



Waugh (Suing on Her Behalf and on Behalf of the Estate of the Late Peter Waugh) v Kiiru & 3 others (Environment & Land Case 74 of 2014) [2022] KEELC 4908 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 4908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 74 OF 2014**

L WAITHAKA, J

JUNE 16, 2022

BETWEEN

**ANGELA EVELINE WAUGH PLAINTIFF
SUING ON HER BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE
PETER WAUGH**

AND

**RHODA WACHUKA KIIRU 1ST DEFENDANT
GERALD WAROGO MWANGI 2ND DEFENDANT
MARGARET WANGUI MERIA 3RD DEFENDANT
MWANGI RUIITHIA 4TH DEFENDANT**

JUDGMENT

Introduction.

1. By a plaint dated March 28, 2014 and amended on April 29, 2015, the plaintiff herein filed this suit seeking judgment against the defendants for: -
 - i. A permanent injunction to restrain the defendants, their servants and/or agents from selling, disposing off and/or taking possession of LR No Mweiga/Block V/Muthuaini/704 and LR No Mweiga/Block V/Muthuaini/1151;
 - ii. A mandatory injunction compelling the defendants, their servants and/or agents to transfer and/or register the suit property in the name of the plaintiff;
 - iii. General damages for trespass;



- iv. Any other and further orders as the court may deem just in the circumstances;
 - v. Costs of the suit.
2. The plaintiff's claim is premised on the grounds that the subject matter of the suit, the parcels of land known as LR No Mweiga/Block V/Muthuaini/704 and LR No Mweiga/Block V/Muthuaini/1151 (hereinafter referred to as the suit properties) were bought by the plaintiff's husband, one Peter Waugh (now deceased) and the plaintiff through the 1st defendant.
 3. The plaintiff accuses the 1st defendant of fraudulently misrepresenting to her husband that the law prohibited him from owning land in Kenya. The particulars of fraud urged against the 1st defendant and the other defendants are listed in paragraph 9A of the amended plaint as follows: -
 - a. The 1st defendant in collusion with the 2nd defendant fraudulently and maliciously registered the suit property in the name of the 1st defendant knowing that the same was jointly owned by the plaintiff and her husband;
 - b. The defendants fraudulently and maliciously represented to the plaintiff's sick husband that he was not allowed to own property in Kenya when in real sense the law allowed him to acquire leasehold interest in land;
 - c. The 1st and 2nd defendants with intent to defraud the plaintiff are alleging that the suit properties were transferred to the 1st defendant as a gift;
 - d. The defendants took advantage of the plaintiff's husband who was ailing to illegally transfer the suit properties to the 1st defendant.
 - e. The 1st defendant sold the second suit property to the 3rd defendant knowing very well that the land belonged to the plaintiff.
 4. The plaintiff also blames the 1st defendant for changing goal posts when she knew that her husband had died by claiming ownership of the suit properties.
 5. Terming the actions of the defendants of refusing to give her vacant possession and to transfer the suit properties to her, constructive breach of trust, the plaintiff urges the court to grant her the reliefs sought in the plaint.
 6. The 1st and 2nd defendants filed responses to the initial plaint but not the amended plaint, denying the allegation levelled against them and putting the plaintiff to strict proof thereof.
 7. The 3rd and 4th defendants never entered appearance or file a defence despite summons to enter appearance having been served upon them by way of substituted service (through advertisement). Consequently, upon request by the plaintiff, interlocutory judgment was entered against them and the matter set down for hearing.

Evidence

The Plaintiff's case.

8. When the matter came up for hearing, the plaintiff, Mrs Angela Waugh (PW1) relied on her statement signed and filed on September 29, 2016 as her evidence in chief.
9. The plaintiff informed the court that the deceased who was an employee of Kimathi University (a senior lecturer) was her husband. The deceased died on October 10, 2013. To proof those facts, PW1



- produced the deceased's letter of appointment, their marriage certificate and the death certificate issued in respect of the deceased death as Pexbt 1, 2 and 3 respectively.
10. The plaintiff informed the court that the deceased left a will dated April 9, 2003 through which he left his entire estate to her. She obtained a grant of probate of the will in the United Kingdom (UK) as the sole executor of the estate of the deceased. She also obtained a resealed grant in respect of the grant from the High Court of Kenya. To attest to those facts, she produced the will, the grant of probate and the resealed grant issued in respect thereof as Pexbt 4, 5 and 6 respectively.
 11. The plaintiff informed the court that the deceased wanted to start a charity and he started looking for land for that purpose. In 2013, the deceased told her that he had identified some land and because the deceased had no money, she sent him £45,100 over a period of two years from her nationwide account number in the UK to the deceased's UK account number. Upon receipt of the money, the deceased transferred it into an account he was operating locally in Kenya Commercial Bank (KCB). To attest to those facts, the plaintiff produced her UK bank statements and those of KCB as Pexbt 7 and 8 respectively.
 12. The court heard that the deceased who was suffering from cancer returned to the UK where he died from cancer in September 2013. The court further heard that while in Kenya, the deceased informed the plaintiff that he had registered the land in the name of the 1st defendant because he was not a Kenyan citizen and that upon obtaining citizenship the land would be transferred to him.
 13. The plaintiff identified the land purchased by her husband using her money as Mweiga/Blk V/ Muthuini/704. The land had been purchased from the 2nd defendant. To prove those facts, the plaintiff produced a certificate of search and an extract of the green card in respect of the land as Pexbt 9 and 10 respectively.
 14. The plaintiff pointed to the court entries in the KCB account of the deceased showing money going to the 2nd defendant's account for purchase of land.
 15. The court heard that the deceased told the plaintiff that he was purchasing the land at Kshs 250,000/= per acre and that he was purchasing 9 acres.
 16. The court further heard that the deceased also paid for a smaller parcel of land to wit LR No Mweiga/ Muthuini Blk V/1151 in cash. The parcel was transferred to the 3rd defendant on November 19, 2013. The plaintiff produced an extract of the green card and a search certificate in respect of the property as Pexbt 11 and 12 respectively.
 17. The plaintiff accessed and printed email communication between the deceased and the 1st defendant. She produced a certificate in respect of the print out as Pexbt 13.
 18. The plaintiff informed the court that in one of the emails which she produced as Pexbt 14(a), her husband was clear that the properties would be registered in his name once he got his Kenyan citizenship.
 19. The court heard that after the deceased purchased the land, he started building a house to be used as a rehabilitation centre for charity. She produced a photograph showing the developments as Pexbt 14.
 20. The court heard that the plaintiff wanted to visit Kenya to see how the project and the developments thereon were progressing. For that reason, she obtained a multiple journey visa to Kenya which she produced as Pexbt 15.
 21. The court further heard that after the plaintiff's husband died, the plaintiff tried to establish how the sale transactions were carried out because she could not trace any sale agreements. Upon



- investigations, the plaintiff found out that the 4th defendant had sold parcel number Mweiga/Block 5 Muithuaini/1151 to the 1st defendant who then sold it to the 3rd defendant. For the foregoing reasons, the plaintiff urged the court to find that the suit properties belong to the deceased and to order that the same be transferred to her as the executor of the estate of the deceased.
22. Upon being cross examined by counsel for the 1st and 2nd defendant, PW1 stated that what is contained in her statement is what she was told by her husband. She further stated that she has emails between herself and her husband about the transaction that were going on in Kenya but she did not produce them.
 23. The plaintiff admitted that her husband was in Kenya between May 2011 and September 2013. She also admitted that during that time, her husband was working and earning Kshs 122,000/= but did not have capacity to purchase the two acres of land on his own. For that reason, her husband asked her to send money to him.
 24. The plaintiff admitted that she has no agreement relating to the 2nd parcel of land. Explaining that the parcel was paid for in cash, the plaintiff stated that she had no bank statements showing any transfer of money made to the 1st defendant. She was also unaware of where the suit property is located.
 25. In the two years her husband was in Kenya, she visited Kenya but did not come to Nyeri. At the time she visited Kenya, her husband had not bought the suit properties.
 26. Concerning the email produced as Pexbt 14(a), which suggests that it was her idea to make the 1st defendant acknowledge the money received and the contention by the 1st defendant that she was her husband's friend and that the suit properties were given to her by her husband as a gift, she stated that the relationship between her husband and the 1st defendant was that of employer and employee (house help) and maintained that the suit properties were not given to the 1st defendant as a gift.
 27. She denied the contention that the emails imply that the 1st defendant and her husband had a deeper relationship and stated that what she knows is that her husband trusted the 1st defendant. She also admitted that by the time she filed this suit, the 2nd parcel of land had been transferred. However, she was not aware of that fact.
 28. Concerning the bigger plot (where the house stands), she stated that she sent money when her husband returned to UK to the 1st defendant to complete the house.
 29. Concerning the email sent on October 3, 2013, produced as Pexbt 14(n), she acknowledged that it suggests that she would go to visit the house but the house was not hers (she would use a spare room). The email made her believe that her husband was under some spell from the 1st defendant.
 30. With regard to the email produced as Pexbt 14(m), she acknowledged that her husband was asking the 1st defendant to move from the rented flat and move to the shamba because she kept asking for rent.
 31. In re-examination, the plaintiff stated that in law, a transaction undertaken by her husband would touch on her directly as his legally married wife. She contended that as the one named as the executor of the entire estate of her husband, by operation of the law, the property automatically passes to her because it was purchased by her husband.
 32. With regard to the circumstances surrounding the possession and occupation of the suit property by the 1st defendant, the plaintiff stated that the 1st defendant was left to take care of the house after her husband left Kenya for UK for treatment.



33. Referring to the email produced as Pexbt 14(n), the plaintiff stated that her husband was telling the 1st defendant to stop asking for money as he needed it for treatment.
34. Citing the mode of communication she had with her husband most of the time being face to face communication as the reason she did not produce emails of the communication between herself and her husband, the plaintiff stated that the Kshs 122,000/= her husband was earning was not enough to sustain him in Kenya.
35. The plaintiff informed the court that her husband's health deteriorated after he purchased the properties and he was unable to follow up on the transactions.
36. The plaintiff stated that neither her nor her husband was aware that the smaller suit property had been transferred to the 3rd defendant in June 2013 while her husband was still in Kenya but very ill.

The Defendant's case.

37. DW1, Rhoda Wachuka Kiiru, relied on her statement filed on March 13, 2017 after it was adopted as her evidence in chief.
38. She stated that she did not know the plaintiff and had not met her before. She had however, heard about her from the deceased.
39. She confirmed having received the email produced as Pexbt 14(a) and money sent to her by the plaintiff. At the time she received the money, the plaintiff's husband was in UK admitted in hospital and she never received any other money from the plaintiff or her husband when he was in UK.
40. Concerning the email produced as Pexbt 14(n), she stated that her understanding of it was that she was to avail a room to Angela (plaintiff) when she visited on holiday and denied the contention by the plaintiff that the house was being built as a home for children suffering from HIV and AIDS. She maintained that the house was built as her home. Referring to the email of October 4, 2013 she stated that there is no suggestion about a children's home being built.
41. She stated that no money was sent to the deceased's KCB bank account that was produced as Pexbt 8 but acknowledged that on November 20, 2012 she banked two cheques in that account on behalf of the deceased.
42. Terming the land she sold to the 3rd defendant her own, she stated that the deceased gave her little money to buy the land. She however admitted that she did not contribute any money to purchase parcel No 704; that all the money came from the deceased. She stated that because the deceased was employed at the time the property was bought, she could not tell whether or not the plaintiff gave the deceased money to buy the land.
43. Terming the claims by the plaintiff that she lied to the deceased that he could not own land in Kenya untrue, she maintained that the property was bought as a gift for her because she lived with the deceased and took care of him when he was very sick.
44. In cross examination, she stated that she knew that the deceased had a wife. She acknowledged that the sale agreement for parcel number was done by her current advocate, Muhoho.
45. She stated that when she received Kshs 67,000/= from Angie (the plaintiff), she did not know who Angie was.
46. Regarding the email produced as Pexbt 14(a), she informed the court that the deceased was telling her he wanted his name attached to both properties.



47. She confirmed selling land parcel number 751 in November 2013.
48. Other than the salary of Kshs 122,000/= which the deceased was earning, she did not know whether the deceased was getting money from elsewhere.
49. She acknowledged that she produced no document showing where and when she got her own money to build the house.
50. She stated that when the 2nd defendant transferred the land to her, the deceased was present.
51. She explained that parcel number 1151 was purchased in August 2012 from Mary Buki although the green card shows it was owned by Mwangi Ruthia and the title in respect thereof transferred on June 7, 2013 while parcel number 704 was transferred on April 26, 2013.
52. In re-examination, she maintained that the deceased bought the parcel of land known as 704 as a gift to her and as a home where they would live together.
53. DW2 Gerald Mwangi, relied on the statement he recorded and signed on February 19, 2016 after it was adopted as his evidence in chief.
54. He stated that he wanted to sell plot No 704 when the 1st defendant was introduced to him by a land broker. They agreed that the 1st defendant would pay Kshs 2,000,000/= for 8 acres and he and the 1st defendant signed the agreement on February 19, 2013. The 1st defendant was accompanied by the deceased whom she described as her husband, paid the money in three instalments through bank transfer from his (deceased's) bank.
55. Explaining that he has no interest in plot number 1151, he produced the sale agreement signed between him and the 1st defendant dated February 19, 2013 as Dextbt 13.
56. In cross examination, he acknowledged that in his statement he has not indicated that the deceased was husband to 1st defendant. Although the agreement does not indicate that the deceased was going to pay the purchase price, he acknowledged that he received the purchase price being Kshs 2,000,000/= from the deceased's bank account and cash of Kshs 5,000/- from the 1st defendant and surrendered all the documents for the suit property to the 1st defendant but he did not attend the land control board.
57. He acknowledged that the sale agreement does not indicate that the property was bought as a gift to the 1st defendant but they told him that they were buying land to build a home.
58. In re-examination, he stated that the transaction between him and the 1st defendant was a sale but he did not know what agreement the deceased and the 1st defendant had but reiterated that he was not selling the land to the deceased but to the 1st defendant.
59. At close of hearing, parties filed submissions which I have read and considered.

Analysis and Determination.

60. From the pleadings, evidence adduced and the submissions, I find the issues for the court's determination to be: -
 - i. Whether the plaintiff had capacity to institute this suit?
 - ii. Whether the defendants fraudulently represented to the deceased that he could not own land in Kenya?
 - iii. Whether in her submissions the plaintiff departed from her pleadings?



- iv. Whether the suit properties are subject of any trust in favour of estate of the deceased or the plaintiff?
 - v. Whether the plaintiff has made up a case for being granted the orders sought, or any of them?
 - vi. What orders should the court make?
61. On whether the plaintiff had capacity to institute this suit, that issue was raised *vide* notice of preliminary objection filed on May 2, 2014. Vide that notice, the 1st and 2nd defendants inter alia contended that the plaintiff had no capacity to institute the suit herein. The 1st and 2nd defendant contended that the plaintiff had no grant issued in her favour, and if she had a grant, the same had not been resealed by the High Court of Kenya. It was also contended that the suit offended the provisions of part vii of the [Evidence Act](#), cap 80 Laws of Kenya, on admissibility of electronic evidence.
62. In the submissions filed on behalf of the plaintiff, reference is made to the provisions of section 2 and 47 of the [Law of Succession Act](#), cap 160 Laws of Kenya, and the documentary evidence produced by the plaintiff to wit will (Pexbt 4), grant of probate issued by a court in UK (Pexbt 5), Resealed grant (Pexbt 6) and certificate of print of emails (Pexbt 13) and submitted that the plaintiff had capacity to institute the suit.
63. It is noted that in the submissions filed on behalf of the 1st and 2nd defendants, the issue was abandoned. Perhaps this happened owing to the evidence produced by the plaintiff showing that she indeed had capacity to institute the suit. For that reason, and on account of the evidence produced by the plaintiff showing that she was the executor of the will of the deceased, I return a positive verdict on that issue.
64. With regard to the 2nd and 3rd issue, which issues I find to be intertwined, it is noteworthy that in her pleading (the amended plaint) the plaintiff has pleaded that the 1st and the 2nd defendants' fraudulently misrepresented to the deceased that the law prohibited him from holding land in Kenya. The particulars of the pleaded fraud and misrepresentation are particularized in paragraph 9A of the amended plaint. The said particulars are reproduced in paragraph 3 of this judgment.
65. In the submissions filed on behalf of the plaintiff, reference is made to the definition of fraud in [Black's Law Dictionary](#), 9th Edition and the dealings of the defendants surrounding the transfer of suit properties to the 1st defendant, in particular want of evidence that the defendants complied with the law regarding transfer of properties and submitted that failure to obtain the requisite documents for transfer made the dealings fraudulent and impeachable under section 80 of the [Land Registration Act](#) 2012.
66. It is further submitted that it is not in doubt that the deceased was misled in believing that he could not own property in Kenya.
67. In the submissions filed on behalf of the 1st and 2nd defendants, reference is made to their statements of defence in which they denied the alleged fraud and misrepresentation and pointed out that in her pleadings the plaintiff made specific allegations of fraud against the defendants. It is submitted that the plaintiff failed to prove those allegations.
68. It is contended that the plaintiff failed to prove: -
- i. That there was any collusion between the 1st and 2nd defendant in registering plot number 704 in the name of the 1st defendant.
 - ii. That the defendants knew that the land was owned by the plaintiff and the deceased;



- iii. That the deceased was misled by the defendants into believing that he could not own property in Kenya;
 - iv. That the defendants had the intention to defraud the deceased; and
 - v. That the 1st defendant sold the 2nd property knowing very well it belonged to the deceased.
69. Based on an email to the 1st defendant by the deceased suggesting that the idea of getting the name of the deceased indicated in the title deeds was the plaintiff's idea, it is submitted that the plaintiff has not discharged the burden of proving the pleaded fraud and misrepresentation against the 1st and 2nd defendants.
70. Concerning the submissions by the plaintiff to the effect that there was fraud arising in want of compliance of Law in transfer of the suit property to the 1st defendant, it is submitted that they cannot hinge her case on those aspects of fraud because they are not part of the particulars of fraud pleaded on her case. The attempt to rely on those aspects of fraud when they had not been pleaded is said to be departure from the plaintiff's pleadings.
71. On account of the fact that the alleged fraudulent dealings were not pleaded, it is submitted that the defendants were not under any legal obligation to defend themselves on those aspects. Being the one who desired judgment on the alleged lack of compliance with the law, it is submitted that the burden was on the plaintiff to plead and prove the none compliance with the law.
72. Having considered the pleadings filed by the plaintiff, I agree with the 1st and 2nd defendants that by introducing the issue of none compliance with the law, in particular the requirement to obtain the consent of the land control board and making that issue a ground of attack of the case of the 1st and 2nd defendant, the plaintiff offended the legal principle that limits the issues for determination by court to pleaded issues. The principle is captured in the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* (2015) e KLR where the Court of Appeal stated:-
- “This court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC* SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:
- “... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
73. In view of the foregoing, I return a positive verdict on issue number (iii) as far as it relates to the attempt by the plaintiff to urge her case on the ground that the registration of the 1st defendant was vitiated by fraud arising from failure to obtain land control board consent to transfer the suit properties to herself. With regard to issue number (ii), on account of the reasons given herein above, I return a negative verdict on that issue.
74. As to whether the suit properties are subject to a trust in favour of the deceased and the plaintiff, on behalf of the plaintiff reference is made to the definition of trust in *Black's Law Dictionary*, 9th Edition, section 25(2) of the *Land Registration Act* which subjects registered land to unregistered trusts and the evidence of the plaintiff to the effect that she paid the purchase price through the deceased and submitted that the suit property is subject of a trust in favour of the estate of the deceased and the plaintiff. In support of that contention, a long account inclusive of case law is given, of circumstances



in which a court may infer trust in dealings. Such circumstances are said to include where one person purchases a property but the same is conveyed in the name of someone else other than the purchaser as happened in the case of *Dyer v Dyer* (1788) 2 Cox Eq, 92 at 93 quoted in Snells, Equity page 206 thus: -

“The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law; that where a feoffment is made without consideration, the use results to the feoffer.”

75. A resulting trust is also said to arise where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee. In that regard, reference is made to *Snell's Equity* 29th Edn, Sweet & Maxwell p.175 where the writer has stated: -

“Unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money.”

76. Based on the above principle and the evidence adduced in this case to the effect that the money used to purchase the property was provided by the plaintiff through the deceased, it is submitted that a resulting trust arises in favour of the plaintiff and the estate of the deceased.

77. On whether the deceased had intention to gift the suit properties to the 1st defendant, reference is made to the email sent to the 1st defendant by the deceased informing her of his wish to have his name inserted in the title to the suit property and submitted that, contrary to the contention by the 1st defendant that the suit properties were given to her as a gift, the deceased had no intention to gift the property to the 1st defendant.

78. It is contended that through the email referred to in paragraph 92 above, the deceased made it clear that the plaintiff had an interest in the property because she had provided half of the purchase price.

79. Concerning the 1st defendant's contention that the deceased bought the suit properties as a gift to her, it is submitted that there is no evidence capable of proving that fact. With regard to this issue, I have considered and analyzed the submissions of the plaintiff and 1st and 2nd defendants and their evidence. My considered view of the issue is that both the deceased and the plaintiff had a disclosed interest in the suit property. That fact is discernable from the emails produced by the plaintiff.

80. Regarding the emails my observations are as follows:

On the email of October 1, 2013 (Pexbt 14(a) the deceased addressed the 1st defendant thus:-

“...please also send a receipt for the money received by western union and what it purchased and acknowledge that when I get Kenyan citizenship I can have my name attached to the title deeds of both properties.”

81. From the above email, the circumstances upon which the suit properties were registered in the name of the 1st defendant are discernable; it is because the deceased did not have Kenyan citizenship at the time. The email confirms the testimony of the plaintiff to the effect that she had been communicating with the deceased about the properties. Otherwise, how else would she have known about the properties.



- The deceased must have told her that he bought the properties in the name of 1st defendant because he did not have Kenyan citizenship. In that regard, I do find the plaintiff's explanation concerning the circumstances upon which the suit properties were registered in the name of the 1st defendant properly explained and accounted for.
82. The email also confirms that part of the money used in buying the suit properties came from the plaintiff. By virtue of having provided part of the purchase price, the plaintiff had an interest in the suit properties distinct from that of the deceased. For it to have been the idea of the plaintiff, it means the deceased had informed the plaintiff of the dealings in Kenya. If the dealings were meant for the benefit of the 1st defendant and without interest of the deceased and/or the plaintiff, there would have been no basis of the deceased informing the plaintiff about the properties, necessitating her to insist on the deceased's name being included in the title of the properties when he acquired Kenyan citizenship. My view of the message is that it is a confirmation that the deceased had an interest in the suit properties and that he had not given it to the 1st defendant, as contended by her. There is no basis for inferring that by being sorry while giving the instructions, (note the word used instructions and not request), means that the deceased had given the property to 1st defendant or that he had acquired it for the benefit of the 1st defendant. It is noted that the 1st defendant was receiving and acting on instructions from the deceased on the project that was being undertaken in plot number 704. If the deceased sent the money for implementation of the project in the property as a gift, would he still ask for account as happened in the emails exchanged between the deceased and the defendant? I don't think so.
83. I note that through the email of September 20, 2013 (Pexbt 14(s)), the 1st defendant reassured the deceased thus: -“...whenever everything is done still remember that you have a place to call home in Kenya.”
84. In the email of October 1, 2013 (14 a), the 1st defendant addressed the deceased thus: -
“You will need everything ready on November for your holiday”.
85. So, now on whose behalf was the 1st defendant carrying out the developments on plot No 704? On account of the reasons cited above, I am of the considered view that the property in the suit property did not belong to the 1st defendant but the deceased.
86. Regarding the 1st defendant's occupation and possession of the suit property, the email of October 3, 2013 goes to show that the 1st defendant's use and occupation of the suit property, (plot No 704), was with the permission of the deceased. To the extent that the 1st defendant was been requested to allow the plaintiff to access and live in the house, it means that the 1st defendant enjoyed some measure of control of the suit property. However, being in use and possession of property belonging to another person does not constitute the person in use and possession the owner. The person in possession and use, may however exercise some measure of control. In my view, this is the scenario painted by email produced as Pexbt 14(n).
87. It is also noted that the email is sent after the email of October 1, 2013 (Pexbt 14(a)) where the deceased had expressed desire to have his name added in the title deeds of the suit properties. The only reasonable inference that can be drawn to those follow up messages, is that the deceased was seeking assurance from the 1st defendant that she would not breach the trust vested in her and deny his wife access and use of the house erected in the suit property.
88. Whilst it is true that *vide* the email produced as (Pexbt 14(n)) the deceased instructed the 1st defendant to move to the shamba, the reason was stated as avoiding issue of payment of rent. To equate



the instructions to giving the property to the 1st defendant, without any other evidence, would be tantamount to entering in the realm of speculating as to what the intention of the deceased was.

89. It is my considered view that the deceased would not still maintain an interest in the suit property, if he had gifted it to the 1st defendant. This is as stated by the 1st defendant in her email of September 20, 2012 (Pexbt 145) in which she assured the deceased that he would have a place to call home (when he returned to Kenya).
90. There is also a request for account made by the deceased. The request was made vide an email dated October 1, 2013 (Pexbt 14(a)) one wonders how the deceased would ask the 1st defendant to account for resources sent to her if they were being sent as a gift.
91. The fact that the deceased was desirous of having his name put in the title to the suit property, regardless of the reason advanced for that desire, negates a finding that the suit properties were given to the 1st defendant as a gift. The mere fact that the 1st defendant was allowed to gain access to the suit properties and to use them does not make her the owner or the intended beneficiary of the properties. In view of the foregoing, I am not convinced that the suit properties were given to the 1st defendant as a gift or were acquired for her benefit.
92. On whether the plaintiff has made up a case for being granted the orders sought or any of them, as pointed out in paragraph 2 above, the plaintiff seeks various reliefs against the defendants, these include: -

A permanent injunction to restrain the defendants, their servants and/or agents from selling, disposing off and/or taking possession of LR No Mweiga/Block V/Muthuaini/704 and LR No Mweiga/Block V/Muthuaini/1151.
93. In respect of that prayer, it is noted that by the time this suit was filed, the suit properties had already being transferred to the 1st defendant and the 1st defendant had already taken possession thereof. It is also noted that the 1st defendant had transferred LR No Mweiga/Block V/Muthuaini/1151 to the 3rd defendant. What this means is that this relief may not be granted in the manner sought.
94. As to whether a mandatory injunction can issue compelling the defendants, their servants and/or agents to transfer and/or register the suit properties in the name of the plaintiff, on account of the fact that the plaintiff is not a citizen of this country; the fact that the interest held by the 1st and 3rd defendants in the suit properties is absolute and the law prohibiting foreigners to hold absolute interest in land (article 65 (1) of the *Constitution*); I am of the considered view that the reliefs sought may not issue in the manner sought.
95. On whether the plaintiff has made a case for grant of damages for trespass to land, a review of the evidence adduced in this case shows that the 1st defendant entered into the suit properties with the permission of the deceased. Whilst no action can attach on the 1st defendant on account of that permission, it is noted that upon entry into the suit properties, the 1st defendant unlawfully dealt with the suit properties by inter alia transferring LR No Mweiga/Block V/Muthuaini/1151 without the sanction of the deceased who was the beneficial owner thereof. She also refused to give vacant possession of Mweiga/Block V/Muthuaini/704 to the plaintiff when she knew that she was the beneficial owner thereof. I find the 1st defendant's occupation of Mweiga/Block V/Muthuaini/704 after the plaintiff claimed it on behalf of the estate of the deceased and on her own behalf, to have been unlawful and amounting to trespass to land for which the plaintiff is entitled to claim damages for trespass to land. However, on account of the evidence adduced by the 1st defendant suggesting that



she had reasonable ground for holding on the properties and to deal with them, I will not award any damages against her.

96. In view of the foregoing, I proceed to make the following orders: -

- i. I declare that the properties known as LR No Mweiga/Muthuaini/Block V/704 and Mweiga/Muthuaini/Block V/1151 are subject of a trust in favour of the estate of Peter Waugh (deceased) and the plaintiff herein.
- ii. A permanent injunction be and is hereby issued to restrain the defendants, their servants and/or agents from selling, disposing off and in any other manner dealing with the parcels of land known as LR No Mweiga/Block V/Muthuaini/704 and LR No Mweiga/Block V/Muthuaini/1151 other than by way of transferring the same to the plaintiff herein or her nominated transferee.
- iii. A mandatory injunction be and is hereby issued compelling the 1st and 3rd defendants, to transfer and/or register the suit property in the name of the plaintiff and/or her nominated trustee.
- iv. The National Land Commission to convert the interest held by the 1st and 3rd defendants in the suit properties LR No Mweiga/Block V/Muthuaini/704 and LR No Mweiga/Block V/Muthuaini/1151, to leasehold interest in order to enable lawful registration of the interest in those parcels of land to the plaintiff or her nominated transferee.
- v. Costs of the suit are awarded to the plaintiff.

DATED AND SIGNED AT ITEN THIS 30TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

Read, signed and delivered at Nyeri this 16th day of June, 2022.

J. O Olola

JUDGE

