



**Kiarie & 5 others v Murungu (As an Administrator of the Estate of Joseph Murungu Kiarie (Deceased)) & another (Environment & Land Case E027 of 2021) [2022] KEELC 3639 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3639 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E027 OF 2021**

**LN MBUGUA, J  
JULY 21, 2022**

**BETWEEN**

**ANDREW KAGWA KIARIE ..... 1<sup>ST</sup> PLAINTIFF  
NG'ANG'A KIARIE ..... 2<sup>ND</sup> PLAINTIFF  
DORCAS WANJIKU NJOROGE ..... 3<sup>RD</sup> PLAINTIFF  
LYDIA WAIRIMU NJUGUNA ..... 4<sup>TH</sup> PLAINTIFF  
BEATRICE WANJIRU KIARIE ..... 5<sup>TH</sup> PLAINTIFF  
ESTHER NJOKI KAMAU ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**JOHN KIARIE MURUNGU (AS AN ADMINISTRATOR OF THE ESTATE OF JOSEPH MURUNGU KIARIE (DECEASED)) ..... 1<sup>ST</sup> DEFENDANT  
JOHN KIARIE MURUNGU JNR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The background of this case is that the plaintiffs and the 1<sup>st</sup> defendant (Joseph Murungu-deceased) are siblings, being children of one Kiarie Murungu alias John Kiarie Murungu who is also deceased. The 2<sup>nd</sup> defendant is a son of the 1<sup>st</sup> defendant. At the heart of the dispute is a land parcel no NRB/K110/150 measuring 0.523 acres (0.2117 HA,) situated in Thome Estate which land originally belonged to the father of the plaintiffs and 1<sup>st</sup> defendant. Vide a Succession cause no. 12 of 2014 at Githunguri SPM'S court, the suit parcel was equally distributed to the plaintiffs, 1<sup>st</sup> defendant and one Simon Murigi



Kiarie culminating in the joint registration of the title (registered on August 26, 2020) to the suit land in their names.

2. It so happens that the 2<sup>nd</sup> defendant was staying on the suit land. The plaintiffs are seeking severance of the joint ownership, sale of the land so as to share the proceeds as well as an order for the 2<sup>nd</sup> defendant to vacate the land. The 2<sup>nd</sup> defendant contends that he has built on the suit land. He is thus claiming a constructive trust and adverse possession on the same and that any excision and severance of the suit land should result in a title issued in defendants' name for the occupied portion of the suit property.
3. At some point in the lifespan of the suit, the parties gave mediation a trial but it did not bear fruits. The 1<sup>st</sup> defendant also died on August 29, 2021 and vide an application dated December 1, 2021, he was duly substituted by his son, the 2<sup>nd</sup> defendant on December 8, 2021.
4. Way back on July 28, 2021, directions had been given through mutual consents of the advocates for the parties for the case to be heard through affidavit evidence and submissions.

### **Case for the Plaintiffs**

5. The plaintiffs filed this suit through the Amended Originating Summons dated August 2, 2021 where they are seeking the following orders:
  - i. That the Joint Ownership in respect of Title Number Nairobi /Block 110/150 (Thome) (hereinafter referred to only as "the suit property") be severed.
  - ii. That the suit property be sold and the proceeds thereof (net of any taxes, land rates and agreed legal fees) be shared equally between the 8 owners /beneficiaries.
  - iii. That the 2<sup>nd</sup> Defendant /Respondent be compelled by an order to render vacant possession of the suit property Title Number Nairobi/ Block 110/150 for purposes of sale of the property.
  - iv. That the deputy registrar be empowered to sign any documents that the 1<sup>st</sup> Respondent may refuse to sign.
  - v. That the court be pleased to grant such further or other relief as it may deem just in the circumstances.
  - vi. That the Respondents be condemned to pay the costs of and incidental to the application.
6. In support of the Originating summons, the plaintiffs also rely on the two supporting affidavits of the 1<sup>st</sup> Plaintiff, one dated August 2, 2021 and another dated March 11, 2022. The plaintiffs contend that they are siblings with the 1<sup>st</sup> defendant and they are all registered owners of LR No Nairobi/ Block 110/150 Thome measuring about 0.2117 hectares, the suit property. They inherited the land from their late father Kiarie Murungu vide a confirmation of grant dated April 28, 2015. The Plaintiffs claim that the late Joseph Murungu Kiarie (who was the 1<sup>st</sup> Defendant before substitution), being the eldest brother was appointed the administrator of their father's estate but he went on to put the 2<sup>nd</sup> Defendant (his son) on the suit property. The 2<sup>nd</sup> Defendant had consequently been collecting rental income from the property without paying the Plaintiffs.
7. They stated that the 2<sup>nd</sup> Defendant had refused to vacate the suit property despite their demands and even went ahead to seek compensation from them. They indicated that the Defendants should not enjoy proceeds of the joint ownership while there were other family members in need of financial aid.



8. As such they are seeking severance of the joint ownership so as to sell the suit property and share out proceeds adding that the said land was incapable of being partitioned as this would affect its proper land use.
9. The Plaintiffs also indicated that vacant possession was necessary as “no interested buyer was willing to purchase the property with the 2<sup>nd</sup> Defendant still in possession of the suit property”.
10. The Plaintiffs filed the supplementary affidavit dated March 11, 2022 in response to the Defendant’s affidavit dated August 18, 2021. They refute the claim that their late father gave the 2<sup>nd</sup> Defendant the said piece of land. That it was the late Joseph Murungu (former 1<sup>st</sup> defendant) who intermeddled with the Estate of their deceased father by placing his son thereon, adding that the late Joseph Murungu had affirmed that the construction took place in October 2005 which was after the demise of their father who died on June 30, 2005.
11. The Plaintiffs questioned how they would have consented to have the 2<sup>nd</sup> Defendant registered as the owner of the portion where the said house was constructed while aware that the suit property was jointly owned by all the siblings.
12. The Plaintiffs affirmed that in the meeting held on January 21, 2020, they reached an agreement to sell the property and give the 2<sup>nd</sup> Defendant Kshs 4,700,000 to help him relocate out of the suit property which was an act of good will and not compensation. But that the 2<sup>nd</sup> Defendant frustrated implementation of the said agreement because he had been collecting rental income from the suit property and was not keen on resolving the dispute amicably.
13. The Plaintiffs went on to state that parties attempted to resolve the dispute vide mediation on the issue of compensating the 2<sup>nd</sup> Defendant, but they did not reach an agreement because they deemed it as aiding an illegality. They further stated that the late Joseph Murungu who was 1<sup>st</sup> Defendant died during the pendency of the mediation, and thereafter the family agreed to sell the suit property and retribute the 2<sup>nd</sup> Defendant but the 2<sup>nd</sup> Defendant had since repudiated the agreement claiming to have signed it under duress. As such, they were no longer willing to retribute the 2<sup>nd</sup> Defendant who was acting in bad faith and went on to claim that he was a trespasser who should give vacant possession.
14. The Plaintiffs added that there was no constructive trust and the 2<sup>nd</sup> Defendant could also not claim the suit property through adverse possession.

### **Case for the Defendants**

15. The defendants have opposed the suit through the Replying Affidavit of the late Joseph Murungu Kiarie (1<sup>st</sup> defendant) sworn on August 18, 2021.
16. I see that another further affidavit dated June 16, 2022 was filed, allegedly sworn by the dependants of the late 1<sup>st</sup> defendant. From the outset, I disregard the said affidavit for the following reason; On January 27, 2022, counsel for the defendants sought leave to file a further affidavit within 14 days. The court acceded to the request, of which the court gave an order for the said affidavit to be filed and served by February 11, 2022. At the same time the court gave directions on the filing of submissions of which the plaintiffs were to file and serve their submissions by March 11, 2022, with defendants filing theirs on April 11, 2022 and the court gave a mention date to confirm the filing of submissions on June 20, 2022. Come the date of June 20, 2022, and it emerged that the protagonists had filed their submissions, although those of the defendants were allegedly filed on that day of June 20, 2022. There was no word from the defendants that they had not filed their further affidavit on time, and there was no request made to the court to have any other affidavit admitted in evidence out of time. I therefore find that



the filing of the further affidavit on June 16, 2022 long after the plaintiffs had filed their submissions amounts to stealing a match and flies against the provisions of Article 50 (1) of the Constitution and Section 1A (3) of the Civil Procedure Act. I will say no more about that affidavit.

17. The late 1<sup>st</sup> defendant had deponed that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Plaintiffs were his siblings, while the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Plaintiffs were his sisters in law. He affirmed that the suit property belonged to his late father. He however deponed that their father had constructed five single rooms houses and allowed him to put up four more units which he did in 2003 when the father was still alive. That in year 2002, their late father allowed the 2<sup>nd</sup> Defendant (son to the 1<sup>st</sup> Defendant) to stay in one of the houses due to proximity to the University he was attending (USIU). Sometime in March 2005, their father expressed a wish that he wanted to have the 2<sup>nd</sup> Defendant put up a residential house for himself and showed him a portion where he could put up the said house. Ist defendant's brothers were informed about this turn of events in the presence of the 2<sup>nd</sup> Defendant and their uncle (David Kamura Murungu), and there was no objection. Thereafter beacons were put in place and the 2<sup>nd</sup> Defendant went on to construct a house between 2005 and 2007 where he currently resides with his family.
18. He went on to state that in a family meeting held on October 5, 2016, it was agreed that the property where the 2<sup>nd</sup> Defendant's house had been constructed would be excised from the main property and registered in the name of the late Joseph Murungu Kiarie and the rest of the land would be owned jointly by his siblings.
19. He went on to depone that on diverse dates between January and April 2019, his siblings held meetings in his absence where they resolved to sell the suit property without sub diving it but that they would compensate the 1<sup>st</sup> Defendant for the development at the market rate and the net balance would be shared equally between the eight beneficiaries. An agent was subsequently commissioned who prepared a valuation report where in a meeting dated January 21, 2020 parties to this suit agreed to use the price in that report as the initial purchase price subject to fresh valuations being undertaken yearly until a suitable buyer was found. In the said meeting, it was also agreed that the late Joseph Murungu would facilitate access of potential buyers to view the suit property in the company of another member of the family and that the area chief had to be notified.
20. The Defendant went on to state that to aid in this arrangement, the 1<sup>st</sup> plaintiff was given keys to access the suit property and the 5<sup>th</sup> Defendant's son who also lives on the suit property also had access. But the 1<sup>st</sup> Plaintiff would take people to view the property unannounced and in total disregard of the agreement which caused unnecessary anxiety to people residing there while also causing insecurity.
21. He stated that the house was constructed before the succession cause and should they follow through with the subdivision, the house would have to be dismantled, hence their clamour for compensation. He added that the County By-laws also did not allow the sub division of units below 0.5 acres in that area.
22. He further stated that the meeting held on March 28, 2021 was done in his absence as he was unwell and recuperating and he questioned the rescission of the agreement on compensation as well as the amount that ought to be paid to the lawyer who would undertake the registration of the transmission from their father's name to the beneficiaries.
23. He also stated that the defendants are the ones who installed electricity, did a total overhaul of upgrading the water connections to the suit property and they have continued to pay rent and rates.
24. The 1st defendant further stated categorically that there is no dispute regarding the fact that the suit land and buildings are to be sold and that the sum of Ksh 5 million being the approximate initial deposit



is to be paid to the defendants to facilitate the relocation of the 2<sup>nd</sup> defendant to enable him to surrender vacant possession, and the net profit is to be shared amongst the eight beneficiaries of the title.

25. The defendants are seeking the following orders in their counterclaim:
- i. An implied and/or constructive trust and estoppel exist in favour of the Defendant/s so that the registration of the Plaintiffs as owners of such part of the land measuring 0.06Ha (approx.) as is occupied by the main house on site is deemed to be in trust for and on behalf of the Defendants.
  - ii. The Defendant/s have since acquired prescriptive rights of adverse possession over the area of the suit land measuring 0.06Ha on which the main building is sitting.
  - iii. The Defendants are entitled to such excision and severance of co-ownership as will produce a title to the occupied portion in their names absolutely.

## Submissions

### Submissions of the Plaintiffs

26. In their submissions dated March 11, 2022, the plaintiffs have framed the following issues for determination: Whether the sale of the suit property is the only recourse available to the plaintiffs. i.e. Severance of the Joint Proprietorship of the Suit Property?; Whether the plaintiffs are entitled to vacant possession of the suit property? (The Defendants illegal occupation of the suit property); and Whether the Defendants are entitled to compensation before they render vacant possession of the suit property?
27. On the issue of severance of the joint ownership, it was submitted that the ownership of the suit property being uncontested, the only recourse to ensure all the registered proprietors enjoyed their proprietary rights was through severance of the joint ownership, sale of the suit property and sharing of the proceeds amongst the registered owners as espoused by Section 96 of the Land Registration Act. It was argued that the suit property which measures 0.211ha was incapable of being partitioned as partitioning it would affect its usage adding that it had been outlawed by the County Government bylaws and that the Defendants had also not contested severance and sale.
28. To this end, reference has been made to the case of Santaben Ramniklal Parmar & another v Beatrice Waruguru Gituru & 2 others (2019) eKLR.
29. On whether the Defendants had illegally occupied the suit property and should render vacant possession, it was submitted that the 2<sup>nd</sup> Defendant had constructed on the suit property illegally which amounted to intermeddling and he should give vacant possession as was held in the case of *Cumberland Consolidated Holdings Ltd vs Ireland (1946) KB 264* at 270. It was argued that being compensated for an illegality was equivalent to unjust enrichment as no cause of action can arise from an illegality.
30. It was submitted that owing to the difficulties brought about by the 2<sup>nd</sup> defendant for the plaintiff's to have free exercise of their proprietary rights over the suit land, the plaintiffs pray for an order that the Deputy Registrar of the court be authorized to sign any documents necessary to facilitate the sale of the suit property. The plaintiffs also pray for costs of the suit.

### Submissions of the defendants

31. The submissions of the defendants are dated June 16, 2022. There in, they confirmed that the issue of the joint ownership of the suit property measuring 0.523acres was not in contention Stating that it was owned by the six Plaintiffs, the original 1<sup>st</sup> Defendant (the late Joseph Murungu) and the 7<sup>th</sup>



- Defendant who also passed on. It was submitted that the Plaintiffs and the 1<sup>st</sup> Defendant had agreed to sell the suit property instead of sub-dividing it, but cautioned that the 7<sup>th</sup> Defendant's (deceased) position was unknown and the court should be careful lest it aids intermeddling with his estate, stating that his estate had not applied to be joined in the suit.
32. It was further submitted that the Defendants were not contesting the sale of the suit property since sub-dividing it would be uneconomical. The dispute was on sharing of proceeds of the sale and the agreements claimed to have been entered into by the parties. It was submitted that for the meeting held on March 28, 2021, the late Joseph Murungu was unaware of it and did not attend having been discharged from hospital a day before the said meeting. It was pointed out that the Defendants did not agree to the alleged resolutions because the issue of compensating the Defendants Kshs 5,000,000 for the house on the suit property so that the 2<sup>nd</sup> Defendant could vacate was not in the said agreement.
  33. It was argued that the Defendants had refused to ratify minutes of another meeting held on October 22, 2021 in their absence as the family was still processing letters of administration over the estate. It was pointed out that there was contention over Kshs 2,500,000 termed as a gift to the 1<sup>st</sup> Plaintiff, Kshs 4,750,000 as legal fees and other payments earmarked for 'elders'.
  34. It was submitted that instituting this suit vide Originating Summons was not appropriate as per Order 37 of the *Civil procedure Rules* regarding administration of the estate of a deceased person and written trusts. Noting that if the Plaintiffs were contesting that the 2<sup>nd</sup> Defendant's occupation of the said portion of land was illegal, having stayed there from the year 2005, then he had satisfied the principles governing proof of adverse possession as stated in the cases of *Mistry Valji vs. Janendra Raichand et al* [2016] eKLR & *John Kiplangat Barbaret & Others vs. Isaiab Kiplangat Arap Cheluget* [2017] eKLR.
  35. It was also submitted that a constructive trust and estoppel was implied from the consensual and uncontested construction and occupation of the portion of land measuring 0.06ha by the 2<sup>nd</sup> Defendant from the year 2005. To this end, the case of *Baron Mathenge Munyoki v Dedan Mbangula Kitbusi* [2022] eKLR was cited.
  36. The defendants further submitted that they have raised matters that are substantially weighty and controversial, which call for a full trial where witnesses would be tested through cross examination.
  37. In conclusion the defendants urge the court to dismiss the suit with costs and a judgement entered in terms of paragraph 4h of the Affidavit dated August 18, 2021 or in the alternative judgement be entered in terms of paragraph 8 of the said affidavit with costs to the Defendants.

### **Analysis and Determination**

38. It is clearly not in contention as claimed by the parties and as per the document of Title issued on August 26, 2020 that the suit property is jointly owned by the 6 plaintiffs, the late Joseph Murungu who was the former 1<sup>st</sup> Defendant and one Simon Murigi Kiarie, who is apparently deceased. I also find that the parties are in agreement that the suit property being the land and buildings thereon should be sold as it is not economically possible to subdivide the property amongst the Co-owners and that the county by laws do not approve such subdivisions which result in less than 0.5 acre of and - ( see paragraph 4 (l) and 6 of 1<sup>st</sup> defendants Affidavit).
39. I therefore find that the issues falling for determination relate to;
  - i. Whether the defendants are entitled to the suit land or a portion thereof via the doctrine of adverse possession or constructive trust,
  - ii. What is the modus- operandi of severance of the suit property,



- iii. Whether the 2<sup>nd</sup> defendant should give vacant possession,
- iv. Whether the 2<sup>nd</sup> defendant should be compensated,
- v. How should the interests of deceased persons be dealt with,
- vi. Who should pay costs of the suit
- vii. The Relief.

### **Claim of Adverse Possession and Constructive Trust**

40. It is trite law that what is pleaded must be proved in evidence. The defendants in their counter claim aver that they are entitled to the suit land through the doctrine of adverse possession or constructive trust. To this end, the first defendant had claimed that he was allowed to put up additional units by his father in year 2003 and by then, his father was alive. That in year 2002 his father again allowed the 2<sup>nd</sup> defendant to live in one of the houses which had been built by the 1<sup>st</sup> defendant's father and in March 2005, the father of 1<sup>st</sup> defendant identified a portion of the suit land and expressed his wish for the 2<sup>nd</sup> defendant to put a residential house. In that regard, the 2<sup>nd</sup> defendant proceeded to build a residential house on site and he occupied the same. This happened after October 20, 2005 when the 1<sup>st</sup> defendant met his brothers and their uncle David Kamura to put beacons to define the area for construction of the aforementioned house. I find that no tangible evidence has been tendered to prove these claims.
41. The defendants in their submissions have claimed that the issues they have raised are substantially weighty and controversial and they would therefore cry out to have a full trial where witness evidence is tested vide cross examination. However, when the suit was at the infancy stage, precisely on July 28, 2021, Counsel for the defendants had addressed the court as follows:
- “I propose we dispose the O S because the prayer in the Notice of Motion and those in the O S are the same. We propose to dispose the O S by way of affidavit and witness statement. We seek 7 days to file a response. We also propose mediation.”
42. The proposal was not opposed by counsel for the plaintiff and therefore the court gave directions that the suit be heard through affidavits. At no time thereafter, did the defendants through their advocates request for variation of the directions given by the court relating to the mode of hearing the suit, yet they were aware that they had filed a counter-claim. Further, the defendants did not seek orders to cross examine any witness at any given time.
43. In light of the above analysis, it is rather late in the day for the defendants to start clamoring for a full trial at the stage of final submissions.
44. All in all, I find that the claim of adverse possession as well as constructive trust have not been proved.
45. I also note that there being no evidence to indicate that the defendants had been allowed to construct on the suit property, any dealings in that land occurring after June 30, 2005 when the original owner of the suit land died amounted to intermeddling in the estate of the deceased and this court cannot sanction such unlawful activities by upholding the doctrine of constructive trust or adverse possession. In conclusion, I find that the counter claim of the defendants is not merited and the same is dismissed.

### **Severance**

46. As stated earlier on, the plaintiffs and the 1<sup>st</sup> defendants as well as one Simon are Co - owners of the suit property vide a title deed issued on August 26, 2020. The said registration arose after the issuance of a



confirmation of grant dated 28th April 2015 in which the suit land was to be shared equally amongst the 6 plaintiffs, the 1st defendants and one Simon Murigi Kiarie. It follows that the Co - owners of the property are in a relationship known as a tenancy in common in so far as the suit land is concerned.

47. In the case of *Isabel Cbelagat vs Samuel Tiro Rotich and 5 others* [2012] eKLR Munyao J had this to say in regard to such a relationship;

“Tenancy in common on the other hand, is different from joint tenancy. In a tenancy in common the two or more holders hold the property in equal and undivided shares. Each tenant has a distinct share in the property which has not been divided among the Co-tenants. In other words, they have separate interest only that it remains undivided and they hold the interest together”

48. What is important to note from the above case is that the property in a tenancy in common is held in equal undivided shares. Thus none of the Co - owners can point out a particular portion of the land as belonging to him or her and none of them has a larger interest than the others.

49. The provisions of Section 94 (1) of The *Land Registration Act* stipulate as follows:

“ Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of title or certificate of lease, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.”

50. While Section 96 (1) of the aforementioned Act provides as follows:

“If for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may—

- (a) Cause a valuation of the land and of the shares of the tenants in common to be undertaken; and
- (b) Order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or
- (c) Make any other order to dispose of the application which the court considers fair and reasonable.”

51. The above provisions of law, resonate well with the holding in the case cited by the plaintiffs; *Santaben Ramniklal Parmar & another v Beatrice Waruguru Gituru & 2 others* [2019] eKLR, where the court stated that:

“..... A tenancy in common can be determined either through partition, sale of the whole property or sale of shares of the other Co-owners of the property to the others. In this case, there is no evidence that the parties had considered other options apart from partition and



sale of the whole property. Since the parties had agreed to put up the property for sale, I believe that was the best option available to them to determine the tenancy in common and I so hold....”

52. There being no objection to the sale of the suit property then, I find that the appropriate orders are for severance of the suit land through sale and the co-owners are to share the proceeds thereafter equally. To this end, I direct that all the co-owners of the suit land do share the costs appertaining to the sale and subsequent transfer of the land to prospective buyers equally.

### **Vacant Possession**

53. The 2nd defendant desires that during the sale of the property, the initial deposit of 5 million be awarded to him to facilitate him to have alternative accommodation, that way he will be able to surrender vacant possession. On the other hand, the plaintiffs aver that the defendants have made it difficult for prospective buyers to view and buy the property because the 2<sup>nd</sup> defendant is residing in that land.
54. I have gone through the records and I find that the parties did attempt to resolve their issues through mediation but this did not materialize. Each party has mentioned various meetings that were convened over the years to resolve the impasse, but it appears there was no mutual tangible agreement arrived at by the parties. Having dismissed the counterclaim of the defendants and noting that the Co - owners of the suit land have equal interest in the suit property, it then follows that the 2nd defendant has no entitlement to stay on that land, while the 1<sup>st</sup> defendant (now represented by the 2<sup>nd</sup> defendant) has no superior claim over his co-owners of the suit land. Further, having concluded that the properties should be sold, then the harmonious way to conduct the process is to have vacant possession before sale. As such the prayer made by the plaintiffs for the 2nd defendant to vacate the premises is merited.

### **Compensation**

55. Again the court has already ruled that the defendants have no better claim over the suit property than the other Co -owners. It is also noted that the 2nd defendant is not a Co - owner of the suit property. The rights and interests of the 2nd defendant are limited to representation of the estate of the 1st defendant in this suit. The Latin Maxim quicquid plantatur solo solo cedit means that what is affixed to the soil belongs to the soil. And it therefore follows that the land shall be sold with whatever fixtures are to be found on that land and the 2nd defendant is not entitled to any compensation thereof. In any event, the defendants have been enriching themselves over the suit property from April 28, 2015 when the grant was confirmed.

### **Interests of Deceased persons**

56. The court has been informed that one Simon Murigi Kiarie who is also a Co-owner of the suit property is deceased and I have no reason to doubt that averment. It is also apparent that the 1st defendant died in the cause of year 2021.
57. Section 45 of the [Law of Succession Act](#) provides that:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.



58. I have already stated that the Co-owners of the suit property have separate but equal undivided interests in the suit land. It follows that upon severance of the property and sale thereof, the interests of the deceased persons shall form part of their estate and cannot be alienated in any other manner other than in line with the applicable law which is the Law of Succession Act. It is noted that the 2<sup>nd</sup> defendant is not a Co-owner of the suit property and the court has made a pronouncement that he has no interests capable of being protected in the suit land. In that regard, the participation of the 2<sup>nd</sup> defendant shall be limited to representing the deceased 1st defendant in the implementation of the judgment and nothing more. He shall not in any way benefit from the suit property unless and until the process of administration of the estate of 1st defendant is conducted through the applicable law.

### Costs

59. Even though the defendants have been unlawfully holding on to the suit property for the last 7 or so years, the court has taken into consideration that the 1st defendant has died and that the parties are close family members. In that regard, the court declines to award any party cost.

### Relief

60. In the final analysis, I proceed to give orders as follows:

- (1) The Counter Claim of the defendants is hereby dismissed.
- (2) The suit land is to be sold and the proceeds thereof are to be shared in equal shares to the following persons;
  - i) The estate of Joseph Murungu Kiairie  
ID No: XXXX
  - ii) Ng'ang'a Kiarie ID No: XXXX
  - iii) Dorcas Wanjiku Njoroge ID No XXXX
  - iv) Lydia Wairimu Njuguna ID No: XXXXX
  - v) Beatrice Wanjiru Kiarie ID No: XXXX
  - vi) Andrew Kagwa Kiarie ID No: XXXX
  - vii) Esther Njoki Kamau ID No: XXXX
  - viii) The estate of Simon Murigi Kiarie  
ID No: XXXX
- (3) In order to have a harmonious process of sale, the court directs that the viewing of the house shall be conducted jointly by the 1st plaintiff and the 2nd defendant (in his capacity as representative of the 1st defendant) at any given time. In that regard, the keys to the premises shall be in the custody of the aforementioned 2 people. Nevertheless, other parties or family members are at liberty to join the two persons in the aforementioned processes.
- (4) The suit property shall be sold in vacant possession. In that regard, an order is hereby issued for the 2nd defendant and any one else residing in the suit property to vacate the land within a period of 45 days failure to which an order of eviction shall take effect against the occupants of the property.



- (5) In order to give effect to the implementation of this Judgment, an order is hereby issued authorizing the Deputy Registrar of this court to sign all requisite documents to facilitate the sale and transfer of the land to prospective buyers.
- (6) Each party shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N MBUGUA**

**JUDGE**

**In the presence of:-**

**Kirwa for Plaintiffs**

**Maweu for Defendants**

**Court Assistant: Joan**

