



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 504 of 2005**

**ROSE WAKUTHII MWANGI NJUNU..... PLAINTIFF**

**VERSUS**

**EDWARD KITHINJI.....1<sup>ST</sup> DEFENDANT**

**HOUSING FINANCE CO. OF KENYA.....2<sup>ND</sup> DEFENDANT**

**ABDILLAHI WARSAME ALI**

**T/A NADHIA AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed the present suit on her own behalf and in her capacity as the administrator of the estate of Julius W. Mwangi Njunu (*hereinafter referred to as the deceased*). In her amended plaint, the plaintiff sought the court's order to declare the transfer of the parcel of land known as LR. No. Nairobi/Block 99/244 (*hereinafter referred to as the suit property*) to the 1<sup>st</sup> defendant as invalid and of no legal effect. The plaintiff further prayed for an order of the court to permanently restrain the defendants, by themselves or through their agents from trespassing, charging, evicting or in any manner whatsoever interfering with the plaintiff's peaceful possession of the suit property. She prayed for the court's order to discharge the charge effected in respect of the suit property and thereafter the title of the suit property be retransferred back to the plaintiff. In the event that the 1<sup>st</sup> defendant would be unwilling to retransfer the suit property to the plaintiff, the plaintiff prayed that the court authorizes the Deputy Registrar of the court to execute the said transfer documents on behalf of the 1<sup>st</sup> defendant. The plaintiff further prayed to be awarded general damages and costs of the suit.

The basis of the plaintiff's suit is the averments made in the said amended plaint which was to the effect that the 2<sup>nd</sup> defendant had colluded with the 1<sup>st</sup> defendant to unlawfully deprive the estate of the deceased of the suit property. She averred that the 2<sup>nd</sup> defendant had fraudulently transferred the suit property to the 1<sup>st</sup> defendant purportedly on the strength of a sale agreement that was not binding on the parties since the terms of the same had not been agreed by the parties. The plaintiff took issue with the action by the 2<sup>nd</sup> defendant who had attempted to evict the plaintiff from the suit property without any lawful authority. The plaintiff set out the particulars of fraud alleged to have been committed by the 2<sup>nd</sup> defendant in the amended plaint. The particulars stated *inter alia* that the 2<sup>nd</sup> defendant had purported to sell the suit property before it had issued the requisite statutory notice under the Registered Land Act. She averred that the 2<sup>nd</sup> defendant had purported to sell the suit property even after the outstanding amount had been paid off by the mortgage insurance upon the death of the deceased. She averred that, by attempting to evict her without a lawful order of the court, the 2<sup>nd</sup> defendant had acted fraudulently and

unlawfully. It is on these grounds and other grounds pleaded in the amended plaint that the plaintiff prayed that the court enters judgment in her favour as prayed in the said amended plaint.

The 1<sup>st</sup> defendant filed an amended defence and counterclaim. In his defence, the 1<sup>st</sup> defendant denied that he had purchased the suit property from the 2<sup>nd</sup> defendant when the said defendant was allegedly exercising its statutory power of sale. The 1<sup>st</sup> defendant averred that he purchased the suit property from the deceased with the consent and approval of the 2<sup>nd</sup> defendant. He averred that the terms of the sale agreement provided that a substantial part of the purchase consideration would be paid to the 2<sup>nd</sup> defendant. In satisfaction of the terms of the agreement, the 1<sup>st</sup> defendant paid the full purchase consideration through his then advocate Mr. M. G. Sharma. He averred that, upon professional undertaking being given by his advocate, the suit property was transferred to his name. He stated that contrary to what was provided in the agreement (*that the plaintiff gives vacant possession of the suit property upon payment of full purchase consideration to the advocate of the deceased and the 2<sup>nd</sup> defendant*), the plaintiff had failed to deliver vacant possession to the 1<sup>st</sup> defendant and thereby caused the 1<sup>st</sup> defendant to suffer loss and damage. The 1<sup>st</sup> defendant averred that the plaintiff's suit did not have any basis in law.

It is on those grounds that the 1<sup>st</sup> defendant was praying that the plaintiff's suit be dismissed with costs and judgment be entered in favour of the 1<sup>st</sup> defendant as prayed in his counterclaim. In the said counterclaim, the 1<sup>st</sup> defendant prayed for the court's order to compel the plaintiff to hand over possession of the suit property. The 1<sup>st</sup> defendant further prayed to be awarded damages for the period that the plaintiff has been allegedly in illegal occupation of the suit property. He further prayed to be awarded costs of the suit. The plaintiff filed a reply to the defence. She denied the averment by the 1<sup>st</sup> defendant that the suit property had been lawfully transferred to the said defendant. She further denied that the 1<sup>st</sup> defendant was entitled to judgment in terms of the prayers made in the counterclaim. She put the 1<sup>st</sup> defendant to strict proof thereof.

On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed defence denying allegations of impropriety made against them by the plaintiff. The 2<sup>nd</sup> defendant denied that it had sold the suit property to the 1<sup>st</sup> defendant in exercise of its statutory power of sale. It averred that it was in fact the deceased's husband of the plaintiff who voluntarily and willingly sold the suit property to the 1<sup>st</sup> defendant with a view to settling the outstanding mortgage that had seriously been in arrears. The 2<sup>nd</sup> defendant averred that it consented to the transfer of the suit property to the 1<sup>st</sup> defendant on the understanding that the sum of KShs.10.5 million from the purchase consideration would be applied to redeem the loan that was advanced to the deceased. The 2<sup>nd</sup> defendant stated that it had facilitated the transfer of the suit property to the 1<sup>st</sup> defendant when it discharged the title of the property on the strength of a professional undertaking given by the advocate's of the 1<sup>st</sup> defendant. It averred that it was to its advantage that the plaintiff had to give vacant possession of the suit property in accordance with the terms of the agreement because the 1<sup>st</sup> defendant had undertaken that it would pay the balance of the purchase consideration upon securing vacant possession. The 2<sup>nd</sup> defendant prayed that the plaintiff's suit be dismissed with costs as it lacked any basis in law. The plaintiff filed a reply to the 2<sup>nd</sup> defendant's defence. She reiterated that the defendants had acted fraudulently and had no legal authority to transfer the suit property to the 1<sup>st</sup> defendant.

At the hearing of the case, the parties to the suit filed an agreed bundle of documents. The said bundle of documents was produced in evidence as exhibit 1(a), 1(b) and 2. The plaintiff testified as PW1. The 1<sup>st</sup> defendant testified as 1<sup>st</sup> defendant's DW1. Whilst Joseph Kamau Kania, the manager legal services of the 2<sup>nd</sup> defendant testified as 2<sup>nd</sup> defendant's DW1. After the close of the plaintiff's and the defendants' case, counsel for the respective parties to this suit agreed by consent to file written closing submissions. The court allowed the said counsel to highlight the said submissions prior to reserving this case for judgment.

I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully evaluated the evidence adduced by the witnesses in this case, including documentary exhibits that was admitted into evidence. I have also read the submissions filed by counsel for the parties herein and considered the oral submissions made at the conclusion of the case. The facts of this case as I understood it is rather straight forward. The deceased, Julius Washington Mwangi Njunu applied to the 2<sup>nd</sup> defendant to be advanced the sum of KShs.6.3 million to enable him complete construction of a residential house on the suit property. The deceased offered the suit property as security for the said loan. The 2<sup>nd</sup> defendant favourably considered the application and agreed to lend the deceased the said sum of KShs.6.3 million. The same was to be repaid at monthly installments of KShs.146,696/= for a period of fifteen (15) years. The amount that was actually disbursed by the 2<sup>nd</sup> defendant to the deceased was KSh.5.8 million. The deceased executed a charge in respect of the suit property in favour of the 2<sup>nd</sup> defendant. The charge, dated 2<sup>nd</sup> December 1998, was duly registered on 7<sup>th</sup> December 1998. The deceased was required to insure his life during the subsistence of the charge.

It was apparent from the evidence adduced by both the plaintiff and the 2<sup>nd</sup> defendant, that the deceased's health deteriorated soon thereafter to an extent that the deceased was unable to keep up with the repayment of the monthly installments. The deceased fell in serious arrears. The 2<sup>nd</sup> defendant entered into negotiations with the deceased with a view to securing an amicable settlement of the outstanding amount. Initially, the deceased had proposed to sell some property in his rural home at Ndakaini and at Thika. However, due to the depressed market at the time, the deceased was unable to secure a buyer.

It was after the attempt to liquidate some of his assets failed, that the deceased and the 2<sup>nd</sup> defendant agreed that suit property be sold, but on certain terms. It was agreed that the 2<sup>nd</sup> defendant would attempt to secure a buyer for the suit property for a purchase consideration of not less than KShs.12 million. It was agreed that if a higher price was secured, then the same would be applied to settle the loan. The 2<sup>nd</sup> defendant agreed to pay to the deceased KShs.1.5 million out of the said purchase consideration less any charges that would be incurred during the transfer of the suit property. The 2<sup>nd</sup> defendant made the offer in its letter dated 27<sup>th</sup> November 2004. The deceased accepted the offer on 29<sup>th</sup> November 2004. The deceased agreed to allow access of the suit property to potential purchasers. In December 2004, after protracted negotiations, the deceased reached an agreement with the 1<sup>st</sup> defendant to sell the suit property. The deal was approved by the 2<sup>nd</sup> defendant. The agreement for the sale of the suit property was executed between the deceased and the 1<sup>st</sup> defendant on 8<sup>th</sup> February 2005. Upon the execution of the agreement, the 1<sup>st</sup> defendant paid to the joint advocate of the deceased and the 2<sup>nd</sup> defendant, Messrs Kamotho, Maiyo & Mbatia Advocates a deposit of KShs.1.5 million. According to the 1<sup>st</sup> defendant, the balance of the purchase consideration was to be paid upon the deceased giving vacant possession of the suit property to the 1<sup>st</sup> defendant. On its part, the 2<sup>nd</sup> defendant understood the contentious clause 9 of the agreement to mean that the 1<sup>st</sup> defendant would have paid the balance of the purchase consideration upon successful registration of the transfer.

In this regard, the then advocate of the 1<sup>st</sup> defendant M. G. Sharma gave professional undertaking to the advocate of the deceased and the bank that he would pay the balance of the purchase consideration upon transfer in accordance with the terms of the agreement for sale. A dispute arose between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant in regard to what was actually agreed to be the condition precedent before the balance of the purchase consideration was paid. Whereas the 1<sup>st</sup> defendant insisted that the deceased ought to give vacant possession of the suit premises before the balance of the purchase consideration could be paid, the 2<sup>nd</sup> defendant on its part was of the firm view that the 1<sup>st</sup> defendant should pay the said balance of the purchase consideration upon transfer of the suit property to the 1<sup>st</sup> defendant. The suit property was duly transferred to the 1<sup>st</sup> defendant. However, for a long time, the 1<sup>st</sup> defendant did not pay the balance of the purchase consideration.

It is apparent from the evidence adduced that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were able to reach an agreement after protracted negotiations. The 2<sup>nd</sup> defendant agreed to secure vacant possession of the suit property

by putting pressure on the deceased and his family to vacate the suit premises. To achieve this, the 2<sup>nd</sup> defendant entered into an agreement with the deceased on 23<sup>rd</sup> June 2005. In the said agreement, the deceased agreed to give vacant possession of the suit property to the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant by 18<sup>th</sup> July 2005. The bank agreed to pay to the deceased KShs.200,000/= to facilitate his movement from the suit property. The deceased was required to vacate the suit premises by 18<sup>th</sup> July 2005. Upon giving vacant possession of the suit premises, the deceased would be paid the agreed sum of KShs.1.5 million less expenses of KShs.560,431/=.

This was not to be. On 5<sup>th</sup> July 2005, the deceased died. After his burial, the widow of the deceased (*the plaintiff*) sought extension of time to give vacant possession. The final extension was to expire by 15<sup>th</sup> September 2005. The plaintiff did not adhere to the period by which she had requested to be given time to give vacant possession. In a bid to secure vacant possession, the 2<sup>nd</sup> defendant instructed the 3<sup>rd</sup> defendant to secure the forceful eviction of the plaintiff. The 3<sup>rd</sup> defendant obtained a break in order from the subordinate court on 5<sup>th</sup> September 2005. The 3<sup>rd</sup> defendant evicted the plaintiff and the members of her family from the suit property on 14<sup>th</sup> September 2005. The plaintiff was out of the suit property for a period of three days before she was restored to occupation by an order of the court. The plaintiff returned to the suit property on 16<sup>th</sup> September 2005.

When the 2<sup>nd</sup> defendant's attempt to secure vacant possession failed, the 1<sup>st</sup> defendant filed suit against the plaintiff vide Nairobi HCCC No. 610 of 2005 Edward Kithinji Rintaugu vs. Rose Wakuthii Mwangi Njunu. In the said suit, the 1<sup>st</sup> defendant in essence sought vacant possession of the suit property. The suit was filed on 19<sup>th</sup> October 2005. Interlocutory applications filed by the 1<sup>st</sup> defendant to secure vacant possession were unsuccessful. There is an appeal pending before the Court of Appeal arising out of one of the disallowed interlocutory applications. From the correspondence exchanged between the advocates of the 1<sup>st</sup> defendant and the advocates of the 2<sup>nd</sup> defendant, it was evident that failure by the 2<sup>nd</sup> defendant to secure vacant possession of the suit property resulted in a stalemate in which the plaintiff sought to enforce the professional undertaking given by the advocate of the 1<sup>st</sup> defendant whilst the said advocate refused to pay the balance of the purchase consideration until the 1<sup>st</sup> defendant had secured vacant possession. The impasse was resolved during the hearing of this case when the said advocate paid the balance of KShs.8.5 million to the 2<sup>nd</sup> defendant. The said amount was paid on 16<sup>th</sup> September 2008. According to the adduced evidence therefore, the 2<sup>nd</sup> defendant has been paid the full purchase consideration for the suit property. The 2<sup>nd</sup> defendant has not however paid to the estate of the deceased (duly administered by the plaintiff) the sum that was agreed of KShs.1.5 million. According to the 2<sup>nd</sup> defendant witness, the said amount, less the agreed expenses of KShs.560,431/= will be paid to the plaintiff on condition that the plaintiff gives vacant possession of the suit property to the 1<sup>st</sup> defendant. It was the 2<sup>nd</sup> defendant's pledge that it would not demand any further sum from the plaintiff should the plaintiff give vacant possession of the suit premises to the 1<sup>st</sup> defendant.

Upon the death of the deceased, the 2<sup>nd</sup> defendant as the beneficiary of the mortgage protection insurance cover, was paid Kshs.5.8 million. According to the 2<sup>nd</sup> defendant, it applied this sum to defray part of the amount that was owed by the deceased to the bank. This amount did not include the sum of Kshs.12 million that constituted the purchase consideration for the suit property. According to the plaintiff, the court should take into account the said sum of Kshs.5.8 million paid by the insurance company as constituting part of the settlement of the amount the deceased agreed with the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant reiterated that the said amount could not possibly be applied to defray the amount owed by the deceased's estate to the 2<sup>nd</sup> defendant as the deceased had failed to pay the required premium to the insurance company. It was the 2<sup>nd</sup> defendant's case that since it had paid the premium for the said insurance cover it was entitled to be paid the said amount. The plaintiff adduced evidence which was to the effect that she should be declared to be the owner of the suit property in light of the events that transpired after the death of the deceased. The plaintiff urged the court to cancel the transfer of the suit property to the 1<sup>st</sup> defendant and order the said property to be registered in the plaintiff's name. On its

part, the 1<sup>st</sup> defendant prayed for the eviction of the plaintiff from the suit property. The 1<sup>st</sup> defendant further prayed to be paid general damages in form of mesne profits occasioned by the plaintiff's failure to give the 1<sup>st</sup> defendant vacant possession. It was the 1<sup>st</sup> defendant's case that in the period of over four (4) years that the plaintiff has been in possession of the suit property, he had been forced to rent a residential house where he is obliged to pay monthly rent of KShs.40,000/=. He therefore sought to be so compensated.

Having set out the facts of this case, the issues for determination by this court are as follows:

- (i) Who sold the suit property to the 1<sup>st</sup> defendant?
- (ii) What were the terms of the said agreement?
- (iii) At what point was the 1<sup>st</sup> defendant entitled to get vacant possession of the suit property?
- (iv) Did the death of the deceased lead to the variation of the terms of the agreement and thereby resulted in the rescission of the sale agreement?
- (v) Did the sale of the suit property result in the settlement of the debt that was owed to the deceased to the 2<sup>nd</sup> defendant?
- (vi) Has the plaintiff established a case to entitle the court grant her prayers in the plaint?
- (vii) Has the 1<sup>st</sup> defendant established his counterclaim?
- (viii) Who is entitled to be declared the owner of the suit property?
- (ix) What are the orders as to costs?

It was apparent from the evidence adduced by the plaintiff and the 2<sup>nd</sup> defendant that the deceased charged the suit property to secure the sum of KShs.5.8 million which was advanced to the deceased to enable him complete the residential house erected on the suit property. The deceased, the registered owner of the suit property, charged the same to the 2<sup>nd</sup> defendant to secure the advanced amount. It was evident from the bank statements that were produced in evidence that the deceased did not repay the said loan. He fell in arrears immediately after the loan was disbursed to him. As far back as 2001, the 2<sup>nd</sup> defendant was already concerned by the deceased's failure to repay the loan amount. It was after the deceased had failed to raise the outstanding amount, and after the loan had escalated to KShs.19,390,386.60 as at 26<sup>th</sup> May 2004, that the deceased entered into an agreement with the 2<sup>nd</sup> defendant with a view to settling the outstanding amount. The agreement was contained in the letter of offer by the 2<sup>nd</sup> defendant dated 27<sup>th</sup> November 2004. In the said agreement, whose terms were accepted by the deceased, the deceased agreed to sell the suit property for the minimum sum of KShs.12 million. Out of the said amount, the 2<sup>nd</sup> defendant agreed to be paid KShs.10.5 million in full and final payment of the amount owed. The amount owed, over the sum of KShs. 12 million, was waived by the 2<sup>nd</sup> defendant. The sum of KSh.1.5 million would be paid to the deceased. Clause 1 of the agreement provided as follows:

*“(i) That your financial obligations to us shall be settled at a net of KShs.10.5 million provided the property is being sold at the secured sale price of KShs.12 million but in case of higher price, any surplus over and above the exceptional refund of KShs.1.5 million to you be taken on account and treated as part of the agreed settlement amount.”*

It was clear that the property was to be sold for the agreed purchase consideration of KShs.12 million. Any sum secured over and above the said sum of KShs.12 million would be treated as part of the agreed settlement amount. This meant that any surplus amount would be applied by the 2<sup>nd</sup> defendant to defray

any amount in the plaintiff's loan account. It was pursuant to this agreement, that the deceased executed the sale agreement in respect of the suit property with the 1<sup>st</sup> defendant. In answer to issue (i), it was the deceased that sold the suit property to the 1<sup>st</sup> defendant. There was no evidence to support the claim by the plaintiff that the suit property was sold by the 2<sup>nd</sup> defendant in exercise of its statutory power of sale.

In answer to issue (ii), the terms of the sale agreement was that the suit property would be transferred to the 1<sup>st</sup> defendant upon the defendant paying a deposit of KShs.1.5 million and his advocate given a professional undertaking to pay the balance of KShs.10.5 million upon the successful registration of the 1<sup>st</sup> defendant as the owner of the suit property. Clause 9 of the sale agreement dated 8<sup>th</sup> February 2005 (though it is erroneously dated 8<sup>th</sup> February 2004) provided that vacant possession would be given to the 1<sup>st</sup> defendant on completion date upon payment of the full purchase price. The 1<sup>st</sup> defendant paid the said deposit. His advocate gave a professional undertaking to pay the balance. A further sum of KShs.2 million was paid. The property was transferred to the 1<sup>st</sup> defendant and on 12<sup>th</sup> May 2005 the title of the suit property was registered in the 1<sup>st</sup> defendant's name. After the registration of the 1<sup>st</sup> defendant as the owner of the suit property, the deceased entered into another agreement with the 2<sup>nd</sup> defendant. In the said agreement dated 23<sup>rd</sup> June 2005, the deceased agreed to give vacant possession of the suit property to the 1<sup>st</sup> defendant by 18<sup>th</sup> July 2005. The 2<sup>nd</sup> defendant agreed to pay the deceased KShs.200,000/= to facilitate his movement out of the suit property. The agreement was rendered inoperative when the deceased died on 5<sup>th</sup> July 2005.

The plaintiff entered the fray and requested more time to give vacant possession. She entered into a separate agreement with the 2<sup>nd</sup> defendant giving the undertaking that she would vacate the suit property by 31<sup>st</sup> August 2005. Therefore in answer to issue (iii), the plaintiff was required to give vacant possession of the suit property to the 1<sup>st</sup> defendant a day after she was supposed to have vacated the suit property. The plaintiff made a big issue of the fact that the 1<sup>st</sup> defendant's advocate failed to honour the professional undertaking that he had given to the advocate of the deceased and the 2<sup>nd</sup> defendant. In my considered view, whether or not the said advocate honoured his professional undertaking is not an issue here. It was of no concern to the plaintiff whether the said amount was paid or not. In any event, the issue of the payment of the balance of the purchase consideration became moot when the said advocate paid to the 2<sup>nd</sup> defendant the balance of the purchase consideration. It is this court's view that the issue of whether the 1<sup>st</sup> defendant's advocate honoured his professional undertaking was raised as a red herring by the plaintiff in a desperate bid to support her claim that she had been defrauded of the suit property.

In answer to issue (iv), I hold that the death of the deceased had no bearing whatsoever with the sale of the suit property to the 1<sup>st</sup> defendant. As stated earlier in this judgment, at the time of the deceased's death, the suit property had already been transferred to the 1<sup>st</sup> defendant. The deceased died on 5<sup>th</sup> July 2005. The title of the suit property was registered in the name of the 1<sup>st</sup> defendant on 12<sup>th</sup> May 2005. The deceased executed the instrument of transfer of the suit property to the 1<sup>st</sup> defendant. The only issue that remained was for the deceased and the members of his family to give vacant possession to the 1<sup>st</sup> defendant. This had not been done at the time of the unfortunate demise of the deceased. As regard to the insurance compensation, again I am of the view that the same was a side show. The issue was raised by the plaintiff in an attempt to clothe her occupation of the suit property with some form of legality. It was churlish for the plaintiff to expect the estate of the deceased to be paid the said mortgage protection insurance compensation of KShs.5.8 million when the deceased did not pay a single cent as premium. There is no dispute that the 2<sup>nd</sup> defendant was entitled to the said amount on account of the fact that it religiously paid the premium even when the deceased had completely failed to repay the loan. The sale agreement of the suit property had substantially been performed save for the fact that the deceased and members of his family were required to give vacant possession of the suit property.

In answer to issue (v), I hold that the transfer of the suit property to the 1<sup>st</sup> defendant resulted in the settlement of the debt owed by the estate of deceased. The 2<sup>nd</sup> defendant confirmed in court that the

estate of the deceased does not owe any amount to the 2<sup>nd</sup> defendant save for any orders that may be issued by this court in its favour.

In answer to issue (vi), I hold that the plaintiff has failed to establish a case to the required standard of proof on a balance of probabilities. It was evident to this court that the plaintiff, while justified in filing the present suit in light of her unlawful eviction from the suit premises, had no basis in law to claim ownership of the suit property. The suit property had already been transferred to the 1<sup>st</sup> defendant by the time of the deceased's death. The plaintiff, as the administrator of the estate of the deceased, cannot purport to have posthumous ownership claim over the suit property. It is clear that an administrator of the estate of a deceased cannot claim rights over a parcel of land that is superior to that of the deceased when he was alive. I therefore find no merit with the plaintiff's suit and proceed to dismiss it with costs to the defendants.

As regard issue (vii), I hold that the 1<sup>st</sup> defendant established his counterclaim. The 1<sup>st</sup> defendant established to the required standard of proof that he is the registered owner of the suit property. He established that he paid valuable consideration for the same. He also established that he is entitled to possession of the same. I therefore find in favour of the 1<sup>st</sup> defendant in terms of his counterclaim. In answer to issue (viii), I hereby declare the 1<sup>st</sup> defendant to be the legal owner of the suit property i.e. L.R. No. Nairobi/Block 99/244. The plaintiff is ordered to give vacant possession of the suit property to the 1<sup>st</sup> defendant within forty five (45) days of the date of this judgment or in default thereof, the 1<sup>st</sup> defendant shall be at liberty to secure the forceful and lawful eviction of the plaintiff from the suit property.

I decline to make any award of damages to the 1<sup>st</sup> defendant on account of the alleged unlawful occupation of the suit property by the plaintiff. This is because of the fact that the defendants earlier took the law into their hands when they purported to unlawfully evict the plaintiff from the suit property. Since the court made no order on compensation to the plaintiff for having been unlawfully evicted from the suit premises, it is only fair and just that no award be made to the 1<sup>st</sup> defendant on account of the alleged unlawful occupation of the suit premises.

The 2<sup>nd</sup> defendant is ordered to pay to the plaintiff the sum of KShs.939,569/=. This is the balance of the sum of KShs.1.5 million that the 2<sup>nd</sup> defendant had agreed to pay to the deceased less expenses of Kshs.560,431/=. The said amount should be paid to the plaintiff within forty five (45) days of today's date or in default thereof the plaintiff shall be at liberty to execute. The plaintiff shall pay to the 1<sup>st</sup> defendant the costs of his counterclaim.

It is so ordered.

DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER, 2009

**L. KIMARU**

**JUDGE**