



REPUBLIC OF KENYA



**Mwangi v Mwangi & 9 others (Environment & Land Case 382 of 2017)  
[2022] KEELC 15553 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 382 OF 2017  
LN GACHERU, J  
DECEMBER 20, 2022**

**BETWEEN**

**PAUL NDUATI MWANGI ..... PLAINTIFF**

**AND**

**STEPHEN NGOTHO MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**ANNE WANJIRU KARIUKI (LEGAL REPRESENTATIVE OF LAWRENCE  
IRUNGU MWANGI-DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**IGNATIUS IRUNGU MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**ALICE KABURA MWANGI ..... 4<sup>TH</sup> DEFENDANT**

**ELIZABETH MUTHONI (LEGAL REPRESENTATIVE OF JOSEPH MACHARIA  
MWANGI-DECEASED) ..... 5<sup>TH</sup> DEFENDANT**

**MIRIAM NYAMBURA MUGO (LEGAL REPRESENTATIVE OF THOMAS  
MUGO MWANGI- DECEASED) ..... 6<sup>TH</sup> DEFENDANT**

**ANGELINA WAMBUI MWANGI ..... 7<sup>TH</sup> DEFENDANT**

**PETER N. GIKUNGU ..... 8<sup>TH</sup> DEFENDANT**

**GRACE NJERI MWANGI ..... 9<sup>TH</sup> DEFENDANT**

**KEZIAH WAIRIMU MWANGI ..... 10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1 Vide a Plaint dated November 4, 2014, and amended on **December 18, 2020**, the plaintiff sought for judgment against the defendants jointly and severally for the following orders:-



- a. An order that the defendants by themselves, their servants, and/or agents be restrained by an Injunction from transferring, charging, and/or in any manner interfering with the ownership of the property which should remain in the name of Mwangi Gikungu.
  - b. A declaration that the Plaintiff is entitled to a one fifth  $1/5^{\text{th}}$  share in property LR No Loc 8/kandegenye/284/1 also known as Plot No 1 Kahuro Market in place of the Defendants.
  - c. An Order that the name of the Plaintiff be inserted as a co-owner of the whole of LR No Loc 8/Kandegenye/284/1 also known as Plot No 1 Kahuro Market in place of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Defendants be ordered to present the necessary forms for registration to the Land Registrar and the County Government of Murang'a.
  - d. In default of prayer (c) above, the Land Registrar Muranga as well as the County Administrator, County Government of Murang'a be authorized and directed to effect the registration of the Plaintiff and the 3<sup>rd</sup> to 10 Defendants over the suit land LR No Loc 8/kandegenye/284/1, also known as Plot No 1 Kahuro Market in the ration of  $1/5^{\text{th}}$  and  $4/5^{\text{th}}$  in favour of the Plaintiff and the 3<sup>rd</sup> to 10<sup>th</sup> Defendants respectively.
  - e. That the Costs of the suit be awarded to the Plaintiff
  - f. Any other relief that the Court may deem fit and just
- 2 It is the Plaintiff's averment that he is a bonafide purchaser for value of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants interests in LR No Loc 8/kandegenye/284/1, also known as Plot No 1 Kahuro Market, which is registered in the name of Mwangi Gikungu (Deceased). That through Muranga Succession Cause No 116 of 2007, the Defendants were granted equal shares of the suit property on October 4, 2010. That by virtual of agreements between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively, it was their mutual understanding that upon conclusion of Muranga CM Succ 116 of 2007, the Defendants would forthwith and promptly transfer the said 2 shares (one each) in the suit property to the Plaintiff, since he had paid them the full purchase price.
  - 3 That upon conclusion of the said Succession cause, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been adamant and reluctant to transfer their portions to the Plaintiff as agreed. That he now seeks an order of Specific Performance against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the suit property and the combined shares of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants amount to  $1/5^{\text{th}}$  of LR No Loc 8/kandegenye/284/1, also known as Plot No 1 Kahuro Market.
  - 4 The Plaintiff's claim was opposed jointly by the Defendants via an Amended Statement of Defence dated 18<sup>th</sup> June, 2021. The Defendants denied in total the allegations made by the Plaintiff and put him to strict proof. In addition, it is the Defendants' averment that LR No Loc 8/kandegenye/284/1, also known as Plot No 1 Kahuro Market is registered in the name of all the Defendants jointly and none of the Defendants had sold their share. That the Plaintiff was in possession of the suit property as a tenant. That the alleged sale agreement referred to by the Plaintiff is a nullity as at the time of the said sale, the property was registered in the name of Mwangi Gikungu (deceased) and none of the Defendants had capacity to sell or transact with the suit land without the consent of the other Defendants. That the purported sale agreements between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were a forgery scheme by the Plaintiff to defraud the Defendants of the suit property.
  - 5 Further that the Plaintiff was a tenant on the suit property and any payment made to any of the Defendants was in furtherance of the said tenancy and not purchase price. That the suit property is registered in the names of the Defendants who are the lawful beneficiaries of Mwangi Gikungu



(deceased), and the Plaintiff is not entitled to any share of it. That the suit is filed in bad faith and is ill motivated and it should therefore be dismissed entirely.

- 6 The matter proceeded via Viva Voce evidence. The Plaintiff gave evidence for himself and called no witness while the Defendants called three witnesses to support their case.

#### **Plaintiff's case**

- 7 **PW 1 Paul Nduati Mwangi**, testified that he knew the Defendants herein. He adopted his Witness Statement dated **November 4, 2014**, as part of his evidence and produced the documents contained in his list of documents dated 4November 4, 2014 as **P EXB 1-7**.
- 8 On cross examination, he testified that he is a tenant on the suit property and that he had also purchased a share of it. That he used to pay yearly rent of **Kshs 30,000/=** and that he does not pay that rent now. That he could not recall the last time he had paid rent. That he stopped paying because he once wrote a cheque to the Defendants and they refused to accept it. That he did not recall the date of the said cheque and he had not produced it as an exhibit in Court. That the instant case was for sale of the suit property and not his lease.
- 9 That he purchased a portion of the suit land from Lawrence Irungu Mwangi and Stephen Ngotho Mwangi on 8/5/2004. That at the time of the purchase, the land was not registered in their names, but it was registered in the name of their father who was deceased. That he had been on the suit land since 1986. That at the time of purchase, he did not carry out a search, but he knew the land was registered in the name of the sellers' father and not the sellers. That in the sale agreement there was a default clause and the liquidated damages payable for default was Kshs 50,000/= by the defaulting party. That he had not claimed the said Kshs 50,000/= and he wanted the land through Specific Performance remedy. That as per the sale agreement, the land he bought was to be transferred to him after succession.
- 10 That he had sued the 7<sup>th</sup> Defendant in her capacity as a beneficiary of the suit land, but he did not know that she was deceased. That he never entered a sale agreement with the 3<sup>rd</sup> -10<sup>th</sup> defendants, but he had sued them because they were beneficiaries of the suit land. That he had sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants because they received the purchase price from him.

#### **Defence case**

- 11 **DW 1 Stephen Ngotho Mwangi**, testified that he knew the Plaintiff herein and that he was a tenant on the suit land. He adopted his amended Witness Statement dated **June 18,2021**, as his evidence and produced the documents contained in his list of documents dated **November 8,2016** as Defendants' exhibit 1.
- 12 On cross examination, he stated that there is a certificate for Confirmation of Grant and the suit property was to be shared equally among the 10 Defendants. That instead of subdividing the property, they registered a partnership called **Ignatius Irungu & Partners**, and the suit land is to be transferred to the partnership. That the portion bought by the Plaintiff was not separated. That he had seen the alleged sale agreements and his signature and name appeared on both of them. That the purported signatures in the sale agreement were not his, and he had never gone to the police to report the forgery of his signature. That he did not sell any parcel of land to the Plaintiff and that the said Plaintiff was only leasing the land. That the transaction between himself and the Plaintiff was for rent and not a purchase, and he had a witness to that effect.
- 13 **DW 2 Igantius Irungu Mwangi**, testified that he was the 3<sup>rd</sup> Defendant and he knew the Plaintiff. That he was testifying on his own behalf and on behalf of the other Defendants. He adopted his



- amended Witness Statement dated **June 18, 2021** as his evidence in chief and produced the documents marked DEXB I as his exhibits.
- 14 On cross examination, he testified that all the Defendants were to share the suit property equally. That in respect of the suit property, they registered a Partnership. That he was not party to the sale agreement alleged by the Plaintiff and only learned about it in Court. That he did not know if the agreements were forged or not. That he had not seen the said sale agreements and the 1<sup>st</sup> Defendant had not complained about his signature being forged on the two sale agreements.
- 15 Further that the Plaintiff is a lessee and not a purchaser. That the Plaintiff started leasing the suit land in **1986**. That the agreements in Court are for sale and not leasing. That the Plaintiff was a tenant and he had never sued him for rent and that he did not have a counterclaim against him.
- 16 DW 3 Anne Wanjiru Kariuki, testified that the 2<sup>nd</sup> Defendant was her father and that he was deceased. She adopted her Witness Statement dated June 18, 2021, as part of her evidence and she also confirmed that she would rely on DEXB 1 already produced in Court. She testified that she knew the Plaintiff and that he was a tenant on the suit land.
- 17 On cross examination, she testified that she did not know that her father signed the impugned sale agreements and that no complaint had been lodged for forgery of her father's signature.
- 18 On **May 10, 2022**, the Court directed the parties to file and exchange written submissions.
- 19 The Plaintiff filed his written submissions dated June 28, 2022, through the Law Firm of JN Mbutia & Co Advocates. It is the Plaintiff's submissions that while it was regrettable that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained money from him while they knew that they lacked capacity to sell the suit land or any portion of it, the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be bound by the terms of the sale agreements that they signed and their share in the suit land should be given to the Plaintiff. He relied on the case of *Transmara Sugar Co Ltd and Another v Ben Kangwaya Ayiamba & Another* (2020) eKLR, where the Court found that not all illegalities vitiate contracts.
- 20 It is the Plaintiff further submissions that even though he was a tenant of the suit land, he was not precluded from buying it whole or in part. That the allegations that the monies he paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were his rent arrears was unfounded as they had not claimed any arrears owing from him in their pleadings That all the Defendants were beneficiaries of the suit land and pursuant to a Succession Cause and therefore they were rightfully parties to this suit.
- 21 He urged the Court to allow his claim as prayed since he had proved his case against the Defendants on a balance of probability and to the required standard.
- 21 The Defendants also filed their Written Submissions dated July 20, 2022, through the Law Firm of LM Kinuthia & Associates Advocates. The Defendants reiterated their pleadings and statements in Court and raised 3 issues for determination by this Court.
- 22 It is their submissions that the Plaintiff had not shown any cause of action against the 3<sup>rd</sup> -10<sup>th</sup> Defendants and therefore the claim against them should be dismissed. That in accordance with Section 45 of the *Law of Succession Act*, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lacked capacity to transact in the suit land and therefore the sale agreements they executed are null and void *abinitio*. Reliance was placed on Succession Cause No 11 of 2009 *In the Matter of the Estate of David Julis Nturibi M'Itthinji (deceased)* 2012 eKLR, where the Court dealt with the issues of intermeddling and found that it results to wastage of the estate of a deceased person. It was the further submissions of the Defendants that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were intermeddlers and should be treated as such. The Defendants urged this Court to find in their favour and dismiss the Plaintiff's claim with costs.



- 23 The Court has carefully read and considered the pleadings by the parties, analyzed the evidence adduced, the rival written submissions and the relevant provisions of law and finds that the issues for determination are;
- a. Whether the Plaintiff's Claim is merited?
  - b. Who should pay costs of the suit?
- 24 It is not in doubt that the suit property was initially registered in the name of Mwangi Gikungu (deceased). That the said Mwangi Gikungu died in 1986, and a Succession Cause was filed in the Chief Magistrates Court in Muranga being Succession Cause 116 of 2007. That a Certificate of Confirmation of Grant was issued on October 4, 2010 and the suit land was transmitted to the Defendants herein, each having an equal share. That pursuant to the Confirmation of Grant, the suit land was transferred to the Defendants herein in their capacity as beneficiaries of the late Mwangi Gikungu. Currently the suit property being LR No Loc 8/kandegenye/284/1, also known as Plot No 1 Kahuro Market is registered in the name of all the Defendants jointly. It is also not in doubt that the Plaintiff has possession of the suit property as a tenant, which he has been since 1986.
- 25 This Court having outlined the above, will now proceed to analyze and determine the issues identified above.

#### **Whether the plaintiff's claim is merited?**

- 26 It is the Plaintiff's claim that he purchased a portion of the suit land being the entitlement of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in **LR No Loc 8/kandegenye/284/1**, also known as **Plot No 1 Kahuro Market**, pursuant to sale agreements dated May 8, 2004 and June 11, 2007 respectively. That he paid the entire purchase price and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants promised to transfer to him their entitlements once the succession for the estate of the late **Mwangi Gikungu** was completed. That since succession was concluded, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have refused to hold up to their end of the bargain and thus prompting him to approach this Court for a remedy.
- 27 The Defendants on the other hand denied the allegations of the Plaintiff and stated that there was no sale agreement entered concerning the suit land. That even though sale agreements were indeed executed between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants lacked capacity to enter such an agreement as the suit property at the time was still registered in the name of **Mwangi Gikungu** (deceased), and was not free property. That the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants amounted to intermeddling and the same cannot be endorsed by this Court.
- 28 To address the issue of whether the Claimant's claim is merited, this Court will first have to determine whether the alleged sale agreement existed, and if it did, whether the same was valid. Section 3(3) of the [Law of Contract Act](#) provides;-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

- (a) The contract upon which the suit is found-
  - (i) Is in writing
  - (ii) Is signed by all the parties thereto; and
- (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”



30 This provision came into force in June 2002, as amended and replaced the previous Section 3 of the [Law of Contract Act](#) which had provided as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

31 In the case of [Patrick Tarzan Matu & Another v Nassim Shariff Abdulla & 2 Others](#) [2009] eKLR Azangalala, J (as he then was), struck out the Plaintiff’s case where he found that the contract relied upon was in contravention of Section 3(3) of the [Law of Contract Act](#) and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the [Law of Contract Act](#) which the Plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

32 In the case of [Silverbird Kenya Limited v Junction Ltd & 3 Others](#) [2013] eKLR, an application had been made by the 1<sup>st</sup> Defendant to strike out the Plaintiff’s suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the [Law of Act](#). In the suit, the Court stated *inter alia*:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of August 19, 2009, in my view does not satisfy the requirements of Section 3(3) of the [Law of Contract Act](#) to be the foundation of the plaintiff’s claim against the defendants. Section 3(3) of the [Law of Contract Act](#) is indeed couched in mandatory terms and does in fact divest the Court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the [Law of Contract Act](#), the plaintiff’s suit must fail for being in contravention of Section 3(3) of the [Law of Contract Act](#), Cap 23 Laws of Kenya.”

33 In the present case, the Sale agreement dated **May 8, 2004**, is in compliance with Section 3 of the [Law of Contract Act](#) and is therefore a valid contract to dispose of the interests in land.

34 Having determined this, the next issue for determination is whether the parties in the said sale agreement had the capacity to deal with the suit land. A perusal of the sale agreements dated **May 8, 2004** and June 11, 2007 show that the Vendors were **Stephen Ngotho Mwangi**, the 1<sup>st</sup>



Defendant herein and **Lawrence Irungu Mwangi**, the 2<sup>nd</sup> Defendant herein. The said agreements also acknowledged that the property being sold belongs to **Mwangi Gikungu**, who had died in **1986** and that both the Vendors were his sons are beneficiaries of his estate. Both the 1<sup>st</sup> and 2<sup>nd</sup> Vendors each sold 1/3<sup>rd</sup> of the suit land to the Plaintiff herein at **Kshs 45,000/=** and **Kshs 40,000/=** respectively. In addition to the sale price the Purchaser also agreed to be paying an annual amount of **Kshs 3,300/=** to **Hannah Gichiru** until her demise. In the Agreement dated **June 11, 2007**, both the purchasers confirmed receipt of **Kshs 45,000/=** and **Kshs 40,000/=** respectively in full payment of the Purchase price as per their earlier agreement dated **May 8, 2004**. In addition, the said Hannah confirmed that she had been receiving the agreed annual **Kshs 3,300/=**.

35 It is settled law that the estate of the deceased person is vested in the legal representative; see *KotharivQuaresb* (1967)EA 364 and *Trouistik Union International and another v Jane Mbeyu and another* (1993)eKLR. Under Section 3 of the *Law of Succession Act* (supra), the term “personal representative” means the executor or administrator as the case may be, of a deceased person. Section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, also defines the term “legal representative”.

36 As such, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not such representatives or persons in respect of the estate of the deceased herein. As indicated herein above the late Mwangi Gikungu died in 1986, and the Administrators of his estate were only appointed in 2007, when a Succession Cause was filed in the Chief Magistrates Court in Muranga being Succession Cause 116 of 2007. The Administrators appointed as evidenced by the Certificate of Confirmation of Grant dated October 4, 2010 were Hannah Gichiru Mwangi, Ignatius Irungu Mwangi and Keziah Irungu Mwangi. It follows therefore that at the time the initial sale agreement was executed the estate of the Late Mwangi Gikungu was yet to be administered and the property was not a free property.

37 In this case, the Plaintiff claims to have bought the land from persons who were not registered owners and who did not have the right to sell it in the first place. In addition, the two purported Vendors were not lawful administrators of the said estate and lacked capacity to deal with the suit land in any manner whatsoever and their actions amounted to intermeddling and offended the provisions of section 45 and section 83 of the *Law of Succession Act*.

38 **Section 45 of the *Law of Succession Act*** reads as follows:

**No intermeddling with property of deceased person.**

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

39 The said Section 45 states further that:

**No distribution of capital before confirmation of grant**

- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71. 82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—



- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

**Provided that—**

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;

40 With regard to all the above provisions, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in violation of the law when they dealt with the suit property by selling it to the Plaintiff, while a **Succession Cause** was yet to be lodged and concluded. The courts have in several instances voided similar sale agreements.

41 In **Civil Appeal 343 And 345 Of 2002 At The Court Of Appeal At Nyeri, Jane Gachoki Gathecha v Priscilla Nyawira Gitungu & Another [2008] Eklr**, the Court dealt with a situation in which the land of a deceased person was unprocedurally transferred to a third party and the third party thereafter sold to a fourth party. The said fourth party thereafter claimed to be protected under section 93 of the *Law of Succession Act*. The Court dismissed the claim and in doing so, stated

**We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the *Law of Succession Act* and the superior Court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable. “**

42 At the High Court in **Chuka Succession Cause No 560 Of 2015; *Estate Of M'muthamia Mwendwa (deceased) [2016] EKLR***, the Court handled a matter in which the beneficiaries of the deceased's estate also sold property while they were not administrators. Mabeya J stated;

**.. of course both Speranza and Linus were neither the owners of the properties they were purporting to sell nor were they administrators of the estate. Even an administrator of the estate with a grant which has not been confirmed cannot pass any title to land by dint of section 82 of the Act. Accordingly, Francis Kithinji and John Mutembei are at best intermeddlers who together with Speranza Kaguri and Linus Mwititi have fallen foul of Section 45 of the Act. Of course under that section, intermeddling with an estate of a deceased person is criminal and it attracts criminal sanctions”.**

43 In **Machakos Hcc 256 Of 2007 *In Re Estate Of John Gakunga Njoroge (deceased) [2015] EKLR***, the Court dealt with similar facts in which property was claimed by persons who had bought land from the deceased prior to his death and by persons who had bought land from beneficiaries to the estate of the deceased. Muriithi J stated:

15. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the



Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

“(ii) no immovable property shall be sold before confirmation of the grant”

**“7. Recovery of consideration**

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

44 As seen in the above cases, Courts have held that transactions for land conducted prior to Confirmation of a Grant were **void ab initio**. This Court is well guided and agrees in toto with the above decisions that where a Certificate of Confirmation of Grant has not been issued in respect of the estate of a deceased person, no person, other than **Administrators** whose rights are limited, has the **capacity** to deal and or dispose off the property of a deceased person. Therefore, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein lacked capacity to enter a sale agreement with the Plaintiff over the suit land, and that the sale agreements dated May 8, 2004, and the one dated June 11, 2007, were **void abinitio**.

45 This Court cannot therefore effect the said sale agreements, as doing so would amount to permitting an **illegality** and would fly in the face of Section 45 of the Law of Succession Act. In the case of *re Estate of Paul Maria (deceased)* [2017] eKLR; J Gikonyo observed thus:

*The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tinctured with killer poison; and is unlawful acquisition; thus property so acquired does not enjoy the protection of property rights under article (40)(6) of the Constitution.”*

46 The duty of this Court is to do justice and even after reaching the conclusion above, it is not blind to the fact that the Plaintiff had paid monies to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pursuant to the sale agreement dated **8<sup>th</sup> May 2004**. DW 1 in his testimony before this Court denied having executed the sale agreement and alleged that his signature as seen on the said sale agreement and on subsequent agreements was forged by the Plaintiff. This Court however notes that while the 1<sup>st</sup> Defendant alleged forgery, he failed to substantiate the said claim with evidence as required by Section 109 of the Law of Evidence Act Cap 80. This Court is therefore inclined, based on the evidence placed before it, to believe the testimony of the Plaintiff that indeed there was a sale agreement entered between himself and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That pursuant to the execution of the said sale agreements, the Plaintiff paid monies to the said Defendants. Since this Court has herein above invalidated the Sale agreements between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the Plaintiff is therefore eligible to pursue the 1<sup>st</sup> and 2<sup>nd</sup> Defendant for a refund of the Purchase Price and any damages he may have suffered as a result of the said transaction.

**(ii) Who should pay costs of this suit?**

47 Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. (See **section 27 of the Civil Procedure Act (Cap 21)**). Consequently, a successful litigant



should normally be awarded costs of an action unless, for good reason, the Court directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287.

48 The Court herein is aware that the Plaintiff herein is the losing party but the said loss was not of his doing alone. The Court is therefore of the view that the appropriate order to make is for each party to bear his own costs.

49 The Upshot of the foregoing is that the Plaintiff has failed to prove his case against the Defendants herein jointly and severally on the required standard of balance of probability. For the above reasons, the Plaintiff's claim stated in the amended Plaint dated December 18, 2020<sup>{}^{}{}}</sup> is found devoid of any merit and the same is dismissed entirely with an order that each party to bear its own costs.

50 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered virtually;**

**In the presence of**

**Mr. Mbuthia for the Plaintiff**

**Mr. L. M. Kinuthia for the 1<sup>st</sup> – 10<sup>th</sup> Defendants**

**Joel Njonjo – Court Assistant**

**L. GACHERU**

**JUDGE**

