



REPUBLIC OF KENYA



**Sian & another v Sian & 2 others (Environment and Land Case Civil Suit 6 of 2019) [2023] KEELC 20432 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 6 OF 2019  
LN MBUGUA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**NIRMAR KAUR SIAN ..... 1<sup>ST</sup> PLAINTIFF**

**LAKHBIR KAUR BANSAL ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PRITHVI PAL SINGH SIAN ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The Pleadings**

1. The Plaintiffs are a mother and daughter team, while the 1<sup>st</sup> defendant is a son and brother of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively. Plaintiffs commenced this suit by a plaint dated 14.12.2018, contending that the 1<sup>st</sup> Plaintiff was the legal beneficial owner of parcel LR No 209/3682, but the 1<sup>st</sup> Defendant caused the suit property to be fraudulently transferred into his name.
2. The plaintiffs seek the following orders;
  - a. That a permanent injunction do issue restraining the Defendants, by themselves, their agents, employees, assigns, servants, representatives or whomsoever acting under their authority from alienating, selling, leasing, encroaching and or trespassing, interfering, wasting or further dealing in whatsoever manner with the Plaintiff's property known as LR No 209/3682.
  - b. A declaration that the 1<sup>st</sup> Plaintiff is the legal owner of the suit property LR No 209/3682.
  - c. An order do issue directing that the title deed illegally and irregularly issued to the 1<sup>st</sup> Defendant on the suit property LR No 209/3682 be revoked.



- d. An order compelling the 2<sup>nd</sup> Defendant, Land Registrar, Nairobi registry, to regularize the register and issue the 1<sup>st</sup> Plaintiff with a title deed for LR No 209/3682 in her name.
  - e. General damages for interfering with the Plaintiff's proprietary rights over Land Reference Number 209/3682.
  - f. Costs of the suit.
3. The suit is opposed by the 1<sup>st</sup> Defendant by way of his statement of defence and counterclaim dated 22.2.2019. He avers that he is the bonafide owner of the suit property having purchased it from the 1<sup>st</sup> Plaintiff in year 2002.
4. In his counterclaim, the 1<sup>st</sup> defendant seeks the following orders;
- a. A mandatory injunction be issued compelling the 1<sup>st</sup> Plaintiff to vacate from LR No 209/3682.
  - b. A permanent injunction to restrain the Plaintiffs and their agents from trespassing, interfering, claiming of dealing in any way with the 1<sup>st</sup> Defendant property LR No 209/3682.
  - c. General damages.
  - d. Mesne profits.
  - e. Costs of the suit.
  - f. Any other relief this court may deem fit to grant.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a statement of defence dated 14.1.2019. They contend that the suit property was charged to Standard Chartered bank in 1998 to secure a facility of Kshs 5 million. In 2002, a discharge of charge was registered. Subsequently, the suit property was procedurally transferred to the 1<sup>st</sup> Defendant.

### **The Evidence**

6. The Plaintiffs called 3 witnesses to advance their case. PW1 was the 2<sup>nd</sup> Plaintiff Lakhbir Kaur Bansal. She adopted her witness statement dated 17.11.2020 as her evidence. She also produced the 3 documents in their list dated 14.12.2018 as P-Exhibits 1-3. Her testimony is that all her life, she has lived in the suit property together with her parents and siblings. She further states that the property was acquired by the 1<sup>st</sup> Plaintiff who is her mother and her father Avtar Singh Sian (now deceased) in their joint names in 1986. Upon her father's death, the suit property was transferred to the 1<sup>st</sup> Plaintiff.
7. She avers that her mother has never sold or attempted to sell the suit property and that as a family, they have never sat down and agreed to have the suit property sold to the 1<sup>st</sup> Defendant, thus the allegation that he purchased the suit property is false and she believes he took advantage of their mother's old age to make her sign the sale agreement and transfer documents without knowing what she was doing at the time.
8. She also states that they had a family company known as Lovely Enterprises Limited, which in July 1998, took a loan of Kshs 5 million from Standard Chartered Bank which loan was secured by a charge registered against the suit property with the consent of their mother. She adds that the loan was fully serviced by the proceeds of the said company.
9. She states that she and her other siblings have equal rights to the suit property just as the 1<sup>st</sup> Defendant, thus the transfer to the 1<sup>st</sup> Defendant should be cancelled.



10. Upon cross-examination, PW1 stated that her mother could not sell the suit property without consulting her and her brothers. That the suit property is their home, they stay there while the 1<sup>st</sup> Defendant went to Canada in the 1990s.
11. She further stated that her deceased father owned the company known as Lovely Enterprises Limited. After his death, the company was run by his 2 brothers Jaswinder Singh Sian and Buphinder Singh Sian since his other brother who is the 1<sup>st</sup> Defendant had relocated to Canada. The company went into receivership and the brothers took an overdraft of Kshs 1.5 million which was secured by his mother's title to the suit land.
12. She stated that Standard bank wrote to them demanding the Kshs 1.5 million but his 2 young brothers were unable to pay. The only person who could assist was the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff called him and he agreed to pay.
13. She admits that the 1<sup>st</sup> Defendant paid the loan in order to discharge title to the suit property. She stated that the 1<sup>st</sup> Defendant expected that his siblings would refund the money but they never did. However, the 1<sup>st</sup> Defendant did not pay their mother as alleged.
14. She stated that the person who picked the title from the bank was her mother but she was accompanied by the 1<sup>st</sup> Defendant. She further stated that while she was not there when their mother signed documents relating to the suit land, the 1<sup>st</sup> Defendant committed fraud as her mother only signed bank papers for the title to be released and not a transfer to the 1<sup>st</sup> Defendant.
15. Referred to the sale agreement at page 36 of the 1<sup>st</sup> Defendant's title, she stated that it is signed by the 1<sup>st</sup> Defendant and their mother, but her mother did not know what she was signing as she only knows Punjab language. She further stated that the 1<sup>st</sup> Defendant tricked their mother to sign the transfer at page 48 of the 1<sup>st</sup> Defendant's bundle of documents.
16. She also stated that she did not know that her other 2 brothers accompanied their mother to lawyer Mugambi Gathungu.
17. She added that house expenses like rates and bills for the suit property were paid by their mother and sometimes the 1<sup>st</sup> Defendant would pay just to help as his other siblings did.
18. She stated that in 2017, some hawkers placed a container right outside the suit house. The 1<sup>st</sup> Defendant advised them to write to City Council of Nairobi to protest, thus she used his name as he authorized them to do so. By then, she did not know that the suit land was registered in the 1<sup>st</sup> Defendant's name.
19. She stated that in 2017, there was a tenant one Baldev Singh Kalsie who stayed for a year on the suit property. The whole family then left Kenya for Canada in 2017 at the invitation of 1<sup>st</sup> defendant. In the main house, they left a tenant known as Mohammed vide the tenancy agreement at page 89 of the 1<sup>st</sup> Defendant's bundle, but the said tenant left just after 2 months. She stated that she had signed the tenancy agreement at Odindo advocates at the directions of the 1<sup>st</sup> Defendant who is indicated as the landlord.
20. She further stated that in their community, when a father dies, the eldest son takes over, that is why they agreed that the 1<sup>st</sup> Defendant's name should be used in the tenancy document and in correspondences.
21. She added that she lives on the suit property with her husband who has a brain tumor due to cancer, a son who is disabled, a teenage daughter and her mother, the 1<sup>st</sup> plaintiff.



22. Upon cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, PW1 stated that she confirms that the transfer on page 23 of their bundle of documents bears her mother's signature but contends that her mother did not know what was written.
23. Upon re-examination, PW1 stated that when she got married, she moved to her husband's property but in 2019, she went back to her mother's home as she was the only one who could give her shelter now that her husband is ailing from cancer and while there, she could also take care of her mother who has diabetes, high blood pressure, arthritis and is 76 years and does not work.
24. She reiterated that the 1<sup>st</sup> Defendant paid Kshs 1.5 million on behalf of the Lovely enterprises Ltd as he was a director, so he had a responsibility to ensure that the loan was serviced.
25. PW2 is the 1<sup>st</sup> plaintiff Nirmar Kaur Slan. She adopted her witness statement dated 14.12.2018 as her evidence. She states that she owned the suit parcel LR No 209/3682 with her late husband Avtar Signh Sian where they established their matrimonial home and lived with their children.
26. That upon her husband's demise, the suit property was transferred to her in 1998 and in the same year, her sons Jaswinder Singh Sian and Bhupinder Singh Sian approached her and requested her to charge the property and acquire some money from Standard Chartered Bank to enable them boost their company. She agreed to the request.
27. She avers that in year 2002, the 1<sup>st</sup> Defendant flew back to Kenya from Canada where he is based and during his short stay, he gave her some documents to sign. He told her that they were to discharge the title to the suit land from Standard chartered bank as they had cleared the loan. She signed the said documents.
28. She continued living on the property with her youngest son and his family and sometimes in 2018, the 1<sup>st</sup> Defendant called her and asked her to start paying rent/vacate the suit property because the suit house belongs to him. He called her again to threaten her, prompting her to conduct a search and was shocked to learn that the suit property was transferred to the 1<sup>st</sup> Defendant in year 2002.
29. She states that she has never sold or consented to transfer the suit property to the 1<sup>st</sup> Defendant and cannot possibly do that since all her children have a right to inherit from her.
30. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, PW2 told the court that her husband who died in 1996 gave the title to the suit land to Standard chartered Bank as guarantee for security to secure a loan for Lovely Enterprises Limited.
31. When referred to the title deed at page 30 of the 1<sup>st</sup> Defendant's bundle of documents, she stated that she is aware of the entries which show that the property went to her name on 21.7.1998. According to entry No 12, her son cleared a loan which her husband had charged. She remembers giving the title as security for lovely enterprises and at the time, the 1<sup>st</sup> Defendant had already left Kenya for Canada.
32. She further stated that all her 3 sons are shareholders of Lovely enterprises limited. She admitted that the 1<sup>st</sup> Defendant cleared the loan with Standard Chartered Bank to prevent the bank from auctioning the suit property, but she is not aware that the 1<sup>st</sup> Defendant had taken a loan in Canada in order to clear the said loan and he did not give her any money after clearing the loan.
33. She stated that it was the 1<sup>st</sup> Defendant and her other son Jaswider Singh who assisted her with the process of discharge of title. She further stated that when she signed the sale agreement at page 36 of the 1<sup>st</sup> Defendant's bundle, she was alone with the 1<sup>st</sup> Defendant, her other sons were not present.



34. She stated that during the 2017 general elections, her whole family traveled to Canada. They stayed with the 1<sup>st</sup> Defendant and he also visited her other son. Before she travelled, the 1<sup>st</sup> Defendant instructed her to travel with some documents thus she travelled with the whole file.
35. She stated that she was the one who was paying bills for her house and the 1<sup>st</sup> Defendant chipped in only in a few instances. She added that she has been paying rates from 2015 and it is not a big deal if rates were paid by the 1<sup>st</sup> Defendant as he is her son.
36. She stated that she came to court since she was threatened with eviction by the 1<sup>st</sup> Defendant and his wife, of which, the 1<sup>st</sup> defendant had told her that he wanted to sell the suit property.
37. PW2 also stated that in the suit premises, there was a tenant via instructions of the 1<sup>st</sup> Defendant, and this happened when the 1<sup>st</sup> Defendant told her to go to Canada. The 1<sup>st</sup> Defendant would collect rent and he used some of it to repair the roof of the suit house.
38. She stated that the 2<sup>nd</sup> Plaintiff used to stay with her husband elsewhere, but they now stay in the suit house even though her husband had banished their daughter from ever using the suit property.
39. Upon cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, PW2 stated that while the signatures in the sale agreement and the transfer are hers, she did not know what she was signing, and that the loan taken was not equivalent to the value of the house.
40. She stated that she did not ask the 1<sup>st</sup> Defendant to pay for the discharge of title as he was part of lovely enterprises. Further, her family never offered the suit property to him.
41. Upon re-examination, PW2 reiterated her averments in cross- examination and stated that she only asked the 1<sup>st</sup> Defendant to assist her when the title was under threat, as her other 2 sons were young at the time and they did not know how lovely enterprises limited business was being operated.
42. She further stated that there was no agreement to the effect that the 1<sup>st</sup> Defendant was to get the suit house after he paid the loan, thus he should make his recoveries from Lovey enterprises.
43. PW3, Jasvinder Singh Sian, is a son of the 1<sup>st</sup> Plaintiff, and brother to the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant. He adopted his witness statement dated 10.10.2020 as his evidence.
44. He states that he moved to Canada in 2002 but all his life, he lived on the suit property with his parents and siblings. He further states that before their father died, he made a will to the effect that his shares in the family company known as Lovely Enterprises ltd would be shared equally among his 3 male children. Thus, his sons took over the management of the company upon his demise.
45. He is aware that on or about July 1998, the company Lovely Enterprises Ltd applied for a bank guarantee limited of Kshs 5 million. Out of the guarantee, the company only applied for an overdraft of Kshs 1,497,532.20 /= which was fully serviced by the proceeds of the company.
46. He states that he did not approach the 1<sup>st</sup> Defendant to offset the said loan in consideration for the purchase of their mothers' matrimonial home, thus to his knowledge, the 1<sup>st</sup> Plaintiff has never sold the suit property and as a family, they have never sat down and agreed to have the suit property sold to the 1<sup>st</sup> Defendant, thus the alleged sale is fraudulent.
47. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, PW3 stated that he was a shareholder in Lovely Enterprises Limited and by the time his father died, the company was running an overdraft and not a loan of Kshs 5million.



48. After his father's death, they ran the company with his brother Buphinda as the 1<sup>st</sup> Defendant was already in Canada.
49. He further stated that there was a charge registered in 1998 only because when his father died, the overdraft was still existing and so the issue had to be regularized. He stated that they were not able to fully pay for the overdraft. The 1<sup>st</sup> Defendant paid the arrears of what was outstanding with the bank, but he did not give their mother any money.
50. He is not aware that the 1<sup>st</sup> Defendant was paying rates/repairs for the suit property. He further stated that there was no agreement that once the 1<sup>st</sup> Defendant paid the overdraft, the suit property would be transferred to him. He added that his mother was tricked into signing documents which she signed thinking they were bank documents as she only understands Punjab.
51. Upon cross examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW3 reiterated that the company was operating an overdraft of Kshs 1.5 million, thus this is the only amount the bank was owed. That overdraft was settled by the 1<sup>st</sup> defendant.
52. The 1<sup>st</sup> Defendant, Prithvi Pal Singh Sian testified as DW1. He adopted his witness statement dated 22.2.2019 as his evidence. He produced documents in his bundle dated 22.2.2019 running from page 18-96 as D. Exhibit 1-25, as well as 2 translations of letters contained in his supplementary list of documents dated 21.4.2022 as D. Exhibit 26.
53. It was the testimony of DW1 that his 2 brothers who were running a family company known as Lovely enterprises Limited took out a loan of Kshs 5 million from Standard Chartered bank against his will. That the loan was secured by a charge over the subject property. Lovely Enterprises Limited defaulted on the loan and as it became clear that the property would be auctioned, the family figured out that it would be best if a sale was done to a member of the family.
54. He states that he was working in Canada at the time and since he did not have ready cash, he took a loan from Canada Trust Bank and used the proceeds to rescue the suit property and with the full knowledge of family members, he purchased the property at Ksh,5.5 million. He claims that it is his mother, the 1<sup>st</sup> plaintiff and his brother Jaswinder who even introduced him to an advocate during the sale of the suit property from his mother to himself.
55. He avers that as the registered owner of the suit property, he had discretion to sell the house in order to generate income. He was however ambushed with court papers on suggesting that the 1<sup>st</sup> Plaintiff should move to Canada or into a 1 bedroom apartment which he would cater for as no one would be using the suit property since his brothers had travelled to Canada.
56. He also states that the 2<sup>nd</sup> Plaintiff who instigated this suit plans on selling the suit property, yet she has never lived on the said property and she was even banished from ever stepping foot on the suit land by their late father after she left her ailing husband and eloped with a man their father's age.
57. He testified that by the time his father died, the title to the suit property was not in the bank as he had cleared all loans in 1992 as indicated in the title to the suit property.
58. He also told the court that the sale agreement between him and his mother was witnessed by Mugambi Gathungu Advocate. All his brothers appeared before the said advocate, so was his wife's brother and the 2<sup>nd</sup> Plaintiff's husband. That they explained to his mother in Punjab, thus it is not true that the Plaintiffs only recently discovered the transfer, as all documents were with the 1<sup>st</sup> Plaintiff since the year 2002 and she even took them to him in Canada.



59. He added that his mother can only speak and write Punjab, and the transactions were explained to her in that language.
60. Upon cross-examination by counsel for the plaintiff, DW1 stated that the suit property was the matrimonial house. He was born in India but started living there in 1980' s. That in 2002, he paid an overdraft on behalf of Lovely Enterprises but he had left the company a long time ago.
61. He further stated that it is the responsibility of the company to clear its debts and this is done by its directors and shareholders. He added that the discharge of charge, transfer and sale agreement herein were prepared at the same time.
62. He added that he paid his mother Kshs 3.5 million in cash, and she then gave the money to PW1. The rest of the purchase price, he cleared debts of over Kshs 1 million owned by Lovely Enterprises to Karachi wares in South B where Lovely Enterprises were getting metal from.
63. Upon cross examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, DW1 stated that the documents of transfer were presented to the Land Registry by his lawyer after the requisite documents of transfer were signed by himself and his mother.
64. In re-examination, DW1 stated that his mother was a 55% shareholder in Lovely Enterprises Limited, so she had an obligation to pay its loans. He reiterated that the purchase price of the suit property was Kshs 5.5 million. Out of this, he paid his mother 3.5 million in cash, Kshs 1.497 million was paid to the bank and the rest he gave his mother to pay debts.
65. The case of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was advanced by DW2, one Gildine Karani, a Principal Land Registration Officer at the Ministry of Lands and Physical Planning. She adopted her witness statement dated 18.1.2023 as her evidence. She also produced 6 items in their list dated 14.1.2019 as D. Exhibit 1-6. She avers that as per their records, the Plaintiff became registered as the proprietor to the suit property through transmission on 21.7.1998. The suit property was then charged as security by Standard Chartered bank to secure a facility of Kshs 5 million. The charge was discharged on 28.8.2002. Subsequently, the property was transferred to the 1<sup>st</sup> Defendant on the same date.
66. Upon cross-examination by counsel for the plaintiff, DW2 stated that when there is a discharge lodged for registration, it goes through stamp duty and before it is booked for registration, it is supposed to meet the threshold for registration .This includes proper execution from bank officials. The original title also has to be attached to the discharge to enable endorsement of the said title.
67. For a transfer, there has to be valuation, then assessment of stamp duty and then it is booked. Transfers have to be witnessed and executed. The original title has to be there as well a consent where applicable. Necessary identification documents have also to be there and the process of discharge can take about 1 week while a transfer can take about 2-3 weeks from valuation to registration.
68. She stated that it is normal for a discharge and transfer to take place on the same day assuming that booking was done simultaneously. For the suit property, there is a valuation dated 28.8.20002 but the value is not indicated as the old forms did not have description of the value. The suit property was valued, discharged and transferred on the same date.

### **Submissions**

69. The Plaintiff's submissions are dated 13.6.2023 where they address the following issues;
  - a. Whether the 1<sup>st</sup> Plaintiff is the rightful and legal owner of the suit premises LR No 209/3682;
  - b. Whether the Plaintiffs had proved fraud/forgery on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



- c. Whether the Plaintiffs are entitled to the reliefs as prayed;
  - d. Who bears costs of the suit?
70. On the 1<sup>st</sup> issue, the Plaintiffs submit that the 1<sup>st</sup> Defendant has failed to discharge the burden of proof by explaining how he came to be the registered owner of the suit property. They rely on the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.
71. They submit that the consideration of Kshs 3.5 million that was allegedly advanced to the 1<sup>st</sup> Plaintiff in cash is not supported by any documentation. The case of *Neptune Credit Management Limited & another v Jani & another* (Civil Appeal 201 of 2019) [2022] KECA 619 (KLR) (13 May 2022) was proffered to buttress this point.
72. On the 2<sup>nd</sup> issue, it was submitted that the Plaintiffs have proved their case to the required standards, arguing that the 1<sup>st</sup> Defendant perpetrated fraud by using forged documents to claim ownership of a property that did not belong to him, and that the land Registrar who was responsible for registering and verifying the transfer did not take precautionary measures to stop the transaction which was hurriedly done in a day. To this end, reference was made to the case of *RG Patel v Lalji Mjakani* cited in the case of *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 others* [2013] eKLR.
73. On the 3<sup>rd</sup> issue, it is submitted that since the transfer of title to the 1<sup>st</sup> defendant was done illegally, it should be impeached as the purpose of Section 26 of the *Land Registration Act* is to safeguard the legitimate owners of property from fraudulent individuals who seek to reap what they have not planted. They rely on the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another* [2013] eKLR and the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.
74. The Plaintiffs also submit that the Defendants should bear costs of the suit.
75. On their part, the Defendants did not file submissions by 5.7.2023 as per the directions of the court given on 14.6.2023.

### **Determination**

76. The dispute over the property known as Land Reference No 209/3682 involves family members who have all resided in the house erected thereon at some point in their lives as they all agree it was a family home. There is no controversy that the suit property was once registered in the joint names of the 1<sup>st</sup> plaintiff and her husband. That upon his death, the land was transmitted to the 1<sup>st</sup> plaintiff. The family kinship is also not in dispute. The parties also appear to be in agreement that there was a family company known as Lovely Enterprises limited. The registration status of the suit property is that the same is now in the hands of the 1<sup>st</sup> defendant, having been so registered in year 2002.
77. The 1<sup>st</sup> Defendant, who is a son of the 1<sup>st</sup> Plaintiff and brother to the 2<sup>nd</sup> Plaintiff claims to have purchased the suit property on 20.8.2002 from his mother. On the other hand, his mother and sister backed by the 1<sup>st</sup> Plaintiff's other child (Pw3) claims to have been shocked upon learning that the suit property was registered to the 1<sup>st</sup> Defendant in 2002.
78. The question falling for determination is whether the 1<sup>st</sup> defendant acquired the suit property lawfully.



79. Seeing that the 1<sup>st</sup> Defendant has title which is under challenge, then he is bound to explain the root of the said title. In [Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others](#) [2015] eKLR, it was stated that;

“The acquisition of title cannot be construed only in the end result, the process of acquisition is material..”

Also see [Munyu Maina v Hiram Gatuika Maina](#) [2013] eKLR.

80. From the evidence adduced by the family members of the 1<sup>st</sup> plaintiff, I discern that 1<sup>st</sup> Defendant’s father also left a company named Lovely Enterprises Limited to his family and dictated its shareholding as per D. Exhibit 1. The title to the suit land shows that the charge of 21.7.1998 was taken out by Lovely Enterprises Limited and it is not denied that it is the 1<sup>st</sup> Defendant who discharged it after paying about Kshs 1.5 million.
81. PW3’s testimony is that while the charge on the title to the property is indicated to be 5 million, Lovely Enterprises Limited only had a running overdraft of about Kshs 1.5 million, which is corroborated by the fact that what was owed was just 1.5 million and not 5 million as DW1 insinuates.
82. Be that as it may, DW1 failed to establish the nexus between him discharging a title for the debt of Lovely Enterprises Limited and taking up an asset of the 1<sup>st</sup> Plaintiff in exchange. There was no manifestation of a common intention or a meeting of the mind between the owner of the then house (read 1<sup>st</sup> plaintiff) and the alleged new owner (read 1<sup>st</sup> defendant). See [Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others](#) [2019] eKLR.
83. Thus it matters not whether there was a loan taken by the company against 1<sup>st</sup> defendant’s will, or that the said 1<sup>st</sup> defendant took a loan to rescue the suit property. The bottom line is that the clearance of the loan was not a gateway for the 1<sup>st</sup> defendant to have his mother’s house.
84. As for the sale agreement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant dated 20.8.2002 to be found at page 36 of the 1<sup>st</sup> defendants documents, the same appears to be a classic case of “Murphy’s law,” where “Anything that can go wrong will go wrong”, as nothing seems right with the said agreement. To start with, the said agreement is drawn by Mugambi & Kariuki Advocates and it is signed by mother and son. It is rather strange that while DW1 claims that family members were present at the signing of the sale agreement, none of them witnessed this document.
85. Further, the agreement is drafted in English. The parties are in agreement that the 1<sup>st</sup> Plaintiff can only understand Punjab language. There is no evidence that the contents of the sale agreement were explained to the 1<sup>st</sup> Plaintiff. DW1 averred that there was an advocate known as David who was explaining to his mother of what was happening during the transaction, but he admitted that the said David does not know Punjab language, he was apparently doing the explanation in Kiswahili language.
86. The 1<sup>st</sup> defendant claims that his mother and his brother (PW3) are even the ones who scouted for the advocate “Mugambi and Kariuki” who drew the agreement for sale. Paragraph 7 of the said agreement states that; “the advocates for the purchaser are Mugambi and Kariuki advocates”. It is not fathomable that the party (1<sup>st</sup> plaintiff) who scouted for the advocate in the sale transaction ended up giving the said advocate to the purchaser while she remained without an advocate!
87. In addition, the sale agreement is silent on how the purchase price was to be paid. DW1 in cross examination claimed that he paid Kshs 3.5 million in cash to his mother, cleared an overdraft for Lovely Enterprises of about Kshs 1.5 million and paid other debts for lovely enterprises amounting to about 1



million. The aforementioned averments ought to have been captured in the sale agreement otherwise it comes out as a variation to the sale agreement.

88. At some point during cross examination, DW1 stated that “ I paid my mother in my house. I paid her Kshs 3.5 million in cash..”, and then continued to state that “ I paid my mother in the presence of the lawyer!”. I pose the question; What was the role of the lawyer, since this information is not captured in the sale agreement. It is not plausible that the 1<sup>st</sup> defendant gave the mother a tidy sum of sh.3.5. million in year 2002 in cash, inside the house, yet there is no trace of such an event.
89. As things stand, there is no evidence that consideration was paid to the 1<sup>st</sup> Plaintiff by the 1<sup>st</sup> Defendant.
90. One more issue with this agreement is the averment captured at paragraph 9 stating that “ The property is sold in vacant possession”. The house was certainly being used as the family home and was not vacant!
91. Another telltale sign that the alleged sale transaction was tainted with irregularities is the speed at which the suit property was divested unto the 1<sup>st</sup> defendant. The sale agreement is dated 20.8.2002. The discharge of charge and the transfer were all lodged at 15.30 hrs on the same day of 28.8.2002. Indeed DW2, the land registrar stated that the property was valued, discharged and transferred on the same date. She stated that there was nothing wrong with that, but went ahead to state that the transfer can even take 3 weeks.
92. Considering that the 1<sup>st</sup> plaintiff can only understand Punjab language, there was certainly everything wrong in taking her through a marathon process of transferring her property. The 1<sup>st</sup> plaintiff doesn't dispute that she signed documents given to her by her son, but to her she was facilitating the discharge of her property, little knowing that she was signing away her rights to the suit property. She was certainly deceived by her very own son, the 1<sup>st</sup> defendant.
93. DW1 also led evidence that he was paying land rates for the suit property and that he defended his rights as an owner when the property was under threat from trespassers. Correspondences at page 82-85 of his bundle show that PW1 wrote to Nairobi City County on his instructions complaining about the invasion by alleged private developers. DW1 also produced D. Exhibit 25 to show that he had let out the suit property as a landlord. Further, he carried out repairs on the suit house. However, all that is not evidence of ownership as this evidence was rebutted by PW1-PW3 who stated that it is common in their culture for the elder son to take care of things in the family.
94. I find that Lovely enterprises Limited is clearly a family company that the 1<sup>st</sup> Defendant was ‘bailing out’. The suit property is the family’s only home and it houses many family members. If the Defendant was saving the family property as he insinuates, then he could not have duped the whole family in the manner he did. If anything, the 1<sup>st</sup> defendant wanted to evict the family, particularly his mother from the suit property.
95. The primary prayers of the 1<sup>st</sup> defendant’s counterclaim read as follows; ”a) A mandatory injunction be issued compelling the 1<sup>st</sup> plaintiff to vacate from LR. No 209/3682; b) A permanent injunction to restrain the plaintiff and their agents from trespassing, interfering, claiming or dealing in any way with the 1<sup>st</sup> defendant’s property LR No 209/3682.”. The 1<sup>st</sup> defendant then filed an interlocutory application dated 22.2.2019, seeking similar prayers. The above prayers do not depict the 1<sup>st</sup> defendant as someone who was looking after the welfare of his mother.



96. This court had this to say on similar issues in the contest of a family setting in *Paul Kirinya v Delfina Kathiri* [2019] eKLR;

“Plaintiff avers that he is the one who took care of his siblings, paying their school fees that he built structures for his mother and that he pays for her bills and even gives her monthly stipend. My question is, isn’t this what is expected of children, to take care of their parents. This is a moral obligation. However, such social commitments, however great do not mature to legal rights. Plaintiff cannot therefore claim the suit land on the basis of having helped his mother and his siblings.

97. One more point of concern is that the 1<sup>st</sup> defendant seems to have an issue that his sister, the 2<sup>nd</sup> plaintiff is staying in the suit property, yet his father had banished her from staying in that house. His mother confirms the said averment. However, that too appears to be a moral rather than a legal issue for the determination of the court. What is clear is that the occupation of the house by the 2<sup>nd</sup> plaintiff is not an issue to the 1<sup>st</sup> plaintiff. What more, the 2<sup>nd</sup> plaintiff has stated that her interest is to see that the house reverts back to the rightful owner, their mother.

98. The plaintiffs have sought for general damages in this suit. Indeed there is no doubts that the 1<sup>st</sup> defendant irregularly and unlawfully interfered with the suit property and has caused suffering and anguish unto his mother. The court even observed the raw pain of the 1<sup>st</sup> plaintiff who occasionally broke down in tears while testifying in court. Nevertheless, I have taken into consideration that the warring parties still remain family members, that they are already separated by physical distance as the 1<sup>st</sup> defendant resides in Canada and that the 1<sup>st</sup> plaintiff is of advanced age, being 76 years as at the time of her testimony. Condemning the 1<sup>st</sup> defendant to pay damages can only drive the wedge of resentment and acrimony further. That is not the desire of this court, hence I decline to award any general damages.

99. In the end, I find that the plaintiffs have proved their case on a balance of probability, while the counterclaim of the 1<sup>st</sup> defendant fails. I proceed to give the following orders;

1. An order is hereby issued declaring the 1<sup>st</sup> plaintiff to be the rightful and legal owner of the suit property LR No 209/3682.
2. An order is hereby issued cancelling the registration of the 1<sup>st</sup> defendant as the owner of the suit property LR No 209/3682.
3. An order is hereby issued directing the 2<sup>nd</sup> defendant to register the 1<sup>st</sup> plaintiff as the owner of the suit property LR No 209/3682.
4. An order of a permanent injunction is hereby issued restraining the Defendants from interfering in whatsoever manner with the 1<sup>st</sup> Plaintiff’s property known as LR No 209/3682.
5. As to costs, ordinarily in circumstances where protagonists are family members as in this case, I prefer parties to bear their own costs. Not so in this case where the 1<sup>st</sup> defendant has caused his own aged mother untold suffering, even attempting to evict her from her own house. I therefore direct that the 1<sup>st</sup> defendant pays costs of the suit to the plaintiffs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**



In the presence of:-

Mugambi Liachena for Plaintiff

M/s Kiiru holding brief for Mr. Thuita for 1<sup>st</sup> Defendant

Court Assistant: Eddel

