **Case for the 1st Defendant.**

18. The 1<sup>st</sup> Defendant opposed to the suit vide her statement of defence dated 28.09.2015. She contends that she bought the suit property on 10.8.2007 from Karugu Guandai (deceased) during in his lifetime.
19. In evidence, the 1<sup>st</sup> Defendant advanced her own case as DW1. Her witness statement allegedly dated 21.10.2015 and filed on 3.11.2015 was adopted as her evidence in chief; but the court did not trace the said document in the court file. She also produced her D-Exhibits 1-5, the documents in her bundle filed on 3.11.2015. Her case is that she began the purchase process of the suit land in year 2007 and the transfer was signed in 2009. By the time she signed the transfer, she had paid 50% of the purchase price and all documents were signed during Mr. Karugu's lifetime.



20. When cross-examined, she stated that when Mr. Karugu died, she informed the 4<sup>th</sup> Defendant that she was not keen to proceed with the transaction.
21. On her relationship with the deceased and the 4<sup>th</sup> Defendant, she stated that she knew Karugu Guandai through the 4<sup>th</sup> Defendant who was her friend for a period of over 30 years. It was the 4<sup>th</sup> Defendant who approached her to buy the suit property, and it was agreed that the 4<sup>th</sup> Defendant would be the advocate for both the purchaser and seller of the suit land.
22. The 4<sup>th</sup> Defendant whose offices were at Embassy House sent the sale agreement to her and she signed it in August 2007. At the time Mr Karugu died she had paid 50% of the purchase which was ksh.4,320,000/=. She stated that the receipt dated 10.8.2007 was issued to her by the 4<sup>th</sup> Defendant after she deposited cash money into the 4<sup>th</sup> Defendants' bank account at Co-operative bank but she does not have the deposit slips as she gave them to the 4<sup>th</sup> Defendant.
23. DW1 also stated that Completion date for the sale of the suit land was on the 30<sup>th</sup> day following transfer of the property into Karugu's name or 90<sup>th</sup> day after the date of the agreement whichever was earlier. Upon the death of Karugu, she decided not to proceed with the transaction, of which, this was a personal decision.
24. She stated that she did not see Karugu Guandai sign the agreement for sale as she dealt with the 4<sup>th</sup> Defendant who was the lawyer for both parties. She did not see him sign the conveyance either and there was no date when the indenture of conveyance was presented to her to sign. When she got the conveyance back, it had a stamp but it was still undated.
25. She told the court that she did not sell the suit property to the 2<sup>nd</sup> Defendant. The purpose of the Power of Attorney which she gave to the 4<sup>th</sup> Defendant was to surrender the property back to Karugu Guandai (Deceased) so that she could get a refund of the purchase price. She was not refunded the monies she paid towards the purchase of the suit property.

#### **Case for the 2nd defendant**

26. The 2<sup>nd</sup> Defendant filed its own statement of defence dated 28.09.2015, denying the allegations set out in the plaint against it. A witness statement and documents were filed for this party, but were not tendered as evidence during the trial.

#### **Case for the 3rd Defendant**

27. The 3<sup>rd</sup> Defendant filed a statement of defence dated 28.9.2015. He denies the allegations contained in the plaint and contends that he is in possession of the suit land. He further contends that the late Karugu Guandai sold the suit land and signed transfer in his lifetime and the suit land was conveyed to him on 9.12.2011.
28. The 3<sup>rd</sup> defendant testified as DW2. His witness statement dated 21.10.2015 was adopted as his evidence, while his documents in the list of even date were produced as his exhibits. He testified that he purchased the suit property and executed the sale agreement dated 1.12.2011 between him and one of the directors of the 2<sup>nd</sup> Defendant. He further testified that he executed an indenture of conveyance and the same was registered on 21.12.2011 at the lands office.
29. He told the court that the 2<sup>nd</sup> Defendant was not the registered owner of the suit property when he bought it as it was in the 1<sup>st</sup> Defendant's name. He was shown a Power of Attorney donated by the 1<sup>st</sup> Defendant to the 4<sup>th</sup> Defendant as well a sale agreement between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant dated 3.11.2011. Therefore, the 2<sup>nd</sup> Defendant had purchased the property from the 1<sup>st</sup>



Defendant through the 4<sup>th</sup> Defendant and on the strength of those documents, he entered into an agreement to buy the suit land.

30. Dw2 contends that there was no caveat lodged on the title as at the time he purchased the suit land. By the time of his testimony, he had sold the suit property to an entity known as West Light International.
31. When cross-examined, he stated that the sale agreement dated 3.11.2011 was between him and the 2<sup>nd</sup> Defendant, the latter was not the registered owner of the suit land therefore the said clause is incorrect.
32. Referred to the conveyance between him and the 2<sup>nd</sup> Defendant and the one between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, he stated that both are dated 9.12.2011, both registered on the same day. The 1<sup>st</sup> Defendant was the registered owner of the suit land at the time he purchased the said land, but he never dealt with her.
33. When re-examined, he stated that the registration instruments for the two transactions, that is the transfer from 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant and the one from 2<sup>nd</sup> defendant to Dw2 were done simultaneously at the lands office, and there is nothing wrong about that. His lawyer in the transaction was Kanyora and Co. Advocates, while the lawyer for the seller was the 4<sup>th</sup> defendant.

#### **Case for the 4th Defendant**

34. The 4<sup>th</sup> Defendant filed a statement of defence dated 26.10.2015. She contends that the conveyance of the suit land to the 1<sup>st</sup> Defendant was executed by the deceased and left undated until date of presentation for registration as happens with conveyancing transactions. She admits that she was charged with fraud but avers that she was acquitted after a full trial.
35. The 4<sup>th</sup> Defendant advanced her own case as Dw3. Her witness statement dated 26.10.2015 and her Replying Affidavit sworn on 5.11.2015 were adopted as her evidence. Her documents are in a list dated 26.10.2015.
36. Her testimony is that the deceased, Karugu was her husband while the Plaintiff herein is her co-wife. It is her testimony that at the time the sale agreement between Karugu and 1<sup>st</sup> defendant was entered into in year 2007, the deceased and the Plaintiff were not staying together as the Plaintiff had filed divorce proceedings as well as matrimonial property case so she could not have known what was happening in Karugu's life as she had moved out of their matrimonial home.
37. She testified that the sale was conducted in her law firm Njeri Mburu Advocates and the payments were made by the 1<sup>st</sup> Defendant to her law firm which issued a series of receipts produced by the 1<sup>st</sup> Defendant. She stated that for the last receipt No.0705, the payment was made on 3.2.2009 for ksh.2,020,000/= and it constituted ksh.1,700,000/= as a further deposit of the purchase price while kshs.320,000/= was stamp duty which was to facilitate transfer. By then, Karugu was alive and well so these transactions were done during his lifetime.
38. She testified that as of February 2009, she witnessed the execution of the transfer of the suit land from her husband, Karugu to the 1<sup>st</sup> Defendant, and the latter went home with a copy as security. The document was undated. She then handed the original transfer to her husband to undertake registration as she had given him the funds. He had a contact who was willing to expedite the process, and that is how the suit land came to be handed over to the 1<sup>st</sup> Defendant.
39. She stated that it is not unusual for a conveyance to be executed but left blank at the part of the date but it would have to be registered. The deceased signed the transfer in February 2009. She stated that when



- the deceased sold the land, it was not in his name, he had purchased it from Mr. Metere Kereri but he had not concluded the purchase price so part of the purchase price was gotten from the 1<sup>st</sup> Defendant.
40. She stated that her husband was a civil engineer who needed funds to conduct his business but due to the divorce case, the 1<sup>st</sup> Defendant had placed caveat on all his properties. Karugu was also sickly, that is why they needed funds at that time, so they decided to sell the suit property which he was in the process of buying so nothing was done underhand.
  41. When cross-examined, Dw3 stated that she was married to the deceased for 17 years and she was staying with him at the time of his death. She further stated that she knows that there is a succession case in respect of the Estate of Karugu Guandai and one of the issues to be dealt with was if she was a wife of the deceased. She stated that she witnessed the sale agreement between Karugu Guandai and the 1<sup>st</sup> Defendant on 10.8.2007 and she was acting for both parties. The purchase price was ksh.8 million of which, the 1<sup>st</sup> Defendant paid a total of kshs.4.3 million inclusive of the stamp duty. The sale agreement had provided that the balance of the purchase price would be paid after the transfer of the property but it was not paid because her husband passed way between the period of payment of deposit and when the process of transfer was ongoing.
  42. She stated that since she was not involved in the actual process of transfer, she did not know where the documents were, but the 1<sup>st</sup> Defendant had not paid the full purchase price as at the time of her husband's death. In the conveyance between Karugu and the 1<sup>st</sup> Defendant, the same is dated 14.9.2009 and the execution page shows she witnessed the document. At page 5 of the document, it shows the date of execution.
  43. She stated that by 14.9.2009, Karugu had passed on, so he did not execute on that date. After the death of her husband, she executed the sale agreement dated 3.11.2011 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on behalf of the 1<sup>st</sup> Defendant who was selling to the 2<sup>nd</sup> Defendant.
  44. She stated that the 1<sup>st</sup> Defendant did not finish paying for the suit land. She declined to proceed yet there was a title registered in her name. The 1<sup>st</sup> Defendant donated a Power of Attorney to her to deal with the suit property and delegate her position as the registered owner and she was to proceed with sale and refund the money which the 1<sup>st</sup> Defendant had paid.
  45. Referred to the evidence of the 1<sup>st</sup> Defendant, she stated that the Power of Attorney she got from her enabled her to deal with the property. She told the Court that she did not have evidence of payment made by the 2<sup>nd</sup> Defendant because after paying 10% deposit, the sale aborted as there was no payment of balance made within 90 days. The 2<sup>nd</sup> Defendant offered the same property to another purchaser but it had to be registered because in the subsequent sale, 2<sup>nd</sup> defendant was making something more, that is why there were simultaneous registrations.
  46. She stated that the conveyance dated 9.12.2011 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant makes reference to a consideration of ksh.10 million but that is incorrect. The 1<sup>st</sup> Defendant did not execute the said conveyance while the conveyance dated 9.12.2011 between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants talks of a purchase price of sh.15 million and the 3<sup>rd</sup> Defendant told the Court that he paid the purchase price to M.N Kanyora Advocates and she does not have evidence of that payment in Court.
  47. She stated that after the transfer was concluded, criminal charges were leveled against her and the 1<sup>st</sup> Defendant declined to deal with her and chose to wait for the conclusion of the case, so the 1<sup>st</sup> defendant has not been paid her refund. Referred to succession cause 1931 of 2009, where the suit land is listed as asset no 14, Dw3 stated that her advocate just duplicated the documents of the plaintiff, but her position is that the suit property does not form part of the estate of the deceased.



48. When re-examined, she stated that the insertion of another date at registration in a conveyancing document doesn't amount to fraud.

### Submissions

49. The submissions of the plaintiff are dated 2.11.2022. She urges the Court to draw an adverse inference from the difference in consideration in the agreement for sale in favour of the 1<sup>st</sup> Defendant which indicates ksh.8 million and the conveyance document which indicates 3 million. She points out that the variance is a case of tax evasion and is illegal. She relies on the decision in *Trans Mara Sugar Company Limited v Ben Kangwaya Ayiamba & another* [2020] eKLR to submit that courts will not enforce contracts that contravene the law.
50. Relying on the case of *Esther Kabugi Njuguna v Martha Chebet & others* [2020] eKLR, she submits that the purported sale and conveyance of the suit property to the 1<sup>st</sup> Defendant would also be liable to be nullified for lack of consideration which the 1<sup>st</sup> and 4<sup>th</sup> Defendants admitted that it was not paid in full.
51. Thus in tandem with the provisions of Section 26 (1) of the *Land Registration Act*, the transfer of the suit land from the deceased to the 1<sup>st</sup> defendant is liable to be cancelled. To this end, she relies on the case of *Alice Chemutai Too v Nickson Kipkurui & others* [2015] eKLR. She adds that having not obtained any good title from the late Guandai, it naturally follows that the 1<sup>st</sup> Defendant could not have been in any position to pass any good title to the 2<sup>nd</sup> Defendant who in turn had no good title to convey to the 3<sup>rd</sup> Defendant. She relies on the case of *Mohamed Shananaz Butt vs Kenya Revenue Authority & others* [2020] eKLR to submit that if a buyer acquires a defective title, they cannot claim to have been an innocent purchaser.
52. The plaintiff points out that the 1<sup>st</sup> Defendant was categorical that she did not see the late Guandai sign either the purported sale agreement or the conveyance. She argues that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are so bold in their fraud so as to even purport to sell and transfer the suit property to yet another party known as Westlite International Limited whilst this suit was subsisting contrary to the doctrine of *lis pendens* as defined in *Naftali Ruthi Kinyua v Patrick Thuita Gachure and City Council of Nairobi Civil Appeal No.44 of 2014*.
53. The submissions of the 1<sup>st</sup> defendant are dated 21.12.2022 where they address the following issues;
- a. Whether the 1<sup>st</sup> Defendant acquired good title to the suit property from the deceased.
  - b. Whether the conveyance from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was proper, legal and lawful.
  - c. Who ought to bear the 1<sup>st</sup> Defendants costs?
54. The 1<sup>st</sup> Defendant submits that forgery is a serious allegation that cannot be proven by inference through mere cursory glances at documents but by calling a document examiner, whom the Plaintiff failed to call to ascertain that the sale agreement between the 1<sup>st</sup> Defendant and the late Karugu Guandai and the subsequent conveyances were forgeries. To this end, reference was made to the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR.
55. She also submits that the value of ksh.3 million on the conveyance document between the late Guandai and the 1<sup>st</sup> Defendant was assigned to the property by the Government valuer for purposes of payment of stamp duty pursuant to the provisions of Section 10(1) of the stamped duty Act and if the Plaintiff



- was aggrieved by the assessment, she would have sought for reassessment as per the procedure at Section 17 of the *Stamp duty Act*.
56. On the issue of the legality of the conveyance from herself to the 2<sup>nd</sup> Defendant, she submits that in 2011, she contacted the 4<sup>th</sup> Defendant and indicated that she wanted to rescind the agreement for sale and at that point, she was aware that the suit property had been transferred to her. As such, she donated a Power of Attorney specifically authorizing the 4<sup>th</sup> Defendant to sign the transfer forms or any other legal documents necessary to transfer the suit property. The said Power of Attorney was registered and she did not revoke it prior to the registration of the transfer to the 2<sup>nd</sup> Defendant and neither has its validity been challenged by the Plaintiff in any proceedings. She submits that the 4<sup>th</sup> Defendant was properly empowered and well within the law in executing the conveyance from herself to the 4<sup>th</sup> Defendant.
  57. The submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are dated 9. 10.2022, where they argue that the purchase of the subject property by the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant was not fraudulent as there were no anomalies to the said transaction, and that the sale agreement dated 3.11.2011 between the 4<sup>th</sup> Defendant and the 2<sup>nd</sup> Defendant confirms that the 4<sup>th</sup> Defendant was selling the suit property by virtue of a donated and registered Power of Attorney IP/A57375/1. They rely on the case of John Guchu Njoroge v Mboi Kamiti Farmers Company Limited [2019] eKLR to submit that a donated power of attorney is valid unless revoked.
  58. They added that while the Plaintiff alleges that she placed a caveat emptor in the newspaper on 21.4.2011, it has no legal consequence as it was not registered on the title as required under Section 68 of the *Land Registration Act* No.3 of 2012.
  59. They rely on the case of C'est Bon Superior School Ltd v Joseph Alex Gichuhi & 2 others [2019] eKLR as well as Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR to submit that the 2<sup>nd</sup> Defendant is a bonafide purchaser for value without notice.
  60. The submissions of the 4<sup>th</sup> defendant are dated 5.12.2022, where she avers that the Plaintiff lacks capacity to bring this suit, pointing out that the issue to determine the administrators of the Estate of Mr. Karugu Guandai are pending determination in Succession Cause No. 1931 of 2009. She also submits that since the suit property is listed as an asset of the deceased in Succession Cause No 1931 of 2009, the filing of this suit offends Section 6 of the *Civil Procedure Act*.
  61. She relies on the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR to submit that the particulars of fraud alleged against her were not proved to the required standard under Section 107 of 109 of the *Evidence Act*. Adding that through the evidence of DW1, it is clear that the suit premises were sold by the deceased during his lifetime and the conveyance drawn and executed without dating as it happens in many conveyancing transactions.
  62. On whether there was consideration, she submits that DW1 established that she paid the purchase price and since the Plaintiff was not involved in the transactions, she cannot dispute its performance.

### **Determination**

63. Having regard to the pleadings, the evidence adduced and the rival submissions, I deem it fit to frame the issues for determination as follows;
  - i. Whether the Plaintiff has capacity to file this suit?
  - ii. Was the sale and transfer of the suit property from the deceased to the 1<sup>st</sup> Defendant done through fraud?



- i. Whether the subsequent sale and transfer of the suit property to the 2<sup>nd</sup> and then to 3<sup>rd</sup> defendant was also conducted through fraud.
  - iv. Whether the suit land should form part of the estate of the deceased Karugu Guandai?
64. On the 1<sup>st</sup> issue, the 4<sup>th</sup> Defendant has argued that the Plaintiff has no capacity to file this suit pursuant to status quo orders issued on 28.9.2012 in Succession Case No.1931 of 2009; In the Matter of The Estate of Peter Karugu Guandai (deceased). However, the said order does not revoke the Plaintiffs' Limited Grant of Letters of Administration Ad Colligenda Bona issued on 29.4.2010 which gave her capacity to file this suit. I conclude that the plaintiff has capacity to sue in this matter.
65. On whether the sale and transfer of the suit property from the deceased to the 1st Defendant was done through fraud, the defendants argue that the deceased sold the land during his lifetime. The plaintiff however contends that the transfer document bears a date of 14.9.2009, yet Karugu had already passed on. It is not in dispute that Karugu died on 26.8.2009, while the conveyancing instrument of transfer to the 1<sup>st</sup> defendant is dated 14.9.2009. The explanation given by DW1 and Dw3 is that Karugu had duly signed the relevant documents, that the 4<sup>th</sup> defendant only dated the transfer document at the point of registration.
66. The provisions of Section 107 of the *Evidence Act* stipulate as follows;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
67. While Section 109 thereof further provides that:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
68. What resonates from the above analysis is that he who alleges bears the burden of proving, see - Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR.
69. The claim of the plaintiff as set out in her pleading is anchored on fraud. She avers that the transfer of the suit property from Karugu to 1<sup>st</sup> defendant, then to the 2<sup>nd</sup> and finally the 3<sup>rd</sup> defendant was done through fraud. It thus behooves the plaintiff to prove first and foremost that there was fraud in the aforementioned transactions. To this end, I pose the question; Does the title now held by the 3<sup>rd</sup> Defendant or anyone claiming under him now fall for impeachment under Section 26 of the *Land Registration Act*? Was the said title acquired unprocedurally and or through fraud, initially by the 1<sup>st</sup> defendant as claimed by the plaintiff?.
70. The legal position as set out in Article 40(6) of *the Constitution* and Section 26 of the *Land Registration Act* is that title to property that is obtained fraudulently or illegally in violation of the provisions of the law cannot be sacrosanct; See Chemey Investment Limited v Attorney General & 2 others [2018] eKLR, Amos Kibata Githeko v Loise Gachiku Kinuthia [2021] eKLR, Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another [2013] eKLR.



71. In *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR the Court held that;
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”
72. The Black’s Law Dictionary defines Faud as follows;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right”
73. In the case of *R. G. Patel v. Lalji Makanji* [1957] EA 314 the former Court of Appeal for Eastern Africa stated thus:-
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
74. In her pleadings, the plaintiff has alluded to the signature of the deceased having been forged in the transfer instrument. The only evidence adduced to support this allegation is the fact that the transfer document bears the date of 14.9.2009, by which date Karugu had passed on. The plaintiff did not however tender any plausible evidence to indicate that the deceased did not sign the said document. During cross-examination by counsel for the 4<sup>th</sup> defendant, the plaintiff had stated thus;
- “I do not have personal evidence that the transaction relating to the transfer to Lydia was not done prior to the demise of my late husband”
75. On the other hand, Dw1 produced the sale agreement dated 10.8.2007 indicating that the sale of the land between Karugu and the 1<sup>st</sup> defendant commenced a while back in year 2007. Looking at the signature of Karugu Guandai with a layman’s eye as imprinted in the sale agreement dated 10.8.2007, vis a vis his alleged signature in the transfer document dated 14.9.2009, the two signatures appear the same.
76. Apparently, the 4<sup>th</sup> defendant was charged with various offences relating to uttering false documents in the criminal case 1360 of 2012 (see plaintiffs documents). In a judgment delivered on 6.10.2014, (judgment is an exhibit of 4<sup>th</sup> defendant), the court noted that the hand writing expert did not point out the similarities or dissimilarities between the alleged forged signatures of Karugu Guandai. The said court had found that there was no evidence to prove that the signature of Karugu Guandai was inserted after his death.
77. Similarly, I find that no evidence has been tabled before this court to indicate that the signatures of Karugu were inserted on the sale agreement and the transfer instrument after his demise.
78. It is not lost to this court that in respect of the aforementioned criminal case, the plaintiff has chosen to avail only the charge sheet containing numerous counts of offences, but was mute on the outcome, particularly the judgment. She is thus guilty of non-disclosure of material facts which undermines justice and introduces festering waters into the pure streams of justice; See - *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR.



79. At this juncture, it is pertinent to interrogate the legal frame work which governs the execution of documents in order to determine the validity of the transfer document dated 14.9.2009. The provisions of Section 108 of the Registered Land Act Cap 300 (Repealed) stipulated that;
- “Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form...”.
80. While Section 109 thereof provided that;
- (1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument.
  - (2) Subject to section 124 (2), an instrument shall be deemed to have been executed only –
    - a. by a natural person, if signed by him;....”
81. The verification of the execution was provided for under Section 110 of the aforementioned statute in the following terms;
- “(1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity”.
82. The above provisions of law are echoed in the current legal regime to be found under Sections 43- 46 of the Land Registration Act. In particular, Section 44 thereof provides that;
- (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
  - (2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person’s signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument”, Emphasize added.
83. From the foregoing provisions of law, (both old and new law), it is apparent that the transfer document had been duly signed and had therefore met the requisite criteria set out under the applicable law.
84. It is noted that the 4<sup>th</sup> defendant has given a plausible explanation that the instrument of conveyance of the suit property from Karugu to the 1<sup>st</sup> defendant had been executed way back in February 2009, and she only inserted the date of 14.9.2009 at the time of registration. That evidence is corroborated by Dw1 who testified that at the point of signing the conveyancing document, the said instrument did not have a date. She went on to state that;
- “I got the conveyance with Mr Karugu’s signature soon after I had signed. When I got it back, it had a stamp but it was still undated”
85. I find that in absence of any challenge to the signature of Karugu both in the sale agreement of 10.8.2007 and the conveyancing document of 14.9.2009, it follows that the latter document had been duly executed paving way for it to become a registrable instrument.
86. The fact that Dw1 had purported to rescind the contract of sale does not in any way invalidate the conveyancing instrument. After all, she had already done her part in so far as execution of the transfer



was concerned. Further, she was purporting to rescind the contract after the death of the vendor, Karugu.

87. Another point for consideration relates to the payments made by 1<sup>st</sup> defendant. The 1<sup>st</sup> payment of sh. 1 000 000 was made on 16.7.2008, with others being made on 10.8.2007 (sh.800 000), on 22.11.2007 (sh 500 000) and on 3.2.2009 (sh.2 020 000) giving a total of sh. 4 320 000. All these amounts were made during the lifetime of Karugu and this buttresses the claim of the 1<sup>st</sup> and 4<sup>th</sup> defendant's that indeed Karugu had embarked on selling the land, long before he even acquired a title to the same in year 2008.
88. I also find that the status of the parties (read plaintiff and 4<sup>th</sup> defendant) in relation to the deceased is a point of concern. This is a situation whereby the deceased was separated from the plaintiff, and in her own words, their relationship was not cordial. The deceased was living with the 4<sup>th</sup> defendant. The narration given by the 4<sup>th</sup> defendant is that though the deceased had purchased the land from one Matere keriri in 2007, he was unable to conclude the purchase due to caveats placed on by the plaintiff in the ongoing divorce case, and that Karugu was also ailing. He thus needed funds, hence the move to sell the suit land to the 1<sup>st</sup> defendant. This piece of evidence is buttressed by the contents of Clause no.1 in the agreement of 10.8.2008 where the vendor (Karugu) had indicated that the property had not yet been transferred to him. The foregoing is another tell tale sign that Karugu had indeed embarked on selling the suit property long before it was registered in his name. The plaintiff on the other hand has no narrative at all to give this court appertaining to the transactions carried out by Karugu in respect of the suit property as from year 2007 up to the time of his demise on 26.8.2009.
89. It follows that whatever Karugu did in the aforementioned transactions is intricately intertwined with the actions and or omissions of the 1<sup>st</sup> and 4<sup>th</sup> defendants. Thus the deceased (now his estate) cannot be severed from any kind of irregularities arising out of the said sale transactions.
90. In the case of *C'est Bon Superior School Ltd v Joseph Alex Gichuhi & 2 others* [2019] eKLR cited by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, I was dealing with a situation whereby a vendor (1<sup>st</sup> defendant) sold land using the family company but without the knowledge of his wife. I held thus;
- “ Any fraud, illegalities and irregularities attributed to 1st defendant ought to be borne by his estate. And since the case against him was marked as abated, then such blame cannot be off loaded unto the 2nd defendant”.
91. In the case at hand, the plaintiff has not sued the estate of Karugu, rightly so because she is the one representing the said estate in this suit. But again, she cannot purport to offload any blame unto the defendants in relation to the sale of the suit land by Karugu to 1<sup>st</sup> defendant while leaving out the estate of the deceased!.
92. In the case of *Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others* [2019] eKLR, where a man was claiming the land of his deceased brother long after the death of the said brother, I invoked the latin maxim; “ *Mortui non mordent*” which means that “dead men don't bite/ dead men don't tell tales.” In the instant case, Karugu is gone, he was not living with the plaintiff. Thus the plaintiff cannot purport to cast aspersions on the dealings which were undertaken by Karugu during his lifetime in so far as the transfer of the suit property is concerned.
93. The upshot of the analysis herein is that there is no tangible evidence to indicate that the sale and transfer of the suit property from the deceased to the 1<sup>st</sup> Defendant was conducted though fraud.
94. Was the subsequent sale and transfer of the suit property to the 2<sup>nd</sup> and then to 3<sup>rd</sup> defendants also done through fraud?. Having found that there is no evidence of fraud in the transfer of the suit property by



Karugu to 1<sup>st</sup> defendant, it then follows that the plaintiff has no capacity to challenge the validity of the subsequent sale transactions.

95. It is clear that the 1<sup>st</sup> defendant has not been refunded back her monies. However, she has not set out her claim in the pleadings. None of the other defendants have set out a claim against each other. It follows that the call made by the plaintiff for the impeachment of the title to the suit property is not merited.
96. Having held that there was no evidence of fraud in the sale of the suit land by Karugu, and having made a pronouncement that the titles to the said land cannot be impeached, I find that the suit land does not form part of the estate of the deceased.
97. Further, whatever dues are owed to any party and or entity, then the same are recoverable as debts.
98. In conclusion, I find that the plaintiff has not proved the particulars of fraud set out comprehensively in paragraph 11 (i-xviii) of the plaint on a balance of probabilities. In the circumstances, the plaintiff's suit is hereby dismissed. On costs, I have taken into consideration that some of the combatants herein (read plaintiff and 4<sup>th</sup> defendant) still have ongoing legal duels to deal with (i.e probate matters), while the issue of unpaid funds to some parties still lingers. In the circumstances, I direct that each party bears their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Koech for Plaintiff

Mwadumbo for 1<sup>st</sup> Defendant

Gachau Karuiuki for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant and holding brief for Mbigi Njuguna for 4<sup>th</sup> Defendant

Court assistant: Philis

