



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngumi v Njuguna & 3 others (Environment and Land Case Civil Suit  
612 of 2015) [2022] KEELC 13787 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13787 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 612 OF 2015  
SO OKONG'O, J  
OCTOBER 27, 2022**

**BETWEEN**

**DAVID KIARIE NGUMI ..... PLAINTIFF**

**AND**

**STEPHEN KAHURANI NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**JANE NJERI NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**KANGERI WANJOHI T/A KINDEST AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR, NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit on June 30, 2015. The plaint was amended with leave that was granted on January 29, 2020. In his amended plaint, the Plaintiff sought the following reliefs;
  1. An order of injunction restraining the Defendants by themselves, their agents, servants or persons claiming under or through them from entering, taking possession, trespassing or otherwise howsoever interfering with the Plaintiff's possession, use or occupation of Plot No Dagoretti/Riruta/T 83 (hereinafter referred to as 'the suit property') until the rightful owner is determined.
  2. The title now in the name of the 2<sup>nd</sup> Defendant be cancelled and the property restored to the estate of Grace Wangari Kinyanjui.
  3. General damages.
  4. Punitive/exemplary damages.
  5. Special damages of Kshs 2,224,340/-.



6. Costs of the suit.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed an amended defence and counter-claim dated March 8, 2019. In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant sought the following reliefs against the Plaintiff;
  1. A declaration that the title for Plot No Dagoretti/Riruta/T 83 (the suit property) held by the 2<sup>nd</sup> Defendant is legal and bona fide.
  2. An order compelling the Plaintiff to remove the semi-permanent structures he has erected on the suit property forthwith and in default the same be forcefully removed.
  3. An injunction restraining the Plaintiff, his agents, servants, heirs and successors from entering, remaining on, constructing any structures on or in any manner howsoever and whatsoever interfering with all or any part of the suit property.
  4. Costs of the suit and interests thereon.
3. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file statements of defence.

**The Plaintiff's case:**

4. In his amended plaint, the Plaintiff averred that he was at all material times a purchaser of the suit property from one, Grace Wangari Kinyanjui, deceased (hereinafter referred to only as 'the deceased'). After purchasing the suit property, he took possession and constructed a rental house thereon. He averred that he obtained from the deceased the necessary documents for the transfer of the property to his name including the Land Control Board Consent. The Plaintiff averred that the 1<sup>st</sup> Defendant who also claimed to have purchased the suit property from the deceased proceeded to obtain a Grant of Letters of Administration in respect of the estate of the deceased at Kajiado Law Court in Kajiado PMC Succession Cause No 27 of 2009 (hereinafter referred to as 'Kajiado Succession Case'). The Plaintiff averred that the said grant was revoked on December 9, 2014 in the High Court at Nairobi in Nairobi HC P&A No 425 of 2013 (hereinafter referred to as 'Nairobi Succession Case'). The Plaintiff averred that while revoking the said grant, the court also directed that the issue of ownership of the suit property be dealt with by this court.
5. The Plaintiff averred that the 1<sup>st</sup> Defendant had before the revocation of the said grant caused the suit property to be registered in his name before transferring the same to the 2<sup>nd</sup> Defendant. The Plaintiff averred that in the High Court Succession Case the court had issued an order prohibiting all dealings with the suit property which had not been discharged as at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were dealing with the property. The Plaintiff averred that on June 24, 2015, hired goons under the direction of the 3<sup>rd</sup> Defendant and supervision of the police descended on the suit property and destroyed properties, damaged the house thereon and took away materials.
6. The Plaintiff averred that this invasion was purportedly carried out pursuant an order to levy distress that was issued to the 3<sup>rd</sup> Defendant in Milimani Chief Magistrates Misc Civil Application No 507 of 2015 (hereinafter referred to as 'the Distress Case'). The Plaintiff averred that in the said order, the Plaintiff was described as a tenant of the 2<sup>nd</sup> Defendant. The Plaintiff averred that the conduct of the Defendants was fraudulent. The Plaintiff set out the particulars of fraud alleged against each of the Defendants. The Plaintiff averred that the fraudulent acts of the Defendants led to the partial demolition of the premises he had put up on the suit property causing him to suffer loss and damage to the tune of Kshs 2,224,340. The Plaintiff averred that he also lost rental income of Kshs 170,000 per month.



7. At the trial, the Plaintiff testified as PW1. He adopted his witness statement dated June 29, 2015 and further witness statement dated April 12, 2019 as part of his evidence in chief and produced his consolidated bundle of documents dated April 12, 2019 as exhibit. He stated as follows in his oral testimony: He bought the suit property from the deceased on January 24, 2003 at a consideration of Kshs 2,000,000/- that he paid in full. They entered into a written agreement. The deceased and he signed the application for Land Control Board Consent. The deceased also executed an instrument of transfer of the suit property from the deceased to him. In addition, the deceased gave him the original title for the suit property. The Plaintiff produced the originals of the aforesaid documents for perusal by the Court. The Plaintiff stated that he did not complete the transfer process because he was short of funds. He however took possession of the suit property, removed the structures that were on it and fenced it.
8. He stated that in 2005 he went to register the transfer but he found a caution registered against the title. He went around looking for the deceased but was informed that she had died. In 2012 he started developing the suit property. The 1<sup>st</sup> Defendant came and claimed that the suit property belonged to him. Their lawyers exchanged correspondence on the dispute. He obtained a court order that enabled him to finish construction of a house on the suit property that he rented out.
9. The Plaintiff stated that one day, he was informed that the structures on the suit property were being demolished. He came to learn that the demolition was being carried out on the strength of the order that the 3<sup>rd</sup> defendant had obtained at the Chief Magistrate's Court to levy distress against him on behalf of the 2<sup>nd</sup> Defendant who claimed that he was her tenant.
10. The Plaintiff stated that the 2<sup>nd</sup> Defendant acquired the suit property from the 1<sup>st</sup> Defendant who was her husband who had transferred the property to his name using a grant that he obtained in the Kajiado Succession Case. The plaintiff stated that he challenged the said grant and had it revoked by the High Court. He also challenged the distress order and had it set aside.
11. The Plaintiff stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware of his interests in the suit property as evidenced by correspondence between their advocates. He stated that after the demolition of the structure on the suit property, he did not collect rent from the property for some time. He urged the court to grant the reliefs sought in the amended plaint.
12. On cross-examination, the Plaintiff stated that he bought the suit property on January 24, 2003 and once he had paid for it, he was issued with a Land Control Board Consent(LCB), transfer, original title and copies of the deceased's Identification Card and PIN. He stated that he purchased the suit property at Kshs 2,000,000/- although the LCB consent indicated the consideration as Kshs 250,000/-. He stated that it was the deceased who was processing the consent and she was therefore the one who indicated the consideration as Kshs 250,000/- in the LCB consent application and as Kshs 500,000/- in the transfer form. He stated that he was not aware that the suit property had been sold earlier. He stated that he did a search and no encumbrance was listed in the register. He stated that he knew about the 1<sup>st</sup> Defendant's claim over the suit property in 2005 and of the fact that the 1<sup>st</sup> Defendant had transferred the suit property to the 2<sup>nd</sup> Defendant during the demolition. The Plaintiff stated further that the order that was granted to the 3<sup>rd</sup> Defendant was to enable him levy distress and not to carry out demolition.
13. The Plaintiff's next witness was the deceased's brother, Duncan Waweru Kinyanjui, who testified as PW2. PW2 adopted his affidavit dated December 17, 2015 as his evidence in chief. In the said affidavit he stated that the Plaintiff purchased the suit property from his deceased sister in 2003. He stated further that before her demise, the deceased confirmed that the Plaintiff had paid the full purchase



- price of Kshs 2,000,000/- and that she had handed over the original title, LCB consent and transfer to him. He stated that the 1<sup>st</sup> Defendant did not purchase the suit property from his deceased sister.
14. On cross-examination, he stated that he was not present when the Plaintiff and the deceased signed the sale agreement. He stated that the deceased died in 2003 and that she had one child and had no other property except the suit property which she sold to the Plaintiff. He reiterated that he was not involved in the transaction.
  15. The deceased's other brother, David Migwi Kinyanjui testified as PW3. He adopted his affidavit dated December 17, 2015 as part of his evidence in chief. In that affidavit, he stated that the Plaintiff purchased the suit property from the deceased. He stated that in 2014 he was summoned to the chief's office at Riruta where he was ordered to sign a document in the presence of the 1<sup>st</sup> Defendant but the document was blank. In his oral testimony, he stated that he knew the Plaintiff as he had visited their home. He stated that the deceased had told him that she sold the suit property to the Plaintiff.
  16. On cross-examination, PW3 stated that he was not involved in the sale of the suit property. He stated that he did not know whether the deceased had been paid by the 1<sup>st</sup> Defendant and whether the 1<sup>st</sup> Defendant had a title over the suit property. On the issue of being summoned to the chief's office, he stated that the 1<sup>st</sup> Defendant was present and that he was the one who had requested for the meeting. He stated that he signed a document whose contents he did not know. He denied stating that the suit property was owned by the 1<sup>st</sup> Defendant.
  17. The Plaintiff's last witness was John Njoroge Karori (PW4). He stated that he was a registered surveyor and valuer working with Precision Valuers Limited. He produced the valuation report dated September 5, 2015 as an exhibit. On cross-examination, he stated that he assessed the suit property. He stated that he went on the suit property to observe and document the loss. He stated that he also considered the input of the Plaintiff. He admitted that he was not furnished with receipts for the lost items. He stated that he estimated the market value of the suit property. On re-examination he stated that his instructions were to assess the loss and damaged items not to assess the value of the land.

**The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's case:**

18. In their amended defence and counterclaim dated March 8, 2019, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants set out their case and claim against the Plaintiff as follows: The Plaintiff was duped into purchasing the suit property as it had already been sold to the 1<sup>st</sup> Defendant by the deceased on September 2, 2002. The 1<sup>st</sup> Defendant bought the suit property at a consideration of Kshs 1,700,000/- which was payable in monthly instalments of Kshs 84,000/-. The 1<sup>st</sup> Defendant was to obtain the LCB consent upon payment of the full purchase price. When he made his last payment on July 23, 2003, he realized that the Plaintiff had been duped into purchasing the suit property. He therefore registered a caution on the title to preserve his interest as the first purchaser.
19. The deceased died before effecting the transfer in favour of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant obtained a Grant of Letters of Administration in respect of her estate as a creditor and effected a transfer of the suit property to himself. By the time the said grant was revoked in the High Court Succession Case, the 1<sup>st</sup> Defendant had legally transferred the suit property to his name. The 1<sup>st</sup> Defendant again legally transferred the property to the 2<sup>nd</sup> Defendant.
20. In their counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants reiterated the contents of their defence and averred that the 2<sup>nd</sup> Defendant had a valid title in respect of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant averred that despite his knowledge of the 2<sup>nd</sup> Defendant's right of ownership over the suit property, the Plaintiff still proceeded to put up semi-permanent structure on the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants



averred that this had made it impossible for the 2<sup>nd</sup> Defendant to deal with the suit property in the manner she deemed fit.

21. At the trial, the 1<sup>st</sup> Defendant testified as DW1. He produced the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's bundle of documents as exhibits and adopted his witness statement as part of his evidence in chief. He stated further as follows:

He purchased the suit property from the deceased but the same was not transferred to him because the deceased moved to Kajiado. He filed the Kajiado Succession Case and obtained a Grant of Letters of Administration. Upon obtaining the said grant, he processed the title in his favour without any objection. He thereafter transferred the suit property to his wife, the 2<sup>nd</sup> Defendant. After the suit property was registered in his name, he found the Plaintiff carrying out construction on the property. He urged the court to issue orders for the eviction of the Plaintiff from the suit property.

22. On cross-examination, he stated that he bought the suit property from the deceased on September 2, 2002. He reiterated that he bought the suit property from the deceased for Kshs 1,700,000/-. He stated that he initially paid Kshs 200,000/- and the balance in instalments over 3 months. He stated that the deceased would acknowledge receipt of the payments. He stated that he did not have the original acknowledgements in court. He could also not recall whether they were issued on the same day or on different days. He stated that the deceased did not give him the original title. The deceased did not also execute a transfer in his favour as she was sickly. He stated that he could not remember going to the LCB. He stated that the deceased died three years after the agreement for sale between them.
23. He stated that he was not aware that the grant that was issued to him in the Kajiado Succession Case was challenged in the High Court case and that the same was revoked. He admitted that the Plaintiff and he had registered cautions against the title of the suit property. He stated that the deceased did not leave him with any document and that he executed the transfer in his favour without the original title nor an order dispensing with the production of the same. He stated that he did not take possession of the suit property because the Plaintiff who was claiming to be the owner of the suit property was in possession and that the Plaintiff sued him when he was considering taking action against him. He admitted that the Plaintiff was not his tenant. The 1<sup>st</sup> Defendant admitted that he was the one who instructed the 3<sup>rd</sup> Defendant to demolish the structure that the Plaintiff had put up on the suit property. He stated that he was not aware that the 2<sup>nd</sup> Defendant had claimed to be the Plaintiff's landlady. He was also not aware that the demolition order had been set aside on November 13, 2015.
24. He stated that he transferred the suit property to his wife as a gift having taken good care of the family. He admitted that the Plaintiff was still in possession of the suit property.
25. The 2<sup>nd</sup> Defendant gave evidence next. She testified as DW2. She adopted her witness statement as her evidence in chief. On cross-examination she stated that: She married the 1<sup>st</sup> Defendant in 1979. He transferred the suit property to her in 2015. They owned other properties but the suit property was the only one in her name. She could not recall going to the Land Control Board for consent. The 1<sup>st</sup> Defendant paid for the transfer in her favour. When the suit property was transferred to her, the Plaintiff was in occupation. He had built rental houses thereon. On her part, she wanted to put up a hardware on the suit property. She instructed the 3<sup>rd</sup> Defendant to remove the plaintiff from the property. She admitted that although the Plaintiff was not her tenant she told the 3<sup>rd</sup> Defendant that he was a tenant so that she could have him evicted. She admitted that she did not give the plaintiff any notice. She stated that she was not involved in the Nairobi Succession Case and as such she was not



aware that the grant that was issued in favour of the 1<sup>st</sup> Defendant in Kajiado had been revoked. On examination by the court she stated that she was born in 1957 while the 1<sup>st</sup> Defendant was born in 1947.

#### **The submissions:**

26. The Plaintiff filed his submissions on June 19, 2022. The plaintiff framed a number of issues for determination that he submitted on. The first issue framed by the plaintiff concerned the ownership of the suit property. The Plaintiff cited Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya and *Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1980]eKLR* and submitted that he had proved his title to the suit property. The Plaintiff submitted that he had tendered in evidence the original title for the suit property, evidence of payment, LCB consent and transfer. The plaintiff submitted that he had also been in possession of the suit property for close to ten years without interruption. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other hand did not satisfactorily prove their claim over the suit property.
27. The second issue framed by the Plaintiff for determination was whether the transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was legitimate and above board. Relying on *Madison Moroko Nyamweya v Benard Magara Maroko & another [2016]eKLR*, the Plaintiff submitted that since the grant on the basis of which the 1<sup>st</sup> Defendant transferred the sui property to himself was revoked, all actions taken using the said grant stood reversed and nullified. The Plaintiff also relied on Section 158 of the *Land Act*; Sections 26 and 103 of the *Land Registration Act*; and the cases of *Elijah Makeri Nyangwira v Stephen Mungai Njuguna & another [2013]eKLR*, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* and *Chauban v Omagwa [1985] KLR 656* to argued that since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained title to the suit property illegally/through a corrupt scheme, the same should be cancelled.
28. The third issue for determination was what orders the court should grant in the matter. Relying on *Esther Ndegi Njiru & another v Leornard Gatei [2014] eKLR*, the Plaintiff submitted that he was entitled to an order for cancellation of the title held by the 2<sup>nd</sup> Defendant since the same was fraudulently obtained. He submitted further that he was entitled to an order of injunction to protect him from the Defendants' acts of hooliganism.
29. On the issue of loss, the Plaintiff submitted that he had proved through the valuation report and the testimony of the valuer(PW4) that the loss inflicted on his property was Kshs 2,224,340/-. On the issue of costs, the Plaintiff submitted that costs follow the event and asked the court to award him the costs of the suit.
30. On April 20, 2022, the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants asked for an extra 14 days to file submissions. As at the time of drafting this judgment on September 21, 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not filed their submissions. Any submissions filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants after this date would be several months out of the time that was allowed by the court and the court is not under any duty to consider the same.

#### **Analysis of the parties' respective cases and determination of the issues arising:**

31. From the pleadings, the following in my view are the issues arising for determination in this suit;
  - a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property lawfully.
  - b. Whether the Plaintiff is a beneficial owner of the suit property.
  - c. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.



- d. Whether the Defendants are entitled to the reliefs sought in the counter-claim.
- e. Who is liable for the costs of the suit and the counter-claim?

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property lawfully.**

32. The suit property is registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (RLA) (now repealed). Sections 27 and 28 of the Registered *Land Act* provides as follows:

' 27. Subject to this Act -

- (a) a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.'

33. Section 143(1) and (2) of the Registered *Land Act* provides as follows:

' (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'

34. Section 24, 25 and 26 of the *Land Registration Act*, 2012 provides as follows:

' 24. Subject to this Act—



- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

35. Both under the Registered *Land Act* and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. Under the Registered *Land Act* which is the statute under which the suit property was registered, a register of land may be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.

36. It is not disputed that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property. The 2<sup>nd</sup> Defendant acquired the suit property from the 1<sup>st</sup> Defendant on April 17, 2015. The 1<sup>st</sup> Defendant acquired the suit property on February 5, 2015 as an administrator and a beneficiary of the estate of the deceased pursuant to a Grant of Letters of Administration and Certificate of Confirmation that were issued in his favour in the Kajjado Succession Case on May 9, 2012 and November 12, 2012 respectively. By virtue of being the registered proprietor of the suit property, the 2<sup>nd</sup> Defendant is presumed to be the lawful owner thereof and her title can only be impeached on account of fraud or mistake or where the title was acquired illegally or through misrepresentation or a corrupt scheme. The



burden was upon the Plaintiff to establish any of the factors that can vitiate the 2<sup>nd</sup> Defendant's title to the suit property.

37. The Plaintiff proved that the grant that was issued to the 1<sup>st</sup> Defendant in the Kajiado Succession Case was revoked by the High Court on December 9, 2014. The grant was revoked in the High Court Succession Case on the ground that the proceedings in the Kajiado Succession Case in which the grant was issued were defective as the court had no jurisdiction to issue the grant. The Plaintiff also proved that before the said grant was revoked, the High Court issued an order on May 15, 2013 prohibiting all dealings with the suit property pending the hearing of the revocation application.
38. I am of the opinion that the High Court having found that the proceedings pursuant to which the 1<sup>st</sup> Defendant obtained the grant in respect of the deceased's estate were defective on account of want of jurisdiction, the Grant of Letters of Administration that was obtained by the 1<sup>st</sup> Defendant in the Kajiado Succession Case was similarly defective, null and void ab initio. I am of the opinion that the 1<sup>st</sup> Defendant who was both an administrator and a beneficiary under the said grant could not derive any lawful benefit from a null and void grant obtained by himself. The situation would have been different if the 1<sup>st</sup> defendant had used the grant to transfer the suit property for valuable consideration to a third party who dealt with the 1<sup>st</sup> defendant in good faith in the belief that the grant was valid before its revocation. Such transaction could have been saved under sections 92 and 93 of the Law of Succession Act, Chapter 160 Laws of Kenya. Neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant can benefit from the said provisions of the Law of Succession Act. For the 1<sup>st</sup> Defendant, he was not a purchaser of the suit property from an administrator of an estate but an administrator himself and a beneficiary. For the 2<sup>nd</sup> Defendant, she did not purchase the suit property. The suit property was transferred to her as a gift by the 1<sup>st</sup> Defendant.
39. It is my finding from the foregoing that the 1<sup>st</sup> Defendant having acquired the suit property as a beneficiary of the estate of the deceased under a defective grant that was null and void ab initio and which was subsequently revoked by the High Court, such a grant did not confer upon the 1<sup>st</sup> Defendant a valid interest in the suit property. That would explain why the High Court directed that the issue of the ownership of the suit property be determined by this court. In *Macfoy v United Africa Co Ltd [1961] 3 All ER 1169* it was stated as follows concerning an act that is void:

' If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

40. The title in respect of the suit property that was acquired by the 1<sup>st</sup> Defendant was null and void the same having been a product of a defective grant that was revoked by the court on that account. It follows therefore that the 1<sup>st</sup> Defendant had no valid ownership right in the suit property that he could transfer to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant had an invalid title. The 2<sup>nd</sup> Defendant could not obtain a better title from him. It is my finding therefore that the title that the 2<sup>nd</sup> Defendant obtained from the 1<sup>st</sup> Defendant was similarly null and void. The 2<sup>nd</sup> Defendant does not therefore have a valid title over the suit property.

#### **Whether the Plaintiff is a beneficial owner of the suit property.**

41. From the evidence on record, I am satisfied that the Plaintiff is the lawful beneficial owner of the suit property. The Plaintiff placed evidence before the court showing that he entered into an agreement



of sale with the deceased on January 24, 2003 and paid to the deceased the purchase price in the sum of Kshs 2,000,000/- in full by way of banker's cheques by March 2003. The Plaintiff proved that he was thereafter handed possession of the suit property by the deceased together with LCB Consent, executed instrument of transfer and original title to enable him transfer the suit property to his name. The plaintiff demonstrated that upon taking possession of the suit property, he developed the same and that he is the one who is in possession.

42. The 1<sup>st</sup> Defendant claimed to have purchased the suit property on September 2, 2002 earlier than the Plaintiff. From the material before the court, the 1<sup>st</sup> Defendant claimed that he had paid the full purchase price as at July 23, 2003. The 1<sup>st</sup> Defendant did not give any convincing reason why he never took possession of the suit property and why the deceased who was alive at the time did not transfer the property to him. The 1<sup>st</sup> Defendant did not also prove that consent of the LCB was obtained in respect of the transaction. The court was also not given reasonable explanation why the 1<sup>st</sup> Defendant paid the entire purchase price of Kshs 1,700,000/- to the deceased in cash in large tranches of Kshs 200,000/-, Kshs 100,000/-, Kshs 300,000/-, Kshs 400,000/-, Kshs 90,000/-, Kshs 400,000/- and Kshs 410,000/-.
43. I am of the view that the Plaintiff having entered into an agreement for sale with the deceased, paid the purchase price in full, was handed over possession, the Original title of the property together with the transfer and LCB consent before the purported agreement between the 1<sup>st</sup> Defendant and the deceased was completed, the Plaintiff's interest in the suit property takes precedence over that of the 1<sup>st</sup> Defendant. It is my finding therefore that the Plaintiff is the lawful beneficial owner of the suit property.

#### **Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.**

44. The Plaintiff has sought a number of reliefs that I have set out earlier in the judgment. The first relief sought is an injunction. The Plaintiff has proved that he is the beneficial owner of the suit property and that he is in possession of the property. The Plaintiff is therefore entitled to an injunction to restrain the Defendants from interfering with his title, possession and user of the property. The Plaintiff has also sought the cancellation of the title held by the 2<sup>nd</sup> Defendant so that the property can revert to the estate of the deceased. I have already held that the 2<sup>nd</sup> Defendant does not have a valid title over the suit property. The title held by her is a nullity the same having been acquired through a defective process. The Plaintiff is entitled to the order cancelling such a title.
45. The other relief sought by the Plaintiff is general damages for trespass. The Defendants admitted at the trial that the Plaintiff was not their tenant and as such they did not have a right to levy distress against him. It was also common ground that the order that was obtained by the 3<sup>rd</sup> Defendant in the Distress Case did not authorise the Defendants to evict the Plaintiff from the suit property or to destroy his properties on the property. It was not contested by the Defendants that the order was set aside as it was wrongly obtained. I have held that the Plaintiff is the beneficial owner of the suit property. That means that he was entitled to possession and enjoyment of the property. The illegal invasion of the property by the Defendants amounted trespass. The Plaintiff is therefore entitled to damages for trespass as against all the Defendants who worked in concert to carry out the illegal attempt to evict the Plaintiff from the suit property.
46. The Plaintiff has also claimed punitive or exemplary damages. In view of the circumstances under which the suit property was invaded, the motive behind the invasion and the nature of the damage that was inflicted, I am persuaded that the Plaintiff is entitled to exemplary damages.
47. The last prayer is for special damages in the sum of Kshs 2,224,340/-. The law on special damages is that the same must be pleaded with the necessary particulars and strictly proved. The Plaintiff pleaded



a global sum of Kshs 2,224,340/-. The break down of this sum is contained not in the plaint but the valuation report that was produced by PW4. The claim is in respect of lost or damaged items and lost rental income. No cogent evidence was placed before the court of any report that was made to the Police by the Plaintiff regarding specific items that were stolen during the illegal eviction that was conducted by the Defendants. There is also no evidence as to the amount of rent that the Plaintiff was receiving from the suit property. In the circumstances, I find the special damages claim for lost/stolen items and loss of rental income not strictly proved. I will therefore disallow the same. I will award special damages for the remaining items.

**Whether the Defendants are entitled to the reliefs sought in the counter-claim.**

48. The Defendants had sought three main reliefs in their counter-claim. The first was a declaration that the 2<sup>nd</sup> Defendant holds a valid and bona fide title over the suit property. In view of the findings I have made earlier in this judgment, the Defendants are not entitled to this declaration. The other relief is for possession of the suit property. Having held that the Defendants have no valid title to the suit property, this relief is not available to them. The last substantive relief sought by the Defendants is an injunction. In view of my findings above, the prayer for injunction has no merit.

**Who is liable for the costs of the suit and the counter-claim?**

49. Cost is at the discretion of the court. As a general rule, costs follow the event unless for good reason, the court orders otherwise. In this case, the Plaintiff has succeeded in his claim against the Defendants while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed in their counter-claim. In the absence of any valid reason put forward to justify denying the Plaintiff the costs of the suit and the counter-claim, I will award the Plaintiff the costs of the two.

**Conclusion:**

In conclusion, I hereby make the following orders:

1. Judgment is entered for the Plaintiff against the Defendants as follows:
  - a. An order of injunction is issued restraining the Defendants by themselves, their agents, servants or persons claiming under or through them from entering, taking possession, trespassing or otherwise howsoever interfering with the Plaintiff's possession, use or occupation of Plot No Dagoretti/Riruta/T 83 ('the suit property').
  - b. Entries Numbers 10, 11, 12, 13 and 14 in the register of the suit property pursuant to which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property are cancelled.
  - c. The suit property shall revert to the name of Grace Helen Wangari.
  - d. Kshs 500,000/- as General Damages against the Defendants jointly and severally.
  - e. Kshs 200,000/- as Exemplary Damages against the Defendants jointly and severally.
  - f. Kshs 1,543,590/- as Special Damages against the Defendants jointly and severally.
2. The Defendants' counter-claim is dismissed.
3. The Plaintiff shall have the cost of the suit and the counter-claim.

**DELIVERED AND DATED AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**S.OKONG'O**



## **JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Kiriimi for the Plaintiff

Mr. Kinyanjui for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

Ms. J. Omondi-Court Assistant

