



**Oyugi & 2 others (Suing as the Administrators of the Estate of Hezekiah Nelson Oyugi - Deceased) v Sherman & another (Environment and Land Case Civil Suit 1517 of 1998) [2025] KEELC 5188 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5188 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1517 OF 1998  
OA ANGOTE, J  
JULY 10, 2025**

**BETWEEN**

**JOB OKUNA OYUGI ..... 1<sup>ST</sup> PLAINTIFF  
DOUGLAS ODHIAMBO OYUGI ..... 2<sup>ND</sup> PLAINTIFF  
JOSHUA ONYANGO ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF HEZEKIAH NELSON  
OYUGI - DECEASED**

**AND**

**TIMDAR SAID SHERMAN ..... 1<sup>ST</sup> DEFENDANT  
THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Forgery, by its very nature, strikes at the core of trust, both in personal dealings, and in the administration of justice. When used as both a shield and sword, it corrodes the very foundations of equitable principles and good conscience.
2. As I shall show in this Judgment, the law cannot, and should not, permit a party to construct a defence from the very ruins it has itself created, only to stand upon the ashes, and claim protection from the fallout.

**The Pleadings**

3. Vide a Further Amended Plaint dated 6<sup>th</sup> June 2022, the Plaintiffs have prayed for judgment against the Defendants jointly and severally for orders that:



- a. The transfer over L.R. 209/4491 in favour of the 1<sup>st</sup> Defendant be and is hereby declared null and void.
  - b. The Registrar of Lands or Land Registrar be and is hereby ordered to amend the land register and reverse entries numbers 15 and 16 on Grant Number I.R. 11591.
  - c. The Defendants be and are hereby ordered to provide accounts for the rent collected from L.R. No. 209/4491, Lavington Nairobi and to pay such rent to the Plaintiffs.
  - d. That a permanent injunction do issue restraining the 1<sup>st</sup> Defendant by herself her agents/ servants and/or any of them whatsoever from selling, disposing or dealing with the property and/or receiving rent from the property known as L.R. No. 209/4491 Lavington, Nairobi.
  - e. The 1<sup>st</sup> defendants, her servants or agents be and are hereby ordered to give vacant possession of L.R. No. 209/4491 Nairobi to the Plaintiffs within 30 days of the judgement and in default, an order be and is hereby issued for the forceful eviction of the 1<sup>st</sup> Defendant, her servants or agents and the Officer Commanding Muthangari Police Station to provide security during eviction.
  - f. Costs of the suit.
  - g. Interest.
4. The Plaintiffs' case is that by a sale agreement dated 13<sup>th</sup> January 1998, they agreed to sell the suit property, L.R. No. 209/4491 situated in Lavington Nairobi, to the 1<sup>st</sup> Defendant for the purchase price of Kshs. 10,000,000/-. It was further averred that the sale was to be completed on 8<sup>th</sup> April 1998.
  5. It was averred in the Plaint that it was an express term of the said agreement that a sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000/=) would be paid to the Plaintiffs upon execution of the sale agreement, and the balance of Kenya Shillings Five Million Two Hundred Thousand (Kshs. 5,200,000/=) would be deposited by the 1<sup>st</sup> Defendant with Guilders international Bank Limited, with instructions for the said balance to be released to the Plaintiffs on or before the agreed completion date.
  6. The Plaintiffs averred that the 1<sup>st</sup> Defendant breached the terms of the agreement by failing, refusing, and/or neglecting to deposit the balance of Kshs. 5,200,000/= as stipulated.
  7. Without prejudice to the foregoing, the Plaintiffs contended that the 1<sup>st</sup> Defendant willfully and fraudulently caused the suit property to be transferred into her name without payment of the said balance, without the Plaintiffs' knowledge, and in the absence of a lawful court order authorizing the said transfer.
  8. The Plaintiffs further alleged that the 1<sup>st</sup> Defendant, either by herself and/or through her agents, willfully and fraudulently forged their signatures on the transfer instrument.
  9. It was further averred that the agents and/or servants of the 2<sup>nd</sup> Defendant, in collusion with the 1<sup>st</sup> Defendant, fraudulently conspired to procure registration of the title in favour of the 1<sup>st</sup> Defendant, while concealing from the Plaintiffs the fact that the sale transaction had been fraudulently concluded.
  10. In the alternative, and without prejudice to the foregoing, the Plaintiffs averred that the Defendants, jointly and severally, falsely and fraudulently procured the registration of the transfer of the suit property in the name of the 1<sup>st</sup> Defendant, fully aware that the same was false, fraudulent, and unlawful, as no payment of the balance of the purchase price had been made and no court order had been obtained to sanction the said transfer.



11. In her Amended Defence, the 1<sup>st</sup> Defendant averred that she duly deposited the balance of the purchase price with Guilders Bank Limited, accompanied by full instructions to release the same to the Plaintiffs.
12. The 1<sup>st</sup> Defendant denied the particulars of fraud and averred that the transfer was duly signed by the Vendors and each of their signatures were witnessed by their advocate. She contended that, following the payment of the deposit upon execution of the sale agreement, the balance of the purchase price was to be released upon registration of the title in her favour.
13. The 1<sup>st</sup> Defendant denied that the sale was conditional upon the sanction of the court. Alternatively, she asserted that the court order lodged at the Lands Registry on the same day as the transfer instrument, signed by the parties, was valid and lawful. She denied the existence of any collusion between herself and the 2<sup>nd</sup> Defendant or its agents and/or servants and further denied concealing any material facts from the Plaintiffs.
14. The 1<sup>st</sup> Defendant averred that she fully performed her obligations under the sale agreement and that the Plaintiffs have no sustainable cause of action against her. She denied that the transfer was null and void for want of court sanction and further denied that the Plaintiffs were unaware of the execution of the transfer instrument, asserting that their signatures were witnessed by Mr. Steve Owino, who acted for them in the transaction.
15. The 1<sup>st</sup> Defendant also denied the existence of any fraud in the sale transaction or the sale agreement and maintained that the transfer of the suit property was registrable upon payment of the deposit in accordance with the terms of the sale agreement.

### **Hearing and Evidence**

16. The 2<sup>nd</sup> Plaintiff, Douglas Odhiambo Oyugi (PW1), informed the court that him and the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs are the duly appointed administrators of the Estate of the late Hezekiah Oyugi. In support of his case, he relied on his witness statements signed on 24<sup>th</sup> September 2014 and 23<sup>rd</sup> September 2023, as well as the bundle of documents dated 24<sup>th</sup> September 2024.
17. PW1 testified that although an agreement was signed on 13<sup>th</sup> January 1998, several documents relied upon by the Defendants were dated much earlier, between 1989 and 1995; that no consideration was paid to the administrators upon execution of the agreement; that Hezekiah Oyugi had died in August 1992, and that between 1993 and 1994, the suit property had been let to the Defendants, with rent payments being made to Betty Oyugi, one of the deceased's four wives.
18. PW1 emphasized that the suit property formed part of the deceased's estate at the time of his demise and had not been transferred as a gift inter vivos to any beneficiary; that upon discovering that Betty Oyugi was collecting rent from the suit property, the administrators dispatched auctioneers to recover the outstanding rent and that it was at this juncture that they uncovered the 1<sup>st</sup> Defendant's attempts to purchase the property from Betty Oyugi, despite her lacking authority to transact on behalf of the estate.
19. To avert potential criminal proceedings against Betty Oyugi for monies received, it was averred by PW1 that negotiations were initiated between the 1<sup>st</sup> Defendant and the administrators; that between 1994 and 1996, certain sums were paid by the 1<sup>st</sup> Defendant's husband, purportedly as rent and part payment for the house, to Betty Oyugi and that parties then sought to isolate these payments and prepared an agreement of sale between the 1<sup>st</sup> Defendant and the administrators to regularize the position.



20. PW1 explained that immediately after signing the agreement dated 13<sup>th</sup> January, 1998, and before obtaining the requisite consents from all beneficiaries, the administrators discovered that the property had already been transferred to the 1<sup>st</sup> Defendant.
21. PW1 noted that the agreement provided for completion by 8<sup>th</sup> April 1998, with a stipulation that the purchaser would deposit Kshs. 5.2 million into a designated bank account for release to the Plaintiffs and that no such payment was ever made to the administrators.
22. With regard to a cash payment voucher dated 27<sup>th</sup> May 1998 for Kshs. 2.2 million allegedly paid to Job Okuno Oyugi by Guilders Bank, PW1 contested its authenticity, noting that it lacked the official stamp or logo of the bank.
23. He similarly challenged a petty cash voucher for Kshs. 2 million presented by the Defendants, arguing that such a payment would ordinarily require supporting documentation. He asserted that this voucher was insufficient evidence of payment and noted that the crossed cheque produced by the Defendants did not bear the name of any of the administrators and was never received by them.
24. PW1 denied ever providing the Defendants with the court order contained in their bundle of documents. He contended that the court order issued in 1993, which was intended to facilitate the payment of school fees for Hezekiah Oyugi's children, was improperly used in 1998 to support the transfer of the suit property. He emphasized that the suit property had not been included in the 1993 order and was unlawfully inserted in 1998.
25. PW1 proceeded to address the documents numbered 8 to 13 and 15 in the 1<sup>st</sup> Defendants' bundle, noting that they relate to alleged payments arising from a purported sale agreement for the suit property, Land Reference No. 209/4491, dated 2<sup>nd</sup> November 1994, between Mrs. Betty Monica Abonyo and Mr. Mzahim Salim Bajaber.
26. It was his evidence that Mrs. Betty Oyugi was not an administrator of the estate of Hezekiah Oyugi and, therefore, lacked the legal capacity to transact in respect of the estate's property. He contended that no confirmation of grant had been issued at the time, rendering the purported sale agreement null and void for want of legal authority.
27. PW1 stated that the 1<sup>st</sup> Defendant was aware of the irregularities surrounding the purported sale, as the administrators had demanded the payments of rent to be paid by the tenants; that the 1<sup>st</sup> Defendant nonetheless continued to making payments to Mrs. Betty Oyugi, an unauthorized individual and that it was only after the administrators engaged auctioneers to recover rent arrears from the tenants that the 1<sup>st</sup> Defendant approached the administrators with a proposal for amicable resolution.
28. The 2<sup>nd</sup> Plaintiff, PW1, expressly denied receiving any payments, whether in cash or otherwise, in connection with the said transaction, including those allegedly made to Mrs. Betty Oyugi in 1995 and 1996. He also denied any involvement in or knowledge of the alleged delivery of three vehicles as gratuity to any beneficiary of the estate.
29. PW1 testified that the Plaintiffs had forwarded certain documents to Mr. Muhammed, the 1<sup>st</sup> Defendant's husband, for perusal pending discussions amongst the beneficiaries, on whether to proceed with a formal transaction. However, it was averred, by a letter dated 2<sup>nd</sup> February 1997, they demanded the immediate return of those documents after the Defendants failed to respond in a manner that would have allowed negotiations to proceed.
30. It was his evidence that neither him nor the other administrators executed the transfer document relied upon by the 1<sup>st</sup> Defendant to transfer the suit property, and that the transfer document produced by the



Defendants was a forgery. He asserted that one Bernard Kalove of Kalove & Company Advocates, who was acting for the 1<sup>st</sup> Defendant, was never instructed by the Plaintiffs or the estate's administrators to act on their behalf or to procure any documents.

31. PW1 further averred that crucial documents, including the rates clearance certificate, rent clearance certificate, and a letter dated 15<sup>th</sup> January 1998, were obtained and applied for solely by the Defendants without the knowledge or consent of the administrators or their legal representatives.
32. It was his evidence that instead of returning the Estate's documents, the Defendants lodged a discharge and transfer at the Ministry of Lands and presented a court order which, upon scrutiny by the Plaintiffs' advocates, was found to be invalid. Additionally, it was alleged, the Defendants presented a transfer document purportedly executed by the administrators, which they categorically denied executing.
33. In cross-examination, PW1 acknowledged that Ms. Betty Oyugi had received Kshs. 4.8 million, which was referenced in the context of the sale transaction. While being referred to a petty cash voucher dated 13<sup>th</sup> January 1998, in the name of one Job Oyugi for Kshs. 4.8 M and bearing a signature allegedly appended on the same date as the sale agreement, PW1 stated that he could not recognize the said signature. PW1 emphasized that the petty cash voucher had no nexus to the formal sale agreement.
34. Additionally, he denied any knowledge of a company named Rover Motors Limited whose name appeared in several petty cash vouchers purportedly signed by Job Oyugi, the 1<sup>st</sup> Plaintiff. Although the accompanying delivery notes indicated that the motor vehicles were received by Job Oyugi, PW1 stated he was unable to confirm whether Job Oyugi indeed signed those delivery notes.
35. PW1 was referred to a letter dated 21<sup>st</sup> December 1997 authored by Job Oyugi, indicating a readiness by the administrators to transfer the suit property. In response, PW1 averred that he did not agree with the contents of that letter, stating that the amounts referenced therein were inconsistent with those contained in the sale agreement. He maintained that, in his discussions with Job Oyugi, the 1<sup>st</sup> Plaintiff, no such agreement had been reached regarding the figures set out in that letter.
36. PW1 further contested the validity of the court order dated 21<sup>st</sup> December 1993 produced by the 1<sup>st</sup> Defendant. He maintained that the genuine court order, issued on that date, served a distinct and unrelated purpose, while the order presented by the 1<sup>st</sup> Defendant was forged by altering the intent of the genuine order. PW1 stated that two separate succession causes had been filed in Kisumu and Nairobi in relation to the estate.
37. While confirming that he signed the sale agreement, PW1 emphatically denied signing the transfer document, asserting that his signature thereon was a forgery. He admitted, however, that he did not lodge a complaint with the Directorate of Criminal Investigations (DCI) or the police upon learning of the alleged forgery in 1998.
38. It was his evidence that under the terms of the sale agreement, certain conditions precedent were to be fulfilled, including the release of the balance of the purchase before the date of completion set for 8<sup>th</sup> April 1998 and before the administrators could lawfully sign any transfer. PW1 conceded that he did not submit the contested signature on the transfer document for forensic examination by a document examiner but urged the court to accept his testimony that he had not signed the disputed transfer.
39. PW1 also disclaimed knowledge of a letter at page 25 of the Defendants' bundle, allegedly authored by Job Oyugi, expressing the Plaintiffs' willingness to proceed with the transaction. Further, he denied any knowledge of the letter dated 20<sup>th</sup> January 1998 from Lumumba Advocates, acting for Betty Oyugi, in which a demand was made for the balance of the purchase price.



40. PW1 testified that he was unaware of the precise date on which the 1<sup>st</sup> Defendant took occupation of the house on the suit property. He noted that the title document had been released to the 1<sup>st</sup> Defendant on the instructions of Job Oyugi, a co-administrator, who possessed authority from the Plaintiffs to release the property's title.
41. However, it was his evidence that following this, the Plaintiffs, by a letter dated 2<sup>nd</sup> December 1997, formally demanded the return of the title deed and the discharge of charge. PW1 averred that he did not know whether Job Oyugi had, at any point, received the balance of the purchase price.
42. PW1 informed the court that they had instituted ELC Case No. 270 of 2021, which was determined; that the suit principally addressed the issue of the allegedly forged court order and that the suit was dismissed, and an appeal against that decision has since been filed.
43. The 1<sup>st</sup> Plaintiff, Job Okuna Oyugi (PW2), adopted his witness statements dated 24<sup>th</sup> September 2014 and 23<sup>rd</sup> September 2023, in which he reiterated and affirmed the facts as set out by PW1. He confirmed his knowledge of the sale agreement dated 13<sup>th</sup> January 1998 concerning the sale of the suit property, Land Reference No. 209/4491.
44. Job Oyugi, PW2, testified that prior to the agreement of 13<sup>th</sup> January, 1998, the purchaser had purportedly entered into an agreement with one of the estate beneficiaries who had no legal standing to transact in respect of the property and that at that time, although the Plaintiffs held letters of administration, the grant had not been confirmed.
45. PW2 stated that the 1<sup>st</sup> Defendant's husband, together with her family, had been tenants on the suit property, paying rent at a rate of Kshs. 150,000 per month; that upon discovering that the tenant had ceased paying rent, they dispatched an auctioneer to recover the outstanding sums and that it was then that the Defendants disclosed that they were in the process of buying the land from one of the beneficiaries.
46. PW2 referred to a letter dated 19<sup>th</sup> June 1997, contained in the 1<sup>st</sup> Defendant's bundle of documents, which referenced a meeting in which the 1<sup>st</sup> Defendant purported to demonstrate that they had made payments to one of the administrators as a justification for withholding rent and that the negotiations ensued thereafter, culminating in the execution of the sale agreement on 13<sup>th</sup> January 1998.
47. According to PW2, the agreed deposit was Kshs. 4.8 million, a figure which was understood to be less the amount that would have been due as rent arrears; that it was agreed that the said Kshs. 4.8 million had been paid for the land and that the balance of the purchase price of Kshs. 5.2 million would follow.
48. When referred to the petty cash voucher of Kshs. 4.8 million dated 13<sup>th</sup> January 1998, signed on the same date they signed the sale agreement and indicating that the payment had been made to Mrs. Oyugi, PW2 denied signing the petty cash voucher or receiving the money. He asserted that the signature on the voucher was not his and maintained that the Kshs. 4.8 million had been treated as previously paid, rather than as part of the consideration executed on that date.
49. In response after being shown a letter dated 21<sup>st</sup> December 1997, purportedly signed by him, PW2 denied appending his signature to it. He explained that, at the material time, he was a parliamentary candidate in Migori and could not have signed such a letter.
50. PW2 further denied knowledge of the said letter of 21<sup>st</sup> December 1997 and also disclaimed having signed any transfer documents in respect of the suit property. He stated that while vehicles had been delivered to him, they were given by Mr. Mzahim Salim Bajaber for use in his political campaign and



were subsequently reclaimed after the elections, one by the Kenya Revenue Authority (KRA) and another following an accident.

51. Referring to the three delivery notes, he indicated that while the narration suggested that he was advanced by M.S. Mohamed vehicles and that the vehicles were delivered as gratuity in respect of the suit property, he personally did not sign any delivery note. He maintained that the vehicles were collected by his driver.
52. PW2 denied any involvement with the rates clearance certificate dated 14<sup>th</sup> January 1998, asserting that no valid sale agreement existed as at that date. Although the agreement required the vendors to obtain all necessary consents, PW2 testified that he did not apply for any such consents.
53. He affirmed that the suit property belonged to the Estate and that any lawful sale required the consent of all twelve beneficiaries, as well as the court's authority. He stated that this was the rationale behind setting a completion date of 8<sup>th</sup> April 1998. However, according to PW2, the transfer was lodged for registration on 23<sup>rd</sup> January 1998 and registered on 20<sup>th</sup> February 1998, ten days after the sale agreement had been executed, without the requisite consents having been obtained or the balance of the Kshs. 5.2 million having been paid.
54. PW2 expressly denied receiving any amounts as alleged in the petty cash voucher of Kshs. 2.2 million dated 21<sup>st</sup> May 1998 or the Kshs 2 million voucher in the Defendants' bundle. He similarly denied signing the voucher dated 11<sup>th</sup> June 1998 for Kshs. 1 million and stated that he did not receive any payments by cheque or cash in respect to the purchase price.
55. PW2 testified that the Plaintiffs instituted this suit in July 1998, upon discovering in June/July 1998 that the suit property had been fraudulently transferred to the Defendants. He stated that the Defendants subsequently approached their advocates and proposed to pay Kshs. 2.2 million, transfer a property in Kileleshwa (LR No. 209/12567), and hand over certain vehicles to them.
56. PW2 referred the court to a draft consent in the 1<sup>st</sup> Defendant's, bundle, noting that negotiations were conducted exclusively with Mr. Mzahim Salim Bajaber and not the 1<sup>st</sup> Defendant.
57. In cross-examination, PW2 admitted that he did not lodge any complaint with the police or investigative authorities concerning the allegedly forged transfer or petty cash vouchers. Nevertheless, he maintained that the documents were forgeries. He explained that they elected to pursue their remedy through a civil suit.
58. PW2 confirmed that he received vehicles from Mr. Mzahim but asserted that these were for use in his political campaigns and not as part of the land purchase transaction. He stated that although the delivery notes suggested that the vehicles were delivered as gratuity in respect of the suit property, he never discussed this issue with his co-administrators, because the vehicles were unrelated to the sale of the land.
59. He further testified that the vehicles were subsequently reclaimed by Mr. Mzahim, the 1<sup>st</sup> Defendant's husband, although he had no documentary evidence to confirm this.
60. PW2 reiterated that the Plaintiffs had forwarded the title and the discharge of charge to the 1<sup>st</sup> Defendant but the same were never returned to them. He did not know, however, who handed over the discharge of charge to the 1<sup>st</sup> Defendant.
61. PW2 testified that by December 1997, Mr. Mzahim Salim Bajaber had indicated that he had made payments totaling Kshs. 7.8 million, inclusive of rent and other payments to their mother, Betty Oyugi



and that they concluded that Kshs. 4.8 million of this sum would be treated as having been paid towards the purchase of the land, with the balance to follow.

62. In regard to the transfer document, PW2 conceded that the signature thereon resembled his own but maintained that he did not sign it. He stated that no completion notice was issued by the Plaintiffs after the 1<sup>st</sup> Defendant transferred the title, nor did they formally rescind the agreement. He further averred that the existence of a separate succession cause in Kisumu was never disclosed to the 1<sup>st</sup> Defendant or Mr. Mzahim.
63. In re-examination, PW2 confirmed that the vehicles he received were not part of the purchase price. He stated that Mr. Mzahim, as a personal friend, had given him the vehicles to assist him with his election campaign and later reclaimed them.
64. He reiterated that no evidence had been adduced from Guilders Bank to show that he had received any money from the 1<sup>st</sup> Defendant and stated that, to date, the administration of the estate remains incomplete.
65. The 1<sup>st</sup> Defendant, Timdhar Said Sherman (DW1) adopted her witness statement as her evidence-in-chief and produced a bundle of documents marked as DEXB1 in support of her case.
66. DW1 testified that her, together with her husband and children, took possession of the suit property in 1991, initially as tenants, paying rent at the rate of Kshs. 60,000/- per month and that they rented the premises from Raju Estate, the estate's managing agent, and paid rent to the said agent.
67. It was the evidence of DW1 that in 1994, herself and Mzahim, met Betty Oyugi, who represented herself as the owner of the suit property and that in or about April/May 1994, she agreed to sell to them the suit property to them.
68. DW1 stated that she was in possession of a letter indicating that the property had been gifted to Betty Oyugi by the late Hezekiah Oyugi and that thereafter, they entered into an agreement wherein Betty Oyugi consented to sell the property to them for a purchase price of Kshs. 11 million.
69. According to DW1, it was an express term of the contract that Kshs. 3,000,000 would be paid to Betty before execution of the contract, which sum was duly paid by Mzahim, her former husband. She asserted that she transacted with Betty between 1994 and 1997 and that by the latter period, they had paid to her a cumulative amount of Kshs. 7,869,600.
70. According to DW1, during that period, it was an express term of the contract that Mzahim would cease to pay any rent for the suit property on the signing of the agreement and that during these dealings, Betty Oyugi never disclosed to them the existence of any succession proceedings relating to the estate of Hezekiah Oyugi, nor were they aware of the Plaintiffs at the time.
71. DW1 referred to a letter from Lumumba and Oyugi Advocates confirming that they were acting for Betty Oyugi and asserting that the property had been gifted to her. She pointed to an acknowledgment of payment of Kshs. 1,137,500 by the said law firm on behalf of Betty.
72. Subsequently, DW1 testified that she received a letter from Job Oyugi, one of the Plaintiffs, dated 25<sup>th</sup> April 1997 informing them that Betty was not authorised to sell the property and that there was a meeting held on 24<sup>th</sup> April 1997 between Mzahim, their lawyer, and Job Oyugi, during which her husband presented documents detailing all payments made up to that point.
73. According to DW1, on 15<sup>th</sup> June 1997, Mzahim, her husband, furnished the Plaintiffs with copies of the sale agreement, cheques written out to Betty and at her request, relevant correspondences with Betty and her advocates and a detailed appendix of payments made out to her on diverse dates.



74. It was the evidence of DW1 that the Plaintiffs informed them that they wanted to verify the authenticity of the documents; that pending the said verification exercise, the 1<sup>st</sup> Plaintiff collected the following four vehicles from Mzahim's company, Rover Motors Limited as gratuity in respect of the suit property:
- a. Toyota Land Cruiser VX KAE 808P, whose value was agreed at Kshs. 3,600,000/-, which the 1<sup>st</sup> Plaintiff collected on 23<sup>rd</sup> June 1997;
  - b. Toyota Corona saloon whose value was agreed at Kshs. 1,800,000/-, which the 1<sup>st</sup> Plaintiff collected on 13<sup>th</sup> September 1997;
  - c. Nissan Patrol 4WD whose value was agreed at Kshs. 2,800,000/-, which the Plaintiff collected on 16<sup>th</sup> December 1997;
  - d. Nissan Patrol 4WD whose value was agreed at Kshs. 2,800,000/-, which the 1<sup>st</sup> Plaintiff collected on 17<sup>th</sup> December 1997.
75. DW1 stated that by a letter dated 21<sup>st</sup> December 1997, the 1<sup>st</sup> Plaintiff confirmed to her husband, Mr. Mzahim Salim Bajaber, that he had no objection to the land being transferred to her and that, in consideration, vehicles were given to the 1<sup>st</sup> Plaintiff as part payment of the outstanding balance of the purchase price, which were never returned either to her husband or to Rover Motors Limited, a company owned by her former husband.
76. DW1 averred that Job Oyugi acknowledged receiving Kshs. 4,800,000 and signed a petty cash voucher for the amount; that Betty Oyugi signed a separate voucher acknowledging the receipt of Kshs. 7,869,600 and that the parties then formalized the arrangement by executing a sale agreement dated 13<sup>th</sup> January 1998, wherein the payment of Kshs. 4,800,000 was acknowledged.
77. According to DW1, the balance of the purchase price was deposited with Guilders Bank Limited with instructions for it to be released to the vendor upon transfer of the property to her. DW1 produced petty cash vouchers indicating the following alleged payments: Kshs. 2,200,000 signed by Job on 21<sup>st</sup> May 1998, a voucher for Kshs. 2,000,000 signed by Job on 21<sup>st</sup> May 1998, and a subsequent voucher for Kshs. 1,000,000, also signed by Job on 11<sup>th</sup> June 1998.
78. DW1 clarified that while petty cash vouchers were signed, Job personally collected the money from the bank, and that cheques were also issued to his account on the same day. She noted, however, that the bank had since closed.
79. She averred that the Plaintiffs, through their representatives, acknowledged receipt of a total of Kshs. 11,000,000. DW1 stated that she was in possession of the original transfer document, which was signed by the Plaintiffs and witnessed by their advocates.
80. DW1 testified that Job Oyugi sent a letter dated 21<sup>st</sup> December 1997 confirming the consent to sign the sale agreement and requesting that the transfer document be forwarded to them for execution. It was her evidence that her lawyer, Kalove Advocates, prepared the transfer which was witnessed by Owino Advocate, while her signature was attested to by Kalove Advocate, now deceased.
81. DW1 referred to a letter by Owino Advocate dated 2<sup>nd</sup> December 1997 addressed to her husband, forwarding the transfer and a copy of the title deed. She asserted that the Plaintiffs never demanded the return of these documents.



82. DW1 maintained that she only dealt with Job Oyugi and denied having had any dealings with the other administrators, Douglas Odhiambo Oyugi and Joshua Oyugi. She expressly denied forging the transfer document or the court order.
83. DW1 further averred that the rates clearance certificate, the rent clearance certificate, and other transfer-related documents, including a court order, were all provided by Job Oyugi. DW1 denied any collusion with Job Oyugi.
84. DW1 stated that she was unaware of the 1998 court order concerning the suit property and admitted that a 2001 court decision indicated that no such order had authorised the sale. She also admitted that she had no documentary records or proof from Guilders Bank Limited to confirm that the balance of the purchase price had been paid. She conceded that, as at the date of transfer, the balance had not yet been settled.
85. DW1 testified that she did not prepare the petty cash vouchers. She asserted, however, that the total payments made exceeded the agreed sum of Kshs. 10 million purchase price and stated that she did not know why her husband subsequently engaged in negotiations to swap the suit property for another property.
86. DW1 testified that she had been in possession of the house since 1998; that from 2000 to 2015, she rented the house out to tenants at an average rent of Kshs. 70,000 to Kshs. 80,000 per month and that since 2019, the property has been occupied by her son.
87. According to DW1, it was curious that during the out of court negotiations, the Plaintiffs did not raise the allegations of forgery of the transfer document and the court order issued at Kisumu and that if the Plaintiffs genuinely believed that the 1<sup>st</sup> Defendant had forged their signatures, they would have made a complaint to the police who would have already taken action against them.

### **Submissions**

88. Counsel for the Plaintiffs submitted that the Plaintiffs entered into the sale agreement in their capacity as administrators of the Estate of Hezekiah Nelson Oyugi. It was contended, however, that the administrators lacked the requisite legal capacity to transfer the suit property in the absence of a court order, as the grant of letters of administration had not been confirmed.
89. Counsel argued that although the sale agreement did not expressly stipulate the requirement of a court order, there existed an implied term that the sale was subject to all applicable written laws, including the provisions of the *Law of Succession Act*, 1981 and the Law Society Conditions of Sale, 1989. In this regard, Counsel relied on Sections 45, 55(1), and 82 of the *Law of Succession Act*, which prohibit the sale, distribution, or disposition of a deceased's estate prior to the confirmation of grant.
90. Counsel further submitted that any disposal of a deceased's property undertaken before the confirmation of grant, and without a valid court order to that effect, is null and void and ought to be set aside. In support of this submission, reliance was placed on the decisions in *In re Estate of M'Ajogi M'Ikiugu (Deceased)* [2017] eKLR and *In the Matter of the Estate of Mariga Njuguna (Deceased)* [2013] eKLR, wherein the courts pronounced themselves on the invalidity of transactions purporting to dispose of deceased persons' estates before confirmation of grants.
91. Counsel urged the court to find that a valid court order was necessary to legitimize the impugned sale, as corroborated by the evidence contained in the witness statements of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.



92. It was further submitted that no such court order was ever issued authorizing the sale of the suit property prior to confirmation of grant, and that the purported order relied upon by the 1<sup>st</sup> Defendant to effect the transfer of the suit property into her name was a forgery.
93. Counsel recounted that, in 2001, the Plaintiffs' advocates wrote to the Deputy Registrar of the High Court at Kisumu, in respect of Kisumu High Court Miscellaneous Application No. 119 of 1993, concerning the Estate of Hezekiah Nelson Oyugi and that the Deputy Registrar, in response, clarified that no such order had been issued, and that the document marked as 'TSS8', purporting to be a court order to that effect, was not a valid order of the court.
94. Counsel submitted that this position was confirmed when the court called for and examined the original court file in Kisumu HCCC Miscellaneous Application No. 119 of 1993.
95. It was the Plaintiffs' counsel's submission that the forged order, marked as 'TSS8', was lodged for registration at the Department of Lands on 20<sup>th</sup> February 1998, and that the 1<sup>st</sup> Defendant fraudulently transferred the suit property to her name by relying on this forged document. Accordingly, it was submitted, the said transfer was fraudulent, unlawful, and of no legal effect.
96. Additionally, Counsel submitted that pursuant to the terms of the sale agreement, the vendors bore the responsibility of procuring all necessary consents and clearances, including rates clearance certificates. It was asserted that the 1<sup>st</sup> Defendant's claim that the 1<sup>st</sup> Plaintiff supplied her advocate with these documents was an afterthought, and that the 1<sup>st</sup> Defendant failed to produce any forwarding letter from one Job, allegedly transmitting the said documents.
97. Counsel drew the court's attention to the witness statement of the late Benard Kalove, Advocate for the 1<sup>st</sup> Defendant, dated 26<sup>th</sup> April 2023, wherein he stated that he applied for all requisite completion documents, including the Rates Clearance Certificate, Rent Clearance Certificate, and Consent to Transfer.
98. Counsel contended that the circumstances surrounding the procurement of these documents evidenced fraud on the part of the 1<sup>st</sup> Defendant. It was observed that the Rates Clearance Certificate was obtained on 14<sup>th</sup> January 1998, a day after execution of the sale agreement on 13<sup>th</sup> January 1998, while the Rent Clearance Certificate was procured on 9<sup>th</sup> January 1998, three days before the execution of the sale agreement. It was further submitted that while Kalove & Co. Advocates allegedly applied for the Consent to Transfer via a letter dated 15<sup>th</sup> January 1998, no evidence was adduced to confirm that such consent was ever obtained.
99. In support of this contention, Counsel cited the case of Jared Omwonyo Nyakwara vs Alice Kingori [2023] eKLR, where the court nullified a Plaintiff's title for want of essential documentary evidence, such as a duly executed transfer and consent to transfer from the Commissioner of Lands, holding that the absence of such documentation constituted clear proof of fraud.
100. Counsel conceded that the Plaintiffs admitted receiving a deposit of Kshs. 4,800,000 from the 1<sup>st</sup> Defendant's husband, paid to Betty Oyugi, notwithstanding that she lacked legal capacity to dispose of the suit property. This amount was remitted prior to the execution of the disputed sale agreement.
101. Counsel further submitted that various motor vehicles were delivered to Job Oyugi on diverse dates between June and December 1997 as gratuity for facilitating negotiations, and that these were not part of the purchase price.



102. The Plaintiff's counsel submitted that subsequently, following the filing of this suit, the 1<sup>st</sup> Defendant's husband offered to transfer two of the vehicles to the Plaintiffs in part settlement, corroborating Job Oyugi's testimony that the vehicles had been returned.
103. While the 1<sup>st</sup> Defendant produced petty cash vouchers, counsel urged the court to find that no evidence had been tendered to demonstrate that Guilders International Bank remitted the balance of the purchase price to the Plaintiffs as stipulated in the sale agreement.
104. Counsel submitted that a mere six days after the filing of this suit, the 1<sup>st</sup> Defendant's husband, by a letter dated 15<sup>th</sup> July 1998, offered to settle the dispute by transferring to the Plaintiffs a property of comparable value in Kileleshwa, being L.R. No. 209/12567, together with the sum of Kshs. 2,200,000 and that a draft consent was subsequently prepared.
105. Counsel submitted that the 1<sup>st</sup> Defendant's husband knew that he had fraudulently transferred the suit property to his wife's name using a forged court order and without paying the balance of the purchase price.
106. In urging the court to award mesne profits, Counsel relied on the authorities of *Nderitu & Another vs Muchemi* (ELC 22 of 2020) [2025] eKLR and *Attorney General vs Halal Meats Products Limited* [2016] eKLR.
107. Counsel for the 1<sup>st</sup> Defendant submitted that recipients of monies paid out by the 1<sup>st</sup> Defendant's husband would ordinarily be acknowledge receipt by signing petty cash vouchers. It was contended that the petty cash voucher signed by Betty Oyugi on 16<sup>th</sup> September 1996, acknowledging receipt of Kshs. 7,869,600/-, was neither disputed nor controverted by the Plaintiffs.
108. Counsel argued that this voucher, together with the appendix transmitted to the Plaintiffs under cover of a letter dated 15<sup>th</sup> June 1997, constituted conclusive proof of part payment of the purchase price and informed the subsequent acknowledgment of receipt of Kshs. 4,800,000/- in the sale agreement.
109. It was submitted that the narration on the petty cash voucher issued on the same date as the sale agreement was instructive, as it indicated that the Kshs. 4,800,000/- comprised monies paid on various dates in respect of the purchase of the suit property.
110. Counsel further argued that it was insufficient for the 1<sup>st</sup> Plaintiff to merely deny signing the petty cash vouchers, which constituted a formal record of payments made towards the purchase price. It was submitted that by alleging forgery, the Plaintiffs bore the evidentiary burden of proving the alleged forgeries by producing a handwriting expert's report demonstrating that the signatures appearing on the impugned vouchers were not those of the 1<sup>st</sup> Plaintiff. No such expert evidence was, however, adduced.
111. In support of this submission, Counsel relied on the case of *In re estate of Kimani Kahehu (Deceased)* [2018] eKLR, where the court held that to establish forgery, it is ordinarily necessary to subject the document in question to forensic examination by a handwriting or document examiner. Additional reliance was placed on the cases of *Daniel Gachanja Githaiga vs Credit Reference Bureau Africa Ltd & 2 others* [2022] eKLR, *Ben Murumba Nakitare vs Speed Capital Limited & another* [2020] KEELC 2548 (KLR) and *Kinyanjui vs Kinyanjui & another* [2024] KEHC 11217 (KLR) where similar findings were made.
112. Counsel submitted that the petty cash vouchers enjoyed a rebuttable presumption of due execution and regularity. On the strength of this presumption, it was contended that the 1<sup>st</sup> Defendant had



- sufficiently demonstrated that the balance of the purchase price was fully paid and duly acknowledged by the Plaintiffs.
113. It was further submitted that a similar presumption of validity and regularity attached to the letter dated 21<sup>st</sup> December 1997, through which the 1<sup>st</sup> Plaintiff informed the 1<sup>st</sup> Defendant's husband that the Plaintiffs had verified the authenticity of the 1<sup>st</sup> Defendant's proof of payment of the sum of Kshs. 7,869,600 and the appendix of payments.
  114. In the same letter, it was submitted, the 1<sup>st</sup> Plaintiff also indicated that the Plaintiffs were prepared to transfer the suit property to the 1<sup>st</sup> Defendant and asked Mzahim Bajaber to draw the transfers as soon as possible and to present them to the Plaintiffs for execution.
  115. Counsel contended that, in the absence of a handwriting expert's report establishing that the signatures on the transfer instrument dated 20th January 1998 were not those of the Plaintiffs, the only reasonable conclusion to be drawn was that the Plaintiffs duly executed the said transfer.
  116. Counsel further submitted that the 1<sup>st</sup> Defendant and her husband had no knowledge of the succession proceedings in Kisumu, and that the only persons who were aware of High Court Miscellaneous Application No. 119 of 1993, and who could reasonably have procured the disputed court order, were the Plaintiffs' then advocates. It was argued that the Plaintiffs' attempt to impute fraud to the 1<sup>st</sup> Defendant was wholly unsubstantiated and without evidentiary merit.
  117. In support, Counsel cited the Court of Appeal case of Vijay Morjaria vs Nansingh Madhusingh Darbar & another [2000] eKLR where the court held that fraudulent conduct must be distinctly pleaded and proved. Counsel also relied on Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 others [2013] eKLR and Belmont Finance Corporation Ltd vs William Furniture Ltd (No. 2) [1980] 1 All ER 393.
  118. It was submitted that although the Plaintiffs alleged that the 2<sup>nd</sup> Defendant's agents, in collusion with the 1<sup>st</sup> Defendant, fraudulently conspired to effect the transfer of the suit property, no credible evidence was adduced in support of this claim. Counsel relied on Central Kenya Ltd vs Trust Bank Ltd & 4 Others [1996] KECA 197 (KLR) where the Court of Appeal held that the burden of proving fraud lies squarely on the party alleging it, and in this case, the Plaintiffs had failed to discharge that burden.
  119. Counsel further highlighted that allegations similar to the ones raised in this matter were raised by the same Plaintiffs in Job Okuna Oyugi & another vs Vinodchandra Jivan Devji Raikundalia & 3 others [2023] eKLR, where the Plaintiffs contended that a deceased's estate property had been transferred using a fraudulent court order. In that case, the court found that the Plaintiffs had failed to establish any fraudulent conduct on the part of the Defendants.
  120. Counsel submitted that the 1<sup>st</sup> Defendant was a bona fide purchaser for value without notice and, as such, enjoyed the protection afforded by Section 26(1) of the *Land Registration Act*. In support, Counsel cited the Ugandan Court of Appeal decision in Katende vs Haridar & Company Ltd, which was cited with approval by the High Court in Lawrence Mukiri vs Attorney General & 4 Others [2013] eKLR. Additional reliance was placed on Kimani vs Njeri & 3 others [2023] KEELC 17771 (KLR).
  121. It was submitted that the 1<sup>st</sup> Defendant had been in possession of the suit property since 1993, initially as a tenant with her family, and later when she expressed interest in purchasing the property. Counsel argued that it would be inequitable to dispossess the 1<sup>st</sup> Defendant after over thirty years, particularly in view of her having paid more than the agreed purchase price.
  122. Counsel also invoked Section 116 of the *Evidence Act*, submitting that where a person is shown to be in possession of property, the burden of proving that such person is not the lawful owner lies on the



- party asserting otherwise. Reliance was placed on the decision in *Mbarak vs Freedom Limited* [2024] KECA 160 (KLR).
123. Further, Counsel submitted that although it was alleged that the grant of letters of administration had not been confirmed at the time the transfer was registered and at the hearing of this suit, there existed a clear and common intention between the parties to transfer the suit property to the 1st Defendant.
  124. Counsel argued that Article 10(2)(b) of the *Constitution* of Kenya, 2010, enshrines equity as a binding national value, and that Article 159(2)(e) obliges courts to exercise judicial authority in a manner that upholds the purposes, values, and principles of the *Constitution*.
  125. Counsel submitted that the *Constitution* elevated equity to the status of a constitutional principle, and that the equitable doctrines of constructive trust and proprietary estoppel were applicable in this case, given that the 1<sup>st</sup> Defendant had paid the purchase price in full and had been put in possession of the suit property.
  126. In support of this proposition, Counsel relied on the Court of Appeal decision in *Willy Kimutai Kitilit vs Michael Kibet* [2018] eKLR, which recognized the applicability of constructive trust and proprietary estoppel in land transactions. Further reliance was placed on *Maina & 87 others vs Kagiri* [2014] KECA 880 (KLR) as well as on Sections 38, 42, and 161 of the *Land Act*, and Section 25 of the *Land Registration Act*.
  127. Counsel contended that the Plaintiffs had admitted to selling the suit property prior to the confirmation of grant, contrary to the provisions of Section 82(b)(ii) of the *Law of Succession Act*, and submitted that they could not be permitted to benefit from their own wrongful conduct.
  128. It was also submitted that the Plaintiffs admitted seeking to regularize or sanitize the arrangement between the 1<sup>st</sup> Defendant and the deceased's widow, Mrs. Betty Oyugi, and that the Plaintiffs had directly benefitted from the purchase price, with particular reference to the 1<sup>st</sup> Plaintiff, who received vehicles from the 1<sup>st</sup> Defendant's husband for use in his political campaigns.
  129. In further support of this argument, Counsel relied on *Veteran Pharmaceuticals Ltd vs Coastal Provincial Hospital & another* [2016] eKLR, *In re Estate of Jared Kimithi Gathiaka (Deceased)* [2020] eKLR, and *Gabriel Mbui vs Mukindia Muranya* [1993] eKLR.
  130. In conclusion, Counsel urged the court, as a court of equity, to consider the Plaintiffs' conduct and decline to grant the reliefs sought, submitting that to do otherwise would amount to a travesty of justice.

### **Analysis and Determination**

131. Having carefully considered the pleadings, the evidence on record, and the submissions by counsel for the respective parties, the primary issue for this Court's determination is whether the title to the suit property, namely Land Reference No. 209/4491, was lawfully transferred to the 1<sup>st</sup> Defendant. In that regard, the following specific issues arise for determination:
  - a. Whether the 1<sup>st</sup> Defendant paid the balance of the purchase price?
  - b. Whether the suit property was lawfully transferred to the 1<sup>st</sup> Defendant?
  - c. Whether the doctrine of constructive trust is applicable in this case?
  - d. The appropriate orders to be issued by the court?



132. It is not in dispute that the suit property was at all material times lawfully registered in the name of the late Hezekiah Nelson Oyugi. The 1<sup>st</sup> Defendant and her family were tenants on the suit premises, paying rent to Raju Estate, the duly appointed agent of Hezekiah Oyugi.
133. Following the demise of Hezekiah Oyugi on 7<sup>th</sup> August 1992, the Plaintiffs, namely Job Okuna Oyugi, Joshua Onyango Ogango, and Douglas Odhiambo Oyugi, petitioned the High Court at Nairobi for a Grant of Letters of Administration in Nairobi High Court Probate and Administration Cause No. 1842 of 1993 In the Matter of the Estate of Hezekiah Nelson Oyugi Ogango (Deceased) on 1<sup>st</sup> October 1993.
134. Additionally, another matter was filed before the High Court at Kisumu being High Court Miscellaneous Application No. 119 of 1993 In the Matter of the Estate of Hezekiah Nelson Oyugi Ogango (Deceased). In this particular matter, the court was asked to allow the sale of certain properties belonging to the Estate before confirmation of grant.
135. This court takes notice that the Estate of Hezekiah Nelson Oyugi Ogango as represented by the Plaintiffs has been engaged in multiple suits, across courts in Nairobi, Nakuru and Kisumu, which suits have concerned alleged fraudulent conveyance of properties to third parties, despite the lack of orders for confirmation of grant. As at the time of writing this judgment, there was no evidence before me to show that an order of confirmation of grant had been issued to the Plaintiffs.
136. The facts giving rise to this dispute are that the 1<sup>st</sup> Defendant, together with her husband and children, took possession of the suit property in 1991, initially as tenants, paying rent at the rate of Kshs. 60,000/- per month, having rented the premises from Raju Estate, the estate's managing agent, and paid rent to the said agent.
137. It was the evidence of the 1<sup>st</sup> Defendant that in 1994, herself and Mzahir, met Betty Oyugi, who represented herself as the owner of the suit property and that in or about April/May 1994, Betty Oyugi, the wife of the late Oyugi, agreed to sell to them the suit property.
138. According to the 1<sup>st</sup> Defendant, they transacted with Betty between 1994 and 1997 and that by the latter period, they had paid to her a cumulative amount of Kshs. 7,869,600 towards the purchase of the suit property.
139. According to DW1, during that period, it was an express term of the contract with Betty that they will cease to pay any rent for the suit property on the signing of the agreement and that during these dealings, Betty Oyugi never disclosed to them the existence of any succession proceedings relating to the estate of Hezekiah Oyugi, nor were they aware of the Plaintiffs at the time.
140. It is not contested that the 1<sup>st</sup> Defendant and her husband paid to Mrs. Betty Oyugi a total sum of Kshs. 7,869,600. Upon the Plaintiffs' discovery of the transaction between the 1<sup>st</sup> Defendant and Mrs. Betty Oyugi, they sought to regularize the arrangement in view of the fact that the suit property formed part of the Estate of the late Oyugi.
141. The 1<sup>st</sup> Plaintiff, Job Oyugi, who took the lead in the entire transaction on behalf of the Estate, subsequently met with Mr. Mzahir Salim Bajaber, the 1<sup>st</sup> Defendant's husband on 24<sup>th</sup> April 1997. In the meeting, the parties isolated the sums paid in respect of rent and those paid towards the purchase price to Betty Oyugi.
142. At that meeting, it was agreed that of the sum of Kshs 7,869,600 paid to Betty, a sum of Kshs. 4,800,000 had been paid by the 1<sup>st</sup> Defendant as a deposit for the purchase of the suit property, with the remaining



sum being considered as rent paid. Thereafter, the 1<sup>st</sup> Defendant and the Plaintiffs executed a formal sale agreement dated 13<sup>th</sup> January 1998, which forms the subject of the present dispute.

143. Under the terms of the said sale agreement, the 1<sup>st</sup> Defendant was obliged to deposit the balance of the purchase price, being Kshs. 5,200,000, with Guilders International Bank Limited, with instructions to release the same to the Plaintiffs on or before the completion date, stipulated as 8<sup>th</sup> April 1998.
144. The Plaintiffs, however, contend that the suit property was unlawfully and fraudulently transferred to the 1<sup>st</sup> Defendant on 20<sup>th</sup> February, 1998, prior to the payment of the balance of the purchase price of Kshs 5,200,000 and before the completion date.
145. The Plaintiffs further allege that the transfer was effected on the strength of a fraudulent transfer, having not signed it, and a forged court order, thereby rendering the registration of the transfer null and void.
146. The 1<sup>st</sup> Defendant, on the other hand, contends that the balance of the purchase price was duly paid to the 1<sup>st</sup> Plaintiff, who acknowledged receipt by signing petty cash vouchers. The 1<sup>st</sup> Defendant denies the allegations of fraud and urges this Court to find that the doctrines of constructive trust and proprietary estoppel are applicable in the circumstances of this case.
147. The 1<sup>st</sup> Defendant has further asserted that she is a bona fide purchaser for value without notice of defect. She has sought to rely on the case of *Katende vs Haridar & Company Limited* [2008] 2 EA 173.
148. The doctrine of a bona fide purchaser for value in *Katende vs Haridar & Company Ltd* (2008) 2 E.A 173, has since been reviewed by the Court of Appeal in *Mwangi James Njehia vs Janetta Wanjiku Mwangi & another* [2021] eKLR, where the court stated as follows:

“...In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.”

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the [Land Registration Act](#).”

149. This novel position as set out in *Mwangi James Njenga* (supra) is that before one can benefit from the doctrine of bona fide purchaser for value, it must be established that the vendor indeed had a valid title, as opposed to an apparent valid title.
150. This equally goes to establishing the 1<sup>st</sup> Defendant’s root of title, which the Plaintiffs have challenged. It is now the legal position that where a party’s title is under challenge, such a party must establish the root of their title, which is the legality of how they acquired the title.



151. This was the holding by the Court of Appeal in the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, as quoted with approval by the Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR):

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

152. The Court of Appeal in *Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School* [2023] KECA 371 (KLR) articulated the three elements that ought to be proved to satisfy a court that a party has good root of title:

“Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title starting with a “good root of title.” A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title.”

### **Whether the 1<sup>st</sup> Defendant paid the balance of the purchase price**

153. As already stated above, the Plaintiffs agreed to sell to the 1<sup>st</sup> Defendant the suit property at a consideration of Kshs. 10 million. According to the sale agreement dated 13<sup>th</sup> January, 1998, the payment of Kshs 4.8 million as deposit was acknowledged, with the balance of Kshs 5,200,000 to be deposited at Guilders International Bank, and to be released to the Plaintiffs on instructions of the 1<sup>st</sup> Defendant on or before the completion date.
154. The 1<sup>st</sup> Defendant’s case is that she lawfully acquired title to the suit property upon payment of the full purchase price to the Plaintiffs. She further asserted that she duly obtained a rates clearance certificate, the requisite consent to transfer, a duly signed transfer and discharge of charge and a court order from the 1<sup>st</sup> Plaintiff, thereby regularizing the transfer of the suit property in her favour on 20<sup>th</sup> February, 1998.
155. It is not in dispute that the sum of Kshs. 4,800,000/- was paid as a deposit in respect of the purchase price. Following negotiations between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant’s husband, it was agreed that this amount, previously paid to Mrs. Betty Oyugi, would be acknowledged as the deposit payable under the sale agreement dated 13<sup>th</sup> January 1998.
156. The issue that remains contested is whether the balance of Kshs. 5,200,000 was in fact paid to the Plaintiffs as required under the terms of the said agreement.
157. In support of her position, the 1<sup>st</sup> Defendant produced in evidence three petty cash vouchers. Two of them are dated 21<sup>st</sup> May 1998, indicating payments of Kshs. 2,200,000 and Kshs. 2,000,000 respectively to Job Oyugi, the 1<sup>st</sup> Plaintiff.



158. Additionally, a further petty cash voucher dated 11<sup>th</sup> June 1998 was produced, showing a payment of Kshs. 1,000,000/- to Job Oyugi, similarly signed as received. The total amount in the three vouchers purportedly signed by the 1<sup>st</sup> Plaintiff is Kshs. 5.2 million, being the balance of the purchase price.
159. The vouchers record payments allegedly made by Guilders International Bank Limited in respect of the sale agreement, with the following narration:
- “Being monies paid out by Guilders International Bank to Mr. Job Okuna Oyugi on behalf of the administrators of the Estate of the late Heskih Oyugi as stipulation no. 5 of the sale agreement of 13.01.1998.”
160. DW1 stated that while petty cash vouchers were signed by Job, Job personally collected the money from the bank. She noted, however, that the bank had since closed.
161. The 1<sup>st</sup> Defendant also averred that vehicles were given to the 1<sup>st</sup> Plaintiff, on various dates between June, 1997 and December 1997 being “gratuity in respect of LR No. 209/4491.” The narration on the delivery notes indicated that the delivery notes were advanced by M.S. Mohamed to the 1<sup>st</sup> Plaintiff, and that the vehicles were delivered as gratuity in respect of the suit property.
162. The 1<sup>st</sup> Plaintiff has vehemently denied signing the said petty vouchers and the delivery notes. He contended that his signature on the vouchers and delivery notes was forged. The obligation of a litigant to prove fraud must, however, go beyond mere denials.
163. It is trite that allegations of fraud must not only be pleaded but must also be proved. Courts have also established that claims of fraud must be proved to a degree higher than that in normal civil suits, which is on a balance of probability. As the Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] KECA 816 (KLR) aptly stated, whether there was fraud or not is a matter of evidence.
164. In *Bullen & Leake & Jacobs, Precedent of Pleadings* 13<sup>th</sup> Edition at page 427, it was stated as follows regarding fraud:
- “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).
- The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”
165. The agreement herein shows that the balance of Kshs 5.2 million was to be deposited with Guilders International Bank by the 1<sup>st</sup> Defendant, or her husband, and to be released to the Plaintiff on or before the completion date on the instructions of the purchaser.



166. My understanding of this clause is that the Plaintiffs were to collect the payments from Guilders International Bank in cash, upon the bank being instructed to release the same to them by the 1<sup>st</sup> Defendant or her husband.
167. The 1<sup>st</sup> Plaintiff, who, as admitted by himself, represented the other Plaintiffs, and the Estate, in the entire transaction at all stages, is said to have collected the total sum of Kshs 5.2 million in cash from the bank on two occasions, on the instructions of the 1<sup>st</sup> Defendant or her husband, and signed three payment vouchers acknowledging receipt of the monies.
168. The burden of proof to establish that his signature was fraudulently executed on the vouchers for the payments of Kshs 5.2 million lay squarely upon the 1<sup>st</sup> Plaintiff. This is in accordance with Section 107 of the *Evidence Act*, which prescribes that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
169. Where a litigant claims that he did not append a signature on a document, the most effective way of dealing with such an allegation is to subject the alleged signature to examination by a document or handwriting examiner or expert. This is the position that has been taken by this court and the Court of Appeal in several decisions, including the decision in *Re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR.
170. Similarly, in *Ben Murumba Nakitare vs Speed Capital Limited & another* [2020] KEELC 2548 (KLR), the court held that:

“In the instant case, the Plaintiff contends that he never executed the charge documents and that his title was forged as well as other documents. It was upon the Plaintiff to prove that his signature was forged; that his title was forged and that all his documents which were used to register the charge were forged. The Plaintiff did not give his specimen signature for examination by a document examiner. The Plaintiff in his evidence stated that the signature appearing on the charge was different from his known signature such as the one in the verifying affidavit. The Plaintiff is not a document examiner and cannot purport to compare the signatures when he is not an expert in handwriting.

12. The Plaintiff claims in the plaint that his title was forged. If this was the case, it would have been expected that the Plaintiff produce his Title and challenge the 1<sup>st</sup> Defendant where they obtained the one they are holding. The Plaintiff did not give any evidence in support of the particulars of fraud. In the case of *R.G. Patel Vs. Lalji Makanji (1957)* EA 314 at 317, the Court of Appeal stated as follows:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required....” The court went on to state “the law places a higher burden on anyone relying on a claim of fraud to go an extra mile of adducing evidence that will suffice to link the allegation of fraud to any party. This is a principle that every party must bear in mind as they strive to make their claim based on fraud.”

171. The 1<sup>st</sup> Plaintiff did not adduce any expert evidence, such as a report of a handwriting expert, to demonstrate that the signatures appearing on the vouchers were forged. In fact, the evidence before this



court shows that the 1<sup>st</sup> Plaintiff had also acknowledged payment of the deposit of Kshs. 4.8 million by signing a payment voucher which was also not presented to a document examiner for examination by the Plaintiffs.

172. In the absence of such evidence, the 1<sup>st</sup> Plaintiff has failed to meet the requisite standard of proof applicable to allegations of fraud, which under the law, demands proof on a standard higher than a balance of probabilities but not as high as beyond reasonable doubt. Consequently, his claim that his signature on the payment vouchers for Kshs 5.2 million was forged remains unsubstantiated.
173. Although there is no correlation between the four vehicles that were delivered to the 1<sup>st</sup> Plaintiff as “gratuity in respect of L.R No. 209/4491” between June – December, 1997, and the payment of the balance of the purchase price of the suit property of Kshs. 5.2 million, this court takes notice that although the 1<sup>st</sup> Plaintiff initially denied having received vehicles from the 1<sup>st</sup> Defendant’s husband and signed for them, he ultimately conceded in his testimony that he did in fact receive high end vehicles from the 1<sup>st</sup> Defendant’s husband for his political campaigns.
174. Indeed, his assertion that he returned the said vehicles after his political campaigns is not supported by any evidence, more so in light of his assertion that one of the vehicles was repossessed by the Kenya Review Authority while another one was written off after being involved in a road accident.
175. In light of the foregoing, and given that the 1<sup>st</sup> Plaintiff undisputedly received the vehicles, it is highly probable that he also received the balance of the purchase price of Kshs. 5.2 m in cash, remitted to him by the 1<sup>st</sup> Defendant or her husband through Guilders International Bank.
176. The fact that the bank has since closed doors cannot be used as an avenue for the 1<sup>st</sup> Plaintiff, who did not subject his signature to a document examiner for analysis, to state that he did not receive the balance of the purchase price on the dates stated in the signed petty cash vouchers. His denials in this regard are inconsistent with the documentary and circumstantial evidence before the Court.
177. Accordingly, the petty cash vouchers and delivery notes benefit from the presumption of due execution, there being no credible evidence of fraud or forgery presented by the 1<sup>st</sup> Plaintiff to displace that presumption. In the absence of such evidence, and based on the contents of the petty cash vouchers and delivery notes produced in evidence, this Court is satisfied that the 1<sup>st</sup> Defendant has duly proved that she paid the balance of the purchase price to the Plaintiffs in full.

#### **Whether the suit property was lawfully transferred to the 1<sup>st</sup> Defendant**

178. The Plaintiffs contended that the suit property was fraudulently transferred to the 1<sup>st</sup> Defendant because their signatures on the transfer document dated 20<sup>th</sup> January, 1998 and registered on 20<sup>th</sup> February, 1998 were not theirs. This is despite admitting that three of them signed the sale agreement of 13<sup>th</sup> January, 1998.
179. The evidence before this court shows that by way of a letter dated 21<sup>st</sup> December, 1997, the 1<sup>st</sup> Plaintiff did a letter ‘for and on behalf of the Administrators of the Estate of Hezekiah Oyugi (deceased)’ addressed to the 1<sup>st</sup> Defendant’s husband. In the said letter, the said 1<sup>st</sup> Plaintiff stated as follows:

“We the administrators are now prepared to effect the transfer of the said property to your good self...as to your request that the transfer be made to your wife, Timdhar Said Sherman, kindly note that we have no objection to the same. Kindly have the transfer documents drawn up as soon as possible and present the same to us so that we can append our signatures to them.”



180. Although the 1<sup>st</sup> Plaintiff denied authoring the said letter, he did not subject the signature to the document examiner to establish that he is not the one who signed it. Consequently, the claim by the 1<sup>st</sup> Plaintiff that he did not sign the letter was not proved.
181. That being the case, it is the finding of this court that on a balance of probabilities, the 1<sup>st</sup> Plaintiff did sign the letter dated 21<sup>st</sup> December, 1997, on his behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
182. Earlier on, the Plaintiffs' advocates, Owino Okeyo & Co. Advocates, had forwarded to the 1<sup>st</sup> Defendant's Advocates a letter dated 2<sup>nd</sup> December, 1997 which confirmed that they had already forwarded the "title documents" and demanded for the payment of the purchase price. The urgency to have the sale completed was captured as follows in the said letter:
- "We forwarded to you title documents. If our client does not receive the amounts due by close of business today, the documents forwarded to you by ourselves will be deemed to have been demanded forthwith."
183. The two letters show that even before the sale agreement of 13<sup>th</sup> January, 1998 was signed, the parties had agreed on the payable purchase price and all the "title documents" had been forwarded to the 1<sup>st</sup> Defendant's Advocate to effect the transfer of the suit property. The 1<sup>st</sup> Plaintiff also called for the transfer document for signing by the administrators.
184. While the Plaintiffs vehemently denied signing the transfer document dated 20<sup>th</sup> January, 1998, they failed to present any analysis by a document or handwriting expert confirming that the signatures on the transfer were forged. Indeed, they did not even report to the land registrar or the police about the alleged forgery of the transfer which was eventually lodged and registered on 20<sup>th</sup> February, 1998.
185. Further, although the Plaintiffs' signatures on the said transfer were witnessed by Stephen Owino Advocate, who is still alive and in active practice, he was not called by the Plaintiffs to deny having witnessed them sign the transfer document.
186. The failure to call the said advocate to testify in this matter can only be interpreted to mean that the Plaintiffs signed the transfer in the presence of the said advocate. Consequently, it is the finding of the court that the Plaintiffs failed to discharge the burden of proof to show that the impugned signatures were a forgery.
187. In fact, considering that it is the Plaintiffs who released the original certificate of title and discharge of charge to the 1<sup>st</sup> Defendant's Advocate, and the urgency that their Advocates showed in demanding for the balance of the purchase price even before the sale agreement was signed, this court is convinced that the Plaintiffs signed the transfer document that was lodged for registration on 20<sup>th</sup> January, 1998, and registered on 20<sup>th</sup> February, 1998.
188. Therefore, the speed with which the transfer was presented for registration on 20<sup>th</sup> January 1998, a mere seven days after the sale agreement was executed by the parties, cannot be attributed to the 1<sup>st</sup> Defendant, if the contents of the letters dated 2<sup>nd</sup> December, 1997 and 21<sup>st</sup> December, 1997 by the Plaintiffs and their counsel respectively is anything to go by.

**Whether the 1<sup>st</sup> Defendant procured a forged court order in Kisumu Miscellaneous Application number 119 of 1993**

189. There is also an allegation that the 1<sup>st</sup> Defendant procured a forged court order in Kisumu Miscellaneous Application number 119 of 1993 which she used to register the title in her favour.



190. The Plaintiffs informed the court that the rationale behind the completion date of 8<sup>th</sup> April 1998 was to give them time to obtain the consent of the court prior to completing the transaction. The Plaintiffs asserted that no such court order was issued by the court and further, that the court order utilized by the 1<sup>st</sup> Defendant to register the transfer was a forgery.
191. The 1<sup>st</sup> Defendant's response to this allegation is that the impugned court order, together with the original title and discharge of charge were presented to her advocate, who is now deceased, by the Plaintiffs.
192. As was held In re Estate of M'Ajogi M'Ikiugu (Deceased) [2017] KEHC 7348 (KLR), no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant is null and void for all purposes and intents.
193. Section 45 (1) of the [Law of Succession Act](#) provides that:
- “ 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 propose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
194. Section 55(1) of the Act further bars the distribution of capital assets constituting a net estate unless and until the grant has been confirmed as provided by Section 71. Section 82 (b)(ii) equally stipulates that no immovable property shall be sold before confirmation of the grant.
195. On the basis of these authorities, it was imperative that the transfer of the suit property to the 1<sup>st</sup> Defendant be accompanied by an order of confirmation of grant or an order of the court allowing the disposition of the land.
196. The record shows that alongside the discharge of charge and the title document, an order dated 21<sup>st</sup> December 1993, purportedly issued in Kisumu High Court Misc. Application No. 119 of 1993, In the Matter of Hezekiah Oyugi Ogango, by Justice J.A. Mango was lodged in the land registry for registration.
197. The said court order was relied upon by the 1<sup>st</sup> Defendant's advocate to facilitate the registration of the transfer of the suit property in her favour. The Deputy Registrar, Kisumu High Court, expressly stated that the court order marked as ‘TSS8’ which was relied upon by the 1<sup>st</sup> Defendant to effect the transfer at the Ministry of Lands, was not an authentic order of the court.
198. By this court's order, the court file with respect to Kisumu High Court Misc. Application No. 119 of 1993 was availed and this court has confirmed that the order marked TSS8 was not issued by the Kisumu High Court and was indeed a forgery.
199. In contrast, the genuine court order bearing the same date as the forged one issued by the Kisumu High Court in Misc. Application No. 119 of 1993 referred to various properties to be sold for purposes of raising school fees for some beneficiaries and maintaining the deceased widows. The suit property was not one of the properties included in the genuine order of 21<sup>st</sup> December, 1993.
200. While it is not explicit on whether the forgery of the court order of 21<sup>st</sup> December, 1993 in Kisumu High Court Misc. Application No. 119 of 1993 was perpetuated by the 1<sup>st</sup> Defendant or the Plaintiffs, this court will infer from the facts and chronology of events the party who is likely to have procured, and indeed procured the fake court order of 21<sup>st</sup> December, 1993 in Kisumu High Court Misc. Application No. 119 of 1993.



201. Kisumu High Court Misc. Application No. 119 of 1993 was filed by the Plaintiffs herein, through their advocate, Stephen Omondi Owino of Owino Okeyo & Co. Advocates. By the time the genuine order of 21<sup>st</sup> December, 1993 was issued, allowing them to sell some of the deceased properties, the transaction between them and the 1<sup>st</sup> Defendant, or her husband in respect to the suit property had not commenced.
202. Consequently, and in the absence of any evidence to the contrary, it is safe to state that as at 1997, when the Plaintiffs commenced the process of selling the suit property to the 1<sup>st</sup> Defendant and her husband, it is only the Plaintiffs and their advocate, Stephen Owino, who were aware of the 1993 suit in Kisumu, wherein a genuine order dated 21<sup>st</sup> December, 1993 allowing the sale of some of the deceased's properties were enumerated.
203. From the record, the firm of Owino Okeyo & Co. Advocates, which is the firm that filed Kisumu High Court Misc. Application No. 119 of 1993 and obtained a genuine court order allowing the sale of some of the deceased properties, vide a letter dated 2<sup>nd</sup> December, 1997, demanded from the 1<sup>st</sup> Defendant's Advocate, the return of the "title documents," which they had sent to them, unless the balance of the purchase price was released to them on the same day.
204. Curiously, the said Plaintiffs' advocates did not list the "title documents" that they had sent to the 1<sup>st</sup> Defendant's Advocate, and which they wanted returned unless the purchase price was paid immediately. The 1<sup>st</sup> Defendant's advocate, having not been alive at the time of trial, did not tell the court the documents he received from the Plaintiffs' advocates. There is no indication if he ever responded to the Plaintiffs' advocates' letter of 2<sup>nd</sup> December, 1997.
205. Suffice to say that a few weeks after said letter of 2<sup>nd</sup> December, 1997 by the Plaintiffs' advocate, on 21<sup>st</sup> December, 1997, the 1<sup>st</sup> Plaintiff, on behalf of the other administrators, informed the 1<sup>st</sup> Defendant's advocates that they (the Plaintiffs) were ready to sign the transfer in favour of the 1<sup>st</sup> Defendant.
206. The Plaintiffs and their advocates having been aware that they needed a court order to effect the said transfer, and in the absence of any letter from their advocates or themselves indicating that they will procure a court order allowing the sale of the suit property after signing the sale agreement and the transfer, it follows that the "title documents" referred to in the Plaintiffs' advocates letter dated 2<sup>nd</sup> December, 1997 did not only include the title deed and the discharge of charge, but also the forged court order of 21<sup>st</sup> December, 1993.
207. I say so because the Plaintiffs and their advocates were the only ones who were aware of the existence of Kisumu High Court Misc. Application No. 119 of 1993, and were also aware that the transfer of the suit property to the 1<sup>st</sup> Defendant could not be effected without a court order authorizing the sale, and the discharge of charge, which were the documents, alongside the transfer, that were lodged for registration on 20<sup>th</sup> January, 1998 by the 1<sup>st</sup> Defendant's advocate.
208. That is the only explanation that can be given on how the forged court order of 21<sup>st</sup> December, 1993 found its way to the land registry, alongside the original discharge of charge, the original certificate of title and the signed transfer. This position is supported by the Plaintiffs' letter dated 27<sup>th</sup> December, 1997 in which they stated that "...we the administrators are now prepared to effect the transfer of the said property to your good self."
209. Further, the said forged court order seems to have been used in a different transaction in 1994 involving the Plaintiffs herein and a third party in a different matter, involving a different property, as I will show hereunder.



210. The attention of this court was drawn to very similar allegations made in a very manner by the same Plaintiffs relating to a different property in the case of Job Okuna Oyugi & Another vs Vinodchandra Jivan Devji Raikundalia & 3 Others [2023] eKLR. This court has read the Judgment of Wabwoto J in the said matter, where the court summarized the Plaintiffs' case as follows:

“It was also the Plaintiffs averment that in the year 2020, in an attempt to prepare and confirm the Estate's grant, the Plaintiffs obtained a search of the property, which indicated that the property had been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and charged by the Interested Party. The Plaintiffs also pleaded fraud on the part of the defendant which was particularized as follows:

- i. The transfer from the Estate to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was transferred without a confirmation of grant of the Estate.
- ii. In the alternative, the transfer from the Estate to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was transferred via a fraudulent court order, as the orders in Miscellaneous Application No 119 of 1993 did not specify the property as one of the properties delineated for sale for the benefit of the beneficiaries.

211. In the above suit, much like they have at paragraph 8 of the Amended Plaint filed in this case, they pleaded that the transfer of the property therein from the Estate of the Deceased to the Defendants was transferred via a fraudulent court order because the orders in Miscellaneous Application No. 119 of 1993 did not specify the property as one of the properties delineated for sale for the benefit of the beneficiaries.

212. Further, just like in the current suit, the Plaintiffs also pleaded that they never signed the transfer document before their advocate, Stephen Owino. The said advocate, just like in the present case, was called to testify in that matter, but declined to do so. In his judgment, Wabwoto J dismissed the Plaintiffs' suit and upheld the Interested Party's title.

213. The facts of this case are very similar to those in Job Okuna Oyugi & Another vs Vinodchandra Jivan (supra), down to allegation that the Interested Party had used a forged order of 21<sup>st</sup> December, 1993; and the failure by Stephen Owino, the advocate who forwarded the documents to the Interested Party's advocates, and witnessed the Plaintiffs sign the Transfer, to attend court and testify.

214. Considering the above, it is the finding of the court that the 1<sup>st</sup> Defendant herein, and her advocate (now deceased) had no knowledge of the irregularity of the Court Order of 21<sup>st</sup> December, 1993. The 1<sup>st</sup> Defendant did not procure it, and it has not been demonstrated that she did procure it.

215. In fact, from the facts stated in the Judgment in Vinodchandra (supra) case, the Plaintiffs were aware of the forged court order in Miscellaneous Application number 197 of 1993 in 1994, the year when Vinodchandra entered into a formal agreement with the Plaintiffs herein for the purchase of one of the properties that was being administered by the Plaintiffs.

216. Therefore, by the time the Plaintiffs entered into an agreement with the 1<sup>st</sup> Defendant herein on 13<sup>th</sup> January, 1998, they were aware, and in possession of the said forged court order which had been used earlier on in different transaction (s).

217. Consequently, this court is convinced that it is the Plaintiffs who procured the forged court order of 21<sup>st</sup> December, 1993 and used it to transfer the suit property to the 1<sup>st</sup> Defendant on 20<sup>th</sup> February, 1998. The Plaintiffs also used the same forged court order to transfer other properties to third parties,



and, just like in the current suit, turned around to deny those transactions using the very order, with a view of having the titles nullified by the court.

218. Indeed, the record shows that the Plaintiffs herein received the balance of the purchase price of 5.2 million, with the first two installments of 4.2 million being in May, 1998, and filed this suit in July, 1998, immediately after the last installment of Kshs 1,000,000 was paid to the 1<sup>st</sup> Plaintiff on 11<sup>th</sup> June, 1998.
219. Considering the urgency that was exhibited in their advocates' letter of 2<sup>nd</sup> December, 1997 and their letter of 27<sup>th</sup> December, 1997, the Plaintiffs must have been aware of the transfer that had been effected in favour of the 1<sup>st</sup> Defendant on 20<sup>th</sup> February, 2025. However, they did not raise any issue in respect to the transfer at that point.
220. The receipt of the balance of the purchase in June, 1998, after the transfer of the suit property to the 1<sup>st</sup> Defendant, and the immediate filing of this suit in July, 1998, after the receipt of the said purchase price, is a manifestation of a dishonest party, a party who all along had prepared to challenge the transfer of the suit property to the 1<sup>st</sup> Defendant on the basis of a forged court order and an impugned transfer document, but only after collecting the entire purchase price.
221. It is therefore not surprising that despite the criminality surrounding the said forged court order, or the alleged of their signatures on the transfer the Plaintiffs have never filed a complaint with the police, neither have they ever subjected the signatures on the transfer document for forensic examination.
222. Nevertheless, they expect this court to condemn the 1<sup>st</sup> Defendant, and nullify the title on the ground that the same was obtained using a forged court order and transfer after receiving the entire purchase price. That, in my view, are actions of parties who want to unjustly enrich themselves with the sanction of the court, a position that a court of equity and justice cannot countenance.
223. These case presents a deeply troubling scenario in which one party deliberately placed a forged court order into circulation and then sought to rely on the very falsity of that document as a basis to defeat a transaction which would have been otherwise valid. It raises fundamental questions not only of law, but of fairness, integrity and abuse of process. The Plaintiffs having procured the forged court order cannot rely on it to avoid the consequences of a transaction they had previously affirmed by word and conduct. This, the court must answer, as it has done, with clarity and principle.

#### **Whether the doctrine of constructive trusts is applicable in this case**

224. Counsel for the 1<sup>st</sup> Defendant invoked the provisions of Section 116 of the *Evidence Act*, submitting that where a person is shown to be in possession of property, the burden of proving that such person is not the lawful owner lies on the party asserting otherwise. Reliance was placed on the decision in *Mbarak vs Freedom Limited* [2024] KECA 160 (KLR).
225. Further, Counsel submitted that although it was alleged that the grant of letters of administration had not been confirmed at the time the transfer was registered and at the hearing of this suit, there existed a clear and common intention between the parties to transfer the suit property to the 1<sup>st</sup> Defendant.
226. Counsel argued that Article 10(2)(b) of the *Constitution* of Kenya, 2010, enshrines equity as a binding national value, and that Article 159(2)(e) obliges courts to exercise judicial authority in a manner that upholds the purposes, values, and principles of the *Constitution*. I was urged to find that the 1<sup>st</sup> Defendant is entitled to the suit property by virtue of the doctrine of constructive trust, an equitable principle recognized under the *Constitution*.



227. A constructive trust was defined by the Court of Appeal in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR as follows:

“a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”

228. In *William Kipsoi Sigei vs Kipkoech Arusei & Another* [2019] eKLR the Court of Appeal stated as follows;

“We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in *Macharia Mwangi Maina* decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.”

229. In *Willy Kimutai Kitilit vs Michael Kibet* [2018] KECA 573 (KLR) the Court of Appeal authoritatively opined that the doctrine of proprietary estoppel overlaps with that of constructive trust, and both are concerned with equity’s intervention to provide relief against unconscionable conduct.

230. The core purpose of the equitable doctrine of constructive trust, as stated above, is to prevent one party from being unjustly enriched at the expense of another. If someone obtains property or money through fraud, breach of trust, abuse of confidence, or wrongful conduct, a constructive trust may be imposed to restore the property to the rightful person.

231. The doctrine reflects the flexibility of equity in addressing injustices that formal legal rules might not cover. It ensures that courts can act according to conscience and fairness, especially in situations where rigid legal title does not reflect the true nature of a party’s entitlement. A constructive trust allows courts to recognize beneficial ownership where the legal titleholder is not morally or equitably entitled to the benefit.

232. The doctrine, which is now constitutionally recognized, serves as deterrence by discouraging dishonest conduct, such as fraud, breach of fiduciary duty, or secret profits. It is a judicial tool for redressing wrongs and promoting justice, particularly in property, by ensuring that a wrongdoer does not profit from his wrongdoing, even if they hold a legal title.

233. As I have already found above, the Plaintiffs conduct in respect to the transaction was unconscionable. The Plaintiffs were fully aware that as at the time of executing the agreement for sale with the 1<sup>st</sup> Defendant, and receiving the entire purchase price, a certificate of confirmation of grant had not been issued in respect of the Estate of the deceased. The Plaintiffs did not only receive the full purchase price,



but signed the transfer document and handed to the 1<sup>st</sup> Defendant the title document, the discharge of charge and the forged court order.

234. That being the case, it would be unconscionable to permit the Plaintiffs to now rely on the absence of a confirmation of grant and the forged court order to invalidate the said agreement. To the contrary, it is the Plaintiffs who are required to personally account to the Estate on how they utilized the purchase price.
235. This is particularly in view of the fact that the 1<sup>st</sup> Defendant, acting in full reliance on the sale agreement, the signed transfer, the discharge of charge and the purported court order authorizing the sale of the suit property, paid the entire balance of the purchase price, and was put in possession of the suit property.
236. In the circumstances, this Court finds that a constructive trust arose in favour of the 1<sup>st</sup> Defendant, so as to prevent the Plaintiffs from resiling from the agreement and acting in a manner that would occasion unjust enrichment to themselves and the Estate or result in unconscionable conduct.
237. The 1<sup>st</sup> Defendant's equitable and legal interest in the suit property, arising from her full payment of the purchase price and long-standing possession, and thereafter registration, is binding upon the Plaintiffs and shall subsist against the Estate of the deceased, even as they finalize its administration.
238. For avoidance of doubt, this equitable and legal interest by the 1<sup>st</sup> Defendant in L.R No. 209/4491 should be reflected and noted in the confirmed grant that will be issued in respect of the Estate Hezekiah Nelson Oyugi.
239. For those reasons, the court dismisses the Plaintiffs' suit with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10<sup>TH</sup> DAY OF JULY, 2025**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ochwo for Plaintiff

Mr. Wachira for 1<sup>st</sup> Defendant

Court Assistant: Tracy

