



Nandeka ((Suing as the Legal Representative of the Estate of the Late George Nzuiko)) v Manthi & 2 others ((Sued in their Capacity as the Legal Representatives of the Estate of the Late Gideon Manthi Nzyuiko)) (Environment & Land Case E145 of 2021) [2022] KEELC 3234 (KLR) (4 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E145 OF 2021**

EK WABWOTO, J

AUGUST 4, 2022

BETWEEN

**MARY MAINA NANDEKA PLAINTIFF
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
GEORGE NZUIKO)**

AND

**JOHN MUKULYA MANTHI 1ST DEFENDANT
MONICAH MWENGA MANTHI 2ND DEFENDANT
AARON MUTHIANI MANTHI 3RD DEFENDANT
(SUED IN THEIR CAPACITY AS THE LEGAL REPRESENTATIVES OF THE
ESTATE OF THE LATE GIDEON MANTHI NZYUIKO)**

JUDGMENT

Introduction

1. The first letter of St. Paul to Timothy says as follows 1st Timothy 5:3-8, “Honour widows who are real widows. If a widow has children or grandchildren, let them first learn their religious duty to their parents, for this is acceptable in the sight of God. She who is a real widow, and is left all alone, has set her hope on God and continues in supplications and prayers night and day; whereas she who is self-indulgent is dead even while she lives. Command this, so that they may be without reproach. If any one does not provide for his relatives and especially for his own family, he has disowned the faith and is worse than an unbeliever.”



By the amended plaint dated July 19, 2021, the plaintiff sought against her in laws; Monicah Mwenga Manthi, John Mukulya Manthi, and Aaron Muthiani Manthi (sued as the legal representatives of the estate of Gideon Manthi Nzyuki) and John Mukulya Manthi the defendant's herein judgment in the following terms:-

- a) An order restraining the Defendants, whether by themselves, their servants or agents from evicting or interfering with the Plaintiff's and the deceased children's quiet possession and enjoyment of the property known as House No. A17, Kimathi Estate, Nairobi
 - b) A declaration that the rescission agreement dated November 14, 2018 purportedly executed between the late George Nzuiko and the Defendant and the sale agreement dated December 22, 2018 purportedly executed between the late George Nzuiko and the Defendants are both null and void.
 - c) An order directing the Defendants to transfer to the Plaintiff and the estate of the late George Nzuiko the property known as House No. A17, Kimathi Estate situated in Nairobi for the consideration of Kshs 8,600,000/-
 - d) Such other or further orders be granted as this court deems expedient.
2. The 1st Defendant, Monicah Mwenga Manthi, John Mukulya Manthi and Aaron Muthiani Manthi filed an amended statement of defence and counterclaim dated November 23, 2021. Through the counterclaim, the following reliefs were sought against the Plaintiff: -
- a) An order of eviction against the Plaintiff and any of her person claiming through her and the same be effected by a court bailiff and or auctioneer with the nearest Police Station providing security.
 - b) Costs of both the suit, counterclaim and eviction process be borne by the Plaintiff.
3. The 2nd Defendant John Mukulya also filed an amended Defence and counterclaim dated October 25, 2021, where he sought for the following orders against the Plaintiff: -
- a) An eviction order do issue against the Plaintiff and any other person claiming through her from the suit property Kimathi House No. A17 and the same be executed by an auctioneer or court bailiff and security be provide by the nearest police station.
 - b) The costs of the suit and the counterclaim to be paid by the Plaintiff.

Plaintiff's case.

4. The Plaintiff's case is contained in the amended plaint dated July 19, 2021, the witness statement dated April 13, 2021, the list and bundle of documents dated April 13, 2021, Supplementary bundle dated January 13, 2022, oral evidence tendered in court on January 24, 2022 and the written submissions filed by Amuga and Company Advocates dated May 4, 2022.
5. It is the Plaintiff's case that the deceased Gideon Manthi Nzyuko was her father in law, was and is still the registered owners of several properties including House No. A 17, Kimathi Estate in Nairobi. The late Gideon Manthi Nzyuko died on December 2, 1974 and he was survived by eleven (11) children including her late husband George Nzuiko who died on September 30, 2020. By a grant of letters issued by the High Court at Machakos on April 21, 2010 in Succession Cause No 122 of 2010 and subsequently confirmed on October 11, 2018, the deceased George Nzuiko and the Defendants were appointed as the legal representatives of the estate of their patriarch Gideon Manthi Nzyuko.



6. It was also averred that the confirmed grant issued on October 11, 2018 was rectified on October 14, 2020 and the deceased was removed as one of the administrators/legal representatives of the estate of the late Gideon Manthi Nzyuko. Pursuant to the said rectification it was ordered that the beneficiaries in occupation of Kimathi Estate House No A17 and the Kangundo Plot No.141 and Kawethei Plot No 43 be given first priority to purchase the same by being given notice to buy the same at an agreed price by all beneficiaries.
7. According to the Plaintiff, it was her case that the deceased George Nzuiko had been in occupation of House No A 17, Kimathi Estate and was entitled as per the court order of Machakos High Court to be given priority in purchasing the same however, the Defendants were unable to obtain the title for the said house and were accordingly not ready to complete the sale of the same to the deceased who died on September 30, 2020.
8. The Plaintiff added that after the deceased death, the 2nd Defendant John Mulukya Manthi made a false claim that the deceased had renounced or abandoned his right to purchase the suit property and that the deceased had signed a rescission agreement dated November 14, 2018 abandoning his right to purchase the suit property and further that the deceased had also allegedly signed an agreement dated December 22, 2018 allowing the 2nd Defendant to purchase the suit property in the deceased place.
9. The Plaintiff averred that the deceased did not renounce his right to purchase the suit property and that the purported rescission agreement dated November 14, 2018 and Sale agreement dated December 22, 2018 was all made up in an attempt to take away the right of the deceased's estate without entitlement under the confined grant and the rectified grant dated October 14, 2020.
10. The Plaintiff further averred that she is ready and willing to purchase the suit property in compliance with the orders given in Machakos Succession Cause No. 122 of 2010 and the defendant's should be compelled by this court to transfer the suit property to the Plaintiff or the deceased's estate for a consideration of Kshs 8,600,000/-
11. The Plaintiff contended that together with the deceased, they incurred a sum of Kshs 951,800/- to renovate the suit property after it had been occupied by Aaron Muthiani who had stayed in it for more than 34 years before vacating in the year 2008.
12. The matter proceeded for hearing on January 24, 2022 and March 18, 2022. During the hearing the Plaintiff testified as PW1. She relied on her witness statement dated April 13, 2021 and her bundle and Supplementary bundle of documents dated April 13, 2021 and January 13, 2022 respectively.
13. During cross-examination, she admitted that she was not an administrator to the estate of Gideon Manthi Nzyuko but her husband was and had even participated in the administration process. In respect to the renovation of the suit property she admitted that there were no receipt to back up the costs and that there were only doing the said renovations because the property was not in a good condition.
14. On further cross-examination, she stated that she had not paid any money yet in respect to the suit property and that her husband had been forced to sign the rescission and subsequent sale agreement in respect to the property.
15. On further cross-examination she also stated that she had never made any complaint to the police in respect to the alleged forgeries of the agreement and neither had she tabled any report of a hand writing expert to confirm otherwise.



16. On re-examination by her Advocate, PW1 stated that the application for her eviction was dismissed by the Machakos Court and she continued being in occupation of the suit property. She also reiterated that the confirmation of grant had a specific pronouncement on the suit property.
17. On further re-examination, she stated that her husband's agreement was forged because one of the signatories Agnes Kalekye was dead at the time of the said agreement. She also reiterated that she had been in the suit property since 2008 and she is willing to buy the same as was stated in the confirmed grant.

The 1st Defendant's Case.

18. The case for the 1st Defendant is contained in the statement of defence and counterclaim dated October 25, 2021, the list and bundle of documents dated 23rd November 2021 and the written submissions dated May 27, 2022 filed by Susan Tum & Company Advocates.
19. In summary, the 1st defendant's case is that the Plaintiff is not entitled to the prayers sought and the 1st defendant is the one entitled to the orders sought in the counterclaim.
20. It was the 1st defendant's case that the Plaintiff's husband was given a chance to purchase the suit property pursuant to an agreement dated 29th September 2017 but was unable to raise the purchase price and by an agreement dated 14th November 2018, he rescinded the sale agreement which rescission agreement was signed by all parties.
21. The 1st defendant also contended that, the 2nd Defendant offered to purchase the suit property for Kshs 10,000,000/- *vide* an agreement dated 2nd December 2018 which agreement was executed by all administrators including the deceased.
22. During the hearing of the suit, Aaron Muthiani Nzyuko testified as DW1 on behalf of the 1st Defendant. He adopted his witness statement dated 23rd November 2021 and the list and bundle of documents dated 23rd November 2021.
23. It was his testimony that he was one of the administrators of the estate of Gideon Manthi Nzyuko and that the suit property had already been sold.
24. On cross-examination by Mr. Amuga Advocate for the Plaintiff, he stated that a deposit of Kshs 5,000,000/- had been paid in advance in 2019 and there was an agreement to that effect though he did not have any evidence before this court to confirm the said payment.
25. On further cross-examination by the Plaintiff's Advocate, he stated the following; that her sister Agnes died through a road accident in 2011 and hence could not have signed the agreement on 29th September 2017 and that they were yet to process and or obtain the title of the suit property.
26. On further cross-examination by Mr. Mumbi Advocate, he stated that the rectification of the grant was being done to remove the deceased administrators and that the property had already been sold to the 2nd Defendant.
27. Upon re-examination by his Counsel, he stated that the said purchase price was to be secured until the deceased and his wife got the title and that there was no agreement of Kshs 8,600,000/-



The 2nd Defendant's Case.

28. The 2nd Defendant filed a statement of defence and counterclaim dated 25th October 2021. He also filed a bundle of documents dated March 17, 2022, witness statement dated November 19, 2021 and written submissions dated May 17, 2022.
29. It was the 2nd Defendant's case that the suit property does not belong to the Plaintiff since her late husband had been given an opportunity to purchase the same but failed to raise the purchase price.
30. It was also the 2nd Defendant's case that vide an agreement signed on 14/11/2018, George Nziuko rescinded the sale agreement dated 29th September 2017 and subsequently thereafter he offered to purchase the suit property for Kshs 10,000,000/- and an agreement dated 22/12/2018 was executed by all the administrators including the deceased.
31. The 2nd Defendant contended that there was no issue with the title to the suit property but the problem was that the deceased was unable to raise the purchase price and this led to the rescission agreement.
32. During cross-examination by Thiwa Advocate, he stated that the first agreement was signed by George as an administrator and the 2nd agreement signed by him as a purchaser. He also stated that the title had a caveat which was lifted pursuant to a court order. He added that the suit property had been sold to him on 22nd October 2018 for kshs 10 million and that he had already paid a deposit of Kshs 5,000,000/- in March 2019.
33. During cross-examination by Mr. Amuga Advocate, he admitted that the title to the property is yet to be issued. He also stated that the rectified grant did not change any distribution but only removed administrators who had died. He further stated that the purported signature of the late Agnes Kalekye was signed by her son and it did not belong to Agnes.
34. On re-examination by Mr. Mumbi Advocate, he reiterated that George had not paid any deposit in respect to the suit property and title could not have been processed. He also stated that no completion notice was given because George was no longer interested in the property. He further stated that he has not paid the balance because the Plaintiff has not vacated the suit property.

The Plaintiff's submissions.

35. The Plaintiff filed her written submissions dated May 4, 2022 through the firm of Amuga and Company Advocates. Counsel for the Plaintiff identified the following four issues for determination by this court: -
 - a) Whether George Nziuko was entitled to be given first priority to purchase the suit property?
 - b) Whether the Rescission Agreement dated 14th November 2018 is binding and debars the Plaintiff from being given first priority to purchase the suit property?
 - c) Whether the Plaintiff is entitled to an order directing the 1st Defendants to transfer the suit property to the Plaintiff on the estate of the late George Nziuko at the consideration of Kshs 8,600,000/-
 - d) Who pays the cost of the suit and the counterclaim?
36. On whether the Plaintiff's "first priority" right to purchase the suit property still subsists, Counsel submitted that there was no dispute that the rectified confirmed Grant dated October 7, 2020 retained



- the order for giving first priority to the beneficiaries in occupation of some of the deceased's properties to purchase them and the suit property was one such of them since George Nzuiko and his family were still in occupation. Counsel underscored the fact that that, the Plaintiff and her children are in occupation of the suit property and they were entitled to exercise their right of purchase.
37. Counsel also urged the court to consider the order for rectification of the confirmed grant of October 7, 2020 which according to Counsel supersedes the initial order dated November 25, 2015, the purported rescission agreement dated November 14, 2018 and all other purported previous agreements in respect to the suit property.
 38. It was also submitted that the ability of George to purchase the suit property was not in doubt since he was entitled to the proceeds of sale of Plot No 141, Kangundo Town, Plot No 43, Kawethei Market and the 5 acre piece of land in Syokimau which are yet to be realized and paid out to the estate of George Nzuiko.
 39. Counsel also submitted that the purported sale agreement dated 29th September 2017 was invalid and the reasons given by George disowning the same was stated in his affidavit sworn on 14th February 2018 which was produced as PEX No 11. It was also submitted that the same contained a signature of Agnes Kalekye who had since died by the time of execution of the said agreement.
 40. On whether the purported rescission agreement dated November 14, 2018 is invalid, Counsel submitted that the same remains invalid in view of the fact that it sought to set aside an invalid, null and void contract. Reliance in this regard was placed on the case of *Suleiman Said Shabhal v IEBC & 3 others* (2014) eKLR where the court said that if something is void, then it is a nullity and it remains as such.
 41. It was also submitted that the agreement dated December 22, 2018 was breached by the 2nd Defendant who was unable to demonstrate whether he had paid Kshs 5,000,000/- within 90 days as was required and further that the same was a nullity having been made contrary to existing court orders.
 42. On whether the Plaintiff is entitled to an order directing the 1st Defendant to transfer the suit property to the Plaintiff at the consideration of Kshs 8,600,000/- Counsel submitted that the Plaintiff was entitled to such order because it was not in dispute that the Machakos High Court had issued an order allowing the beneficiaries in occupation of the respective suit properties be given first priority right of purchase, the said order had not been renewed nor set aside and also the suit property was valued at kshs 8,600,000/- of which the Plaintiff is ready and willing to purchase. Counsel concluded his submissions by urging the court to grant the Plaintiff the orders sought since she had proved her case to the required standard.

The 1st Defendant's Submissions

43. The 1st Defendants filed written submissions dated May 27, 2022 through the firm of Susan Tum & Company Advocates. Counsel submitted that the Plaintiff had not proved her case to the required standard and that the allegation that the Rescission Agreement dated November 14, 2018 was fraudulent had not been proven.
44. It was also submitted that George Nziuko had lost his right of first to purchase by not paying the purchase price within the required 90 days' period which led him to sign the rescission agreement.
45. Counsel also submitted that this court lacked jurisdiction to withdraw contract between the parties and or re-write them in the manner requested by the Plaintiff since Agreements are binding not only on the deceased but also on the administrators.



46. It was also submitted that the suit property is not available for sale as there is now a valid agreement between the estate and the 2nd Defendant. Further the beneficiaries have already agreed to sell the land at kshs 10,000,000/- as ordered by the Succession Court and that If the court was to order the estate to sell the land at a less value of Kshs 8,600,000/- then the same would amount to renewing the term of the confirmed grant which would be legally unsuitable as this court cannot sit on appeal of an order of a court of equal jurisdiction. Counsel concluded the submissions by urging the court to dismiss the suit and allow the counterclaim.

The submissions by the 2nd Defendant.

47. The 2nd Defendant equally filed written submissions dated May 17, 2022 through the firm of B. Mung'ata & Company Advocates. Counsel outlined five issues for consideration. This included the following: -

- i. Whether the suit has merit.
- ii. What is the effect subsequent rectification of the grant.
- iii. Whether the issue of title is material in this transaction.
- iv. Whether the court can compel the defendants/administrators to sell the suit property to the Plaintiff at kshs 8,600,000/-
- v. Whether the counterclaim has merit.

48. On whether the suit is meritorious, Counsel submitted that the suit is not merited for the reasons that there was a sale agreement dated 29/09/2017 signed as between the administrators and the said George Nziuko deceased who was unable to purchase the property for Kshs 8,600,000/- and later rescinded the same vide an agreement dated 14/11/2018. The deceased then signed a sale agreement dated 22/12/2018 where the property was sold to the 2nd Defendant for Kshs 10,000,000/- who in turn paid Kshs 5,000,000/- and is waiting for the Plaintiff to vacate the suit property so as that he can clear the balance.

49. On the rectification of the grant, Counsel submitted that the purpose of the rectification was to remove the deceased administrator who had declined to sign the transfer forms. The rectification did not affect the distribution or the earlier status of the grant and that the Plaintiff had misled this court as to the nature of the said rectification.

50. On whether the issue of the title is material in this transaction, Counsel argued that the property has no title and the transaction cannot be completed. Counsel further argued that the deceased knew that the property had no title and he still did not pay the purchase price within 90 days from 29th September 2017 and therefore the issue of the title has nothing to do with the purchase price.

51. In respect to the order sought by the Plaintiff for the court to compel the defendants/administrators to sell the suit property to her for Kshs 8,600,000/-. Counsel submitted that the confirmed grant was to the effect that the suit property be sold and proceeds shared equally at a price agreed by all beneficiaries. The deceased was unable to purchase the property for kshs 8,600,000/- and the beneficiaries had agreed to sell the same to 2nd Defendant for Kshs 10,000,000/- and as such this property is no longer available for sale at Kshs 8,600,000/- and further this court should not review the terms of the confirmed grant.

52. Finally, on the counterclaim, Counsel submitted that the same was meritorious and it ought to be allowed. The deceased defaulted on the sale agreement and equally on the rescission agreement as the Plaintiff continues to occupy the suit property.



Analysis and determination

53. Having carefully analyzed the pleadings in this matter, the evidence adduced and the submissions by Counsel for the parties, this court is of the view that the following are the key issues for determination: -
- i. Whether the late George Nzuiko was entitled to be given first priority to purchase the suit property.
 - ii. Whether the rescission agreement dated 14th November 2018 was binding to the parties.
 - iii. Whether the Plaintiff is entitled to the order sought in the plaint and specifically the order directing the Defendants to transfer the suit property to the her or the estate of the late George Nzuiko for consideration of Kshs 8,600,000/-
 - iv. Whether the 1st and 2nd Defendants are entitled to the orders sought in their counterclaim.
 - v. What orders should issue as to costs.

Issue No 1

Whether the late George Nzuiko was entitled to be given first priority to purchase the suit property.

54. It is not disputed that the late George Nzuiko was one of the administrators of the estate of the late Gedion Manthi Nzyuko and that pursuant to the rectified certificate of confirmation of grant dated 7th October 2020, the suit property “Kimathi Estate House No A17” was to be sold and proceeds shared equally among all the 11 beneficiaries who are listed as Monica Mwenga, Aaron Muthiani Nzuiko, Agnes Kalekye, Lillian Nthoki, Jane Ndungwa, Henry Muli Nziuko, Joyce Mathei Nziuko, Maurine Mwelu Nziuko, Jemimah Nduku Manthi, John Mukulya Manthi and George Nziuko. It was also provided in the said grant that, “the beneficiaries in occupation of the said property to be given first priority to purchase the property by being given a notice to buy the same at a price agreed by all beneficiaries”
55. It is also not disputed that the late George Nzuko and his family were in occupation of the suit property from the year 2008 until 30th September 2020 when he died leaving his wife the Plaintiff herein in occupation. The doctrine of priority helps the Court in determining the correct party to whom the rights are to be given priority over the other in a case where the court has conflicting interests. As such it is the finding of this court that the late George Nzuiko had the “first priority” for the right of purchase of the suit property.

Issue No 2

Whether the rescission agreement dated November 14, 2018 was binding to the parties.

56. The 1st and 2nd Defendants case was that George Nziuko deceased had rescinded the agreement for the purchase of the suit property dated 29th September 2017 and clause 3 of the said agreement had provided as follows: -
- “3. The purchaser and the sellers have mutually agreed to rescind the sale agreement dated 29th September 2017.
 4. The purchaser has freely agreed to and has relinquished his interest in the said Kimathi House No. A17 in Nairobi County.



5. The sellers and purchaser have agreed that the seller will sell the said Kimathi House No. A17 to third parties who are willing to purchase the same.
 6. The Purchaser has agreed to vacate the said Kimathi House No. A17 within 14 days of signing this agreement and in default, eviction to issue against him and or any other person claiming occupation under him”
57. The defendants argued that the said rescission agreement was binding and the allegation that the same had not been signed by the deceased were false.
 58. Counsel for the Plaintiff argued that the same was not binding since it was since it sought to set aside the invalid sale agreement dated 29th November 2017 and pursuant to the decision of *Suleiman Said Shabbal v IEBC and other* (2014) eKLR that if an act is void, then it is in law a nullity.
 59. I have perused the said rescission agreement and it is evident that the same sought to rescind the sale agreement dated September 29, 2017 and with had the effect of selling the suit property to a third party which is definitely contrary to the terms of the certificate of grant rectified on 7th October 2020. As such the said rescission agreement being contrary to the said grant rectified on October 7, 2020 cannot be considered binding to the parties as it is be contrary to an existing court order.
 60. An agreement that is contrary to an existing court order has no force of law and cannot be considered binding to the parties. The rectified grant dated October 7, 2020 is an order of the court and if any person was unhappy with the confirmation process, the aggrieved person ought to have appealing against the same or sought for review to the extent that the same is permissible under the *Law of Succession Act* cap 160 of the Laws of Kenya. This having not been done, this court has no option but to invalidate the same.

Issue No. 3

Whether the Plaintiff is entitled to the orders sought in the plaint and specifically the order directing the Defendants to transfer the suit property to her on the estate of the late George Nzuiko.

61. The Plaintiff pleaded that she and or the deceased estate are ready and willing to purchase the suit property in compliance with the orders given in court to transfer the suit property to the Plaintiff or the deceased’s estate for a consideration of Kshs 8,600,000/- and she sought for orders directing the Defendant’s to transfer to her or the estate of the late George Nzuiko the suit property for consideration of that amount.
62. This prayer was vehemently opposed by the Defendants who submitted that the late George Nzuiko had failed to exercise his first priority right of purchase when he failed to pay the purchase price of the said property within 90 days as was stipulated in the sale agreement dated 29/09/2017.
63. The Defendant further based their case on the fact that the said property was not available for sale as it had been sold to the 2nd Defendant for a purchase price of Kshs 10,000,000/- of which a down payment of Kshs 5,000,000/- had already been paid.
64. As earlier stated in this Judgment, it is not in dispute that the Plaintiff has the first priority right of purchase of the suit property and according to the testimony given by the Plaintiff, it was evident that the late George Nzuiko was still committed to exercising that right of purchase of the suit property before his unfortunate demise.



65. The Plaintiff also testified that the deceased had in fact sworn an affidavit on February 14, 2018 which was produced as PEX 11 where he gave his reasons for disowning the purported sale agreement dated September 29, 2017.
66. Having perused the sale agreement dated September 29, 2017 and considering the testimony tendered by the Plaintiff, together with the cross-examination of DW1 and DW2, it is evident that the said agreement cannot have the force of law for *inter alia* containing a signature of one Agnes Kalekye who had died in 2011 and had no capacity to execute the same. The same remains invalid and the defendants cannot make out a case for its enforceability.
67. In view of the foregoing, it is the finding of this court that the Plaintiff having demonstrated in her testimony that she is still in occupation of the suit property and further that she is still willing to purchase the same for consideration of kshs 8,600,000/- in line with the terms of the rectified grant, she is entitled to the said relief.

Issue No IV

Whether the 1st and 2nd Defendants are entitled to the orders sought in their counterclaim.

68. In their counterclaims which were separately filed, the 1st and 2nd Defendants' main prayer was for an eviction order to issue against the Plaintiff and any other person claiming through her from the suit property Kimathi House No. A17 and the same to be executed by an auctioneer or Court Bailiff and security be provided during the eviction.
69. The basis for seeking that eviction order was to the effect that the Plaintiff was not an administrator of the estate of the deceased and has no interest to the same. However, according to the testimony that was tendered by the Plaintiff it is evident that the deceased George Nzuiko and his family began staying in the suit property since 2008 and also the deceased had an existing first priority right of purchase of the said property.
70. During the hearing of the suit, the Defendants did not lay a basis for their entitlement of the eviction orders sought and it is therefore the finding of this court that the Defendants counterclaim which were separately filed have not been proven to the required standard to warrant the grant of the eviction orders sought. In the circumstances the 1st and 2nd defendants counterclaim dated October 25, 2021 and November 23, 2021 respectively are hereby dismissed.

Issue No V

What orders should issue as to costs.

71. Although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provisions to section 27 of the [Civil Procedure Act](#) (cap 21). In the instant case, the suit involves a dispute between family members and it is my view that imposing costs to either party in such a matter would further strain the relationship of the family members and in the circumstances, I will direct that each party bears own costs of the suit.

Final orders.

72. In conclusion, it is the finding of this court that the Plaintiff has proved her claim against the Defendants to the required standard and accordingly I make the following orders: -



- a) An order is hereby issued restraining the Defendants, whether by themselves, their servants or agents from evicting or interfering with the Plaintiff's and the deceased children's quiet possession and enjoyment of the property known as House No. A17, Kimathi Estate, Nairobi.
- b) A declaration that the Rescission Agreement dated November 14, 2018 purportedly executed between the late George Nzuiko and the Defendants and the Sale Agreement dated December 22, 2018 purportedly executed between George Nzuiko and the Defendants are both null and void.
- c) An order is hereby issued directing the Defendants to transfer to the Plaintiff or the estate of the late George Nzuiko the property known as House No. A17, Kimathi Estate situated in Nairobi for the consideration of Kshs 8,600,000/-
- d) The prayers in the 1st and 2nd Defendants counterclaim are declined.
- e) Each party shall bear their own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF AUGUST 2022.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Amuga for the Plaintiff.

N/A for the 1st Defendant.

N/A for the 2nd Defendant

E.K. WABWOTO

JUDGE

