



Issa & another v Mbugua & 5 others (Environment and Land Case Civil Suit 77 of 2014) [2023] KEELC 21152 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 77 OF 2014
LN MBUGUA, J
OCTOBER 26, 2023**

BETWEEN

MAHADIA WANJIRU ISSA 1ST PLAINTIFF

ALMA WANJIKU KINUTHIA 2ND PLAINTIFF

AND

HON.HARRISON KINUTHIA MBUGUA 1ST DEFENDANT

FRANCIS MUREITHI KIBICHO 2ND DEFENDANT

JOSEPH MUNYUNGU KAMAU 3RD DEFENDANT

GEORGE KAMAU KINUTHIA 4TH DEFENDANT

KELVIN MBUGUA KINUTHIA 5TH DEFENDANT

ERIC NJAU KINUTHIA 6TH DEFENDANT

JUDGMENT

1. It is not disputed that most of the parties herein are family members. The 2nd Plaintiff (now deceased) and the 1st Defendant's mother one Loise Njeri Mbugua were married to 2 of 4 brothers (all deceased), who were sons of Zakayo Kinuthia Mbugua (deceased). The 1st Plaintiff is the daughter of the 2nd Plaintiff, thus the 1st Defendant and the 1st Plaintiff are first cousins. The 4th-6th Defendants are the 1st Defendant's children, while the 3rd Defendant is a brother to the 1st Defendant's wife.
2. The 2nd Plaintiff passed away on 22.6.2017 and was never substituted, thus on 15.5.2019, her claim against the Defendants was marked as abated.



The pleadings

3. The Plaintiff's claim was commenced by a plaint dated 8.1.2014 and amended on 24.3.2014. She contends that her mother gave her the parcel of land known as Dagoretti/Mutuini/699 measuring 1 acre and instructed the 1st Defendant who was in custody of her title to transfer that land to her.
4. She was then issued with a title known as Dagoretiti/Mutuini/921 measuring less than an acre which prompted her and her mother to investigate why her title number had changed from parcel 699 to 921 and why it had shrunk in size as well. They made a discovery that parcel 699 had been fraudulently subdivided by the 1st-6th Defendants without the 2nd Plaintiff's consent and knowledge.
5. The Plaintiff seeks the following orders;
 - a. A declaration that the subdivision of the initial title number Dagoretti/ Mutuini/699 to Dagoretti /Mutuini/ 817 and Dagoretti/ Mutuini /818 (currently changed to Dagoretti/ Mutuini/1136 and registered to the 4th-6th Defendants) and the subsequent subdivision of Dagoretti /Mutuini/ 817 to Dagoretti/ Mutuini/920 and Dagoretti/ Mutuini/921, and the further subdivisions of Dagoretti/Mutuini/ 920 to Dagoretti/Mutuini/938 (Currently changed to title No.1113)and Dagoretti/Mutuini/939 (Currently changed to title no.1114),were obtained through fraud, are illegal, null and void and that the aforementioned properties now registered as Dagoretti/ Mutuini/1113, Dagoretti/Mutuini/ 1114, and 0.176 part of forming Dagoretti/Mutuini/ 1136 as currently registered belong to the Plaintiffs.
 - b. An order directed at the Land Registrar, Kiambu Land Registry, for the cancellation of the registration of the 2nd-6th Defendants as registered owners of the respective properties now known and registered as Dagoretti/ Mutuini/1113, Dagoretti/ Mutuini/ 1114, Dagoretti/Mutuini/ 1135 and 0.176 Ha forming part of Dagoretti/ Mutuini/1136, and for registration of the said properties to the 1st Plaintiff as owner thereof and consequently, an order directed at the 7th Defendant to effect the said cancellation of registration of the 2nd-6th Defendants as the registered owners of the respective titles ,and to issue the title deeds in respect of the said properties to the 1st Plaintiff as the intended beneficiary thereof and alternatively to the 2nd Plaintiff as the bona fide owner thereof.
 - c. An order for the eviction of the 2nd- 6th Defendants, their agents, servants and or any other persons who may be in occupation of the property by virtue of the consent or authority of the said Defendants ,and for the demolition of any structures they may have been erected on the subject properties without the consent of the plaintiffs.
 - d. A permanent injunction to restrain the 1st-6th Defendants either by themselves, employees, servants and or agents from henceforth interfering in any manner whatsoever with the Plaintiffs' enjoyment, use and occupation of the subject properties namely Dagoretti/ Mutuini/1113, Dagoretti/ Mutuini/ 1114, Dagoretti/ Mutuini/ 1135 and Dagoretti / Mutuini / 1136.
 - e. Costs of this suit.



6. The suit is opposed by the 1st, 4th, 5th and 6th Defendants vide a joint statement of defence and counterclaim dated 18.3.2014.
They contend the 1st Defendant was housing his mother one Loise Njeri Mbugua together with the 2nd Plaintiff who was widowed and had been abandoned by her children on his property known as Dagoretti/Mutuini/700 which is adjacent to the 2nd Plaintiff's property known as parcel 699.
7. That as a show of gratitude, the 2nd Plaintiff offered to transfer a portion of her land to the 1st Defendant, thus her land was subdivided into 2 portions being Dagoretti/Mutuini/817 and 818. They aver that the 2nd Plaintiff transferred parcel 818 measuring 0.176Ha to the 1st Defendant and a title was issued on 19.7.1991. The 1st Defendant then transferred the said parcel to the 4th Defendant and it was later registered into the joint names of the 4th-6th Defendants and a title deed issued on 7.9.2005. The property was later re-numbered and became Dagoretti/Mutuini/1111.
8. They contend that Dagoretti/Mutuini/1111 was subdivided into 4 portions known as Dagoretti/Mutuini/1133-1136 and after re-survey and combination with other parcels owned by the 1st Defendant, Dagoretti/Mutuini 1133-1135 ceased to exist thus only Dagoretti/Mutuini/1136 exists and is registered to the 4th -6th Defendants.
9. They also contend that the 2nd Plaintiff expressed interest to construct a house on Dagoretti/Mutuini 817 and since she did not have funds, she had it subdivided into 2 portions being Dagoretti/Mutuini 920 and 921. After the subdivision, she sold parcel 920 to the 2nd and 3rd Defendants. It was subsequently partitioned into 2 equal portions known as Dagoretti/Mutuini 938 and 939 registered to the 2nd and 3rd Defendants respectively.
10. They counterclaim for an order of declaration that the 4th-6th defendants are the lawfully registered proprietors of parcel Dagoretti/Mutuini/1136 and that the caution now registered against the said property is unjustified and should be removed forthwith.
11. The 2nd Defendant opposed the suit vide his amended statement of defence dated 6.5.2014, where he avers that he purchased a portion of the 2nd Plaintiff's property known as Dagoretti/Mutuini/920 jointly with the 3rd Defendant at ksh.120, 000/= sometime in years 1995-1996. Thus he is the registered owner of parcel Dagoretti/Mutuini/1114 measuring 0.0406 Ha.
12. The 3rd Defendant filed a statement of defence dated 28.2.2014. He also contends that he purchased a portion of the 2nd Plaintiff's parcel known as Dagoretti/Mutuini/920. It was subdivided into 2 portions namely Dagoretti/Mutuini/938 and 939. He received his title for Dagoretti/Mutuini/939 and the parcel changed name to Dagoretti/Mutuini 1113.

The Evidence

Case of the Plaintiff

13. The case of the plaintiff was advanced by one witness, herself, testifying as PW1, Mahadia Wanjiru Issa. She adopted her witness statement dated 8.1.2014 as her evidence. She produced 19 documents in her list dated 1.4.2015 running from page 1-54 as her exhibits.
14. PW1 states that her mother inherited parcel Dagoretti/Mutuini/699 from her grandfather Kinuthia Mbugua on behalf of her husband. Similarly Loise Njeri Mbugua, mother to the 1st defendant got land. That due to the age of her mother and the 1st Defendant's mother Loise Njeri Mbugua, the 2nd of



them decided to give the 1st Defendant (by then a District Commissioner in Nakuru) their 2 title deeds for safe custody as they trusted him since he was a senior civil servant.

15. She states that her mother owned parcel Dagoretti/Mutuini /920 which she bequeathed to her in 2007 and she also allocated her 2 sons other properties. She instructed the 1st Defendant to facilitate transfer of Dagoretti/Mutuini/920 to PW1.
16. She was then issued with a title in 2009, but she noted discrepancies thereof as the title which was known as Dagoretti/Mutuini/920 had changed to Dagoretti/Mutuini /921 and the size had reduced from 0.101 ha to 0.077 ha.
17. PW1 adds that the discrepancies prompted them to make inquiries over Dagoretti/Mutuini/921 at the land registry. They unearthed that parcel Dagoretti/Mutuini/920 had been subdivided and some of the resulting parcels were allegedly sold to the 2nd Defendant and 3rd Defendants as parcel 920, subsequently giving rise to parcels 938 and parcel 939. Another resulting parcel was 818 which had been transferred to the 4th-6th Defendants. This prompted the plaintiff and her mother to lodge cautions on the said properties.
18. She states that it is not clear how the properties were transferred to persons closely related to the 1st Defendant as her mother did not sell them and did not attend any Land control board meetings to give her consent, thus she has been deprived of her land and now only holds ¼ of what she is entitled to.
19. PW1 also told the court that she stayed with her mother at the Muslim place even though they lived in separate houses thus her mother was renting out the suit premises. She averred that her mother used to thumbprint her documents.
20. In cross-examination by counsel for 1st, 4th – 6th defendants, PW1 stated that there was fraud in the manner in which her mother's land was subdivided, but she did not report the 1st Defendant to the police as he is her brother. She contends that there are many large buildings on the suit land which were constructed long before this matter was filled in court. That she could not stop the construction as she had a plot at Muslims and was a teacher by then. She cannot tell if her mother consented to the construction on the suit parcels.
21. She refuted the allegations that her mother subdivided parcel 699 into 2 as alleged. She admitted to having a title for parcel 921.
22. Upon cross-examination by counsel for the 2nd Defendant, PW1 stated that she stays on the suit land, there is a permanent house. She is aware that the 2nd Defendant has stayed on the suit plot since 2000.
23. Upon cross-examination by counsel for the 3rd Defendant, PW1 stated that she did learn that the 3rd Defendant had built a permanent house on the suit land, but her mother told her she didn't know how he came to live on the said parcel. Referred to the transfer to the 3rd Defendant dated 5.6.1996, she stated that she has never seen it and she cannot say whether the thumbprint thereon belongs to her mother.
24. She has no grant of letters of administration of her late mother's estate because she fell sick.
25. Upon re-examination, PW1 stated that her mother had a right to do what she desired with her land and she chose to give her the land.



Case for the 1st, 4th, 5th and 6th Defendants

26. The 1st, 4th-6th Defendants called 2 witnesses. DW1 was Kinuthia Mbugua (1st Defendant) and he adopted his witness statement dated 18.3.2014 as his evidence. He produced 36 documents in his list of documents as D. Exhibit 1-36.
27. His testimony is that his grandfather Zakayo Mbugua owned parcel Dagoretti/Mutuini/476. When he died, the property was inherited by his 4 sons' families represented by; Richard Supeyo Ole Malei, the 2nd Plaintiff, Hannah Wanjiku Gitau and himself. That since he was footing all expenses to file the succession cause, he would get an additional 0.9 acres out of parcel 476. Each family was getting 1 acre while his family got 1.9 acres.
28. After partitioning of parcel 476, the 2nd Plaintiff was registered as proprietor of Title Number Dagoretti/Mutuini/699 while he was registered as proprietor of Dagoretti/Mutuini /700 for his family and titles were issued in 1985. The other 2 families got parcel 697 and 698 and the properties are adjacent to each other. At the time, the Plaintiff and her children were living at the Riruta Muslim Village.
29. That in 1989, the 2nd Plaintiff informed him that she had lost her title and he assisted her to get a new title. That in 1991, the 2nd Plaintiff approached him and informed him that her children had abandoned her. She requested him to allow her to live with his mother who was living on the portion that he had inherited from his grandfather (parcel 700). He agreed and she started living with his mother.
30. He further states that as a show of gratitude, the 2nd Plaintiff offered to transfer to him a portion of her land. He accepted her offer and at his expense, her property (parcel 699) was subdivided into 2 portions which became known as Dagoretti/Mutuini/817 and 818 where upon she transferred parcel 818 to him. He then transferred the gift to the 4th Defendant who is his son.
31. He contends that in 1995, the 2nd Plaintiff approached him again and informed him that she wanted to build a small house on her remaining portion of land, but since she did not have money to do so, it was agreed that her remaining parcel 817 would be subdivided into 2 portions Dagoretti/Mutuini/920 and 921 and one of them would be sold to finance her construction. From the proceeds of the sale, she was able to build a home on the remaining portion. The portion known as 920 was sold to the 2nd and 3rd Defendants and was subsequently partitioned to give rise to parcels Dagoretti/Mutuini/938 and 939.
32. He states that the parcel known as Dagoretti/Mutuini/818 was subsequently transferred into the joint names of the 4th, 5th and 6th Defendants and re-numbered Dagoretti/Mutuini/1111. It was then subdivided into 4 portions namely Dagoretti/Mutuini/1133, 1134, 1135 and 1136. That due to resurvey and combination with the land he inherited from his grandfather, the 1st three titles were merged and ceased to exist, leaving only Dagoretti/Mutuini/1136 in the names of the 4th-6th Defendants.
33. Upon cross-examination by counsel for the 2nd Defendant, DW1 stated that the 2nd Defendant is known to him and that he resides with his family on the suit land.
34. Upon cross-examination by counsel for the 3rd Defendant, DW1 stated that he is aware that the 2nd Plaintiff sold a parcel of land to the 3rd Defendant but he cannot recall when the sale was done. That the 2nd Plaintiff had approached him and asked him if he knew anyone who wanted to buy land and since he knew the 2nd and 3rd Defendants, he recommended them to her, but he did not get involved in the sale. He is aware that the 3rd Defendant has settled on that land for many years and got all his children there.



35. In cross-examination by counsel for the Plaintiff, DW1 stated that the 2nd Plaintiff did reside on parcel 699 on the house she constructed.
36. He stated that he started to develop parcel 818 between 1993-1995 but he has no evidence of that development which is a permanent residential structure and the Plaintiffs used to visit his home so they were aware of what was happening as far back as 1990's and they never raised any issues regarding his developments. He added that in his opinion, the 2nd Plaintiff was in her right mind when she transferred parcel 818 property to him.
37. He stated that when the 2nd Plaintiff approached her with the issue of having lost her titles, she helped her to replace it, he did not process 2 titles. However, he helped her with the subdivision of parcel 699 to parcel 818 and 817 and there is a transfer to that effect though he cannot recall whether they attended the land control board and has no minutes which led to issuance of a consent.
38. He further stated that after subdivision of parcel 699 to parcel 817 and 818, titles were issued in the name of the 2nd Plaintiff on 8.7.1991 and 11 days later, on 19.7.1991, parcel 818 was transferred to himself after the land control board had given consent to subdivide that land.
39. He also stated that he is aware of transactions relating to the 2nd and 3rd Defendants, where the 2nd Plaintiff was fully in charge of those transactions. He is aware that the 2nd Plaintiff retained parcel 921 measuring 0.077 Ha. He was not a party to the transfer of parcel 921 from the 2nd plaintiff to the 1st Plaintiff and he was never in possession of the 2nd Plaintiff's title.
40. DW1 also stated that he merged parcel 818 with 700 in terms of development but not in title and on parcel 818, there are his residential houses, his children's houses and his business premises.
41. Upon re-examination, DW1 stated that the 2nd Plaintiff thumb printed the application for consent to land control board for transfer of parcel 818 but the copy is undated.
42. He further stated that the 3rd Defendant is his brother in law and that there is nothing illegal for a person related to him to purchase land of his relative. He added that for mutation of parcel 817, the deceased was in charge of the subdivision thus the manner of executing those documents was within her control.
43. DW2 was Abdi Ali Kunuthia who adopted his witness statement dated 8.12.2015 as his evidence. He is a brother of the 1st plaintiff, son to 2nd plaintiff and a cousin to 1st defendant. He stays in Kagio in Kirinyaga. He contends that his mother became legal proprietor of parcel 699 following succession proceedings in respect to the estate of Zakayo Mbugua Kinuthia where upon parcel 476 was subdivided to his heirs. That in early 1991, his mother informed him, his brother Salim Iboya Kinuthia and the 1st Plaintiff that she intended to give a portion of her property (parcel 699) to the 1st Defendant as a gift so that he could access his parcel 700 which had no access road and as a family, they consented.
44. That parcel 699 was then subdivided into parcel 817 and 818 and the latter transferred to the 1st Defendant. He states that as far as he is concerned, there was no dispute between his mother and the 1st Defendant since she transferred her land to him as a gift with the consent of her children
45. In cross –examination, DW2 stated that he has never heard his mother complaining about the suit land. He just knows that his mother gave the 1st Defendant land as an access to his land but he does not know the acreage of the access path. He does not know that his mother sold land to some people, he doesn't visit the land often, hence he knows not if the 1st Defendant has developed his land.
46. Upon re-examination, DW2 reiterated that there was a family meeting and that his mother resolved to give land to the 1st Defendant who had requested for an access road.



Case for the 2nd Defendant

47. DW3 was Francis Muriithi Kibicho (2nd Defendant) who adopted his witness statement dated 17.4.2014 as his evidence. He produced 6 items in his bundle of documents as D. Exhibit 1-6.
48. His case is that the 1st Defendant's wife informed his wife that the 2nd Plaintiff intended to sell a portion of her land known as Dagoretti/Mutuini/920. Subsequently, they met the 2nd Plaintiff who showed them the land. They agreed to purchase it jointly with the 3rd Defendant at ksh.120,000/= . This amount was paid.
49. He stated that Parcel 920 was then subdivided in 1996 and he got a resulting parcel Dagoretti/ Mutuini/1114. He built his homestead in year 2000 and settled there.
50. He has been in uninterrupted occupation of his parcel since 1996 to the full glare of the public and to the specific knowledge of the Plaintiffs who have never raised any objections, thus their claim is barred by section 38 of the *Limitation of Actions Act*.
51. Upon cross-examination, DW3 stated that he knew the 3rd Defendant around 1993-1994. That they purchased land together from the 2nd Plaintiff who was introduced to him by the 1st Defendant's wife through his late wife. He further stated that parcel 920 was pointed out to them by the 2nd Plaintiff. He also stated that he did not know of the 2nd Plaintiff's children and they were not present when he purchased the land in 1995.
52. He further stated that he met the 1st Plaintiff in 2010, she had gone to the suit parcel to close the access road that leads to his house. She was contending that the road does not exist and that he should access his house through the forest. However, when the 1st Plaintiff closed the road, they called the 2nd Plaintiff who told them that the road existed and she went to the parcel and stopped the 1st Plaintiff from planting poles on the road in his presence.
53. He stated that his property is also adjacent to that of the 1st Defendant's which stretches from the main road. He further stated that the 2nd Plaintiff signed the agreement for sale by thumb printing and that the agreement does not show who drew it and the purchasers' signatures are not there. He also stated that the sale price for parcel 920 was ksh.120,000/= he handed over ksh.60,000/= to the 1st Defendant's spouse in the presence of the 2nd Plaintiff at the 1st Defendant's house and she handed over the money to the 2nd Plaintiff.
54. Referred to the transfer of parcel 920, he stated that it indicates that consideration paid was ksh. 50,000/ = which is incorrect as they paid ksh.120,000/= together with the 3rd Defendant. He also stated that he did not attend the land control board in person.
55. Upon re-examination, DW3 stated that when he handed over cash, he was present with his late wife, Nancy(1st Defendant's wife) and the 2nd Plaintiff. He also stated that the 2nd Plaintiff thumbrinted the transfer for parcel 920 in the presence of B.Karanja Advocate.

Case for the 3rd Defendant

56. DW4 was Joseph Munyungu Kamau (3rd Defendant). His witness statement dated 28.2.2014 was adopted as his evidence.
He produced documents in his list dated 28.2.214 as D. Exhibit 1-6.



57. He states that in year 1996, he learnt about the sale of parcel 920 from an acquaintance. Thereafter, he met the 2nd Plaintiff who agreed to sell a portion of the said parcel. That it was while dealing with the 2nd Plaintiff that he met the 2nd Defendant who was also interested in the parcel. They jointly purchased the parcel at ksh.120,000/=. Each of them paid ksh.60,000/=.
58. That upon payment, the 2nd Plaintiff obtained a surveyor and parcel 920 was subdivided into 2 portions known as parcel 938 and 939 and the mutation duly registered on 29.11.1996. He was issued with a title for parcel 939 in 1996, the parcel's number was later changed to Dagoretti/Mutuini/1113 as a normal procedure in the registry of lands.
59. Upon cross-examination and when referred to the sale agreement between himself, the 2nd Defendant and the 2nd Plaintiff, he stated that it is not signed by the parties and that the purchase price to be paid was ksh.120,000/=. He was to pay half while the 2nd Defendant was supposed to pay the other half but in the transfer, the consideration is indicated as ksh.50,000/=
60. Referred to the mutation form in his bundle that was used to subdivide parcel 920 which was in the 2nd Plaintiff's name, she stated that the proprietor of the parcel did not append her signature on the said document. He further stated that he did not have a consent from the Land Control Board. He also stated that he is Nancy Mbugua's sister (1st Defendant's wife) and that he knows the 2nd Plaintiff had her children, but he cannot recall whether her children were present during the transactions.
61. In re-examination, DW4 stated that he cannot recall whether he signed a sale agreement as his documents got lost, but he paid the 2nd plaintiff in cash and attended land control board with her. He further stated that he has occupied his parcel since 1998. Adding that the 2nd Plaintiff transferred parcel 920 to himself and the 2nd Defendant, so she did not need to sign the mutation form to subdivide the parcel into 2.

Submissions

62. The submissions of the Plaintiff are dated 17.5.2023 where they address the following issues;
 - a. Whether the 3rd Defendant's objection at paragraph 19 of his statement of defence has any merit.
 - b. Whether the 1st Plaintiff has established her case on a balance of probability.
 - c. Whether the 1st Plaintiff is entitled to the prayers sought.
 - d. Who should pay the costs of this suit?
63. On the 1st issue, the 1st Plaintiff submits that while the 3rd Defendant pleads limitation of Actions in so far as the claim against him is concerned on the basis of a supposed contract for sale of land between him and the 2nd Plaintiff, the said contract was a fraud, thus the 3rd Defendant did not acquire any right in the property. That under Section 26 of the *Limitation of Actions Act*, limitation of Actions does not apply as the transaction was fraudulent.
64. The 1st Plaintiff submits that the 1st Defendant and his wife deliberately took advantage of the illiteracy of the 2nd Plaintiff to deprive her of her property, as the 1st defendant's wife is the one who received the supposed purchase price paid by the 2nd and 3rd Defendants, and that there is no evidence that she transmitted it to the 2nd Plaintiff.



65. The 1st Plaintiff also submits that the title held by the 4th to 6th Defendants is invalid as it came about by the 1st Defendant's actions of abusing his trust and causing subdivision of parcel 699 and transferring portions of it to himself and his children, thus the said title cannot stand. She relies on the case of *Alice Chemutati Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) 19 November 2021) Judgement as well as the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR.
66. The 1st Plaintiff submits that the 2nd and 3rd Defendants cannot be said to be innocent purchasers for value. She points out that their unsigned document which they purported to be a sale agreement kick started the fraudulent process. She points out that they transacted in the 1st Defendants home, yet the 2nd Plaintiff had a home and that they did not produce an application for the consent of the land control board nor the consent itself. To this end, reference was made to the case of *Kitale Chepkorok Farm Limited v Peter Nasasa & 4 others* [2021] eKLR.
67. The 1st, 4th-6th Defendant's submissions are dated 7.7.2023 where they address the following issues;
- a. What was the effect of abatement on the deceased's suit as against the 1st, 4th and 6th Defendants?
 - b. Does the Plaintiff have a cause of action as against the 1st, 4th-6th Defendants?
 - c. Is the Plaintiff entitled to rely on the witness statement filed by the deceased in support of her claim?
 - d. Has the Plaintiff proven her case to the required standard and therefore entitled to the reliefs sought in the counterclaim?
 - e. Who shall bear costs of the suit?
68. On the 1st issue, these Defendants submitted that the 2nd Plaintiff's suit(deceased) as against the Defendants does not exist as it abated a year after her death on 22.6.2017 in accordance with Order 24 Rule 3 (2) of the Civil Procedure Rules. They argue that the only suit before this court is that of the 1st Plaintiff against the Defendants. They rely on the case of *Aggrey Swaka Waswa v Patrick Omonge Khaemba; Thomas Omonge Khaemba & 3 others* (proposed Respondents) [2020] eKLR as well as the case of *Said Sweilem Gheithan Saanamum v Commissioner of lands* (being sued through the Attorney General & 5 others [2015] eKLR.
69. They cite the case of *Anne Jepkemoi Ngeny v Joseph Tireita & Another* [2021] eKLR to submit that the Plaintiff has no cause of action against them. They argue that since the deceased became the registered proprietor of parcel 699 in 1985 when the Registered *Land Act* (now repealed) was applicable, she exercised her rights under the Act as a proprietor when she subdivided the land, thus she did not need the consent of the 1st Plaintiff. They rely on the case of *Ogango & another v Orangi & 3 others* (Environment & Land case 466 of 2015) [2023] KEELC 16348 (KLR).
70. On the 3rd issue, they point out that the 1st Plaintiff made an application dated 4.9.2019 which sought admission of the deceased's witness statement dated 23.4.2014 which they opposed and the application was ultimately dismissed by the court due to non-attendance of the Plaintiff. They urge the court not to consider the witness statement at this stage of submissions.
71. The Defendants also submit that the Plaintiff relied on allegations of fraud that were alleged to have been committed as against the deceased and not herself and that the same were not proved to the standards required in *Vijay Morjaria v Nasingh Madhusingh Darbar & another* [2000] eKLR.



72. The 2nd Defendant's submissions are dated 25.5.2023. He argues that the 1st Plaintiff's suit does not disclose a cause of action against him. That his title is indefeasible and that the 1st Plaintiff ought to have brought herself within the interests defined under Section 28 (a) and/or Section 30 of the Registered [Land Act](#) to assert any interest over his title.
73. He also argues that the parties transacted with the 2nd Plaintiff between 1995-1996 and her suit was marked as abated on 15.5.2019, thus the 1st Plaintiff has no locus to sustain their suit. He relies on the case of Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others [2021] eKLR.
74. The 2nd Defendant further submits that the allegations of fraud levelled against him were not proved to the required standards in terms of Section 107 as read with Section 108 of the [Evidence Act](#).
75. The 2nd Defendant also relies on the case of Weston Gitonga & 10 others v Peter Rugu Gikanaga & Another [2017] eKLR to submit that he falls within the protection afforded by the doctrine of an innocent purchaser for value without notice.
76. The 3rd Defendant's submissions are dated 17.5.2023. They address the following issues;
- a. Whether the 3rd Defendant acquired a clean title over the property known as Dagoretti/Mutuini/939 (now 1113) fraudulently;
 - b. Whether the Plaintiff has made out a case for grant of orders prayed.
 - c. Whether the caution registered on Title No. Dagoretti/mutuini/939 (now 1113) is justifiable.
 - d. Who bears cost of the suit?
77. It was submitted for the 3rd Defendant that the Plaintiffs are challenging titles to the property known as Dagoretti/Mutuini/939 (now 1113) and claim that the property was illegally and fraudulently transferred to the 3rd Defendant through forgery of the 2nd Plaintiff's signature and thumb print, yet no evidence from a document examiner was produced in evidence. He contends that the onus was on the Plaintiffs to prove fraud and forgery on his part, but they did not discharge that burden at all. To this end, he avers that he acquired a clean title over the suit property.
78. The 3rd Defendant relies on the case of Maria Nganga Gwako v Charles Mwenzi Nganga [2014] eKLR to submit that the caution placed by the Plaintiffs is unjustifiable since no reasonable and valid explanation has been given by the Plaintiffs to justify the same. He urges the court to invoke Section 73 (1) of the [Land Registration Act](#) to issue orders that the illegal and unjustified caution be removed from his title.

Determination

79. The issues falling for determination are;
- a. What is the fate of the 2nd Plaintiff's witness statement dated 23.4.2014?
 - b. Has the 1st Plaintiff been deprived of the parcel of land known as Dagoretti/Mutuini/699 or 920?
 - c. Are defendants lawfully registered as owners of their respective parcels?
 - d. Should the cautions registered on the defendants parcels of land be removed?



80. This suit was instituted by 2 Plaintiffs who are mother and daughter. Unfortunately, the 2nd Plaintiff passed away in year 2017 before her evidence could be taken. She was not substituted in the suit and on that basis, this court marked her case against the Defendants as having abated on 15.5.2019. It follows that this court has the mandate to determine only the 1st Plaintiff's case.
81. The 1st Plaintiff has extensively argued in her submissions that the 2nd Plaintiff's statement dated 23.4.2014 should be admitted by this court. This is the 2nd time that the Plaintiff is attempting to have the said statement admitted. Her 1st attempt was made vide her application dated 4.9.2019 which was dismissed for want of prosecution. The court cannot reconsider the same issue in the platform of submissions, hence the said statement shall not be admissible in evidence.
82. The parties herein do not dispute that indeed, Dagoretti/ Mutuini/476 was partitioned into 4 parcels following probate proceedings concerning the estate of Zakayo Mbugua. Subsequently, in 1985, the 2nd Plaintiff was then issued with a title to parcel 699 measuring 0.40 ha which was one of the subdivisions of parcel 476.
83. The 1st Plaintiff claims that she was bequeathed the said parcel known as Dagoretti/Mutuini/699 (though she is identifying it as 920) by her late mother (the 2nd Plaintiff) and that the Defendants have deprived her of the same and left her with a portion measuring 0.077 Ha only. She produced a title to the land known as Dagoretti/Mutuini/1112 measuring 0.077 ha issued on 29.11.2013 in her name.
84. The 1st Plaintiff claimed that the 1st Defendant had been given custody of the 2nd Plaintiff's title for safe keeping. However, she was unable to prove that allegation. It is the 1st Defendant who produced an affidavit of loss of title of parcel 699 sworn and thumb printed by the 2nd Plaintiff on 17.2.1989 (page 52) of the 1st Defendant's bundle. There is a title for parcel 699 issued on 18.9.1990 to the 2nd Plaintiff (see page 57 of 1st defendant's bundle). This evidence gives credibility to the 1st Defendant's assertion that the 2nd Plaintiff's title to parcel 699 issued in 1985 got lost and it was replaced in 1990.
85. There is evidence that parcel 699 was subdivided into 2 parcels being Dagoretti/Mutuini/817 and 818 and titles thereof issued on 8.7.1991. The evidence of DW1 is that the 2nd Plaintiff willfully ceded part of parcel 699 to him. That evidence has not been controverted.
86. At paragraph 8 of her witness statement, the 1st plaintiff avers that her mother decided to distribute her land in year 2007 when she fell sick. That is when she was bequeathed the suit land No.920. Thus the alleged bequeathed property can be termed as a gift *intervivos*.
87. I pose the question; Was the alleged gift perfected?. In Halsburys" Laws of England" 4th" " Edition Volume 20(1) at paragraph 67, it was stated as follows with respect to incomplete gifts:
- “Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”
88. No evidence was advanced by the 1st Plaintiff to demonstrate that there was perfection of the gift allegedly bequeathed to her by way of transfer. What more, the parcels 699 and or 920 did not exist by



the year 2007, since parcel 699 had long been subdivided in the year 1991, while the title to parcel 920 was registered to Francis Kibicho, the 2nd defendant on 15.8.1996!

89. In cross-examination, PW1 told the court that there are many developments on the disputed parcel of land but she did not stop construction of any of them. The 1st Plaintiff admits the 1st Defendant's evidence that he constructed a house on parcel 818 between 1993-1995 and has never been summoned by the police for doing so. This suit was filed 19-21 years after the 1st Defendant had settled on parcel 818!
90. As for the occupation of the land by the 2nd defendant, Pw1 had this to say " I know that Kibicho has stayed there since year 2000". Upon cross examination by the 3rd defendant, pw1 stated that " I came to know Joseph Munyungu through my mother when I went there.....It is when I learnt that Joseph has been there since 1996." That means the suit was filed when the 2nd and 3rd defendants had been on the suit parcels for a period of 14 and 18 years respectively by the time the case was filed!
91. From the foregoing analysis, again the claim that pw1 was given the suit land in year 2007 is baseless as the land was already occupied by the defendants with the knowledge of the plaintiffs.
92. The 1st Defendant led evidence as to how parcel 699 was subdivided into parcel 817 and 818, the 2nd Plaintiff transferred parcel 818 to him and subdivided parcel 817 into 2 portions being parcel 920 and 921. She further subdivided parcel 920 and sold the same to the 2nd and 3rd Defendants.
93. The issue as to whether parcel 920 was regularly transferred to the 2nd & 3rd Defendants cannot be determined without delving into the case of the 2nd Plaintiff against the 3rd Defendants. As earlier stated, the 2nd Plaintiff's case abated. I'm guided by the holding in Peter Ndungu Thiongo & another v Juvenalis Gitau Muchuga & 6 others [2006] eKLR to conclude that the 1st Plaintiff's case was reliant on the 2nd Plaintiff's case against the Defendants, and thus it cannot stand alone. In that case, it was held as follows;

"The cause of action is entirely structured on the actions of the 1st defendant and the main remedy sought is against him. The 2nd to 7th defendants are subsidiary parties. In my view, with the death of the first defendant and there being no legal representatives of the 1st defendant, the whole substratum of the suit is gone and in effect, the whole suit has abated under Order XXIII Rule 4 (3) of the Civil Procedure Rules".
94. In the case of Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others [2019] eKLR, I used the Latin phrase "Mortui non mordent" which means "dead men don't tell tales, dead men don't bite" in relation to a claim on the property of a deceased person. In the case at hand, 2nd plaintiff is no More. The 1st plaintiff is staking a claim upon the suit properties through her mother's alleged entitlement. However, she has no locus to litigate through her mother. She has no basis to poke holes on the transactions relating to the initial and subsequent subdivisions of the suit properties. Thus the particulars of fraud and illegality as set out at paragraph 29 of her plaint have not been proved to the required standard, while the counterclaim of the 1st, 4th – 6th defendants is found to have merits.
95. I therefore proceed to give the following orders:
 - i. Plaintiffs claim is dismissed.
 - ii. The defendants are found to be the lawful owners of their respective parcels.



- iii. The caution lodged by the plaintiff in respects of any of the suit properties including Dagoretti/Mutuini 1136, 1113 or 1114 is hereby discharged and removed.
- iv. In view of the fact that all parties save 2nd defendant are relatives, then I direct that each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

